NORTH CAROLINA COURT OF APPEALS REPORTS

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206 N.C. APP.

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THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

JOHN C. MARTIN

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H. James Hutcheson

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Allegra Collins

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DISTRICT	JUDGES	ADDRESS
	First Division	
1	Jerry R. Tillett	Manteo
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2	Wayland Sermons	Washington
3A	W. Russell Duke, Jr.	Greenville
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7BC	Walter H. Godwin, Jr.	Tarboro
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3B	Benjamin G. Alford	New Bern
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4B	Charles H. Henry	Jacksonville
5	W. Allen Cobb, Jr.	Wrightsville Beach
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	Phyllis M. Gorham	Wilmington
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8B	Arnold O. Jones II	Goldsboro
	Third Division	
9	Robert H. Hobgood	Louisburg
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9A	W. Osmond Smith III	Semora
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	Paul C. Gessner	Wake Forest
	Paul C. Ridgeway	Raleigh
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	Michael O'Foghludha	Durham
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	Wayne Abernathy	Burlington
15B	Carl R. Fox	Chapel Hill
	R. Allen Baddour	Chapel Hill

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11B	Thomas H. Lock	Smithfield
12	Claire Hill	Fayetteville
12B	Gale M. Adams	Fayetteville
12C	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
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	R. Stuart Albright	Greensboro
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19D	James M. Webb	Whispering Pines
21	William Z. Wood, Jr.	Troutman
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	Ronald E. Spivey	Winston-Salem
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19C	Anna Mills Wagoner	Salisbury
20A	Tanya T. Wallace	Rockingham
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	GARY GAVENUS	Boone
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	MARVIN POPE	Asheville
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29B	MARK E. POWELL	Hendersonville
30A	JAMES U. DOWNS	Franklin
30B	BRADLEY B. LETTS	Sylva

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	Ralph A. Walker, Jr.	Raleigh

1. Term ended 14 May 2013.
2. Sworn in 1 May 2013.
3. Resigned 2 May 2013.
4. Sworn in 1 May 2013.
5. Deceased 16 July 2013.
6. Resigned 12 April 2013.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	C. Christopher Bean (Chief)	Edenton
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2	Michael A. Paul (Chief)	Washington
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	Brian DeSoto	Greenville
3B	L. Walter Mills (Chief)	New Bern
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	Clinton Rowe	New Bern
	W. David McFadyen III	New Bern
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	Carol Jones Wilson	Kenansville
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	David Sipprell	Winston-Salem
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	Carlton Terry	Advance
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	Ronald C. Chapman	Charlotte
	Donnie Hoover	Charlotte
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	Jena P. Culler	Charlotte
	Kimberly Y. Best-Staton	Charlotte
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	Elizabeth Thornton Trosch	Charlotte
	Theofanis X. Nixon	Charlotte
	Karen Eady-Williams	Charlotte
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	Emily Cowan	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

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JAMES E. MARTIN	Greenville
EDWARD H. MCCORMICK	Lillington
J. BRUCE MORTON	Greensboro
OTIS M. OLIVER	Dobson
STANLEY PEELE[10]	Chapel Hill
MARGARET L. SHARPE	Greensboro
SAMUEL M. TATE[11]	Morganton
J. KENT WASHBURN	Burlington
JOHN L. WHITLEY	Wilson

1. Appointed Chief District Court Judge 1 January 2013..
2. Appointed to Superior Court Judge 12 April 2012.
3. Appointed Chief District Court Judge 8 January 2013.
4. Deceased 3 July 2013.
5. Resigned 30 April 2013; Appointed Special Superior Court Judge 1 May 2013.
6. Appointed Chief District Court Judge 1 May 2013.
7. Appointed Superior Court Judge 10 February 2011.
8. Appointed 10 February 2012.
9. Deceased 7 February 2013.
10. Resigned 7 February 2013.
11. Resigned 6 May 2013.

ATTORNEY GENERAL OF NORTH CAROLINA

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ROY COOPER

Chief of Staff
KRISTI HYMAN

Deputy Chief of Staff
NELS ROSELAND

Chief Deputy Attorney General
GRAYSON G. KELLEY

Senior Policy Advisor
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CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. NEIL MATTHEW SARGEANT, DEFENDANT

No. COA09-262

(Filed 3 August 2010)

1. Homicide— first-degree murder—verdicts—separate theories

The trial court erred in a first-degree murder prosecution by having the jury deliver its verdicts on lying in wait and felony murder at the end of one day, and then to continue deliberating and deliver its verdict on premeditation and deliberation the next day. The court may not take partial verdicts as to theories of a crime. Moreover, this intrusion into the province of the jury cannot be deemed harmless beyond a reasonable doubt; the jury's ultimate decision had it been permitted to continue deliberating on all of the theories of first-degree murder cannot be known.

2. Evidence— hearsay—residual exception—witness asserting Fifth Amendment—prior statement—equivalent guarantees of trustworthiness

The trial court erred in a prosecution for first-degree murder and other offenses by not allowing defendant to introduce a witness's statement to an officer where three people had participated in the murder; this witness (Dalrymple) agreed to testify against the third (Triplett) and gave a statement putting most of the blame on Triplett; Dalrymple was called to testify against defendant but asserted the Fifth Amendment; and defendant moved to admit the statement under the residual hearsay exception of N.C.G.S. § 8C-1, Rule 803(5). The trial court erred in its

findings concerning the required equivalent circumstantial guarantees of trustworthiness, and the error was prejudicial because the statement presented a very different picture of the crime.

Judge ERVIN dissenting.

Appeal by defendant from judgments entered 24 April 2008 by Judge Ronald K. Payne in Watauga County Superior Court. Heard in the Court of Appeals 2 September 2009.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.

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

GEER, Judge.

Defendant Neil Matthew Sargeant appeals his convictions for first degree murder, first degree kidnapping, robbery with a dangerous weapon, and burning of personal property. The primary issue on appeal is whether the trial court erred in taking partial "verdicts" from the jury.

At trial, at the end of the first day of deliberation, the jury had not reached a unanimous decision as to each of the charges. The trial court requested that the jury go ahead and submit verdict sheets for any of the charges as to which it had unanimously found defendant guilty. The trial court then received the jury's verdicts finding defendant guilty of first degree kidnapping, robbery with a dangerous weapon, and burning of personal property, as well as first degree murder on the bases of both felony murder and lying in wait. The only issue left for the jury to decide was whether defendant was guilty of first degree murder on the basis of premeditation and deliberation. The next morning, the court gave the jury a new verdict sheet solely asking the jury to decide whether defendant was guilty of first degree murder on the basis of premeditation and deliberation. The jury returned a guilty verdict later that day.

The issue on appeal is whether it was error to take a "verdict" as to lying in wait and felony murder when the jury had not yet agreed on premeditation and deliberation. Premeditation and deliberation, felony murder, and lying in wait are not crimes, but rather are theories upon which a defendant may be convicted of first degree murder. We hold that a trial court cannot take a verdict on a theory. Therefore,

the trial court, in this case, erred by taking partial verdicts on theories as to the charge of first degree murder.

Facts

Stephen Harrington was kidnapped, robbed, and murdered on the night of 7 November 2005. A medical examiner determined the cause of death to be asphyxiation. Defendant, Kyle Triplett, and Matthew Dalrymple were subsequently charged capitally with the first degree murder of Harrington. They were also charged with first degree kidnapping, robbery with a dangerous weapon, and burning of personal property. The three men and the victim were acquaintances who dealt and used illegal drugs together.

The State first proceeded against Triplett. On 10 September 2007, Dalrymple had given the State a written statement pointing to Triplett as responsible for the death of Harrington and as having orchestrated the removal of Harrington from defendant's home. In anticipation of trying Triplett, the State entered into an agreement with Dalrymple on 13 September 2007. In that agreement, the State agreed not to seek the death penalty against Dalrymple. In return, Dalrymple agreed to "be available to provide truthful testimony concerning the events surrounding the death of Stephen Harrington if called upon by the state to do so." The truthfulness of his testimony was to "be measured against [his] written statement in the presence of Detective Dee Dee Rominger on 10th September 2007." The State agreed further "[t]hat as to the statement to Detective Rominger the State will not use the statement against [Dalrymple] in any state criminal proceedings, and will not use any evidence derived from such statement against him in any state judicial proceeding."

Ultimately, Dalrymple was not required to testify against Triplett because Triplett pled guilty to second degree murder, among other offenses, for his involvement in the crime. The State next proceeded against defendant and called Triplett as a witness during the trial. Triplett's testimony placed the majority of the blame for Harrington's murder on defendant.

Triplett testified that when he arrived at defendant's house on the night of 7 November 2005, defendant told him to put on gloves, grab Harrington when he arrived later, and put a gun to Harrington's head. When Harrington arrived, Triplett grabbed Harrington by the throat and put a gun to his head. Then, defendant wrapped Harrington in duct tape and punched him while Dalrymple kicked him. Dalrymple

removed cocaine from Harrington's pocket before Triplett and defendant put Harrington in the trunk of Harrington's car. Triplett testified that he and defendant drove Harrington's car, while Dalrymple followed in a second car. They parked the car near a bridge where defendant sprayed Harrington's body with lighter fluid, and Triplett lit the fluid with a lighter. The three men then returned to defendant's house in the car driven by Dalrymple.

During defendant's case in chief, defendant called Dalrymple to the stand. Dalrymple invoked his Fifth Amendment right against self-incrimination and refused to testify. Since Dalrymple was unavailable to testify on defendant's behalf, defendant moved, pursuant to N.C.R. Evid. 804(b)(5), to introduce Dalrymple's 10 September 2007 statement to Detective Rominger. According to Dalrymple's statement, Triplett had grabbed Harrington by the neck and held him at gunpoint, as Triplett had testified, but Triplett was also responsible for duct-taping Harrington's head, hitting Harrington, and kicking him. Dalrymple stated that defendant had been asleep during the initial attack, but had awoken later and ridden in the second car with Dalrymple because Dalrymple was scared. Triplett, he said, lit the fire. The trial court concluded that the statement lacked sufficient indicia of trustworthiness and excluded the statement.

On the morning of Tuesday, 22 April 2008, with closing arguments having concluded the previous day, the court instructed the jury as to the charges, including the "three theories under which [the jury could] find [defendant] guilty of first degree murder, those theories being lying in wait, the felony murder rule, and premeditation and deliberation." The verdict sheet for the first degree murder charge set out the following choices:

> WE THE JURY, AS OUR UNANIMOUS VERDICT, FIND THAT THE DEFENDANT, NEIL MATTHEW SARGENT, IS:
>
> ____ GUILTY OF FIRST DEGREE MURDER.
>
> ____ (A) IF YES, DO YOU UNANIMOUSLY FIND ON THE BASIS OF LYING IN WAIT.
>
> ____ (B) IF YES, DO YOU UNANIMOUSLY FIND ON THE BASIS OF THE FELONY MURDER RULE
>
> (I) ____ IF YES, DO YOU UNANIMOUSLY FIND THE UNDERLYING FELONY TO BE:
>
> ____ 1. KIDNAPPING

____ 2. ROBBERY WITH A DANGEROUS WEAPON

____ (C) IF YES, DO YOU UNANIMOUSLY FIND ON THE BASIS [SIC] PREMEDITATION AND DELIBERATION

OR

____ GUILTY OF SECOND DEGREE MURDER OR

____ NOT GUILTY

The verdict sheets for the other charges gave the jury a choice of only guilty of the charge or not guilty, except for robbery, which had a choice of (1) guilty of robbery with a dangerous weapon, (2) guilty of common law robbery, or (3) not guilty.

At 10:55 a.m., after the jury had retired to deliberate, the jury sent its first note to the court: "What did State need to prove for a verdict of guilty to Burning of personal property—Can we have a list?" At 11:35 a.m., the jury sent another note: "Are there any possible consequences/punishments/repercussions to a witness for lying under oath? Specifically a witness who made a plea agreement with the State? We need to be reinstructed on the elements needed to be proven by the state on the charge of robbery w/ a dangerous weapon & common law robbery." The jury sent its third note at 12:25 p.m.: "Please reinstruct us on First Degree Murder. If we are going to lunch please wait until we return." Shortly after receiving this note, the court dismissed the jurors for their lunch break and told them to return at 2:00 p.m.

After the lunch break, the court reinstructed the jury on first degree murder. At 3:00 p.m., after having resumed deliberation, the jury sent a fourth note: "Would you reinstruct us on one theory @ a time so that we may deliberate one @ a time. Please redefine 'in concert[.]' Please redefine 'premeditated[.]' Please reinstruct on the difference between 1st & 2nd degree murder." In response to this note, the court first reinstructed the jury as to the theory of lying in wait. When the jury notified the court at 3:20 p.m. that it was ready for the next instruction, the court reinstructed the jury as to the theory of felony murder. After the jury indicated at 3:40 p.m. that it was ready for the final theory, the court reinstructed the jury as to the theory of premeditation and deliberation. At 4:15 p.m., the jury sent its fifth note of the day asking the court to "redefine two of five points" regarding premeditation and deliberation: "premeditation" and "intent."

Shortly after the jurors exited the courtroom, the trial judge informed the State and defendant that before the court recessed for the day, the trial judge intended to ascertain whether the jury had already reached any unanimous verdicts:

> Now, I am thinking about this. If we don't have the verdict, I should say verdicts by 5:00 p.m. I am going to make an inquiry if they've reached a verdict on any of the counts. If they have, it is my plan to take the verdict before we—those verdicts or verdict as the case may be if we have any before we adjourn for the evening. The reason being if they've reached a verdict on one or more and not on all and something happens over the evening hour I've got a problem. If we take those verdicts tonight, I won't have that problem.

Although the State had no objection, defendant noted his objection.

At 4:51 p.m., after about five hours of deliberation, the trial judge advised the State and defendant that he had resolved to go forward with his plan to assess the jury's progress:

> I think what I'm going to do is bring the alternates back as well as the other jurors. I'm going to make an inquiry and make it clear I'm not trying to rush them just to find out whether they've reached a unanimous verdict on all the matters. If they indicate they have not, I'm going to ask whether or not they've reached a unanimous verdict on any of the matters. If they have I'm going to make an inquiry of the foreperson to determine whether he has filled out the verdict sheets in accordance with my instructions on the matters which they have reached a unanimous verdict. If they have not, I'll send them back to the jury room with instructions to go ahead if they have reached a unanimous verdict to return so I can take this verdict before we adjourn for the evening. If they ask to continue and again this is not something I'm going to suggest but if they ask I'll send them back to the jury room and let them deliberate for a while. Now, I'm not going to keep them here late because they're going to want to be getting into the dinner hour . . . and most folks may well have other plans for the evening. But go ahead if we can, let's get the alternate jurors brought in first and if you will, Sheriff, get the jury, twelve jurors and tell them to stop deliberations and to bring the verdict sheets with them.

The jurors were then summoned back to the courtroom, and the trial judge addressed the foreperson, Mr. Price:

THE COURT: Mr. Price, I'm not asking you this in an effort to try to cause anyone to rush. That's the last thing I would want anyone to do but it is getting close to the evening break. Let me first begin by asking you, sir, has the jury reached a unanimous verdict in all matters?

FOREPERSON PRICE: No, sir.

. . . .

THE COURT: Has the jury reached a—and I take it's necessary for further deliberations on the matters that are not resolved, is that right?

FOREPERSON PRICE: Yes, sir.

THE COURT: Okay. Has the jury reached a unanimous verdict on any of the matters?

FOREPERSON PRICE: Yes, sir.

THE COURT: Okay. As to those matters have you filled out the verdict sheets in accordance with my instructions?

FOREPERSON PRICE: Yes, sir.

THE COURT: Is the jury ready to pronounce its verdict on those matters?

FOREPERSON PRICE: Yes, sir.

THE COURT: All right, I'm going to ask you to hand the verdict sheets to the bailiff.

The jurors then submitted the verdict sheets to the court, but since one of the verdict sheets was not yet signed, the trial judge sent the jury back to the jury room to properly complete the sheet.

Once the jury verified that all verdict sheets had been signed and dated, it was escorted back to the courtroom. At this point, the court received "the four verdicts" already decided upon: guilty of first degree murder on both the theories of lying in wait and felony murder, guilty of first degree kidnapping, guilty of burning of personal property, and guilty of robbery with a dangerous weapon. The jury had not reached a unanimous agreement about the first degree murder theory of premeditation and deliberation. The court then adjourned for the day.

Court reconvened at 9:30 a.m. the next morning, Wednesday, 23 April 2008. Before the jury entered, the trial judge explained that the

recording system had not been activated on the previous afternoon and informed the State and defendant that he would be retaking the verdicts so that they would have a proper record. The trial judge then gave both sides an opportunity to be heard. Defense counsel stated: "I'd move that the taking of the verdicts yesterday be set aside and the jury be sent out until they've reached a unanimous verdict on all issues. I believe that taking of partial verdicts violates [defendant's] right to a trial by jury."

When the jury entered the courtroom, the trial judge again explained the issue of the tape recording system and told the jury that he would retake the verdicts and poll each of the jurors. Each juror confirmed that he or she still assented to the guilty verdicts. Defense counsel renewed his motion to set aside the verdicts.

The trial judge returned the jury to the jury room to continue deliberating as to whether defendant was guilty of first degree murder on the theory of premeditation and deliberation. The trial judge had prepared a new verdict sheet solely for that issue. The new verdict sheet gave only two options: guilty or not guilty of first degree murder on the theory of premeditation and deliberation.

At 10:23 a.m., the jury sent the following note: "Please reinstruct on Malice, Premeditation & Deliberation. Please redefine 'premeditation.' " At 10:30 a.m., the jury sent its final note: "If we are not coming to a unanimous decision what do we do? Do we need to be unanimous for NOT GUILTY as well as for Guilty?" After receipt of the last note, the State indicated that it would have no objection to the trial court's declaring a mistrial as to the first degree murder theory of premeditation and deliberation. Defendant then formally moved for a mistrial on that theory, but the trial judge denied the motion. The judge subsequently informed the jury that a "verdict is not a verdict whether it's guilty or not guilty until all twelve jurors agree unanimously as to the decision." The judge also gave the jurors an *Allen* charge and sent them back to continue deliberating.

At 12:14 p.m. the jury returned a verdict of guilty of first degree murder based on the theory of premeditation and deliberation. The court polled each of the jurors and accepted the verdict.

Sentencing occurred on the morning of Thursday, 24 April 2008. Although defendant had been tried capitally, the State elected not to proceed with the death penalty phase. For the first degree murder conviction, defendant was, therefore, sentenced to life imprisonment

without parole. For the first degree kidnapping conviction, defendant was sentenced to a consecutive presumptive-range term of 100 to 129 months imprisonment. The trial court consolidated the robbery with a dangerous weapon and burning of personal property convictions and imposed a presumptive-range term of 60 to 81 months imprisonment to run consecutive to the kidnapping sentence. Defendant timely appealed to this Court.

I

[1] Defendant contends on appeal that the trial court erred in taking verdicts on two of the three possible theories of first degree murder on Tuesday and then, on Wednesday, permitting the jury to continue deliberating as to the third theory of first degree murder. Defendant argues that the trial court's procedure violated his "constitutional guarantee to a unanimous verdict of a jury of 12 in a criminal case." We note that the State has cited no authority authorizing what the trial court did in this case, and we have found none in North Carolina or in any other jurisdiction.

Premeditation and deliberation, felony murder, and lying in wait are all theories under which a defendant may be convicted of first degree murder. *See State v. Thomas*, 325 N.C. 583, 593, 386 S.E.2d 555, 560-61 (1989) ("Premeditation and deliberation is a theory by which one may be convicted of first degree murder; felony murder is another such theory."). Even though the State may proceed under multiple theories of first degree murder, "[c]riminal defendants are not convicted or acquitted of *theories* . . . ." *Id.*, 386 S.E.2d at 561 (emphasis added). Rather, "they are convicted or acquitted of crimes." *Id.* Thus, in cases involving multiple theories of first degree murder, the defendant is "charged with only one crime, first degree murder; [he or] she [is] convicted of that crime." *Id.*, 386 S.E.2d at 560.

A trial court includes the different theories on the first degree murder verdict sheet because of the need in sentencing—particularly capital sentencing proceedings—to understand the theory upon which the jury found the defendant guilty of first degree murder. *See State v. Goodman*, 298 N.C. 1, 16, 257 S.E.2d 569, 580 (1979) ("If the jury's verdict were general, not specifying the theory upon which guilt was found, the court would have no way of knowing what theory the jury used and would not have proper basis for passing judgment.").

Whether or not the jury based its verdict on premeditation and deliberation as well as felony murder determines what aggravating

circumstances may be submitted to the jury in capital sentencing. *See State v. Millsaps*, 356 N.C. 556, 560, 572 S.E.2d 767, 770-71 (2002) (holding that when defendant is convicted of felony murder only, underlying felony constitutes element of first degree murder and merges into murder conviction; if defendant is convicted of first degree murder based on both premeditation and felony murder, then felony underlying felony murder may be used as aggravating factor in sentencing proceeding, and defendant may receive separate sentences for both murder and felony). Further, the fact that a jury based its verdict only on felony murder may affect the findings necessary during capital sentencing. *See State v. Stokes*, 308 N.C. 634, 651 n.1, 304 S.E.2d 184, 195 n.1 (1983) (noting that, when felony murder is one theory presented, requiring jury to indicate theory under which jury returned first degree murder verdict may obviate need to have jury decide in sentencing whether defendant killed, attempted to kill, or intended that life would be taken).

Even in non-capital cases, specification of the theory affects whether the trial court should sentence the defendant for both the murder and any felony argued to be the basis for felony murder. *State v. Norwood*, 303 N.C. 473, 480, 279 S.E.2d 550, 555 (1981) ("Since conviction of the defendant for first degree murder was based upon proof of premeditation and deliberation, proof of the underlying felony was not an essential element of the State's homicide case and the trial court properly sentenced defendant both upon the murder conviction and the felony conviction."). Thus, a jury's specification of its theory does not constitute a conviction of a crime, but is for purposes of sentencing proceedings.

The State's argument that the jury in effect rendered three first degree murder verdicts—as opposed to verdicts on three theories—cannot be reconciled with *Thomas*, 325 N.C. at 593, 386 S.E.2d at 560 (rejecting dissent's argument because it "presupposes that defendant has been charged with, and could have been convicted of, two different crimes—first degree felony murder and first degree premeditated and deliberated murder"). In this case, there was only one conviction and one verdict finding defendant guilty of first degree murder, although the jury ultimately based its verdict on three theories. Only one person was killed, defendant was charged with only one count of first degree murder, the jury rendered a single verdict of guilty of first degree murder, and defendant was sentenced for only a single count of murder.

Consequently, we are not talking about true partial verdicts in this case: these were not verdicts as to crimes but factual findings regarding theories of the crime of first degree murder. Even assuming, without deciding, that partial verdicts as to multiple charges are permissible in North Carolina, we hold that a trial court may not take partial verdicts as to theories of a crime. We cannot reconcile *Thomas*—and its proposition that "defendants are not convicted or acquitted of theories; they are convicted or acquitted of crimes"—with what the trial court did in this case. *Id.*, 386 S.E.2d at 561.

This holding is further supported by the Supreme Court's decision in *State v. Booker*, 306 N.C. 302, 293 S.E.2d 78 (1982). In *Booker*, the jury in the defendant's first trial had been unable to reach a verdict, but had indicated in a note that it was deadlocked on second degree murder. After a mistrial was declared and the defendant was retried, the defendant argued on appeal that North Carolina should adopt the New Mexico rule requiring in cases involving lesser included offenses that a trial court submit to a deadlocked jury verdict sheets indicating whether the jury had unanimously voted for acquittal on any of the greater or lesser included offenses. *Id.* at 305, 293 S.E.2d at 80. The Supreme Court "reject[ed] this request" because it was "of the opinion that the better reasoned rule is the majority rule which requires *a final verdict* before there can be an implied acquittal." *Id.* (emphasis original).

We see no material difference between the New Mexico rule and the procedure followed in this case. When a jury is deadlocked, the New Mexico rule in effect calls for the taking of partial "verdicts" on greater and lesser included offenses with respect to a single charge even though there is no unanimity as to whether the defendant should be convicted of the charged offense. In other words, the New Mexico rule attempts to establish unanimity on aspects of a charged crime in advance of a final verdict on the charged crime. That is precisely what the trial court's procedure in this case was designed to accomplish.

The jury was not yet in agreement with respect to the charge of first degree murder. The trial judge was, however, concerned that something might occur overnight and, for that reason, had the jury complete verdict sheets setting out the theories on which the jury was unanimous. The jury did not, however, render a final verdict on the single first degree murder charge, but continued to deliberate the next day. If, as the Supreme Court stated in *Booker*, there must be a final verdict before there can be an acquittal, there must be a final

verdict before there can be a conviction. The jury in this case did not, on Tuesday, return a final verdict as to first degree murder; rather, it expressed unanimity as to two theories of first degree murder.

Even though we have concluded that the trial court erred in taking partial "verdicts" as to two of the first degree murder theories, we must still decide whether that error is harmless. Because this issue involves defendant's constitutional right to a unanimous jury verdict, the State bears the burden of demonstrating that the error is harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2009).

The State argues that when the jury rendered its "verdicts" on lying in wait and felony murder, "[t]he jury's consideration of (and final unanimous agreement on) the theory of malice, premeditation, and deliberation then became moot so far as defendant's conviction of first degree murder was concerned. Conviction based on that theory as well would have been relevant only to our Supreme Court's proportionality review had this defendant been sentenced to death." This argument, however, disregards the importance of the potential of juror compromises during the jury's deliberations.

In *Booker*, our Supreme Court quoted with favor the rationale of the Michigan Court of Appeals decision in *People v. Hickey*, 103 Mich. App. 350, 303 N.W.2d 19 (1981), as supporting the Supreme Court's decision to reject the New Mexico rule and require a final verdict:

> "Defendant's conviction followed a second trial on the charge of first-degree murder, the first trial having ended in a mistrial due to a hung jury. At the first trial, the jury was instructed that it could return one of four possible verdicts: guilty of first-degree murder, guilty of second-degree murder, guilty of voluntary manslaughter, or not guilty. When the jury indicated to the court that it could not reach a unanimous verdict, defense counsel requested that the trial court inquire as to whether the jury had reached a decision concerning defendant's guilt or innocence on any of the charges submitted to it. The trial court refused to make such an inquiry.
>
> Defendant contends that his second trial on the charge of murder was barred by art 1, § 15 of the Michigan Constitution, and by the Fifth Amendment to the United States Constitution, which provide that a person may not be placed twice in jeopardy for the same offense. Defendant argues that the trial court's failure to inquire as to the status of the jury's deliberations on the

various possible verdicts submitted to it prevented the court from discovering whether the jury had decided that defendant was innocent of all charges except manslaughter. Defendant urges the adoption of the rule announced in *State v Castrillo*, 90 NM 608; 566 P 2d 1146 (1977), where it was held that where a jury announced its inability to reach a verdict, and the trial court failed to determine whether the jury had unanimously voted for acquittal on any of the included offenses, jeopardy attached as to all charges except the charge of voluntary manslaughter, the least of the included offenses. The New Mexico court held that there is no plain and obvious reason to declare a mistrial as to any included offense upon which the jury has reached a unanimous agreement of acquittal. Consequently, the Court ruled that when a jury announces its inability to reach a verdict in a case involving included offenses, the trial court is required to submit verdict forms to the jury to determine if it has unanimously voted for acquittal on any of the included offenses, and the jury may then be polled with regard to any verdict thus returned.

Other jurisdictions have examined defendant's argument and rejected it. See, *Walters v State*, 255 Ark 904; 503 SW 2d 895 (1974), *cert den* 419 US 833; 95 SCt 59; 42 LEd 2d 59 (1974), *People v Griffin*, 66 Cal 2d 459; 58 Cal Rptr 107; 426 P 2d 507 (1967), *People v Doolittle*, 23 Cal App 3d 14; 99 Cal Rptr 810 (1972), *People v Hall*, 25 Ill App 3d 992; 324 NE 2d 50 (1975), *State v Hutter*, 145 Neb 798; 18 NW 2d 203 (1945). *We conclude that polling the jury on the various possible verdicts submitted to it would constitute an unwarranted and unwise intrusion into the province of the jury. As was noted by the California Supreme Court in Griffin, supra, it must be recognized as a practical matter that jury votes on included offenses may be the result of a temporary compromise in an effort to reach unanimity. A jury should not be precluded from reconsidering a previous vote on any issue, and the weight of final adjudication should not be given to any jury action that is not returned in a final verdict.*"

Booker, 306 N.C. at 305-06, 293 S.E.2d at 80-81 (quoting *Hickey*, 103 Mich. App. at 351-53, 303 N.W.2d at 20-21) (emphasis original).

Other courts, in evaluating the risks of taking partial verdicts, have echoed such concern about protecting the province of the jury to revisit previously held views in the course of reaching a final ver-

dict. *See, e.g.*, *United States v. Benedict*, 95 F.3d 17, 19 (8th Cir. 1996) ("The danger inherent in taking a partial verdict is the premature conversion of a tentative jury vote into an irrevocable one. It is improper for a trial court to intrude on the jury's deliberative process in such a way as to cut short its opportunity to fully consider the evidence. Such an intrusion would deprive the defendant of the very real benefit of reconsideration and change of mind or heart." (internal citations and quotation marks omitted)); *People v. Richardson*, 184 P.3d 755, 763-64 (Colo. 2008) ("[I]n the case where a jury has not completed deliberations at the time of the partial verdict instruction, the resulting verdict might well be the result of juror coercion—a particular concern where, as here, the jury is deadlocked."); *Caldwell v. State*, 164 Md. App. 612, 642-43, 884 A.2d 199, 216 (2005) ("[A] verdict must be unambiguous and unconditional and must be final—in the sense of not being provisional or tentative and, to the contrary, being intended as the last resolution of the issue and not subject to change in further deliberation. A verdict that is tentative . . . is defective and not valid. In deciding whether to accept a partial verdict, a trial judge must guard against the danger of transforming a provisional decision into a final verdict.").

We think that the same concerns raised in taking partial verdicts (whether as to lesser included offenses or to individual charges of a multiple count indictment), are equally triggered by the taking of partial "verdicts" on theories of first degree murder. Here, after the jury had submitted its verdict sheets on Tuesday evening, it was not permitted on Wednesday to reconsider those earlier decisions and was left to consider the theory of premeditation and deliberation essentially in a vacuum. Indeed, the jury was given a whole new verdict sheet limited to premeditation and deliberation. Because the jury's decisions on the theories of lying in wait and felony murder, at that moment in time, were not in themselves convictions, but rather were *bases* for a conviction, we find troubling the possibility that taking separate decisions on the theories may have "cut short [the jury's] opportunity to fully consider the evidence . . . [or] deprive[d] the defendant of the very real benefit of reconsideration and change of mind or heart." *Benedict*, 95 F.3d at 19 (internal quotation marks omitted).

We conclude that this intrusion into the province of the jury cannot be deemed harmless beyond a reasonable doubt. We do not know what the jury ultimately would have decided had it been permitted to continue deliberating about *all* the theories of first degree murder.

The record indicates that the jury had been periodically asking the court for reinstruction and was still engaged in fruitful deliberation by the time the court solicited verdicts at the end of the first day of deliberation. Many of the jury's questions focused on the murder charge, requesting explanation of each of the theories as well as the definition of "in concert." Additionally, the jurors apparently harbored significant doubt about Triplett's testimony. Their question about the consequences of perjury to "a witness who made a plea agreement with the State" could only have applied to Triplett.

We find merit in defendant's contention that the outcome may have been different if the jury had been able to continue deliberating on all three theories. For example, on the second day of deliberation, those jurors previously not willing to find defendant guilty of first degree murder based on premeditation and deliberation may have been persuaded to change their position based on the fact that "verdicts" of first degree murder had already been rendered. Even if no partial verdicts had been taken and defendant had still been convicted of first degree murder based on one, but not all, of the theories, that result would have had ramifications for sentencing whether before the jury, had the State continued to proceed capitally, or before the trial judge in non-capital sentencing.

We find persuasive the reasoning applied in *Benedict*. In *Benedict*, 95 F.3d at 18, the Eighth Circuit held that partial verdicts had been taken in error when the trial court, over the defendant's objection, took verdicts on three counts (conspiracy to burglarize a post office, aiding and abetting post office burglary, and aiding and abetting theft of post office property) when the jury indicated, after approximately eight hours of deliberation, that it had agreed on three counts, but was still undecided on a fourth count (conspiracy to steal post office property). The trial court "entered as final judgments" the verdicts on the three counts and denied the defendant's motion for a mistrial on the fourth count. *Id.* at 18-19. Ultimately, after deliberating further, the jury was still deadlocked on the final count, and the government dismissed that count. *Id.* at 19.

On appeal, the Eighth Circuit expressed concern over the short length of time spent deliberating before the trial court took partial verdicts, the indication that the jury was progressing toward unanimity on the fourth count, the absence of a deadlock, and the lack of any request by the parties for partial verdicts. *Id.* at 19-20. The court also noted the close relationship between the fourth count and one of the counts that had already been decided:

> It is difficult to imagine that the jury could continue to deliberate on the conspiracy charge without reweighing the evidence with respect to the substantive offense where, as here, the government's evidence on both counts was virtually the same. The jury expressed as much when it asked for clarification between the two charges.

Id. at 20. Although the court acknowledged that partial verdicts "may be appropriate in certain circumstances," the court concluded that the trial court had committed "error in the manner" in which it conducted deliberations and had abused its discretion by instructing the jury to deliver partial verdicts. *Id.* at 19-20.

Similar facts appear in this case. Here, deliberations had not been underway for a substantial amount of time given that this case involved a capital murder charge. The trial judge decided on his own volition, without request from the jury or the parties, to take verdicts before adjourning on the first afternoon of deliberation, solely because of the trial judge's concern that if "something happens over the evening hour I've got a problem." The jury had not arrived at a deadlock, but rather was still actively deliberating when the court requested the partial verdicts. Lastly, the court took "as final judgments" guilty verdicts on three of the charges and on two of the three theories of first degree murder. As was the case in *Benedict*, the three murder theories were all "so closely related" that "[i]t is difficult to imagine that the jury could continue to deliberate on [one theory] without reweighing the evidence with respect to" the other theories. *Id.* at 20. Under these circumstances, we must conclude the court's error was prejudicial.

Defendant is entitled to a new trial as to the murder indictment. Defendant does not argue any prejudice with respect to the trial court's taking partial verdicts on the charges of first degree kidnapping, robbery with a dangerous weapon, or burning of personal property. Therefore, we do not address whether the trial court properly took partial verdicts as to those charges. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role of the appellate courts . . . to create an appeal for an appellant.").

II

[2] Defendant contends, in addition, that the trial court erred when it barred him from introducing Dalrymple's September 2007 statement to Detective Rominger. Defendant argues that this statement

should have been admitted under the residual hearsay exception of Rule 803(5) of the Rules of Evidence.

There is no dispute that once Dalrymple asserted his Fifth Amendment rights when called by defendant to testify, Dalrymple was unavailable within the meaning of Rule 804. *See State v. Harris*, 139 N.C. App. 153, 158, 532 S.E.2d 850, 854 ("Where a witness is physically present at the trial, but asserts his Fifth Amendment right not to testify, he is considered 'unavailable' for the purpose of" Rule 804.), *disc. review denied*, 353 N.C. 271, 546 S.E.2d 850 (2000).

Since Dalrymple was unavailable, the trial court, in order to determine whether Dalrymple's statement was admissible under Rule 804(5), was required to undertake a six-step inquiry and determine (1) whether proper notice of the intent to use the statement had been given; (2) whether the statement did not fall within the scope of any other hearsay exception set out in Rule 804; (3) whether the statement exhibited circumstantial guarantees of trustworthiness equivalent to those required for other specific hearsay exceptions; (4) whether the statement was relevant to a material issue of fact; (5) whether the statement was more probative on the issue than any other evidence that the proponent could procure through reasonable efforts; and (6) whether the interests of justice would be served by the admission. *See State v. Triplett*, 316 N.C. 1, 8-9, 340 S.E.2d 736, 741 (1986).

At the trial of this case, the State did not contest that the Dalrymple statement met five of the *Triplett* elements. The State contended only that defendant could not show that the statement had the required equivalent circumstantial guarantees of trustworthiness. Our Supreme Court has held:

> A trial judge should consider a number of factors in determining whether a hearsay statement possesses sufficient indicia of trustworthiness to be admitted under Rule 804(b)(5). Among these factors are: (1) the declarant's personal knowledge of the underlying event; (2) the declarant's motivation to speak the truth; (3) whether the declarant recanted; and (4) the reason, within the meaning of Rule 804(a), for the declarant's unavailability. . . . [T]his list is not inclusive and . . . other factors may be considered when appropriate. Among the many factors which courts have considered are the existence of corroborating evidence, and the degree to which the proffered testimony has elements of enumerated exceptions to the hearsay rule.

State v. Nichols, 321 N.C. 616, 624-25, 365 S.E.2d 561, 566-67 (1988) (internal citations omitted). The trial court is required to make specific findings of fact and conclusions of law regarding these factors. *Triplett*, 316 N.C. at 9, 340 S.E.2d at 741.

In this case, the trial court, in support of its decision to exclude the Dalrymple statement, read the following findings of fact and conclusions of law into the record:

> It is clear from the evidence presented on behalf of the State that Mr. Dalrymple was present during at least some of the events in question and therefore, he would have personal knowledge.
>
> Second would be the declarant's motivation to speak the truth. It appears to the Court that [Dalrymple] by refusing to testify has kept the death penalty in play in his own criminal case and therefore has acted against his own self interests by refusing to testify when called by the defense in this matter.
>
> The third thing the Court is supposed to determine is whether the defendant has recanted his testimony. While the defendant has an unlimited right to assert the Fifth Amendment, the Court concludes that his refusal to testify while not a recantation is a factor considered by the Court not only in his trustworthiness but in the fourth reason, that being the reason that he is unavailable. The Court has considered that his refusal to testify is a voluntary him [sic] making himself unavailable and would put the Court in [sic] position in every case where a co-defendant makes an out of Court statement that could be under some circumstances considered exculpatory as to that co-defendant against another co-defendant admissible into evidence even though its [sic] an unsworn statement by the co-defendant simply taking the Fifth Amendment and refusing to testify and not being subject to cross-examination. The Court has also noted that in the defendant's statement on the—given to the Detective Rominger on September 9 or apparently transcribed September 10th that in Paragraph Number Four that the witness Dalrymple has stated that he saw [sic] "saw Kyle moving around in the interior part and then it went into flames. Kyle moved to the trunk and then it went into flames." The Court does not recall there being any testimony of the interior of the car being ignited or there being any fire damage but there was smoke damage to the interior but there was no evidence that the Court has yet heard that would indicate that there was any interior damage due to a fire. That would indicate

to the Court some reservation concerning the trustworthiness of the statement made by Mr. Dalrymple.

Having considered all the factors enumerated in *State versus Nichols* and *State versus Triplett* the Court is not satisfied that the statement by Mr. Dalrymple is trustworthy and therefore defendant's motion to admit the statement under Rule 804 and have the declarant declared unavailable is denied.

Thus, the trial court found the existence of the first factor (personal knowledge). It is unclear what precisely the trial court found with respect to the existence of the second factor (motive to speak the truth), or whether the trial court made any finding at all regarding the third factor (recanting). It appears that the court primarily based its decision not to admit the statement on the fourth factor. Because there is no dispute by the parties that Dalrymple had the required personal knowledge, we focus our review on the findings related to the second, third, and fourth factors.

With respect to the second factor, Dalrymple's motive to speak the truth, the trial court does not explain whether it believed Dalrymple's acting against his own interests by not testifying suggests that Dalrymple had a motive to tell the truth or a motive to dissemble. In addition, this finding lacks evidentiary support because it assumes that by refusing to testify in this case, Dalrymple lost the benefit of his agreement with the State—in other words, that Dalrymple's refusal to testify meant that he was again subject to the death penalty. The State, on appeal, acknowledges that this assumption was in error: "The State believes that the trial court misread or misapprehended the State's agreement with Dalrymple when it found that Dalrymple 'has kept the death penalty in play in his own criminal case . . . by refusing to testify when called by the defense.' As noted above, the agreement said nothing about charging consequences if Dalrymple was called as a defense witness . . . ." (Internal citation omitted.) Finally, this finding erroneously focuses on Dalrymple's actions at the time of the trial rather than on whether he had a motive to tell the truth at the time he made his 10 September 2007 statement. We, therefore, hold that the trial court erred in making this finding of fact.

With respect to whether Dalrymple ever recanted the 10 September 2007 statement (the third factor), the trial court recited the factor, but then made no specific finding other than noting that Dalrymple voluntarily chose to assert his Fifth Amendment rights.

The record contains no evidence that Dalrymple ever recanted his statement. To the extent that the trial court was suggesting that Dalrymple's refusal to testify amounted to a recantation, such a finding cannot be supported. In exchange for Dalrymple's agreement to make himself available to testify if called by the State, the State only agreed to take the death penalty off the table. Dalrymple was still subject to being tried for murder with a possible resulting lengthy sentence. Under the agreement, the State could not use the September 2007 statement in any prosecution of Dalrymple, but it could still use testimony given by Dalrymple in any other proceedings. Since Dalrymple had not yet been tried at the time of defendant's trial, he had no realistic choice but to assert his Fifth Amendment rights since, if he testified, he would provide the State with admissions that could then be used to convict him in his own trial. His assertion of his Fifth Amendment rights, therefore, has no bearing on the question whether Dalrymple ever recanted. We, therefore, hold that the trial court erred in failing to find that Dalrymple never recanted his September 2007 statement.

Turning to the final factor, the reason for Dalrymple's unavailability, the trial court apparently considered Dalrymple's assertion of his Fifth Amendment rights as a basis for concluding that his statement lacked guarantees of trustworthiness equivalent to those required by other hearsay exceptions. The bare fact that unavailability is due to the Fifth Amendment cannot, however, without more, justify a finding of a lack of trustworthiness since statements falling within other exceptions under Rule 804, such as a statement against interest, would be admissible even though the basis for unavailability was an assertion of Fifth Amendment rights.

Although it is not entirely clear, when we consider the trial court's finding as to the second factor (motive to tell the truth) with this factor, it appears that the trial court's concern was that co-defendants, such as Dalrymple, could strategically assert their Fifth Amendment rights specifically so that a prior statement exculpating a defendant could be admitted into evidence. The trial court's finding that Dalrymple had acted contrary to his own interest in refusing to testify suggests that the trial court thought Dalrymple had some other motive, such as aiding defendant, in invoking the Fifth Amendment. As noted above and acknowledged by the State, however, the trial court misread the agreement. In fact, refusing to testify was entirely consistent with Dalrymple's personal interests. The trial court, therefore, also erred with respect to the fourth factor.

The trial court next found that one aspect of Dalrymple's statement was inconsistent with the trial testimony. While *Nichols* noted that one factor considered by courts was the existence of evidence corroborating the hearsay statement, the Supreme Court subsequently held that this Court, in applying Rule 804(5), "improperly referenced the hearsay statement's consistency with *other statements admitted at trial* where the proper analysis is whether the statement to the detective, standing alone, was inherently trustworthy." *State v. Finney*, 358 N.C. 79, 84, 591 S.E.2d 863, 866 (2004) (emphasis added). Accordingly, the trial court erred in determining the trustworthiness of the September 2007 statement by comparing it to other evidence presented at trial.

In sum, only one of the trial court's findings of fact relating to the trustworthiness of the September 2007 statement is supported by competent evidence and the law. That finding—that Dalrymple had personal knowledge—is contrary to the trial court's conclusion of law that the statement lacked trustworthiness within the meaning of *Nichols* and *Triplett*. Given the trial court's findings of fact, we must conclude that the court's exclusion of Dalrymple's September 2007 statement was in error.

We cannot find this error harmless. Triplett testified that defendant was the leader with respect to the murder, kidnapping, robbery, and burning of personal property. Dalrymple's statement would have painted a very different picture, with Triplett initiating the attack and murder and being substantially in control with respect to the remaining offenses. It is apparent that the jury had serious doubts about Triplett's credibility since they asked the trial court: "Are there any possible consequences/punishments/repercussions to a witness for lying under oath? Specifically a witness who made a plea agreement with the State?" Given the stark differences between Triplett's testimony and Dalrymple's statement together with the jury's question suggesting its belief that Triplett was lying under oath, it is reasonably possible that the jury would have reached a different verdict had it been able to consider Dalrymple's statement. *See* N.C. Gen. Stat. § 15A-1443(a) (2009).

Although we have already granted a new trial on the charge of first degree murder, we now grant a new trial on the remaining charges based on the exclusion of Dalrymple's statement. Because of our disposition of these first two issues, we need not address defendant's final contention that the trial court allowed the State to engage

in prosecutorial misconduct or discriminatory use of immunity in connection with the State's agreement with Dalrymple.

New trial.

Judge STROUD concurs.

Judge ERVIN dissents in a separate opinion.

ERVIN, Judge, dissenting.

Although I fully agree with the Court that trial judges would be well-advised to avoid accepting separate verdicts concerning the various theories of first degree murder that are submitted for the jury's consideration at separate times and that the trial court's findings and conclusions concerning the admissibility of Mr. Dalrymple's statement contain a number of errors, I cannot agree with the Court's conclusion that the manner in which the trial court took the jury's verdict violated Defendant's constitutional right to trial by jury guaranteed by Article I, section 24. Moreover, even if the trial court's action constituted an error of constitutional dimensions, I believe that, on the facts of this case, any such error was harmless beyond a reasonable doubt. Finally, despite my concerns about the trial court's findings and conclusions, I am not persuaded that Mr. Dalrymple's statement was admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 804(b)(5). As a result, I respectfully dissent from the Court's decision to grant Defendant a new trial in the case in which he was convicted of first degree murder.

I. Separate Verdict Issue

Although the majority finds that the trial court's decision to take separate verdicts at separate times on the three theories under which the evidence permitted Defendant to be convicted of first degree murder violated his state constitutional right to trial by jury, it is not clear to me why the majority reaches this conclusion. Just as the majority finds there to be no authority condoning the practice in which the trial court engaged in this case, there is also no authority that explicitly prohibits it. Instead, as best I have been able to ascertain, the present issue is one of first impression in this jurisdiction. As a result, in order to reach the conclusion that the trial court's action violated Article I, section 24 of the North Carolina Constitution, the Court relies on the uncontroverted fact that a defendant is charged with,

and convicted of, criminal offenses rather than theories of liability; points out that trial judges include multiple theories of liability on the verdict sheets that are submitted for the jury's consideration for reasons that are primarily related to the imposition of sentence; and contends that the trial court's action is inconsistent with the decision of the Supreme Court in *State v. Booker*, 306 N.C. 302, 293 S.E.2d 78 (1982). I am not, however, persuaded that the Supreme Court's logic establishes that an error of constitutional dimension occurred in this case.

The fact that "defendants are not convicted or acquitted of theories [but] are convicted or acquitted of crimes," *State v. Thomas*, 325 N.C. 583, 593, 386 S.E.2d 555, 561 (1989), while well-established, does not seem to me to be particularly relevant to the issue that is before us. As the Court notes, the primary purpose of requesting a jury to specify the theory upon which it convicts a defendant of first degree murder relates to sentencing issues rather than to issues relating to the defendant's guilt. *State v. Millsaps*, 356 N.C. 556, 560, 572 S.E.2d 767, 770-71 (2002) (stating that the extent to which a predicate felony used to support the defendant's conviction of first degree murder under a felony murder theory can be used as an aggravating factor during a capital sentencing hearing depends upon whether the jury also found that the defendant acted with premeditation, and deliberation); *State v. Norwood*, 303 N.C. 473, 480, 279 S.E.2d 550, 555 (1981) (stating that, in the event that the defendant was convicted of first degree murder on the basis of premeditation and deliberation as well as under the felony murder rule, the trial court could properly impose a separate sentence upon the defendant for the predicate felony). The majority's argument overlooks the fact that, once the jury has found unanimously and beyond a reasonable doubt that a defendant committed first degree murder under any theory, he or she has been convicted of first degree murder.[1] As a result, while I agree with the Court that we are not talking about true partial verdicts in this case (for that reason, I will describe the approach taken by the trial court in this case as the taking of separate verdicts in the remainder of this opinion), I am not convinced that the fact that defendants are convicted of offenses rather than theories sheds a great deal of light on the extent to which the trial court's actions in this case violated Article I, section 24 of the North Carolina Constitution.

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1. The verdict sheet contained in the record reflecting the jury's verdicts on the felony murder and lying in wait issues reflects, at its very top, that the jury found that Defendant was guilty of first degree murder.

The fact that the verdicts that the jury rendered on the various theories of liability submitted for its consideration would impact the sentences to which Defendant was exposed, while true, does not strike me as particularly relevant to the lawfulness of the trial court's action. The lawfulness of the trial court's action, it seems to me, should hinge upon the proper interpretation of the relevant constitutional or statutory provisions rather than upon the impact of the approach adopted by the trial court upon the sentences imposed upon Defendant, which is generally governed by double jeopardy or statutory construction considerations. As a result, while a premature decision to accept a guilty verdict with respect to one or more theories of guilt might, under some circumstances not present here,[2] call the trial court's ability to impose a separate, consecutive sentence for kidnapping into question, it does not, at least in my opinion, have any bearing on the extent to which the trial court erred by accepting separate verdicts in the present case.

Thirdly, I do not share the Court's concern that the trial court's action was inconsistent with the Supreme Court's decision in *Booker*. In *Booker*, the defendant contended that, in light of a note that the foreperson sent to the trial judge to the effect that the jury was deadlocked on the issue of the defendant's guilt of second degree murder, "the jury had implicitly found the defendant not guilty of first-degree murder" and that he should not have been retried for that offense based on double jeopardy considerations. *Booker*, 306 N.C. at 304, 293 S.E.2d at 79. In rejecting the defendant's argument, the Supreme Court pointed out that "the better reasoned rule is the majority rule which requires a *final verdict* before there can be an implied acquittal." *Id.*, 306 N.C. at 305, 293 S.E.2d at 80. As support for this conclusion, the Supreme Court in *Booker* quoted the decision of the Michigan Court of Appeals in *People v. Hickey*, 103 Mich. App. 350, 35 303 N.W.2d 19 (1981), in which the Court stated that "polling the jury on the various possible verdicts submitted to it would constitute an unwarranted and unwise intrusion into the province of the jury," since, "as a practical matter," "jury votes on included offenses may be the result of a temporary compromise in an effort to reach unanimity" and since "[a] jury should not be precluded from reconsidering a previous vote on any issue, and the weight of final adjudication should

2. The fact that one of the first two verdicts which the trial court accepted in the homicide case involved the jury's determination that Defendant was guilty of first degree murder under a lying in wait theory eliminates any concern that the delay in the jury's decision on the premeditation and deliberation issue in any way prejudiced Defendant.

not be given to any jury action that is not returned in a final verdict." I do not believe that *Booker* sheds much light on the present issue, since the trial court did not, in this case, question the jury about its decision about the issue of Defendant's guilt of lesser included offenses. Put another way, *Booker* involved a request that the trial judge question the jury about inchoate decisions that might have been made by the jury during its discussions rather than about any sort of final verdict that the jury might have reached. In this instance, however, the trial court ascertained that the jury had reached final verdicts on the issues of Defendant's guilt of all of the charges except the first degree murder charge and that it had reached verdicts as to two of the three theories of liability that had been submitted for its consideration with respect to that charge. As a result, the trial court's action in this case, which amounted to accepting verdicts from the jury with respect to issues about which the jury indicated that it had reached a decision, is simply not similar to those that the Supreme Court refused to countenance in *Booker*. Thus, none of the three arguments that the Court advances in support of its conclusion that the action taken by the trial court in this instance violated Article I, section 24 of the North Carolina Constitution persuade me that a constitutional violation actually occurred.

The total absence of any authority shedding any direct light on the claim that Defendant has presented for our review necessitates an examination of the aims and purposes of Article I, section 24 of the North Carolina Constitution, which provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court," while preserving the General Assembly's right to "provide for other means of trial for misdemeanors, with the right of appeal for trial *de novo*." "It is not questioned either that trial by jury is deeply rooted in our institutions or that the term 'jury' as understood at common law and as used in the Constitution imports a body of twelve [persons] duly summoned, sworn, and impaneled for the trial of issues joined between litigants, in a civil action[,] or for the determination of facts adduced for and against the accused in a criminal case." *State v. Dalton*, 206 N.C. 507, 512, 174 S.E. 422, 424-25 (1934) (citations omitted). If a practice "preserves the essential attributes of trial by jury, number, impartiality, and unanimity [citation omitted], it cannot be said to impair the common law right as guaranteed by the Constitution." *Id.*, 206 N.C. at 512, 174 S.E. at 425; *see also State v. Fowler*, 312 N.C. 304, 308, 322 S.E.2d 389, 392 (1984) (stating that "our constitution has been interpreted to require a jury of twelve and a unanimous verdict") (citing *State v. Hudson*, 280

N.C. 74, 79, 185 S.E.2d 189, 192 (1971), *cert. denied*, 414 U.S. 1160, 39 L. Ed. 2d 112 (1974)). The issues that have been addressed by the Supreme Court and this Court in cases involving alleged violations of Article I, section 24 of the North Carolina Constitution have included claims such as those involving the use of disjunctive jury instructions, *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986); the delivery of instructions to a single juror instead of to the entire jury, *State v. Wilson*, 363 N.C. 478, 681 S.E.2d 325 (2009); *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985); issues arising from questions posed by the trial court to the jury during deliberations in which the trial court allegedly coerced the jury into reaching a verdict, *State v. Rasmussen*, 158 N.C. App. 544, 582 S.E.2d 44, *disc. review denied*, 357 N.C. 581, 589 S.E.2d 362 (2003); issues involving jury misconduct, *State v. Jackson*, 189 N.C. App. 747, 659 S.E.2d 73, *disc. review denied*, 362 N.C. 512, 668 S.E.2d 564 (2008), *cert. denied*, —— U.S.——, 173 L. Ed. 2d 662 (2009); and issues involving jury polling, *State v. Black*, 328 N.C. 191, 400 S.E.2d 398 (1991). As a result of the fact that Defendant does not contend that the trial court's actions resulted in a verdict returned by less than twelve jurors; adversely affected the jury's impartiality; permitted the jury to reach non-unanimous verdicts with respect to any theory of liability; or coerced the jury into reaching unanimous verdicts with respect to these theories in any way, Defendant's claim does not resemble any of the grounds for appellate relief typically urged upon us under Article I, section 24 of the North Carolina Constitution.

As a result of my inability to foresee all possible ways in which the approach adopted by the trial court in this instance might impinge upon jury unanimity considerations, I am unwilling to hold that accepting separate verdicts would never be a violation of Article I, section 24 of the North Carolina Constitution. However, in order for such a violation to occur, I believe that the trial court's action would have to implicate one of the attributes of a jury trial set out in *Dalton*, 206 N.C. at 512, 174 S.E. at 425. In making this determination, I believe that the Court must examine the relevant facts on a case-by-case basis. Such an approach would be consistent with the "totality of the circumstances" approach that has been adopted by the Supreme Court for addressing cases in which trial judges allegedly questioned the jury in such a manner as to coerce it into reaching a guilty verdict. *Fowler*, 312 N.C. at 308, 322 S.E.2d at 392. As a result, "[t]he actions of the trial judge in context and under all the circumstances presented must be reviewed to determine if a judge's instructions and actions had a coercive effect," *United States v. Taylor*, 19 Fed. Appx. 62, 65 (4th Cir. 2001) (citing *Jenkins v. United States*, 380 U.S. 445,

446, 13 L. Ed. 2d 957, 958 (1965)), or otherwise adversely impacted the attributes of a jury trial protected by Article I, section 24 of the North Carolina Constitution. In light of that standard, a trial judge should carefully consider any decision to accept partial or separate verdicts, making sure that he or she "neither pressure[s] the jury to reconsider what it had actually decided nor force[s] the jury to turn a tentative decision into a final one." *United States v. Wheeler*, 802 F.2d 778, 781 (5th Cir. 1986) (citing *United States v. DiLapi*, 651 F.2d 140, 146-47 (2d Cir. 1981), *cert. denied*, 455 U.S. 938, 71 L. Ed. 2d 648 (1982)). Given the risks inherent in taking partial or separate verdicts, I would strongly discourage members of the trial bench from taking such verdicts. However, I am unable, after carefully considering the attributes protected by Article I, section 24 of the North Carolina Constitution, to conclude that engaging in the practice of taking partial or piecemeal verdicts constitutes a *per se* violation of that constitutional provision and believe that we must evaluate the lawfulness of taking such verdicts based on the totality of the circumstances.

The approach I have suggested for evaluating claims of the nature advanced by Defendant in this case is consistent with the approach that the federal courts have adopted in cases involving the taking of partial verdicts.[3] The federal courts have authorized trial judges to take partial verdicts in cases involving multiple criminal offenses. Fed. R. Crim. P. 31(b)(2); *see also United States v. Benedict*, 95 F.3d 17, 19 (8th Cir. 1996) (stating that, in the federal courts, "the practice of taking a partial verdict in a single-defendant case is not *per se* invalid," while reviewing the trial court's decision in the case in question for an abuse of discretion and finding that such an abuse of discretion occurred under the facts of that case) (citing *United State v. Ross*, 626 F.2d 77, 81 (9th Cir. 1980) (stating that "it is settled that a trial court may accept a partial verdict on only one of two or more counts of an indictment"); *United States v. DeLaughter*, 453 F.2d 908, 910 (5th Cir.), *cert. denied*, 406 U.S. 932, 32 L. Ed. 2d 135 (1972) (stating that "[i]t is also permissible for a jury, as here, to render a partial verdict; a court may accept a jury's verdict as to one count and declare a mistrial as to another upon which no agreement has been reached"); *United States v. Barash*, 412 F.2d 26, 31-32 (2d Cir.), *cert. denied*, 396 U.S. 832, 24 L. Ed. 2d 82 (1969) (stating that "[t]he prac-

3. Admittedly, the federal courts are not applying a constitutional standard in these cases. However, since the concerns that led to the challenges advanced against the partial verdicts challenged in those cases are similar to the concerns that have motivated Defendant's challenge to the separate verdicts at issue here, I believe that these cases shed some light on the issues that are before us in this case.

tice of sending the jury back for further deliberations on unresolved counts has been followed in this circuit since *United States v. Cotter*, 60 F.2d 689, 690-91 (2d Cir.), *cert. denied*, 287 U.S. 666, 77 L. Ed. 575 (1932), and we adhere to that practice here"). As a result, while these cases are distinguishable in that they address partial verdicts dealing with different charges rather than separate verdicts dealing with separate theories of guilt, it is clear that the federal courts have not, as best I can tell, condemned the basic practice employed by the trial court in this case out of hand but have, instead, chosen to evaluate the taking of partial verdicts on a case-by-case basis of the type that I believe to appropriately reflect the approach that should be adopted under Article I, section 24 of the North Carolina Constitution.

At bottom, the Court's concern in this case appears to be that, by taking separate verdicts on a theory-by-theory basis, the trial court precluded the jury from reconsidering their decisions with respect to the issues of Defendant's guilt under a felony murder and lying in wait theory during their deliberations on the issue of Defendant's guilt under a premeditation and deliberation theory. After carefully considering the record, I am simply unable to agree that the Court's concerns are well-founded given the facts that we have before us in this case. I reach this conclusion for a number of different reasons.

First, and perhaps most importantly, the jury effectively asked to be permitted to deliberate on a theory-by-theory basis. Before the end of the first day of deliberations, the jury had asked to be reinstructed on a particular theory, to deliberate on that theory until it reached a decision, and to repeat that process with the next theory. As a result, at least in this case, the jury had already decided to approach each theory of liability separately and to reach a decision with respect to that theory before moving on to the next one. Thus, the trial court's decision to take separate verdicts in this case merely reflected an approach that the jury had already adopted.

Secondly, unlike the situation in *Benedict*, upon which the Court places considerable reliance, the factors that are relevant to determining Defendant's guilt of first degree murder under a lying in wait or felony murder theory are not particularly interrelated with the considerations that are critical to the issue of Defendant's guilt of first degree murder under a premeditation and deliberation theory. As a general proposition, the first two theories focus on what Defendant did, while the third theory focuses on the state of mind with which he acted. As a result, the process adopted here does not seem to me to

have "intrude[d] on the jury's deliberative process in such a way as to cut short its opportunity to fully consider the evidence." *Benedict*, 95 F.3d at 19. Simply put, the jury could, with complete logical consistency, return a verdict in this case finding that Defendant was not guilty of first degree murder on the basis of premeditation and deliberation after finding that Defendant was guilty of first degree murder on the basis of felony murder and lying in wait.

Thirdly, the record suggests that the jury had, in fact, reached final verdicts with respect to the issue of Defendant's guilt of first degree murder on the basis of felony murder and lying in wait by the end of the first day of deliberations. According to the transcript, the jury had completed that portion of the verdict form indicating its determination that Defendant was guilty of first degree murder under a felony murder and a lying in wait theory at the time that the trial court inquired as to whether the jury had reached a verdict on any issues (although the necessary signature had not been affixed to one or more verdict sheets, causing the trial court to send the jury back out for the purpose of ensuring that the verdict sheets were properly signed). As a result, contrary to the Court's suggestion that the jury might well have changed its mind on the issue of Defendant's guilt of first degree murder under a felony murder or lying in wait theory during its deliberations on the issue of his guilt of first degree murder on the basis of premeditation and deliberation, the record tends to suggest that the jury had already completed the portions of the verdict sheet dealing with the felony murder and lying in wait issues before beginning its deliberations concerning the issue of his guilt of first degree murder on the basis of premeditation and deliberation.

Fourth, I do not believe that this Court, the Supreme Court, or the General Assembly intends to encourage compromise verdicts of the sort mentioned in *Hickey*. Instead, it is my impression that jurors are supposed to base their decisions on a thorough analysis of the evidence in light of the legal principles embodied in the trial court's instructions. N.C. Gen. Stat. § 15A-1235(b)(4) (stating that among the instructions that a trial court may deliver to deliberating jurors is that "[n]o juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict"); *see also State v. Alston*, 294 N.C. 577, 596, 243 S.E.2d 354, 366 (1978) (stating that the trial court's instruction "was amply sufficient to convey to each member of the jury that he should not surrender any conscientious conviction in order to reach a unanimous verdict"). For that reason, I

am more than slightly reluctant to base a decision on the prospect that members of the jury would engage in horse-trading with each other in order to reach compromise verdicts. Although individual jurors may, in fact, engage in such activities during the process of deliberating, I do not believe that we should encourage such conduct by the way that we decide the cases that come before us.

Finally, the trial court polled the jury after taking the separate verdicts at the end of the first day of deliberations and repeated the procedure before the jury resumed its deliberations on the following morning in light of a recording error. On both occasions, each member of the jury indicated that the verdicts reported by the jury foreperson were his or her verdicts and that he or she still assented to them. *See Black*, 328 N.C. at 191, 400 S.E.2d at 398 (stating that polling is a means of ensuring that a juror has not changed his or her mind). The fact that the members of the jury had an opportunity to reconsider the verdicts which the trial court accepted at the conclusion of the first day of deliberations before resuming deliberations on the following morning provides further indication that the concern that motivates the majority to overturn Defendant's first degree murder conviction is not operative in this case. As a result, for all of these reasons, I do not believe that the trial court's decision to accept separate verdicts concerning the issue of Defendant's guilt of first degree murder on the basis of lying in wait and the felony murder rule violated Article I, section 24 of the North Carolina Constitution.

Even if the trial court's action violated Article I, section 24 of the North Carolina Constitution, I am satisfied that any such error was harmless beyond a reasonable doubt. There is no question but that the jury found Defendant guilty of first degree murder on the basis of three different theories of liability. In order for there to have been any harm to Defendant from the approach adopted by the trial court, the jury would have had to have found, during its further deliberations in connection with the issue of Defendant's guilt of first degree murder on the basis of premeditation and deliberation, either that Defendant was not guilty of first degree murder at all or that Defendant was not guilty of first degree murder on the basis of any theory except the felony murder rule (in which case, as the Court notes, he would be entitled to a new sentencing hearing in the cases in which he was convicted of the predicate felonies used to support his first degree murder conviction under the felony murder rule). I am simply not persuaded, for all of the reasons that convince me that the trial court did not violate Article I, section 24 in the first place, that there is any

chance that either of these outcomes would have occurred had the trial court not accepted the separate verdicts which are at issue here. The fact that the jury asked to proceed on a theory-by-theory basis convinces me that it is very unlikely that, after finishing its deliberations with respect to one theory, it would have gone back and revisited its decision with respect to a previously-considered theory during its discussion of a later one. My conclusion to this effect is bolstered by the fact that the jury had already completed the relevant portions of the verdict sheet at the time that the trial court proposed taking the separate verdicts and the fact that the considerations that are relevant to the issue of Defendant's guilt of first degree murder under a premeditation and deliberation theory are significantly different than the issues that must be addressed in determining his guilt of first degree murder under a felony murder or lying in wait theory. Finally, the lack of hesitancy expressed by any member of the jury during the polling process, even after having overnight to think about the possible ramifications of the jury's decision, gives me further confidence that any error committed by the trial court in taking the separate verdicts was harmless beyond a reasonable doubt. At most, the only verdict that was defective was the jury's verdict on the issue of Defendant's guilt of first degree murder on the basis of premeditation and deliberation, and there is no need to disturb the trial court's judgments even if that verdict is set aside given that the jury's decision to find Defendant guilty of first degree murder on the basis of lying in wait is sufficient to support the separate sentence imposed upon Defendant for the predicate felonies used to support his first degree murder conviction under the felony murder rule.

Thus, for all of these reasons, I conclude that, given the unusual facts present here, the trial court did not violate Article I, section 24 of the North Carolina Constitution by taking the jury's verdicts in the manner in which they were taken in this case and that, even if the manner in which the verdicts were taken was erroneous, any such error was harmless beyond a reasonable doubt. Since the Court concludes otherwise, I respectfully dissent from its decision to award Defendant a new trial in the case in which Defendant was convicted of first degree murder based on the manner in which the trial court took the jury's verdict.

II. Residual Hearsay Issue

In addition, the Court concludes that the trial court erred by refusing to admit the statement of Mr. Dalrymple, which Defendant sought to have admitted pursuant to N.C. Gen. Stat. § 8C-1, Rule

804(b)(5) after Mr. Dalrymple asserted his right not to incriminate himself guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 23 of the North Carolina Constitution when called as a witness by Defendant. Although I agree with the Court that the trial court's findings and conclusions concerning the admissibility of Mr. Dalrymple's statement contain a number of errors, I believe that the trial court's ultimate decision was correct.

The analytical framework that must be utilized in evaluating the admissibility of residual hearsay is well-established.

> Once a trial court establishes that a declarant is unavailable pursuant to Rule 804(a) of the North Carolina Rules of Evidence, there is a six-part inquiry to determine the admissibility of the hearsay evidence proffered under Rule 804(b)(5). *State v. Fowler*, 353 N.C. 599, 608-[6]09, 548 S.E.2d 684, 696 (2001), *cert. denied*, 535 U.S. 939, 152 L. Ed. 2d 230 (2002); *State v. Triplett*, 316 N.C. 1, 8-9, 340 S.E.2d 736, 741 (1986). . . . Under either of the two residual exceptions to the hearsay rule, the trial court must determine the following: (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (6) whether the interests of justice will be best served by admission. *State v. Smith*, 315 N.C. 76, 91-98, 337 S.E.2d 833, 844-[8]48 (1985); *accord* N.C. [Gen. Stat.] § 8C-1, Rule 804(b)(5) (2001); *see also Triplett*, 316 N.C. at 8-10, 340 S.E.2d at 740-741.

State v. Valentine, 357 N.C. 512, 517-18, 591 S.E.2d 846, 852 (2003). As a practical matter, however, the only one of the criteria enunciated in North Carolina's residual hearsay jurisprudence that is in serious dispute in this case is that relating to the "trustworthiness" of Mr. Dalrymple's statement.[4] For that reason, I will focus the remainder of my dissent on the trustworthiness issue.

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4. In its brief, the State argues that Defendant failed to establish that Mr. Dalrymple's statement was more probative than any other evidence available to Defendant. According to the State, Defendant's own testimony would have been more probative than Mr. Dalrymple's statement. The State did not, however, cite any decision from any federal or state court indicating that the requirement that a criminal defendant's attempt to offer residual hearsay could be defeated because a criminal defendant refused to waive his federal and state right against compulsory self-incrimina-

"To be admissible under the residual exception to the hearsay rule, the hearsay statement must possess 'guarantees of trustworthiness' that are equivalent to the other exceptions contained in Rule 804(b)." *State v. McLaughlin*, 316 N.C. 175, 179, 340 S.E.2d 102, 104 (1986). In "determining . . . trustworthiness, the following considerations are at issue: (1) whether the declarant had personal knowledge of the underlying events, (2) whether the declarant is motivated to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) whether the declarant is available at trial for meaningful cross-examination." *Valentine*, 357 N.C. at 518, 591 S.E.2d at 852 (citing *State v. King*, 353 N.C. 457, 479, 546 S.E.2d 575, 592 (2001), *cert. denied*, 534 U.S. 1147, 151 L. Ed. 2d 1002 (2002); *State v. Tyler*, 346 N.C. 187, 195, 485 S.E.2d 599, 603, *cert. denied*, 522 U.S. 1001, 139 L. Ed. 2d 411 (1997); *State v. Nichols*, 321 N.C. 616, 624, 365 S.E.2d 561, 566 (1988). Although "[t]he trial court should make findings of fact and conclusions of law when determining if an out-of-court hearsay statement possesses the necessary circumstantial guarantee of trustworthiness to allow its admission," *State v. Swindler*, 339 N.C. 469, 474, 450 S.E.2d 907, 910-11 (1994) (citing *State v. Deanes*, 323 N.C. 508, 515, 374 S.E.2d 249, 255 (1988), *cert. denied*, 490 U.S. 1101, 104 L. Ed. 2d 1009 (1989), and *Triplett*, 316 N.C. at 10, 340 S.E.2d at 742), this Court has held that, while "[t]he six part inquiry [set out in *Smith*] is very useful when an appellate court reviews the admission of hearsay under Rule 804(b)(5) or 803(24), . . . its utility is diminished when an appellate court reviews the exclusion of hearsay," since "[c]ommon sense dictates that if proffered evidence fails to meet the requirements of one of the inquiry steps, the trial judge's findings concerning the preceding steps are unnecessary." *Phillips & Jordan Investment Corp. v. Ashblue Co.*, 86 N.C. App. 186, 191, 357 S.E.2d 1, 3-4, *disc. review denied*, 320 N.C. 633, 360 S.E.2d 92 (1987); *see also State v. Hardison*, 143 N.C. App. 114, 118, 545 S.E.2d 233, 236 (2001); *State v. Harris*, 139 N.C. App. 153, 159, 532 S.E.2d 850, 854, *disc. review denied*, 353 N.C. 271, 546 S.E.2d 121 (2000). As a result, in cases in which the trial court made a trustworthiness determination without making findings of fact and conclusions of law, the Supreme Court has simply made its own evaluation of the record to determine whether the evidence supported the trial court's conclusion. *Valentine*, 357 N.C. at 518-19, 591 S.E.2d at 853 (citing *State v. Daughtry*, 340 N.C. 488, 514, 459 S.E.2d

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tion, and I have not found any support for such a proposition in my own research. As a result, I agree with the Court's implicit decision to refrain from accepting the State's argument on this point.

747, 760 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996) (upholding the trial court's generalized finding of trustworthiness based on a review of the record); *Swindler*, 339 N.C. at 474, 450 S.E.2d at 911 (reversing the trial court's generalized finding of trustworthiness based on a review of the record).

In analyzing the trial court's findings, the Court correctly concludes that the trial court erred to the extent that it believed that Mr. Dalrymple was acting against his own interests by refusing to testify at Defendant's trial. More particularly, as the State candidly concedes, to the extent that the trial court believed that Mr. Dalrymple subjected himself to a risk that the death penalty would be imposed upon him by declining to testify at Defendant's trial, that understanding of Mr. Dalrymple's agreement with the prosecutor's office is simply incorrect. Simply put, the agreement in question said nothing about what would happen if Mr. Dalrymple testified for a party other than the State. For that reason, Mr. Dalrymple's refusal to testify at Defendant's trial had no bearing on whether he subjected himself to a risk of execution for his role in Mr. Harrington's murder.

Furthermore, I agree with the Court's conclusion that the record contains no indication that Mr. Dalrymple ever recanted his statement to investigating officers and that the trial court erred to the extent that it equated Mr. Dalrymple's refusal to testify with a recantation. As the Court notes, Mr. Dalrymple was still subject to being prosecuted for first degree murder and "had no realistic choice except to invoke his Fifth Amendment rights since, if he testified, he would provide the State with admissions that could then be used to convict him at his own trial." For that reason, the Court correctly concludes that "the trial court erred in failing to hold that [Mr.] Dalrymple never recanted his September 2007 statement."

Finally, I agree with the Court that the fact that Mr. Dalrymple asserted his right 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 does not provide any basis for concluding that Mr. Dalrymple's statement is untrustworthy. An individual may invoke his or her constitutional protection against compulsory self-incrimination for a host of reasons that are unrelated to the trustworthiness of any statement that he or she may have given to investigating officers. As a result, to the extent that the trial court deemed the fact that Defendant invoked his federal and state constitutional right against compulsory self-incrimination to have any

bearing on the trustworthiness of his statement, any such conclusion was erroneous.

I am not, at this point, prepared to either agree with, or dissent from, the Court's discussion of the appropriateness of the trial court's decision to consider the consistency of the information contained in Mr. Dalrymple's statement with other available evidence in evaluating the trustworthiness of his statement. Although there are certainly decisions that suggest that such considerations should not be taken into account in the course of conducting the required trustworthiness analysis, *State v. Finney*, 358 N.C. 79, 84, 591 S.E.2d 863, 866 (2004); *Tyler*, 346 N.C. at 199-203, 485 S.E.2d at 605-07; *State v. Hurst*, 127 N.C. App. 54, 61, 487 S.E.2d 846, 852, *disc. review denied*, 347 N.C. 406, 494 S.E.2d 427 (1997), *cert. denied*, 523 U.S. 1031, 140 L. Ed. 2d 486 (1998), these decisions predicate this requirement on the dictates of the Confrontation Clause of the Sixth Amendment of the United States Constitution as construed in *Idaho v. Wright*, 497 U.S. 805, 111 L. Ed. 2d 638 (1990). In view of the fact that the approach to Confrontation Clause issues embodied in *Wright* has been superseded by the approach embodied in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004); the fact that the evidence at issue here was proffered by Defendant rather than the State; and the fact that earlier decisions of the Supreme Court, such as *Nichols*, 321 N.C. at 625, 365 S.E.2d at 567, allowed for consideration of "corroborating evidence" during the required trustworthiness analysis, it is not entirely clear to me that the Court is correct in concluding that "the trial court erred in determining the trustworthiness of the September 2007 statement by comparing it to other evidence presented at trial." However, since the policy justifications that underlie many of the other hearsay exceptions set out in N.C. Gen. Stat. § 8C-1, Rule 804(b) focus primarily on the circumstances surrounding the making of the statement in question, *see, e.g.*, *State v. Stevens*, 295 N.C. 21, 29, 243 S.E.2d 771, 776 (1978) (stating that the hearsay exception for dying declarations rests "upon the tenet that when an individual believes death to be imminent, the ordinary motives for falsehood are absent and most powerful considerations impel him to speak the truth"); *Smith v. Moore*, 142 N.C. 277, 287, 55 S.E. 275, 278 (1906) (stating that admissions against interest are admissible because "[t]his natural disposition to speak of favor of, rather than against interest, is so strong that when one has declared anything to his own prejudice, his statement is so stamped with the image and superscription of truth that it is accepted by the law as proof of the correctness and accuracy of what was said"), and since I do not believe that it is necessary to

resolve this question in order to decide the present issue, I will refrain from commenting on this issue at the present time.

At bottom, the Court concludes that, since each of the reasons that the trial court gave for excluding Mr. Dalrymple's statement was in error, the trial court erred by excluding his statement. I am not satisfied with this justification for overturning the trial court's ruling. Instead, I believe, on the basis of decisions such as *Valentine*, *Ashblue Co.*, *Hardison*, and *Harris*, that our task on appeal, given the situation that we face in this case, is to make our own determination of whether Mr. Dalrymple's statement is sufficiently trustworthy to be admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 804(b)(5). The Court does not, it seems to me, ever address this question.

When I undertake what I believe to be the necessary trustworthiness evaluation, it appears to me that the only factors that militate in favor of a finding of trustworthiness are that Mr. Dalrymple had personal knowledge of the events that occurred at the time of Mr. Harrington's death and that he never recanted his statement after giving it to investigating officers. Unlike Defendant, I am not persuaded that Mr. Dalrymple "was motivated to speak the truth by the State's agreement to take death off the table." On the contrary, the existence of such sentence concessions is typically a basis for challenging, rather than bolstering, a witness' credibility. *State v. Carey*, 285 N.C. 497, 508, 206 S.E.2d 213, 221 (1974) (holding that trial court erred by limiting the scope of cross-examination during a first degree murder trial "so as to exclude all mention of the death penalty" because the "question of [the witness'] credibility and bias is of such vast importance in this case" and because "one very important factor which may have influenced [the witness'] decision to cooperate with the State was the possibility that . . . he might have been convicted and sentenced to death"). In other words, it seems to me that the fact that Mr. Dalrymple was facing the possibility of a death sentence, instead of motivating him to tell the truth, might well have impelled him to say whatever he thought was necessary to further his own interests. *See Swindler*, 339 N.C. at 475, 450 S.E.2d at 911 (finding a lack of trustworthiness because, among other things, declarant's motivation "was not . . . to speak the truth, but rather for him to say what the police wanted to hear"); *McLaughlin*, 316 N.C. at 180, 340 S.E.2d at 105 (finding a lack of trustworthiness because, among other things, the declarant "made the statement to gain favor with the police and in hopes of a favorable plea bargain"). As a result, I am inclined to find that the circumstances under which Mr. Dalrymple made his state-

ment to investigating officers militates against, rather than for, its trustworthiness. *Id.*, 316 N.C. at 180, 340 S.E.2d at 105 (holding that the trial court erred by admitting the statement of an accomplice because "[t]he totality of the circumstances surrounding [the accomplice's] confession justifies our conclusion that it lacked the required 'equivalent . . . guarantees of trustworthiness' "). As a result, I believe that the only factors that tend to support a finding of trustworthiness are the fact that Mr. Dalrymple had the requisite personal knowledge and the fact that he never recanted his statement after making it. These factors are not, at least in my opinion, adequate to justify a conclusion that Mr. Dalrymple's statement was sufficiently trustworthy to permit its admission into evidence pursuant to N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) when considered in conjunction with the questions about Mr. Dalrymple's motivations that arise from the sentencing concessions that he received from the State. Since the Court concludes otherwise, I respectfully dissent from its decision to grant Defendant a new trial in the case in which he was convicted of first degree murder on the basis of this issue as well.

III. Conclusion

For the reasons set forth above, I respectfully disagree with the Court's conclusion that the trial court violated Article I, section 24 of the North Carolina Constitution by taking the jury's verdicts with respect to the issue of Defendant's guilt of first degree murder on the basis of lying in wait and the felony murder rule separately from its verdict with respect to the issue of Defendant's guilt of first degree murder on the basis of premeditation and deliberation. In addition, I respectfully disagree with the Court's conclusion that the trial court erred by refusing to admit Mr. Dalrymple's statement into evidence pursuant to N.C. Gen. Stat. § 8C-1, Rule 804(b)(5). As a result, I respectfully dissent from the Court's decision awarding Defendant a new trial in the case in which he was convicted of first degree murder.

AMWARD HOMES, INC., ANGE CONSTRUCTION COMPANY, BLUEPOINT HOMES, INC., HOMESCAPE BUILDING COMPANY, IMPACT DESIGN-BUILD, INC., JOHN LEGGETT AND COMPANY, POYTHRESS CONSTRUCTION COMPANY, INC., POYTHRESS HOMES, INC., WARDSON CONSTRUCTION, INC., WHG, INC. D/B/A TIMBERLINE BUILDERS, AND ZEIGLER & COMPANY, PLAINTIFFS V. TOWN OF CARY, A BODY POLITIC AND CORPORATE, DEFENDANT

TRADITION AT STONEWATER I, LP, PLAINTIFF-INTERVENOR V. TOWN OF CARY, A BODY POLITIC AND CORPORATE, DEFENDANT TO CLAIM OF PLAINTIFF-INTERVENOR

No. COA09-923

(Filed 3 August 2010)

1. Jurisdiction— subject matter jurisdiction—school impact fees—claims not moot—plaintiffs had standing

The trial court and the Court of Appeals had subject matter jurisdiction over a case involving school impact fees charged to plaintiff homebuilders by the Town of Cary pursuant to the Adequate Public School Facilities ordinance.

2. Cities and Towns— actions ultra vires—school impact fees

The trial court did not err in granting summary judgment in favor of plaintiff homebuilders on their claims to recover school impact fees paid to the Town of Cary because the Town had no authority to enact or enforce the Adequate Public School Facilities ordinance or Condition 17 of the development proposal which outlined the fees.

3. Statutes of Limitation and Repose— claims not barred—recovery of school impact fees

Plaintiff homebuilders' claims to recover school impact fees paid to the Town of Cary pursuant to the Adequate Public School Facilities ordinance were not barred by the two-month statute of limitations contained in N.C.G.S. § 160A-364.1; the ten-year statute of limitations in N.C.G.S. § 1-56 applied to plaintiffs' claims under Article I, section 19 of the North Carolina Constitution.

4. Estoppel— no benefit received—claims not barred

Plaintiffs' claims to recover school impact fees paid to the Town of Cary were not barred by the doctrine of estoppel. Plaintiffs were forced to participate in the Town's illegal custom and practice of imposing and accepting the fees and the Town

failed to show that plaintiffs received any benefit under the Adequate Public School Facilities ordinance or Condition 17 of the approved development proposal.

5. Constitutional Law— substantive due process—summary judgment proper

The trial court correctly concluded that plaintiff homebuilders were entitled to summary judgment on their substantive due process claims concerning school impact fees paid to the Town of Cary. Plaintiffs demonstrated a fundamental property interest protected by the Fourteenth Amendment of the North Carolina Constitution and proved that they were deprived of this property interest by government action that had no rational relation to a valid state objective.

6. Constitutional Law— equal protection—summary judgment proper

The trial court did not err in granting plaintiff homebuilders summary judgment on their claims to recover school impact fees paid to the Town of Cary as the Town violated plaintiffs' equal protection rights. Plaintiffs were intentionally treated unequally by the Town compared to similarly situated entities and there was no rational basis for the Town's disparate treatment.

7. Attorney Fees— substantive due process and equal protection claims—award proper

The trial court did not err by ordering the Town of Cary to pay plaintiff home builders' attorney fees pursuant to 42 U.S.C. § 1988(b) in an action concerning school impact fees paid to the Town. The Town violated plaintiffs' substantive due process and equal protection rights.

JACKSON, Judge, dissenting.

Appeal by defendant from orders entered 5 March 2009, 1 April 2009, and 2 April 2009 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 9 February 2010.

K&L Gates, LLP, by William J. Brian, Jr., and Nathaniel C. Parker, for plaintiff appellees.

The Brough Law Firm, by Michael B. Brough; and Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., John C. Cooke, and Michael T. Henry, for defendant appellant.

J. Michael Carpenter and Stam Danchi & Donaldson, PLLC, by Paul Stam, for Amicus Curiae Home Builders Association of Raleigh-Wake County and the North Carolina Home Builders Association.

HUNTER, JR., Robert N., Judge.

In 2003, Jerry Turner & Associates, the developer of a proposed subdivision called Cameron Pond, submitted a subdivision proposal to the Town of Cary. The proposal sought permission from the Town to subdivide a 143-acre tract of land into 417 dwelling units. The Town of Cary approved the subdivision proposal, which contained a condition providing that no building permit would be issued within Cameron Pond unless building applicants paid a fee, pursuant to a set schedule, for the funding of schools in the Town of Cary. Under the proposal's terms, the developer of Cameron Pond would receive the benefit of the subdivided property, while the home builders seeking building permits would be required to pay the fees. No fees were required to be paid by the developer. According to the language of the condition, the fees paid by the builders satisfied the requirements of one of the Town's ordinances.

The builders in Cameron Pond—Amward Homes, Inc., Ange Construction Company, Bluepoint Homes, Inc., Homescape Building Company, Impact Design-Build, Inc., John Leggett and Company, Poythress Construction Company, Inc., Poythress Homes, Inc., Wardson Construction, Inc., WHG, Inc. d/b/a Timberline Builders, and Zeigler & Company (collectively "plaintiffs")—paid the fees under the condition for approximately four years before filing this action to recover the fees. The amount is around $600,000 as of the filing of this appeal. The trial court granted plaintiffs' motion for summary judgment and found that (1) the Town of Cary had violated plaintiffs' due process and equal protection rights under the United States and North Carolina Constitutions, and (2) the condition and ordinance requiring the fees were void and *ultra vires*. The Town has filed this appeal.

After careful review, we hold: (1) the Town of Cary engaged in *ultra vires* acts by accepting the fees pursuant to the condition and the subdivision ordinance, (2) plaintiffs' causes of action are not barred by the statute of limitations, (3) plaintiffs are not estopped from bringing their claims against the Town, (4) the Town of Cary violated plaintiffs' rights to due process and equal protection under the North Carolina and United States Constitutions, and (5) the trial

court did not abuse its discretion in awarding plaintiffs attorneys' fees and costs. Accordingly, we affirm the trial court's orders.

BACKGROUND

On 22 July 1999, the Town of Cary enacted an "Adequate Public School Facilities" ordinance (the "APSFO") for the following stated purpose: "The purpose of this part is to ensure that, to the maximum extent practical, new residential developments will be approved by the Town of Cary only when it can reasonably be expected that adequate public school facilities will be available to accommodate such new developments." Under the APSFO as first adopted, developers could gain zoning approval for a new planned unit development ("PUD") by satisfying one of two requirements: (1) obtain a Certificate of Adequate Educational Facilities ("CAEF") from Wake County Public Schools certifying that adequate school facilities were available to accommodate residents of new homes, or (2) qualify for an exemption from the APSFO by either building in a low population density area or constructing an affordable housing project.

At the time the APSFO was first enacted, Cary's Town Council was aware that they did "not control the provision of public school facilities," because the authority to build, fund, and manage schools fell within the exclusive province of the Wake County Public School System ("WCPSS") and the Wake County Board of Commissioners ("WCBC"). In an effort to shore up their authority to enforce the APSFO, members of Cary's Town Council attempted to enter into a Memorandum of Understanding between the Town, WCPSS, and WCBC. The school board for WCPSS approved the memorandum, but the WCBC declined to adopt it. The resulting agreement between WCPSS and the Town of Cary was outlined in a non-binding memorandum of understanding whereby the Town and WCPSS agreed to "work cooperatively" to meet certain target percentages for school enrollment capacity over a five-year period. In order to achieve these target percentages, the parties agreed to these provisions in the memorandum of understanding:

> Adequate Public Facilities Ordinance (APFO). The Town will adopt an ordinance to limit the approval of major residential developments within the Town's jurisdiction to those that can be adequately served with existing or proposed school facilities.
>
> Establishment of Procedure to Issue Certificates of Adequate Education Facilities (CAEF's). The School System will establish

> an administrative review process to receive and take action upon applications for . . . [CAEF's] submitted by developers who are required by the Town's [APSFO] to have such certificates before obtaining subdivision or site plan approval from the Town.
>
> The School System will issue a CAEF for a proposed development if it concludes that, given the number of school age children projected to reside in that development, and considering all of the factors listed below, the number of students projected to attend the Wake County elementary, middle, and high schools that serve the corresponding attendance districts where the development site is located will not exceed the standards specified in paragraph 1 above.

(Underlining added.) The memorandum listed a set of factors to be considered by WCPSS in making its determination to grant a CAEF, including current student population in the area of the proposed development, future and ongoing school construction, funding for school construction projects, increases in enrollment, Cary's population growth, changes in district boundaries, and any other factor deemed relevant by WCPSS.

Neither the memorandum of understanding nor the APSFO granted the Town of Cary the authority to charge fees to developers or builders as part of the subdivision application process for the purpose of funding schools.

On 16 November 2001, the Town of Cary approved a PUD application for a subdivision called "Cary Park." The developers of Cary Park sought permission to develop 484 acres within Cary's town limits into 2,744 residential dwelling units. As part of the approved proposal, Cary Park agreed to build an elementary school for $5,500,000.00. With respect to Cary's APSFO, the agreement contained an acknowledgment provision where the parties agreed that Cary Park's payment for the school satisfied the APSFO, even though the APSFO at this time did not allow the Town to grant an exception on such grounds.

> (c) It is acknowledged and agreed that the performance of its obligations under this Paragraph 1(a) [construction of the school] by [Cary Park] shall satisfy all requirements of . . . Cary Park with respect to the Town's Adequate Public Facilities Ordinance for Schools.

On 10 October 2002, Cary's Town Council approved a development plan submitted by Jerry Turner & Associates ("Amberly"). In-

stead of paying for a school to comply with the APSFO like Cary Park, Amberly agreed to pay a fee directly to the Town of Cary with every building permit issued for units to be built in the development. The fee schedule, as reflected in the Town Council's meeting minutes, provided:

Amberly's Proposal for Compliance with Cary's APF for Schools

One bedroom	$500 per dwelling
Two bedroom	$1,000 per dwelling
Three bedroom	$2,000 per dwelling
Four bedroom	$3,000 per dwelling
Over four bedrooms	$1,000 per bedroom over four, in addition to the four-bedroom amount

This schedule was proposed by Amberly after the Planning and Zoning Board meeting but prior to the meeting of Cary's Town Council. According to the proposal, the fees were to be paid directly to the Town of Cary for school development. Between September 2002 and January 2003, Cary's Town Council approved the same payment fee schedule under the APSFO for subdivisions named "Stonewater," "Village at the Park," and "Riggsbee Farm." Other proposals for developments, in particular the proposals for subdivisions "Glenkirk" and "Huggins Glen," paid a flat fee of $2,000 per unit rather than a dollar amount per bedroom.

On 8 May 2003, Cary's Town Council approved a development proposal by Cameron Pond Development, LLC ("Cameron Pond"). In Cameron Pond's proposal for a new PUD, the developer included a fee schedule to comply with the APSFO:

> 17. Upon issuance of a building permit for each residential dwelling unit within Cameron Pond, Cameron Pond or its designee will pay the Town the following amount based on the size of the dwelling to comply with the Town's [APSFO] for schools:
>
> - One bedroom— $500 per dwelling
> - Two bedroom— $1,000 per dwelling
> - Three bedroom— $2,000 per dwelling
> - Four bedroom— $3,000 per dwelling
> - Over four bedrooms— $1,000 per bedroom

This condition ("Condition 17") traveled with the lots that were sold in Cameron Pond, and plaintiffs paid a fee according to the above schedule in order to acquire a building permit to construct a new home in the development. As a group, plaintiffs in Cameron Pond allege that, as of the filing of this appeal, they have paid over $600,000.00 in fees to comply with the APSFO.

In explaining why all these development proposals contained fees for schools—even though the APSFO contained no language regarding any fees whatsoever—a managing partner of Cameron Pond, Glenn Futrell, provided the following in his affidavit:

> 5. The Cameron Pond PUD application was prepared and initially submitted in November 2002. In connection with the PUD application, I attended several meetings with Town staff and officials to discuss the proposed development and the conditions or amendments that would be necessary to obtain approval of the project by the Town Council.
>
> 6. On more than one occasion during the approval process, I met with then-Mayor Glen Lang to discuss the Cameron Pond PUD. One of the topics discussed during these meetings was the manner in which the applicant would comply with the Town's Adequate Public Facilities Ordinance ("APFO") for Schools. I was informed that the Town Council, and Mr. Lang in particular, expected the applicant to include a condition in the PUD requiring the payment of fees for school capacity based on the number of bedrooms within each dwelling unit in order to comply with the APFO.
>
> 7. During our meetings, Mr. Lang expressed his strong desire for developers to enable the Town to make expenditures on schools within the Town's borders by paying school fees. I also understood that Mr. Lang controlled enough votes on the Town Council to insure that any application that did not comply would be denied.
>
> 8. I was informed and understood that the Cameron Pond PUD would not be approved by the Town Council unless we accepted a condition requiring the payment of school fees. This was consistent with my prior dealings with the Town of Cary on other projects and the information that had been conveyed to me in connection with other residential PUD approvals.

Project managers and other people involved with the PUD applications for Stonewater, Glenkirk, Cary Park, Amberly, Village at the Park, Riggsbee Farm, and Huggins Glen recounted similar stories during the application process.

On 1 July 2003, the Town of Cary amended the APSFO to officially allow the Town to accept fees to waive the requirements of the APSFO. In adding an exemption to the APSFO via payment of fees, the new ordinance read in part:

> 3.18.2 Certificate of Adequate Educational Facilities (CAEF)
>
> (A) Except as provided by Section 3.18.6 below, no subdivision plan or site plan may be approved unless on the date of such approval there exists a valid and current Certificate of Adequate Educational Facilities (CAEF) applicable to the project for which such approval is sought.
>
> (B) A CAEF must be obtained from the Wake County Public School System in accordance with Section 3.18.4 below. The School System will issue or deny a CAEF in accordance with the provisions of the Memorandum of Understanding between the Town, and the Wake County Public School System, dated July 22, 1999.
>
> . . . .
>
> (D) CAEF's attach to the land in the same way that development permission attaches to the land. CAEF's may be transferred along with other interests in the property with respect to which they are issued, but may not be severed or transferred separately.
>
> . . . .
>
> 3.18.6 Exemption From Certification Requirement for Small, Low Density, and Affordable Housing Development Projects
>
> (A) A CAEF shall not be required, if the gross density of the proposed residential subdivision development does not exceed (i) one dwelling unit per two acres of the development tract, or (ii) the project is exempt from subdivision plan or site plan approval as allowed under the provisions of this Ordinance.

> (B) In addition, the Town Council may waive the requirements of this Ordinance in the case of affordable housing projects[.] . . .
>
> (C) *The Town Council may also exempt proposed developments from the requirements of this Section on a case-by-case basis if the proposed development provided funds per unit to support new school development.*

(Emphasis added.) Under these amended procedures, a developer seeking to start a new housing development could gain permission from the Town of Cary if he or she either: (1) obtained a CAEF from Wake County Public Schools, (2) qualified for exemption due to low population density or the construction of an affordable housing project, or (3) offered a sufficient amount of money per home built to be paid to the Town of Cary directly for funding schools.

The amended APSFO was effective for about 14 months before it was repealed. On 9 September 2004, the Town of Cary repealed the APSFO by adopting the following resolution.

> 3.18 ADEQUATE PUBLIC SCHOOL FACILITIES (REPEALED 9/9/04)
>
> The repeal of this section (Adequate Public School Facilities) shall be effective upon adoption and such repeal shall apply to applications for approval of subdivision plans or site plans that are submitted for approval by the Town after the effective date of repeal *unless the property for which subdivision or site plan approval is sought is subject to a zoning condition or a developer agreement that requires compliance with this (the Adequate Public School Facilities) ordinance. These properties/planned developments include Cary Park (Rezoning Case # 00-REZ-04)*, *Glenkirk (02-REZ-15)*, *Cameron Pond (02-REZ-27)*, *Amberly (02-REZ-O5)*, *Stonewater [(]02-REZ-08)*, *Village at the Park (02-REZ-06)*, *Huggins Glen—currently know[n] as The Battery (O2-REZ-26)*, *and Riggsbee Farm—currently known as Stonecreek Village (02-REZ-23)*. If the property is subject to a developer agreement or zoning condition or other approval requiring or contemplating compliance, then such property shall be subject to the requirements of the developer agreement or zoning approval which shall be interpreted in terms of this ordinance as it exists immediately

> before repeal, unless such requirement is modified or removed after review on a case by case basis.

(Emphasis added.) Because this repeal excluded Cameron Pond from the repealed requirements of the APSFO, builders applying for building permits in Cameron Pond continued to pay fees under Condition 17 to the Town of Cary.

On 27 September 2007, plaintiffs filed suit against the Town of Cary. In the complaint, plaintiffs sought: (1) an accounting; (2) a declaration that the fees under the APSFO were beyond the Town's statutory authority under N.C. Gen. Stat. § 160A-4 (2009); (3) a declaration that the APSFO violated plaintiffs' rights to equal protection and substantive due process under the United States and North Carolina Constitutions; (4) a declaration that the July 2003 amendment to the APSFO allowing for fees was beyond the statutory authority of the Town in violation of N.C.G.S. § 160A-4; (5) a declaration that the July 2003 amendment to the APSFO violated the plaintiffs' rights to equal protection and substantive due process; (6) a declaration that the repeal of the APSFO was beyond the Town's statutory authority; (7) a declaration that the repeal of the APSFO violated the plaintiffs' equal protection and substantive due process rights; (8) a declaration that the enforcement of the original APSFO, the July 2003 amendment to the APSFO, and the repeal of the APSFO via the collection of fees was beyond the statutory authority of the Town; (9) a declaration that the enforcement of the original APSFO, the July 2003 amendment to the APSFO, and the repeal of the APSFO via the collection of fees violated plaintiffs' equal protection and substantive due process rights under the North Carolina and United States Constitutions; (10) an injunction ordering a refund of the fees paid to the Town, a prohibition of the collection of further fees, and an accounting; and (11) damages under 42 U.S.C. § 1983 (2009)[1] and Article I, section 19[2] of the North Carolina Constitution.

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1. Every person who, under color of any statute, ordinance, regulation, *custom*, *or usage*, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

42 U.S.C. § 1983 (emphasis added).

2. **Sec. 19. Law of the land; equal protection of the laws.**

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the

On 6 May 2008, Stonewater motioned the trial court to intervene in plaintiffs' action, and the motion was granted on 25 July 2008. Plaintiffs thereafter filed a motion for summary judgment on 12 January 2009, and the Town of Cary filed a competing motion for summary judgment on 13 February 2009.

On 5 March 2009, the trial court granted summary judgment to plaintiffs and denied the Town of Cary's motion for summary judgment. In finding for plaintiffs as a matter of law, the trial court explained in its order:

> a. Pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, the Court hereby declares:
>
> i. that any obligation of Plaintiffs to pay fees or monies pursuant to Condition 17 of the Cameron Pond Planned Unit Development ("PUD") and/or the Town of Cary's [APSFO], as amended, including without limitation the ordinance passed by the Town on September 9, 2004, is invalid, unenforceable, void and of no legal effect; and
>
> ii. that the Defendant has violated Plaintiffs' rights to equal protection and due process as provided by Article I, Section 19 of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution.

The Town of Cary made a motion to amend the summary judgment order to add a certification for appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, and the trial court granted defendant's motion and filed an amended order on 1 April 2009. On 2 April 2009, the trial court granted plaintiffs' motion for attorneys' fees and costs under 42 U.S.C. § 1988(b) (2009) and awarded plaintiffs $368,008.82.

The Town of Cary filed a timely notice of appeal on 6 April 2009, and has raised seven issues for this Court: (1) whether the trial court and this Court lack subject matter jurisdiction over plaintiffs' claims and this appeal; (2) whether plaintiffs' claims are barred by the applicable statute of limitations; (3) whether plaintiffs' causes of action are barred by the doctrine of estoppel; (4) whether Condition 17 is outside the scope of the Town of Cary's authority; (5) whether

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> equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

N.C. Const. art. I, § 19.

the Town of Cary violated plaintiffs's due process rights; (6) whether the Town of Cary violated plaintiffs' equal protection rights; and (7) whether the trial court erred in awarding plaintiffs' attorneys fees.

ANALYSIS

I. Jurisdiction and Standard of Review

We note that this appeal is interlocutory given that plaintiff-intervenor Stonewater's causes of action against the Town are still pending in the trial court. *Embler v. Embler*, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001) (orders made during the pendency of an action not disposing of entire controversy at trial are interlocutory). However, where the trial court certifies an order under N.C.R. Civ. P. 54(b) (2010), jurisdiction in this Court is proper. *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) ("When the trial court certifies its order for immediate appeal under Rule 54(b), appellate review is mandatory."); *see Oestreicher v. Stores*, 290 N.C. 118, 127, 225 S.E.2d 797, 803 (1976) (trial court is a "dispatcher" and determines "the appropriate *time when each* '*final decision*' upon 'one or more but less than all' of the claims in a multiple claims action is ready for appeal") (citation omitted); *Trull v. Central Carolina Bank*, 117 N.C. App. 220, 450 S.E.2d 542 (1994) (jurisdiction proper where summary judgment granted to one defendant but fewer than all defendants on all of the plaintiff's claims), *aff'd in part and disc. review improvidently allowed in part*, 347 N.C. 262, 490 S.E.2d 238 (1997). In this case, given that summary judgment was granted in favor of plaintiffs on all their claims against the Town, and only the claims of Stonewater remain at trial, it is apparent that the trial court's order is "a final judgment as to one . . . but fewer than all of . . . [the] parties," and we agree that there is "no just reason for delay." N.C.R. Civ. P. 54(b). Jurisdiction in this Court is accordingly proper under Rule 54(b).

"We review orders granting summary judgment *de novo*." *Self v. Yelton*, 201 N.C. App.653, 658, 688 S.E.2d 34, 37 (2010). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c) (2010). The burden rests initially on the moving party to show that there exists no genuine issue of material fact. *Self*, 201 N.C. App. at 658, 688 S.E.2d at 38. "If a moving party shows that no genuine issue of material fact exists for trial, the burden shifts to the nonmovant to adduce specific facts establishing a triable issue." *Id.*

II. Subject Matter Jurisdiction

[1] The Town of Cary argues that the trial court and this Court lack subject matter jurisdiction over this case for two reasons: (1) the APSFO was repealed, rendering plaintiffs' causes of action moot; and (2) plaintiffs lack standing to challenge the APSFO, because the sole reason plaintiffs had to pay the scheduled fees was due to Condition 17 rather than the APSFO itself. We do not agree.

A. Mootness

"Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *In re Peoples*, 296 N.C. 109, 147-48, 250 S.E.2d 890, 912 (1978). "Repeal of a challenged law generally renders moot the issue of the law's interpretation or constitutionality." *Property Rights Advocacy Grp. v. Town of Long Beach*, 173 N.C. App. 180, 183, 617 S.E.2d 715, 718, *appeal dismissed and disc. review denied*, 360 N.C. 177, 626 S.E.2d 649 (2005), *aff'd per curiam*, 360 N.C. 474, 628 S.E.2d 768 (2006). "However, the repeal of a challenged statute does not have the effect of mooting a claim arising under that statute in the event that . . . the repeal of the challenged statute does not provide the injured party with adequate relief or the injured party's claim remains viable." *Bailey and Associates, Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 182, 689 S.E.2d 576, 582 (2010).

In this case we are presented with an ordinance exempting specific parties from the effect of a repeal. Plaintiffs have filed this action for the dual purposes of (1) reclaiming the APSFO fees they have already paid and (2) preventing the Town of Cary from charging any further fees under Condition 17. Since the repeal of the APSFO here does not redress either of these claims, clearly the issues raised in this case are still viable and not moot.

B. Standing

"Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Property Rights Advocacy Group*, 173 N.C. App. at 182, 617 S.E.2d at 717 (citation and internal quotation marks omitted). "Standing to challenge the constitutionality of a legislative enactment exists where the litigant has suffered, or

is likely to suffer, a direct injury as a result of the law's enforcement." *Maines v. City of Greensboro*, 300 N.C. 126, 130-31, 265 S.E.2d 155, 158 (1980).

The Town of Cary's contention that plaintiffs lack standing rests on the nature of Condition 17. The Town asserts that Condition 17 is only a rezoning condition which was not mandated by the APSFO at the time Cameron Pond was approved as a subdivision, and based on this fact, the Town contends that plaintiffs' predecessor-in-interest voluntarily agreed to the condition now causing plaintiffs' damages. The Town argues that since Condition 17 is the sole source of injury, and it was caused by the developer of Cameron Pond, plaintiffs lack standing to pursue their claims against the Town.

This argument by the Town of Cary regarding the voluntariness of Condition 17 is, in reality, a sword with two edges. In accepting Cameron Pond's subdivision proposal, the Town voluntarily accepted the plain, unambiguous language of Condition 17: "Upon issuance of a building permit for each residential dwelling unit within Cameron Pond, Cameron Pond or its designee will pay the Town the following amount based on the size of the dwelling *to comply with the Town's [APSFO] for schools*[.]" (Emphasis added.) If the Town did not wish this language regarding the APSFO to be part of Condition 17, there existed ample time to change the language prior to the adoption of Cameron Pond's proposal. As it stands, Condition 17 is patently connected to the APSFO as it existed at the time the proposal was accepted by Cary's Town Council. Thus, plaintiffs have standing to challenge the Town's imposition of fees purportedly due to the requirements of the APSFO.

III. Ultra Vires

[2] The Town of Cary argues that Condition 17 is not *ultra vires*. We disagree.

In *Union Land Owners Ass'n v. County of Union* [*Union*], this Court examined the imposition of school impact fees similar to those at issue in this case, and concluded that there exists no statutory authority for such fees. 201 N.C. App. 374, 381, 689 S.E.2d 504, 508 (2009) ("Defendant [Union County] may not use the APFO to obtain indirectly the payment of what amounts to an impact fee given that defendant lacks the authority to impose school impact fees directly."). In its reply brief, the Town attempts to distinguish *Union* on a variety of grounds which we now address.

The Town contends that *Union* is distinguishable because: (1) in *Union*, the mechanism for imposing the fees was through an ordinance, and in this case the device is Condition 17; and (2) the developers in *Union* had their projects delayed if they did not pay the fees, and in this case the developer was never delayed due to the APSFO. Neither of these arguments have merit.

As discussed *supra*, Condition 17 is inextricably tied to the APSFO by the language accepted by the Town. The language of Condition 17 is a reflection of the Town's interpretation of the APSFO, its own ordinance, at the time it approved Cameron Pond. Thus, the Town cannot now claim that the fees paid were not pursuant to the APSFO. Moreover, whether a project was delayed due the APSFO has no bearing on the issue of *ultra vires*—either the Town had the authority to accept fees or it did not. To answer this question, we now examine our holding in *Union* to determine whether Condition 17 is *ultra vires*.

In *Union*, the County contended that three sources of authority supported its APFO: "(1) statutes relating to the county police power, (2) zoning statutes, and (3) subdivision statutes." 201 N.C. App. at 377, 689 S.E.2d at 506. Under the APFO adopted by Union County, the county could approve a subdivision plan that adversely affected school capacity by satisfying one of the following conditions:

> (1) deferring approval for five years; (2) postponing development until school capacity becomes available; (3) scheduling the development to match the rate of school capacity growth; (4) redesigning the proposed development to reduce the impact on school capacity; (5) requesting minor plat approval so as to exempt the proposed development from APFO conditions; (6) offsetting any excess impact on school capacity resulting from the proposed development by providing a VMP [Voluntary Mitigation Payment] to the County; (7) constructing school facilities to offset the proposed development's impact in excess of estimated school capacity; or (8) satisfying, with defendant's approval, other reasonable conditions offsetting the proposal's impact on the capacity of schools serving the proposed development.

Id. at 376, 689 S.E.2d at 505. The VMP's in *Union*, like those at issue here, were proposed at the subdivision proposal phase, and the County chose to deny or accept subdivision proposals, in part, based on whether the VMP's were adequate. *Id.* In holding that the APFO in *Union* was beyond the County's authority, this Court held:

> Therefore, because our Constitution places the duty to fund public schools on the General Assembly and local governments and because the General Assembly has neither expressly nor impliedly authorized defendant to shift that duty using subdivision ordinances that impose fees or use similar devices upon developers of new construction, we hold that defendant's adoption of an APFO that includes a VMP and similar measures was in excess of its statutory authority.

Id. at 381, 689 S.E.2d at 508.

Condition 17 plainly falls within the scope of our holding in *Union*. The Town of Cary had no statutory authority to adopt the APSFO or accept fees under it, and Condition 17 and the APSFO illegally shifted the burden of paying for public education to the subdivision builder-plaintiffs in this case. Moreover, even though *Union* was not decided until after the Town of Cary adopted the APSFO, the Town should have known that Condition 17 was *ultra vires*, because the APSFO at the time Cameron Pond was approved gave the Town no authority to accept fees in lieu of satisfying the APSFO's requirements. The record clearly shows, contrary to the Town's explanations, that upon the adoption of the APSFO in this case, the Town of Cary entered into a custom and practice of accepting fees pursuant to the APSFO. The Town has failed to establish even a colorable claim that the acceptance of these fees was within the Town's authority, and accordingly, we can discern no genuine issue of material fact on this issue.

Since the Town had no authority to enact or enforce the APSFO or Condition 17, it likewise had no authority to require plaintiffs to continue paying the illegal fees when the APSFO was repealed. Therefore, under *Union*, we conclude that the APSFO and Condition 17 are *ultra vires*, and hold that the trial court did not err in declaring that they are "invalid, unenforceable, void and of no legal effect." This assignment of error is overruled.

IV. Statute of Limitations

A. Two-Month Statute of Limitations

[3] The Town of Cary argues that plaintiffs' claims are barred by the two-month statute of limitations contained in N.C. Gen. Stat. § 160A-364.1 (2009). We do not agree.

Section 160A-364.1 provides:

> A cause of action as to the validity of any *zoning* ordinance, or amendment thereto, adopted under this Article or other applicable law shall accrue upon adoption of the ordinance, or amendment thereto, and shall be brought within two months as provided in G.S. 1-54.1.

N.C.G.S. § 160A-364.1 (emphasis added); *see* N.C. Gen. Stat. § 1-54.1 (2009) ("Within two months an action contesting the validity of any zoning ordinance or amendment thereto adopted by a county under Part 3 of Article 18 of Chapter 153A of the General Statutes or other applicable law or adopted by a city under Chapter 160A of the General Statutes or other applicable law."). Where these statutes are applicable, this Court has strictly applied the two-month statute of limitations to bar causes of action challenging an ordinance. *See, e.g.*, *Potter v. City of Hamlet*, 141 N.C. App. 714, 719, 541 S.E.2d 233, 236 (2001).

In this case, we hold that the two-month statute of limitations in N.C.G.S. § 160A-364.1 does not apply, because the APSFO is a subdivision ordinance rather than a zoning ordinance. Section 3.18.2(A) of the APSFO provides that "no *subdivision* plan or site plan may be approved unless on the date of such approval there exists a valid and current Certificate of Adequate Educational Facilities (CAEF) applicable to the project for which such approval is sought." (Emphasis added.) Moreover, in addition to the APSFO's plain language, the term "subdivision" under Chapter 160A of our General Statutes is defined as:

> [A]ll divisions of a tract or parcel of land into two or more lots, building sites, or other divisions when any one or more of those divisions is created for the purpose of sale or building development (whether immediate or future) and shall include all divisions of land involving the dedication of a new street or a change in existing streets[.]

N.C. Gen. Stat. § 160A-376(a) (2009). The accepted proposal by Cameron Pond satisfies this definition.

In *Coventry Woods Neighborhood Ass'n, Inc. v. City of Charlotte*, this Court recently restated the reasoning behind the exclusion of subdivision ordinances from the two-month statute of limitations in section 160A-364.1. 202 N.C. App. 247, 688 S.E.2d 538, *appeal dismissed*, 364 N.C. 128, 695 S.E.2d 757 (2010). "The regulation of sub-

divisions and zoning are addressed in separate provisions of Chapter 160A of the General Statutes. As a result, the limitations period relating to challenges to 'zoning ordinances' set out in [N.C.G.S. §§ 1-54.1 and 160A-364.1] simply does not apply to challenges to the constitutionality of subdivision ordinance provisions[.]" *Id.* at 254, 688 S.E.2d at 543 (citation omitted); *see also Meares v. Town of Beaufort*, 193 N.C. App. 96, 104, 667 S.E.2d 239, 244 (2008) (" 'Although this Court has recognized that the legal principles involved in review of zoning applications are similar and relevant to review of the denial of subdivision applications, we have also stated that zoning statutes do not limit how a subdivision applicant may seek judicial review.' ") (quoting *Hemphill-Nolan v. Town of Weddington*, 153 N.C. App. 144, 147, 568 S.E.2d 887, 889 (2002) (citation and quotations omitted)). Thus, since the APSFO at issue here is a "subdivision" ordinance, section 160A-364.1 is not the applicable statute of limitations to plaintiffs' causes of action.

This conclusion does not, however, end our analysis. As a general rule, the burden is on a defendant to plead and prove an affirmative defense under Rule 8 of the North Carolina Rules of Civil Procedure. N.C.R. Civ. P. 8(c) (2010). However, in North Carolina, once the defense of statute of limitations is raised, the burden is on the plaintiff to show that their claim is not time-barred. *Georgia-Pacific Corp. v. Bondurant*, 81 N.C. App. 362, 363-64, 344 S.E.2d 302, 304 (1986) ("North Carolina, apparently alone among American jurisdictions, continues to adhere to the rule that once the statute of limitations has been properly pleaded in defense the burden of proof shifts to the plaintiff to show that the action was filed within the statutory period."). A defendant's failure to raise the precise General Statute prescribing the time period for the statute of limitations does not alleviate a plaintiff's burden on this issue. *See Bonestell v. North Topsail Shores Condominiums*, 103 N.C. App. 219, 223, 405 S.E.2d 222, 225 (1991) ("Nationwide's failure to plead N.C.G.S. § 1-52(16) by precise number and subsection is not fatal under N.C.G.S. § 1A-1, Rule 8(c).").

In light of the above principles, we turn to plaintiffs' claim that all their claims are governed by the ten-year statute of limitations contained in N.C. Gen. Stat. § 1-56 (2009).

B. Claims under 42 U.S.C. § 1983

In *Faulkenbury v. Teachers' and State Employees' Retirement System of North Carolina*, this Court noted that the three-year

statute of limitations for personal injuries in N.C. Gen. Stat. § 1-52 applies to actions brought under section 1983. 108 N.C. App. 357, 367, 424 S.E.2d 420, 424-25 (citing *Wilson v. Garcia*, 471 U.S. 261, 85 L. Ed. 2d 254 (1985)), *aff'd*, 335 N.C. 158, 436 S.E.2d 821 (1993). However, even though the limitations period is prescribed by state law, the question of "when a § 1983 cause of action accrues is a question of federal law." *Housecalls Home Health Care, Inc. v. State Dept. of Health and Human Services*, 200 N.C. App. 66, 72, 682 S.E.2d 741, 745 (2009), *disc. review denied and appeal dismissed*, 363 N.C. 802, 690 S.E.2d 698 (2010). A cause of action accrues under federal law " 'when [a] plaintiff knows or has reason to know of the injury which is the basis of the action.' " *Id.* (quoting *Nat'l Adver. Co. v. Raleigh*, 947 F.2d 1158, 1162 (4th Cir. 1991)).

Plaintiffs have pled that they have paid the fees pursuant to Condition 17 "under protest." Thus, it appears each plaintiffs' cause of action accrued the first time an application was made for a building permit and the fee was paid to the Town under Condition 17.[3] The exact time of accrual is different for each individual plaintiff under this standard; however, the record shows that all of plaintiffs' claims accrued sometime between 3 May 2005 and 27 September 2007, the time period from the time the first payment was made by any of the plaintiffs and the filing of the complaint. The first payments were made on 3 May 2005 by Bluepoint Homes and Impact Design-Build, Inc. Bluepoint paid the Town $4,000 and Impact paid $3,000.

The Town contends that plaintiffs' causes of action accrued at the time the APSFO was adopted or when Cameron Pond was approved in May 2003. Even assuming *arguendo* that either of these dates are the date of accrual, plaintiffs' suit is not barred, because plaintiffs also argue that the Town's acceptance of the fees pursuant to Condition 17 was a continuing violation. The "continuing wrong doctrine" is "an exception to the general rule that a claim accrues when the right to maintain a suit arises." *Babb v. Graham*, 190 N.C. App. 463, 481, 660 S.E.2d 626, 637 (2008), *disc. review denied*, 363 N.C. 257, 676 S.E.2d 900 (2009). "When this doctrine applies, a statute of limitations does not begin to run until the violative act ceases." *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 179, 581 S.E.2d 415, 423 (2003). " 'A continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original vio-

3. We believe that this point in time would be the point of accrual because Condition 17 was not part of the chain of title. The builder-plaintiffs in this case would not therefore have been on notice of the fee at the time the lots were purchased.

lation.' " *Id.* (quoting *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981)). In determining whether a plaintiff suffers from a continuing violation, we consider " '[t]he particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged[.]' " *Id.* (quoting *Cooper v. United States*, 442 F.2d 908, 912 (7th Cir. 1971)). The tolling of the statute of limitations for section 1983 claims is governed by state law unless the state law is inconsistent with "either § 1983's chief goals of compensation and deterrence or its subsidiary goals of uniformity and federalism[.]" *Hardin v. Straub*, 490 U.S. 536, 539, 104 L. Ed. 2d 582, 588-89 (1989) (footnote omitted).

We hold that the acceptance of each fee under Condition 17 was a continuing wrong by the Town, because the violation was the result of "continual unlawful acts" rather than merely the "continual ill effects from an original violation." *Ward*, 650 F.2d at 1147. Each time a builder-plaintiff applied for a permit and paid the fee to the Town, the Town perpetuated its "custom" or "usage" under "color of . . . ordinance" to unlawfully deprive the builders of their money. 42 U.S.C. § 1983. In North Carolina, we have long held that the payment of such illegal fees tolls the running of the statute of limitations, and that a plaintiff is entitled to recover all fees within the limitations period from the time their cause of action is initiated. *Cf. Faulkenbury v. Teachers' and State Employees' Ret. Sys.*, 345 N.C. 683, 695, 483 S.E.2d 422, 429 (1997) ("We believe that the reductions in payments under the new systems were deficiencies which have continued to the present time."); *Haanebrink v. Meyer*, 47 N.C. App. 646, 648, 267 S.E.2d 598, 599 (1980) ("The right of action to recover the penalty for usury paid accrues upon each payment of usurious interest giving rise to a separate cause of action to recover the penalty therefor, which action is barred by the statute of limitations at the expiration of two years from such payment."). This rule applies so long as the illegality was not complete at the time the transaction took place between the parties. *See*, *e.g.*, *Shepard v. Ocwen Federal Bank, FSB*, 172 N.C. App. 475, 617 S.E.2d 61 (2005), *aff'd*, 361 N.C. 137, 638 S.E.2d 197 (2006).

Here, similar to our Supreme Court's holding in *Faulkenbury*, the acceptance of the illegal fees by the Town was a continuing violation, and plaintiffs are entitled to seek the recovery of the fees dating back to 27 September 2004, three years from the filing of their complaint, pursuant to their 42 U.S.C. § 1983 causes of action. *See Marzec v. Nye*, 203 N.C. App. 88, 94, 690 S.E.2d 537, 542 (2010); *South Shell Investment v. Town of Wrightsville Beach*, 703 F. Supp. 1192, 1195

(E.D.N.C. 1988) ("[T]he pretrial order . . . shows that all of the impact and tap fees paid by . . . plaintiffs were paid within three years of the motion to amend except for the payment of one tap fee of $2,250.00[.] . . . Plaintiffs' claim for that payment, therefore, is barred by the statute of limitations."), *aff'd*, 900 F.2d 255 (4th Cir. 1990). Since the first impact fees were paid in May 2005, plaintiffs are entitled to recover all the fees they have paid by application of the continuing wrong doctrine in addition to the standard operation of the statute of limitations.

C. Article I, section 19 Claims

The trial court awarded plaintiffs' recovery of the fees paid under Condition 17 under both the North Carolina Constitution and 42 U.S.C. § 1983. Article I, section 19 of the North Carolina Constitution "is self-executing, and neither requires any law for its enforcement, nor is susceptible of impairment by legislation." *Sale v. Highway Commission*, 242 N.C. 612, 617, 89 S.E.2d 290, 295 (1955). A direct cause of action to enforce the rights contained in Article I of the North Carolina Constitution is permitted in circumstances where there is an " 'absence of an adequate state remedy.' " *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 675, 449 S.E.2d 240, 247 (1994) (citation omitted); *see, e.g.*, *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 632, 538 S.E.2d 601, 620 (2000) ("As we have reversed the trial court's grant of summary judgment on plaintiff's state tort law claims against Acker, there is an adequate state remedy for plaintiff's alleged injury resulting from Acker's conduct."). In examining whether a state constitutional claim can proceed under the "adequate state remedy" standard, our Supreme Court has given the North Carolina "Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property." *Corum v. University of North Carolina*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992); *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 338, 678 S.E.2d 351, 354 (2009) (" '[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution.' ") (quoting *Corum*, 330 N.C. at 782, 413 S.E.2d at 289).

Causes of action brought pursuant to the North Carolina Constitution, however, are not without limits, and may be subject to dismissal if untimely. *See Mahaffey v. Forsyth County*, 99 N.C. App. 676,

394 S.E.2d 203 (1990) (state constitutional challenge to zoning ordinance held barred by statute of limitations contained in N.C.G.S. § 1-54.1), *aff'd*, 328 N.C. 323, 401 S.E.2d 365 (1991); *Midgett v. Highway Commission*, 260 N.C. 241, 132 S.E.2d 599 (1963) (takings claim against North Carolina Department of Transportation barred by statute of limitations), *overruled on other grounds*, *Lea Co. v. North Carolina Bd. of Transp.*, 308 N.C. 603, 304 S.E.2d 164 (1983). In determining the limitations period for claims under the North Carolina Constitution, we must examine a plaintiff's cause of action and apply the statute of limitations encompassing the claim at issue. *See Pinehurst Area Realty, Inc. v. Village of Pinehurst*, 100 N.C. App. 77, 394 S.E.2d 251 (1990) (state and federal constitutional claims barred by former nine-month statute of limitations applying to zoning ordinance challenges); *Staley v. Lingerfelt*, 134 N.C. App. 294, 297, 517 S.E.2d 392, 395 (1999) (three-year statute of limitations applies to state constitutional claims involving personal injury).

Here, we conclude that plaintiffs have no adequate state remedy available in these circumstances, and therefore their state constitutional claims are appropriate. After reviewing the entirety of Chapter I, article 5 of our General Statutes, N.C. Gen. Stat. § 1-46 through -55 (2009), we can ascertain no specific shorter limitations period applying to the type of declaratory claims brought by plaintiffs in this case. Plaintiffs' claims involve the Town's custom, usage, and practice of accepting fees through an abandoned and unlawful mechanism grandfathered by a subdivision plan. Our General Statutes do not delineate a shortened time frame for such causes of action. Accordingly, we hold that the ten-year statute of limitations in N.C.G.S. § 1-56 applies, and plaintiffs are entitled to recoup all of the fees that they have sought in their complaint pursuant to their claims under Article I, section 19 of the North Carolina Constitution.

Plaintiffs have carried their burden of showing that their claims are not barred, and the Town has failed to adduce any facts showing an issue for trial. Therefore, summary judgment on this issue was proper. The Town's assignment of error is overruled.

V. Estoppel

[4] The Town of Cary argues that all of plaintiffs' claims are barred by the doctrine of estoppel. The Town contends that since plaintiffs and their predecessor-in-interest accepted the benefits of their subdivision approval with Condition 17, they are now precluded from challenging it. We disagree.

"The acceptance of benefits under a statute generally precludes an attack upon it."[4] *Convent v. Winston-Salem*, 243 N.C. 316, 324, 90 S.E.2d 879, 884 (1956) [*Covenant*]. Under the doctrine of estoppel, a plaintiff "cannot claim the benefit of statutes and afterwards assail their validity. There is no sanctity in such a claim of constitutional right as prevents it being waived as any other claim of right may be." *Id.*

> "Estoppel to question the constitutionality of laws applies not only to acts of the Legislature, but to ordinances and proceedings of municipal corporations, and may be extended to cases where proceedings of a municipal corporation are questioned on the ground of the unconstitutionality of the statute under which they are had, as well as to cases where they are attacked on other grounds."
>
> . . . "Estoppel is most frequently applied in cases involving constitutional law where persons, in some manner, partake of advantages under statutes. The rule is well settled that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens. Certainly such a person will not be allowed to retain his advantage or keep his consideration and then repudiate the act as unconstitutional. This principle applies also to questioning the rules or actions of state commissions."

Id. at 324, 90 S.E.2d at 884-85 (citation omitted). In *Covenant*, this State's Supreme Court held that the acceptance of benefits pursuant

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4. There seems to be an inherent tension with this proposition and the holding of *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 71 L. Ed. 1165 (1927). In *Saunders*, a foreign corporation was not estopped from challenging the constitutionality of a statute controlling venue for foreign corporations, even though the corporation accepted the benefit of doing business within the forum state. *Saunders*, 274 U.S. at 496-97, 71 L. Ed. at 1169. In finding that the foreign corporation's challenge was not estopped, the United States Supreme Court stated:

> The contention advanced by counsel for the plaintiff that the defendant impliedly assented to the venue provisions is answered and refuted by repeated decisions holding that a foreign corporation by seeking and obtaining permission to do business in a State does not thereby become obligated to comply with or estopped from objecting to any provision in the state statutes which is in conflict with the Constitution of the United States. . . . [T]he case of *W. W. Cargill Co. v. Minnesota*, 180 U.S. 452, 468, [45 L. Ed. 619] . . . held that 'the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute . . . that are repugnant to the Constitution of the United States.' "

Id. (citations omitted). For the reasons below, however, we do not reach this issue in this case.

to an ordinance by a prior owner in a property's chain of title may estop a challenge by a successor-in-interest, where the successor-in-interest also participated in the benefit and had knowledge of the benefit prior to taking ownership. *Id.* at 326, 90 S.E.2d at 885-86 ("[T]he Sisters took title to the property with full knowledge, and are estopped to challenge the validity of the ordinance under which they are permitted to conduct a private school.").

This Court applied these principles in *Goforth Properties, Inc. v. Town of Chapel Hill*, 71 N.C. App. 771, 323 S.E.2d 427 (1984). In *Goforth*, the plaintiffs sought recovery of fees paid to the Town of Chapel Hill. *Id.* at 772, 323 S.E.2d at 429. The fees were paid pursuant to an ordinance requiring a developer to either (1) install parking spaces within 500 feet of a building being constructed in the Town's central business district or (2) pay $2,500 per space not constructed under the ordinance. *Id.* at 772, 323 S.E.2d at 428. Since the plaintiffs in *Goforth* could not construct the required parking spaces within 500 feet of the building, the plaintiffs paid $28,750 in fees in order to receive their building permit. *Id.*

The *Goforth* plaintiffs filed suit to recover the fees under claims of negligence, illegality, and unconstitutionality of the ordinance, both as written and as applied. *Id.* at 772, 323 S.E.2d at 429. The trial court granted summary judgment to the Town of Chapel Hill on all of the plaintiffs' causes of action. *Id.* On appeal, this Court upheld summary judgment under the doctrine of estoppel.

> It is undisputed in the present case that plaintiffs have in fact constructed their restaurant. Nowhere do plaintiffs challenge the Town's requirement of a certain number of off-street parking spaces for the restaurant. The Town's uncontradicted evidence shows that plaintiffs cannot physically construct the necessary number of spaces on site; nothing in the record suggests any effort by plaintiffs to provide the spaces elsewhere within the 500 foot distance. The Town's uncontradicted evidence also shows that under the terms of the ordinance plaintiffs could not have built a building of the size of the one actually constructed. Plaintiffs have never applied for a variance, and they have not offered to demolish their building, apparently the only other feasible alternative. We therefore hold that, having accepted the benefit of the payment scheme by constructing the restaurant in its present, otherwise illegal size, plaintiffs are estopped to challenge the validity of the ordinances. Summary judgment on

> plaintiffs' statutory and constitutional challenges was therefore proper.

Id. at 773-74, 323 S.E.2d at 429. Without further discussion of the merits of plaintiffs' constitutional claims or their causes of action under the theory of illegality, this Court affirmed the trial court's order granting summary judgment to the Town of Chapel Hill.

Here, the Town contends that plaintiffs accepted the following benefits:

> 5. When Cameron Pond was rezoned to a PUD overlay district in May of 2003, the total number of potential dwelling units rose from 292 to 417.
>
> 6. In addition to the increased density provided by the 2003 rezoning, Cameron Pond received the following zoning benefits per various conditions that were mutually acceptable between the applicant and the Town:
>
> a. all building setbacks could be reduced by a maximum of 10% by the Town without evidence of a hardship or the requirement to gain a variance from the Zoning Board of Adjustment as would normal1y be the case;
>
> b. building setbacks as specified in the PUD document were exempt from future ordinance changes, a zoning provision which was not normally available to other properties;
>
> c. buffers and streetscapes as specified in the PUD were exempt from future code changes, a zoning provision which was not normally available to other properties;
>
> d. the developer retained the option to implement alternate street designs from Town of Cary standards, a zoning provision which was not normally available to other properties; and
>
> e. where buffers and topography created barriers to street crossings, the developer obtained a waiver from the street connectivity requirements in Cary's [Unified Development Ordinance].

A close examination of these benefits demonstrates how plaintiffs, unlike the plaintiffs in *Goforth* and *Covenant*, have not received any benefit under the APSFO or Condition 17. The primary benefit of the Cameron Pond subdivision proposal was an increase in the num-

ber of building lots on the 143 acres comprising the subdivision. After Cameron Pond was approved, the developer reaped this benefit to sell 125 additional lots. The secondary benefits outlined above involving setback standards, streetscapes, street design, and design barriers allowed the developer of Cameron Pond to arrange these additional lots with minimal interference from the Town during construction. While the developer of Cameron Pond reaped these numerous benefits, builder-plaintiffs were burdened only with the detriment of paying the fees under Condition 17.

The Town of Cary fails to demonstrate how plaintiffs have received any benefit at all. There is no allegation that any of plaintiffs were able to build more homes through Condition 17 or that the zoning variances somehow benefitted plaintiffs through the building process. In *Covenant*, the Sisters fully benefitted under the ordinance accepted by the predecessor-in-interest by being able to run their school. *Covenant*, 243 N.C. at 316, 90 S.E.2d at 885-86. No such similar benefit is present in this case. The record instead shows that the developer of Cameron Pond agreed to Condition 17 despite their feeling that the condition was unlawful, and then passed the burden of Condition 17 to plaintiffs, who had to actually pay the fees when applying for building permits. Since the Town has failed to show that plaintiffs have received any benefit under the APSFO or Condition 17, even though plaintiffs have been forced to participate in the Town's illegal custom and practice of imposing and accepting the fees, plaintiffs are not estopped from pursuing their claims. This assignment of error is overruled.

VI. Due Process

[5] The Town of Cary argues that it did not violate plaintiffs' substantive due process rights. We disagree.

"In general, substantive due process protects the public from government action that [1] unreasonably deprives them of [2] a liberty or property interest." *Toomer v. Garrett*, 155 N.C. App. 462, 469, 574 S.E.2d 76, 84 (2002). " 'Substantive due process denotes a standard of reasonableness and limits a state's exercise of its police power[.]' " *Beneficial North Carolina v. State ex rel. Banking Comm.*, 126 N.C. App. 117, 127, 484 S.E.2d 808, 814 (1997) (citation omitted). "The traditional substantive due process test has been that a statute must have a rational relation to a valid state objective." *Id.* (citations and quotation marks omitted). " 'Substantive due process' protection prevents the government from engaging in conduct that 'shocks the con-

science,' or interferes with rights 'implicit in the concept of ordered liberty.' " *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998) (citations omitted). "Substantive due process is a guaranty against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary or capricious, and that the law be substantially related to the valid object sought to be obtained." *State v. Joyner*, 286 N.C. 366, 371, 211 S.E.2d 320, 323 (1975). "Our courts have long held that '[t]he "law of the land" clause has the same meaning as "due process of law" under the Federal Constitution.' " *State v. Guice*, 141 N.C. App. 177, 186, 541 S.E.2d 474, 480 (2000) (citation omitted).

Applying these principles to this case, plaintiffs were required to make two showings in their substantive due process claim: (1) demonstrate a fundamental property interest protected by the Fourteenth Amendment or the North Carolina Constitution; and (2) prove that they were deprived of this property interest by government action that either "shocks the conscience" or has no "rational relation to a valid state objective." There is no genuine issue of material fact regarding the first element, because plaintiffs had a property interest in the fees that they paid to the Town of Cary. *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 766, 162 L. Ed. 2d 658, 675 (2005). There is also no genuine issue of material fact as to the second element, because the Town of Cary had no authority under its own APSFO to charge the fees at the time the Cameron Pond proposal was accepted, and the Town had no statutory authority to enact the APSFO. As a result, the fees paid by plaintiffs pursuant to Condition 17 and the APSFO had no relation to a "valid" state objective.

Given that plaintiffs satisfied their burden of proof, the trial court correctly concluded that plaintiffs were entitled to judgment as a matter of law on their substantive due process claims under the United States and North Carolina Constitutions in the absence of a triable issue presented by the Town of Cary. This assignment of error is overruled.

VII. Equal Protection

[6] The Town of Cary argues that it did not violate plaintiffs' equal protection rights. We disagree.

> "The Equal Protection Clause of the Fourteenth Amendment provides that 'no State shall . . . deny to any person within its jurisdiction the equal protection of the laws.' U.S. Const. amend. XIV, § 1. The equal protection requirement 'does not take from

> the States all power of classification,' but 'keeps governmental decision-makers from treating differently persons who are in all relevant respects alike.' To succeed on an equal protection claim, [plaintiff] 'must first demonstrate that [it] has been treated differently from others with whom [it] is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination.' If [it] makes this showing, 'the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny.' To state an equal protection claim, [plaintiff] must plead sufficient facts to satisfy each requirement[.]"

Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs., 174 N.C. App. 266, 274, 620 S.E.2d 873, 880-81 (2005) (quoting *Veney v. Wyche*, 293 F.3d 726, 730-31 (4th Cir. 2002)).

Plaintiffs do not assert that a higher scrutiny is applicable here, and we accordingly apply a rational basis standard. Here, there is no genuine issue of material fact that (1) plaintiffs were intentionally treated unequally by the Town compared to similarly situated entities, and (2) there is no rational basis for the Town's disparate treatment. Plaintiffs paid higher fees than several of their counterparts, and when the APSFO was repealed, plaintiffs were singled out to continue paying fees even though future subdivision lot owners would not have to pay the fees. By the language of Condition 17, the Town purposely imposed the fees to satisfy its ordinance, which we have already concluded to be beyond the Town's statutory authority. Given that these facts are not in dispute and the Town has otherwise failed to demonstrate a triable issue, the trial court was correct in granting plaintiffs summary judgment. This assignment of error is overruled.

VIII. Attorneys' Fees

[7] The Town of Cary finally argues that the imposition of attorneys' fees pursuant to 42 U.S.C. § 1988(b) was improper, because the trial court erred in concluding that the Town of Cary violated plaintiffs' substantive due process and equal protection rights. We disagree.

Section 1988(b) provides that "[i]n any action or proceeding to enforce a provision of [section 1983,] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs[.]" 42 U.S.C. § 1988(b). Because the award of attorneys' fees under section 1988 is discre-

tionary, we review such awards for an abuse of discretion. *Shaw v. Jones*, 81 N.C. App. 486, 489-90, 344 S.E.2d 321, 324 (1986).

We have already concluded that the trial court did not err in concluding that plaintiffs' constitutional rights were violated by the Town. Since the Town offers no other argument as to how the trial court abused its discretion in awarding the fees, we hold that the award was properly granted under section 1988. This assignment of error is overruled.

CONCLUSION

Based on the foregoing, the orders of the trial court are

Affirmed.

Chief Judge MARTIN concurs.

Judge JACKSON dissents with separate opinion.

JACKSON, Judge, dissenting.

Although I agree with the reasoning in the majority opinion, because I believe this appeal is interlocutory, I would vote to dismiss.

As the majority notes, in most circumstances, an interlocutory order is not immediately appealable. *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, our legislature has created two exceptions to this general rule: (1) pursuant to Rule 54(b), "if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal" and (2) " 'if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.' " *Bartlett v. Jacobs*, 124 N.C. App. 521, 524, 477 S.E.2d 693, 695 (1996) (quoting *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995)).

Although 54(b) provides the trial court with the authority to certify a case for immediate appeal, this Court has emphasized that the trial court's certification of an appeal pursuant to Rule 54(b) does not deprive this Court of its role in determining whether the appeal is properly before us or not. As this Court has explained, "the trial court's determination that there is no just reason to delay the appeal, while accorded great deference, cannot bind the appellate courts because ruling on the interlocutory nature of appeals is properly a

matter for the appellate division, not the trial court." *First Atl. Mgmt., Corp. v. Dunlea Realty, Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998) (citations and quotation marks omitted). *See, e.g., Cagle v. Teachy*, 111 N.C. App. 244, 247, 431 S.E.2d 801, 803 (1993) ("[A] trial court cannot by denominating its decision a 'final judgment' confer appeal status under Rule 54(b) if its ruling is not indeed such a judgment." (citation omitted)). Therefore, it is incumbent upon the parties also to articulate how they will be deprived of a substantial right in the absence of immediate review when the matter is not before us as the result of a final judgment. *See First Atl. Mgmt., Corp.*, 131 N.C. App. at 247, 507 S.E.2d at 60.

Here, the Town of Cary has done no more than make the bare assertion that this matter has been "certified by the trial court for review in this Court pursuant to N.C.R. Civ. P. 54(b)" and accordingly, jurisdiction is proper. Without more, I must vote to dismiss, although I agree with the reasoning set forth in the majority opinion.

IN THE MATTER OF THE WILL OF LEWIS MANLY DURHAM

No. COA09-274

(Filed 3 August 2010)

1. Appeal and Error— untimeliness of appeal—writ of certiorari—prevention of multiple appeals

Although caveator failed to timely appeal from a sanctions order, the Court of Appeals exercised its discretion and granted *certiorari* under N.C. R. App. P. 21(a) in order to reach the merits of caveator's challenge. The Court of Appeals prefers to decide appeals on the merits, and caveator's delay actually prevented the Court from having to consider multiple appeals arising from the same basic set of facts.

2. Jurisdiction— Rule 11 sanctions—caveat—superior court

The superior court had jurisdiction to hear and decide a sanctions motion made under N.C.G.S. § 1A-1, Rule 11 following the filing of a caveat stemming from the filing of a verified complaint for revocation of letters testamentary following the appointment of two individuals as executors of an estate.

3. Wills— revocation petition for letters testamentary— caveat—Rule 11 sanctions—standing

The trial court did not err by imposing sanctions under N.C.G.S. § 1A-1, Rule 11 based on its conclusion that caveator's petition set forth no lawful basis for revocation of letters testamentary. A caveat, and not a revocation petition, is the proper method for challenging the validity of a disputed will once it has been admitted to probate; further, caveator lacked standing to file a revocation petition since he was not entitled to share in decedent's estate under the 20 February 2006 will.

4. Wills— caveat—execution—undue influence

The trial court did not err by granting summary judgment in favor of executors in a caveat proceeding on the issues of the execution of the will and undue influence.

Appeal by petitioner and caveator from order entered 10 March 2008 by Judge Donald W. Stephens in Chatham County Superior Court and judgment entered 6 November 2008 by Judge Carl R. Fox in Chatham County Superior Court. Heard in the Court of Appeals 16 September 2009.

Stark Law Group, PLLC, by Thomas H. Stark and Seth A. Neyhart, for Petitioner/Caveator-Appellant.

Levine & Stewart, by James E. Tanner, III, for Respondent/Propounders-Appellees.

ERVIN, Judge.

Petitioner and Caveator Gary Dixon[1] appeals from an order imposing sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11 stemming from the filing of a Verified Complaint for Revocation of Letters Testamentary following the appointment of Ida Pharr and Frank Durham as executors[2] of the estate of Lewis M. Durham. In addition, Caveator appeals the trial court's order granting summary judgment in favor of Executors concerning the validity of Decedent's will. After

1. Although Mr. Dixon was the petitioner in connection with the revocation petition and the caveator in connection with the caveat proceeding, we will refer to him as Caveator in the interests of simplicity throughout the remainder of this opinion.

2. Although Ms. Pharr and Frank Durham were the co-executors of Decedent's estate for purposes of the revocation proceeding and propounders for purposes of the caveat proceeding, we will refer to them as Executors in the interest of simplicity throughout the remainder of this opinion.

careful consideration of the record in light of the applicable law, we conclude that the trial court's orders should be affirmed.

I. Factual Background

On 27 July 1983, Decedent and his wife, Ona Mae Durham, executed mutual and reciprocal wills which provided that, upon the death of either spouse, his or her estate would pass to the surviving spouse. Both wills also provided that, in the event that either spouse died before the other spouse's will became effective, 50% of "any cash on hand," "any cash on deposit," and "any amounts due under any promissory note receivable" would pass to Aldersgate Methodist Church and all remaining real and personal property would pass to Caveator, who was Decedent's adopted grandson.

Caveator claimed that, after Mrs. Durham was diagnosed with cancer, he assisted the couple with dressing, transportation and financial management issues on a daily basis. On 17 February 2006, Mrs. Durham died. According to Caveator, Decedent became very depressed, expressed suicidal thoughts, and became highly susceptible to third party influences following his wife's death. Executors concede that Caveator had a longstanding relationship with the couple and that the same had not been true of them.

On 18 February 2006, Griffin Funeral Home contacted Clarice Jones, sister of Executors and Decedent's niece, to inform her that Caveator had missed several appointments that day regarding Mrs. Durham's funeral arrangements. In response, Ms. Jones telephoned Decedent to apprise him of the situation. During the call, she heard him call out "Help me!" On the following morning, Executors went to investigate the situation, only to discover that Caveator had locked himself in Mrs. Durham's bedroom. Upon entering the residence, Executors found Decedent sitting in his own dried urine. Decedent told Executors that he had not eaten in two days, that he had given Caveator $10,000 to pay for Mrs. Durham's funeral, and that Caveator had failed to make the necessary payment.

After leaving Decedent's residence on 19 February 2006, Propounders initially took Decedent to the hospital. At the hospital, Decedent was described as being oriented and alert despite being in a weak and dehydrated condition. A hospital social worker recommended that Decedent contact an attorney to work out certain power of attorney issues.

On 20 February 2006, Executors took Decedent to his attorney's office. Due to the press of other business, Decedent's attorney referred him to the firm of Levine & Stewart for preparation of a power of attorney and a will. According to the drafting attorney, who met with Decedent out of Executors' presence, Decedent "stated quite adamantly that he wanted to draw up a new Will in order to take his [Caveator] out of his Will." After consulting with the drafting attorney, Decedent executed a new will on 20 February 2006 which revoked all of his prior wills, designated Executors to administer his estate, and bequeathed his estate in equal shares to his eight living nieces and nephews, including Executors.

After Executors took Decedent to the funeral home on 19 February 2006, he never lived in his home again. Instead, he resided in Cambridge Hills in Pittsboro. Caveator was not allowed to see Decedent after 19 February 2006. On 21 September 2007, Decedent died.

On 28 September 2007, Executors successfully presented the 20 February 2006 Will for admission to probate to the Clerk of Superior Court of Chatham County. On 1 October 2007, Caveator filed a petition seeking to have the letters testamentary that had been issued to Executors revoked. On 11 October 2007, Executors filed an Answer to Show Cause and Motion for Sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11. On 18 October 2007, Caveator filed a Response in Opposition to Motion.

On 13 November 2007, Caveator filed a Caveat to Purported Will Dated February 20, 2006 in which he alleged that the 20 February 2006 will was invalid because Decedent lacked sufficient testamentary capacity to execute a valid will on 20 February 2006 and because the 20 February 2006 will resulted from undue influence on the part of Executors. A few minutes prior to the filing of the Caveat, the parties filed a Memorandum of Judgment/Order in which they stipulated that, given the filing of the Caveat, the revocation petition should be dismissed as moot. On 16 November 2007, the Clerk entered an order suspending the administration of Decedent's estate and issued a citation directing all interested parties to appear at the 14 January 2008 session of the Chatham County Superior Court. On 27 February 2008, Caveator filed a Motion for Rule 11 Sanctions seeking sanctions against counsel for Executors due to their failure to withdraw their original sanctions motion.

On 10 March 2008, Judge Stephens entered an Order for Sanctions Pursuant to Rule 11 granting Executors' motion for sanc-

tions against Caveator and denying Caveator's motion for sanctions against Executors' counsel. On 19 September 2008, Executors filed a summary judgment motion directed to the Caveat. On 13 October 2008, Caveator filed a response to Executors' summary judgment motion. On 6 November 2008, Judge Fox entered an order granting Executors' summary judgment motion. On 8 December 2008, Caveator noted an appeal to this Court from both the 10 March 2008 order imposing sanctions and the 6 November 2008 order granting Executors' summary judgment motion.

II. Legal Analysis

A. Sanctions Order

1. Standard of Review

N.C. Gen. Stat. § 1A-1, Rule 11 provides, in pertinent part, that:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry that it is well grounded in fact and is warranted by existing law . . . ; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

"There are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose." *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 521 (1994) (citing *Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992)). "In analyzing whether the [filing] meets the factual certification requirement, the court must make the following determinations: (1) whether the [party] undertook a reasonable inquiry into the facts and (2) whether the [party], after reviewing the results of his inquiry, reasonably believed that his position was well-grounded in fact." *McClerin v. R-M Industries, Inc.*, 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995) (citing *Higgins v. Patton*, 102 N.C. App. 301, 306, 401 S.E.2d 854, 857 (1991), *overruled on other grounds*, *Bryson*, 330 N.C. 644, 412 S.E.2d 327). "The text of [N.C. Gen. Stat. § 1A-1, Rule 11] requires that whether the document complies with the legal sufficiency prong of the Rule is determined as of the time it was signed." *Bryson*, 330 N.C. at 657, 412 S.E.2d at 334. "To satisfy the legal sufficiency requirement, the disputed action must be warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." *Dodd*, 114 N.C. App. at 635,

442 S.E.2d at 365 (citing N.C. Gen. Stat. § 1A-1, Rule 11(a), and *Bryson*, 330 N.C. at 656, 412 S.E.2d at 332). Finally, "[t]he improper purpose prong of [N.C. Gen. Stat. § 1A-1,] Rule 11 is separate and distinct from the factual and legal sufficiency requirements." *Bryson*, 330 N.C. at 663, 412 S.E.2d at 337. "An improper purpose is 'any purpose other than one to vindicate rights . . . or to put claims of right to a proper test." *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992) (quoting G. P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* § 13(C) (Supp. 1992)). "Thus, even if a paper is well grounded in fact and in law, it may still violate [N.C. Gen. Stat. § 1A-1,] Rule 11 if it is served or filed for an improper purpose." *Brooks v. Giesey*, 334 N.C. 303, 315, 432 S.E.2d 339, 345-46 (1993) (citing *Bryson*, 330 N.C. at 663, 412 S.E.2d at 337). The determination of whether a filing was made for an improper purpose "must be reviewed under an objective standard," *Id.* (citing *Turner v. Duke University*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989), *disc. review denied*, 329 N.C. 505, 407 S.E.2d 552 (1991)), with "the relevant inquiry [being] whether the existence of an improper purpose may be inferred from the alleged offender's objective behavior." *Mack*, 107 N.C. App. at 93, 418 S.E.2d at 689 (citing Joseph, *Sanctions* § 13(A) (1989)). "A violation of any one of these requirements mandates the imposition of sanctions under" N.C. Gen. Stat. § 1A-1, Rule 11. *Dodd*, 114 N.C. App. at 635, 442 S.E.2d at 365.

> The trial court's decision to impose or not to impose mandatory sanctions under [N.C. Gen. Stat.] § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C. [Gen. Stat.] § 1A-1, Rule 11(a).

Turner, 325 N.C. at 165, 381 S.E.2d at 714 (1989); *see also Static Control Components, Inc. v. Vogler*, 152 N.C. App. 599, 603, 568 S.E.2d 305, 308 (2002); *Polygenex International, Inc. v. Polyzen, Inc.*, 133 N.C. App. 245, 249, 515 S.E.2d 457, 460 (1999). "A court's failure to enter findings of fact and conclusions of law on [sanctions] issue[s] is error which generally requires remand in order for the trial court to resolve any disputed factual issues. *McClerin*, 118 N.C. App.

at 644, 456 S.E.2d at 355. "The trial court's findings of fact are conclusive on appeal if supported by competent evidence, even when the record includes other evidence that might support contrary findings." *Static Control Components*, 152 N.C. App. at 603, 568 S.E.2d at 308 (citing *Institution Food House v. Circus Hall of Cream*, 107 N.C. App. 552, 556, 421 S.E.2d 370, 372 (1992)). "[I]n reviewing the appropriateness of the particular sanction imposed, an 'abuse of discretion' standard is proper because '[t]he rule's provision that the court 'shall impose' sanctions for motions abuses . . . concentrates [the court's] discretion on the *selection* of an appropriate sanction rather than on the *decision* to impose sanctions.' " *Turner*, 325 N.C. at 165, 381 S.E.2d at 714 (quoting *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985) and citing *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 360 S.E.2d 772 (1987)).

2. Timeliness of Caveator's Appeal

[1] Before considering Caveator's challenge to the sanctions order, we must first address the timeliness of his appeal. In essence, Executors argue that the sanctions order was entered in response to the filing of the removal petition; that a removal proceeding conducted pursuant to N.C. Gen. Stat. § 28A-9-1 is a separate proceeding from a caveat proceeding conducted pursuant to N.C. Gen. Stat. § 31-32 *et seq.*; that the sanctions order was the final order entered in the removal proceeding; and that Caveator's failure to note an appeal to this Court within the time period set out in N.C.R. App. P. 3(c)(1) deprived this Court of jurisdiction to hear Caveator's appeal from the sanctions order. We agree.

The trial court entered the sanctions order on 10 March 2008. Caveator noted an appeal to this Court from the sanctions order on 8 December 2008. Apparently, Caveator believed that he was not entitled to appeal the sanctions order until the caveat proceeding had concluded. However, as Executors note, the sanctions order was the last decision made in the removal proceeding and constituted a final order which Caveator was required to appeal within the 30-day period specified in N.C.R. App. P. 3. *Long v. Joyner*, 155 N.C. App. 129, 134, 574 S.E.2d 171, 175 (2002), *disc. review denied*, 356 N.C. 673, 577 S.E.2d 624 (2003) (stating that, while "defendant's appeal from the sanction order would [ordinarily] be dismissed as interlocutory," "the underlying legal issues in this case have been resolved by the parties in a settlement agreement," leaving the sanction order "appealed in this case . . . the only unresolved issue in the case and therefore appealable"). As a result, the sanctions order was entered in a sepa-

rate proceeding from the caveat case and could not be challenged as part of an appeal from the trial court's summary judgment order in the caveat proceeding.

According to N.C.R. App. P. 3(c), notice of appeal in a civil action or special proceeding must be filed "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 "within thirty days after service upon the party of a copy of the judgment if service was not made within that three day period." Since 8 December 2008 is much more than 30 days after 10 March 2008 and since the record contains no indication that Caveator filed any sort of motion that would have tolled the running of the 30-day period specified in N.C.R. App. P. 3(c), the only way in which Caveator's notice of appeal could have been timely would have been if there had been a substantial delay in the service of the sanctions order. The record is completely silent, however, as to when, if ever, the sanctions order was served upon Caveator, which precludes us from determining that Caveator noted his appeal from the sanctions order in a timely manner. According to well-established North Carolina law, the record on appeal should "contain a showing of the jurisdiction of the appellate court." *Love v. Moore*, 305 N.C. 575, 582, ftn. 1, 291 S.E.2d 141, 147, ftn. 1 (1982). "The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008). Given the complete absence of any showing in the record on appeal that Caveator appealed the sanctions order in a timely manner, we have no alternative except to dismiss Caveator's appeal from the sanctions order as untimely.

We do, however, have the authority, in the exercise of our discretion, to treat the record on appeal and briefs as a petition for writ of certiorari pursuant to N.C. R. App. P. 21(a)(1), to grant the petition, and to then review Caveator's challenge to the sanctions order on the merits. *See Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) (holding "that 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"). Although we have concluded that Caveator failed to note a timely appeal from the sanctions order, there is no question but that he proceeded, albeit mistakenly, in good faith in waiting until the trial court entered a final order in the caveat proceeding before noting his appeal from the

sanctions order. In view of our preference for deciding appeals on the merits, *Dogwood Development*, 362 N.C. at 198-99, 657 S.E.2d at 365, and the fact that Caveator's delay actually prevented us from having to consider multiple appeals arising from the same basic set of facts, we conclude that we should exercise our discretion and grant certiorari pursuant to N.C.R. App. P. 21(a) in order to reach the merits of Caveator's challenge to the sanctions order.

3. Applicability of Rules of Civil Procedure

[2] Caveator's initial challenge to the sanctions order rests on a contention that the Rules of Civil Procedure do not apply to estate matters pending before the Clerk, so that the trial court erred by sanctioning him pursuant to N.C. Gen. Stat. § 1A-1, Rule 11. According to Caveator, this Court held in *In re Estate of Newton*, 173 N.C. App. 530, 537-38, 619 S.E.2d 571, 575, *disc. review denied*, 360 N.C. 176, 625 S.E.2d 786 (2005), that:

> While respondent would have us conclude that any estate matter is subject to the Rules of Civil Procedure by virtue of its nature and similarity to a special proceeding, we note that, as detailed above, trustee removal proceedings are held "in an estate matter and *not in a special proceeding or in a civil action*." N.C. Gen. Stat. § 36A-26.1 (emphasis added). Although Chapter 36A does not expressly or "otherwise" prescribe "differing [rules of] procedure," we are not persuaded that, in addition to the duties already placed upon them, clerks of court must also make decisions regarding discovery and other issues of law arising during estate matters. Instead, we conclude that the clerks of our superior courts hear the matters before them summarily, and are responsible for determining questions of fact rather than providing judgment in favor of one party or the other. Thus, where a clerk of superior court is presented with a petition to remove a trustee, the clerk examines the affidavits and evidence of the parties and determines only whether the trustee is qualified or fit to faithfully discharge his or her duties. The process due to the parties during such a determination, having not been expressly prescribed by statute, is only that which is reasonable when applying general principles of law. *See Edwards v. Cobb*, 95 N.C. 5, 12 (1886) ("The statute conferring power on the Clerk to remove executors and administrators, does not prescribe in terms how the facts in such matters shall be ascertained, but it plainly implies that he shall act promptly and summarily. Applying general principles of law,

> the method of procedure we have above indicated, or one substantially like it, is the proper one.")

After noting that a proceeding to remove an executor or administrator of an estate "was not a civil action, but a proceeding concerning an estate matter, which was exclusively within the purview of the Clerk's jurisdiction, and over which the Superior Court retained appellate, not original, jurisdiction," *In re Parrish*, 143 N.C. App. 244, 251, 547 S.E.2d 74, 78, *disc. review denied*, 354 N.C. 69, 553 S.E.2d 201 (2001); that Executors' sanctions motion had been filed while the revocation petition was still pending before the Clerk; and that the issues raised by the revocation petition had been resolved by a Memorandum of Judgment that had been entered with the consent of the parties, Caveator argues that, since this matter had never been appealed to the Superior Court, the trial court never obtained jurisdiction to act on the sanctions motion. We disagree.

The North Carolina Rules of Civil Procedure "govern the procedure . . . in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." N.C. Gen. Stat. § 1A-1, Rule 1. The "phrase 'all actions and proceedings of a civil nature' [is] inclusive of, but not exclusive to, civil actions; the phrase is broad and encompasses different types of legal actions, not solely those initiated with a complaint." *In re Estate of Rand*, 183 N.C. App. 661, 663, 645 S.E.2d 174, 175, *disc. rev. denied*, 361 N.C. 568, 650 S.E.2d 601 (2007). According to N.C. Gen. Stat. § 1-393, "[t]he Rules of Civil Procedure and the provisions of this Chapter on civil procedure are applicable to special proceedings, except as otherwise provided." *See also Virginia Electric and Power Co. v. Tillett*, 316 N.C. 73, 76, 340 S.E.2d 62, 65, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986) (stating that, "[e]ven where an action is a special proceeding, the Rules of Civil Procedure are made applicable by N.C. [Gen. Stat.] § 1-393 . . ."). A proceeding for the revocation of previously-issued letters testamentary initiated pursuant to N.C. Gen. Stat. § 28A-9-1 "constitutes a special proceeding." *In re Estate of Sturman*, 93 N.C. App. 473, 475, 378 S.E.2d 204, 205 (1989) (citing *Phil Mechanic Construction Co. v. Haywood*, 72 N.C. App. 318, 321, 325 S.E.2d 1, 2 (1985)). As a result, "an estate proceeding is a 'proceeding of a civil nature' " in which a Superior Court Judge has the authority to impose sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11. *In re Estate of Rand*, 183 N.C. App. at 661, 645 S.E.2d at 175.

Although Caveator's challenge to the trial court's jurisdiction is understandable given certain language that appears in our prior deci-

sions, we conclude that the position advocated by Executors and adopted by the trial court is, on balance, the more persuasive one. We reach this conclusion for several reasons.

First, while *Estate of Newton*, upon which Caveator places principal reliance, clearly states that "trustee removal proceedings are held 'in an estate matter and *not in a special proceeding or in a civil action*' " to which the Rules of Civil Procedure apply and refuses, for that reason, to overturn the Clerk's decision despite the absence of "discovery as well as twenty days to prepare a responsive pleading following the denial of his motions to dismiss," 173 N.C. App. at 537-38, 619 S.E.2d at 575, we do not find *Estate of Newton* controlling for several reasons. First, *Estate of Newton* deals with trustee removal proceedings, while at least one other relevant decision involves a proceeding initiated for the purpose of removing an executor or administrator. As a result, we believe that other decisions are more directly on point than *Estate of Newton* despite the fact that *Estate of Newton* certainly references the removal of executors and administrators. Secondly, *Estate of Newton* does not hold that all components of the Rules of Civil Procedure are irrelevant to trustee removal proceedings; instead, *Estate of Newton* simply held that traditional discovery procedures and the twenty-day period within which a party is allowed to file a responsive pleading following the denial of a dismissal motion were not required in trustee removal proceedings. In other words, *Estate of Newton* does not address the extent to which a remedy for filings that lack an adequate basis in law or fact or which have been filed for an improper purpose should be provided. Thirdly, the statutory provision upon which *Estate of Newton* relies, N.C. Gen. Stat. § 36A-26.1, was repealed effective 1 January 2006. 2005 N.C. Sess. L. c. 192. s. 1. The current statutory provision governing the procedures to be employed in trust-related proceedings contains language that closely tracks that of N.C. Gen. Stat. § 1A-1, Rule 11(a), indicating that relief for the filing of meritless trustee removal petitions is now available. Accepting Caveator's argument, on the other hand, would effectively countenance the filing of frivolous petitions seeking the removal of administrators or executors without any remedy being available for the injured fiduciary, which is not consistent with what we believe to have been the General Assembly's intent. As a result, we do not believe that *Estate of Newton* compels the conclusion that N.C. Gen. Stat. § 1A-1, Rule 11 does not apply in the removal petition context.

Instead of focusing on *Estate of Newton*, we believe that *Estate of Sturman* and *Estate of Rand* are more relevant to the present discussion. As we have already noted, *Estate of Sturman* states that a revocation proceeding is a special proceeding. 93 N.C. App. at 476, 378 S.E.2d at 206. Given that N.C. Gen. Stat. § 1-393 provides that the Rules of Civil Procedure, including N.C. Gen. Stat. § 1A-1, Rule 11, apply in special proceedings, *Estate of Sturman* establishes that relief under N.C. Gen. Stat. § 1A-1, Rule 11, is available in revocation proceedings. Furthermore, without making any mention of *Estate of Sturman* and while citing the very language from *Estate of Newton* upon which Caveator relies, *Estate of Rand* noted "the lack of any authority to suggest the Rules [of Civil Procedure] do not apply to estate proceedings." 183 N.C. App. at 664, 645 S.E.2d at 176. Thus, the weight of authority establishes that relief under N.C. Gen. Stat. § 1A-1, Rule 11, is available in revocation proceedings conducted pursuant to N.C. Gen. Stat. § 28A-9-1.

Finally, Caveator argues that the trial court erred by hearing and deciding the sanctions issue despite the fact the issues raised by the revocation petition had already been resolved and the fact that the Superior Court typically acts in an appellate capacity in estate-related matters. However, according to well-established North Carolina law, the filing of a dismissal does not deprive the trial court of jurisdiction to consider a sanctions motion. *Bryson*, 30 N.C. at 653, 412 S.E.2d at 331 (stating that "[d]ismissal does not deprive the court of jurisdiction to consider collateral issues such as sanctions that require consideration after the action has been terminated") (citing *In re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979)). Moreover, by the time that the trial court heard the sanctions motion, Caveator had filed a caveat challenging the 20 February 2006 will. Pursuant to N.C. Gen. Stat. § 31-36, upon the filing of a caveat, the "clerk of superior court shall forthwith issue an order that shall apply during the pendency of the caveat to any personal representative, having the estate in charge," suspending the administration of the estate except for the "preserv[ation of] the property of the estate," the "pursu[it] and prosecut[ion of] claims that the estate may have against others," the "fil[ing of] all appropriate tax returns," and the payment of "taxes; funeral expenses of the decedent; debts that are a lien upon the property of the decedent; claims against the estate that are timely filed; professional fees related to administration of the estate, including fees for tax return preparation, appraisal fees, and attorney's fees for estate administration." *See also In re Will of Tatum*, 233 N.C. 723,

729, 65 S.E.2d 351, 355 (1951) (stating that, "[u]nder the provisions of [N.C. Gen. Stat. §] 31-36, the executor is charged with the preservation of the estate pending final determination of the issue raised by the caveat, unless and until he be removed") (citing *Edwards v. McLawhorn*, 218 N.C. 543, 11 S.E.2d 562 (1940); *Elledge v. Hawkins*, 208 N.C. 757, 182 S.E. 468 (1935); and *In re Will of Palmer*, 117 N.C. 133, 23 S.E. 104 (1895)). Furthermore, when the pleadings "raised an issue of *devisavit vel non* and necessitated transfer of the cause to the civil issue docket for trial by jury," "jurisdiction to determine the whole matter in controversy, as well as the issue of *devisavit vel non*, passed to the Superior Court in term." *In re Will of Wood*, 240 N.C. 134, 136, 81 S.E.2d 127, 128 (1954); *see also In re Will of Charles*, 263 N.C. 411, 416, 139 S.E.2d 588, 591 (1965) (stating that, "[w]hen a caveat is filed[,] the Superior Court acquires jurisdiction of the whole matter in controversy"). Based upon these legal principles, we conclude that, given the suspension of the administration of the estate, which is a process necessarily overseen by the Clerk of Superior Court; the necessity for continued supervision over contested estate-related issues by some component of the General Court of Justice; and the fact that the Superior Court has jurisdiction, in the aftermath of the filing of a caveat, over "the whole matter in controversy," *Will of Wood*, 240 N.C. at 136, 81 S.E.2d at 128, the Superior Court was the division of the General Court of Justice with jurisdiction to hear and decide the sanctions motion following the filing of the caveat, so that the trial court did not err by hearing and deciding the sanctions motion.

4. Appropriateness of Sanctions Order

[3] The trial court made the following findings of fact in the sanctions order:

1. [Caveator] affirmed by Verified Complaint that [Executors] obtained letters testamentary by falsely representing a purported will to be the genuine last will and testament of [Decedent].

2. Under the terms of this February 20, 2006 Will, the eight living nieces and nephews of [Decedent], including the Co-Executors, inherit equal shares of the estate.

3. Under the provisions of a previous July 27, 1983 Will, [Caveator] was to inherit 50% of the estate, with the other 50% going to Aldersgate Methodist Church.

4. If the Will submitted by Ms. Pharr and Mr. Durham is genuine, [Caveator] and the Church are disinherited. By letter to this Court, the Church has disclaimed any interest in these proceedings.

5. On its face, the 2006 Will appears to be a valid attested written will. It was prepared by the offices of Levine & Stewart, notarized by Patricia F. Clapper, a Notary Public, Certified Paralegal, and staff member of Levine & Stewart. The Will was witnessed by attorney John T. Stewart, and by Catherine L. McLean, who was at that time employed as a receptionist at Levine & Stewart, and is currently a law student attending Wake Forest Law School.

8. [Caveator] affirmed that each of the signatures of [Decedent], appearing on: (1) Resignation of Executor 06 E 296;[3] (2) Inventory for Decedent's Estate 06 E 296; (3) Final Account 06 E 296, and (4) Statement of Receipt of Funds 06 E 296, are not the signatures of [Decedent]. Patricia F. Clapper notarized each of these signatures, just like the signature on the Will. Neither [Caveator] nor any representative of [Caveator] has ever contacted Ms. Clapper with respect to the alleged falsification of her Notary Seal.

9. [Caveator] affirmed that each of the signatures of [Decedent] appearing on the Oath of Executor in 06 E 296 and a General Warranty Deed are not the signatures of [Decedent]. Karen W. Wolfe, a Chatham County Notary Public, notarized these signatures. Neither [Caveator] nor any representative of [Caveator] has ever contacted Ms. Wolfe regarding the alleged falsification of her Notary Seal.

10. [Caveator] affirmed that the Co-Executors, Ida Pharr and Frank Durham, were both disqualified under N.C. Gen. Stat. § 28A-4-2. Neither person was or is so disqualified.

11. [Caveator] affirmed that the Co-Executors violated a fiduciary duty through default or misconduct in the execution of their office, but in fact indicates no such default or misconduct with respect to any actions taken in the execution of their office as Executors. The Complaint instead makes numerous allegations concerning activities prior to the death

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3. File No. 06 E 296 was the file in which Mrs. Durham's estate was being administered.

of [Decedent], including the forgery of all the notarized documents listed hereinabove.

12. [Caveator] affirmed that the Co-Executors have a private interest that would be adverse to fair administration of the [Decedent's] Estate, in that a fair administration would require an accounting of their actions as fiduciaries prior to the death of [Decedent]. Unless the 2006 Will is invalidated, [Caveator] is not a beneficiary of the [Decedent's] Estate entitled to such an accounting. Counsel for the Estate has offered to provide such an accounting upon request to any beneficiary of the 2006 Will.

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

2. Under the application of N.C. Gen. Stat. § 1A-1, Rule 11, by signing a pleading or other paper, a party certifies that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact, warranted by existing law, and not interposed for any improper purpose. A violation [of] any of these three requirements justifies the Court in awarding sanctions.

3. [Caveator's] affirmations concerning the Will and other notarized documents are not well grounded in fact based upon knowledge, information or belief that was formed as the result of any reasonable inquiry. Neither [Caveator] nor any representative made any inquiry whatsoever that would provide an adequate factual basis to contend the Will and notarized documents were forgeries requiring the falsification of independent witness signatures or Notary Seals, much less the kind of investigation that would support the contention that all of these documents were executed by some sort of imposter.

4. [Caveator's] Complaint was not warranted by existing law; not one of the grounds to revoke letters testamentary was present under 28A-9-1(a).

5. Given the self-serving nature of [Caveator's] attempt to challenge his disinheritance, combined with the fact that his affirmations in the Complaint were not well grounded in fact or warranted by existing law, and were asserted without inquiry, reasonable or otherwise, the Court strongly infers and

hereby concludes that the Complaint was asserted for an improper purpose.

6. [Caveator] has violated each of the prongs of Rule 11, and is subject to sanction by this Court.

7. The Court concludes that it is fair and reasonable to require [Caveator] to reimburse the costs in attorneys fees incurred by virtue of his violation of Rule 11, in the amount submitted by Affidavit of Counsel for the Estate.

Since Caveator has not challenged any of the trial court's findings of fact, they are binding on us for purposes of appeal. *Static Control Components*, 152 N.C. App. at 603, 568 S.E.2d at 308 (stating that "findings of fact to which plaintiff has not assigned error and argued in his brief are conclusively established on appeal") (citing *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998)). As a result, our review of the sanctions order is limited to determining whether the trial court's findings of fact support its conclusions of law and whether its conclusions of law rest on a correct understanding of the applicable statutory provisions.

N.C. Gen. Stat. § 28A-9-1(a) provides that "[l]etters testamentary, letters of administration, or letters of collection may be revoked after hearing on any of the following grounds:

1. The person to whom they were issued was originally disqualified under the provisions of [N.C. Gen. Stat. §] 28A-4-2 or has become disqualified since the issuance of letters.

2. The issuance of letters was obtained by false representation or mistake.

3. The person to whom they were issued has violated a fiduciary duty through default or misconduct in the execution of his office, other than acts specified in [N.C. Gen. Stat. §] 28A-9-2.

4. The person to whom they were issued has a private interest, whether direct or indirect, that might tend to hinder or be adverse to a fair and proper administration. The relationship upon which the appointment was predicated shall not, in and of itself, constitute such an interest.

According to N.C. Gen. Stat. § 28A-9-1(b), the issue of whether letters testamentary should be revoked may be raised by a "verified complaint" filed by "any person interested in the estate."

The qualifications required for obtaining or retaining letters testamentary are set out in N.C. Gen. Stat. § 28A-4-2, which provides that:

> No person is qualified to serve as a personal representative who:
>
> (1) Is under 18 years of age;
>
> (2) Has been adjudged incompetent in a formal proceeding and remains under such disability;
>
> (3) Is a convicted felon, under the laws of either the United States or of any state or territory of the United States, or of the District of Columbia and whose citizenship has not been restored;
>
> (4) Is a nonresident of this State who has not appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate, and caused such appointment to be filed with the court; or who is a resident of this State who has, subsequent to appointment as a personal representative, moved from this State without appointing such process agent;
>
> (5) Is a corporation not authorized to act as a personal representative in this State;
>
> (6) Repealed by Session Laws 1999-133, s. 1, effective January 1, 2000.
>
> (7) Has lost his rights as provided by Chapter 31A;
>
> (8) Is illiterate;
>
> (9) Is a person whom the clerk of superior court finds otherwise unsuitable; or
>
> (10) Is a person who has renounced either expressly or by implication as provided in [N.C. Gen. Stat. §] 28A-5-1 and 28A-5-2.

The trial court specifically found that neither Ms. Pharr nor Frank Durham was disqualified from serving as a co-executor of Decedent's estate under N.C. Gen. Stat. § 28A-4-2. The only statutory basis for disqualification upon which Caveator relies in challenging the trial court's determination is N.C. Gen. Stat. § 28A-4-2(9), with this contention based on [Frank] Durham's criminal record and "the circum-

stances of the case." However, N.C. Gen. Stat. § 28A-4-2(3) specifically addresses the ability of a convicted felon to serve as a personal representative and allows such a person to do so as long as his or her rights have been restored. The record contains no indication that Frank Durham's rights have not been restored. Furthermore, Caveator made no reference to "the circumstances of the case" in his original revocation petitions as a basis for seeking the revocation pursuant to N.C. Gen. Stat. § 28A-9-1(a)(1). *State v. Sharpe*, 344 N.C. 190, 195, 473 S.E.2d 3, 6 (1996) (stating that "[i]t is well settled in this jurisdiction that [a party] cannot argue for the first time on appeal [a] new ground for admission that he did not present to the trial court"). As a result, the trial court correctly concluded that Caveator's petition set forth no lawful basis for revocation pursuant to N.C. Gen. Stat. § 28A-9-1(a)(1).

Secondly, the record contains no indication that the letters testamentary issued to Executors were "obtained by false representation or mistake." N.C. Gen. Stat. § 28A-9-1(a)(2). In seeking to obtain revocation based upon this statutory provision, Caveator argued in the revocation petition that Executors obtained the issuance of the disputed letters testamentary "by the false representation that the [20 February 2006 will] was the genuine last will and testament of Decedent" and that Executors "falsely stated the known value of the estate, in that they were personally aware of assets exceeding the amount she listed." "The filing of a caveat is the customary and statutory procedure for an attack upon the testamentary value of a paperwriting which has been admitted by the clerk of superior court to probate in common form." *In re Will of Spinks*, 7 N.C. App. 417, 423, 173 S.E.2d 1, 5 (1970). As a result, a caveat, and not a revocation petition, is the proper method for challenging the validity of a disputed will once it has been admitted to probate. In addition, there is no evidence that the increase in the value of the assets in Decedent's estate shown in the filings made by Executors constitutes proof of fraudulent concealment of assets. Furthermore, even if Executors falsely and materially understated the value of the assets in the estate in these filings, there is no basis for believing that any such false and material understatement contributed to the Clerk's decision to issue letters testamentary to Executors. As a result, the revocation petition provides no basis in law for the revocation of the letters testamentary issued to Executors pursuant to N.C. Gen. Stat. § 28A-9-1(a)(2).

Thirdly, the record does not establish any basis for a conclusion that Executors "violated a fiduciary duty through default or miscon-

duct in the execution of [their] office, other than acts specified in [N.C. Gen. Stat. §] 28A-9-2." Although the revocation petition alleges that this ground for revocation exists to the extent that "such assets are no longer property of the estate as a result of [Executors'] embezzlements or mismanagement, or insofar as [Executors] have been attempting to abscond with the assets without listing them with the Court," we understand this allegation to refer to events that Caveator believes to have occurred prior to the issuance of the letters testamentary that Caveator seeks to have revoked. Aside from the fact that Caveator has offered no evidence beyond mere speculation that such acts of "embezzlement or mismanagement" occurred, the acts that Caveator hypothesizes do not constitute "default or misconduct in the execution of [Executors'] office." N.C. Gen. Stat. § 28A-9-1(a)(3). As we have already noted, the mere fact that the value of the assets listed on a later filing was substantially higher than the value of the assets listed on the initial application does not, without more, show any breach of fiduciary duty. As a result, the revocation petition does not adequately allege grounds for revocation pursuant to N.C. Gen. Stat. § 28A-9-1(a)(3).

Fourth, the record does not establish that Executors labored under any sort of "private interest, whether direct or indirect, that might tend to hinder or be adverse to a fair and proper administration . . . ." N.C. Gen. Stat. § 28A-9-1(a)(4). According to Caveator, grounds for revocation pursuant to N.C. Gen. Stat. § 28A-9-1(a)(4) exist because "any fair and proper administration of the estate would require legal action to force [Executors] to account for their acts in their fiduciary capacity to [Decedent] and [Decedent's] estate." The entire basis for Caveator's contention is his unsupported belief that Executors engaged in acts of misconduct with respect to Decedent's property prior to Decedent's death. In the absence of any ability to prove the existence of such acts of misconduct, Caveator cannot establish the necessary "private interest" required to support a request for removal pursuant to N.C. Gen. Stat. § 28A-9-1(a)(4). Thus, this aspect of the removal petition lacks an adequate basis in law as well.

An even more fundamental problem with the filing of the revocation petition is that Caveator lacked standing to file it. A revocation petition may be filed by a "person interested in the estate." N.C. Gen. Stat. § 28A-9-1(b). At the time the revocation petition was filed, the 20 February 2006 will had been admitted to probate. Caveator was not entitled to share in Decedent's estate under the 20 February 2006 will.

As a result, Caveator had no standing to seek to have Executors removed as the co-executors of Decedent's estate at the time that he filed the revocation petition. Thus, although this issue is not specifically mentioned in the trial court's conclusions of law, the revocation petition lacked any basis in law for this reason as well.

Caveator argues that, to the extent that his "counsel may have erred in his analysis of N.C. Gen. Stat. § 28A-9-1(a), such error is the responsibility of [Caveator's] counsel and not Caveator, who relied on the advice and analysis in good faith." Although "good faith reliance on an attorney's advice preclude[s] sanctions against the party under the legal sufficiency prong" of N.C. Gen. Stat. § 1A-1, Rule 11, *Brooks v. Giesey*, 334 N.C. 303, 309, 432 S.E.2d 339, 342 (1993) (citing *Bryson*, 330 N.C. at 662, 412 S.E.2d at 336), the trial court did not find, as it did in *Bryson*, that Caveator acted in good faith in reliance on advice provided by his attorney. Although Caveator's argument might have merit in the event that the record reflected that it had been presented to the trial court, *Taylor v. Collins*, 128 N.C. App. 46, 53, 493 S.E.2d 475, 480 (1997) (holding that an award of sanctions against a litigant were inappropriate where the litigant's counsel "frankly admit[ted] that at all times, [the plaintiff] relied on his advice as to the legal and factual sufficiencies of the action"), we are unable to find any indication that Caveator advanced this claim in the court below. *In re Estate of Peebles*, 118 N.C. App. 296, 301, 454 S.E.2d 854, 858 (1995) (stating that "caveator argues for the first time on appeal that . . . the trial court erred in denying her motion" and that "[b]ecause the trial court never had the opportunity to consider the issue, it is not properly before us on appeal"). As a result, Caveator is not entitled to rely on his "good faith reliance on the advice of counsel" argument on appeal.

Thus, the trial court correctly concluded that the revocation petition was not well-grounded in law. *Jackson v. Jackson*, 192 N.C. App. 455, 467, 665 S.E.2d 545, 553 (2008) (upholding trial court's decision to sanction litigant for filing a motion requiring that the opposing party show cause why she should not be held in contempt when the alleged violations did not justify a finding of contemptuous behavior). Having reached this conclusion, we need not examine whether the trial court correctly concluded that Caveator was subject to sanctions on the grounds that the revocation petition was factually insufficient or filed for an improper purpose and express no opinion on that subject. In addition, since Caveator has not challenged the actual sanction imposed in the trial court's order, we need not consider

whether the trial court erred by ordering Caveator to pay $4,255.75 to Executors' counsel. As a result, for all of the reasons set forth above, the sanctions order is affirmed.

B. Summary Judgment Concerning Caveat

[4] Finally, Caveator appeals from the trial court's order granting summary judgment in favor of Executors in the caveat proceeding. "A caveat is an 'attack upon the validity of the instrument purporting to be a will. The will and not the property devised is the *res* involved in the litigation.' " *In re Will of Mason*, 168 N.C. App. 160, 162, 606 S.E.2d 921, *disc. review denied*, 359 N.C. 411, 613 S.E.2d 26 (2005) (quoting *In re Will of Cox*, 254 N.C. 90, 91, 118 S.E.2d 17, 18 (1961)). Although the caveat filed by Caveator challenged the validity of the 20 February 2006 will on the grounds that Decedent lacked testamentary capacity and that the 20 February 2006 will had been procured by undue influence on the part of Executors, among other things, Caveator's challenges to the trial court's order on appeal are limited to arguments that it erred in granting summary judgment on the execution and undue influence issues.

1. Standard of Review

The extent to which summary judgment is appropriate depends on whether there is any genuine issue of material fact and whether the moving party is entitled to "judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c); *In re Will of Priddy*, 171 N.C. App. 395, 396, 614 S.E.2d 454, 456 (2005). In ruling on a motion for summary judgment, the court may consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." N.C. Gen. Stat. § 1A-1, Rule 56(c); *In re Will of McCauley*, 356 N.C. 91, 100, 565 S.E.2d 88, 95 (2002). All of the evidence presented for the trial court's consideration must be viewed in the light most favorable to the non-moving party. *NationsBank of North Carolina, N.A. v. Parker*, 140 N.C. App. 106, 108-09, 535 S.E.2d 597, 599 (2000) (citation omitted).

2. Proper Execution

"In a caveat proceeding, the burden of proof is upon the propounder to prove that the instrument in question was executed with the proper formalities required by law." *In re Will of Coley*, 53 N.C. App. 318, 320, 280 S.E.2d 770, 772 (1981). On appeal, Caveator contends that the 20 February 2006 will was admitted to probate as a self-proved will and that the requirements for a valid self-proved will

include "acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where execution occurs and evidenced by the officer's certificate, under official seal[.]" N.C. Gen. Stat. § 31-11.6(a). A valid acknowledgment, according to Caveator, requires the person to be either "personally known" to the notary or to be identified through the use of "satisfactory evidence." N.C. Gen. Stat. § 10B-3(1)(b). "Satisfactory evidence" is defined in N.C. Gen. Stat. § 10B-3(22) as "[a]t least one current document issued by a federal, state or state-recognized tribal agency bearing the photographic image of the individual's face and either the signature or a physical description of the individual." According to Caveator, the affidavit of the notary who witnessed the 20 February 2006 will does not state whether she asked Decedent for any of the types of identification required by statute or "administered any oaths or affirmations to persons accompanying [Decedent] who would identify him as" Decedent.

Although Caveator contends that the failure of the notary's affidavit to address the identification question raises an issue of fact sufficient to defeat Propounders' summary judgment motion, we are not persuaded by his logic. The acknowledgment and oath utilized in the 20 February 2006 will are in substantial compliance with the forms set out in N.C. Gen. Stat. § 31-11.6(a). The fact that the notary's affidavit is silent as to whether Decedent was personally known to the notary or produced "satisfactory evidence" of his identity does not show a lack of compliance with N.C. Gen. Stat. § 10B-3(1)(b) given that the issues of personal knowledge or "satisfactory evidence" are simply not addressed in that affidavit. Were we to hold that a genuine issue of material fact as to the validity of the 20 February 2006 will arose from the failure of the notary's affidavit to address the identification issue, no self-proved will would be sufficient to support and sustain a summary judgment motion in a caveat proceeding. Such a result is inconsistent with the very concept of a self-proved will. As a result, the trial court properly granted summary judgment in Executors' favor on the execution issue.

3. Undue Influence

The Supreme Court has defined "undue influence" as:

> something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not

> properly an expression of the wishes of the maker, but rather the expression of the will of another. "It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made."
>
> In short, undue influence, which justifies the setting aside of a will, is a fraudulent influence, or such an overpowering influence as amounts to a legal wrong. It is close akin to coercion produced by importunity, or by a silent, resistless power, exercised by the strong over the weak, which could not be resisted, so that the end reached is tantamount to the effect produced by the use of fear or force.

In re Will of Jones, 362 N.C. 569, 574, 669 S.E.2d 572, 574 (2008), (quoting *In re Will of Turnage*, 208 N.C. 130, 132, 179 S.E. 332, 333 (1935)). "The four general elements of undue influence are: (1) decedent is subject to influence, (2) beneficiary has an opportunity to exert influence, (3) beneficiary has a disposition to exert influence, and (4) the resulting will indicates undue influence." *In re Will of Smith*, 158 N.C. App. 722, 726, 582 S.E.2d 356, 359 (2003). "[U]ndue influence is generally proved by a number of facts, each one of which standing alone may be of little weight, but taken collectively may satisfy a rational mind of its existence." *Hardee v. Hardee*, 309 N.C. 753, 757, 309 S.E.2d 243, 246 (1983) (citation and quotation marks omitted). Seven factors are traditionally considered in evaluating whether undue influence occurred, including:

1. Old age and physical and mental weakness.
2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.
3. That others have little or no opportunity to see him.
4. That the will is different from and revokes a prior will.
5. That it is made in favor of one with whom there are no ties of blood.
6. That it disinherits the natural objects of his bounty.
7. That the beneficiary has procured its execution.

In re Will of Andrews, 299 N.C. 52, 55, 261 S.E.2d 198, 200 (1980) (quoting *In re Will of Mueller*, 170 N.C. 28, 30, 86 S.E. 719, 720

(1915)). A caveator need not demonstrate the existence of every factor named in *Will of Andrews* in order to prove undue influence. *In re Estate of Forrest*, 66 N.C. App. 222, 225, 311 S.E.2d 341, 343, *aff'd and remanded*, 311 N.C. 298, 316 S.E.2d 55 (1984). Instead, there is a "need to apply and weigh each factor in light of the differing factual setting of each case." *Will of Jones*, 362 N.C. at 575, 669 S.E.2d at 578. If a reasonable mind could infer from such evidence that the purported last will and testament is not the product of the testator's "free and unconstrained act," but is rather the result of "overpowering influence . . . sufficient to overcome [the] testator's free will and agency," then "the case must be submitted to the jury" for its consideration. *Will of Andrews*, 299 N.C. at 56, 261 S.E.2d at 200. Such a determination requires us to "engag[e] in a heavily fact-specific inquiry." *Will of Jones*, 362 N.C. at 575, 669 S.E.2d at 577.

In contending that the trial court erred by granting summary judgment in favor of Executors on the undue influence issue, Caveator argues that, at the time the 20 February 2006 will was executed, Decedent was 96 years old, distraught over his wife's death, depressed, in poor health, hard of hearing, and suicidal. In addition, Dr. Dale Bieber indicated in his affidavit that, as of May, 2004, Decedent "demonstrated a tendency to depression and anxiety;" that," [a]t that time," his "depressive symptoms included talking about his life ending, talking about going to sleep and not waking up," and "express[ing] some suicidal thoughts; and that the Ativan that had been prescribed for Decedent's "distress and agitation often has a tendency to disorient." As of 28 February 2006, a colleague of Dr. Bieber's noted that Decedent "demonstrated passive suicidal tendencies, in other words he didn't care whether his life continued." According to Dr. Bieber, Decedent "was susceptible to the influence of others and relied on others for constant care toward the end of his treatment" due to his "constant depressive state." However, while Decedent's advanced age is undisputed, medical records stemming from a hospital visit on 19 February 2006 indicate that he was "alert" and "oriented X 3." Furthermore, the affidavit of the attorney who drafted the 20 February 2006 will stated that, despite his age, Decedent was in command of his mental faculties. Thus, although Caveator's evidentiary forecast does suggest that Decedent suffered from difficulties associated with extreme old age, none of the evidence forecast by Caveator tends to show that Decedent's condition resulted in his will actually being overborne at the time that the 20 February 2006 will was executed.

Secondly, Caveator argues "that others have [had] little or no opportunity to see" Decedent. According to Caveator, Executors removed Decedent from his residence, obtained exclusive control over him, and prevented Caveator from visiting him. However, the record reveals that the majority of the period during which Caveator claims to have been denied access to Decedent occurred after the execution of the 20 February 2006 will. Executors made initial contact with Decedent on 19 February 2006, some twenty-four hours prior to the execution of the 20 February 2006 will. During the period between Executors' initial contact with Decedent and the execution of the 20 February 2006 will, Decedent visited the hospital and consulted two different attorneys in two separate offices. In this same general time frame, Decedent informed law enforcement officers that "he was scared of [Caveator] and thought he was going to try and kill him." As a result, the undisputed evidence indicates that Decedent was in regular contact with people other than Executors during the time prior to the execution of the 20 February 2006 will and expressly indicated to such persons that he did not wish to have contact with Caveator.

Thirdly, Caveator argues that "the [20 February 2006] will is different [from] and revokes a prior will." While Caveator's statement is accurate, an affidavit by the drafter of the 20 February 2006 will explains that Decedent "stated quite adamantly that he wanted to draw up a new Will in order to take [Caveator] out of his Will." According to the drafting attorney, this statement was made out of the presence of Executors. Thus, the undisputed evidence concerning the actual drafting of the 20 February 2006 will establishes that the decision to change the terms of Decedent's estate plan resulted from Decedent's unhappiness with specific perceived deficiencies in Caveator's conduct and that Decedent expressed this sentiment out of Executors' presence.

In addition, Caveator argues that the 20 February 2006 "will disinherits the natural objects of his bounty." Admittedly, Caveator was Decedent's adopted grandson. However, the beneficiaries of the 20 February 2006 Will were Decedent's relatives as well. Both Caveator and the beneficiaries under the 20 February 2006 will were natural objects of decedent's bounty.

Finally, Caveator submits that Executors procured the execution of the will. In support of this assertion, Caveator relies on a statement in Dr. Bieber's affidavit that, "d]ue to [Decedent's] consistent depressive state, he was susceptible to the influence of others and relied on

others for constant care toward the end of his treatment." The record indicates, however, that Dr. Bieber merely spoke of "tendencies" and that he had no personal knowledge of the events that occurred at the time that the 20 February 2006 will was executed. All of the evidence concerning Decedent's attitudes at the time that the 20 February 2006 will was executed indicate that Decedent acted in accordance with his own preferences. At the time the disputed will was executed, Decedent had only been in the presence of Propounders for a twenty-four hour period. During that interval, Decedent "clearly and cogently" expressed his desire to disinherit Caveator outside Executors' presence and met with the drafting attorney and his staff outside Executors' presence. Caveator points to no evidence suggesting that the Executors in fact procured the will.

As a result, although Caveator argues that five of the seven evidentiary factors set out in *Will of Andrews* exist in this case, we disagree with his analysis. As we have already noted, the fact that Decedent was elderly should not obscure the fact that the record contains no evidence suggesting that his will was actually overborne, that many people not aligned with Executors saw and communicated with Decedent during the hours surrounding the execution of the 20 February 2006 will, that a number of people heard Decedent expressly state that he wished to disinherit Caveator due to dissatisfaction with his conduct, and that the alleged isolation of Decedent by Executors occurred after the execution of the 20 February 2006 will. At bottom, the fundamental problem with Caveator's argument is that he has presented no evidence concerning the events that occurred immediately prior to, at the time of, or immediately after the execution of the 20 February 2006 will that has the effect of countering the evidentiary forecast submitted by Executors to the effect that Decedent's decision to execute the 20 February 2006 will was his free and voluntary choice motivated, at least in part, by his unhappiness with the treatment he had received at the hands of Caveator. The present record simply lacks the sort of evidence upon which the Supreme Court relied in finding the evidentiary forecast relating to the undue influence issue in *Will of Jones* sufficient to withstand a summary judgment motion, such as the testator's complete dependence on the propounder wife in the weeks leading up to the execution of the disputed will, the wife's constant surveillance of the testator's communications with others, the wife's failure to let the attorney who drafted the prior will communicate with the testator, the wife's repeated expressions of dissatisfaction with the prior will, and statements by the testator suggesting that his resistance to changing his will in accordance with

his wife's desires was weakening. 362 N.C. at 579-82, 669 S.E.2d at 579-82. As a result, the record amply supports the trial court's decision to grant summary judgment in favor of Propounders with respect to the undue influence issue. *In re Will of Mason*, 168 N.C. App. at 165, 606 S.E.2d at 924 (holding that summary judgment may be granted in appropriate instances in caveat proceedings).

III. Conclusion

Thus, we conclude that Judge Stephens had the authority to consider the imposition of sanctions pursuant to N.C. Gen. Stat. 1A-1, Rule 11 against Caveator for filing the revocation petition and that his order sanctioning Caveator for filing the revocation petition because it was not well-grounded in law should be affirmed. In addition, we conclude that Judge Fox correctly granted summary judgment in favor of Propounders in the caveat proceeding. As a result, the orders entered below are affirmed.

AFFIRMED.

Judges GEER and STROUD concur.

WILLIAM LAWSON BROWN, III, PLAINTIFF v. MARK P. ELLIS, DEFENDANT

No. COA06-710-2

(Filed 3 August 2010)

1. Jurisdiction— minimum contacts—alienation of affections—telephone calls and email from California

A North Carolina plaintiff alleged sufficient facts to satisfy minimum contacts in an alienation of affections case against a California defendant where he alleged that defendant initiated almost daily contacts with plaintiff's wife, these contacts involved defendant's pursuit of a sexual and romantic relationship with plaintiff's wife, the contacts directly related to plaintiff's cause of action, and California does not have this cause of action.

2. Appeal and Error— notice of appeal—sufficiently clear

Although defendant's notice of appeal could have been worded more artfully, it was sufficiently clear to notice appeal from both a judgment at which defendant was neither present nor

represented by counsel and a subsequent order denying defendant's motion for a new trial.

3. Process and Service— due process—insufficient notice

The trial court erred by denying a new trial for a California defendant in an alienation of affections case where several notices were sent to the wrong address, including an order allowing his attorney to withdraw and an order setting the trial date. The notice defendant finally received on the Friday before the Monday trial date was entirely inadequate.

Upon remand from the Supreme Court of North Carolina for further review of an appeal by defendant from judgment entered on or about 2 February 2005 by Judge Melzer A. Morgan Jr. in Superior Court, Guilford County and order entered 13 December 2005 by Judge W. Douglas Albright in Superior Court, Guilford County.

Nix & Cecil, by Lee M. Cecil, for plaintiff-appellee.

Forman Rossabi Black, P.A., by T. Keith Black and William F. Patterson, Jr., for defendant-appellant.

STROUD, Judge.

Plaintiff William Brown sued defendant Mark Ellis for alienation of affections and criminal conversation alleging that defendant, a California resident, had a romantic and sexual relationship with Mrs. Brown. After a trial at which defendant was neither present nor represented by counsel, judgment was entered against him for $600,000.00. When this case was first before us, we vacated the trial court's judgment, holding that the trial court did not have jurisdiction over defendant under N.C. Gen. Stat. § 1-75.4, the long-arm statute. Brown filed a petition for discretionary review, which the Supreme Court allowed. The Supreme Court reversed this Court's opinion, holding that North Carolina has jurisdiction over defendant pursuant to N.C. Gen. Stat. § 1-75.4, and remanded for our consideration of defendant's remaining issues. On remand, we reverse the trial court's order denying defendant's motion for new trial because defendant did not have adequate notice of trial.

I. Background

The Supreme Court summarized the factual background of plaintiff's complaint and claims as follows:

> Plaintiff filed his verified complaint in Superior Court, Guilford County, alleging causes of action against defendant for alienation of affections and criminal conversation. In his complaint, plaintiff alleged he resided in Guilford County, North Carolina, with his wife and daughter, and that defendant resided in Orange County, California. According to the complaint, plaintiff's wife and defendant were both employed by the same parent company and worked together on numerous occasions. Plaintiff alleged defendant willfully alienated the affections of plaintiff's wife by, among other actions, initiating frequent and inappropriate, and unnecessary telephone and e-mail conversations with plaintiff's wife on an almost daily basis. The telephone conversations between defendant and plaintiff's wife often occurred in the presence of plaintiff and his minor child and involved discussions of defendant's sexual and romantic relationship with plaintiff's spouse. Plaintiff alleged that through numerous telephone calls and e-mails to plaintiff's spouse, defendant has arranged to meet, and has met with plaintiff's spouse on numerous occasions outside the State of North Carolina, under the pretense of business-related travel.
>
> The complaint further alleged that plaintiff's wife and defendant committed adultery during these business trips, which further alienated and destroyed the marital relationship between plaintiff and his wife. In support of his complaint, plaintiff submitted an affidavit alleging that the majority of defendant's conduct which constitutes an alienation of affections occurred within the jurisdiction of North Carolina and that evidence as to the frequent electronic and telephonic contact between defendant and plaintiff's spouse can be established through records and witnesses located in the State of North Carolina.

Brown v. Ellis, 363 N.C. 360, 361-62, 678 S.E.2d 222, 222-23 (2009) (quotation marks and brackets omitted). The Supreme Court reviewed this Court's holding that the State of North Carolina did not have personal jurisdiction over defendant pursuant to N.C. Gen. Stat. § 1-75.4. *Id.*, 363 N.C. 360, 678 S.E.2d 222. On 18 June 2009, the Supreme Court by a *per curiam* opinion reversed and remanded the Court of Appeals decision, holding that "[w]e conclude plaintiff's complaint alleges sufficient facts to authorize the exercise of personal jurisdiction over defendant pursuant to N.C.G.S. § 1-75.4(4)(a)." *Id.*, 363 N.C. at 364, 678 S.E.2d at 224. Because we previously held that North Carolina did not have jurisdiction over defendant under

N.C. Gen. Stat. § 1-75.4, we did not address defendant's constitutional arguments that North Carolina's exercise of jurisdiction over him violates his due process rights and that he did not have adequate notice of his trial. As instructed by the Supreme Court, we will now consider defendant's remaining arguments.

II. Minimum Contacts

[1] Defendant contends that "plaintiff [f]ailed to [s]how [s]ufficient [c]ontacts between [d]efendant and North Carolina to [s]atisfy the [d]ue [p]rocess [r]equirements for [e]xercise of [*i*]*n personam* [j]urisdiction." Our inquiry regarding personal jurisdiction requires consideration of two questions. *Brown v. Meter*, —— N.C. App. ——, ——, 681 S.E.2d 382, 387 (2009), *disc. review denied and appeal dismissed*, 364 N.C. 128, —— S.E.2d —— (2010). The first question is whether North Carolina has jurisdiction under N.C. Gen. Stat. § 1-75.4, the long-arm statute. *Id.* Our Supreme Court has answered that question in the affirmative. *See Brown v. Ellis*, 363 N.C. at 364, 678 S.E.2d at 224. We must now address the second part of the inquiry, which is whether defendant has "minimum contacts" with the State of North Carolina sufficient to satisfy the requirements of due process. "Due process requires that the defendant have minimum contacts with the state in order to satisfy traditional notions of fair play and substantial justice." *Cooper v. Shealy*, 140 N.C. App. 729, 734, 537 S.E.2d 854, 857 (2000) (citation and quotation marks omitted).

> When evaluating personal jurisdiction, the trial court must engage in a two-step inquiry: first, the trial court must determine whether a basis for jurisdiction exists under the North Carolina long-arm statute, and second, if so, the trial court must determine whether the assertion of personal jurisdiction over the defendant is consistent with applicable due process standards. When personal jurisdiction is alleged to exist pursuant to the long-arm statute, the question of statutory authority collapses into one inquiry, which is whether defendant has the minimum contacts necessary to meet the requirements of due process. . . .
>
> . . . .
>
> [D]ue process considerations prohibit our state courts from exercising personal jurisdiction unless the defendant has had certain minimum contacts with the forum state such that traditional notions of fair play and substantial justice are not offended by maintenance of the suit.

Id., —— N.C. App. at ——, 681 S.E.2d at 387-88 (citations, quotation marks, and brackets omitted). Prior cases have set forth factors for consideration as to whether a defendant has had sufficient minimum contacts with North Carolina to satisfy due process. *See, e.g., id.*, —— N.C. App. at ——, 681 S.E.2d at 388.

> Although a determination of whether the required minimum contacts are present necessarily hinges upon the facts of each case, there are several factors a trial court typically evaluates in determining whether the required level of contacts exists: (1) quantity of the contacts between the defendant and the forum state, (2) quality and nature of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest in the forum state, and (5) convenience of the parties.

Id. (citation and quotation marks omitted).

Our standard of review for this inquiry is *de novo*. *Id.*, —— N.C. App. at ——, 681 S.E.2d at 387.

> In examining the legal sufficiency of the trial court's order, our review on appeal focuses initially on whether the findings are supported by competent evidence in the record. If the findings of fact are supported by competent evidence, we conduct a *de novo* review of the trial court's conclusions of law and determine whether, given the facts found by the trial court, the exercise of personal jurisdiction would violate defendant's due process rights.

Id., —— N.C. App. at ——, 681 S.E.2d at 387 (citations, quotation marks, and brackets omitted).

Although the trial court did not make any factual findings in its order denying defendant's motion to dismiss, our Supreme Court has set forth the facts as alleged by plaintiff in its opinion. *See Brown v. Ellis*, 363 N.C. 360, 678 S.E.2d 222. Defendant argues that "the allegations in the verified complaint are devoid of any facts going to the nexus between the alleged misconduct and this State, citing *Tompkins v. Tompkins*, 98 N.C. App. 299, 390 S.E.2d 766 (1990). In *Tompkins*, this Court concluded that North Carolina did not have personal jurisdiction over the defendant because

> the pleadings are devoid of any allegations that the parties resided here during a portion of the marriage or at the time of the separation. It is true that the failure to plead the particulars of personal jurisdiction is not necessarily fatal, so long as the facts

> alleged permit the reasonable inference that jurisdiction may be acquired. However, plaintiff's allegations of defendant's marital misconduct, absent any allegations going to a nexus between such misconduct and this State, are simply insufficient to permit the reasonable inference that personal jurisdiction over defendant could properly be acquired in this case.

Tompkins at 304, 390 S.E.2d at 769 (citation omitted).

It is undisputed that defendant has never visited North Carolina. However, the Supreme Court has held that defendant's telephone calls and email messages to plaintiff's wife in North Carolina were sufficient contacts to satisfy the long-arm statute, stating that:

> [p]laintiff alleged that he resided in Guilford County with his wife and daughter and that defendant initiated frequent and inappropriate, and unnecessary telephone and e-mail conversations with plaintiff's wife on an almost daily basis. According to the complaint, defendant and plaintiff's wife discussed their sexual and romantic relationship in the presence of plaintiff and his minor child. In his supporting affidavit, plaintiff specifically averred that defendant's alienation of his wife's affections occurred within the jurisdiction of North Carolina. Although the complaint does not specifically state that plaintiff's wife was physically located in North Carolina during the telephonic and e-mail communications, that fact is nevertheless apparent from the complaint.

Brown v. Ellis, 363 N.C. at 364, 678 S.E.2d at 224 (quotation marks and brackets omitted). Because plaintiff's complaint and affidavit, read together, averred that the "alienation of [plaintiff's] wife's affections occurred within the jurisdiction of North Carolina[,]" *id.*, the factual allegations "permit the reasonable inference that personal jurisdiction over defendant could properly be acquired in this case." *Tompkins* at 304, 390 S.E.2d at 769.

Defendant also argues that *Fox v. Gibson*, 176 N.C. App. 554, 626 S.E.2d 841 (2006) and *Cooper v. Shealy*, 140 N.C. App. 729, 537 S.E.2d 854 (2000) can be distinguished from this case. In *Fox* and *Cooper*, this Court held that North Carolina could properly exercise personal jurisdiction over the defendant. *See Fox*, 176 N.C. App. 554, 626 S.E.2d 841, *Cooper*, 140 N.C. App. 729, 537 S.E.2d 854. In *Fox*, the plaintiff sued the defendant, a Georgia resident, for alienation of affections. *Fox* at 555-56, 626 S.E.2d at 842-43. In *Fox*, the plaintiff's

husband had filed an affidavit detailing the sexual relationship between himself and the defendant in North Carolina. *Id.* at 555, 626 S.E.2d at 843. Defendant contends that his case is different from *Fox* because the affiant in *Fox* "had personal knowledge of the alleged conversations and emails because he was a party to the communications" but here, the affiant, plaintiff, did not have any personal knowledge of defendant's contact with Mrs. Brown. In *Cooper*, the plaintiff sued the defendant, a South Carolina resident, for alienation of affections and criminal conversation, alleging that the "defendant had wrongfully contacted [the] Plaintiff and [the] Plaintiff's husband by telephone, which contacts included both telephone conversations and telephone transmitted e-mail to Plaintiff's home." *Cooper* at 731, 537 S.E.2d at 856 (quotation marks and brackets omitted). Defendant contends his case is different from *Cooper* because in *Cooper* "the verified complaint alleged that defendant telephoned his spouse in North Carolina, whereas in this case there is no such evidence of record." Again, our Supreme Court has rejected defendant's arguments. *See Brown v. Ellis*, 363 N.C. 360, 678 S.E.2d 222.

Although plaintiff was not a party to any communications with defendant and the complaint did not specifically allege that plaintiff's wife was in North Carolina when defendant contacted her by telephone and email, our Supreme Court has held that the complaint is sufficient to support the inferences of personal knowledge and contact with plaintiff's wife within North Carolina:

> In his supporting affidavit, plaintiff specifically averred that defendant's alienation of his wife's affections occurred within the jurisdiction of North Carolina. Although the complaint does not specifically state that plaintiff's wife was physically located in North Carolina during the telephonic and e-mail communications, that fact is nevertheless apparent from the complaint.

Brown v. Ellis, 363 N.C. at 363-64, 678 S.E.2d at 224 (quotation marks omitted). Based upon the Supreme Court's opinion, which held that plaintiff's complaint was sufficient to demonstrate plaintiff's personal knowledge of "defendant's alienation of his wife's affections" in North Carolina and that plaintiff's "wife was physically located in North Carolina during the telephonic and email communications[,]" we must reject defendant's contentions regarding *Fox* and *Cooper* in this regard. *Id.*

Defendant also distinguishes his case from *Fox* and *Cooper* because the defendants in those cases were from Georgia and South

Carolina respectively; thus, there was "a minimal travel burden on [the] defendant[s]." *Cooper* at 736, 537 S.E.2d at 858; *see Fox* at 560, 626 S.E.2d at 845. On this point, it is true that the travel burden on defendant, a California resident, would be much greater than that imposed on a resident of Georgia or South Carolina. However, we must consider all of the factors regarding minimum contacts, not just convenience of the parties.

When we consider the totality of the factors, the plaintiff did allege sufficient facts to support a finding of minimum contacts. As to the first factor, the "quantity of the contacts between the defendant and the forum state," *Brown v. Meter*, —– N.C. App. at —–, 681 S.E.2d at 388, plaintiff alleged that defendant initiated "almost daily" contact with plaintiff's wife in North Carolina. *Brown v. Ellis*, 363 N.C. at 363, 678 S.E.2d at 224. From this we infer a substantial quantity of contacts by telephone or email, although it is not necessary that the plaintiff allege any particular number of contacts. *See Cooper* at 735, 537 S.E.2d at 858 ("The quantity of defendant's contacts with North Carolina may not have been extensive. However, we have already determined that the contacts were sufficient for purposes of N.C. Gen. Stat. § 1-75.4, especially considering that the alleged injury under the claim (ultimately the destruction of plaintiff's marriage) was suffered by plaintiff allegedly within this state.") On the second factor, the "quality and nature of the contacts," *Brown v. Meter*, —– N.C. App. at —–, 681 S.E.2d at 388, plaintiff alleged that the contacts from defendant involved his pursuit of a "sexual and romantic relationship with" plaintiff's wife. *Brown v. Ellis*, 363 N.C. at 361, 678 S.E.2d at 223. The third factor is "the source and connection of the cause of action to the contacts," *Brown v. Meter*, —– N.C. App. at —–, 681 S.E.2d at 388, and the contacts directly relate to plaintiff's causes of action for alienation of affections and criminal conversation. As to the fourth factor, "the interest in the forum state," *id.*, our courts have previously noted that North Carolina's interest in this type of lawsuit "is especially great" because alienation of affections and criminal conversation are not recognized torts in many states. *See Eluhu v. Rosenhaus*, 159 N.C. App. 355, 364, 583 S.E.2d 707, 713 (2003) ("It is important to note that plaintiff cannot bring the claims for alienation of affections and criminal conversation in (defendant's resident state) since that state has abolished those causes of actions." (citation and ellipses omitted)), *aff'd per curiam*, 358 N.C. 372, 595 S.E.2d 146 (2004). California, the state in which defendant resides, abolished the causes of action of alienation of affection and criminal conversation in 1939. *See* Cal. Civ. Code § 43.5(a)-(b) (2007) ("No cause of action

arises for: (a) Alienation of affection. (b) Criminal conversation."). On the last factor, "convenience of the parties," *Brown v. Meter*, ––– N.C. App. at –––, 681 S.E.2d at 388, plaintiff resides in North Carolina, and defendant resides in California. The only factor to weigh in defendants' favor is the inconvenience of attending to litigation in North Carolina, but plaintiff has alleged that evidence regarding his claims is located in North Carolina. When we consider the totality of these factors in light of our Supreme Court's guidance in its opinion, we conclude that plaintiff has alleged sufficient facts to satisfy minimum contacts. We conclude "that traditional notions of fair play and substantial justice are not offended by maintenance of the suit[,]" *id.* (citations and quotation marks omitted), and thus defendant's rights to due process in regard to personal jurisdiction have not been violated. This argument is overruled.

III. Notice

Defendant's last argument is that "the trial court erred in denying the motion for a new trial because defendant did not receive adequate notice of the trial in accordance with due process requirements[.]" (Original in all caps.) Defendant's motion for new trial and his argument on appeal are premised upon the fact that he did not receive any notice of the trial date until the Friday before the Monday on which the trial took place.

On 4 October 2002, defendant was served with the summons and complaint at the Sheriff's Office in Laguna Hills, California. Defendant's address on the summons was "*28442* Calle Pinata San Juan Capistrano, California 92675-6326[.]" (Emphasis added.)[1] On 3 December 2002, defendant, through his attorney Ms. Cynthia A. Hatfield, filed a motion for extension of time to respond to the complaint, which the trial court granted. In December of 2002, Ms. Hatfield also filed a motion to dismiss the case for lack of personal jurisdiction over defendant. On 29 March 2004, defendant filed an affidavit in support of his motion to dismiss. On 6 April 2004, the trial court denied defendant's motion to dismiss. The order denying defendant's motion to dismiss was served upon Ms. Hatfield, as defendant's attorney. On or about 28 April 2004, defendant filed a verified answer denying most of the allegations of the complaint.

On 9 June 2004, Ms. Hatfield filed a motion to withdraw as defendant's counsel. The certificate of service on the motion to with-

1. As defendant was actually served with the documents noting his address as "28442 Calle Pinata[,]" we will refer to this address as his service address.

draw stated that she had mailed a copy of the motion to defendant at "*28422* Calle Pinata San Juan Capistrano, CA 92675[.]" (Emphasis added.) The address on the certificate of service for the motion to withdraw is not defendant's service address, as the street address differs by one digit. On 19 July 2004, the trial court entered an order allowing Ms. Hatfield's motion to withdraw; again, the certificate of service for the order allowing withdrawal stated that the order was mailed to defendant at "28422 Calle Pinata[,]" the incorrect address. On 5 November 2004, the trial court held an administrative session to schedule trial of this matter; defendant was not present and was not represented by counsel. The trial court entered an order setting the case for trial during the "January 31, 2005 Session of Guilford County Superior Court." The order stated that a copy would be mailed to defendant but did not state his specific address.

When the case was called for trial on 31 January 2005, defendant was not present or represented. Prior to starting the trial, the trial court put on the record testimony from Ms. Faye Byrd, Judicial Assistant to the Superior Court Judge, regarding the court's notification to defendant. Ms. Byrd testified that she mailed the trial calendar to defendant at "28422 Calle Pinata[,]" the incorrect address. Prior to starting the trial, plaintiff's attorney also informed the trial court that he had

> retained a private investigator in California for the purposes, not necessarily of providing notice to Mr. Ellis, because we think he already has notice, but for verifying for me that this was his correct address. And I have with me in court, which arrived in my office by express mail about an hour ago, a notarized Proof of Service from Jim Zimmerman, who is a private investigator, Badge #12651, in San Juan Capistrano, who averred that he served Mr. Ellis personally with the order setting this matter for hearing today at *28442* Calle Pinata, San Juan Capistrano, California, 92675.

(Emphasis added.) Although plaintiff's attorney stated that the private investigator had served defendant on the preceding Friday at 28442 Calle Pinata, the service address, it appears that neither he nor anyone else present in the courtroom realized at that time that this address differed from the one to which the prior relevant notices had been mailed. Therefore, defendant's attorney's motion to withdraw, the order allowing the motion to withdraw, the order setting the trial date, and the trial calendar mailed from the trial court were all mailed

to the incorrect address. The record contains no indication that defendant received any notices or documents regarding the case after the trial court denied his motion to dismiss, and defendant's first notification of the trial date was on Friday, 28 January 2005, when the order setting the trial date was personally delivered to him by plaintiff's private investigator.

After the inquiry regarding defendant's notice of the trial, the trial court proceeded with the case and plaintiff was awarded a monetary judgment against defendant. However, three days after the trial, on 3 February 2005, plaintiff's counsel realized that an error in the address had been made, and he informed the trial court that the address at which the private investigator had served defendant was not the same as the address to which prior documents and notices had been mailed. The trial court made a record of this information but took no action upon it.

On or about 15 February 2005, defendant, through his new attorney Marshall F. Dotson, III, filed an amended motion for new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, alleging in pertinent part that he was entitled to a new trial under Rule 59(a)(1), "[a]ny irregularity by which any party was prevented from having a fair trial[,]" (7) "[i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law[,]" and/or (9) "[a]ny other reason heretofore recognized as grounds for new trial." On 11 July 2005, defendant filed a declaration stating that he had been unaware that Ms. Hatfield had withdrawn as his counsel and that he was not aware that trial was scheduled for 31 January 2005 until 28 January 2005, when plaintiff's private investigator served him. Defendant averred that

> [c]ommencing on Saturday, January 29, 2005, I attempted to contact Attorney Cynthia A. Hatfield by telephone. It was not until on or about February 7, 2005 that I was able to speak to someone in her office. I was advised that Ms. Hatfield was not able to assist me as she had a conflict with representing me in the case.

On 13 December 2005, the trial court denied defendant's motion for a new trial.

A. Notice of Appeal from Order Denying New Trial

[2] Before we consider the merits of defendant's appeal, we must address plaintiff's argument that defendant failed to appeal specifically from the 13 December 2005 order denying his motion for a new trial. Defendant's notice of appeal reads,

> Defendant in the above-entitled cause hereby gives written notice of appeal to the North Carolina Court of Appeals from the Order rendered in this cause during the February 2, 2005 Session of Superior Court for the Eighteenth Judicial District held in High Point, Guilford County, North Carolina; Defendant's motion for new trial filed pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, having been denied by the aforesaid Court by Order rendered December 12, 2005 and filed December 13, 2005.

Plaintiff argues that it is not clear whether defendant was appealing from both the 2 February 2005 judgment and the 13 December 2005 order or from only the 2 February 2005 judgment.

North Carolina Rule of Appellate Procedure 3(d) provides that "[t]he notice of appeal required to be filed and served by subsection (a) of this rule . . . shall designate the judgment or order from which appeal is taken . . . ." N.C.R. App. P. 3(d). In *Fearrington v. Univ. of North Carolina*, 126 N.C. App. 774, 487 S.E.2d 169 (1997), this Court noted that where the notice of appeal completely fails to mention an order, the notice of appeal is deficient. *Id.* at 777, 487 S.E.2d at 172. In *Fearrington*, we noted that:

> The notice of appeal specifies that the appeal is from the order of the Superior Court of Orange County entered 8 August 1996. However, by his first assignment of error, petitioner attempts to present for our review the propriety of the order of 2 September 1993 issued by the Superior Court of Wake County, from which an earlier appeal was dismissed by this Court as interlocutory. N.C.R. App. P. 3(d) (1995) requires that the notice of appeal designate the judgment or order from which appeal is taken. *Because the notice of appeal completely omits any reference to the Wake County order, we are without jurisdiction to review it.* The jurisdictional requirements of N.C.R. App. P. 3(d) may not be waived by this Court, even under the discretion granted by N.C.R. App. P. 2. However, N.C.R. App. P. 21(a)(1) gives this Court the authority to treat the purported appeal as a petition for writ of *certiorari* to review the Wake County order, and we elect to do so and consider the merits of petitioner's assignment of error.

Fearrington at 777-78, 487 S.E.2d at 172 (citations, quotation marks, and ellipses omitted).

Defendant's notice of appeal, unlike the notice in *Fearrington*, does make specific reference to both the judgment and order. In fact,

the order is mentioned in detail: "Defendant's motion for new trial filed pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, having been denied by the aforesaid Court by Order rendered December 12, 2005 and filed December 13, 2005." Although defendant could have worded the notice of appeal more artfully, we conclude that the wording is sufficiently clear to notice an appeal from both the judgment and the order, and thus we will consider the merits of defendant's appeal.

B. Notice of Trial

[3] Defendant argues that "the trial court erred in denying the motion for a new trial because defendant did not receive adequate notice of the trial in accordance with due process[.]" (Original in all caps.) "Whether a party has adequate notice is a question of law, which we review *de novo*." *Swanson v. Herschel*, 174 N.C. App. 803, 805, 622 S.E.2d 159, 160 (2005) (citation omitted). "[W]here the Rule 59 motion involves a question of law or legal inference, our standard of review is *de novo*." *Batlle v. Sabates*, —— N.C. App. ——, ——, 681 S.E.2d 788, 799 (2009) (citations, quotation marks, and brackets omitted). We will therefore review the trial court's denial of the motion for new trial *de novo*. *See id.*

This Court has recognized that "[n]otice and an opportunity to be heard" are "essential elements of due process of law[.]" *Swanson* at 805, 622 S.E.2d at 160.

> Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1, section 17, of the North Carolina Constitution. Notice is adequate if it is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id. at 805, 622 S.E.2d at 160-61 (citations and quotation marks omitted).

In *Laroque v. Laroque*, this Court examined Rules of Civil Procedure and Rules of Practice governing notice requirements:

> [s]ubject to the provisions of Rule 40(a), N.C. Rules of Civ. Proc. and G.S. § 7A-146, the calendaring of civil cases is controlled by Rule 2 of the General Rules of Practice for the Superior and District Courts. Rule 2 provides that a ready calendar shall be

> maintained by the Clerk of Court and that five months after a complaint is filed the clerk shall place that case on the ready calendar. From the ready calendar a tentative calendar shall be prepared and shall be mailed to each attorney of record four weeks before the first day of court. A final calendar shall likewise be prepared and mailed to each attorney of record no later than two weeks prior to the first day of court. Rule 2(d) requires that when an attorney desires a case placed on the ready calendar earlier than five months after complaint is filed, he shall file a certificate of readiness with the clerk, with copy to opposing counsel. The clerk shall immediately place said case on the ready calendar. Thus the rule contemplates that systematic notice of the calendaring of a case be given to a party at each stage of the calendaring process.

Laroque v. Laroque, 46 N.C. App. 578, 580, 265 S.E.2d 444, 445-46 (quotation marks and brackets omitted), *disc. review denied*, 300 N.C. 558, 270 S.E.2d 109 (1980). Thus, Rule 2 of the General Rules of Practice for the Superior and District Courts contemplates that a party should get at least two notifications from the court prior to a trial date: a tentative calendar at least four weeks prior to trial and a final calendar at least two weeks prior to trial. *See id.* at 580, 265 S.E.2d at 445. A party may also have notice in the form of a certificate of readiness filed by another party in the case. *See id.* at 580, 265 S.E.2d at 445-46. In this case, an administrative order setting the trial and at least one calendar were mailed to defendant by the trial court, but neither was mailed to defendant's service address.

> Although, once a court has obtained jurisdiction in a cause through the service of original process, a party has no constitutional right to demand notice of further proceedings in the cause, the law does not require parties to dance continuous or perpetual attendance on a court simply because they are served with original process.
>
> The law recognizes that it must make provision for notice additional to that required by the law of the land and due process of law if it is to be a practical instrument for the administration of justice. For this reason, the law establishes rules of procedure admirably adapted to secure to a party, who is served with original process in a civil action or special proceeding, an opportunity to be heard in opposition to steps proposed to be taken in the civil action or special proceeding where he has a legal right to

> resist such steps and principles of natural justice demand that his rights be not affected without an opportunity to be heard.

Id. at 581, 265 S.E.2d at 446 (citation and quotation marks omitted). Therefore, even though service of the summons and complaint on the defendant gave the court jurisdiction over defendant, due process still requires compliance with procedural rules governing notice. *See id.*

Laroque went on to note that despite the reference in Rule 2 to mailing notices to the "attorney of record[,]" where a party is unrepresented, notice must be provided to the party directly. *See id.*

> Rule 2 of the Rules of Practice, by requiring notice of the calendaring of a case, secures to a party the opportunity to prepare his case for trial and to be present for trial or to seek a continuance. Although the rule specifies that the calendar be sent to each attorney of record and that the copy of the certificate o[f] readiness be sent to opposing counsel, it is implicit in the rule that where a party is not represented by counsel he is entitled to the same notice. We note that it has long been the practice in this State that when a party to an action does not have counsel, a copy of each calendar on which his action appears calendared for trial is mailed to him at the last address available to the Clerk.

Id. (citation omitted).

As noted in *Laroque*, the clerk is to send the notice to the "last address available to the Clerk." *Id.* Plaintiff argues that the Clerk did mail the calendars to the "last address available" to her and cites to *Dalgewicz v. Dalgewicz*, 167 N.C. App. 412, 606 S.E.2d 164 (2004). In *Dalgewicz*, the defendant filed a motion to set aside an equitable distribution judgment and an order awarding sanctions against him; the defendant claimed he had no notice. *Id.* at 418, 606 S.E.2d at 168. The trial court denied the defendant's motion because the defendant "was neglectful and inattentive to his case[,]" and the defendant appealed. *Id.* This Court affirmed the trial court's denial of defendant's motion for a new trial because

> the record indicates that defendant was properly served with a civil summons and complaint on 23 April 2001. Defendant does not deny that plaintiff's original and amended complaints were served upon him properly, *nor does defendant deny that he was properly served with a civil summons as well as the trial court's*

> *25 July 2002 order, which advised the parties that the matter was set for an equitable distribution trial on 4 November 2002.*

Id. at 419, 606 S.E.2d at 169 (emphasis added). In *Dalgewicz*, the defendant received an order setting the case for trial. *See id.* But here neither the scheduling order nor the court calendar was mailed to the service address, through no fault of defendant. Defendant had no way of knowing and no reason to know that both his original counsel and the trial court were sending documents to him at an incorrect address until after he was notified of the trial three days before it was to begin and he was able to contact an attorney in North Carolina.

We conclude that *Laroque* is more on point with our current case. *See Laroque*, 46 N.C. App. 578, 265 S.E.2d 444.

In *Laroque*,

> a copy of the calendar request or certificate of readiness was not sent to defendant as required by Rule 2(d) when an attorney desires a case placed on the ready calendar earlier than five months after the complaint is filed. Nor is there anything in the record to show that there was a trial calendar mailed to defendant. *Defendant received no notice of the trial* which was held one day after her answer was filed and 30 days after the complaint was served.

Id. at 581, 265 S.E.2d at 446 (emphasis added). This Court noted that while cases have concluded that

> a party to a legal action, having been duly served with process, is bound to keep himself advised as to the time and date his cause is calendared for trial for hearing; and when a case is listed on the court calendar, he has notice of the time and date of the hearing[,]

the key to each of those cases "was neglect and inattention by the party or his counsel." *Id.* at 582, 265 S.E.2d at 446. In *Laroque* we found no neglect on the part of the defendant and that the constructive notice which arises solely from the trial having been calendared offended "common sense and fundamental fairness[,]" so we reversed and remanded the trial court order denying the defendant's motion to set aside the judgment. *Id. Laroque* controls the result in this case because both cases involve defendants who were *never* properly notified of their trial dates through no fault of their own. Although defendant received actual notice on Friday, 28 January 2005 of his trial date three days later, on Monday, this notice was entirely inadequate.

Defendant resided on the other side of the country, in California. Upon receiving notice, he immediately contacted Ms. Hatfield's office, as he was unaware that she was no longer his attorney. The record does not demonstrate that defendant was neglectful or inattentive to the case. We therefore reverse the trial court's order denying defendant's motion for a new trial and remand this case for further proceedings.

IV. Conclusion

Defendant had minimum contacts with North Carolina sufficient that North Carolina may exercise personal jurisdiction over defendant that comports with due process. However, defendant did not receive proper notice of his trial date and must be granted a new trial. The judgment against defendant is hereby vacated, the order denying defendant's motion for new trial is reversed, and this case is remanded to the trial court for further proceedings consistent with this opinion.

VACATED IN PART; REVERSED AND REMANDED IN PART.

Chief Judge MARTIN and Judge HUNTER, Robert C. concur.

STATE OF NORTH CAROLINA v. TYUS SENTELL HEADEN, DEFENDANT

No. COA09-606

(Filed 3 August 2010)

Criminal Law— Batson challenge—race-neutral explanation—failure to show purposeful discrimination

The trial court did not err in a voluntary manslaughter case by denying defendant's *Batson* challenge based on the State offering a race-neutral explanation and defendant failing to show purposeful discrimination. Heavy tattooing and inappropriate casual clothing, standing alone, are not unique to any particular race.

Appeal by defendant from judgment entered 21 August 2008 by Judge Ronald E. Spivey in Guilford County Superior Court. Heard in the Court of Appeals 28 October 2009.

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

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

GEER, Judge.

Defendant Tyus Sentell Headen appeals from his conviction of voluntary manslaughter. Defendant, who is African-American, contends that the trial court erred in overruling his objection, pursuant to *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986), to the State's peremptory challenge of a prospective juror who is also African-American. Defendant argues that he met his burden of making a *prima facie* showing of racial discrimination and that the State's explanation for the challenge was a pretext for a race-based strike.

Under the applicable standard of review, because the State volunteered its basis for the challenge before the trial court ruled on whether defendant had established his *prima facie* case, we consider whether the trial court's findings—that (1) the State offered a race-neutral explanation for its challenge and (2) defendant ultimately failed to prove the State purposefully discriminated—were clearly erroneous. Our review of the record shows that the State did offer a race-neutral explanation for its challenge, and we are not persuaded by defendant's arguments that the State's explanation was pretextual. We must, therefore, uphold the trial court's ruling.

Facts

The State's evidence tended to establish the following facts. On the evening of 7 August 2005, following a rally at a local drag racetrack, a group of motorcycle riders gathered for an anniversary cookout sponsored by the Carolina Kings, a motorcycle club in Greensboro, North Carolina. The cookout was held at the home of club member Jeff Hinson. Defendant and an acquaintance, Terry Neal, were not members of the club, but they attended the cookout.

Defendant had recently withdrawn $4,500.00 and was carrying the cash in his pocket. At some point during the evening, Neal reached into defendant's pocket, and the two men began to scuffle. A gun fell onto the ground. Defendant picked up the gun, pointed it at Neal, and shot.

As Neal stumbled and ran toward the house, defendant followed with the gun. Witnesses saw defendant holding the gun, heard the gun being fired in the house, and saw blood in the house. Neal made his way out of the house and into the front yard, where he took a couple of deep breaths, gasped for air, and stopped breathing. Albert Glasco brought defendant outside and wrestled with him. The gun went off again, and the shot went into the ground. Defendant then left.

An autopsy performed on Neal revealed two gunshot wounds. One bullet pierced the muscle tissue of Neal's buttock and exited his right thigh. The other bullet, which the medical examiner estimated had been fired from less than two feet away, went through both of Neal's lungs and esophagus, exited the chest cavity, and lodged in his left upper arm. This wound, which ultimately caused Neal's death, resulted in both lungs collapsing, created a large amount of blood, and made it difficult for Neal to breathe.

Defendant was indicted for first degree murder on 6 September 2005. His case was first tried in October 2006, but the trial court granted the State's and defendant's joint motion for a mistrial after the jury indicated it was "hopelessly deadlocked." When the case came on for retrial in May 2008, the trial court dismissed the entire jury pool due to an error in the method by which the jurors were selected for service. Defendant's case was finally retried in July 2008.

At the retrial, defendant testified on his own behalf. He explained that he was standing near Neal at the party when Neal put his right hand in defendant's left pocket and took defendant's money. Defendant dropped his beer and grabbed Neal's right hand with both of his hands. According to defendant, Neal, with his left hand, brandished a gun in defendant's face. The two men started wrestling, and defendant grabbed at the top of the gun. The gun went off and fell between them. Neal backed up, stumbled, and ran fast toward the house. Defendant claimed he did not know how the gun went off and did not realize Neal had been shot.

Defendant picked up the gun and chased after Neal—not to shoot him, but to get his money back. In the house, when Glasco grabbed defendant, the gun went off again. Glasco marched defendant outside and tried to get him to calm down. They were wrestling when the gun went off for a third time. Defendant denied having brought the gun to the party or even owning or knowing much about guns. When he was asked about several kinds of ammunition that had been found in his

bedroom, he said that he had bought the ammunition for a friend who used it to make belts.

On 5 August 2008, the jury returned a verdict of guilty of voluntary manslaughter. The court sentenced defendant to a presumptive-range term of 75 to 99 months imprisonment. Defendant timely appealed to this Court.

Discussion

In his sole argument on appeal, defendant contends that the trial court erred in determining that defendant did not make a *prima facie* showing of racial discrimination by the State in its use of one of its two peremptory challenges during jury selection. Defendant further contends that the court erred in finding that the State's explanation for its peremptory challenge was race-neutral and not pretextual. These errors, defendant claims, violated his constitutional right to a jury selected without regard to race.

Jury selection began on 29 July 2008 with the clerk calling the first panel of 12 prospective jurors, including juror number six, William Brooks, a black and Indian male. The prosecutor questioned the first panel, inquiring of Brooks, as he did with many of the other prospective jurors, as to where in the county he resided. After questioning the entire panel, the prosecutor announced that he would exercise two peremptory challenges. The prosecutor chose to strike Brooks and juror number one, a white male.

At that point, defense counsel informed the trial court that he intended to make a *Batson* challenge. The prospective jurors were escorted from the courtroom. Defense counsel noted for the record that defendant is African-American. Defense counsel then stated that in the first trial, "there appeared to be racial overtones from some members of the jury that could possibly caused [sic] that jury to be unable to reach a verdict." Defense counsel provided the court with no further explanation about what "racial overtones" may have existed.

Defense counsel also asserted that during the first attempt to retry the case, the bailiff overheard one of the prospective jurors—a black male—indicate "that he was going to find [defendant] not guilty regardless of any evidence that was presented." Defense counsel argued that Brooks was the only African-American male on the panel, but admitted that he could not tell whether juror number 11, a woman, was also African-American. Defense counsel then argued:

"There's a definite pattern that emerged between the first trial, I would contend, and what the jurors were overheard [sic] by the bailiffs during the second trial and it would fall right in line to excuse an African-American male in this case."

The trial court asked the State, "Did you wish to say something at this point, Mr. DA?" The prosecutor explained:

> [As Brooks] walked in I observed that he was heavily tattooed up and down his arms. And was attired in baggy jeans hanging low with a big red, blood red color splotch on the back of the pocket, like splattered down the jeans. I observed that attire and those tattoos and I—again, it has nothing to do with his race, it just has to do with what he chose to wear to court today and his choice of applying, you know, that much ink. Maybe that's the wrong reason but I contend, Your Honor, that that's certainly something the State is inclined or able to take into account on an individual and I did so.

The prosecutor further noted that he had tried over 130 cases, and this was the first time he had ever faced a *Batson* challenge. Defense counsel responded, "I don't believe that my Batson challenge in any way, shape or form is a racial accusation against" the prosecutor, and he reiterated that he "simply [saw] what [he] call[ed] a pattern emerging."

The trial court then summoned Brooks back to the courtroom and asked him to state his race for the record. Brooks responded, "Black and Indian." The trial court excused Brooks from the courtroom and rendered its decision on defendant's *Batson* challenge:

> Mr. Brooks has now identified that his heritage is black and Indian. . . .
>
> The Court will now move on to consider relevant circumstances to determine whether or not the defendant has made out a prima facia case of a Batson violation.
>
> The Court is going to consider the relevant circumstances, which would include pattern of peremptories against minorities, include intentional regular and repeated peremptories against minorities, disproportionate peremptories against minorities, the manner of jury selection including questions and remarks by the contested party during jury selection and the mannerisms of the contested party, the racial dynamics of the case.

> At this point the Court is aware of—of purported race of the defendant and the purported race of the victim and the attorneys in the case, at least as it appears by sight, the past history of the parties, if any, including whether the challenge party has a habit, to the Court's knowledge, of systematically excluding minorities in case after case and the credibility of the plaintiff.
>
> The Court, after considering all of these factors, after this first round, if you will, of jury selection will find in my discretion that the defendant has not made out a prima facia case of any Batson violation.
>
> The Court will go on to note that even though the Court did not request the State make any response, the State wished to make a response, apparently, and did so and stated reasons why Juror Number 1 and 6 were excused.
>
> The Court will find that even if it could be argued that a prima facia case was made, which this Court will find it was not, the Court would then find again this an academic exercise at this point. The State has offered race neutral explanations for why they chose to excuse Juror Number 6, Mr. Brooks.
>
> So the Court will find that at this stage of the trial there have been no Batson errors . . . .

In *Batson*, 476 U.S. at 89, 90 L. Ed. 2d at 83, 106 S. Ct. at 1719, the United States Supreme Court explained that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." Our Supreme Court has construed *Batson* as outlining a "three-part test for determining whether the state impermissibly excluded a juror on the basis of race": (1) "the defendant must make a prima facie showing that the state exercised a race-based peremptory challenge"; (2) "[i]f the defendant makes the requisite showing, the burden shifts to the state to offer a facially valid, race-neutral explanation for the peremptory challenge[]"; and (3) "the trial court must decide whether the defendant has proved purposeful discrimination." *State v. Taylor*, 362 N.C. 514, 527, 669 S.E.2d 239, 254 (2008), *cert. denied*, —– U.S. —–, 175 L. Ed. 2d 84, 130 S. Ct. 129 (2009).

"To allow for appellate review, the trial court must make specific findings of fact at each stage of the *Batson* inquiry that it reaches."

State v. Cofield, 129 N.C. App. 268, 275, 498 S.E.2d 823, 829 (1998). This Court "must uphold the trial court's findings unless they are 'clearly erroneous.' " *Id.* (quoting *State v. Barnes*, 345 N.C. 184, 210, 481 S.E.2d 44, 58, *cert. denied sub nom. Chambers v. North Carolina*, 522 U.S. 876, 139 L. Ed. 2d 134, 118 S. Ct. 196 (1997), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473, 118 S. Ct. 1309 (1998)).[1] Under this standard, the fact finder's choice between two permissible views of the evidence " 'cannot' " be considered clearly erroneous. *Id.* at 276, 498 S.E.2d at 829 (quoting *Hernandez v. New York*, 500 U.S. 352, 369, 114 L. Ed. 2d 395, 412, 111 S. Ct. 1859, 1871 (1991)). We reverse "only" when, after reviewing the entire record, we are " 'left with the definite and firm conviction that a mistake ha[s] been committed.' " *Id.* (quoting *Hernandez*, 500 U.S. at 369, 114 L. Ed. 2d at 412, 111 S. Ct. at 1871).

"Generally, when a trial court rules that the defendant has failed to establish a *prima facie* case of discrimination, this Court's review is limited to a determination of whether the trial court erred in this respect." *State v. Bell*, 359 N.C. 1, 12, 603 S.E.2d 93, 102 (2004), *cert. denied*, 544 U.S. 1052, 161 L. Ed. 2d 1094, 125 S. Ct. 2299 (2005). "When, however, the prosecutor volunteers his reasons to the trial court before the trial court rules, then, despite the trial court's ultimate ruling that defendant failed to establish a *prima facie* case, the appellate court proceeds as though the defendant had established a *prima facie* case and examines the prosecutor's explanations. In such a case, the appellate court considers the prosecutor's explanations pursuant to step two of *Batson*, and then proceeds to step three, inquiring whether the trial court was correct in its ultimate determination that the State's use of peremptory challenges did not constitute intentional discrimination." *State v. Mays*, 154 N.C. App. 572, 575, 573 S.E.2d 202, 205 (2002).

Thus, although defendant argues that the trial court erred in finding that defendant failed to make out a *prima facie* case of discrimination, "[w]hether defendant established a *prima facie* case is moot as the prosecutor here 'volunteer[ed] his reasons for the peremptory challenges . . . .' " *State v. Wright*, 189 N.C. App. 346, 352, 658 S.E.2d 60, 64 (quoting *State v. Williams*, 343 N.C. 345, 359, 471 S.E.2d 379, 386 (1996), *cert. denied*, 519 U.S. 1061, 136 L. Ed. 2d 618, 117 S. Ct.

1. "Normally our state appellate courts utilize an 'any competent evidence' standard of review of the findings of fact entered by the trial court. The 'clear error' standard is a federal standard of review adopted by our courts for appellate review of the *Batson* inquiry." *Cofield*, 129 N.C. App. at 275 n.1, 498 S.E.2d at 829 n.1 (internal citation omitted).

695 (1997)), *disc. review denied*, —— N.C. ——, 667 S.E.2d 280 (2008). The sole issues before this Court are whether the trial court's findings as to the second and third steps of *Batson* are clearly erroneous. *Bell*, 359 N.C. at 12, 603 S.E.2d at 102.

Accordingly, we first review the trial court's finding that the State offered a race-neutral explanation for striking Brooks. "To rebut a *prima facie* case of discrimination, the prosecution must 'articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group.' " *State v. McClain*, 169 N.C. App. 657, 668, 610 S.E.2d 783, 791 (2005) (quoting *State v. Cummings*, 346 N.C. 291, 308-09, 488 S.E.2d 550, 560 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873, 118 S. Ct. 886 (1998)). The State's explanation "need not 'rise to the level justifying a challenge for cause,' and need not be 'persuasive, or even plausible.' In fact, the challenges may be based on . . . counsel's 'legitimate hunches . . . .' " *Cofield*, 129 N.C. App. at 277, 498 S.E.2d at 830 (internal citation omitted) (quoting *Barnes*, 345 N.C. at 209, 481 S.E.2d at 57). The issue at this stage is mere "*facial* validity," and "absent a discriminatory intent, which is inherent in the reason, the explanation given will be deemed race-neutral." *McClain*, 169 N.C. App. at 668, 610 S.E.2d at 791.

In this case, the State's explanation for peremptorily challenging Brooks included that Brooks was "heavily tattooed up and down his arms" and was "attired in baggy jeans hanging low with a big red, blood red color splotch on the back of the pocket, like splattered down the jeans." The prosecutor expressed concern over what Brooks "chose to wear to court today and his choice of applying . . . that much ink."

Courts from other jurisdictions have found similar explanations about clothing and tattoos to be sufficiently race-neutral to satisfy the second step of *Batson*. *See*, *e.g.*, *United States v. Jones*, 245 F.3d 990, 993 (8th Cir. 2001) ("[T]he veniremember's grooming may be a sufficiently race neutral explanation, as may his style of dress . . . ." (internal citation omitted)); *State v. Washington*, 288 S.W.3d 312, 316 (Mo. Ct. App. E.D. 2009) (noting "distinctive tattoo" would be " 'individualistic' trait[]" that "could have applied equally to any venireperson"); *State v. Williams*, 97 S.W.3d 462, 471 (Mo.) ("Striking a prospective juror based upon clothing and attire is [sic] does not reflect an inherent racial bias motivating the strike."), *cert. denied*, 539 U.S. 944, 156 L. Ed. 2d 631, 123 S. Ct. 2607 (2003); *Knuckles v. State*, 236 Ga. App.

449, 452-53, 512 S.E.2d 333, 337 (1999) ("[U]nconventional methods of self-adornment in attire, hair style, hair color, shaving the head, jewelry, tattoos, or scarification, may indicate youthful rebellion against authority and convention, or anti-social attitudes, or identification that would extend across gender and racial lines. Such may constitute a race/gender-neutral reason to strike.").

Consistent with these other jurisdictions, we conclude that the reason proposed by the State in this case was race-neutral. Heavy tatooing and inappropriate, casual clothing—standing alone—is not unique to any particular race, but rather crosses racial lines. Further, in a murder case, concern about a prospective juror's wearing clothes made to appear blood-spattered is both a race-neutral concern and one particularly related to the subject matter of this case. We, therefore, hold that the trial court's finding that the State's explanation was race-neutral is not clearly erroneous.

Next, we move to the third step of *Batson* and consider whether the trial court's finding that there was ultimately no *Batson* error was clearly erroneous. In the third step, the defendant may introduce evidence that the State's explanation is merely a pretext, and " 'the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.' " *State v. Gaines*, 345 N.C. 647, 668, 483 S.E.2d 396, 408 (quoting *Hernandez*, 500 U.S. at 359, 114 L. Ed. 2d at 405, 111 S. Ct. at 1866), *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177, 118 S. Ct. 248 (1997). This stage is where the " 'persuasiveness of the justification [offered by the State] becomes relevant . . . .' " *State v. Wiggins*, 159 N.C. App. 252, 262, 584 S.E.2d 303, 312 (quoting *Purkett v. Elem*, 514 U.S. 765, 768, 131 L. Ed. 2d 834, 839, 115 S. Ct. 1769, 1771 (1995)), *disc. review denied*, 357 N.C. 511, 588 S.E.2d 472 (2003), *cert. denied*, 541 U.S. 910, 158 L. Ed. 2d 256, 124 S. Ct. 1617 (2004).

In attempting to show that the State's explanation was pretextual, a defendant may proceed by showing "that the reasons presented 'pertained just as well to some white jurors who were not challenged and who did serve on the jury.' " *State v. McCord*, 158 N.C. App. 693, 696, 582 S.E.2d 33, 35 (2003) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 343, 154 L. Ed. 2d 931, 954, 123 S. Ct. 1029, 1043 (2003) ("*Miller-El I*")). Other factors that a defendant may rely upon in showing pretext include "the defendant's race, the victim's race, and the race of the State's key witnesses[;] . . . whether the prosecutor made racially motivated statements or asked racially motivated questions of black prospective jurors and whether there was a discernable difference in

the prosecutor's method of questioning black prospective jurors that raises an inference of discrimination[;] . . . [and] whether the prosecutor used a disproportionate number of peremptory challenges to strike black jurors in a single case." *State v. Gregory*, 340 N.C. 365, 397-98, 459 S.E.2d 638, 656 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478, 116 S. Ct. 1327 (1996).

We note first that the requirement under *Batson* is purposeful discrimination; disparate impact is not sufficient. *See United States v. Roberts*, 163 F.3d 998, 999 (7th Cir. 1998) ("*Batson* establishes a rule of disparate treatment, not of disparate impact . . . ."). In other words, a defendant must demonstrate that the State intentionally challenged the prospective juror based on his or her race. It is not enough that the effect of the challenge was to eliminate all or some African-American jurors. On this point, the State argues with some persuasive force that defense counsel's admission at trial that he was not making "in any way, shape or form . . . a racial accusation against" the prosecutor was inconsistent with the requirement of purposeful discrimination.

On the other hand, the statement may also be read as defense counsel's saying he did not think the prosecutor was a racist, but that the prosecutor was using the strike for a strategic purpose because prior African-American jurors or prospective jurors had exhibited a reluctance to convict defendant. Strategically using a race-based strike is just as much a violation of *Batson*. Thus, we turn to the merits of defendant's arguments regarding pretext.

Defendant purports to rely extensively on the statistics involved in this case. Defendant argues that the prosecutor used "half of his strikes . . . against African Americans." In addition, defendant claims that by excluding Brooks, the prosecutor "prevented his acceptance of any African Americans . . . . His acceptance rate of African Americans was zero." Defendant did not, however, sufficiently establish that latter fact at trial. Defense counsel admitted that "by appearance, I cannot tell if [prospective juror] Ms. Campbell is of African-American decent [sic] or not." If Campbell, who was accepted as a juror, is African-American, then the "statistics" would indicate that the State accepted 50% of the African-American prospective jurors. As this disparity in the possible "acceptance rate[s]" demonstrates, reliance upon statistics is meaningless when the the jury pool contains only one or two African-Americans.[2]

2. We note that defendant has not suggested that any racial discrimination occurred in the selection of the jury pool.

Defendant nonetheless repeatedly points to *Miller-El v. Dretke*, 545 U.S. 231, 241, 162 L. Ed. 2d 196, 214, 125 S. Ct. 2317, 2325 (2005) ("*Miller-El II*"), as "emphasiz[ing] the constitutional significance of the numerical disparities in the use of peremptory strikes against prospective jurors because of gender or race." Defendant's reliance on *Miller-El II* is misplaced.

In *Miller-El I* and *Miller-El II*, the United States Supreme Court was concerned about the prosecution's "remarkable" use of peremptory challenges against African-Americans: "Out of 20 black members of the 108-person venire panel for Miller-El's trial, only 1 served. Although 9 were excused for cause or by agreement, 10 were peremptorily struck by the prosecution. 'The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members[.]' " *Miller-El II*, 545 U.S. at 240-41, 162 L. Ed. 2d at 214, 125 S. Ct. at 2325 (internal citation omitted) (quoting *Miller-El I*, 537 U.S. at 342, 154 L. Ed. 2d at 953, 123 S. Ct. at 1042). The Court recognized that " '[h]appenstance is unlikely to produce this disparity.' " *Id.* at 241, 162 L. Ed. 2d at 214, 125 S. Ct. at 2325 (quoting *Miller-El I*, 537 U.S. at 342, 154 L. Ed. 2d at 953, 123 S. Ct. at 1042).

"[I]t is axiomatic in statistical analysis that the precision and dependability of statistics is directly related to the size of the sample being evaluated." *Moultrie v. Martin*, 690 F.2d 1078, 1083 (4th Cir. 1982). *See also Capitol Hill Hosp. v. Baucom*, 697 A.2d 760, 765 (D.C. 1997) (recognizing "statistics may be less elucidating when based on a small sample"). The numbers in this case—by defendant's count, a sample size of one—are not at all analogous to *Miller-El I* and *Miller-El II*—which had a larger sample size of 11. We question whether we can derive any "remarkable" inference from a sample size of one. *Miller-El II*, 545 U.S. at 240, 162 L. Ed. 2d at 214, 125 S. Ct. at 2325. *See Wade v. Terhune*, 202 F.3d 1190, 1198 (9th Cir. 2000) (where one of three of prosecutor's peremptory challenges had been exercised against African-American, and only four of 64 of prospective jurors in venire were African-American, observing "that the sample is so small that the statistical significance of the percentages is limited"). *See also State v. Nicholson*, 355 N.C. 1, 22, 558 S.E.2d 109, 125 ("While the state did exercise its first two peremptory challenges to excuse African-American jurors, those excusals took place too early in *voir dire* to establish a pattern of discrimination."), *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71, 123 S. Ct. 178 (2002).

We, therefore, find no persuasive value in defendant's claim that the State excluded 100% of the African-American prospective jurors

and that 50% of the State's challenges were used against African-American prospective jurors. Based on the jury pool's containing only one or two African-Americans, and the State's exercising only two peremptory challenges, we cannot say in this case that " '[h]appenstance is unlikely to produce [the] disparity . . . .' " *Miller-El II*, 545 U.S. at 241, 162 L. Ed. 2d at 214, 125 S. Ct. at 2325 (quoting *Miller-El I*, 537 U.S. at 342, 154 L. Ed. 2d at 953, 123 S. Ct. at 1042).

Defendant also points to his argument in the trial court that the State's peremptory challenge should be considered "in light of" the procedural history of the case and the "definite pattern that emerged" because "it would fall right in line to excuse an African-American male in this case." Here, in order to establish a basis for the State's strategic exclusion of a black juror, defense counsel relied on what had occurred at defendant's first trial and at the first attempt to retry the case. Defendant did not, however, present any evidence to support his counsel's assertions regarding what occurred during the prior proceedings.

While defendant did submit to this Court a transcript of the jury selection at the first attempted retrial, there is nothing in the record to indicate that this transcript was provided to the trial court for consideration in connection with the *Batson* challenge. In fact, the cover page of that transcript indicates that the transcript was ordered on 8 August 2008 and delivered on 15 December 2008—after the *Batson* ruling and after defendant was tried and convicted. This Court "cannot review evidence which was not considered by the trial court in its analysis." *Gupton v. Son-Lan Dev. Co.*, 205 N.C. App. 133, 138, 695 S.E.2d 763, 767 (2010). *See also 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.").

Defense counsel's statements regarding what occurred in the prior proceedings do not constitute evidence. As our Supreme Court has stated, "it is axiomatic that the arguments of counsel are not evidence." *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996). *See also State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985) ("Defendant presented no evidence. His position with respect to his inability to comply was related through the statements of his counsel. We hold that counsel's statements were not competent evidence . . . ."). Defendant bore the burden of demonstrating pretext. Since he did not present evidence to the trial court to support his contentions regarding the "racial overtones" in the prior proceedings,

the prior proceedings cannot form a basis for overturning the trial court's decision.

Defendant also challenges the State's comments about Brooks' clothing and tattoos as being a pretextual basis for excluding a black male from the jury. *See Knuckles*, 236 Ga. App. at 453, 512 S.E.2d at 337 (holding that if an aspect of a juror's physical appearance disfavored by State "[is] shown to be *unique* to a racial or gender identification, then it could constitute an impermissible explanation," but "such exclusive identification with race or gender would be part of the movant's ultimate burden of persuasion"). Defendant has not shown that Brooks' type of clothing or tattoos are exclusively identifiable with African-Americans, but rather suggests that the State's reason must be pretextual because the prosecutor "did not ask Mr. Brooks about his tattoos or his attire" and "[m]ore importantly, he did not ask any other prospective juror if he or she had a tattoo or ever wore baggy pants."

As the prosecutor explained, however, the issue was not whether a person had ever worn baggy pants or had a covered-up tattoo, but rather "what [Brooks] chose to wear to court today and his choice of applying, you know, that much ink." Defendant did not at trial point to any other prospective juror wearing inappropriate clothing for court or having extensive, visible tattoos. We do not believe that the prosecutor's failure to ask Brooks or any other prospective juror about readily visible features or attire is suggestive of racial discrimination. *Compare Snyder v. Louisiana*, 552 U.S. 472, 480-83, 170 L. Ed. 2d 175, 182-84, 128 S. Ct. 1203, 1209-1211 (2008) (remanding where challenged juror "was 1 of more than 50 members of the venire who expressed concern that jury service or sequestration would interfere with work, school, family, or other obligations," other jurors' conflicts "appear[ed] to have been at least as serious" as that of challenged juror, and "shared characteristic" was "thoroughly explored" by trial court during *voir dire*).

We find this case similar to *State v. Augustine*, 359 N.C. 709, 714, 616 S.E.2d 515, 521 (2005), *cert. denied*, 548 U.S. 925, 165 L. Ed. 2d 988, 126 S. Ct. 2980 (2006), in which the Supreme Court concluded that no purposeful discrimination occurred when the defendant argued that the prospective juror in question "was the first African-American prospective juror to be considered, that the number of African Americans who had been summoned for the jury pool in this case was small, and that [she] had indicated during *voir dire* that she could consider both the death penalty and life imprisonment without

parole as potential punishments in this case." The Court reasoned that "numerous factors support[ed] the trial court's ruling": the case "was not particularly susceptible to racial discrimination" because the defendant, victim, and three critical witnesses were African-American; the State "neither made any racially motivated statements nor asked any racially motivated questions of" the African-American prospective juror; the State contemporaneously peremptorily challenged a white prospective juror; and the African-American prospective juror had a son near the defendant's age who was serving a sentence in federal prison. *Id.* at 716, 616 S.E.2d at 522.

In this case, as in *Augustine*, both defendant and the victim were African-American. *See also State v. Chapman*, 359 N.C. 328, 342, 611 S.E.2d 794, 808 (2005) ("[T]he shared race of the involved parties tends to contradict an inference of purposeful discrimination by prosecutors."); *Nicholson*, 355 N.C. at 22, 558 S.E.2d at 125 (finding no "inference of discrimination" where defendant, both victims, and two key State witnesses were African-American).

Our review of the record indicates that the State asked no racially motivated questions, and defendant has not contended otherwise. Brooks, like the other prospective jurors, stated his occupation and marital status for the record. The State asked Brooks only one question—where in the county he lived—and Brooks replied that he lived in the northern part of Guilford County. "There was no discernable difference in the prosecutor's method of questioning [Brooks] from the method of questioning the rest of the jury venire." *Gregory*, 340 N.C. at 398, 459 S.E.2d at 657.

In addition, like the prosecutor in *Augustine*, the State contemporaneously challenged both a black prospective juror and a white prospective juror. These were the only two peremptory challenges by the State. Defendant left unresolved the question whether one of the jurors, who was accepted by the State, was African-American.

Finally, Brooks had chosen to wear clothes to court that simulated blood-spattered clothing, and he was heavily tattooed. Defendant did not show that any other prospective jurors wore similarly inappropriate clothing or had comparable tattooing.

In view of the circumstances preserved in the record and under the applicable standard of review, we cannot conclude that the trial court's findings as to the State's race-neutral explanation or defendant's failure to show purposeful discrimination were clearly erroneous. We, therefore, hold that the trial court did not err in deny-

ing defendant's *Batson* challenge and in allowing the State to exercise its peremptory challenge.

No error.

Judges ROBERT C. HUNTER and CALABRIA concur.

MICHAEL R. LAND, PETITIONER v. THE VILLAGE OF WESLEY CHAPEL AND THE BOARD OF ADJUSTMENT OF THE VILLAGE OF WESLEY CHAPEL, RESPONDENTS

No. COA09-1465

(Filed 3 August 2010)

1. Zoning— judicial review—de novo standard

The superior court correctly identified *de novo* review as the standard of review for a municipal zoning decision.

2. Zoning— shooting range—grandfathered—not clearly covered by ordinance

The trial court correctly concluded that petitioner's property was grandfathered under a land use ordinance and that petitioner was not required to obtain a special use permit for his personal shooting range, absent a clear land use ordinance regulating shooting ranges.

3. Zoning— shooting range—grandfathered—improvements—not a material alteration

The trial court correctly concluded that there had been no material alteration of property that was grandfathered under a zoning ordinance where a shooting range on the property was rotated, a new and larger backstop was built, and other changes were made in response to nearby residential development. The Village did not include the value of the land in its calculation of the percentage threshold for determining "material alteration" under the ordinance.

Judge BEASLEY concurring.

Appeal by respondents from order entered 30 July 2009 by Judge W. Erwin Spainhour in Union County Superior Court. Heard in the Court of Appeals 12 April 2010.

The Helms Law Firm, PLLC, by W. Tate Helms, for petitioner appellee.

Hamilton Moon Stephens Steele & Martin, PLLC, by Keith J. Merritt and Rebecca K. Cheney, for the Village of Wesley Chapel respondent appellants.

Shumaker, Loop & Kendrick, LLP, by William H. Sturges, for The Board of Adjustment of the Village of Wesley Chapel respondent appellants.

HUNTER, JR., Robert N., Judge.

The Village of Wesley Chapel and its Board of Adjustment (collectively the "Village"), appeal an order reversing the Village's decision to prohibit Dr. Michael R. Land ("Dr. Land") from using a shooting range on his private property. The Village contends that Dr. Land's use of the shooting range has been and continues to be unlawful because the shooting range was unauthorized by zoning laws existent at the time the shooting range was established, and because "material alterations" have been made to the range thereafter in violation of the Village's current Land Use Ordinance.

The trial court concluded that the Union County Land Use Ordinance of 1988 (the "1988 Ordinance"), the Land Use Ordinance in place at the time Dr. Land bought the land in issue, did not bar shooting ranges; and assuming *arguendo* that there was a violation of the 1988 Ordinance, the Village was barred by *laches* from enforcing the 1988 Ordinance. The trial court also concluded that Dr. Land did not make any material alterations to the shooting range.

The Village appeals the trial court's order and argues that the trial court erred in concluding that: (1) Dr. Land's use of the property was in compliance with the 1988 Ordinance; (2) Dr. Land did not materially alter the shooting range in 2007 and 2008; and (3) the doctrine of *laches* bars the Village from enforcing its current Land Use Ordinance against Dr. Land. Dr. Land also cross-assigns as error the trial court's failure to conclude that the Sport Shooting Range Protection Act of 1997, N.C. Gen. Stat. § 14-409.45, *et seq.*, protects his use of the range.

We agree with the trial court that Dr. Land's use of the property did not violate the 1988 Ordinance and that Dr. Land did not materially alter the shooting range under the Village's Land Use Ordinance. Since our decision on these issues disposes of this ap-

peal, we accordingly decline to address the application of the doctrine of *laches* and Dr. Land's cross-assignment of error regarding the Sport Shooting Range Protection Act of 1997.

I. FACTUAL BACKGROUND

In July 1991, Dr. Land purchased 5.68 acres of unincorporated land ("the property") in Union County. His acquisition cost was over $80,000. Dr. Land is the father of four sons, and the family's hobbies include shooting, hunting, fishing, and riding four-wheeled ATVs. Shortly after the purchase, Dr. Land established a shooting range on the back two-thirds of the property with 144 railroad ties and fill dirt at a cost of $2,000. Between 1996 and 2003, Dr. Land and his family lived on the property.

Dr. Land collects guns, including some semi-automatic and fully automatic guns, which he shoots on the range. The property is fenced and posted with no trespassing signs. Dr. Land personally supervises firing on the range and limits its use to Dr. Land's family and guests. While about ninety percent of the shooting on the range is exercised with a .22 caliber rifle, Dr. Land does sometimes shoot the semi-automatic and fully automatic weapons at the range. These weapons can fire up to 900 rounds per minute.

In 1999, in response to a new residential development being built adjacent to the property, Dr. Land spent $1,000 to rotate the range and the line of fire approximately 110 degrees. Between 2007 and 2008, Dr. Land spent $15,000 in improvements to heighten the backstop by five feet, deepen the backstop by 20 feet, and widen the backstop by 40 feet. These improvements required 1,200 tons of dirt.[1]

Wesley Chapel incorporated on 15 July 1998, and Dr. Land voluntarily annexed the property into the Village on 23 June 1999. The Village enacted its first Land Use Ordinance on 22 August 2000. Dr. Land continued to use the land for a shooting range after the Village's Land Use Ordinance was enacted.

II. PROCEDURAL HISTORY

On 9 January 2007, Mr. Krieg, then Wesley Chapel's Planning and Zoning Administrator, wrote a letter to Dr. Land informing him that the Village's Land Use Ordinance did not permit gun ranges in residential districts. On 11 January 2007, Dr. Land replied by letter claim-

1. At the Board of Adjustment hearing, the parties stipulated that Dr. Land's safe use of property as a firing range was not an issue.

ing that the Sports Shooting Range Protection Act of 1997 shielded his use of the property from municipal regulation. The Village zoning authorities took no further action after Dr. Land's first letter.

On 10 September 2008, Wesley Chapel's new Zoning Administrator, Mr. Langen, issued a cease-and-desist order prohibiting Dr. Land from using the property as a target shooting range. Mr. Langen claimed that the shooting range was not an allowable use "as of right" in any zoning district without a conditional use permit.

In his letter, Mr. Langen stated that the property was subject to the 1988 Ordinance when the property was purchased and the range was established. Under Mr. Langen's interpretation, the 1988 Ordinance was a "unified" land use ordinance, and Mr. Langen contended that Dr. Land's use of the land as a shooting range most closely fit with the category "privately-owned outdoor recreational facility." In order to operate this type of "facility" under the 1988 Ordinance, Dr. Land would have been required to obtain a special use permit. Since no special use permit was on record, Mr. Langen claimed that the target range was not permitted under the 1988 Ordinance, and therefore the range did not qualify as a prior nonconforming use of the property which could be grandfathered in under the provisions of the subsequent Village Land Use Ordinance.[2]

The lack of a special use permit aside, Mr. Langen's letter also asserted that even if the property had been considered a "nonconforming use" and was grandfathered in under the 1988 Ordinance, the range and property had undergone a "material alteration" in 2007 and 2008. The letter quotes Section 7.3.2 of the Village Land Use Ordinance, which addresses nonconforming uses of land and states:

> If said land use is . . . materially altered, the land use shall be considered discontinued and shall not be reestablished unless the use is in conformance with the regulations of the district in which

2. Village Ordinance Section 7.1 reads as follows:

> Nonconforming uses, which are uses of structure or of land existing at the Effective Date of initial adoption of this Ordinance, which do not comply with the provisions of this Ordinance, are declared by this Ordinance to be incompatible with permitted uses in the various districts. The intent of this Article is to permit the continued use of a structure, or portion thereof, or of the use of land legally existing prior to the Effective Date of this Ordinance, until such uses are removed, but not to encourage their survival. Such nonconforming uses shall not be expanded, extended or changed in any manner except as specifically provided for in this Article. Creation of additional nonconforming uses are not to be encouraged nor shall be permitted.

> it is located. Material alteration for the purpose of this subsection is defined as change to size, contour, etc. to an extent of more than fifty percent (50%) of the replacement cost at the time of said alteration.

Based on this language, Mr. Langen concluded:

> Therefore, as you have made improvements to the shooting range, including removal of wooden targets and installation of earthern berms, the improvements to the use would be in violation of any non-conforming use status. Specifically, the wooden targets were of very poor quality with negligible replacement value and installation of earthen berms is considered to be a material alteration to an extent of more than fifty percent of the replacement cost of the wooden targets. Therefore, any potential nonconforming land use status of the shooting range would have to be considered to be discontinued and the use in violation of the Zoning Ordinance.

Dr. Land appealed the Administrator's decision to the Board of Adjustment on 25 September 2008, and the Board held hearings on 30 October 2008 and 12 November 2008. On 12 December 2008, the Board entered an order upholding Mr. Langen's decision.

Dr. Land filed a petition for writ of certiorari of the Board's decision to the superior court on 11 January 2009, and on 8 June 2009, the superior court reversed the decision of the Board of Adjustment. In its order, the superior court held that: (1) no special use permit was required under the 1988 Ordinance; (2) *laches* barred the Village's enforcement actions; and (3) there was no material alteration of the use of the land by Dr. Land. The Village thereafter filed a timely notice of appeal.

III. JURISDICTION AND STANDARD OF REVIEW

Appellate review in this case is proper under N.C. Gen. Stat. § 7A-27(b) (2009), because the order of the superior court is a final order disposing of all issues in the trial court. "When reviewing an appeal from a petition for writ of certiorari in superior court, this Court's scope of review is two-fold: (1) examine whether the superior court applied the appropriate standard of review; and, if so, (2) determine whether the superior court correctly applied the standard." *Cole v. Faulkner*, 155 N.C. App. 592, 596, 573 S.E.2d 614, 617 (2002).

If a petitioner appeals an administrative decision "on the basis of an error of law, the [superior] court applies *de novo* review; if the

petitioner alleges the decision was arbitrary and capricious, or challenges the sufficiency of the evidence, the trial court applies the whole record test." *Blue Ridge Co., L.L.C. v. Town of Pineville*, 188 N.C. App. 466, 469, 655 S.E.2d 843, 845-46, *disc. review denied*, 362 N.C. 679, 669 S.E.2d 742 (2008). The superior court " 'may properly employ both standards of review in a specific case[,]' [h]owever, 'the standards are to be applied separately to discrete issues,' and the reviewing superior court must identify which standard(s) it applied to which issues[.]" *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 15, 565 S.E.2d 9, 18 (2002) (citations omitted).

IV. ANALYSIS

A. Was the proper standard of review applied by the superior court?

[1] In his order, Judge Spainhour cited the following language from *CG&T Corp. v. Bd. of Adjustment of Wilmington*, as the proper scope of review for superior courts in examining zoning decisions of a municipality:

> The superior court should determine the following: (1) whether the Board committed any errors in law; (2) whether the Board followed the procedures specified by law in both statute and ordinance; (3) whether the appropriate due process rights of the petitioner were protected, including the rights to offer evidence, cross-examine witnesses, and inspect documents; (4) whether the Board's decision was supported by competent, material and substantial evidence in the whole record; and (5) whether the Board's decision was arbitrary and capricious.

105 N.C. App. 32, 36, 411 S.E.2d 655, 658 (1992).

In specifying the standard of review for errors of law, Judge Spainhour properly stated and applied the *de novo* standard of review as follows: " 'Under a *de novo* review, the superior court "consider[s] the matter anew[] and freely substitut[es] its own judgment for the agency's judgment." ' " *Welter v. Rowan Cty. Bd. of Comm'rs*, 160 N.C. App. 358, 361, 585 S.E.2d 472, 475-76 (2003).

Given that the superior court identified the correct standard of review, we now examine the record to determine whether this standard was correctly applied.

B. Was Dr. Land in compliance with the 1988 Union County Zoning Ordinance?

[2] The Village argues that the trial court erred in ruling that Dr. Land was in compliance with the 1988 Ordinance, because the 1988 Ordinance regulated "every conceivable use of property . . . whether or not the use [wa]s specifically mentioned." The Village contends that since every use of real property was regulated by the county when Dr. Land bought the property in 1991, then Dr. Land was required to obtain a special use permit in order to establish his shooting range. We disagree.

The Village's argument rests on section 149 of the 1988 Ordinance:

> (a) The presumption established by this ordinance is that all legitimate uses of land are permissible within at least one zoning district with the county. Therefore, because the list of permissible uses set forth in Section 146 (Table of Permissible Uses) cannot be all-inclusive, those uses that are listed shall be interpreted liberally to include other uses that have similar impacts to the listed uses.
>
> (b) All uses that are not listed in Section 146 and that do not have impacts that are similar to those of the listed uses are prohibited. Nor shall Section 146 be interpreted to allow a use in one zoning district when the use in question is more closely related to another specified use that is permissible only in other zoning districts.

Both parties agree that section 146 does not mention shooting ranges. Thus, because subsection (a) requires that every use of land fit into a category listed in section 146, the Village contends that the most similar use, under the liberal application urged by subsection (a), is "privately-owned outdoor recreational facility." This particular category in section 146 necessitates a special use permit in residential zoning districts, and because Dr. Land never acquired a special use permit, the Village urges this Court to hold that Dr. Land was not compliant with the 1988 Ordinance. If Dr. Land was not compliant with the 1988 Ordinance, then the shooting range cannot be sanctioned by the subsequent Land Use Ordinance enacted by the Village.

The critical part of section 149 of the 1988 Ordinance is the presumption that all land uses not specifically listed or capable of being categorized are "prohibited." The superior court specifically rejected this presumption:

The 1988 County Ordinance does not expressly prohibit sports shooting ranges. In fact, the 1988 Ordinance does not mention shooting ranges or firing ranges at all. Respondents urge the construction that all uses not expressly permitted are impliedly prohibited. However, such a construction would prohibit any number of uses that have not been specifically enumerated in the 1988 Ordinance. As such, the Court expressly rejects this over-broad interpretation of the 1988 Ordinance. Therefore, Petitioner's use of the subject property as a shooting range is a prior nonconforming use which is "grandfathered" under the relevant ordinances.

* Respondents would have the Court classify Petitioner's sports shooting range as a "Privately owned outdoor recreational facility such as a golf and country club, etc. (but not including campgrounds), not constructed pursuant to a permit authorizing the construction for some residential development" under § 6.210 of the 1988 Ordinance. However, the Court concludes that Petitioner's sports shooting range, which has never been open to the public and which was established appurtenant to a preexisting residential structure, is not properly classified under § 6.210.

* It was not until the passage of the Union County Land Use Ordinance of 2001 that Union County first regulated the use of an "outdoor firing range." . . .

* The terms of the 1988 County Ordinance are not ambiguous. However, even if they were, the Court would be compelled to interpret these ambiguities in Petitioner's favor. Unless an ordinance clearly prohibits a particular land use, that land use is allowed. This includes shooting ranges. This mandate for strict construction in favor of the landowner arises from a long line of cases, including *Yancey v. Heafner*, 268 N.C. 263, 150 S.E.2d 440 (1966) ("well-founded doubts as to the meaning of obscure provisions of a Zoning Ordinance should be resolved in favor of the free use of property"); *Sanford v. Dandy Signs, Inc.*, 62 N.C. App. 568, 303 S.E.2d 228 (1983) ("[elverything not clearly within the scope of the language used shall be excluded from the operation of the ordinances, taking the words in their natural and ordinary meaning"); and *Capricorn Equity Corp. v. Chapel Hill*, 334 N.C. 132, 431 S.E.2d 183 (1993) ("restrictions on usage [must be] construed in favor of the landowner").

Like the trial court, we similarly reject the Village's interpretation of the 1988 Ordinance and the presumption established by section 149.

The text of the 1988 Ordinance clearly incorporates the following philosophy: everything is proscribed except that which is allowed. The problem with this philosophy, however, is that it fails to clearly place the public on notice as how a particular use is to be classified absent an explicit mention in the Land Use Ordinance. While the presumptive language may be useful in applying an ordinance with a comprehensive schedule of categories, it is of little value when no similar use is listed in any category.

In *Yancey v. Heafner*, the legislative philosophy apparent in the 1988 Ordinance was clearly rejected:

> "Zoning ordinances should be given a fair and reasonable construction, in the light of their terminology, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the Ordinance as a whole. * * * **Zoning regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which is not clearly their express terms.** It has been held that well-founded doubts as to the meaning of obscure provisions of a Zoning Ordinance should be resolved in favor of the free use of property."

268 N.C. at 266, 150 S.E.2d at 443 (quoting Yokley, *Zoning Law and Practice*, Second Edition (1962 supplement), Vol. 1, Section 184) (emphasis added).

The common law principle of the "free use of property" is clearly the antithesis of subsection (b) of section 149 of the 1988 Ordinance—the theory now advanced by the Village—and has been upheld in numerous cases other than those cited by the superior court. *See*, *e.g.*, *In re Application of Construction Co.*, 272 N.C. 715, 718, 158 S.E.2d 887, 890 (1968) ("A zoning ordinance, however, is in derogation of the right of private property and provisions therein granting exemptions or permissions are to be liberally construed in favor of freedom of use."); *In re Couch*, 258 N.C. 345, 346, 128 S.E.2d 409, 411 (1962) (" 'Zoning ordinances are in derogation of the right of private property, and where exemptions appear in favor of the property owner, they should be liberally construed in favor of such owner.' ") (quoting *In re Appeal of Supply Co.*, 202 N.C. 496, 163 S.E.

462 (1932)); *Coleman v. Town of Hillsborough*, 173 N.C. App. 560, 564, 619 S.E.2d 555, 559 (2005) ("Zoning regulation is in derogation of common law property rights and therefore must be strictly construed to limit such derogation to that intended by the regulation.").

In its brief, the Village does not address the trial court's cited authority or attempt to distinguish this body of North Carolina case law. Were we to follow the logic of the 1988 Ordinance, a citizen seeking to use his land for otherwise legal purposes would have to speculate as to which governmentally permitted use was "similar to" a nebulous category in the county's Land Use Ordinance and then conform his conduct thereto. This approach leaves the landowner exposed to the arbitrary and capricious whims of zoning authorities who may disagree with a landowner's decision concerning "similarity of use." The law of this State does not favor this approach. Accordingly, we hold that the superior court correctly applied the *de novo* standard of review to reach its conclusion that, absent a clear Land Use Ordinance regulating shooting ranges, Dr. Land was not required to obtain a special use permit. Since the property was therefore being used for a prior non-conforming use, the superior court was also correct in concluding that the property was grandfathered under the Village's Land Use Ordinance.

The Village also argues that the Board of Adjustment properly concluded that Dr. Land's shooting range was a "privately owned outdoor recreational facility," and in support, the Village cites *Willow Wood Rifle & Pistol Club, Inc. v. Town of Carmel Zoning Bd. of Appeals*, 115 A.D.2d 742 (N.Y. App. Div. 2d Dep't 1985) (shooting range within zoning category named "annual membership clubs, including country, golf, swim and tennis clubs") and *Evergreen State Builders, Inc. v. Pierce County*, 516 P.2d 775 (Wash. Ct. App. 1973) (firing range properly classified as "privately operated recreational center" within the zoning ordinance). In light of the above-cited precedential authority from North Carolina, we can give no weight to these out-of-state authorities. Such theories, even if employed elsewhere, do not comport with statutory construction rules with which courts in this State must construe ambiguities in zoning ordinances. This assignment of error is overruled.

C. Did Dr. Land "materially alter" his property, making it subject to the Village's Land Use Ordinance?

[3] The Village also contends that Dr. Land's alterations to the shooting range between 2007 and 2008 constituted a material alteration to

the property. The Village claims that since the property underwent a material alteration, the shooting range would have lost its grandfather status as a legal non-conforming use of the property under the 1988 Ordinance and cannot be allowed under the Village's Land Use Ordinance. We disagree.

The Village's Land Use Ordinance provides in part:

Section 7.3 Nonconforming Uses of Land

Nonconforming uses of land, which may include structures incidental and accessory to the use of the land, such as but not limited to, storage yards for various materials, or areas used for recreational purposes, shall not be used for other nonconforming purposes, once the nonconforming use has been abandoned.

7.3.1 No such nonconforming use of land shall be enlarged, increased or extended to occupy a greater area of land than was occupied at the effective date of initial adoption of this Ordinance.

7.3.2 If said land use is abandoned for 180 days or more, or materially altered, the land use shall be considered discontinued and shall not be reestablished unless the use is in conformance with the regulations of the district in which it is located. *Material alteration for the purpose of this subsection is defined as change to size, contour, etc. to an extent of more than fifty percent (50%) of the replacement cost at the time of said alteration.*

7.3.3 A nonconforming use of land shall not be changed to another nonconforming use of land.

(Emphasis added.)

In examining this portion of the Village's Land Use Ordinance to determine whether Dr. Land had made a "material alteration" to the "land use," the superior court stated:

> In his cease-and-desist order of September 2008, the Zoning Administrator maintains that Petitioner's improvements to the property constitute a material alteration to the use—that is, a change to an extent of more than fifty percent of the replacement cost at the time of the alteration. The uncontroverted evidence in the record reveals otherwise, Petitioner spent approxi-

> mately $2,000 in 1991; $1,000 in 1998; and $15,000 in 2008. In 1991, the land value alone of the subject property (excluding the house) was over $80,000 (in 1991 dollars). In 2008, the land value alone was $219,000 (in 2008 dollars). Two thirds of the property is used for the sports shooting range, which includes the firing area, the target area/backstop, and the buffer zone around the firing area.
>
> Two thirds of $80,000 is $53,333. Two thirds of $219,000 is $146,000. These are the land values attributable to the shooting range in 1991 and 2008, respectively. As evidenced by these figures, Petitioner's expenditures have in no way approached the fifty percent level necessary to trigger the "material alteration" threshold. In addition, the frequency and duration of Petitioner's use of the subject property as a shooting range have not increased. Nor has the net size of the shooting range been expanded.

(Citations omitted.)

We agree with the superior court that Dr. Land did not materially alter his land. Mr. Langen, in his letter, offered no competent evidence of "replacement costs at the time of said alteration" as section 7.3.2 of the Village Land Use Ordinance requires. Village of Wesley Chapel Zoning Ordinance § 7.3.2 (Sept. 9, 2002). Instead, the record shows that Mr. Langen made the following general averments:

> Therefore, as you have made improvements to the shooting range, including removal of wooden targets and installation of earthen berms, the improvements to the use would be in violation of any non-conforming use status. Specifically, the wooden targets were of very poor quality with negligible replacement value and installation of earthen berms is considered to be a material alteration to an extent of more that fifty percent of the replacement cost of the wooden targets.

During the hearing before the Board of Adjustment, the Village made this same assertion that Dr. Land had made a "material alteration" to his use of the property. However, in order to meet the percentage threshold under the Land Use Ordinance, the Village ignored the value of the real property constituting the shooting range to make its computation.

Mr. Langen's letter and the Village's corollary arguments before the Board of Adjustment fail to provide any competent evidence of a

violation of the Village's Land Use Ordinance as written, which was the Village's burden of proof. *City of Winston-Salem v. Concrete Co.*, 47 N.C. App. 405, 414, 267 S.E.2d 569, 575 (1980) ("The city had the burden of proving the existence of an operation in violation of its zoning ordinance."). In order to make a proper percentage calculation under section 7.3.2 of the Village's Land Use Ordinance, competent evidence would need to be provided of: (1) the costs which were expended by Dr. Land, which would provide the numerator for a percentage equation; and (2) the costs of replacing the private shooting range at the time of the alterations in 2007 and 2008, which would provide the denominator for the equation.

As to the denominator, the Village's Land Use Ordinance does not define "replacement cost"; however, the term's general meaning is: "The cost of a substitute asset that is equivalent to an asset currently held." *Black's Law Dictionary* 372 (8th ed. 2004). Applying this definition to section 7.3.2, the replacement cost of the shooting range must include not only the attachments to the land, but also the properly measured value of a substitute parcel of real property to which a new range could be attached. As the superior court points out, the calculations presented by the Village ignore in its computation of replacement costs any value associated with the cost of the land at the time of the replacement. Therefore, lacking any competent evidence of the denominator, which was the Village's burden, the replacement cost calculation cannot be made.

Given that no competent evidence shows that Dr. Land made any material alterations to the shooting range as defined specifically by the Village's Land Use Ordinance, we affirm the superior court in its conclusion that there was no material alteration of Dr. Land's property in 2007 and 2008. This assignment of error is overruled.

III. CONCLUSION

Because Dr. Land was in compliance with the 1998 Ordinance, his use of the property was grandfathered under the Village's Land Use Ordinance. Since the Village has failed to carry its burden in showing that a "material alteration" has been made to Dr. Land's use of the property as defined by the Village's current Land Use Ordinance, Dr. Land's continued use of the shooting range is lawful. Based on our disposition of these issues in this case, we need not address the Village's remaining assignments of error or Dr. Land's remaining cross-assignment of error. Accordingly, the order of the superior court is

Affirmed.

Chief Judge MARTIN concurs.

Judge BEASLEY concurs with separate opinion.

BEASLEY, Judge, concurring with separate opinion.

I write separately only to point out that the costs of replacing the private shooting range (i.e. the denominator in the "material alteration" equation laid out by the majority) must include not only the land value at the time of the replacement but also the cost of replacing the *use* of the land. In concluding that Dr. Land's changes to his shooting range did not constitute a material alteration under § 7.3.2 of the Village Land Use Ordinance, the trial court compared the cost of the improvements to only the value of the land area used for the range. The trial court, however, was unable to perform the calculation contemplated by the ordinance because it did not have at its disposal any numbers associated with the replacement cost of the land use.

The Village contended that Dr. Land's firing range lost its grandfathered status when in November 2007 through March 2008 he spent approximately $15,000 on improvements thereto. As support for its determination, the Village argued that Dr. Land had spent $3,000 constructing the range—roughly $2,000 in 1991 when it was first erected and $1,000 to rotate the direction of fire and replace some railroad ties in 1999—and that the $15,000 spent after the ordinance was adopted equaled 500% of the replacement cost. The $3,000 figure, however, represents the cost of the initial improvement as of 1999, not the replacement cost of the use "at the time of said alteration" between 2007 and 2008. Thus, not only did the Village ignore in its computation of replacement costs any value associated with the land but also failed to present any evidence of the replacement cost of the use at the relevant time under the ordinance. As such, I would qualify the majority's conclusion—that the Village failed to meet its burden of showing material alteration because it ignored the land value—by emphasizing that the Village Land Use Ordinance also requires consideration of the land use and that the Village likewise neglected to present competent evidence of the cost of replacing said use at the time of the alteration at issue.

MELVIN McLAUGHLIN, EMPLOYEE, PLAINTIFF v. STAFFING SOLUTIONS, EMPLOYER, GALLAGHER BASSETT SERVICES, THIRD-PARTY ADMINISTRATOR, DEFENDANTS

No. COA09-739

(Filed 3 August 2010)

1. Workers' Compensation— suitable employment—within restrictions—competent evidence

Competent evidence in the record supported the Industrial Commission's finding of fact in a workers' compensation case that between the time plaintiff was terminated from his employment with defendant and the time plaintiff reached maximum medical improvement, plaintiff was unable to find suitable employment within the restrictions related to his injury.

2. Workers' Compensation— total disability compensation—failure to obtain other employment—due to injury-related work restrictions

The Industrial Commission did not erroneously conclude that plaintiff was eligible for continuing temporary total disability compensation under the test established in *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228. The Commission's conclusion that plaintiff's failure to obtain other employment was due to his injury-related work restrictions was supported by the Commission's findings of fact. Moreover, contrary to defendant's contention, the *Seagraves* test is not applicable only when plaintiff's injury played a role in his termination.

3. Workers' Compensation— disability established

The Industrial Commission did not err in finding that plaintiff was disabled within the meaning of N.C.G.S. § 97-2(9). The Commission's findings of fact established that plaintiff was disabled pursuant to two methods enumerated in *Russell v. Lowe's Prod. Distrib.*, 108 N.C. App. 762.

4. Workers' Compensation—fees and costs for appeal

Plaintiff's request for attorney fees for the appeal to the Court of Appeals in a workers' compensation case was granted as plaintiff satisfied the statutory requirements of N.C.G.S. § 97-88.

Appeal by defendants from Opinion and Award entered 24 February 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 November 2009.

Albert S. Thomas, Jr., for plaintiff-appellee.

Rudisill, White & Kaplan, P.L.L.C., by Stephen Kushner, for defendant-appellant.

STROUD, Judge.

Staffing Solutions and Gallagher Bassett Services (collectively referred to as "defendants") appeal an opinion and award by the Full Commission arguing that the Commission erred in awarding temporary total disability compensation to Melvin McLaughlin ("plaintiff"). For the following reasons, we affirm the Full Commission's award and remand for a determination of the appropriate amount of costs to be taxed to defendants.

I. Background

The Full Commission ("Commission"), by Chairman Pamela T. Young, made the following uncontested findings of fact:

> 1. Plaintiff is 58 years old. Plaintiff has a high school education and two years of courses at Ohio State University in mechanical engineering. Plaintiff explained that he took non-accredited courses in mechanical engineering to improve his mechanical ability in relation to a maintenance job he had at the time with American Can. He also served in the United States Marine Corp for two years and was honorably discharged.
>
> 2. In the last several years, plaintiff has held a variety of jobs. He was a plant manager for two manufacturing companies that produced plastic bottles, for approximately four years each. He then did some temporary assignment work over the next few years, including a four-year stint with Defendant-Employer. Through Defendant-Employer, Plaintiff was assigned to work as a shipping and receiving clerk for Nomacork, a company that produces corks for wine bottles. Plaintiff also testified that he worked for some time in the past as a truck dispatcher.
>
> 3. Plaintiff sustained an admittedly compensable injury by accident on September 30, 2004. While on the Nomacork premises, another employee drove a forklift into a stack of crates and a crate weighing approximately 700 pounds fell onto Plaintiff's left

side. Plaintiff was pinned by the crate, and it had to be moved off of him.

4. After the crate was moved, Plaintiff was inspected by his co-workers and it was determined that he was already getting black and blue. Accordingly, Plaintiff was taken by ambulance to Wake Med, where he was diagnosed with multiple injuries including a fractured scapula, fractured ribs, a punctured lung, a punctured spleen, and a bruise on his neck. Plaintiff testified that he stayed in the ICU for more than a week.

5. After his discharge, Plaintiff's treatment focused primarily on his left shoulder. Plaintiff came under the care of Dr. Nelms, his family doctor, who referred him to Dr. Robert C. Martin, an orthopedic surgeon.

6. Dr. Martin first saw Plaintiff on May 2, 2005. By the time Plaintiff presented to Dr. Martin, many of his initial injuries had already healed. Plaintiff had one remaining rib fracture, which Dr. Martin indicated would heal over time. He also had some residual neck pain, for which no specific treatment was recommended.

7. The primary focus of Dr. Martin's treatment was the left shoulder. Plaintiff reported continued pain, stiffness, and decreased function. Dr. Martin obtained an MRI, which revealed a partial rotator cuff tear, significant impingement, and AC joint arthropathy. Dr. Martin recommended surgical repair.

8. Plaintiff was able to return to work at Nomacork filling out bills of laden [sic] and scanning crates with a handheld bar code device for a short time before his surgery.

9. Dr. Martin performed surgery on July 25, 2005, specifically an arthroscopic subacromial decompression, distal clavulectomy, and debridement of a glenoid labral tear. Following surgery, Dr. Martin recommended a course of rehabilitative therapy. Plaintiff was kept out of work until February 22, 2006, when Dr. Martin allowed him to return to work for four hours a day with certain light duty restrictions.

10. Plaintiff sought work after his release, but was only able to find a couple of odd jobs. He did those jobs until they ended, then he called Defendant-Employer seeking further employment. Defendant-Employer offered him a position in its office in Raleigh.

11. Plaintiff worked for Defendant-Employer for four hours per day through March 16, 2006. On the morning of March 16, 2006, Mr. Silvestre Gonzalez, Defendant-Employer's area manager, was informed by another employee that Plaintiff was giving off a strong odor of alcohol. Mr. Gonzalez proceeded to Plaintiff's workstation, where he himself noticed the odor.

12. Mr. Gonzalez confronted Plaintiff, in the presence of at least one witness, regarding the odor of alcohol. Plaintiff responded that the assertion was ludicrous, and that he had not been drinking. Mr. Gonzalez asked him to take a breathalyzer, consistent with company policy. Plaintiff refused to take a breathalyzer and left the premises.

13. According to Mr. Gonzalez's testimony, it is contrary to Defendant-Employer's company policy for an employee to have consumed, or be under the influence, of alcohol during work hours. It is also against company policy to refuse a breathalyzer when requested. A violation of either of those policies is grounds for immediate termination of any employee. Plaintiff would have been informed of these procedures when he began his employment. Mr. Gonzalez testified that if he himself went into work the next day and refused a breathalyzer test upon request, he would be fired.

14. Plaintiff denied having consumed alcohol on the day in question. Plaintiff did not dispute that he was offered a breathalyzer test on March 16, 2006, and acknowledged he did not take the test. Plaintiff acknowledged that drinking or being under the influence of alcohol on the job would be grounds for termination. He also acknowledged that refusing a breathalyzer was grounds for termination.

15. The evidence establishes and the Full Commission finds that Plaintiff was terminated for violation of company policy for refusing to take a breathalyzer, that such a refusal would have resulted in the termination of a nondisabled employee, and that Plaintiff's termination was unrelated to Plaintiff's compensable injuries and claim. Accordingly, Plaintiff's termination is deemed to constitute a constructive refusal of suitable employment.

16. Plaintiff has been out of work since his March 16, 2006 termination. Following his termination, Plaintiff sought employment through the VA representative in Wilson, North Carolina and

through the Employment Security Commission. They provided him several leads, which he pursued, but he was unable to find work for only four hours per day. Plaintiff also testified that he met with a vocational rehabilitation counselor provided by Defendant for several weeks, but was again unable to locate a job that would let him work only four hours per day.

17. Per Dr. Martin's testimony, by April 6, 2006, Plaintiff had reached maximum medical improvement. Plaintiff underwent an FCE at Dr. Martin's direction, which indicated that Plaintiff met the standards for sedentary work (may exert up to 10 pounds of force occasionally and negligible amount of force frequently), with the exception that he could not lift any weight from waist to shoulder or shoulder to overhead with his left arm. On April 24, 2006, Dr. Martin released Plaintiff to return to work within the restrictions outlined by the FCE. Dr. Martin released Plaintiff from his care and assigned a 28% permanent partial disability rating to the left upper extremity.

18. Plaintiff underwent a second opinion evaluation by Dr. Kevin Speer, an orthopedic surgeon, on October 4, 2006. Dr. Speer testified that he found on exam that Plaintiff had a very stiff shoulder and he could only elevate his arm actively to about chin level, which was estimated at a 50% loss in range of motion. He had extensive bursitis in his shoulder and his shoulder muscle exhibited atrophy compared to the opposite side. Dr. Speer agreed that Plaintiff was at maximum medical improvement regarding his left shoulder and assigned a 35% permanent disability rating.

19. With respect to plaintiff's ability to work, Dr. Speer testified that Plaintiff had a very dysfunctional and painful shoulder and it was doubtful that vocational efforts or retraining would be successful even with 'the most remedial shoulder-sparing work efforts.' Dr. Speer testified that, within a reasonable degree of medical certainty, plaintiff would more likely than not need to be totally disabled due to his shoulder injury.

20. Plaintiff testified that he has not looked for work since Dr. Speer told him he was disabled.

21. Defendant has continued to pay Plaintiff temporary partial disability benefits since his March 2006 termination.

. . .

23. The opinions of both Drs. Martin and Speer are found to be credible. With respect to the period after plaintiff reached MMI in April 2006, the totality of the medical and other evidence establishes and the Full Commission finds that plaintiff was and is severely limited by his left shoulder injury and has been totally disabled since his termination by Defendant-Employer.

24. Plaintiff testified that he requires assistance from his wife in order to dress and perform certain personal grooming activities. Plaintiff testified that his wife does most of the yard work and that he is not able to help her with household cleaning. Plaintiff acknowledged that he does some yard work, including cutting the grass with a riding lawnmower, using a weed eater, and light raking. Plaintiff's wife testified that Plaintiff is not able to help with yard work and housework as much as he did before his injury. Plaintiff's wife testified that Plaintiff is able to load clothes into the washer and load the dishwasher, but he cannot move clothes to the dryer or put away dishes that are in upper cabinets. Plaintiff's wife is employed outside the home during the day.

25. No medical evidence was submitted showing that any physician recommended attendant care or home assistance for Plaintiff.

26. The Full Commission finds that Plaintiff's wife is not entitled to compensation for attendant care for Plaintiff.

Based on its findings, the Commission concluded:

1. Plaintiff sustained a compensable injury by accident on or about September 30, 2004, resulting in multiple injuries, including to his left shoulder. N.C. Gen. Stat. § 97-2(6).

2. Plaintiff constructively refused suitable employment provided by Defendant-Employer on March 16, 2006. Plaintiff's termination was for cause, and similar behavior by a non-disabled employee would have resulted in that employee's termination as well. Plaintiff's termination was not related to his compensable injury. However, Plaintiff was totally disabled following his termination based on his failure to obtain other employment due to his injury-related work restrictions. *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 397 (1996); *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 597 S.E.2d 695 (2004); N.C. Gen. Stat. § 97-32.

> 3. Based on the medical and other evidence, Plaintiff is and has been temporarily totally disabled since his termination by Defendant-Employer. Plaintiff is entitled to receive ongoing temporary total disability compensation beginning March 17, 2006. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993); N.C. Gen. Stat. § 97-2(9).
>
> 4. Plaintiff is entitled to have Defendant pay for medical treatment related to his compensable injury. N.C. Gen. Stat. § 97-25.
>
> 5. Plaintiff's wife is not entitled to compensation for attendant or home care for Plaintiff. N.C. Gen. Stat. § 97-25.

Defendants were ordered to pay: (1) "temporary total disability compensation in the amount of $471.00 per week beginning March 17, 2006 and continuing until further order of the Commission[;]" (2) "all medical expenses incurred or to be incurred as a result of Plaintiff's compensable injury by accident on September 30, 2004, for so long as such evaluations, examinations, and treatments may reasonably be required to effect a cure, provide relief, or tend to lessen the period of disability, when bills for the same have been approved in accordance with the provisions of the Act[;]" and (3) "reasonable attorney's fee of twenty-five (25%) of the compensation due Plaintiff under paragraph 1 of this Award[.]" On 25 March 2009, defendants filed notice of appeal.

II. Standard of Review

This Court has previously stated that

> review of a decision of the Industrial Commission is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law. The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings. This Court reviews the Commission's conclusions of law *de novo*.

Egen v. Excalibur Resort Prof'l, 191 N.C. App. 724, 728, 663 S.E.2d 914, 918 (2008) (citation omitted).

III. Constructive Refusal and Continuation of Benefits

[1] Defendants first argue that competent evidence in the record does not support the following portion of the Commission's finding of

fact No. 22[1]: "the evidence is sufficient to establish that between his termination and reaching MMI in April 2006, plaintiff was unable to find suitable employment within his part-time and other restrictions related to his injury." Defendants argue that "there is no evidence regarding plaintiff's activities" following his 16 March 2006 termination and reaching maximum medical improvement on 6 April 2006.

Plaintiff's testimony at the hearing before Deputy Commissioner Ronnie E. Rowell on 17 September 2007 provided competent evidence for finding of fact No. 22:

> Plaintiff's Counsel: Okay. Now when you–after being terminated by Staffing Solutions, did you seek employment after that?
>
> Plaintiff: Yes, I did.
>
> Q: And do you recall where you went and how many jobs, perhaps, that you applied for?
>
> A: I don't remember.
>
> Q: Were you ever offered any vocational assistance?
>
> A: Yes, by the Workman's Comp [sic] rep.
>
> Q: All right. And were you able to find employment?
>
> A: No, sir.
>
> Q: Do you know why you were unable to find employment?
>
> A: (Unintelligible) four hours and a lot of compan[ies] don't want you to work just four hours.

The Commission's finding of fact No. 9, uncontested by defendants, states that because of plaintiff's injuries, he was restricted to working only four hours a day. Plaintiff testified that following his termination, he attempted unsuccessfully to find work, but he could not find employment that would accommodate his restriction to working only four hours a day. Therefore, there is competent evidence in the record to support finding of fact No. 22. Defendants do not bring forth

1. In their brief on appeal, defendants claim that their first argument is based on assignments of error 1 and 4. However, in the record on appeal, defendants have two assignments of error labeled as number "4." The first assigns error to the Commission's finding of fact number 16 and the second assigns error to the Commissions' finding of fact number 22. However, on appeal defendants only make an argument in their brief against a portion of finding of fact number 22 but make no mention of finding of fact number 16. Therefore, any argument as to the Commission's finding of fact 16 is deemed abandoned. N.C.R. App. P. 28(b)(6).

any argument against the Commission's remaining findings of fact, so they are binding on appeal. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003).

[2] Defendants next contend that the Commission erroneously concluded that plaintiff was eligible for continuing temporary total disability compensation under the test established in *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 397 (1996), and adopted by *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 597 S.E.2d 695 (2004). Defendants contend that the Commission correctly concluded that plaintiff had constructively refused employment, but the Commission erroneously concluded that plaintiff was totally disabled from work. Defendants contend that this conclusion was based on contradictory testimony from Drs. Martin and Speer, and there was no evidence regarding plaintiff's job search during the period of time following his termination. Therefore, there was no evidence supporting plaintiff's total disability and the Commission erred as a matter of law "in failing to suspend plaintiff's compensation in light of its finding that plaintiff constructively refused an offer of suitable employment[.]"

In *Seagraves*, this Court held that when an employee who had sustained a compensable injury and was "provided light duty or rehabilitative employment [was] terminated from such employment for misconduct or other fault on the part of the employee, such termination [did] not automatically constitute a constructive refusal to accept employment so as to bar the employee from receiving benefits for temporary partial or total disability." 123 N.C. App. at 233-34, 472 S.E.2d at 401. Instead,

> the test is whether the employee's loss of, or diminution in, wages is attributable to the wrongful act resulting in loss of employment, in which case benefits will be barred, or whether such loss or diminution in earning capacity is due to the employee's work-related disability, in which case the employee will be entitled to benefits for such disability.

Id. at 234, 472 S.E.2d at 401. "Thus, under the *Seagraves*' test, to bar payment of benefits, an employer must demonstrate initially that: (1) the employee was terminated for misconduct; (2) the same misconduct would have resulted in the termination of a nondisabled employee; and (3) the termination was unrelated to the employee's compensable injury." *McRae*, 358 N.C. at 493, 597 S.E.2d at 699.

> An employer's successful demonstration of such evidence is 'deemed to constitute a constructive refusal' by the employee to perform suitable work, a circumstance that would bar benefits for lost earnings, '*unless* the employee is then able to show that his or her inability to find or hold other employment . . . at a wage comparable to that earned prior to the injury[] is due to the work-related disability.' *Id.* (emphasis added). In other words, a showing of employee misconduct is not dispositive on the issue of benefits if the employee can demonstrate that his or her subsequent failure to perform suitable work or find comparable work was the direct result of the employee's work-related injuries. Under *Seagraves*, the employee would be entitled to benefits if he or she can demonstrate that work-related injuries, and not the circumstances of the employee's termination, prevented the employee from either performing alternative duties or finding comparable employment opportunities.

Id. at 493-94, 597 S.E.2d at 699 (quoting *Seagraves*, 123 N.C. App. at 234, 472 S.E.2d at 401.).

Contrary to defendants' argument, the focus of the second part of the *Seagraves* test is not whether there was a finding that plaintiff was "totally disabled" but whether plaintiff's subsequent failure to perform or find comparable work was the direct result of plaintiff's "work-related injuries[.]" *See id.* The Commission's conclusion of law No. 3, that plaintiff's "failure to obtain other employment [was] due to his injury-related work restrictions[,]" was supported by the Commission's findings of fact 9, 16, and 22. The Commission's finding of fact No. 9, uncontested by defendants, states that following plaintiff's work-related shoulder injury, Dr. Martin "allowed him to return to work for four hours a day with certain duty restrictions." The Commission's finding of fact 16, uncontested by defendants, states that following plaintiff's termination on 16 March 2006, he sought employment through a VA representative, the Employment Security Commission, and the vocational rehabilitation counselor provided by defendants but was unable to locate a job that would let him work only four hours a day. As stated above, the Commission found in finding of fact 22 that following plaintiff's termination, he "was unable to find suitable employment within the part-time and other restrictions related to his injury." These findings support the Commission's conclusion that plaintiff was unable to find other employment due to his work-related shoulder injury, and plaintiff was entitled to temporary total disability compensation. Therefore, we are not persuaded by defendants' contentions.

Defendants also argue that the test in *Seagraves* is applicable only when "the claimant's injury played a role in the termination." Defendants contend that "the vast majority of cases on this subject,"[2] including *Castaneda v. Int'l Leg Wear Group*, 194 N.C. App. 27, 668 S.E.2d 909 (2008), *affirmed per curiam*, 363 N.C. 369, 677 S.E.2d 454 (2009), are "easily distinguishable from the instant scenario . . . because in each of those cases . . . *the claimant's injury played a role in the termination*." (emphasis added.) In *Castaneda*, after her injury by accident, the

> plaintiff was in severe pain. She called work and stayed out that day. [The next day], when plaintiff returned to work, she asked to be sent to a doctor. Defendant had plaintiff go to the office where she was requested to sign a 'written verbal' warning about work performance. Plaintiff believed she would be terminated if she signed the form, but did initial her name to the form. Defendant was not satisfied and terminated plaintiff. Plaintiff had no prior misconduct or warnings.

194 N.C. App. at 34, 668 S.E.2d at 914-15. The Commission found that "there is insufficient evidence to support a finding that plaintiff was terminated for misconduct." *Id.* at 35, 668 S.E.2d at 915. However, this Court held that "[e]ven if the Full Commission erred in determining that plaintiff was not terminated for misconduct, if she showed that her inability to find other employment at a wage comparable to the wage she earned prior to the injury is due to a work-related disability, then her payments are not barred. *Seagraves*, *supra*." *Id.*

Thus, defendants' argument misinterprets the third factor identified by *Seagraves* and *McRae*: that the plaintiff must show that "the termination was *unrelated* to the employee's compensable injury." *McRae*, 358 N.C. at 493, 597 S.E.2d at 699. (emphasis added). If "the claimant's injury played a role in the termination" as argued by defendants, the termination would be *related* to the employee's compensable injury and the *Seagraves* test would be inapplicable. *See id.* However, here, the Commission's conclusion No. 2 stated that plaintiff had "constructively refused employment[,]" as plaintiff's "termination was for cause, and similar behavior by a non-disabled employee would have resulted in that employee's termination as well[,]" and plaintiff's "termination was not related to his compensable injury." As stated above, defendants agree that "the Commission

2. Defendants cite only one published case, *Casteneda*, in support of this proposition and one unpublished case. We address only *Casteneda*.

correctly concluded that plaintiff had constructively refused employment" because his termination was clearly not related to his compensable injury. Therefore, we are not persuaded by defendants' argument.

The fact that defendants proved that plaintiff had constructively refused employment did not end the inquiry, as the burden then shifts back to the plaintiff to "demonstrate that his or her subsequent failure to perform suitable work or find comparable work was the direct result of the employee's work-related injuries." *McRae*, 358 N.C. at 494, 594 S.E.2d at 699. An employee is not entitled to benefits after his termination for cause unrelated to his injury " '*unless* the employee is then able to show that his or her inability to find or hold other employment . . . at a wage comparable to that earned prior to the injury[] is due to the work-related disability.' " *Id.* (quoting *Seagraves*, 123 N.C. App. at 234, 472 S.E.2d at 401.). In other words, a showing of employee misconduct is not dispositive on the issue of benefits "if the employee can demonstrate that his or her subsequent failure to perform suitable work or find comparable work was the direct result of the employee's work-related injuries." *Id.* Thus, defendants' argument that plaintiff's termination must be related to his compensable injury is without merit.

IV. Plaintiff's Total Disability

[3] Defendants next contend that the Commission erred "as a matter of law in finding that employee-plaintiff was disabled within the meaning of N.C. Gen. Stat. § 97-2(9)" because plaintiff "returned to work and earned wages prior to his termination, and in light of evidence from his treating physician that plaintiff was capable of working within restrictions."

N.C. Gen. Stat. § 97-2(9) (2004) states that the term disability "means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Therefore, "[u]nder the Workmen's [sic] Compensation Act disability refers not to physical infirmity but to a diminished capacity to earn money." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 434-35, 342 S.E.2d 798, 804 (1986) (citation and quotation marks omitted). The employee can meet his burden to show that "he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment[,]" in one of four ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable

> of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowe's Prod. Distrib., 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations and quotation marks omitted).

The Commission summarized the relevant evidence related to plaintiff's disability in findings of fact 16, 17, 18, 19 and 23:

> 16. Plaintiff has been out of work since his March 16, 2006 termination. Following his termination, Plaintiff sought employment through the VA representative in Wilson, North Carolina and through the Employment Security Commission. They provided him several leads, which he pursued, but he was unable to find work for only four hours per day. Plaintiff also testified that he met with a vocational rehabilitation counselor provided by Defendant for several weeks, but was again unable to locate a job that would let him work only four hours per day.
>
> 17. Per Dr. Martin's testimony, by April 6, 2006, Plaintiff had reached maximum medical improvement. Plaintiff underwent an FCE at Dr. Martin's direction, which indicated that Plaintiff met the standards for sedentary work (may exert up to 10 pounds of force occasionally and negligible amount of force frequently), with the exception that he could not lift any weight from waist to shoulder or shoulder to overhead with his left arm. On April 24, 2006, Dr. Martin released Plaintiff to return to work within the restrictions outlined by the FCE. Dr. Martin released Plaintiff from his care and assigned a 28% permanent partial disability rating to the left upper extremity.
>
> 18. Plaintiff underwent a second opinion evaluation by Dr. Kevin Speer, an orthopedic surgeon, on October 4, 2006. Dr. Speer testified that he found on exam that Plaintiff had a very stiff shoulder and he could only elevate his arm actively to about chin level, which was estimated at a 50% loss in range of motion. He had extensive bursitis in his shoulder and his shoulder muscle exhib-

ited atrophy compared to the opposite side. Dr. Speer agreed that Plaintiff was at maximum medical improvement regarding his left shoulder and assigned a 35% permanent disability rating.

19. With respect to plaintiff's ability to work, Dr. Speer testified that Plaintiff had a very dysfunctional and painful shoulder and it was doubtful that vocational efforts or retraining would be successful even with 'the most remedial shoulder-sparing work efforts.' Dr. Speer testified that, within a reasonable degree of medical certainty, plaintiff would more likely than not need to be totally disabled due to his shoulder injury.

. . .

23. The opinions of both Drs. Martin and Speer are found to be credible. With respect to the period after plaintiff reached MMI in April 2006, the totality of the medical and other evidence establishes and the Full Commission finds that plaintiff was and is severely limited by his left shoulder injury and has been totally disabled since his termination by Defendant-Employer.

Defendants assign error to the Commission's findings of fact 16, 19, and 23, but do not present any argument on appeal challenging those findings of fact. Therefore, these findings of fact are binding on appeal. *See Haley v. ABB, Inc.*, 174 N.C. App. 469, 474, 621 S.E.2d 180, 183 (2005) ("Findings of fact to which [an appellant] has not assigned error and argued in his brief are conclusively established on appeal." (citations and quotation marks omitted)). Instead, defendants argue that the opinions of Dr. Martin and Dr. Speer as set forth in the Commission's findings are contradictory as Dr. Martin testified that plaintiff was capable of working within restrictions but Dr. Speer stated that plaintiff was totally disabled. Defendants contend that "[t]hose positions are clearly inconsistent with one another, and it is logically impossible to accept them both." Defendants further argue that the Commission erroneously relied on this contradictory testimony of Dr. Martin and Dr. Speer in making its conclusion that plaintiff was totally disabled due to his shoulder injury. Contrary to defendants' contentions, the Commission's findings establish that plaintiff was disabled pursuant to two of the methods enumerated in *Russell*.

First, the Commission's findings establish that following plaintiff's 16 March 2006 termination, he was "capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment[.]" *Russell*, 108 N.C. App. at 765, 425

S.E.2d at 457. Finding of fact 17 addresses plaintiff's limitations on his ability to work. Finding No. 16 sets forth plaintiff's inability to find employment within his restrictions despite his reasonable efforts.

The Commission's findings also establish that by October 2006 "medical evidence" showed that plaintiff was "physically" disabled "as a consequence of the work related injury, incapable of work in any employment[.]" *Id.* Finding of fact 18 states that plaintiff went to see Dr. Speer on 4 October 2006 for examination of his left shoulder. Finding of fact 19 states that it was Dr. Speer's opinion that "Plaintiff had a very dysfunctional and painful shoulder and it was doubtful that vocational efforts or retraining would be successful even with 'the most remedial shoulder-sparing work efforts[,]' " and that "within a reasonable degree of medical certainty, plaintiff would more likely than not need to be totally disabled due to his shoulder injury." This medical evidence establishes that it was Dr. Speer's opinion that plaintiff was physically disabled as a consequence of his work-related shoulder injury and incapable of work. *See id.*

Therefore, the Commission's findings, summarizing the testimony of Dr. Martin and Dr. Speer, were not contradictory but demonstrated that at two different times following plaintiff's termination, plaintiff established that he was disabled by two of the methods enumerated in *Russell*. We hold that the above findings support the Commission's conclusion that plaintiff was temporarily totally disabled. Therefore, defendants' assignment of error is overruled.

V. Attorney's Fees for Appeal

[4] Plaintiff has requested an award of attorney's fees and expenses for this appeal. Pursuant to N.C. Gen. Stat. § 97-88 (2004), "the Commission or a reviewing court may award costs, including attorney's fees, to an injured employee 'if (1) the insurer has appealed a decision to the full Commission or to any court, and (2) on appeal, the Commission or court has ordered the insurer to make, or continue making, payments of benefits to the employee.' " *Brooks v. Capstar Corp.*, 168 N.C. App. 23, 30, 606 S.E.2d 696, 701 (2005) (quoting *Brown v. Public Works Comm.*, 122 N.C. App. 473, 477, 470 S.E.2d 352, 354 (1996) (awarding plaintiff attorney's fees pursuant to N.C. Gen. Stat. § 97-88 when defendant had appealed the Full Commission's order directing payment of additional benefits to plaintiff, even though plaintiff had previously appealed "within the Commission")). Here, even though plaintiff appealed the deputy commissioner's decision "within the Commission[,]" *see id.*, defendant appealed the Full

Commission's order to this Court, and we affirm the Commission's order that defendants pay temporary total disability compensation to plaintiff. Therefore, the statutory requirements of N.C. Gen. Stat. § 97-88 are met. Accordingly, we remand this matter to the Commission with instruction that the Commission determine the amount due plaintiff for the costs incurred as a result of the appeal to this Court, including reasonable attorney's fees.

VI. Conclusion

As the Commission's findings of fact are supported by competent evidence and those findings support the conclusions of law, *Egen*, 191 N.C. App. at 728, 663 S.E.2d at 918, we affirm the Commission's opinion and award and remand this matter for a determination of the appropriate amount of costs to be taxed to defendants.

AFFIRMED AND REMANDED.

Judges STEPHENS and BEASLEY concur.

HARBOUR POINT HOMEOWNERS' ASSOCIATION, INC., BY AND THROUGH ITS BOARD OF DIRECTORS, INDIVIDUALLY AND IN ITS REPRESENTATIVE CAPACITY ON BEHALF OF ITS MEMBERS, PLAINTIFF v. DJF ENTERPRISES, INC., FORREST DEVELOPMENT COMPANY, INC.; DAVY GROUP CONSTRUCTION, INC.; WRANGELL HOMES, INC., HPPI INVESTMENTS, LLC, COASTAL ROOFING COMPANY, INC., GEORGIA-PACIFIC CORPORATION, AND CRAFTMASTER MANUFACTURING, INC., DEFENDANTS

No. COA09-1545

(Filed 3 August 2010)

1. Appeal and Error— interlocutory orders and appeal—Rule 54(b) certification improper—substantial right—writ of certiorari review denied

The Court of Appeals elected not to grant *certiorari* review of plaintiff's appeal from an interlocutory order granting, in part, defendant's motion seeking return of certain privileged documents that it inadvertently provided to plaintiff during discovery.

2. Appeal and Error— preservation of issues—additional issues not addressed—mootness

The Court of Appeals declined to address additional issues raised by plaintiff since it concluded the trial court's interlocu-

tory order was not subject to immediate review. Further, the issue of whether the trial court should have allowed plaintiff to depose witnesses during the pendency of *Harbour Point I* was moot.

Appeal by plaintiff from order entered 15 May 2009 by Judge Richard T. Brown in New Hanover County Superior Court. Heard in the Court of Appeals 26 April 2010.

Block, Crouch, Keeter, Behm & Sayed, L.L.P., by Auley M. Crouch, III, and Christopher K. Behm, for Plaintiff-Appellant.

Johnston, Allison & Hord, P.A., by Martin L. White, and Robert L. Burchette, for Defendant-Appellee.

ERVIN, Judge.

Plaintiff Harbour Point Homeowners' Association, Inc., appeals from an order granting, in part, a motion by Defendant Georgia-Pacific Corporation seeking the return of certain documents that Defendant inadvertently provided to Plaintiff during discovery. After careful consideration of the record in light of the applicable law, we conclude that Plaintiff's appeal has been taken from an unappealable interlocutory order and should be dismissed.

I. Factual Background

Plaintiff is a non-profit corporation organized for the purpose of representing homeowners in Harbour Point, which is a development comprised of ninety town homes located in New Hanover County, North Carolina. On 22 February 2008, Plaintiff filed a lengthy complaint[1] seeking damages from eight defendants, each of whom had some role in the development or construction of Harbour Point. According to Plaintiff's complaint, there were "substantial and numerous latent defects" in the buildings that made up Harbour Point. As a result, Plaintiff asserted the following claims:

1. A negligence claim against DJF Enterprises, Forrest Development Company, Davy Group Construction, Wrangell Homes, HPPI Investments, and Coastal Roofing.

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1. On 29 April 2008, Plaintiff filed a motion to amend its complaint. On 9 May 2008, the parties signed a consent order allowing the requested amendment, which was filed on 12 May 2008. Plaintiff's amendment did not alter its claims against Defendant in any way.

2. A negligence *per se* claim against DJF Enterprises, Forrest Development Company, Davy Group Construction, Wrangell Homes, HPPI Investments, and Coastal Roofing.

3. A breach of implied warranties claim against DJF Enterprises and Forrest Development Company.

4. A breach of implied warranties claim against DJF Enterprises and Davy Group Construction.

5. A breach of implied warranties claim against Wrangell Homes.

6. A breach of implied warranties claim against DJF Enterprises, HPPI Investments, and Forrest Development Company.

7. A breach of contract claim against DJF Enterprises.

8. A negligent misrepresentation claim against DJF Enterprises.

9. An alternative claim seeking to pierce the corporate veils of Forrest Development Company, Davy Group Construction and HPPI Investments.

10. A breach of express warranty claim against Georgia-Pacific Corporation.

11. An alternative claim seeking damages as third-party beneficiary under Georgia-Pacific Corporation's warranty.

12. A negligence claim against Georgia-Pacific Corporation.

13. A product liability claim pursuant to N.C. Gen. Stat. § 99B-1 *et. seq*. against Georgia-Pacific Corporation.

14. A breach of express warranty claim against CraftMaster Manufacturing.

15. A third-party beneficiary claim against CraftMaster Manufacturing.

16. A negligence claim against CraftMaster Manufacturing.

17. A product liability claim pursuant to N.C. Gen. Stat. § 99B-1 *et. seq*. against CraftMaster Manufacturing.

Defendant is a corporation engaged in the manufacture and sale of building materials. In its complaint, Plaintiff alleged that Defendant had previously manufactured a building material known as

"PrimeTrim," which was used in the construction of some of the Harbour Point town homes; that PrimeTrim had numerous defects; and that the use of PrimeTrim in town homes located at Harbour Point had resulted in damage to buildings and common areas within Harbour Point. As a result, Plaintiff alleged that it was entitled to relief from Defendant under four different legal theories based upon the allegedly defective nature of PrimeTrim.

On 11 June 2008, this case was designated an exceptional case by the Chief Justice and assigned to Judge John W. Smith. On 30 October 2008, Defendant "filed a motion to compel arbitration and stay litigation of [Plaintiffs'] claims against [Defendant, and on]. . . 20 November 2008, the trial court entered an order denying [Defendant's] motion to compel arbitration and to stay litigation[.]" *Harbour Point Homeowners' Ass'n v. DJF Enters.*, —— N.C. App. ——, ——, 688 S.E.2d 47, 49, *disc. review denied*, —— N.C. ——, ——, S.E.2d —— (2010) (*Harbour Point I*). In light of Defendant's appeal from the denial of its motion to compel arbitration, this case was stayed until 5 January 2010, when this Court filed its opinion in *Harbour Point I* affirming the trial court's order.

This appeal arises from a dispute stemming from the discovery process. On 9 April 2008, Plaintiff served Defendant with Interrogatories and Requests for Production of Documents. Between 15 August 2008 and 8 October 2008, Defendant provided discovery responses to Plaintiff. On 30 January 2009, Defendant wrote to Plaintiff for the purpose of requesting that several documents provided during discovery be returned on the grounds that Defendant had inadvertently delivered privileged documents to Plaintiff. After Plaintiff disagreed with Defendant's characterization of the documents as privileged and refused to return them, Defendant filed an amended motion for a protective order and for an order compelling Plaintiff to return the documents on 27 February 2009. On 4 March 2009, Plaintiff filed motions seeking the entry of orders issuing commissions allowing Plaintiff to depose certain defense witnesses during the pendency of Defendant's appeal.

On 6 March 2009, a hearing was conducted concerning Defendant's motion for the entry of a protective order and for recall of privileged documents and Plaintiff's motion for commissions to take depositions.[2] On 15 May 2009, the trial court entered an order granting Defendant's motion for recall of certain documents in part and

2. A portion of the 6 March 2009 hearing was held *in camera*.

denying Plaintiff's motion for the issuance of commissions to take depositions. Plaintiff noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Interlocutory Nature of Appeal

[1] An order is either "interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, Rule 54(a) (2009). "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). The order from which Plaintiff has appealed directs Plaintiff to return a document that Defendant provided during discovery and denies Plaintiff's motion for the issuance of commissions allowing the taking of depositions during the pendency of Defendant's earlier appeal. Since the order from which Plaintiff has appealed "does not dispose of the case," it is interlocutory. "Ordinarily, an appeal will lie only from a final judgment." *Steele v. Moore-Flesher Hauling Co.*, 260 N.C. 486, 491, 133 S.E.2d 197, 201 (1963) (citing *Perkins v. Sykes*, 231 N.C. 488, 490, 57 S.E.2d 645, 646 (1950)). As a result, we must first consider whether Plaintiff is entitled to appellate review of this interlocutory order.

B. Certification

On appeal, Plaintiff first asserts that "[t]he [trial court's order was] certified [for] immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure." N.C. Gen. Stat. § 1A-1, Rule 54(b), provides, in pertinent part, that:

> When more than one claim for relief is presented in an action, . . . or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal[.]

Plaintiff does not contend that the trial court has entered a "final judgment" with regards to any party or claim. "[T]he trial court may not, by certification, render its decree immediately appealable if '[it] is not a final judgment.' " *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (quoting *Lamb v. Wedgewood South Corp.*,

308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983), and citing *Tridyn Indus. v. American Mut. Ins. Co.* 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979)).[3] As a result, since the order in question was not a final judgment with respect to any claim or party, we conclude that the trial court's order was not subject to certification for immediate review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), and that no immediate appeal from the trial court's order is available on this basis.

C. Substantial Right

Next, Plaintiff argues that it is entitled to immediate review of the trial court's order because its appeal has been taken from "an interlocutory order affecting a substantial right as described in N.C. Gen. Stat. § § 1-277 and 7A-27(d)(1) and as recognized in *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 271 S.E.2d 522 (1980)." After carefully reviewing Plaintiff's arguments, we conclude that Plaintiff's argument lacks merit.

N.C. Gen. Stat. § 1-277(a) provides that an "appeal may be taken from every judicial order or determination of a judge of a superior or district court . . . which affects a substantial right claimed in any action or proceeding[.]" Similarly, N.C. Gen. Stat. § 7A-27(d) allows an appeal to be taken from an "interlocutory order or judgment" that "[a]ffects a substantial right[.]" As a result, the ultimate issue which must be resolved in order for us to determine whether we are entitled to decide Plaintiff's claims on the merits is whether Plaintiff has demonstrated that the trial court's order affects one of its substantial rights.

" 'A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment.' " *Musick v. Musick*, —— N.C. App. ——, ——, 691 S.E.2d 61, 63 (2010) (quoting *Embler v. Embler*, 143 N.C. App. 162, 165, 545 S.E.2d 259, 262 (2001) (internal quotations and citation omitted)). "Examples of what has been determined to affect a substantial right include: (1) the State's capacity to be sued; (2) the possibility of inconsistent verdicts for different parties; and (3) a class representative's discontinuance in a potentially meritorious suit." *Hoke County*

3. In addition, the record reflects that the trial court did not attempt to certify the appeal for immediate review, since it did not state that its order was "a final judgment as to one or more but fewer than all of the claims or parties" or that "there is no just reason for delay." N.C. Gen. Stat. § 1A-1, Rule 54(b). Instead, the court simply "certifie[d]" that "there is a contention by the Plaintiff that this Order affects a substantial right of appeal."

Bd. of Educ. v. State, —— N.C. App. ——, ——, 679 S.E.2d 512, 516 (2009) (citing *RPR & Assocs. v. State*, 139 N.C. App. 525, 527-28, 534 S.E.2d 247, 250 (2000), *aff'd*, 353 N.C. 362, 543 S.E.2d 480 (2001); *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982); and *Perry v. Cullipher*, 69 N.C. App. 761, 762, 318 S.E.2d 354, 356 (1984)).

"In determining whether a substantial right is affected a two-part test has developed—'the right itself must be substantial and the deprivation of that substantial right must potentially work injury to [appellant] if not corrected before appeal from final judgment.' " *Estate of Redden v. Redden*, 179 N.C. App. 113, 116, 632 S.E.2d 794, 797 (2006) (quoting *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990)). However:

> A party is not permitted to appeal an interlocutory order because they believe that the ruling places them at a tactical disadvantage[.] . . . To be appealable, the appellant must be able to clearly articulate why the order affects a substantial right[.] . . . The reason for this rule was set forth by Justice Ervin in *Veazey v. Durham*:
>
> > 'There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through . . . successive appeals from intermediate orders. The rules regulating appeals . . . forestall the useless delay inseparable from unlimited fragmentary appeals[.]'

Ford v. Mann, —— N.C. App. ——, ——, 690 S.E.2d 281, 283 (2010) (citing *Wiggins v. Pyramid Life Ins. Co.*, 3 N.C. App. 476, 478, 165 S.E.2d 54, 56 (1969); and quoting *Veazey*, 231 N.C. at 363-64, 57 S.E.2d at 382)). The appellant has the burden of showing that an interlocutory order is immediately appealable:

> It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (citing *GLYK and Associates v. Winston-Salem Southbound Railway Co.*, 55 N.C. App. 165, 170-71, 285 S.E.2d 277, 280 (1981)); *see also* N.C. R. App. P. 28(b)(4) (2009) (requiring the appellant to include in his or her brief "[a] statement of grounds

for appellate review," which "shall include citation of the statute or statutes permitting appellate review" and which, in the case of an appeal from an interlocutory order, "must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right")).

"An order regarding discovery matters is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." *In re Will of Johnston*, 157 N.C. App. 258, 261, 578 S.E.2d 635, 638 (2003), *aff'd*, 357 N.C. 569, 597 S.E.2d 670 (2003) (citing *Sharpe*, 351 N.C. at 163, 522 S.E.2d at 579). Plaintiff makes no mention of this general rule in its brief. In addition, Plaintiff does not "identify what right is at issue or why any substantial right would be jeopardized without immediate review of the trial court's order." *Wilfong v. N.C. DOT*, 194 N.C. App. 816, 818, 670 S.E.2d 331, 333 (2009). Instead, Plaintiff argues that it is entitled to immediate review of the trial court's order based upon our decision in *Dworsky*, 49 N.C. App. at 447-48, 271 S.E.2d at 523, in which we stated that:

> [If] the desired discovery would not have delayed trial or have caused the opposing party any unreasonable annoyance, embarrassment, oppression or undue burden or expense, and if the information desired is highly material to a determination of the critical question to be resolved in the case, an order denying such discovery does affect a substantial right and is appealable.

(citing *Tennessee-Carolina Transportation, Inc. v. Strick Corp.* 291 N.C. 618, 231 S.E.2d 597 (1977); and *Starmount Co. v. City of Greensboro*, 41 N.C. App. 591, 255 S.E.2d 267, *disc. review denied*, 298 N.C. 300, 259 S.E.2d 915 (1979)). An examination of the information contained in the record convinces us, however, that Plaintiff is not entitled to immediate review of the trial court's order under the principle enunciated in *Dworsky*.[4]

Although the trial court ordered Plaintiff to return several documents, Plaintiff only challenges the trial court's ruling concerning two

4. As an aside, *Dworsky* addressed the appealability of an order denying a party's motion seeking discovery, while Plaintiff appeals from an order granting Defendant's motion for return of a previously-disclosed document. Although the discussion of the appealability issue in the text assumes that *Dworsky* applies to the appealability of orders requiring the return of documents that had already been produced in discovery in addition to orders denying requests for discovery, we do not wish to be understood as having decided this issue and have only assumed *Dworsky's* applicability to such situations for purposes of discussion.

pages of a single memo in its appeal to this Court. According to Plaintiff, the trial court's order that Plaintiff return the memo in question affects a substantial right because the memo establishes that, "despite [Defendant's] actual and constructive knowledge that PrimeTrim was defective," Defendant "continued to distribute and market PrimeTrim" after Defendant "was aware, or in the exercise of ordinary care should have known, that PrimeTrim posed a substantial risk of harm to a reasonably foreseeable user or consumer[.]" As a result, Plaintiff asserts that, "[i]n general terms, the [trial court's order] meets the first, materiality requirement for allowing this interlocutory appeal, as set forth in *Dworsky*" on the grounds that the memo "establishes what [Defendant's] employees, outside product testers, and experts knew about the adequacy of the PrimeTrim product and when they knew it."

In addition, Plaintiff argues that "[t]his appeal satisfies the second *Dworsky* element" because "[d]elay of trial would not have resulted from either ruling by the trial court in March, 2009 because [Plaintiff's] causes of action against [Defendant] in this action have been and, as of the filing of this brief, remain, stayed by the trial court since November, 2008[5] pending [Defendant's] interlocutory appeal of the Order Denying Arbitration." "[A]lternatively, [Plaintiff argues that it] could have completed the depositions sought through its motions for commissions to take depositions during the nine (9) months which have elapsed since [the] hearing [concerning Defendant's] Recall Motion and while the parties have otherwise been awaiting an outcome of [Defendant's] interlocutory appeal in" *Harbour Point I*. Plaintiff also argues that "[a]llowing retention of [the memo] would have prevented the need to conduct voluminous depositions, likely in several other states, seeking to establish the very information conclusively established in these two (2) pages." Finally, Plaintiff argues that "allowing the requested commissions to take depositions would have resulted in no additional annoyance, embarrassment, oppression, or undue burden or expense to [Defendant], because these depositions will need to be taken eventually in the event that the document recall portion of the [trial court's order] is, *arguendo*, upheld by this Court on appeal. As a result, Plaintiff contends that it has satisfied both prongs of the *Dworsky* test. We disagree.

A careful reading of *Dworsky* indicates that this Court's opinion in that case did not state that mere "materiality" was the standard

5. Pending issuance of this Court's mandate in COA09-527 on January 25, 2010 (footnote in the original quotation).

that a party had to meet in order to obtain immediate review of an interlocutory discovery order. Instead, *Dworsky* stated that denial of a discovery motion could affect a substantial right if "the information desired is highly material to a determination of the critical question to be resolved in the case[.]" *Dworsky*, 49 N.C. App. at 448, 271 S.E.2d at 523 (emphasis added). Thus, in order to meet the "materiality" prong of the *Dworsky* test, Plaintiff must establish that the memo in question is "highly material" to the "critical question to be resolved in the case."

Although Plaintiff contends that the memo shows that Defendant knew of the existence of defects in PrimeTrim prior to its installation at Harbour Point and that this fact establishes the memo's materiality under the *Dworsky* test, we are simply not persuaded by Plaintiff's argument. The disputed document consists of two pages from a four page memo[6] which was provided to counsel for Defendant and to certain of Defendant's employees. The memo generally tends to show that, in 1998, a university professor in the field of wood science made six written comments about characteristics of PrimeTrim, the appropriate use of PrimeTrim, and suggestions for improving PrimeTrim. His comments are presented as general conclusions, each of which is followed by a brief response from one of Defendant's employees, most of which are in basic agreement with the relevant comment by the professor. In assessing the importance of the memo to Plaintiff's claims, it is significant that the memo:

1. Does not include any information about the professor's background or qualifications;

2. Does not identify the field or fields, if any, in which the professor might be qualified as an expert;

3. States the professor's opinions in conclusory form, without providing any supporting facts;

4. Does not include any information about the basis for the professor's opinions; for example, there is no indication as to whether his opinions were based on his discussions with others, his review of academic literature, any testing of PrimeTrim samples he or others may have performed, or some other source of information;

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6. The discussion of the document that lies at the heart of the present dispute in the text is couched in very general terms in order to avoid disclosure of information that the trial court deemed protected.

5. Does not include (assuming that the professor based his opinions on testing performed on PrimeTrim samples, to a greater or lesser extent), any information as to:

a. The size and number of PrimeTrim samples that were tested;

b. Whether the samples had the same composition as the PrimeTrim used at Harbour Point;

c. What tests were performed; or

d. The results of these tests.

Thus, the memo contains the opinions of a university professor in the field of wood science, unsupported by factual information concerning his qualifications, the basis for his opinions, the literature he reviewed, the testing he conducted, or the results of any such testing.[7] We conclude that, because the memo contains only conclusory statements of opinion, it does not "establish[] what [Defendant's] employees, outside product testers, and experts knew about the adequacy of the PrimeTrim product and when they knew it."

In addition, as we have already discussed, Plaintiff has asserted the following claims against Defendant: (1) breach of express warranty; (2) an alternative claim that Plaintiff is a third-party beneficiary of Defendant's PrimeTrim warranty; (3) a negligence claim; and (4) a product liability claim brought pursuant to N.C. Gen. Stat. § 99B-1 *et. seq.*[8] A claim for breach of express warranty pursuant to N.C. Gen. Stat. § 25-2-313 requires proof of "(1) an express warranty as to a fact or promise relating to the goods, (2) which was relied upon by the plaintiff in making his decision to purchase, (3) and that this express warranty was breached by the defendant." *Hall v. T.L. Kemp Jewelry, Inc.*, 71 N.C. App. 101, 104, 322 S.E.2d 7, 10 (1984) (citing *Pake v. Byrd*, 55 N.C. App. 551, 286 S.E.2d 588 (1982).[9] A claim for breach

7. In addition to the informational deficiencies cited in the text, Plaintiff has not directed us to other documents in the record that reference the memo and supply this information.

8. Plaintiff's claim against Defendant pursuant to N.C. Gen. Stat. § 99B-1 *et seq.* is, in reality, a claim for breach of the implied warranties of merchantability and fitness for a particular purpose.

9. Plaintiff's third party beneficiary claim is simply an alternative method of attempting to hold Defendant liable under the express warranty that Defendant provided in connection with sales of PrimeTrim. *Michael v. Huffman Oil Co., Inc.*, 190 N.C. App. 256, 269, 661 S.E.2d 1, 10 (2008), *disc. review denied*, 363 N.C. 129, 673 S.E.2d 360 (2009) (stating that, "[i]n order to assert rights under a contract as third-

of the implied warranty of merchantability pursuant to N.C. Gen. Stat. § 25-2-314 requires a plaintiff to prove "first, that the goods bought and sold were subject to an implied warranty of merchantability; second, that the goods did not comply with the warranty in that the goods were defective at the time of sale; third, that his injury was due to the defective nature of the goods; and fourth, that damages were suffered as a result." *Cockerham v. Ward*, 44 N.C. App. 615, 624-25, 262 S.E.2d 651, 658 (1980) (citing *Tennessee-Carolina Transportation, Inc. v. Strick Crop.*, 286 N.C. 235, 210 S.E.2d 181 (1974), and *Burbage v. Atlantic Mobilehome Suppliers Corp.*, 21 N.C. App. 615, 205 S.E.2d 622 (1974). Similarly, a claim for breach of the implied warranty of fitness for a particular purpose requires proof that "the seller at the time of contracting ha[d] reason to know of any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods[.]" N.C. Gen. Stat. § 25-2-315. Finally, "the essential elements of a suit for products liability" sounding in negligence that require proof are "a standard of care owed by the reasonably prudent person in similar circumstances," "breach of that standard of care," "injury caused directly or proximately by the breach," and "loss because of the injury." *Warren v. Colombo*, 93 N.C. App. 92, 96, 377 S.E.2d 249, 252 (1989). Although evidence that Defendant knew that PrimeTrim had defects prior to its installation at Harbour Point might assist in establishing Plaintiff's claims based in negligence and implied warranty, nothing in our review of the elements of the claims that Plaintiff has asserted against Defendant indicates that such prior knowledge is essential to the successful assertion of any of those claims. Simply put, Plaintiff has failed to identify the claim or claims with respect to which it is "critical" to establish "what [Defendant's] employees . . . knew about the adequacy of the PrimeTrim product and when they knew it" and we have not identified any such claims during the course of our own research. Finally, assuming that such knowledge is "the critical question" with respect to one or more of Plaintiff's claims against Defendant, we conclude that the memo at issue would not contribute significantly to determination of the issue. As a result, for all of these reasons, we conclude that the memo addressed in the trial court's order does not contain information that is "highly material to a determination of the critical question to be resolved in the case[,]"

party beneficiaries, plaintiffs must show: '(1) that a contract exists between two persons or entities; (2) that the contract is valid and enforceable; and (3) that the contract was executed for the direct, and not incidental, benefit of the [third party]' ") (quoting *Spaulding v. Honeywell Int'l, Inc.*, 184 N.C. App. 317, 325, 646 S.E.2d 645, 651, *disc. review denied*, 361 N.C. 696, 654 S.E.2d 482 (2007).

Dworsky, 49 N.C. App. at 448, 271 S.E.2d at 523, and that the order directing Plaintiff to return the memo to Defendant did not implicate a "substantial right" that will be lost absent immediate review.[10] Thus, Plaintiff is not entitled to an immediate appeal as of right from the trial court's order.

D. Alternative Request for Certiorari Review

Finally, Plaintiff requests "this Court to treat its appeal as a petition for *certiorari* pursuant to Rules 2 and 21 of the North Carolina Rules of [Appellate] Procedure." N.C.R. App. P. 21 provides, in pertinent part, that a "writ of *certiorari* may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when . . . no right of appeal from an interlocutory order exists." According to N.C.R. App. P. 21:

> (b) Application for the writ of *certiorari* shall be made by filing a petition therefor with the clerk of the court of the appellate division to which appeal of right might lie from a final judgment[.]
>
> (c) . . . The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. . . . The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order, or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition.

Plaintiff has not complied with the procedural provisions of N.C. App. P. 21, *see Rauch v. Urgent Care Pharm., Inc.*, 178 N.C. App. 510, 515, 632 S.E.2d 211, 216 (2006), and has not offered any explanation for its failure to do so. Instead, Plaintiff cites N.C. R. App. P. 2, which provides that, "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative[.]" However:

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10. Plaintiff also "directs the Court to and incorporates herein, its additional materiality arguments reflected in the sealed, *in camera* portions of the trial court hearing transcript from March 6, 2009." We have carefully reviewed the transcript to which Plaintiff has directed our attention and conclude that it does not provide any support for Plaintiff's appealability argument over and above that contained in the relevant portions of Plaintiff's brief.

> Rule 2 must be applied cautiously . . . [and] relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances.'

State v. Hart, 361 N.C. 309, 315-16, 644 S.E.2d 201, 205 (2007) (quoting *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999)). Although we have the authority, in the exercise of our discretion, to treat the record on appeal and briefs as a petition for writ of certiorari pursuant to N.C. R. App. P. 21, to grant the petition, and to review the Plaintiff's challenge to the trial court's order on the merits, see *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) (holding "that 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"), we elect not to exercise our discretion in this fashion in this case given the general policy against the piecemeal review of interlocutory orders enunciated in *Veazey* and the absence of any compelling reason to depart from our general policy of declining to grant *certiorari* in order to entertain such appeals in this case. As a result, we conclude that Plaintiff's alternative request for *certiorari* review of its challenge to the trial court's order should be denied.

E. Other Issues

[2] Plaintiff also argues on appeal that (1) the memo that was the subject of the trial court's order is not protected by attorney-client privilege or work product privilege; (2) Defendant waived any privileges that might be applicable to the memo; and (3) the trial court erred by failing to rule that Plaintiff was entitled to discovery of the memo under N.C. Gen. Stat. § 1A-1, Rule 26(b). However, as we have concluded that the trial court's order is not subject to immediate review, we do not reach these issues. In addition, Plaintiff argues that the trial court erred by denying its motion for the issuance of an order allowing it to take depositions during the pendency of Defendant's appeal from the denial of its motion to compel arbitration. However, this Court issued its opinion in that appeal on 5 January 2010[11] and the Supreme Court declined to allow further review of our decision on 16 June 2010. Accordingly, the issue of

11. N.C. R. App. P. 32(b) provides, in pertinent part, that the "clerk shall enter judgment and issue the mandate of the court twenty days after the written opinion of the court has been filed with the clerk." Accordingly, the mandate in *Harbour Point I* issued on 26 January 2010.

whether the trial court should have allowed Plaintiff to depose witnesses during the pendency of *Harbour Point I* is now moot and need not be addressed further.

III. Conclusion

As a result, for the reasons discussed above, we conclude that Plaintiff is not entitled to immediate review of the trial court's order; that we will not, in the exercise of our discretion, grant Plaintiff's alternative request for the issuance of a writ of *certiorari* to permit review of the trial court's order; and, given that this Court has now issued its opinion in *Harbour Point I* and that the Supreme Court has refused to review our decision in that case, Plaintiff's challenge to the trial court's refusal to issue commissions authorizing Plaintiff to depose certain witnesses during the pendency of Defendant's earlier appeal is now moot. Thus, Plaintiff's appeal should be, and hereby is, dismissed.

DISMISSED.

Chief Judge MARTIN and Judge JACKSON concur.

WILLIAM P. MILLER, AS RECEIVER FOR ROSE FURNITURE COMPANY, PLAINTIFF V. FIRST BANK AND E. F. MERRELL COMPANY, L.L.C., DEFENDANTS

FIRST BANK, THIRD-PARTY PLAINTIFF V. ROBERT L. KESTER, WILLIAM V. KESTER, JR. AND EDGAR F. MERRELL, THIRD-PARTY DEFENDANTS

No. COA09-607

(Filed 3 August 2010)

Fraud— fraudulent payments—loan to third parties

The trial court did not err by entering summary judgment for First Bank on a claim by a receiver for constructive fraudulent payments where E.F. Merrell borrowed money for its furniture business, the loans were made to individuals, the payments were made by E.F. Merrell, the business of E.F. Merrell declined and funds were transferred from Rose Furniture so that E.F. Merrell could make the payments, and some of the individuals eventually finished making the payments.

MILLER v. FIRST BANK

[206 N.C. App. 166 (2010)]

Appeal by plaintiff from order entered 2 March 2009 by Judge Cressie Thigpen, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 4 November 2009.

Roberson Haworth & Reese, P.L.L.C., by James C. Lanik and Christopher C. Finan, for plaintiff-appellant.

Smith Moore Leatherwood LLP, by Bruce P. Ashley and Patrick M. Kane, for defendant-appellee First Bank.

GEER, Judge.

William P. Miller, as the Receiver for Rose Furniture Company ("Rose Furniture"), filed this action seeking to void payments made by E. F. Merrell Company, L.L.C. ("E. F. Merrell")—with money received from Rose Furniture—to First Bank to reduce the debt on a loan made by First Bank to the third-party defendants, Robert L. Kester, William V. Kester, Jr., and Edgar F. Merrell. The Receiver contends that the E. F. Merrell payments were constructively fraudulent under the Uniform Fraudulent Transfer Act, N.C. Gen. Stat. §§ 39-23.1 through 39-23.12 (2009) ("UFTA"). We hold that the payments made by E. F. Merrell to First Bank were in exchange for reasonably equivalent value given that the proceeds of the loan had been used solely by E. F. Merrell. Therefore, the payments were not constructively fraudulent, and we affirm the trial court's grant of summary judgment in First Bank's favor.

Facts

E. F. Merrell is a limited liability company established by Robert Kester, his brother William Kester, Jr., and Edgar Merrell. The Kesters and Edgar Merrell are the only current members of E. F. Merrell. Eileen Addis was originally a member of E. F. Merrell, but she withdrew from the company in 2002. E. F. Merrell began operating on 14 February 1996. The purpose of the company was to engage in a high end retail furniture business that would supplement the business of Rose Furniture. Rose Furniture has never been a member of E. F. Merrell, but Robert Kester has at all relevant times been an officer of Rose Furniture.

In 1998, E. F. Merrell was solicited by a local director of First Bank to move its banking business from High Point Bank to First Bank. That year, First Bank made a loan of $1,500,000.00 ("the 1998 loan") to the Kesters and Edgar Merrell as individuals. Joseph Youngblood, Senior Vice President/Area Executive for First Bank,

submitted an affidavit stating that although the 1998 loan was intended for use in E. F. Merrell's business, the Kesters and Edgar Merrell obtained the loan in their individual names for tax reasons. Robert Kester, on the other hand, submitted an affidavit stating that the three men intended that the loan would be made to E. F. Merrell with them as guarantors.

As part of the loan process, First Bank required that E. F. Merrell open bank accounts with First Bank, which E. F. Merrell did in 1998. All of the proceeds from the 1998 loan were deposited on 2 September 1998 directly into E. F. Merrell's money market account with First Bank. Most of the loan proceeds ($1,272,700.91) were used to pay off an existing loan to E. F. Merrell from High Point Bank. The rest of the funds were used by E. F. Merrell in its business operations.

E. F. Merrell made the regularly scheduled monthly payments on the 1998 loan beginning in October 1998 and continuing through February 2000. Robert Kester stated in his affidavit that E. F. Merrell made the payments because "the purpose of the loan was for use in E.F. Merrell's business; the proceeds from the loan were, in fact, used by E.F. Merrell to pay off its existing loan from High Point Bank and Trust; E.F. Merrell received the benefit of the loan, and we thought the loan had been made to E.F. Merrell, as borrower." Joseph Youngblood also stated in his affidavit that First Bank expected E. F. Merrell to make the payments because "the loan funds went to E. F. Merrell and were supposed to be used for E. F. Merrell's business activities."

In February 2000, First Bank made another loan in the amount of $1,566,869.00 ("the 2000 loan") for E. F. Merrell to use in its business. While Robert Kester again believed the loan was being made to E. F. Merrell with his brother, Edgar Merrell, and him as guarantors, Joseph Youngblood said the loan was made to the three men individually. Eileen Addis was also named as a borrower on the 2000 loan. First Bank issued three checks to fund this loan. Two of these checks, totaling $1,364,577.27, were used to pay off the 1998 loan from First Bank. The third check, in the amount of $202,291.73, was deposited in E. F. Merrell's operating account with First Bank on 29 February 2000.

As with the 1998 loan, E. F. Merrell made the regularly scheduled monthly payments to First Bank on the 2000 loan. According to Joseph Youngblood, First Bank expected E. F. Merrell to make these payments "since the purpose of the February 2000 loan was for E. F. Merrell's use in its business activities." Robert Kester stated that E. F.

Merrell, on its tax returns and other financial statements, treated both loans and the obligation to repay those loans as if the loans had been made to E. F. Merrell.

The 2000 loan was modified in February 2002 to remove Eileen Addis from the 2000 note when she left the company. In December 2002, the third party defendants renegotiated the 2000 note. Neither of these modifications led to any additional money being loaned, and they did not alter the amount of monthly payments on the 2000 loan.

A forensic accounting investigation of E. F. Merrell's books found that by 2002, E. F. Merrell was "losing money hand over fist" and missing inventory. Russell Taylor, the Controller of Rose Furniture, testified that in 2002 or 2003, the South Carolina operation of E. F. Merrell was shut down, but because there were monetary and tax incentives to keep the company alive, E. F. Merrell began operating out of the same store as Rose Furniture Clearance, a subsidiary of Rose Furniture. Some sales were allocated to E. F. Merrell and some were allocated to Rose Furniture Clearance, but all of the furniture sold belonged to Rose Furniture Clearance. At this time, E. F. Merrell owed money to both Rose Furniture and Rose Furniture Clearance.

During this period, the regularly scheduled payments on the 2000 loan in the amount of $19,630.78 remained unchanged and continued to be made by E. F. Merrell. Beginning in 2003, Rose Furniture started transferring funds to E. F. Merrell on a monthly basis. Each of those transfers to E. F. Merrell occurred just before E. F. Merrell made the monthly payments to First Bank. Rose Furniture made the transfers to E. F. Merrell so that E. F. Merrell could make the loan payment to First Bank since E. F. Merrell did not have the funds available to make the payments. This process continued until December 2006. In 2007, the Kesters individually began making the remaining payments on the loan. As of November 2007, the loan balance had been reduced to zero.

William Miller was subsequently appointed as the Receiver for Rose Furniture in separate litigation. The Receiver filed suit against First Bank and E. F. Merrell on 29 May 2008, alleging fraudulent transfers, constructive trust, and unjust enrichment. On 28 July 2008, defendants filed an answer and asserted third party claims against the Kesters and Edgar Merrell that are unrelated to this appeal.

On 20 January 2009, First Bank moved for summary judgment, and on 30 January 2009, the Receiver cross-moved for summary judg-

ment. On 2 February 2009, the Receiver dismissed all claims against E. F. Merrell and dismissed all claims against First Bank except for the claim for fraudulent transfers. On 2 March 2009, the trial court denied the Receiver's motion for summary judgment and granted First Bank's motion for summary judgment. The Receiver timely appealed to this Court.

Discussion

The sole issue raised by this appeal is whether the trial court erred in granting summary judgment to First Bank on the Receiver's claim for fraudulent transfers under the UFTA. "On appeal, an order allowing summary judgment is reviewed *de novo*." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). The Court must determine " '(1) whether there is a genuine issue of material fact and (2) whether the movant is entitled to judgment as a matter of law.' " *McCoy v. Coker*, 174 N.C. App. 311, 313, 620 S.E.2d 691, 693 (2005) (quoting *NationsBank v. Parker*, 140 N.C. App. 106, 109, 535 S.E.2d 597, 599 (2000)).

N.C. Gen. Stat. § 39-23.5(a), part of the UFTA, provides:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation *without receiving a reasonably equivalent value in exchange for the transfer* or obligation, and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(Emphasis added.) Pursuant to N.C. Gen. Stat. § 39-23.7(a)(1), a creditor who establishes the existence of a fraudulent transfer may obtain "[a]voidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim[.]" Further, "the creditor may recover judgment for the value of the asset transferred . . . or the amount necessary to satisfy the creditor's claim, whichever is less." N.C. Gen. Stat. § 39-23.8(b). There is no claim of actual fraud in this case, only an allegation of constructive fraud.

In order to establish that the transfers made from E. F. Merrell to First Bank were constructively fraudulent, the Receiver must show that (1) its claim arose before the transfers were made, (2) E. F. Merrell made the transfers without receiving a reasonably equivalent value in exchange, and (3) E. F. Merrell was insolvent at the time. The parties only dispute the second of these requirements: whether E. F.

Merrell received reasonably equivalent value in exchange for the transfers. The Receiver argues that because E. F. Merrell was making payments to First Bank to reduce the debt on the loan from First Bank to the Kester brothers and Edgar Merrell, E. F. Merrell did not receive reasonably equivalent value in return for those payments.

Although the North Carolina courts have not yet addressed this issue, the Official Comments to the UFTA provide some initial guidance as to the intent of the General Assembly. "[T]he commentary to a statutory provision can be helpful in some cases in discerning legislative intent." *Parsons v. Jefferson-Pilot Corp.*, 333 N.C. 420, 425, 426 S.E.2d 685, 689 (1993). Here, although the Official Comments to the UFTA were not enacted into law, they were included with the printing of the statute and are, therefore, relevant in construing the intent of the statute. *See also Rentenbach Constructors, Inc. v. CM P'ship*, 181 N.C. App. 268, 271, 639 S.E.2d 16, 18 (2007) (holding that although Official Comment to section of Uniform Commercial Code was not binding because it was not enacted into law, it could be used to ascertain legislative intent since it was printed with statute).

The Official Comment included with N.C. Gen. Stat. § 39-23.6 provides:

> The debtor may receive reasonably equivalent value in exchange for an obligation incurred even though the benefit to the debtor is indirect. *See Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d [979, 991-92 (2d Cir. 1981)]. . . .

Because *Rubin* is cited in the Official Comment to § 39-23.6, we use it as the starting point for our analysis.

In *Rubin*, 661 F.2d at 991, the Second Circuit, in addressing fraudulent conveyances under § 67(d) of the Bankruptcy Act, explained the indirect benefit rule referenced in the Official Comment to N.C. Gen. Stat. § 32-23.6. Under § 67(d), even if a debtor transferred property or incurred an obligation within one year of filing for bankruptcy, the trustee could not set aside the transaction if the debtor received "fair" consideration for his property or obligation. 661 F.2d at 991. Consideration was considered "fair" " '(1) when, in good faith, in exchange and as a fair equivalent therefor, property [was] transferred or an antecedent debt [was] satisfied, or (2) when such property or obligation [was] received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property or obligation obtained.' " *Id.* (quoting 11 U.S.C. § 107(d)(1)(e)).

The Second Circuit recognized that "special difficulties" are presented when, as in this case, the transaction is "[t]hree-sided." *Id.* The Court explained:

> On its face, the statute appears to sanction, as supported by "fair" consideration, a transaction in which the debtor transfers property or incurs an obligation as security for the debt of a third person, provided that the debt is "not disproportionately small" in comparison to that property or obligation. Nonetheless, if the debt secured by the transaction is not the debtor's own, then his giving of security will deplete his estate without bringing in a corresponding value from which his creditors can benefit, and his creditors will suffer just as they would if the debtor had simply made a gift of his property or obligation. Accordingly, courts have long recognized that "[t]ransfers made to benefit third parties are clearly not made for a 'fair' consideration," and, similarly, that "a conveyance by a corporation for the benefit of an affiliate [should not] be regarded as given for fair consideration as to the creditors of the conveying corporations."

Id. (quoting 4 Collier on Bankruptcy ¶ 67.33 at 514.1-14.2 (14th ed. 1978)).

On the other hand, the Court continued:

> The cases recognize . . . that a debtor may sometimes receive "fair" consideration even though the consideration given for his property or obligation goes initially to a third person. As we have recently stated, although "transfers *solely* for the benefit of third parties do not furnish fair consideration" under § 67(d)(1)(e), the transaction's benefit to the debtor "need not be direct; it may come indirectly through benefit to a third person."

Id. (quoting *Klein v. Tabatchnick*, 610 F.2d 1043, 1047 (2d Cir. 1979)). The Court reasoned:

> If the consideration given to the third person has ultimately landed in the debtor's hands, or if the giving of the consideration to the third person otherwise confers an economic benefit upon the debtor, then the debtor's net worth has been preserved, and § 67(d) has been satisfied—provided, of course, that the value of the benefit received by the debtor approximates the value of the property or obligation he has given up.

Id. at 991-92.

The Court then cited as examples cases in which "fair consideration [was] found for an individual debtor's repayment of loans made to a corporation, where the corporation had served merely as a conduit for transferring the loan proceeds to him." *Id.* at 992. It also discussed cases holding that fair consideration existed "where the debtor's discharge of a third person's debt also discharges his own debt to that third person," as well as in "multi-party transactions of greater intricacy. . . ." *Id.* The Court explained that "[i]n each of these situations, the net effect of the transaction on the debtor's estate is demonstrably insignificant, for he has received, albeit indirectly, either an asset or the discharge of a debt worth approximately as much as the property he has given up or the obligation he has incurred." *Id.*

The Fourth Circuit applied the indirect benefit rule in *In re Jeffrey Bigelow Design Group, Inc.*, 956 F.2d 479, 485 (4th Cir. 1992), holding that a company received reasonably equivalent value when the company received the proceeds of a loan made in the name of the owner of the company, but the company repaid the loan directly. In *Bigelow*, the First American Bank of Maryland issued a line of credit to Donatelli & Klein, Inc., which owned 50% of the stock of the debtor company. *Id.* at 480-81. Although Donatelli & Klein was the maker of the line of credit, only the debtor company received the draws on the line of credit (ultimately amounting to $1,000,000.00), and all payments were made directly by the debtor company to First American. *Id.* at 481. The debtor company executed a note for $1,000,000.00 to Donatelli & Klein in the same amount as the line of credit and with the same terms as the line of credit. *Id.* As the debtor company made direct payments to First American, its liability on the note to Donatelli & Klein decreased. *Id.*

Subsequently, however, Donatelli & Klein executed another note to First American establishing a second line of credit that was also used for the benefit of the debtor company. *Id.* Throughout 1986 and 1987, the debtor company drew on both lines of credit and sent the payments directly to First American even though the company had no direct obligation to First American. *Id.* Ultimately, the debtor company filed a bankruptcy petition, and the trustee filed a complaint seeking to recover the payments from the debtor company to First American, contending the payments were fraudulent transfers. *Id.*

The trustee argued that the debtor company, who had no contractual obligation to First American, obtained nothing in exchange for its payments to the bank and, therefore, did not receive reason-

ably equivalent value. *Id.* at 484-85. The Fourth Circuit rejected that argument, explaining that "[i]t is well settled that reasonably equivalent value can come from one other than the recipient of the payments, a rule which has become known as the indirect benefit rule." *Id.* at 485. The Court explained that " '[a] debtor may sometimes receive "fair" consideration even though the consideration given for his property or obligation goes initially to a third person. . . .' " *Id.* (quoting *Rubin*, 661 F.2d at 991-92). The Court stressed that "the focus is whether the net effect of the transaction has depleted the bankruptcy estate." *Id.*

The Court then held:

> It seems apparent that the transfers have not resulted in the depletion of the bankruptcy estate. The transfers by the debtor served simply as repayment for money received. Other creditors should not be able to complain when the bankruptcy estate has received all of the money which it is obligated to repay. Otherwise, the creditors would receive not only the benefit of the money received from the draws on the lines of credit, but also the windfall of avoided transfers designed to repay the draws. In essence, the estate, and hence the unsecured creditors, would be paid twice. Consequently, we hold that no fraudulent transfer occurred.

Id.

The Receiver attempts to distinguish *Bigelow* on the basis that the debtor company executed a note to Donatelli & Klein in the same amount as the line of credit, and, therefore, as the debtor company made payments to First American, its liability on the note to Donatelli & Klein decreased. The Receiver has, however, overlooked the fact that there were two lines of credit issued for the benefit of the debtor company, and the debtor company only issued a note back to Donatelli & Klein on one of those lines. *Bigelow* is materially indistinguishable from this case with respect to the second line of credit.

The Ninth Circuit followed the reasoning of *Bigelow* in *In re Northern Merchandise, Inc.*, 371 F.3d 1056, 1059 (9th Cir. 2004). The debtor company in *Northern Merchandise* wanted a loan for working capital, but the bank refused to make a loan to the debtor company, instead offering to lend the needed money, $150,000.00, to the debtor company's individual shareholders. *Id.* at 1057. The bank understood that the shareholders would allow the debtor company to use the loan proceeds to fund its operations, and the loan was structured so

that the proceeds were deposited directly into the debtor company's banking account. *Id.* The transaction, however, was documented as a loan to the shareholders. *Id.* at 1057-58. On the same day that the shareholders entered into the loan with the bank, the debtor company executed a commercial security agreement giving the bank a security interest in its inventory, chattel paper, accounts, equipment, and general intangibles. *Id.* at 1058.

Several months later, the debtor company went out of business leaving $875,000.00 in unsecured debt. At that time, the debtor company had approximately $400,000.00 worth of inventory that it transferred to Benjamin News Group, a company owned by its shareholder Paul Benjamin, for $125,000.00. *Id.* Benjamin News Group paid the $125,000.00 to the bank, rather than the debtor company, as repayment for the loan. *Id.*

Creditors of the debtor company filed an involuntary Chapter 7 petition against the debtor company, and the trustee filed a complaint against the bank, arguing that the grant of the security interest and the $125,000.00 transfer were fraudulent conveyances. *Id.* On appeal, the bank argued that the bankruptcy court erred in finding a fraudulent conveyance because the debtor company received reasonably equivalent value for the transfers. *Id.* The Ninth Circuit, citing *Bigelow*, agreed, holding:

> Although Debtor was not a party to the October loan, it clearly received a benefit from that loan. In fact, [the bank] deposited the $150,000 proceeds of the October Loan directly into Debtor's checking account. Because Debtor benefited [sic] from the October Loan in the amount of $150,000, its grant of a security interest to [the bank] to secure Shareholder's indebtedness on that loan, which totaled $150,000, resulted in no net loss to Debtor's estate nor the funds available to the unsecured creditors. To hold otherwise would result in an unintended $150,000 windfall to Debtor's estate. Accordingly, Debtor received reasonably equivalent value in exchange for the security interest it granted to [the bank].

Id. at 1059.

In sum, in *Bigelow*, the debtor company's owner obtained a loan from the bank in the owner's name, but the debtor company received all the loan proceeds and repaid the loan to the bank directly. The Fourth Circuit held the debtor company received reasonably equivalent value because it had received the proceeds of the loan and its

repayments reduced that debt. In *Northern Merchandise*, the company's shareholders obtained a loan from the bank in their name, but the loan proceeds went directly to the company, and the company granted the bank a security interest in its corporate assets and paid $125,000.00 to the bank in repayment of the loan. The Ninth Circuit held that because the company benefitted from the loan even though it was not in the company's name, it received reasonably equivalent value in exchange for the security interest and $125,000.00 it transferred to the bank. Here, the third party defendants obtained the loan from the bank, but E. F. Merrell received the loan proceeds and made the repayments on the loan. Since the facts parallel those in *Bigelow* and *Northern Merchandise*, we think this is a case in which the indirect benefit rule should apply.

The Receiver argues, however, that this Court should focus on whether *at the time of the transfer of funds by the debtor*, the debtor received reasonably equivalent value in exchange. He contends that "[t]he record is devoid of any evidence that E. F. Merrell received any property or any other benefit from First Bank contemporaneously with any of the 32 transfers." This view is, however, contrary to the approach followed in the cases above. Their emphasis is not on whether value was received contemporaneously with the transfer, but on the net effect on the debtor's estate. *See*, *e.g.*, *Rubin*, 661 F.2d at 992 ("In each of these situations, the net effect of the transaction on the debtor's estate is demonstrably insignificant, for he has received, albeit indirectly, either an asset or the discharge of a debt worth approximately as much as the property he has given up or the obligation he has incurred."); *Bigelow*, 956 F.2d at 485 (stressing that "the focus is whether the net effect of the transaction has depleted the bankruptcy estate"); *Northern Merchandise*, 371 F.3d at 1059 ("[T]he primary focus . . . is on the net effect of the transaction on the debtor's estate and the funds available to the unsecured creditors."). Here, the Receiver has shown no net loss to the estate—the only reason the estate was at its existing level was because it received the loan proceeds in the first place.

In support of his position, the Receiver primarily relies on two cases from the federal bankruptcy courts: *In re Whaley*, 229 B.R. 767 (Bankr. D. Minn. 1999), and *In re Fox Bean Co.*, 287 B.R. 270 (Bankr. D. Idaho 2002), *aff'd*, 144 Fed. Appx. 697 (9th Cir. 2005). In *Whaley*, 229 B.R. at 770-71, the debtor used his funds to pay a credit card bill in the name of his girlfriend. The court held that the debtor had not received reasonably equivalent value in exchange for those pay-

ments, explaining that "[a] payment made *solely* for the benefit of a third party, such as a payment to satisfy a third party's debt, does not furnish reasonably-equivalent value to the debtor." *Id.* at 775. The court rejected the argument that "[t]he easing of personal strain that had resulted from the existence of the debt" or "the more general promotion of love, affection, or other personal tie" could constitute reasonable equivalent value. *Id.*

It also rejected the contention that the debtor received economic benefit from the expenditures funded by the original extension of credit, explaining that "the inquiry on reasonable equivalence goes solely to the exchange that included the subject transfer." *Id.* at 776. "[T]hat was the *satisfaction* of the debt, and not to any earlier transaction that may have created it." *Id.* "Because the Debtor was not liable on the debt, he received no direct or indirect benefit from its satisfaction." *Id.*

In *Fox Bean Co.*, 287 B.R. at 273-74, the other case cited by the Receiver, Mr. Fox, the sole proprietor of a bean trading business, opened a bank account and established a line of credit secured by a promissory note in his name that he used to fund his business. He subsequently incorporated his business as Fox Bean Company, Inc. *Id.* at 274. When the business suffered due to an uncollectible receivable, Mr. Fox authorized the bank to apply company funds to pay the note that had originally funded the business, but which was in Mr. Fox's name personally. *Id.* at 275. The company then filed for bankruptcy, and the trustee sought to recover the funds paid on the note. *Id.*

The bankruptcy court held that the trustee could avoid the transfer as constructively fraudulent, explaining:

> In this case, the Court finds Debtor received nothing of value in exchange for the March 14 transfer of funds that paid off the Fox note to Defendant. Viewed simply, Debtor's funds were used to pay off the debt of another entity. Further, testimony from the loan officer supervising collection of both the Fox note and Debtor's loan, and a review of the loan documents, confirm Debtor was not legally obligated to pay the loan, nor were any corporate assets used to secure the Fox note. In other words, when the Fox note was paid, Debtor received no benefit by having liens on corporate assets satisfied. Nothing in the record indicates that Debtor benefitted in any way, directly or indirectly,

> from the transfer. The Court concludes that Debtor received less than a reasonably equivalent value in exchange for such transfer.

Id. at 281-82 (internal citations omitted).

While *Whaley* and *Fox Bean Co.* support the Receiver's position that we should look for a contemporaneous exchange of value for the transfer of funds, these cases are not controlling authority on the appellate courts of North Carolina. We find more persuasive the reasoning of the Second, Fourth, and Ninth Circuits to the contrary. We, therefore, adopt the reasoning of *Rubin*, *Bigelow*, and *Northern Merchandise* and hold that E. F. Merrell received reasonably equivalent value in exchange for its payments to First Bank.

The Receiver argues that even if E. F. Merrell received value in exchange for its transfers to First Bank, the trial court still erred in granting summary judgment because E. F. Merrell repaid over $200,000.00 more than the original loan proceeds, creating an issue of fact as to whether the value received was reasonably equivalent. Whether the value received is reasonably equivalent is often a question of fact. *See*, *e.g.*, *In re Image Worldwide, Ltd.*, 139 F.3d 574, 576 (7th Cir. 1998) ("Whether 'reasonably equivalent value' was received in a transaction is a question of fact."); *In re S. Health Care of Arkansas, Inc.*, 309 B.R. 314, 319 (B.A.P. 8th Cir. 2004) ("In the Eighth Circuit, the issue of whether a transfer is made for a reasonably equivalent value is a question of fact. . . .").

In *In re Erlewine*, 349 F.3d 205, 209 (5th Cir. 2003), however, the Fifth Circuit observed that although "the question of reasonable equivalence is usually a question of fact," "[c]ertain transactions, however, can give the debtor reasonably equivalent value as a matter of law." In this case, there is no dispute about the amount of the loan proceeds or the amount E. F. Merrell transferred to First Bank in repayment of the loans. The payments were the regularly scheduled monthly payments due to pay off the loan.

As First Bank points out, when paying off a loan, the borrower ends up paying more than originally borrowed as a result of interest due on the loan. The Receiver makes no argument that the amount of interest charged on the loans in this case was unreasonable and has cited no case requiring dollar-for-dollar equivalence. *See In re Fairchild Aircraft Corp.*, 6 F.3d 1119, 1125-26 (5th Cir. 1993) (holding "the debtor need not collect a dollar-for-dollar equivalent to receive reasonably equivalent value"). It is undisputed that E. F. Merrell had

the benefit of the loan proceeds for eight years on the first loan and six years on the second loan. The Receiver has presented no evidence that the use of the money for that period is insufficient to constitute reasonably equivalent value for the amount over and above the loan proceeds.

We, therefore, hold that there is no genuine issue of fact as to whether the value received was reasonably equivalent. Consequently, the trial court did not err in entering summary judgment in favor of First Bank.

Affirmed.

Judges ROBERT C. HUNTER and CALABRIA concur.

DONNA W. CROOK AND WILLIAM B. CROOK, PLAINTIFFS V. KRC MANAGEMENT CORPORATION, D/B/A KIMCO REALTY COMPANY AND KIR CARY LIMITED PARTNERSHIP, DEFENDANTS

No. COA09-936

(Filed 3 August 2010)

Judges— order impermissibly overruled prior discovery order—vacated

The superior court's 10 October 2008 order imposing monetary sanctions, ordering payment of attorney fees, striking defendants' answer, and entering judgment for plaintiffs in a negligence action was vacated and the matter was remanded for further proceedings. One judge may not modify, overrule, or change the judgment of another superior court judge previously made in the same action.

Appeal by defendants from orders entered 10 October 2008, 17 December 2008, and 29 January 2009 by Judge Orlando F. Hudson, Jr., in Wake County Superior Court. Heard in the Court of Appeals 25 January 2010.

Larcade & Heiskell, PLLC, by Jodee Sparkman Larcade and Margaret P. Eagles; and Smyth & Cioffi, LLP, by Theodore B. Smyth, for Plaintiffs-Appellees.

Nelson Mullins Riley & Scarborough LLP, by Charles H. Mercer, Jr.; Reed J. Hollander; and Joseph S. Dowdy, for Defendants-Appellants.

ERVIN, Judge.

Defendants KRC Management Corporation and KIR Cary Limited Partnership appeal from a series of orders imposing monetary sanctions, ordering payment of attorney fees, striking Defendants' answer, and entering judgment for Plaintiffs. After careful consideration of the trial court's orders in light of the record and the applicable law, we vacate the trial court's orders and remand this case to the trial court for further proceedings not inconsistent with this opinion.

I. Procedural History

On 25 October 2006, Plaintiffs Donna and William Crook filed a civil action against Defendants seeking an award of damages based on claims sounding in negligence and loss of consortium. In their complaint, Plaintiffs alleged that, at approximately 1:40 p.m. on 19 February 2006, they were lawfully on the premises of The Centrum, a shopping center located in Cary, North Carolina, that was owned by Defendants.[1] Plaintiffs parked near an Alltel™ store at which they planned to have a cellular telephone repaired. As Plaintiff Donna Crook was walking across the parking lot between her car and the Alltel™ store, she slipped on "black ice" and fell to the ground, sustaining severe injuries. The injuries that Plaintiff Donna Crook sustained deprived Plaintiff William Crook of Plaintiff Donna Crook's "marital services, society, affection, and companionship." According to Plaintiffs, Plaintiff Donna Crook's fall and resulting injuries were proximately caused by Defendants' negligence.

On 4 December 2006, Defendants filed a motion to dismiss and an answer. On 20 December 2006, Defendants filed another dismissal motion and an amended answer. In their responsive pleadings, Defendants denied the material allegations of Plaintiffs' complaint, asserted various affirmative defenses, and sought dismissal of Plaintiffs' complaint.

1. In their answer, Defendants admitted that the shopping center was owned by KIR Cary, but denied that KRC Management/KIMCO possessed any interest in the center.

On 19 February 2007, Plaintiffs served Defendants with a set of formal discovery requests that included interrogatories, a request for production of documents, and a request for admissions. On 23 April 2007, Defendants served responses to Plaintiffs' discovery requests. On 1 June 2007, Plaintiffs filed their first motion to compel discovery, in which they alleged that Defendants had failed to "make complete responses" to Plaintiffs' discovery requests. On 9 August 2007, Judge R. Allen Baddour, Jr., conducted a hearing concerning the issues raised by Plaintiffs' motion. On 23 August 2007, Judge Baddour entered an order that granted Plaintiffs' motion to compel discovery in part and denied Plaintiffs' motion to compel discovery in part, denied Defendants' motion to dismiss, and ordered each side to pay its own costs. Neither party sought review of Judge Baddour's order.

On 15 January 2008, Judge Michael R. Morgan entered an order allowing Defendants' existing counsel to withdraw and substituting new counsel for Defendants. On 14 August 2008, Plaintiffs served a second motion to compel discovery on Defendants' substitute counsel. Plaintiffs' 14 August 2008 motion sought the entry of an order requiring the production of certain documents allegedly requested in Plaintiffs' initial discovery requests and the payment of expenses associated with "obtaining the order to compel, including attorneys fees." On 29 August 2008, Defendants filed their own motion to compel discovery. On 24 September 2008, Plaintiffs filed an amended motion to compel and for sanctions which was intended as a substitute for the 14 August 2008 motion. In the 24 September 2008 motion, Plaintiffs sought discovery of two of the same items listed in the 14 August 2008 motion. In addition, Plaintiffs sought to compel production of documents allegedly requested in the initial discovery requests that were not mentioned in the 14 August 2008 motion and to depose an individual named Glenn Brettschneider. Plaintiffs also requested the imposition of sanctions, including "that the Defendants' answer to the Complaint be stricken, that Judgment be entered on behalf of Plaintiff[s] and for attorneys fees and costs associated with this motion." On 29 September 2008, Defendants filed an Opposition to Plaintiffs' Amended Motion to Compel and For Sanctions.

On 6 October 2008, the trial court conducted a hearing on Plaintiffs' amended motion to compel and for sanctions and on Defendants' motion to compel. On 10 October 2008, the trial court entered an order granting Plaintiffs' motion to compel and denying Defendants' motion to compel. According to the 10 October 2008

order, Defendants were required to "provide such documents as outlined in [Plaintiffs' motion to compel] to counsel for the Plaintiff on or before [16 October 2008];" to "make Glenn Brettschneider available for deposition at a mutually convenient time;" and to "pay attorneys fees and costs in connection with Plaintiffs' Motion to Compel in the amount of $3,850.00 to counsel for the Plaintiff[s] on or before" 16 October 2008.

On 16 October 2008, Defendants served a response to the 10 October 2008 order which included a check drawn to Plaintiffs' counsel in the amount of $3,850.00, various documents, information concerning the availability of other documents, and information concerning dates upon which Mr. Brettschneider could be deposed. On 23 October 2008, Plaintiffs filed a Motion for Sanctions in which Plaintiffs sought the entry of an "order sanctioning the Defendants and striking their Answer" on the grounds "that the Defendants have failed to comply with" the 10 October 2008 order. On 28 October 2008, Defendants filed an Opposition to Motion for Sanctions in which Defendants asserted that they had complied with the 10 October 2008 order. On 7 November 2008, Defendants filed a Motion for Sanctions in which they sought the imposition of sanctions against Plaintiffs based on Plaintiffs' refusal to withdraw their second sanctions motion.

On 1 December 2008, a hearing was conducted on Plaintiffs' 23 October 2008 motion for sanctions before the trial court. At this hearing, the parties presented their arguments to the trial court, supported by exhibits, regarding Defendants' compliance with the 10 October 2008 order. After the hearing, the trial court granted Plaintiffs' sanctions motion and ordered Defendants to produce various documents sought by Plaintiffs and to make an individual named Suzanne Anderson "available for deposition." In addition, the trial court ordered Defendants to pay $50,000.00 in sanctions, $24,587.16 in costs, and $8,875.00 in attorney fees. The trial court's order, which was signed on 8 December 2008 and filed on 17 December 2008, ordered Defendants to comply by 11 December 2008. On 11 December 2008, Defendants filed an Objection, Response to Order to Compel and Sanctions, and Motion for an Extension of Time to Comply with the Court Order in which Defendants, while acknowledging payment of the $50,000.00 sanction, challenged the trial court's authority to impose such a sanction; acknowledged payment of $24,587.16 in costs and $8,875.00 in attorney fees to Plaintiffs; indicated that certain additional documents had been provided to

Plaintiffs; and sought an extension of time to comply with the remainder of the trial court's order.

On 16 December 2008, Plaintiffs filed a Motion for Sanctions requesting the imposition of sanctions against Defendants "for their failure to comply with" the 17 December 2008 order and because the motion filed by Defendants on 11 December 2008 "is not well grounded in fact, not warranted by existing law and not done in good faith, but rather for the purpose of harassment and to cause unnecessary delay and needless increase in the cost of litigation" and seeking the entry of an order "striking Defendants' Answer and for attorney's fees and costs associated with this motion and for such other relief as the Court deems necessary, just and appropriate." On 6 January 2009 and 9 January 2009, respectively, Defendants filed Supplemental Responses to Order to Compel in which they provided certain additional documents to Plaintiffs. On 29 January 2009, Defendants made a filing that objected to the issuance of a subpoena directed to Mr. Brettschneider.

On 28 January 2009, the trial court heard Plaintiffs' latest sanctions motion. At the 28 January 2009 hearing, Plaintiffs contended that Defendants had not provided complete or timely responses to the discovery ordered at the 1 December 2008 hearing, and that the information provided in response to the order entered by the trial court following that hearing contradicted prior testimony regarding inspection reports, insurance coverage, the availability of e-mail records, and the identity of the person who took certain photographs. On 29 January 2009, the trial court entered an order in which it allowed Plaintiffs' sanctions motion, struck Defendants' answer, entered judgment in favor of Plaintiffs, and denied Plaintiffs' motion to quash Defendants' subpoenas. On 11 February 2009, Defendants filed notice of appeal from the 10 October 2008, 17 December 2008, and 29 January 2009 orders.

II. Legal Analysis

On appeal, Defendants argue that the trial court erred by ruling on Plaintiffs' 24 September 2008 amended motion to compel. Following a hearing on this motion conducted on 6 October 2008, the trial court entered an order on 10 October 2008 granting Plaintiffs' motion to compel, denying Defendants' motion to compel, and awarding Plaintiffs attorney fees. According to Defendants, the 10 October 2008 order "impermissibly overruled Judge Baddour's prior discovery order." We agree.

"The well established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (citations omitted).

> The reason one superior court judge is prohibited from reconsidering the decision of another has remained consistent for over one-hundred years. When one party wait[s] for another [j]udge to come around and [takes its] chances with him, and the second judge overrules the first, an unseemly conflict is created. Given this Court's intolerance for the impropriety referred to as judge shopping and its promotion of collegiality between judges of concurrent jurisdiction, this unseemly conflict . . . will not be tolerated.

State v. Woolridge, 357 N.C. 544, 550, 592 S.E.2d 191, 194 (2003) (internal quotations and citations omitted) (quoting *Henry v. Hilliard*, 120 N.C. 479, 487-88, 27 S.E. 130, 132 (1897)) (quoting *Roulhac v. Brown*, 87 N.C. 1, 4 (1882)). If one trial judge enters an order that unlawfully overrules an order entered by another trial judge, such an order must be vacated, including any award of fines or costs. *Cail v. Cerwin*, 185 N.C. App. 176, 187, 648 S.E.2d 510, 518 (2007) (where judge enters order "effectively overruling" earlier order on same issue, the second order and civil penalty are vacated). Since the issue in question "relates to jurisdiction, and jurisdictional issues 'can be raised at any time, even for the first time on appeal and even by a court *sua sponte*,' " *Cail*, 185 N.C. App. at 181, 648 S.E.2d at 514 (quoting *Brown v. Brown*, 171 N.C. App. 358, 362, 615 S.E.2d 39, 41 (2005)), Defendants are not precluded from raising this issue on appeal by virtue of the fact that they did not raise it at the 6 October 2008 hearing.

In their first motion to compel, Plaintiffs sought "an order compelling Defendants to respond completely to [Plaintiffs'] First Set of Interrogatories, First Request for Production of Documents, and First Request for Admissions, which were served on Defendants . . . on February 19, 2007." According to Plaintiffs, Defendants had "failed to make complete responses to said discovery." For that reason, Plaintiffs specifically asked that Defendants "properly answer[]" "Interrogatories 7, 8, 9, 12, and 15;" "Request for Admissions 5, 6, 7, 8,

9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, and 23;" and "Request for Production of Documents." With respect to their request for production of documents, Plaintiffs asserted that "[D]efendants have produced one document not generated by the plaintiff and they have documents requesting a confidentiality agreement and others have been withheld based on attorney client privilege."

On 9 August 2007, Judge R. Allen Baddour, Jr., conducted a hearing "upon motion by the plaintiffs to compel defendants to respond to certain of plaintiffs' Interrogatories, Requests for Admissions and Requests for Production of Documents." On 23 August 2007, Judge Baddour entered an order stating that:

> The Court, having considered the matter, finds that defendants shall supplement their responses to interrogatories 7, 8, 9 and 12 to the extent any additional information is available and discoverable pursuant to the North Carolina Rules of Civil Procedure within fifteen (15) days of entry of this Order. Should any additional information available and discoverable not be provided, the Court may consider the exclusion of such material from evidence as allowed under the North Carolina Rules of Civil Procedure. The Court further orders defendants to produce all documents marked as confidential within five (5) days of entry of this Order, and that these and any discovery designated as confidential by either party shall be used solely in this matter, 06 CVS 15774, and for no other purpose. That portion of plaintiffs' motion with regard to defendants' responses to plaintiffs' Requests for Admission and plaintiffs' Requests for Production is denied. Plaintiffs' request that defendants waive their objections to plaintiffs' discovery requests and their motion seeking an order from the court striking defendants' objections are denied.
>
> [Further], the Court finds that defendants' motion to dismiss the complaint of plaintiffs in its entirety pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil [Procedure] shall be denied.

Judge Baddour's order does not include findings or conclusions, does not identify the documents that Plaintiffs sought at the hearing, and does not specify the legal issues argued before the court. Furthermore, we have not been provided with a transcript of the hearing before Judge Baddour or a summary of the proceedings that transpired at that time. Accordingly, we are unable to tell from the record what documents Plaintiffs sought to obtain from Defendants

in connection with their first motion to compel or the legal or factual arguments that were advanced in support of their efforts to obtain those additional materials. However, the undisputed information contained in the record establishes that Plaintiffs sought production of additional documents and that Judge Baddour's order denied this part of Plaintiffs' motion. Thus, Judge Baddour's order amounts to a general denial of Plaintiffs' request for the entry of an order compelling Defendants to produce additional documents.

On 14 August 2008, Plaintiffs served a second motion to compel discovery on Defendants' substitute counsel. On 24 September 2008, Plaintiffs filed an amended motion to compel and for sanctions that replaced the 14 August 2008 motion. According to Plaintiffs' amended motion to compel discovery:

1. That on the 19th day of February, 2007, [Plaintiffs] served on [Defendants] certain written Interrogatories . . . and certain Requests for Production of Documents

. . . .

2. That the information requested is material and relevant to the matter in controversy and within the scope of allowable discovery.

3. That, to date, [Defendants have] refused . . . to provide complete answers and responses to . . . [Plaintiffs'] Interrogatories and Request for Production of Documents and specifically with regard to the following:

   a. 20 e-mails referred to by Carrie Karcher deposition[.] in her

   b. Deposition of Mr. Brettschneider[.]

   c. Mileage records and reimbursement from Kimco to and from Centrum by Carrie Karcher and Chris Freeman[.]

   d. Photos and notes taken on inspections by Carrie Karcher from 2006 to the present[.]

   e. Additional third party reports from 2001 through 2006[.]

   f. The Alltel lease[.]

   g. Carrie[] Karcher's phone records January—March 2006.

In their amended motion to compel, Plaintiffs asserted that the "above information has been requested since the filing of this action[.]" As a result, Plaintiffs clearly sought in their amended motion

to compel to obtain production of additional documents based on their 19 February 2007 discovery request. The 19 February 2007 request for production of documents had also been the basis for Plaintiffs' first motion to compel production of documents, which Judge Baddour had, in relevant part, denied. As a result, by seeking the entry of an order compelling the production of documents based on the same request for production of documents that had been before Judge Baddour and which had led to the entry of Judge Baddour's order refusing to order the production of additional documents, Plaintiffs were effectively asking the trial court to modify or overrule Judge Baddour's earlier order ruling on their original motion to compel, an action that the trial court lacked the authority to take unless the existence of one of the limited number of exceptions to the general prohibition against one trial judge overruling another was established.

The record does not establish that the trial court was formally notified of Plaintiffs' earlier motion to compel and Judge Baddour's earlier order ruling on that motion. As we have already noted, neither the original second motion to compel nor the amended motion to compel mentioned the first motion to compel or Judge Baddour's order ruling on that motion. At the 6 October 2008 hearing before the trial court, Plaintiffs argued that Defendants had refused to comply with their 19 February 2007 discovery request and had abused the discovery process. In support of their allegations, Plaintiffs offered the trial court a detailed summary of the parties' discovery-related interactions and submitted numerous additional exhibits, including a chart labeled "Timeline of [Request for Production of Documents]." Although Plaintiffs' "Timeline" includes the 19 February 2007 discovery request and Defendants' responses, it makes no mention of the motion to compel or Judge Baddour's order. In addition, Plaintiffs submitted a document intended to demonstrate Defendants' "protracted, deceptive, and manipulative practices to thwart Plaintiffs' pursuit of this action." This exhibit, which included a chart of Defendants' discovery responses, also makes no mention of the motion to compel or Judge Baddour's order. As a result, none of the filings that Plaintiffs made and none of the documents that Plaintiffs tendered to the trial court made the trial court aware that Judge Baddour had already ruled on a motion to compel arising from Plaintiffs' 19 February 2007 discovery requests.

Furthermore, in their arguments to the trial court at the 6 October 2008 hearing, Plaintiffs contended that they had sought production of

certain documents since the submission of their formal discovery request on 19 February 2007 and that Defendants had failed to provide the requested discovery. For example, Plaintiffs informed the trial court that "[e]very single one of these documents that we have tried to subpoena now to the depositions was asked for in the first request for production of documents." However, despite taking the position that they had sought the requested documents throughout the course of the discovery process, Plaintiffs did not expressly inform the trial court that they had attempted to obtain the production of additional documents in their first motion to compel discovery, that Judge Baddour had heard their first motion to compel, or that Judge Baddour had entered an order granting their motion to compel in part and denying it in part.

In their brief, Plaintiffs assert that "Plaintiffs' counsel referenced the August 2007 motions to compel in her argument to the Court." Admittedly, the transcript of the 6 October 2008 hearing shows that Plaintiffs' counsel told the trial court that Defendants responded to their February 2007 discovery request in April 2007, and that "[t]he next interaction that we had through some motions to compel was seven months later." This passing reference to a motion to compel does not indicate the date upon which the motion to compel was filed or the contents of that motion. In addition, Plaintiffs' argument made no reference to the disposition of the motion in question. More specifically, Plaintiffs' argument did not inform the trial court that a hearing was held before Judge Baddour or that Judge Baddour had entered an order ruling on the prior motion to compel. Thus, we conclude that the trial court was never explicitly informed of the existence of Judge Baddour's earlier order ruling on their request for production of documents, so that it had no warning that the order that it was requested to enter would have the effect of impermissibly overruling or modifying a prior order entered by Judge Baddour.

In defending the trial court's authority to rule on their second motion to compel, Plaintiffs argue that "Courts have repeatedly held that the doctrine of one Judge not overruling a judgment entered by another Judge[] does not apply to interlocutory orders given in the progress of the cause." However, the Plaintiffs' argument misapprehends the exception to the rule prohibiting one trial judge from overruling another upon which Plaintiffs appear to rely, since there is no blanket exemption to the general prohibition against one trial judge overruling another applicable to all interlocutory orders. On the contrary, as Defendants observe, the orders that a party seeks to have

modified in violation of the general prohibition are almost always interlocutory. However, one trial judge is authorized to overrule an order entered by another under certain circumstances:

> An exception to this rule allows a subsequent trial judge to rehear an issue and enter a ruling "if there has been a material change in the circumstances of the parties and the initial ruling was one which was addressed to the discretion of the trial judge."

Morris v. Gray, 181 N.C. App. 552, 555, 640 S.E.2d 737, 739 (2007) (quoting *Atkinson v. Atkinson*, 132 N.C. App. 82, 88, 510 S.E.2d 178, 181, *rev'd on other grounds*, 350 N.C. 590, 516 S.E.2d 381 (1999)). As a result:

> One superior court judge may only modify, overrule, or change the order of another superior court judge where the original order was (1) interlocutory, (2) discretionary, and (3) there has been a substantial change of circumstances since the entry of the prior order. A substantial change in circumstances exists if since the entry of the prior order, there has been an 'intervention of new facts which bear upon the propriety' of the previous order. The burden of showing the change in circumstances is on the party seeking a modification or reversal of an order previously entered by another judge.

First Fin. Ins. Co. v. Commercial Coverage, 154 N.C. App. 504, 507, 572 S.E.2d 259, 262 (2002) (citing *Stone v. Martin*, 69 N.C. App. 650, 652, 318 S.E.2d 108, 110 (1984), and quoting *Calloway*, 281 N.C. at 505, 189 S.E.2d at 490). " 'Thus, a subsequent judge could modify the order for circumstances which changed the legal foundation for the prior order.' " *Jacobs v. Physicians Weight Loss Ctr. of Am., Inc.*, 173 N.C. App. 663, 677, 620 S.E.2d 232, 241 (2005) (quoting *Dublin v. UCR, Inc.*, 115 N.C. App. 209, 220, 444 S.E.2d 455, 461 (1994)).

During oral argument, Plaintiffs candidly admitted that the extent to which the trial court was authorized to rule on their motion to compel in light of Judge Baddour's prior ruling was not addressed at the 6 October 2008 hearing and speculated that the absence of any discussion of this issue could have stemmed from the fact that both parties believed that there had been such a sufficient change of circumstances as to authorize the trial court to overrule or modify Judge Baddour's earlier order. In addition, Plaintiffs make a conclusory assertion in their brief that Judge Hudson's order "dealt with an evolving set of discovery circumstances;" however, they do not articulate any material change in circumstances sufficient to justify mod-

ifying or overruling Judge Baddour's order. Plaintiffs' arguments are not sufficient to justify upholding the 10 October 2008 order on the basis of a "changed circumstances" theory for two different, albeit related, reasons.

First, the determination of whether an adequate change in circumstances has occurred must be made by the trial court, not the parties. *Morris*, 181 N.C. App. at 556, 640 S.E.2d 739-40. The record simply contains no indication that the trial court made the required "change of circumstances" determination, probably because the trial court was unaware that such a determination needed to be made. Secondly, in the absence of adequate findings specifying the nature of the change of circumstances upon which the court relies, it is "without authority to overrule, either expressly or implicitly, [the first judge's] prior determination" as reflected in its order. *Pittman v. Pittman*, 73 N.C. App. 584, 589, 327 S.E.2d 8, 11 (1985) (emphasis added). In other words, where the trial court fails to find that there has been a material change in circumstances, it has no authority to modify the order of another judge. For example, in *Morris*, a district court judge entered a Qualified Domestic Relations Order (QDRO), which was not appealed by either party. Subsequently, another judge entered an order modifying the terms of the QDRO. On appeal, this Court held that the trial court erred by failing to specify the changed circumstances that justified modification of the QDRO:

> After reviewing the record, we can find no findings or statements by the trial judge that would indicate his reasons for modifying the terms of the earlier order. [The parties] offer possible explanations, . . . but their theories cannot substitute for the reasoning of the trial judge.
>
> . . . Although we cannot say the trial judge did not engage in a competent inquiry in deciding to modify the terms of the earlier [order,] we likewise cannot say that he did, in light of the absence of any findings or reasons stated in the record. We have no evidence before us of a 'material change in circumstances' that would warrant the exception of one trial judge's modifying, overruling, or changing the order of another.
>
> Accordingly, we conclude that the trial judge erred in failing to make adequate findings to justify his modifications to the [first order.] Because this is sufficient grounds to vacate the . . . order, we do not address the remainder of [appellant's] arguments.

Morris, 181 N.C. App. at 556, 640 S.E.2d at 739-40. As we have already noted, the 10 October 2008 order contains no findings explaining the reason that the trial court believed that overruling or modifying Judge Baddour's earlier order was appropriate. Thus, in the absence of a determination by the trial judge, as reflected in its findings of fact, that a change in circumstances sufficient to justify the overruling or modification of a prior order had occurred, the trial judge lacked the authority to modify an order entered by another trial judge. As a result, the 10 October 2008 order must be vacated, since it effectively overrules or modifies Judge Baddour's prior order in the absence of adequate findings establishing the existence of changed circumstances justifying the overruling or modification of the prior order.

In the aftermath of the entry of the 10 October 2008 order, the trial court entered two other orders sanctioning Defendants, the first of which was entered on 17 December 2008 and sanctioned Defendants for failing to comply with the 10 October 2008 order, and the second of which was entered on 29 January 2009 and sanctioned Defendants for failing to comply with the 17 December 2008 order. According to Defendants, these orders are "wholly derivative" of the 10 October 2008 order, so that the invalidity of the 10 October 2008 order necessarily invalidates the 17 December 2008 and 29 January 2009 orders. We agree.

In *Willis v. Duke Power Co.*, 291 N.C. 19, 32, 229 S.E.2d 191, 199 (1976), the plaintiff sought to have defendant held in contempt for failing to comply with a discovery order. Although it upheld the trial court's general authority to issue a citation for criminal contempt predicated on a litigant's failure to comply with a discovery order, the Supreme Court found that the discovery order at issue in *Willis* was invalid and held that, "[i]nsofar as the contempt order addresses the defendant's failure to produce documents, it is based upon an unlawful order for production and is therefore erroneous." *Id.* As a result, a sanctions order predicated on an unlawful discovery order is invalid.

In the present case, as in *Willis*, Defendants were sanctioned for failing to comply with an invalid discovery order. Since the 10 October 2008 order must be vacated because it impermissibly overrules or modifies Judge Baddour's earlier order granting Plaintiffs' motion to compel in part and denying Plaintiffs' motion to compel in part, the subsequent orders sanctioning Defendants for failing to comply with the 10 October 2008 order must be vacated as well. Since we have vacated all three of the trial court's orders that Defendants have chal-

lenged on appeal, we do not reach Defendants' remaining appellate arguments and express no opinion about whether changed circumstances justify modifying or overruling Judge Baddour's order. As a result, the 10 October 2008, 17 December 2008, and 29 January 2009 orders are vacated and this matter is remanded to the trial court for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Chief Judge MARTIN and Judge Robert C. HUNTER concur.

FREE SPIRIT AVIATION, INC. AND GEORGE RONAN, PLAINTIFFS v. RUTHERFORD AIRPORT AUTHORITY; RUSTY WASHBURN, INDIVIDUALLY AND AS A MEMBER OF THE RUTHERFORD AIRPORT AUTHORITY; PHILLIP ROBBINS, INDIVIDUALLY AND AS A MEMBER OF THE RUTHERFORD AIRPORT AUTHORITY; ALAN GUFFEY, INDIVIDUALLY AND AS A MEMBER OF THE RUTHERFORD AIRPORT AUTHORITY; DON GREENE, INDIVIDUALLY AND AS A MEMBER OF THE RUTHERFORD AIRPORT AUTHORITY; AND DAVID RENO, AS A MEMBER OF THE RUTHERFORD AIRPORT AUTHORITY, DEFENDANTS

No. COA09-806

(Filed 3 August 2010)

1. Attorney Fees— denial of summary judgment motion—reasonable pursuit of claim

The trial court did not err by failing to award defendant attorney fees under N.C.G.S. § 6-21.5 for claims including malfeasance of office by retaliating against plaintiffs, improper personal benefit from a contract made or administered on behalf of a public agency, and wrongful interference with plaintiffs' contractual rights. Defendants failed to demonstrate why plaintiffs could not have reasonably pursued their claims given the rationale of the trial court's summary judgment order and the reasoning of the Court of Appeals in the first appeal.

2. Attorney Fees— prevailing party—prevailed on significant issue

The trial court erred by failing to award defendant attorney fees under N.C.G.S. § 143-318.16B based on its mistaken belief that it was required to designate either plaintiffs or defendants as the prevailing party, and that it was not possible for both to be prevailing parties. On remand, the trial court must determine whether defendants prevailed on a significant issue and if so,

whether in the exercise of the trial court's discretion, defendants should be awarded attorney fees.

Appeal by defendants from order entered 6 April 2009 by Judge Mark Powell in Rutherford County Superior Court. Heard in the Court of Appeals 30 November 2009.

Craig Law Firm, PLLC, by Sam B. Craig, for plaintiffs-appellees.

Womble Carlyle Sandridge & Rice, PLLC, by Sean F. Perrin, for defendants-appellants Rusty Washburn, Phillip Robbins, Alan Guffey, and Don Greene.

GEER, Judge.

The Rutherford Airport Authority ("the Authority") and its individual members Rusty Washburn, Alan Guffey, Don Greene, and Phillip Robbins (collectively "defendants") appeal from the trial court's order denying their motion for attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.5 (2009) and N.C. Gen. Stat. § 143-318.16B (2009). Defendants contend they are entitled to attorneys' fees under N.C. Gen. Stat. § 6-21.5 with respect to those claims dismissed at the directed verdict stage because plaintiffs persisted in litigating the claims after they reasonably should have known the claims were not justiciable. Since defendants base their claim of non-justiciability solely on arguments regarding those claims that the trial court rejected at the summary judgment stage, we hold that the trial court properly determined that plaintiffs did not unreasonably continue to litigate those claims through trial.

With respect to the request for fees under N.C. Gen. Stat. § 143-318.16B, we hold that the trial court's refusal to award defendants attorneys' fees was based at least in part on its mistaken belief that only one party can be a prevailing party under N.C. Gen. Stat. § 143-318.16B. Because a lawsuit may result in more than one prevailing party and because the trial court made its decision while under a misapprehension of the law, we reverse and remand the portion of the trial court's order addressing N.C. Gen. Stat. § 143-318.16B for further findings of fact.

Facts

From 1995 until 28 February 2005, plaintiff Free Spirit Aviation, Inc. ("Free Spirit"), which is owned by plaintiff George Ronan, was

the Fixed Based Operator ("FBO") at the Rutherford Airport. As the FBO, Free Spirit was responsible for managing the Airport, including selling fuel and repairing and maintaining airplanes. The Authority, which oversaw the FBO, was composed of five members: Rusty Washburn, Alan Guffey, Don Greene, Phillip Robbins, and David Reno. This appeal arises out of litigation concerning the Authority's selection of Leading Edge Aviation, one of Free Spirit's competitors, to take over as the FBO in 2006.

On 27 January 2006, plaintiffs filed suit against defendants, claiming improprieties in the Authority's selection of Leading Edge as the new FBO. Plaintiffs alleged that defendants violated Article 33C of Chapter 143 of the General Statutes, commonly known as the Open Meetings Laws, in holding certain meetings and in improperly entering into a closed session. Plaintiffs requested injunctions against further violations of the Open Meetings Laws and against implementation of the 13 January 2006 decision naming Leading Edge as the new FBO.

Plaintiffs also alleged that the Authority, acting through defendants Washburn, Robbins, Guffey, and Greene, unlawfully chose Leading Edge over Free Spirit to be the FBO in retaliation for complaints made by Ronan about the closed session meetings held by the Authority. Plaintiffs further alleged that Washburn, Robbins, and Greene engaged in malfeasance of office by receiving improper benefits from hangar lease agreements with the Authority and that Greene received a discount on fuel costs in violation of N.C. Gen. Stat. § 14-234(a)(1) (2009) (providing that "[n]o public officer or employee who is involved in making or administering a contract on behalf of a public agency may derive a direct benefit from the contract" except in limited situations). Plaintiffs also asserted claims for wrongful interference with contract, conspiracy, and punitive damages.

After plaintiffs filed their complaint, plaintiffs dismissed their claims against defendant David Reno, and defendant Phillip Robbins passed away. Mr. Robbins' estate was substituted as a defendant. Defendants then filed a motion for summary judgment, asserting that plaintiffs failed to produce any evidence to support any of their claims and, alternatively, that the individual defendants were entitled to public official immunity.[1]

1. Defendants' summary judgment motion is not included in the record on appeal. We have relied upon the description of that motion included in the trial court's order denying the motion for summary judgment.

On 15 June 2007, the trial court denied defendants' motion for summary judgment on the ground that genuine issues of material fact existed as to whether defendants violated the Open Meetings Laws, whether defendants acted in a retaliatory or malicious manner, whether the individual defendants were protected by public official immunity, whether the individual defendants received improper benefits in violation of N.C. Gen. Stat. § 14-234(a)(1), and whether defendants wrongfully interfered with plaintiffs' contract.

Defendants appealed the trial court's ruling that they were not entitled to the protection of public official immunity. On appeal, defendants contended that plaintiffs had failed to demonstrate that a genuine issue of fact existed regarding whether the individual defendants acted with malice. On 21 February 2008, this Court affirmed the trial court's denial of defendants' motion for summary judgment. *See Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 191 N.C. App. 581, 582, 664 S.E.2d 8, 9-10 (2008) ("*Free Spirit I*").

On remand and prior to trial, plaintiffs dismissed their claim for conspiracy and their claim for injunctive relief. The remaining claims proceeded to trial, and at the close of plaintiffs' evidence, the trial court granted defendants' motion for a directed verdict on plaintiffs' claims of malicious and retaliatory acts, receipt of improper benefits in violation of N.C. Gen. Stat. § 14-234(a)(1), wrongful interference with contract, and punitive damages.

Following defendants' evidence, the trial court submitted the following issues to the jury:

> 1. Whether there was an unannounced official meeting of the Rutherford Airport Authority on December 15, 2004? Answer:
>
> 2. Whether there was an unannounced official meeting of the Rutherford Airport Authority on February 21, 2005? Answer:
>
> 3. Whether there was an unannounced official meeting of the Rutherford Airport Authority on May 5, 2005? Answer:
>
> 4. Whether there was an unannounced official meeting of the Rutherford Airport Authority on September 22, 2005? Answer:
>
> 5. Whether there was an unannounced official meeting of the Rutherford Airport Authority on September 28, 2005? Answer:
>
> 6. Whether the closed sessions of the Rutherford Airport Authority for January 10, 2006, and January 13, 2006, were properly entered into? Answer:

In addressing these issues, the jury found that defendants did not have unannounced official meetings on the dates set out in questions one through five, but found, in response to question six, that the Authority improperly entered into closed sessions on 10 January 2006 and 13 January 2006.

The trial court granted plaintiffs' motion for attorneys' fees, finding that "Plaintiffs' claim for relief regarding Defendants' violation of the Open Meetings laws through improperly entering into a closed session on January 10, 2006, was a significant issue in this matter." The court concluded that it was required, under N.C. Gen. Stat. § 143-318.16B, to apply the "merits test" set out in *H.B.S. Contractors, Inc. v. Cumberland County Bd. of Educ.*, 122 N.C. App. 49, 468 S.E.2d 517, *disc. review improvidently allowed*, 345 N.C. 178, 477 S.E.2d 926 (1996). Applying that test, the trial court noted that "while Defendants prevailed on more claims, and Plaintiffs did not prevail on all of their claims, Plaintiffs did prevail on a very significant issue in this matter, and are the prevailing parties pursuant to N.C.G.S. § 143-318.16B."

The trial court further concluded that "Plaintiffs' issues regarding retaliatory or malicious acts; receipt of improper benefits and violations of N.C.G.S. § 14-234(a)(1); and wrongful interference with contract by Defendants, were justiciable, and were not frivolous." The trial court concluded, therefore, that defendants were not prevailing parties under either N.C. Gen. Stat. § 143-318.16B or N.C. Gen. Stat. § 6-21.5.

After noting that the individual defendants followed the advice of the Authority's attorney, the court entered judgment for attorneys' fees in favor of plaintiffs against solely the Authority in the amount of $17,500.00. The trial court denied defendants' motion for attorneys' fees. Defendants timely appealed to this Court from that order.

I

[1] Defendants first contend that the trial court erred in failing to award them attorneys' fees under N.C. Gen. Stat. § 6-21.5 for the following claims: (1) malfeasance of office by retaliating against plaintiffs, (2) improper personal benefit from a contract made or administered on behalf of a public agency in violation of N.C. Gen. Stat. § 14-234(a)(1), and (3) wrongful interference with plaintiffs' contractual rights. The trial court denied summary judgment as to those claims, but subsequently, at trial, granted a directed verdict on them.

N.C. Gen. Stat. § 6-21.5 provides:

> In any civil action, special proceeding, or estate or trust proceeding, the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was *a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading*. The filing of a general denial or the granting of any preliminary motion, such as a motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12, a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), a motion for a directed verdict pursuant to G.S. 1A-1, Rule 50, or a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award. A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees. The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this section.

(Emphasis added.) In this case, the trial court determined that the claims at issue "were justiciable, and were not frivolous" and that defendants were not prevailing parties under N.C. Gen. Stat. § 6-21.5.

We review a denial of a motion for attorneys' fees under N.C. Gen. Stat. § 6-21.5 for abuse of discretion. *See Willow Bend Homeowners Ass'n v. Robinson*, 192 N.C. App. 405, 417, 665 S.E.2d 570, 577 (2008). The presence or absence of justiciable issues in pleadings is, however, a question of law that this Court reviews de novo. *Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 325, 344 S.E.2d 555, 565, *disc. review denied*, 318 N.C. 284, 348 S.E.2d 344 (1986).

In deciding a motion under N.C. Gen. Stat. § 6-21.5, "the trial court is required to evaluate whether the losing party persisted in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue." *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 258, 400 S.E.2d 435, 438 (1991). This Court has explained further:

> A "justiciable issue" is not defined by our statutes or case law. A "justiciable controversy" is a real and present one, not merely an apprehension or threat of suit or difference of opinion. Presumably, a "justiciable controversy" involves "justiciable is-

> sues," thus those which are real and present, as opposed to imagined or fanciful. "Complete absence of a justiciable issue" suggests that it must conclusively appear that such issues are absent even giving the losing party's pleadings the indulgent treatment which they receive on motions for summary judgment or to dismiss.

Sprouse, 81 N.C. App. at 326, 344 S.E.2d at 565 (internal citations omitted).

Defendants contend that following the deposition of George Ronan, plaintiffs should have been aware that there was no justiciable issue as to their claims of retaliation, improper benefits, and wrongful interference with contract. According to defendants, plaintiffs should have ceased litigating those claims at that point.

With respect to the retaliation and wrongful interference with contract claims, defendants assert that Ronan's deposition established that there was no evidence of defendants' retaliating against plaintiffs for complaining about alleged violations of the Open Meetings Laws or of defendants' acting maliciously by selecting Leading Edge over plaintiffs. Defendants point out that Ronan, when asked in his deposition what evidence he had that the Authority was retaliating against him, said only: "Here I am. They threw me out." Defendants also point to other testimony by Ronan that he was upset about the selection of Leading Edge because its owner was the least qualified of the four FBO bidders. Defendants argue that Ronan's testimony showed that Ronan merely thought defendants made a mistake in selecting Leading Edge and not that defendants were acting maliciously in failing to choose Free Spirit as the FBO.

With respect to plaintiffs' claim that Washburn and Robbins, by leasing hangars at the Airport, received improper benefits in violation of N.C. Gen. Stat. § 14-234(a)(1), defendants point out that Ronan admitted in his deposition that an individual need not be an Authority member to lease an airport hangar or extend a lease on one, which defendants contend "ma[de] this claim meritless."

Defendants, however, made these exact arguments to the trial court as part of their motion for summary judgment. The trial court, in denying defendants' motion for summary judgment, concluded that Authority minutes, other portions of Ronan's deposition, and an e-mail were sufficient to give rise to an issue of fact regarding whether defendants had acted in a retaliatory or malicious manner,

whether defendants received improper benefits, whether defendants violated N.C. Gen. Stat. § 14-234(a)(1), whether defendants wrongfully interfered with plaintiffs' contracts, and whether the individual defendants were protected by public official immunity.

Defendants likewise made these same arguments in their appeal to this Court from that summary judgment order, contending that the same Ronan testimony established that the individual defendants did not act with legal malice and that plaintiffs thus could not overcome their defense of public official immunity.[2] Although this Court in *Free Spirit I* addressed only the issue of public official immunity, the Court, in the process, concluded—as the trial court had—that the evidence cited by defendants was not uncontroverted and that issues of fact as to legal malice existed with respect to the claims that defendants received improper benefits in violation of N.C. Gen. Stat. § 14-234 and wrongful interference with contract. *Free Spirit I*, 191 N.C. App. at 586, 664 S.E.2d at 12. In this appeal, defendants do not make any attempt to reconcile their arguments with the holding of *Free Spirit I* regarding the evidence.

To rule in defendants' favor, we would have to hold that a plaintiff is required to voluntarily abandon a claim even though a court has ruled that the claim may go to trial. Our appellate courts have not specifically addressed this issue. This Court has held that "[t]he mere fact that plaintiffs' complaint survived a Rule 12(b)(6) motion to dismiss is not determinative proof of justiciability." *Winston-Salem Wrecker Ass'n v. Barker*, 148 N.C. App. 114, 119, 557 S.E.2d 614, 618 (2001). The Court's reasoning was, however, that "[t]he purpose of a Rule 12(b)(6) motion to dismiss is to test the *legal sufficiency* of the complaint." *Id.* (emphasis added). A denial of a motion to dismiss, addressing only whether the complaint's allegations state a claim for relief, does not preclude a determination that the actual facts, as opposed to the allegations, are not sufficient to raise a justiciable issue. In contrast, at the summary judgment stage, the question is whether the non-movant has presented sufficient evidence to give rise to a genuine issue of fact on the material issues in the case and keep the case moving forward to the fact finder.

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2. This Court takes judicial notice of defendants' brief in *Free Spirit I*. As this Court has previously held, "[i]n addition to the record on appeal, appellate courts may take judicial notice of their own filings in an interrelated proceeding." *Lineberger v. N.C. Dep't of Corr.*, 189 N.C. App. 1, 6, 657 S.E.2d 673, 677, *aff'd in part and disc. review improvidently allowed in part per curiam*, 362 N.C. 675, 669 S.E.2d 320 (2008). *See also Alford v. Shaw*, 327 N.C. 526, 541-42, 398 S.E.2d 445, 453-54 (1990) (taking judicial notice of briefs filed in Court in prior, related appeal).

Although the trial court, in this case, ultimately granted defendants' motion for a directed verdict, there was nothing until that point indicating to plaintiffs that no justiciable issue existed with respect to their claims. The Florida Court of Appeals addressed precisely this issue in *Kahn For Use & Benefit of Amica Mut. Ins. Co. v. Kahn*, 630 So.2d 223 (Fla. Dist. Ct. App. 1994) (per curiam). In *Kahn*, the trial court denied the defendants' motion for summary judgment, but, after the presentation of evidence, entered a directed verdict. *Id.* at 223. The trial court then awarded attorneys' fees to the defendants under Fla. Stat. Ann. § 57.105(1), which—like N.C. Gen. Stat. § 6-21.5—provides for an award of attorneys' fees to the prevailing party when the court finds that the losing party knew or should have known its claim or defense was not supported by the facts or the law.

When the plaintiffs in *Kahn* appealed, the appellate court reversed the award of attorneys' fees, explaining:

> The difficulty we have with the section 57.105 award is that the trial court found sufficient issues in dispute to deny the defendants' motion for summary judgment. In order for there to be an award under subsection 57.105(1), there must be "a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party." *Where the trial court found that there was a sufficient justiciable issue created to survive summary judgment, we do not see how it can be said that there was a complete absence of a justiciable issue in the case.* It is true that a directed verdict was later granted, but the granting of a directed verdict in favor of the defendants does not automatically translate into a determination that the action was without basis and frivolous.

630 So.2d at 223-24 (emphasis added) (internal citations omitted).

We find the Florida court's analysis persuasive under the circumstances of this case. Here, defendants have focused on the summary judgment evidence rather than the trial evidence and have not demonstrated why plaintiffs could not have reasonably pursued their claims given the rationale of the trial court's summary judgment order and the reasoning of this Court in the first appeal. Like the Florida Court of Appeals in *Kahn*, "we do not see how it can be said that there was a complete absence of a justiciable issue in the case" given the order denying summary judgment. *Id.*

Defendants argue, however, that such an approach would improperly preclude an award of fees whenever a case proceeded to trial after a denial of a motion for summary judgment. We need not address whether fees are always precluded after a denial of summary judgment because under the circumstances of this case—given the trial court's summary judgment order, our previous opinion in *Free Spirit I*, and defendants' arguments relying upon deposition testimony—the trial court did not err in denying defendants' motion for attorneys' fees under N.C. Gen. Stat. § 6-21.5.

II

[2] Defendants also contend that the trial court erred in denying their motion for attorneys' fees under N.C. Gen. Stat. § 143-318.16B, which provides:

> When an action is brought pursuant to G.S. 143-318.16 or G.S. 143-318.16A, the court may make written findings specifying the prevailing party or parties, and may award the prevailing party or parties a reasonable attorney's fee, to be taxed against the losing party or parties as part of the costs. The court may order that all or any portion of any fee as assessed be paid personally by any individual member or members of the public body found by the court to have knowingly or intentionally committed the violation; provided, that no order against any individual member shall issue in any case where the public body or that individual member seeks the advice of an attorney, and such advice is followed.

The first issue raised by N.C. Gen. Stat. § 143-318.16B is the identification of the prevailing party or parties. "The designation of a party as a prevailing party . . . is a legal determination which we review de novo." *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 274 (4th Cir.), *cert. denied*, 537 U.S. 825, 154 L. Ed. 2d 35, 123 S. Ct. 112 (2002). Nonetheless, an award of attorneys' fees pursuant to N.C. Gen. Stat. § 143-318.16B is "discretionary under the statute." *Knight v. Higgs*, 189 N.C. App. 696, 704, 659 S.E.2d 742, 748 (2008). Thus, even if a trial court determines that a party is a prevailing party, it may still exercise its discretion to refuse to award fees. *See News & Observer Pub. Co. v. Coble*, 128 N.C. App. 307, 311, 494 S.E.2d 784, 787 ("The award of attorneys' fees [under § 143-318.16B] is discretionary with the trial court. The trial court is authorized but no longer required to award attorneys' fees to the prevailing party."), *aff'd per curiam*, 349 N.C. 350, 507 S.E.2d 272 (1998).

In *H.B.S. Contractors*, 122 N.C. App. at 57, 468 S.E.2d at 523, this Court adopted the "merits test" for determining a prevailing party entitled to attorneys' fees under § 143-318.16B. As the Court explained, "[u]nder the merits test, 'to receive attorney's fees allowed by statute to the prevailing party, a party must *prevail on the merits of at least some of his claims*.' " *Id.*, 468 S.E.2d at 522 (quoting *Smith v. Univ. of N.C.*, 632 F.2d 316, 352 (4th Cir. 1980)). An award of attorneys' fees is authorized if a party succeeds " 'on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing the suit.' " *Id.*, 468 S.E.2d at 523 (quoting *House v. Hillhaven, Inc.*, 105 N.C. App. 191, 195-96, 412 S.E.2d 893, 896, *disc. review denied*, 331 N.C. 284, 417 S.E.2d 251 (1992)).

In *H.B.S. Contractors*, this Court concluded that the plaintiff was a prevailing party because it "succeeded, at least in part, by securing a declaration the Board violated the Open Meetings Law." *Id.* at 58, 468 S.E.2d at 523. The Court held that H.B.S. was a prevailing party even though H.B.S. had not obtained everything set out in its prayer for relief, including its request for a declaration that the order based on the closed session was null and void. *Id.*

In this case, the trial court held that plaintiffs were prevailing parties and entitled to attorneys' fees, while defendants were not prevailing parties. The trial court concluded:

> 3. Plaintiffs succeeded on a significant issue in this matter in obtaining a verdict that Defendants violated the Open Meetings laws by improperly entering into a closed session on January 10, 2006.
>
> 4. In exercising its discretion to award attorney's fees pursuant to N.C.G.S. § 143-318.16B, the Court must apply the "merits test" adopted in *H.B.S. Contractors, Inc. v. Cumberland Co. Bd. of Education*, 468 S.E.2d 517 (N.C. App. 1996).
>
> 5. Applying the merits test here, while Defendants prevailed on more claims, and Plaintiffs did not prevail on all of their claims, Plaintiffs did prevail on a very significant issue in this matter, and are the prevailing parties pursuant to N.C.G.S. § 143-318.16B.
>
> . . . .
>
> 7. Defendants are not prevailing parties under either N.C.G.S. § 143-318.16B or N.C.G.S. § 6-21.5.

Defendants do not dispute that plaintiffs were prevailing parties and do not challenge the trial court's award of fees to plaintiffs. Rather, defendants contend that they were also prevailing parties who were entitled to fees. This argument raises the question whether both a plaintiff and a defendant can be prevailing parties in the same action.

The plain language of the statute says a court may award attorneys' fees to "the prevailing party *or parties*." N.C. Gen. Stat. § 143-318.16B (emphasis added). Although no appellate court has addressed this issue in the context of N.C. Gen. Stat. § 143-318.16B, this Court held in *Persis Nova Constr., Inc. v. Edwards*, 195 N.C. App. 55, 66, 671 S.E.2d 23, 30 (2009), that the plain language of N.C. Gen. Stat. § 6-21.5, which also authorizes attorneys' fees to a "prevailing party," meant that "attorney's fees may be awarded against more than one party in an action." The Court then concluded that the trial court erred in determining that the defendants were not prevailing parties when they prevailed on the claims in the plaintiff's complaint, but the plaintiff prevailed on the defendants' counterclaim. 195 N.C. App. at 67, 671 S.E.2d at 30.

Other courts have recognized that the phrase "prevailing party" is " 'a legal term of art.' " *Griggs v. E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 454 (4th Cir. 2004) (quoting *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603, 149 L. Ed. 2d 855, 862, 121 S .Ct. 1835, 1839 (2001)). In *Grissom v. The Mills Corp.*, 549 F.3d 313, 318 (4th Cir. 2008), the Fourth Circuit parenthetically quoted *Smyth*, 282 F.3d at 274, which explains that since the phrase "prevailing party" is a term of art, it should be " 'interpreted consistently—that is, without distinctions based on the particular statutory context in which it appears.' " Interpreting the phrase in N.C. Gen. Stat. § 143-318.16B consistently with N.C. Gen. Stat. § 6-21.5 requires that we hold that more than one party—including both a plaintiff and a defendant in the same action—can be the prevailing party entitled to fees.

The trial court's conclusion of law number 5 stated that plaintiffs "[were] *the prevailing parties* pursuant to N.C.G.S. § 143-318.16B." In the decretal portion of the order, the trial court stated that "judgment is entered for Plaintiffs, *as prevailing party* in this matter, against Defendant Rutherford Airport Authority for attorneys fees pursuant to N.C.G.S. § 143-318.16B . . . ." These statements indicate that the trial court mistakenly believed that it was required to designate either

plaintiffs or defendants as the prevailing party, and that it was not possible for both to be prevailing parties.

When the trial court exercises its discretion under a misapprehension of the law, it is appropriate to remand for reconsideration in light of the correct law. In *Harwell v. Thread*, 78 N.C. App. 437, 438-39, 337 S.E.2d 112, 113 (1985), the plaintiff appealed from the Industrial Commission's denial of her claim for attorneys' fees, claiming the Commission denied her request for fees under the mistaken belief that it could not award attorneys' fees in a case in which both the plaintiff and the defendant insurer appealed. The Court agreed that the language in the Commission's order was ambiguous as to whether the Commission believed it lacked the authority to award fees in a case where both parties appealed. *Id.* at 439, 337 S.E.2d at 113. It, therefore, held: "We cannot discern whether the Industrial Commission exercised its discretion in denying attorney's fees or believed it was compelled to deny attorney's fees due to a misapprehension of the law. We therefore remand this case to the Industrial Commission for a *discretionary* determination consistent with this opinion." *Id.*

Similarly, here, even though the trial court had discretion whether to award fees, because it appears the court was acting under a misapprehension of law, it could not properly exercise that discretion. We must, therefore, remand for reconsideration of this issue under the correct standard. The trial court will be required to determine on remand whether defendants prevailed on a significant issue and if so, whether, in the exercise of the court's discretion, defendants should be awarded attorneys' fees.

Affirmed in part; reversed and remanded in part.

Chief Judge MARTIN and Judge ELMORE concur.

STATE OF NORTH CAROLINA v. LEON OXENDINE, JR.

No. COA09-858

(Filed 3 August 2010)

1. Appeal and Error— oral notice of appeal insufficient—satellite-based monitoring hearing—civil in nature

Defendant's oral notice of appeal from an order imposing satellite-based monitoring (SBM) upon him was insufficient to confer jurisdiction on the Court of Appeals as SBM hearings and proceedings are civil regulatory proceedings. The Court treated defendant's brief as a petition for *certiorari* and granted said petition to address the merits of defendant's appeal.

2. Satellite-Based Monitoring—low risk assessment—judgment vacated

The trial court erred in finding that defendant required the highest possible level of supervision and monitoring and ordering defendant to enroll in satellite-based monitoring where the Department of Corrections' risk assessment determined that defendant was a low level risk.

Judge STROUD concurs in the result with separate opinion.

Appeal by defendant from judgment entered 10 March 2009, by Judge James M. Webb in Rockingham County Superior Court. Heard in the Court of Appeals 3 December 2009.

Attorney General Roy Cooper, by Assistant Attorney General Joseph Finarelli, for the State.

James W. Carter for defendant appellant.

HUNTER, JR., Robert N., Judge.

Leon Oxendine, Jr. ("defendant") was ordered to enroll in satellite-based monitoring ("SBM") for ten years after release from prison for sexual crimes to which defendant pled guilty. Defendant now appeals from the trial court's judgment arguing that the court erred by (1) finding defendant required the "highest possible level of supervision and monitoring" and (2) ordering defendant to enroll in SBM given that the Department of Corrections' ("DOC") risk assessment determined defendant was a low level risk. In addition, defendant argues that, in the event this Court fails to reverse his sen-

tence based on the aforementioned assignments of error, the Court should hold the SBM statute unconstitutional on due process grounds for vagueness or lack of statutory notice. With regard to defendant's appeal, the State concedes that the trial court's judgment should be vacated due to defendant's low risk assessment, and in light of this Court's recent decisions in *State v. Kilby*, —— N.C. App. ——, 679 S.E.2d 430 (2009) (concluding that the findings of fact were insufficient to support the trial court's conclusion that "defendant required the highest possible level of supervision and monitoring" based upon a "moderate" risk assessment from DOC), and *State v. Causby*, —— N.C. App. ——, 683 S.E.2d 262 (2009) (applying and adopting the holding in *Kilby*). As *Kilby* and *Causby* are controlling, and defendant was assessed to be a "low" level risk, we reverse the decision of the trial court. However, in light of *State v. McCravey*, —— N.C. App. ——, ——, S.E. ——, —— 2010 N.C. App. LEXIS 722 (filed 4 May 2010) (No. COA09-712) (holding that second-degree rape pursuant to N.C. Gen. Stat. § 14-27.3(a) (2009) is an aggravated offense as defined by the statute), we remand to the trial court for entry of an order consistent with this Court's present ruling.

I. FACTUAL BACKGROUND

On 8 September 2008, defendant was indicted for three counts of second-degree rape involving a mentally disabled victim, two counts of statutory rape by a defendant more than six years older than the victim, and five counts of statutory sex offense by a defendant in a parental role. On 9 March 2009, defendant pled guilty to all charges following a plea agreement with the State. The trial court consolidated the convictions for judgment and sentenced defendant to an active term of 173 to 217 months' imprisonment.

After defendant was sentenced, the trial court attempted to assess defendant's SBM eligibility on three occasions—occurring on 9 March 2009 and 10 March 2009—after a request was made to do so by the State pursuant to N.C. Gen. Stat. § 14-208.40A (2009).

In its first assessment, on 9 March 2009, the trial court made several findings of fact, relying on AOC-CR-615—Judicial Findings and Order for Sex Offenders, including that defendant: (1) was convicted of an offense against a minor, (2) was not classified as a sexually violent offender, (3) was not a recidivist, (4) the offense of conviction was not an aggravated offense, and (5) that the offense of conviction involved the physical, mental or sexual abuse of a minor. Based on these findings, the court ordered that defendant enroll in the SBM

program upon his release from prison. The court did not require that DOC conduct a Static 99[1] risk assessment or specify a particular duration for the monitoring. Defendant's counsel gave immediate notice of appeal to the trial court's order and expressed doubts about the correctness of the court's determination.

After a brief recess, the trial court struck its initial order and findings of fact and in its second assessment, again relying on AOC-CR-615, made essentially the same findings of fact, except that the court specifically noted that defendant had been convicted of the reportable conviction of rape of a child under the age of twelve as a principal, in violation of N.C. Gen. Stat. § 14-27.2A (2009). Moreover, when asked whether the evidence supported a finding that the offense of conviction was an aggravated offense, the State specifically stated that defendant's conviction was not an aggravated offense. After conducting its findings, the court acknowledged that DOC had not conducted a Static 99 risk assessment, but nonetheless ordered that defendant enroll in SBM for his natural life following his release from prison. Subsequently, the trial court struck the findings in its second order after the prosecutor notified the trial court that N.C.G.S. § 14-27.2A was inapplicable because defendant's victims were not under the age of twelve as required by the statute.

In its third assessment of defendant's SBM eligibility, the trial court again made findings of fact pursuant to AOC-CR-615 and specifically found that defendant's convictions for second-degree rape were aggravated offenses, as defined by N.C. Gen. Stat. § 14-208.6(1a) (2009). Before the trial court's findings were made, when asked a second time whether defendant's conviction was an aggravated offense, the State answered

> No, sir. The definition of aggravated offense is by force or engaging in a sexual act involving vaginal, anal or oral penetration where the victim was less than 12. And the crimes that he is charged with are not forceable.

---

1. Where the trial court finds that a male offender committed an offense involving the physical, mental, or sexual abuse of a minor, the court must order DOC to do a Static 99 risk assessment on the offender, allowing at least 30 days but not more than 60 days to complete the assessment. The Static 99 is an actuarial instrument normalized for use with adult males age 18 and older which involves taking answers from an offender to ten standard, predetermined questions, wherein the offender's answers are assigned a point value and tabulated, with the total determining whether the offender poses a low, moderate or high risk of recidivism.

> That the second-degree rape was due to the mental retardation of the child, of the woman, and the statutory crimes were not enforceable [sic].

After the trial court inquired as to whether defendant had pled guilty to second-degree rape, the State replied in the affirmative, and stated that "the allegation in the indictment was that—it could be force that the victim was mentally retarded" and that, since "it is alleged by force and against their will[,] I would concur, then, that that is an aggravated offense." Before determining whether defendant should enroll in SBM upon his release for life or for a specific number of years, the trial court ordered DOC to conduct a Static 99 risk assessment of defendant. Chief Probation and Parole Officer Tom Grant conducted defendant's risk assessment, and on 10 March 2009, testified that defendant's answers generated a score of "1," placing him in a "low" category. Based on this and further discussion, the trial court again struck its findings of fact from the previous SBM eligibility assessment.

In its final assessment, the trial court again made the same findings of fact as it had in the previous assessment, except that the court found that defendant *had not* been convicted of an aggravated offense. During this assessment, the trial court acknowledged that there had been disagreement about whether second-degree rape was an aggravated offense. However, at this time, the court specifically asked the State, "[a]s I understand it, the contention was that the 18-year-old [victim] had some mental instability while there was not even actual physical force with the threat of serious violence to that victim; is that correct?" The State responded, "[t]hat's correct[]" without explicitly objecting to any aspect of the trial court's order. Based on the findings, the trial court ultimately ordered that defendant be enrolled in the SBM program for a period of ten years upon his release from prison. Defendant gave oral notice of appeal from the court's 10 March 2009 order.

II. ISSUES ON APPEAL

Defendant raises three issues on appeal: (1) whether the trial court erred in finding that defendant required the "highest possible level of supervision and monitoring" and by ordering him to enroll in SBM; (2) whether the SBM statutes are facially unconstitutional and, as applied to defendant, violate both state and federal provisions for vagueness and overbreath; and (3) whether the trial court's order violates defendant's due process rights. In the absence of evidence sufficient to contradict DOC's risk assessment, the State concedes

that the trial court's order requiring that defendant receive the "highest possible level of supervision and monitoring" and enroll in SBM for a period of ten years following his release from prison should be vacated. Based on the analysis below, we reverse the trial court's order.

We also note that the State filed a Petition for Writ of Certiorari concurrent with its brief arguing that defendant should nonetheless be required to enroll in lifetime SBM given that he pled guilty to three counts of second-degree rape of a mentally disabled victim, an aggravated offense as defined by N.C.G.S. § 14-208.6(1a). In light of this Court's decision in *McCravey*, —— N.C. App. at ——, —— S.E.2d at —— (holding as an issue of first impression, that second-degree rape pursuant to N.C.G.S. § 14-27.3(a) is an aggravated offense as defined by the statute), and the extensive discussion of this issue in the trial court, we grant the State's petition for certiorari.

III. GROUNDS FOR APPELLATE REVIEW OF DEFENDANT'S APPEAL

[1] We note that defendant gave oral notice of appeal at the SBM hearing from the trial court's final order. SBM hearings and proceedings are civil regulatory proceedings; therefore, defendant's oral notice of appeal is insufficient to confer jurisdiction on this Court. *State v. Bare*, —— N.C. App. ——, ——, 677 S.E.2d 518, 527 (2009); *see State v. Brooks*, —— N.C. App. ——, ——, 693 S.E.2d 204, 206 (2010) (holding that oral notice of appeal from an SBM hearing or proceeding is insufficient to confer jurisdiction on this Court, and instructing that a defendant must, instead, give written notice of appeal with the clerk of superior court and serve copies of such notice upon all parties pursuant to N.C.R. App. P. 3(a)). However, in the interest of justice, and to expedite the decision in the public interest, we *ex mero motu* treat defendant's brief as a petition for certiorari and grant said petition to address the merits of defendant's appeal.

IV. ANALYSIS

A. Standard of Review

The Court recently stated in *State v. Kilby* that "whether '[an] offender requires the highest possible level of supervision and monitoring[,]' is neither clearly a question of fact nor a conclusion of law." *Kilby*, —— N.C. App. at ——, 679 S.E.2d at 432. The Court in *Kilby* held that, on appeal, the trial court's order should be reviewed to ensure that "the determination that 'defendant requires the highest possible

level of supervision and monitoring' 'reflect[s] a correct application of law to the facts found.' " *Id.* (alteration in original).

B. SBM Hearing Procedure

[2] Where, as in the present case, a defendant has been convicted of a reportable offense pursuant to N.C.G.S. § 14.208.6(4) involving the physical, mental or sexual abuse of a minor and the district attorney has requested that the trial court consider SBM during the defendant's sentencing hearing pursuant to N.C.G.S. § 14.208.40A, the trial court is required to base its determination that defendant enroll in SBM on evidence presented during two phases—a "qualification" phase and a "risk assessment" phase. *Causby*, —— N.C. App. at ——, 683 S.E.2d at 264 (citing *Kilby*, —— N.C. App. at ——, 679 S.E.2d at 433).

During the qualification phase, the Court in *Causby* provides that the following events must occur:

> [First,] the "district attorney shall present to the court any evidence" that the defendant falls into one of five categories: "(i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor." N.C. Gen. Stat. § 14-208.40A(a). [Second,] [u]pon receipt of the evidence from the State and any contrary evidence from the offender, the trial court is required to determine "whether the offender's conviction places the offender" in one of the five categories and to "make a finding of fact of that determination," specifying the category into which the offender falls. N.C. Gen. Stat. § 14-208.40A(b).

Id. In the present case, defendant pled guilty to several reportable offenses as defined by N.C.G.S. § 14-208.6(4) and the trial court, after receiving evidence from the State, found that defendant's offense involved the physical, mental, or sexual abuse of a minor. Defendant does not argue that the trial court erred in making this determination during the qualification phase, thus we do not question nor address its accuracy on appeal.

Where the reportable offense involves the physical, mental, or sexual abuse of a minor, and the defendant was not convicted of an aggravated offense, or determined to be a recidivist or a sexually vio-

lent predator, the trial court must order that DOC conduct a Static 99 risk assessment of the defendant. N.C.G.S. § 14-208.40A(d). If the trial court determines that the defendant requires the "highest possible level of supervision and monitoring" based on DOC's Static 99 risk assessment that defendant poses a "high" risk of re-offending, the court is required to order the defendant to enroll in a satellite-based monitoring program for a period of time to be specified by the court. N.C.G.S. § 14-208.40A(e); *Causby*, ––– N.C. App. at –––, 683 S.E.2d at 263; *Kilby*, ––– N.C. App. at –––, 679 S.E.2d at 434.

In the present case, DOC's Static 99 risk assessment concluded that defendant posed a "low" risk of re-offending. Based solely on DOC's assessment, with no further findings of fact or additional evidence from the State to support its determination, the trial court found that defendant "requires the highest possible level of supervision and monitoring" and ordered defendant to enroll in SBM for a period of ten years following his release from prison. On appeal, the State concedes that the trial court's ruling should be vacated in light of defendant's "low" risk assessment and this Court's recent holdings in *Kilby* and *Causby*. In *Kilby* and *Causby*, our Court held that a DOC risk assessment of "moderate," without any other evidence as to the defendant's risk of recidivism, was insufficient to support the trial court's finding that defendant "requires the highest possible level of supervision and monitoring." *Causby*, ––– N.C. App. at –––, 683 S.E.2d at 263; *Kilby*, ––– N.C. App. at –––, 679 S.E.2d at 434. Therefore, applying these holdings to the present case, the trial court's determination was clearly erroneous.

Defendant's remaining assignments of error ask this Court to hold the SBM statute unconstitutional on due process grounds for vagueness or lack of statutory notice. Defendant did not raise the constitutionality of the SBM statute before the trial court by asserting an objection on this basis. "Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court." *State v. Cumber*, 280 N.C. 127, 131-32, 185 S.E.2d 141, 144 (1971). Moreover, we note that this Court has previously rejected similar arguments to those presently raised by defendant where defendant failed to preserve the issue for appeal. *See State v. Morrow*, ––– N.C. App. –––, –––, 683 S.E.2d 754, 758-59 (2009) (dismissing defendant's constitutional challenge to the SBM statute where defendant failed to raise the issue in the trial court). As such, we dismiss defendant's remaining assignments of error.

Based on the aforementioned, we reverse the trial court's order requiring defendant to enroll in SBM based on DOC's risk assessment of defendant. However, because we grant the State's petition for writ of certiorari, we remand this matter to the trial court to enter an appropriate order in light of *McCravey*.

Reversed and remanded.

Judge ERVIN concurs.

Judge STROUD concurs in the result with separate opinion.

STROUD, Judge, concurring.

I concur with the result reached by the majority opinion to the extent that it reverses the SBM order and remands to the trial court for entry of an order that defendant enroll in SBM for life under N.C. Gen. Stat. § 14-208.40A(c), as second-degree rape under N.C. Gen. Stat. § 14-27.3(a)(2) is an "aggravated offense" as defined by N.C. Gen. Stat. § 14-208.6(1a). I also agree that the trial court erred in finding that defendant required the "highest possible level of supervision and monitoring" where defendant's Department of Correction ("DOC") risk assessment showed a level of "low" risk and the State presented no additional evidence as to defendant's risk of recidivism. However, I write separately on the issue of whether second-degree rape under N.C. Gen. Stat. § 14-208.6(1a) is an aggravated offense because I believe that mere citation to *State v. McCravey*, —— N.C. App. ——, 692 S.E.2d 409 (2010) is not an adequate rationale for this holding, given the issues raised in this case. In addition, as the SBM statutes were recently enacted and have been the subject of much confusion as to proper application, I believe that a full analysis of the issue may be of some assistance to North Carolina's district attorneys, counsel for defendants, the DOC, and superior court judges, all of whom are working to address SBM cases in accordance with these new SBM statutes. I also agree with the majority that this Court should grant the State's petition for certiorari and review the issue of whether defendant's second-degree rape conviction was an aggravated offense.

The majority holds, and I concur, that second-degree rape under N.C. Gen. Stat. § 14-27.3(a)(2) (2007) is an "aggravated offense" as defined by N.C. Gen. Stat. § 14-208.6(1a) (2009). However, this case raises substantially different issues than *State v. McCravey* as to sec-

ond-degree rape, and the arguments before the trial court all focused upon these very issues. As noted in the majority opinion, the trial court reconsidered whether defendant required SBM based upon commission of an "aggravated offense" or a high risk of recidivism several times, and the fact that defendant's conviction involved a mentally disabled victim was the reason for much of the debate at the hearing. I therefore believe that a more in-depth analysis of the issue is in order.

N.C. Gen. Stat. § 14-27.3(a) defines second-degree rape as follows:

> A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.

In *McCravey*, this Court held that second-degree rape pursuant to N.C. Gen. Stat. § 14-27.3(a)(1) is an "aggravated offense." —— N.C. App. at ——, 692 S.E.2d at 420. However, this Court has not previously addressed the issue of whether second-degree rape under N.C. Gen. Stat. § 14-27.3(a)(2) is an "aggravated offense." Under subsection (a)(1), "by force and against the will of the other person" is a specific element of the crime, *see* N.C. Gen. Stat. § 14-27.3(a)(1), which satisfies the definition of an "aggravated offense" under N.C. Gen. Stat. § 14-208.6(1a) requiring commission of the sexual act "through the use of force or the threat of serious violence[.]" *Id.*

In *McCravey*, the defendant argued "that the statutory definition of 'aggravated offense' in N.C. Gen. Stat. § 14-208.6(1a) is unconstitutionally vague because it does not specify what constitutes 'use of force[.]' " *Id.* at ——, 692 S.E.2d at 418. This Court considered the context and purpose of the SBM statute and the case law which has defined "the force required in a sexual offense of this nature." *Id.* at ——, 692 S.E.2d at 419-20. In *McCravey*, we held that

> The language of N.C. Gen. Stat. § 14-208.6(1a)—'through the *use of force* or the threat of serious violence'—reflects the established definitions as set forth in case law of both physical force and constructive force, in the context of the sexual offenses enu-

> merated in N.C. Gen. Stat. §§ 14-27.2, 14-27.3, 14-27.4, and 14-27.5. (emphasis added).
>
> The legislature intended that the same definition of force, as has been traditionally used for second-degree rape, to apply to the determination under N.C. Gen. Stat. § 14-208.6(1a) that an offense was committed by 'the use of force or the threat of serious violence.'

Id. Although defendant herein was convicted of rape under subsection (a)(2), based upon sexual intercourse with a "mentally disabled" victim, our courts have previously held that attempted second-degree rape under N.C. Gen. Stat. § 14-27.3(a)(2) is a felony committed "through the use of force or the threat of serious violence[.]" *See* N.C. Gen. Stat. § 14-208.6(1a). In *State v. Holden*, our Supreme Court considered the defendant's argument that a prior conviction of attempted second-degree rape should not be used as an aggravating factor supporting a sentence of death as a conviction of "a felony involving the use of violence [pursuant to] N.C.G.S. § 15A-2000(e)(3) (1988)." 338 N.C. 394, 403, 450 S.E.2d 878, 883 (1994). In *Holden*, the attempted second-degree rape conviction did not specify which subsection of N.C. Gen. Stat. § 14-27.3 formed the basis for defendant's conviction, and the defendant argued that

> no evidence was presented from which the jury could find beyond a reasonable doubt that the attempted second-degree rape involved violence or the threat of violence. He argues that because the State only offered proof of his conviction for second-degree rape by presenting the judgment, it failed to present evidence sufficient to prove the aggravating circumstance beyond a reasonable doubt. He reasons that the conviction is insufficient to prove the use of or threatened use of violence because second-degree rape may be predicated on sexual intercourse with a person who is mentally defective, mentally incapacitated, or physically helpless. N.C.G.S. § 14-27.3(a)(2) (1993).

Id. at 404, 450 S.E.2d at 883. The Supreme Court rejected this argument, holding that "the crime of attempted rape always involves at least a 'threat of violence' within the meaning of N.C.G.S. § 15A-2000(e)(3)." *Id.* at 405, 450 S.E.2d at 884. The Court went on to explain that

> [t]his Court has concluded that for purposes of N.C.G.S. § 15A-2000(e)(3), rape is a felony which has as an element the

use or threat of violence to the person. *State v. Artis*, 325 N.C. 278, 321, 384 S.E.2d 470, 494 (1989) (quoting *McDougall*, 308 N.C. at 18, 301 S.E.2d at 319), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604, *on remand*, 327 N.C. 470, 397 S.E.2d 223 (1990). We have further reasoned that where rape is deemed to have as an element the use or threat of violence, the 'felony of attempt to commit rape is therefore by nature of the crime a felony which threatens violence.' *State v. Green*, 336 N.C. 142, 170, 443 S.E.2d 14, 30 (1994) (interpreting military law). Under N.C.G.S. § 15A-2000(e)(3), '[a]ttempting to commit a crime which inherently involves violence obviously constitutes, at least, a 'threat of violence." *Id.* at 169, 443 S.E.2d at 30. Therefore, the judgment showing that the defendant had previously been convicted of attempted second-degree rape was sufficient, standing alone, to require that the trial court submit the aggravating circumstance that the defendant had committed a prior felony involving the use or threat of violence to the person.

For purposes of applying this aggravating circumstance, we reject the notion of any felony which may properly be deemed 'non-violent rape.' We believe that a more enlightened view of this matter has been expressed in the opinions of military courts which have been cited with approval by this Court. Under the Uniform Code of Military Justice, rape is always, and under any circumstances, deemed as a matter of law to be a crime of violence. *United States v. Bell*, 25 M.J. 676 (A.C.M.R. 1987), *rev. denied*, 27 M.J. 161 (C.M.A. 1988); *United States v. Myers*, 22 M.J. 649 (A.C.M.R. 1986), *rev. denied*, 23 M.J. 399 (C.M.A. 1987). As stated in *Myers*, military courts 'specifically reject the oxymoronic term of 'non-violent rape.' The more enlightened view is that rape is always a crime of violence, no matter what the circumstances of its commission.' *Myers*, 22 M.J. at 650. 'Among common misconceptions about rape is that it is a sexual act rather than a crime of violence.' *United States v. Hammond*, 17 M.J. 218, 220 n. 3 (C.M.A. 1984). *Green*, 336 N.C. at 169, 443 S.E.2d at 30. We conclude, for similar reasons, that the crime of attempted rape always involves at least a 'threat of violence' within the meaning of N.C.G.S. § 15A-2000(e)(3).

Id. at 404-05, 450 S.E.2d at 883-84. The Court also specifically rejected the argument that sexual intercourse with a person who is mentally defective, incapacitated, or statutorily deemed incapable of consenting does not necessarily involve force or a threat of violence.

> The acts of having or attempting to have sexual intercourse with another person who is mentally defective or incapacitated and statutorily deemed incapable of consenting—just as with a person who refuses to consent—involve the 'use or threat of violence to the person' within the meaning of N.C.G.S. § 15A-2000(e)(3). In this context, the force inherent to having sexual intercourse with a person who is deemed by law to be unable to consent is sufficient to amount to 'violence' as contemplated by the General Assembly in this statutory aggravating circumstance. Likewise, the attempt to have sexual intercourse with such a person inherently includes a threat of force sufficient to amount to a 'threat of violence' within the meaning of this aggravating circumstance.

Id. at 406, 450 S.E.2d at 884.

Certainly, if the crime of attempted second-degree rape is a crime which "always involves at least a threat of violence" for purposes of an aggravating factor which may support a sentence of death, there is no reason to consider second-degree rape any differently in the context of enrollment in SBM. I therefore concur with the majority in remand of this matter to the trial court for entry of an order that defendant enroll in SBM for life after his release from prison, pursuant to N.C. Gen. Stat. § 14-208.40A(c) (2009).

I therefore concur.

JAMES W. LANGSTON, PLAINTIFF v. JULIE RICHARDSON, AS EXECUTRIX OF THE ESTATE OF JEANNE E. LANGSTON, DEFENDANT

No. COA09-1535

(Filed 3 August 2010)

1. Divorce— equitable distribution—classification—marital property—investment accounts

The trial court did not err in an equitable distribution case by concluding as a matter of law that the investment accounts were marital property. Defendant wife acquired the accounts during the marriage and prior to separation, and plaintiff husband failed to show by a preponderance of the evidence that the accounts were separate property when he did not state in the conveyance that he intended for the accounts to remain separate property.

2. Divorce— equitable distribution—unequal division—factors including paying other party's separate debt

The trial court did not err in an equitable distribution case by ordering plaintiff husband to pay the equity line debt the court found to be defendant wife's separate debt. Plaintiff was awarded $220,992.40 and defendant was awarded $87,021.05 as their sole and separate property, and the court found plaintiff's obligation to pay the equity line debt was a major factor for an unequal distribution.

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

Assignments of error not argued in plaintiff's brief were deemed abandoned under N.C. R. App. P. 28(b)(6).

Judge WYNN dissenting.

Appeal by plaintiff from judgment entered 9 June 2009 by Judge C. Christopher Bean in Perquimans County District Court. Heard in the Court of Appeals 27 April 2010.

The Twiford Law Firm, P.C., by Edward A. O'Neal, for plaintiff-appellant.

Trimpi & Nash, LLP, by John G. Trimpi, for defendant-appellee.

CALABRIA, Judge.

James W. Langston ("plaintiff") appeals the trial court's equitable distribution judgment ("the order"). The trial court classified certain joint accounts as marital property, certain debt as separate property, and ordered an equitable distribution of property. We affirm.

I. BACKGROUND

On 1 September 1998, plaintiff and Jeanne Langston ("Mrs. Langston") (collectively "the parties") were married in Hertford County, North Carolina. There were no children born of the marriage. The parties lived together as husband and wife until 11 February 2004, when they separated.

Prior to the marriage, plaintiff owned several investment accounts. After the parties were married and prior to the date of separation, plaintiff added Mrs. Langston's name to the investment accounts. Also during the marriage, plaintiff and Mrs. Langston negotiated an equity line loan with Wachovia Bank ("the equity line"). On

23 January 2004, less than three weeks before the date of separation, Mrs. Langston withdrew $51,000.00 from the equity line and deposited the funds into a bank account listed in her individual name. Prior to Mrs. Langston's withdrawal, the total indebtedness of the equity line was $6,419.78. On the date of separation, the total indebtedness was $57,419.78.

On 14 May 2004, plaintiff filed a complaint in Perquimans County District Court seeking, *inter alia*, an absolute divorce as well as a distribution of the parties' marital property and debt. Mrs. Langston answered and counterclaimed, seeking, *inter alia*, an equitable distribution. Plaintiff subsequently moved to sever the issue of absolute divorce from the other claims. On 9 May 2005, the trial court granted plaintiff an absolute divorce.

Mrs. Langston died testate on 12 July 2005. Julie Richardson, Executrix of the Estate of Mrs. Langston ("defendant"), was substituted as the party defendant and appeared in a representative capacity in this matter. On 2 December 2008, an Equitable Distribution Pretrial Order was filed. Schedules were included explaining the reasons both parties contended that an equal division of property was not equitable.

The equitable distribution hearing was held on 23 March 2009 in Perquimans County District Court. Plaintiff was 89 years old, received income in the amount of $792.00 per month in Social Security benefits and approximately $1,500.00 per month in retirement benefits. Following the hearing, the trial court entered an order finding and concluding that the investment accounts were marital property and that $51,000.00 of the equity line loan was defendant's separate debt. The court distributed the Wachovia CAP Account, Dominion Direct Account, and Putnam Hartford Capital Manager Contract to plaintiff, and the America's Utility Fund Account to defendant. The court also ordered plaintiff to pay defendant's $51,000.00 separate debt and stated that plaintiff's "obligation to do so was considered as a major factor for an unequal distribution." Plaintiff appeals.

II. STANDARD OF REVIEW

"The division of property in an equitable distribution is a matter within the sound discretion of the trial court." *Cunningham v. Cunningham*, 171 N.C. App. 550, 555, 615 S.E.2d 675, 680 (2005) (internal quotations and citation omitted). "When reviewing an equitable distribution order, the standard of review 'is limited to a deter-

mination of whether there was a clear abuse of discretion.' " *Petty v. Petty*, —— N.C. App. ——, ——, 680 S.E.2d 894, 898 (2009) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White*, 312 N.C. at 777, 324 S.E.2d at 833. "Further, '[i]t is well established that a trial court's conclusions of law must be supported by its findings of fact.' " *Squires v. Squires*, 178 N.C. App. 251, 256, 631 S.E.2d 156, 159 (2006) (quoting *Robertson v. Robertson*, 167 N.C. App. 567, 574, 605 S.E.2d 667, 671 (2004)). "[T]he findings of fact are conclusive [on appeal] if they are supported by any competent evidence from the record." *Beightol v. Beightol*, 90 N.C. App. 58, 60, 367 S.E.2d 347, 348 (1988).

III. INVESTMENT ACCOUNTS

[1] Plaintiff argues that the trial court erred in concluding as a matter of law that the investment accounts were marital property. We disagree.

As an initial matter, we note that in the instant case, the trial court made sixty-nine findings of fact in the order. Plaintiff argues only Findings 20, 23, 28, 34 and 40. "Under N.C.R. App. P. 10(a), this Court's review is limited to those findings of fact and conclusions of law properly assigned as error." *Dreyer v. Smith*, 163 N.C. App. 155, 156, 592 S.E.2d 594, 595 (2004) (citing *Koufman v. Koufman*, 330 N.C. 93, 98, 408 S.E.2d 729, 731 (1991)). Assignments of error not argued in plaintiff's brief are abandoned. N.C. R. App. P. 28(b)(6) (2009). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. Therefore, in the instant case, all the other findings to which plaintiff has not assigned error or argued are presumed to be supported by competent evidence and are binding on this Court.

A pending action for equitable distribution does not abate upon the death of a party. *Estate of Nelson v. Nelson*, 179 N.C. App. 166, 170, 633 S.E.2d 124, 128 (2006). "Pursuant to N.C. Gen. Stat. § 50-20 (2007), equitable distribution is a three-step process requiring the trial court to '(1) determine what is marital [and divisible] property; (2) find the net value of the property; and (3) make an equitable distribution of that property.' " *Petty*, —— N.C. App. at ——, 680 S.E.2d at 898 (quoting *Cunningham*, 171 N.C. App. at 555, 615 S.E.2d at 680). "The initial obligation of the trial court in any equitable distribution

action is to identify the marital property in accordance with G.S. 50-20 and the appropriate case law." *Cornelius v. Cornelius*, 87 N.C. App. 269, 271, 360 S.E.2d 703, 704 (1987) (citing *Mauser v. Mauser*, 75 N.C. App. 115, 330 S.E.2d 63 (1985). N.C. Gen. Stat. § 50-20(b) (2008) defines marital and separate property as follows:

> (1) "Marital property" means 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 . . . in accordance with subdivision (2) . . . of this section.
>
> (2) "Separate property" means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage.

"Under N.C. Gen. Stat. Sec. 50-20(c), only marital property is subject to distribution." *Rogers v. Rogers*, 90 N.C. App. 408, 409, 368 S.E.2d 412, 413 (1988). "The trial court must classify and identify property as marital or separate 'depending upon the proof presented to the trial court of the nature' of the assets." *Atkins v. Atkins*, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787 (1991) (quoting *Johnson v. Johnson*, 317 N.C. 437, 455, 346 S.E.2d 430, 440 n.4 (1986)).

> The burden of showing the property to be marital is on the party seeking to classify the asset as marital and the burden of showing the property to be separate is on the party seeking to classify the asset as separate. A party may satisfy her burden by a preponderance of the evidence.

Id. (citations omitted).

> The party claiming the property to be marital must meet her burden by showing by the preponderance of the evidence that the property: (1) was "acquired by either spouse or both spouses"; and (2) was acquired "during the course of the marriage"; and (3) was acquired "before the date of the separation of the parties"; and (4) is "presently owned." N.C.G.S. § 50-20(b)(1). If this burden is met and a party claims the property to be separate, that party has the burden of showing the property is separate. This burden is met by showing by the preponderance of the evidence that the property was: (1) "acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage" (third-party gift provision); or (2) "acquired by gift from

the other spouse during the course of marriage" and the intent that it be separate property is "stated in the conveyance" (interspousal gift provision); or (3) was "acquired in exchange for separate property" and no contrary intention that it be marital property is "stated in the conveyance" (exchange provision). N.C.G.S. § 50-20(b)(2). If both parties meet their burdens, then under the statutory scheme of N.C.G.S. § 50-20(b)(1) and (b)(2), the property is excepted from the definition of marital property and is, therefore, separate property.

Id. at 206, 401 S.E.2d at 787-88.

In the instant case, plaintiff testified as follows:

Q: [Plaintiff's counsel]: Did you at some point in time put Mrs. Langston's name on these [investment] accounts?

A: [Plaintiff]: I guess I did, I believe.

Q: Okay. And do you know how you did that?

A: She did it. I made that decision, but she's the one that initiated it.

. . .

Q: [Plaintiff], tell me what you intended to do when you put Mrs. Langston's name on these accounts.

A: Well, I (inaudible) that she was going to [be] part of it, I guess.

Q: She was going to be part of it. You wanted her to be able to access the accounts?

A: Yes, sir.

On cross-examination, plaintiff testified:

Q: [Defendant's counsel]: But you treated the accounts differently; you put her name on those accounts?

A: [Plaintiff]: Yes, I did.

Q: And isn't the reason that you did that, Mr. Langston is that you wanted to take care of her if something would happen to you?

A: Yeah.

Q: And you told her that, did you not?

A: Sure.

Plaintiff further testified that he was from the "old school," which to him meant that in a marriage, "what's mine is yours, what's yours is mine[.]" Defendant then testified on behalf of Mrs. Langston since Mrs. Langston was deceased and defendant had witnessed Mrs. Langston's sworn testimony in her deathbed deposition from the Norfolk Sentara Hospital:

> Q: [Defendant's counsel]: Ms. Richardson, did I ask Ms. Langston about the circumstances existing at the time the accounts were made joint?
>
> A: [Defendant]: Yes.
>
> Q: What did she testify about?
>
> A: She said that about a month after [Ms. Langston and plaintiff] married they discussed adding her onto those [investment] accounts. [Plaintiff] had stated that he wanted her to be taken care of if he were to pass. And that she then was added onto those accounts with his knowledge.

The trial court found that the accounts were marital property since Mrs. Langston acquired the accounts during her marriage to plaintiff and prior to their separation. Therefore, the burden shifted to plaintiff to show by a preponderance of the evidence that the accounts were separate property. *See Lilly v. Lilly*, 107 N.C. App. 484, 486, 420 S.E.2d 492, 493 (1991).

"When classifying real property as marital or separate, the fact that legal title is in one or the other spouse, or in both, is not controlling. Rather, property is classified according to the definitions of marital and separate property contained in N.C. Gen. Stat. § 50-20(b)." *Estate of Nelson*, 179 N.C. App. at 169, 633 S.E.2d at 127 (citation omitted). Under N.C. Gen. Stat. § 50-20, "property acquired by gift from the other spouse during the course of the marriage shall be considered separate property *only if* such an intention is stated in the conveyance." N.C. Gen. Stat. § 50-20(b)(2) (2008) (emphasis added). "Thus, there is a presumption under N.C. Gen. Stat. § 50-20(b) that property acquired during the marriage is marital property." *Estate of Nelson*, 179 N.C. App. at 169, 633 S.E.2d at 127.

In the instant case, plaintiff testified that he added Mrs. Langston's name to the accounts and told her that the reason for doing so was to "take care of her" when he passed away. Plaintiff also contacted some of the various investment houses and requested having Mrs. Langston's name added to the accounts. Since plaintiff did

not state in the conveyance that he intended for the accounts to remain separate property, he did not prove by a preponderance of the evidence that the accounts were separate property. The trial court properly concluded the accounts were marital, not separate property. Plaintiff's assignments of error are overruled.

IV. UNEQUAL DISTRIBUTION

[2] Plaintiff argues that the trial court erred in ordering him to pay the equity line debt which the court found to be defendant's separate debt. We disagree.

N.C. Gen. Stat. § 50-20(c) states, in pertinent part:

> If the court determines that an equal division is not equitable, the court shall divide the marital property . . . equitably. The court shall consider all of the following factors under this subsection:
>
> (1) The income, property, and liabilities of each party at the time the division of property is to become effective.
>
> . . .
>
> (3) The duration of the marriage and the age and physical and mental health of both parties.
>
> . . .
>
> (5) The expectation of pension, retirement, or other deferred compensation rights that are not marital property.
>
> (6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker.
>
> . . .
>
> (11b) In the event of the death of either party prior to the entry of any order for the distribution of property made pursuant to this subsection:
>
> a. Property passing to the surviving spouse by will or through intestacy due to the death of a spouse.
>
> b. Property held as tenants by the entirety or as joint tenants with rights of survivorship passing to the surviving spouse due to the death of a spouse.

c. Property passing to the surviving spouse from life insurance, individual retirement accounts, pension or profit-sharing plans, any private or governmental retirement plan or annuity of which the decedent controlled the designation of beneficiary (excluding any benefits under the federal social security system), or any other retirement accounts or contracts, due to the death of a spouse.

. . .

(12) Any other factor which the court finds to be just and proper.

N.C. Gen. Stat. § 50-20(c) (2008).

In the instant case, the trial court's equitable distribution judgment awarded $220,992.40 to plaintiff as his sole and separate property and $87,021.05 to defendant as her sole and separate property. The court ordered plaintiff to pay $51,000.00 of the equity line debt that the trial court classified as defendant's separate debt. Stating that plaintiff's "obligation to do so was considered as a major factor for an unequal distribution," the court concluded that "[t]he division of the marital property and debt . . . is equitable after considering the evidence presented and the contentions asserted by each of the parties for an unequal division." Plaintiff's assignments of error are overruled.

V. CONCLUSION

[3] Assignments of error not argued in plaintiff's brief are abandoned. N.C.R. App. P. 28(b)(6) (2009). The trial court's equitable distribution order is affirmed.

Affirmed.

Judge STEELMAN concurs.

Judge WYNN dissents by separate opinion.

WYNN, Judge, dissenting.

A spouse claiming that separate funds deposited into a joint account represent marital property must demonstrate "that the exchange of separate property was accompanied by: (1) an *intention* that the account be marital property; and (2) that such intention was

expressly stated in the conveyance."[1] In the present case, the trial court classified several joint accounts as marital property absent such a showing by Defendant. Because I would hold that the trial court erred in classifying the accounts as marital property, I respectfully dissent.

The facts of this case are not in dispute. Plaintiff James W. Langston and Defendant Jeanne E. Langston were married in 1998. Prior to the marriage, Plaintiff owned various investment accounts. During the marriage, Defendant's name was placed on the accounts.

At the hearing conducted in this matter, Plaintiff indicated that he placed Defendant's name on the accounts because he wanted her "to be a part of it." On cross-examination, counsel for Defendant asked Plaintiff, "And isn't the reason that you did that . . . is that you wanted to take care of her if something would happen to you?" Plaintiff replied, "yeah." Plaintiff could not recall "any particular conversation" when he informed Defendant of this intention.

Also during the marriage, the parties negotiated an equity line loan with Wachovia Bank. On 23 January 2004, Defendant received a cash advance of $51,000 from the Wachovia Equity Line which she deposited into her individually owned bank account. The trial court found that this debt represented Defendant's separate property.

Plaintiff commenced this action on 14 May 2004, seeking a divorce and equitable distribution of the marital estate. The parties were divorced by a judgment filed 9 May 2005. During the pendency of this action, Defendant died and Julie Richardson was appointed executrix of her estate. The equitable distribution case was tried during the 23 March 2009 civil session of District Court in Perquimans County. The trial court filed an equitable distribution judgment distributing the marital property on 9 June 2009. Plaintiff appealed.

On appeal, Plaintiff alleges the trial court erred in (I) concluding that the investment accounts became marital property; and (II) ordering Plaintiff to pay the equity line debt.

I

Plaintiff first argues that the trial court erred in concluding that the investment accounts became marital property.

1. *Friend-Novorska v. Novorska*, 131 N.C. App. 508, 511, 507 S.E.2d 900, 902 (1998).

N.C. Gen. Stat. § 50-20 defines separate property to include "all real and personal property acquired by a spouse before marriage[.]" N.C. Gen. Stat. § 50-20(b)(2) (2009). "However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance." *Id.*

We addressed a similar issue in *Manes v. Harrison-Manes*, 79 N.C. App. 170, 338 S.E.2d 815 (1986). Plaintiff and defendant in *Manes* were married in 1979. *Id.* at 170, 338 S.E.2d at 815. Plaintiff then acquired separate property (by inheritance) which he deposited into a bank account in his sole name. *Id.* Plaintiff subsequently changed the bank account to a joint account by adding defendant's name. *Id.* at 170, 338 S.E.2d at 816. In an action for equitable distribution, the trial court concluded that the account remained the separate property of plaintiff, and defendant appealed. *Id.* at 171, 338 S.E.2d at 816. On appeal, this Court held that the trial court did not err in its disposition of the bank account.

> Although the plaintiff added defendant's name to the bank account . . ., the record discloses no evidence of any intention that the funds would not remain plaintiff's separate property. The deposit of funds into a joint account, standing alone, is not sufficient evidence to show a gift or an intent to convert the funds from separate property to marital property.

Id. at 172, 338 S.E.2d at 816-17.

We revisited the issue of joint accounts in *Friend-Novorska v. Novorska*, 131 N.C. App. 508, 507 S.E.2d 900 (1998). We there stated,

> The plain language of the [equitable distribution] statute requires that in order to classify a joint account created by the deposit of separate funds as marital property, the spouse claiming such a classification must demonstrate by a preponderance of the evidence that the exchange of separate property was accompanied by: (1) an *intention* that the account be marital property; and (2) that such intention was *expressly stated in the conveyance*.

Id. at 511, 507 S.E.2d at 902. The Court recognized that "we have not found an 'express statement' of an intent to create marital property in any of our reported cases involving personal property and the creation of joint accounts." *Id.*

Here, Defendant attempts to distinguish these precedents by arguing that Plaintiff clearly intended to make a gift of the accounts to Defendant. Defendant essentially raises the same arguments that were considered, and rejected, by this Court in *Friend-Novorska*. In that case, the wife contended that the accounts were properly classified as marital property because her husband had stated that at least part of the property in controversy would be used "for the marriage." *Id.* at 512, 507 S.E.2d at 903. We rejected this argument for three reasons:

> First, defendant's statement is not an express statement of intention that the IDS funds were to be the property of the marital estate. . . . Second, plaintiff was not able to offer evidence of any express statement by defendant that the IDS funds would be marital property. Third, the statement in question was made about a year prior to defendant's exchanging his separate funds for the IDS account. Due to the passage of time, we do not believe the statement was one made "in the conveyance."

Id.

In the present case, Defendant points to no expressly stated intention of the Plaintiff to convert the investment accounts into marital property. Rather, Defendant argues that Plaintiff's statement that he was putting his wife's name on the joint accounts in order to take care of her in case anything happened to him was "an express statement demonstrating an intention to directly benefit her and indirectly benefit the marital estate." Such a statement is not adequate to transform separate property into marital property. *See id.* at 511, 507 S.E.2d at 902. Indeed, Plaintiff's statement was neither an explicit statement of intention to create marital property nor an express statement in any conveyance. I would therefore hold that the trial court erred in concluding that the joint accounts were entirely marital property.

II

Plaintiff next argues that the trial court erred in ordering Plaintiff to pay the equity line debt. I agree.

N.C. Gen. Stat. § 50-20 authorizes the trial court to distribute only marital and divisible property. N.C. Gen. Stat. § 50-20(a) (2009). "Separate property is not subject to equitable distribution." *Caudill v. Caudill*, 131 N.C. App. 854, 855, 509 S.E.2d 246, 248 (1998). "Debts, as well as assets, must be classified as marital or separate property." *Fox v. Fox*, 114 N.C. App. 125, 134, 441 S.E.2d 613, 618 (1994).

N.C. Gen. Stat. § 50-20(c) allows the trial court to make an unequal distribution of the marital and divisible property "[i]f the court determines that an equal division is not equitable[.]" N.C. Gen. Stat. § 50-20(c) (2009). One factor the court is allowed to consider in making an unequal distribution is "[t]he income, property, and liabilities of each party at the time the division of property is to become effective." *Id.* Thus, although the trial court may consider the parties' separate property in its scheme of equitable distribution, the trial court is empowered to divide and distribute only the marital and divisible property. *Id.*

In the present case, the trial court found that "[t]he Wachovia Bank equity line account totaled $57,419.78 on the date of separation. Of that amount, $51,000.00 was the Defendant's separate debt . . . ." Notwithstanding, the trial court directed Plaintiff to pay that debt, noting that "[Plaintiff's] obligation to do so was considered as a major factor for an unequal distribution." Plaintiff now argues that the trial court exceeded its authority under the statute in distributing to him what is in effect Defendant's separate property.

In support of the order, Defendant adverts to the unequal distribution of the marital property. Defendant points, however, to no statutory provision authorizing the trial court to distribute one party's separate property to the other. Indeed, the statute contains no such provision. *See* N.C. Gen. Stat. § 50-20 (2009).

I conclude from this that the trial court erred in distributing to Plaintiff Defendant's $51,000 debt.

JUDY CARDWELL, EMPLOYEE, PLAINTIFF v. JENKINS CLEANERS, INC., EMPLOYER, AND MIDWEST EMPLOYERS CASUALTY COMPANY, CARRIER (KEY RISK INSURANCE COMPANY), THIRD-PARTY ADMINISTRATOR, DEFENDANTS

No. COA10-136

(Filed 3 August 2010)

1. Workers' Compensation— stipulation—scope of review by Industrial Commission

The Industrial Commission did not err in a workers' compensation case by determining that the parties had stipulated that the sole issue was whether plaintiff's injury occurred on defendant's premises. The Commission resolved both of the factual issues

raised by the employee and did not improperly limit the scope of its review.

2. Workers' Compensation— job duties—unlocking door—fall in parking lot

The Industrial Commission did not err in a workers' compensation case by failing to find that unlocking the back door was part of plaintiff's job where the Commission found that defendant had not reached the back door when the injury occurred.

3. Workers' Compensation— slip and fall—findings—location of fall

Competent evidence supported the Industrial Commission's findings in a workers' compensation case that plaintiff was in a parking lot not controlled by defendant when she fell.

4. Workers' Compensation— injury by accident—fall on ice—outside defendant's premises

The Industrial Commission did not err by failing to find that plaintiff's fall on ice was not an injury by accident in the course of her employment where the fall occurred close to defendant's doorway but in a parking lot over which defendant had no control.

Chief Judge MARTIN dissenting.

Appeal by plaintiff-employee from opinion and award entered 17 September 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 June 2010.

Pope McMillan Kutteh Privette Edwards & Schieck, P.A., by Martha N. Peed and Anthony S. Privette, for plaintiff-employee.

McAngus, Goudelock & Courie, P.L.L.C., by Jason C. McConnell & Danielle M. Walther, for defendants.

BRYANT, Judge.

On 23 January 2008, plaintiff-employee Judy Cardwell was injured in an accident. Defendant-employer Jenkins Cleaners, Inc., and defendant-carrier Key Risk Insurance Company denied employee's claim for workers' compensation benefits via a Form 61. Following a hearing, the deputy commissioner rendered an opinion and award on 16 March 2009 denying plaintiff benefits. Employee

appealed to the Full Commission. By an opinion and award filed 17 September 2009, the Full Commission affirmed the opinion of the deputy commissioner with modifications. Employee appealed. As discussed below, we affirm.

Facts

On 23 January 2008, employee arrived at work at approximately 7:15 a.m. and parked her vehicle in the parking lot next to employer's location. Employee walked across the parking lot toward the back door of the business and slipped on black ice approximately three feet in front of the door. As a result, she fell and broke her wrist.

The sole issue before the Full Commission was whether the injury employee sustained was compensable in that it occurred on employer's premises, thereby rendering it compensable under the Workers' Compensation Act. Employer leases the building where its business is located. Employer does not control the parking lot adjacent to the building which is shared by a number of businesses. In addition, employer has no obligation for upkeep of the parking lot and is prohibited from reserving any parking spots for its customers' or employees' use.

On appeal, employee makes four arguments: that the Commission erred in (I) determining that the parties stipulated that the sole issue to be decided by the Commission was whether the injury sustained by employee occurred on employer's premise; (II) failing to find as fact that opening the shop, including unlocking the rear door before 7:30 a.m. was a requirement of employee's job; (III) finding that employee was in the parking lot at the time of her injury; and (IV) failing to find that employee's injury was an "injury by accident arising out of and in the course of employment."

Standard of Review

Our review of an opinion and award from the Industrial Commission is limited to determining whether competent evidence supports the Commission's findings of fact and whether those findings support the conclusions of law. *Calloway v. Mem'l Mission Hosp.*, 137 N.C. App. 480, 484, 528 S.E.2d 397, 400 (2000) (citation omitted). Findings supported by competent evidence are conclusive on appeal even if the evidence could support contrary findings. *Id.* (citing *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d at 414 (1998), *reh'ing denied*, 350 N.C. 108, 532 S.E.2d 522 (1999)). We review con-

clusions of law de novo. *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 605, 615 S.E.2d 350, 357, *disc. review denied*, 360 N.C. 63, 623 S.E.2d 582 (2005).

I

[1] Plaintiff first argues the Commission erred in determining that the parties stipulated that the sole issue to be decided was whether the injury sustained by plaintiff occurred on defendant's premises and was therefore compensable. We disagree.

The Commission's opinion and award includes the following stipulation:

> 7. The sole issue to be decided by the Industrial Commission is whether the injury [employee] sustained on January 23, 2008, occurred on the defendant-employer's premises and is therefore compensable under the North Carolina Workers' Compensation Act.

Employee contends that the Commission mis-characterized the issue to be decided in that the order from the final pre-trial conference stated the issue to be decided as "[w]hether [employee] sustained a compensable on-the-job injury on January 23, 2008." Employee asserts that narrowing the issue to whether the injury occurred on the premises improperly narrowed the Commission's focus. Our review of the record suggests that employee's argument is without merit.

Under the Worker's Compensation Act, an employee is entitled to benefits for injuries sustained in an accident arising out of and in the course of employment. N.C. Gen. Stat. § 97-2(6) (2009). "The term 'arising out of' refers to the origin or causal connection of the injury to the employment; the phrase 'in the course of' refers to the time, place and circumstances under which the injury by accident occurs." *Barham v. Food World*, 300 N.C. 329, 332, 266 S.E.2d 676, 678, *reh'ing denied*, 300 N.C. 562, 270 S.E.2d 105 (1980). "As a general rule, injuries occurring while an employee travels to and from work do not arise in the course of employment and thus are not compensable." *Id.* This "going and coming" rule has further evolved such that "an employee injured while going to and from work *on the employer's premises* is generally covered by the Act." *Id.*

Here, the record reveals that the dispute between the parties about compensability of employee's injury concerned two factual matters: (1) employee's physical location when she fell (i.e. whether

she was in the parking lot or on employer's premises) and (2) employee's actions at the time of the fall (i.e. whether she was performing job duties). Issue (1) falls directly under the "coming and going" rule. In addition, employee's argument as to issue (2) was that unlocking the back door was one of her job duties and, therefore, if she was in the process of unlocking the back door when she fell, the injury would be compensable. Thus, although issue (2) is not facially an issue of "coming and going," the facts here indicate that whether employee was on employer's premises is dispositive of that matter as well. In finding of fact 2, the Commission specifically found that, at the time employee slipped and fell, she had "not even reached the back door." Having not reached the back door, employee cannot have been in the process of unlocking it. Because the Commission resolved both issues raised by employee in its opinion and award and did not improperly limit the scope of its review, we overrule employee's argument on this point.

II

[2] Employee next argues the Commission erred in failing to find as fact that opening the shop, including unlocking the rear door before 7:30 a.m., was a requirement of plaintiff's job. We disagree.

We first note that employee fails to cite any authority in support of her argument. Our appellate rules require that "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." N.C. R. App. P. 28(6) (2009). However, as this rules violation does not impair our ability to consider the merits of her argument, we address employee's substantive contention. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008).

The Commission need not make specific findings of fact on every issue raised by the evidence. *Watts v. Borg Warner Auto., Inc.*, 171 N.C. App. 1, 5, 613 S.E.2d 715, 719, *affirmed*, 360 N.C. 169, 622 S.E.2d 492 (2005) (per curiam). Rather, it is only "required to make findings on crucial facts upon which the right to compensation depends." *Id.* Whether unlocking the rear door each morning was one of employee's duties is not crucial to her right to compensation. As noted above, the Commission found as fact that employee had "not even reached the back door" when the injury occurred. Thus, any finding that unlocking the door was part of her job duties was irrelevant and would have no effect on the Commission's conclusions as to

compensability. The Commission did not err in failing to make the finding sought by employee, and this argument is overruled.

III

[3] Employee also argues that the Commission erred in finding she was in the parking lot at the time of her injury. We disagree.

Finding of fact 2 states:

> 2. On January 23, 2008, plaintiff arrived at the 825 N. Center Street location sometime between 7:15 and 7:30 a.m. in order to open the location at 7:30 a.m. She parked her vehicle on the west side or the rear of the store, according to her normal routine. As plaintiff was walking through the parking lot to the back door, she slipped on black ice and fell, breaking her right wrist. Plaintiff had not entered the store, or even reached the back door, prior to slipping, falling, and injuring her wrist.

Plaintiff contends that "uncontroverted evidence in the record reflects the fact that [she] 'fell in the doorway' " and that no competent evidence supports the Commission's finding that she was in the parking lot at the time of the injury. However, employee's own brief undercuts her assertion. Employee's brief acknowledges that she fell on the "cement area extending approximately three feet from the door." Employee testified that she "fell between the—the right before the-the black whatever—the black pavement and the—and the cement. I fell right on that, really on that cement area right there." Similarly, in her responses to defendants' first set of interrogatories, employee stated that she was "about three steps from the door" when she slipped and fell.

Employee contends that the cement area is not part of the parking lot because "it is graded on a different slope than the parking lot and separated from the parking lot by cement curbing." However, she cites no authority for this proposition and we have found none.[1] Moreover, even if the cement area where employee fell was designated as something other than "parking lot," employee does not argue that the cement area was part of employer's premises.

Competent evidence supports finding 2, that "[a]s plaintiff was walking through the parking lot to the back door, she slipped on black ice and fell, breaking her right wrist. Plaintiff had not entered

1. As with the previous issue, plaintiff fails to cite any authority in support of her argument as required by N.C. R. App. P. 28(6).

the store, or even reached the back door, prior to slipping, falling, and injuring her wrist." This argument is overruled.

IV

[4] In her final argument, employee contends that the Commission erred in failing to find that her injury was an "injury by accident arising out of and in the course of employment." We disagree.

Employee returns to her assertions that her injury was compensable because she fell in the doorway of employer's premises with the key in her hand as she prepared to unlock the business, a part of her job duties. The Commission's unchallenged findings 4-10 reflect that employer leased his premises in a shopping center and did not exercise any control or rights over the common areas of the shopping center outside his store. Further, as discussed *supra*, competent evidence supports finding 2, which is conclusive on appeal:

> 2. On January 23, 2008, plaintiff arrived at the 825 N. Center Street location sometime between 7:15 and 7:30 a.m. in order to open the location at 7:30 a.m. She parked her vehicle on the west side or the rear of the store, according to her normal routine. As plaintiff was walking through the parking lot to the back door, she slipped on black ice and fell, breaking her right wrist. Plaintiff had not entered the store, or even reached the back door, prior to slipping, falling, and injuring her wrist.

Thus, the Commission's findings show that employee was not on her employer's premises and had not yet reached the back door to unlock it when she slipped and fell. Therefore, the injury was not "arising out of and in the course of employment" and was not compensable. *Barham*, 300 N.C. at 332, 266 S.E.2d at 678.

The dissent cites *Bass v. Mecklenburg County*, for the proposition that "the great weight of authority holds that injuries sustained by an employee while going to or from his place of work upon premises owned or controlled by his employer are generally deemed to have arisen out of and in the course of the employment." 258 N.C. 226, 232, 128 S.E.2d 570, 574 (1962) (citations omitted). We agree entirely with this proposition, but find it inapplicable to the facts before us in this case. In *Bass*, the employee was a practical nurse at the County Home and lived "on the premises" in quarters furnished by the employer "[a]s part of her salary." *Id.* at 231, 128 S.E.2d at 574. The employee slipped and fell on a sidewalk while attempting to avoid overgrown bushes as she walked between her quarters and the

main building, where she was to begin her work. *Id.* at 229-30, 128 S.E.2d at 572-73. Thus, in *Bass*, unlike the instant case, the employee was *on the premises*, which were owned, maintained, and controlled by the employer, at the time of her injury, even though she had not yet begun her work. *Id.* at 233, 128 S.E.2d at 575. Here, in contrast, employee was *not* on her employer's premises and the dissent agrees that competent evidence support's the Commission's finding that employer had no rights or control over the parking lot. The Commission made no findings about employer's right to control or duty to maintain the area between "the black pavement and . . . the cement" area outside back door.

Likewise, we find the dissent's reliance on *Hunt v. State*, 201 N.C. 707, 161 S.E. 203 (1931), misplaced. In *Hunt*, the employee was a member of the National Guard who died following a car accident on a public highway which occurred as he was on his way to report for duty. *Id.* at 709, 161 S.E. at 204. The Supreme Court held that

> [w]hen injured the plaintiff had not reached the place where he could do any work for his employer; he was not in a car provided by or under the control of his employer; he was not within the ambit of the camp or the sphere of the proposed service; he would have entered upon his work where he would have left it off. The injury, therefore, did not arise out of and in the course of the employment.

Id. at 711, 161 S.E. at 205. As in *Bass*, the Court focused on whether the employer owned or controlled the location where the employee was injured, noting that "a reasonable margin must be allowed [the employee] to get to the place of work if he is on the premises of the employer or on some access to the premises which the employer has provided." *Id.* at 710-11, 161 S.E. at 205.

Again, here, employee was not on employer's premises when the injury occurred. Further, nothing in the record or Commission's findings suggests that employer "provided" the area where employee fell as "some access to the premises." Thus, the Commission did not err in failing to find that employee's slip and fall was an "injury by accident arising out of and in the course of employment." This assignment of error is overruled.

Affirmed.

Judge ELMORE concurs.

Chief Judge MARTIN dissents in a separate opinion.

MARTIN, Chief Judge, dissenting.

The majority concludes, and I do not disagree, that competent evidence was presented to support the Commission's findings of fact that defendant-employer "neither had exclusive control of the parking lot nor cleaned or maintained the parking lot . . . and the lease did not otherwise grant defendant-employer any rights or control over the parking lot." I also agree with the majority that it was based upon these and similar findings that the Commission concluded plaintiff-employee's injury did not "arise out of and in the course of" her employment. However, I do not agree that there was any competent evidence presented to support the Commission's finding that plaintiff-employee slipped and fell on black ice as she was "*walking through the parking lot* to the back door." (Emphasis added.) Instead, the evidence presented indicated that plaintiff-employee slipped and fell on black ice in the cement access area in front of the employee-only entrance door of defendant-employer's business. Accordingly, as plaintiff-employee argues in her brief,[2] since this access area—which occupies the three feet between the employee-only entrance door and the six-to eight-inch high cement curbs that mark the end of the paved adjoining parking lot—is "in such proximity and relation" to defendant–employer's premises so as to be "in practical effect a part of employer's premises," I believe the Industrial Commission erred by concluding that plaintiff-employee's injury did not "arise out of and in the course of" her employment with defendant-employer. Therefore, I would vote to reverse the Commission's Opinion and Award denying plaintiff-employee's claim, and would remand the matter to the Commission for further proceedings.

As the majority has recognized, "[i]n order to be compensable under our Workers' Compensation Act, an injury must arise out of and in the course of employment." *Barham v. Food World, Inc.*, 300 N.C. 329, 332, 266 S.E.2d 676, 678, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 105 (1980). While it is a general rule "that injuries sustained by an employee while going to or from work are not ordinarily compensable," *see Bass v. Mecklenburg Cty.*, 258 N.C. 226, 231-32, 128

2. The majority indicates that plaintiff-employee "does not argue that the cement area was part of [defendant-]employer's premises." However, as I read plaintiff-employee's brief, she argues her injury occurred either on defendant-employer's premises, or in an area that is "in practical effect a part of the employer's premises," on pages 13-15, 19-21, and 24-26 of her brief.

S.E.2d 570, 574 (1962), "the rule has evolved that an employee injured while going to and from work *on the employer's premises* is generally covered by the Act." *Barham*, 300 N.C. at 332, 266 S.E.2d at 679; *see Bass*,[3] 258 N.C. at 232, 128 S.E.2d at 574 ("[T]he great weight of authority holds that injuries sustained by an employee while going to or from his place of work upon premises owned or controlled by his employer are generally deemed to have arisen out of and in the course of the employment within the Workmen's Compensation Acts and are compensable."). As our Supreme Court has recognized:

> "If the employee be injured while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, *or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises*, the injury is one arising out of and in the course of the employment as much as though it had happened while the employee was engaged in his work at the place of its performance."

Bass, 258 N.C. at 232-33, 128 S.E.2d at 575 (emphasis added) (quoting *Bountiful Brick Co. v. Giles*, 276 U.S. 154, 158, 72 L. Ed. 507, 509 (1928)). Thus, "the moment when [an employee] begins his work is not necessarily the moment when he gets into the employment," because "a reasonable margin must be allowed him to get to the place of work if he is on the premises of the employer *or on some access to the premises which the employer has provided*." *Hunt v. State*,[4] 201 N.C. 707, 710-11, 161 S.E. 203, 205 (1931) (emphasis added); *see also Bass*, 258 N.C. at 233, 128 S.E.2d at 575 (" 'Probably, as a general rule, employment may be said to begin when the employee reaches the entrance to the employer's premises where the work is to be done; but it is clear that in some cases the rule extends to include adjacent premises used by the employee as a means of ingress and egress with the express or implied consent of the employer.' " (quoting *Bountiful Brick Co.*, 276 U.S. at 158, 72 L. Ed. at 509)).

According to the testimony of plaintiff-employee, as well as that of defendant-employer's owner, at the time plaintiff–employee was

3. The majority concludes that *Bass* is inapplicable to the present case. However, the majority repeatedly cites *Barham*, which itself relies on *Bass*. Indeed, one of the majority's direct quotes from *Barham* is a principle that *Barham* recognizes as having been borrowed from *Bass*.

4. While the majority recognizes, and I do not disagree, that the facts of *Hunt* are distinguishable from the present case, it is my opinion that the principles of law articulated in *Hunt* are nevertheless applicable here.

injured during the early morning hours of 23 January 2008, she had her key in hand, was within three steps of the rear entrance door marked "Authorized Personnel Only," and was within reach of defendant-employer's premises where she would begin to carry out her job functions, which included unlocking the door, turning on the lights, setting up the cash register, and getting "ready for business." Thus, plaintiff-employee presented uncontroverted evidence that both "the origin or causal connection of [her] injury to the employment," as well as "the time, place and circumstances under which [her] injury by accident occur[red]," rendered her injury compensable. *See Barham*, 300 N.C. at 332, 266 S.E.2d at 678.

Our Supreme Court has "repeatedly held 'that our Workers' Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependents, and its benefits should not be denied by a technical, narrow, and strict construction.' " *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). In the present case, I believe the Commission narrowly construed the evidence presented so as to contravene the purpose of the Act. I agree that there is competent evidence to support the Commission's finding that plaintiff-employee "had not entered the store, or even reached the back door, prior to slipping, falling, and injuring her wrist." However, the evidence establishes, without contradiction, that the location of plaintiff-employee's fall was within three steps of the employee-only entrance door to defendant-employer's premises and that, after her fall, plaintiff-employee was within close enough proximity of said door to be "able to pull herself up and unlock the door with her left hand" in order to enter the premises to call defendant-employer and seek medical attention. Thus, in light of the evidence presented and in keeping with the purpose of the Act, I believe the Commission erred by failing to conclude that plaintiff-employee's injury "arose out of and in the course of" her employment when she slipped and fell in an area that was within the "reasonable margin" allowed to her to access the premises which defendant-employer provided," *Hunt*, 201 N.C. at 710-11, 161 S.E. at 205, and was "in such proximity and relation as to be in practical effect a part of the [defendant-]employer's premises." *Bass*, 258 N.C. at 233, 128 S.E.2d at 575 (internal quotation marks omitted). Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA v. THOMAS EDWARD WRIGHT, DEFENDANT

No. COA09-674

(Filed 3 August 2010)

1. Obstruction of Justice— common law—campaign finance reports

The trial court properly denied defendant's motion to dismiss a charge of obstruction of justice arising from his failure to file complete and accurate campaign finance reports.

2. Obstruction of Justice— campaign finance reports—no ex post facto violation

Obstruction of justice charges against defendant for not filing accurate campaign finance reports were constitutional. *Ex post facto* analysis does not apply because defendant was not arguing that a legislative act was being applied retroactively.

3. Obstruction of Justice— instructions—campaign finance reports

The trial court did not err in its instructions on obstruction of justice in a prosecution where the instructions focused on obstructing the State Board of Election's access.

Appeal by defendant from judgment entered 27 August 2008 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 16 November 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Alexander McC. Peters, for the State.

Douglas S. Harris for defendant-appellant.

GEER, Judge.

Defendant Thomas Edward Wright appeals his conviction of felony obstruction of justice, contending his failure to file complete and true campaign finance disclosure reports with the North Carolina State Board of Elections ("SBOE") cannot constitute common law obstruction of justice. We recognize that our courts have not previously encountered an attempt to apply this criminal common law offense in circumstances similar to those in this case. Nevertheless, after reviewing North Carolina's precedent and considering the ratio-

nale underlying the common law offense, we hold defendant's conduct fits within the definition of common law obstruction of justice adopted by our courts.

Facts

The evidence at trial tended to show the following facts. Defendant, a member of the North Carolina House of Representatives, was a candidate for re-election in 2000, 2002, 2004, and 2006. He was required to file with the SBOE campaign finance disclosure reports disclosing all campaign contributions and expenditures. Quarterly reports were required to be filed during even-numbered or general election years, and semi-annual reports were required to be filed during odd-numbered years.

Between January 2000 and December 2006, defendant filed approximately 22 campaign finance disclosure reports. Defendant personally certified each report as "complete, true and correct," and four of these reports were signed under oath and notarized. Defendant was also required to give the SBOE his campaign treasurer's contact information and all account numbers for campaign bank accounts.

In December 2006, the SBOE received a sworn complaint from a registered voter alleging that defendant had failed to timely disclose some of the contributions made to his campaign. As a result, the SBOE initiated an investigation of defendant's campaign finance disclosure reports. Defendant had identified "Velma McCoy" as his treasurer, but had failed to provide the SBOE with her contact information, and the SBOE was unable to locate her. The SBOE also learned that the bank account defendant had on record as his campaign account had been closed several years earlier, but that his campaign had five other bank accounts, one of which was a joint account he shared with his wife and another of which was his own personal account.

Ultimately, the SBOE determined that defendant had failed to disclose $150,350.00 in contributions and $76,892.00 in transfers from campaign accounts to defendant. After the irregularities were brought to his attention, defendant failed to amend the reports.

On 10 December 2007, defendant was indicted for felony obstruction of justice. On 27 August 2008, the jury convicted defendant of that charge, and the trial court sentenced defendant to six to eight months imprisonment. Defendant timely appealed to this Court.

I

[1] Defendant's primary contention on appeal is that the trial court erred in denying his motion to dismiss because the State failed to present sufficient evidence that he engaged in common law obstruction of justice. According to defendant, because he filed all of the campaign finance disclosure reports before any criminal investigation or legal proceedings had begun, there could be no obstruction of justice.

"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). "When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Id.* " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925, *aff'd*, 301 N.C. 374, 271 S.E.2d 277 (1980)). We view the evidence in the light most favorable to the State. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

In *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983), our Supreme Court confirmed that "[o]bstruction of justice is a common law offense in North Carolina" that was not abrogated by Article 30 of Chapter 14 of the General Statutes, which sets out statutory "obstruction of justice" offenses. The Court then adopted the following definition of the common law offense: " 'At common law it is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice. The common law offense of obstructing public justice may take a variety of forms . . . .' " *Id.* (quoting 67 C.J.S. *Obstructing Justice* §§ 1, 2 (1978)).

Although *Kivett* involved a superior court judge's attempt to prevent the convening of a grand jury to indict him, the Supreme Court, a year later, concluded that common law obstruction of justice extends beyond interference with criminal proceedings. In *Henry v. Deen*, 310 N.C. 75, 87, 310 S.E.2d 326, 334 (1984), the plaintiff alleged that the defendants had created false and misleading entries in a medical chart of a deceased patient and had obliterated another entry in the chart that described the true facts of the diagnosis and treatment of the deceased. The complaint further alleged that one defendant created a false medical record that a second defendant agreed to produce to anyone who inquired about the second defendant's involvement in the deceased's treatment. *Id.* At the time of

the alleged acts, no legal proceedings were pending or actually threatened, although the plaintiff had attempted to begin to investigate the deceased's death.

Despite the lack of pending proceedings, the Supreme Court held that "[s]uch acts by the defendants, if found to have occurred, would be acts which obstruct, impede or hinder public or legal justice and would amount to the common law offense of obstructing public justice." *Id.* The Court explained that "this State has a policy against parties deliberately frustrating and causing undue expense to adverse parties gathering information about their claims" and that "[w]here, as alleged here, a party deliberately destroys, alters or creates a false document to subvert an adverse party's investigation of his right to seek a legal remedy," a claim for obstruction of justice arises. *Id.* at 87-88, 310 S.E.2d at 334-35.

This Court applied *Henry* in *Grant v. High Point Reg'l Health Sys.*, 184 N.C. App. 250, 254-55, 645 S.E.2d 851, 854-55 (2007), *disc. review improvidently allowed per curiam*, 362 N.C. 502, 666 S.E.2d 757 (2008). The Court described the plaintiff's allegations as being

> that Defendant destroyed the medical records of decedent. Plaintiff alleged Defendant's actions effectively precluded Plaintiff from obtaining the required Rule 9(j) certification. Plaintiff further alleged that Defendant's actions "obstructed, impeded and hindered public or legal justice[ ] in that the failure of . . . Defendant . . . to preserve, keep and maintain the x-ray film described above has effectively precluded . . . Plaintiff from being able to successfully prosecute a medical malpractice action against . . . Defendant . . . and others."

Id. at 255, 645 S.E.2d at 855. The Court held that such acts, if true, would amount to the common law offense of obstructing public justice. *Id.* The Court specifically rejected defendant's contention that *Henry* did not apply because the plaintiff had "failed to allege that [d]efendant's actions directly impacted a judicial proceeding brought by [p]laintiff." *Grant*, 184 N.C. App. at 256, 645 S.E.2d at 855.

In this case, the State argues that defendant is guilty of common law obstruction of justice "because he knowingly filed with the [SBOE] false campaign finance reports with the intent of misleading the [SBOE] and the voting public about the sources and uses of his campaign contributions." During the relevant time frame, defendant was a member of the House of Representatives and was four times a

candidate for re-election. He was required to file regular campaign finance disclosure reports with the SBOE to provide both the SBOE and the public with accurate information about his compliance with campaign finance laws, the sources of his contributions, and the nature of his expenditures. His reports were made under oath or under penalty of perjury.

We believe these facts fall within the scope of the common law offense of obstruction of justice as set out in *Kivett*, *Henry*, and *Grant*. As occurred in *Henry*, defendant's sworn false reports deliberately hindered the ability of the SBOE and the public to investigate and uncover information to which they were entitled by law: whether defendant was complying with campaign finance laws, the sources of his contributions, and the nature of his expenditures. Further, his false reports concealed illegal campaign activity from public exposure and possible investigation. We cannot meaningfully distinguish the creation of a false medical chart, as in *Henry*, from the formal filing of sworn false campaign finance disclosure reports with the SBOE, as in this case. In effect, defendant was creating a false campaign finance "chart" to deceive anyone seeking to review his conduct—much like the defendants in *Henry*.

Because this Court in *Grant* held that no judicial proceeding actually needed to be pending, the lack of any pending proceeding in this case is immaterial. Further, under the circumstances of this case, it does not matter that, in contrast to *Henry*, the State did not show that anyone had specifically begun to investigate whether defendant had violated campaign finance laws. We note that *Grant* did not require any pending investigation, but, rather, the obstruction of justice claim was based on the fact that the destruction of records blocked any investigation.

Here, in addition, the whole purpose of the campaign finance laws is to make the information available to the public at all times for voters' review, and the SBOE is required to investigate the reports filed with it after each election. *See* N.C. Gen. Stat. § 163-278.22 (2009) (requiring SBOE to maintain reports for 10 years and make them available to public); N.C. Gen. Stat. § 163-278.24 (2009) (requiring SBOE to determine, within four months after each election, "whether the statement conforms to law and to the truth"). Thus, when defendant filed his reports with the SBOE, he knew that his misinformation was blocking the SBOE and the public from uncovering and further investigating any improper campaign activity—just as the defendants allegedly intended in *Henry* and *Grant*.

Our view that, under *Henry* and *Grant*, defendant's conduct meets the requirements for obstruction of justice is supported by our General Assembly's enactments. Our Supreme Court in *Kivett* defined obstruction of justice as preventing, obstructing, impeding, or hindering " 'public or legal justice.' " 309 N.C. at 670, 309 S.E.2d at 462 (quoting 67 C.J.S. *Obstructing Justice* §§ 1, 2 (1978)). That definition prompts the question: What constitutes "public justice"? In the subchapter of our criminal code entitled "Offenses Against *Public Justice*" (emphasis added), the General Assembly included as offenses against "public justice," among others, offenses involving perjury, bribery, obstructing justice,[1] secret listening, and misconduct in public office. "Public justice" is, thus, a broad concept.

Defendant's preventing, obstructing, impeding, and hindering of the SBOE's and the public's ability to review what defendant was doing with respect to campaign contributions and funds constitutes preventing, obstructing, impeding, or hindering public justice. Because we hold that under *Kivett's* definition, this conduct amounts to common law obstruction of justice, we hold the trial court properly denied defendant's motion to dismiss.

II

[2] Defendant makes several related arguments as to the constitutionality of the charges filed against him. First, he argues that the trial court's allowing him to be tried for common law obstruction of justice based on the filing of inaccurate campaign finance disclosure reports amounted to an *ex post facto* application of the law. The basis of this argument is the same as his first contention on appeal: that defendant's type of conduct "was never a violation of the common law and is not a violation of the common law now."

This argument, however, overlooks the fact that "[t]here is no violation of the *ex post facto* clause . . . when a decision is applied retroactively because the clause applies to legislative and not judicial action." *State v. Rivens*, 299 N.C. 385, 392, 261 S.E.2d 867, 871 (1980). Since defendant is not arguing that a legislative act is being retroactively applied to him, *ex post facto* analysis is inapplicable. In any event, we have already held that defendant's conduct falls within *Kivett* and *Henry*, both of which predated defendant's conduct.

1. The Supreme Court held in *Kivett* that "[t]here is no indication that the legislature intended Article 30 [the obstruction of justice article within the subchapter] to encompass all aspects of obstruction of justice." 309 N.C. at 670, 309 S.E.2d at 462. The Court specifically pointed to Article 29, addressing bribery offenses, as encompassing obstruction of justice offenses as well.

Defendant also argues that his right to be free from the *ex post facto* application of law was violated when he received a greater punishment than would have been given if he had been charged with misdemeanors for failing to file accurate campaign finance reports under N.C. Gen. Stat. § 163-278.27 (2009) instead of with common law obstruction of justice. Defendant also points out that allowing the common law charge in effect permitted the State to sidestep the statute of limitations that barred it from proceeding under N.C. Gen. Stat. § 163-278.27 for the reports filed between 2000 and 2005.

Defendant, however, cites no authority that precludes the district attorney from proceeding on a common law charge when a potentially applicable statutory charge is barred by the statute of limitations or could result in a lesser sentence. Nor do we see how a choice to proceed under applicable common law implicates the *ex post facto* clause.

In *State v. Ward*, 354 N.C. 231, 243, 555 S.E.2d 251, 260 (2001) (quoting *State v. Camacho*, 329 N.C. 589, 593, 406 S.E.2d 868, 871 (1991)), the Supreme Court recognized that pursuant to Article IV, Section 18 of our Constitution, " 'the responsibility and authority to prosecute all criminal actions in the superior courts is vested solely in the several District Attorneys of the State.' " That authority includes "[t]he ability to be selective in determining what cases to prosecute and what charges to bring against a particular defendant . . . ." 354 N.C. at 243, 555 S.E.2d at 260. The district attorney, in this case, was entitled to elect to proceed under the common law rather than under the campaign finance statutes.[2]

Defendant also contends the trial court's decision to enhance the common law obstruction of justice charge to make it a felony pursuant to N.C. Gen. Stat. § 14-3(b) (2009) was an *ex post facto* application of the law. N.C. Gen. Stat. § 14-3(b) provides that "[i]f a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H felony." The district

2. Defendant also argues that by charging defendant under the common law rather than under the statutory law, the State "interfered with a vested right," pointing to case law that a statute cannot be applied retroactively if it will interfere with rights that have vested. Although it is not entirely clear, it appears that defendant is contending that he had a vested right to the statute of limitations defense and to serving in the legislature (conviction under the statute would not have removed him from the legislature). Even assuming, without deciding, the existence of a vested right, no statute or even common law has been applied retroactively to interfere with such a right.

attorney had the discretion to decide to seek enhancement of the charge under this statute. We fail to see how the application of N.C. Gen. Stat. § 14-3(b), which was effective in its current form prior to defendants' acts, constitutes an *ex post facto* application of the law. We, therefore, find no error.

III

[3] Defendant also contends the trial court erred in instructing the jury on the elements of common law obstruction of justice. "It is well settled in this State that the trial judge is not required to charge the jury in the *exact* language requested by the defendant. A charge which conveys the substance of the requested instructions is sufficient." *State v. Smith*, 311 N.C. 287, 290, 316 S.E.2d 73, 75 (1984). "We review jury instructions contextually and in their entirety." *State v. Allen*, 193 N.C. App. 375, 381, 667 S.E.2d 295, 300 (2008). Defendant specifically argues, in this case, that the trial court's instructions "fundamentally altered the indictment which was neither in response to a motion by the District Attorney or on the Court's own motion."

The trial court instructed the jury as follows:

> The defendant has been charged with the felony obstruction of justice. For you to find the defendant guilty of this felony offense, the State must prove three things beyond a reasonable doubt:
>
> First, that the defendant obstructed justice by engaging in the following conduct. That the defendant, as a candidate seeking to obtain and maintain election to a seat in the North Carolina House of Representatives between January 1st of 2000 and January 31st of 2007, collected thousands of dollars in campaign contributions and failed to properly report receipt of these campaign contributions to the North Carolina State Board of Elections as by law required.
>
> And further, that the defendant, after receiving such campaign contributions and having failed to report such receipts, did convert such campaign contributions to his own personal use and failed to report the use of expenditures of such campaign funds to the North Carolina State Board of Elections as by law required.
>
> And further, that the defendant did knowingly and intentionally file incomplete and false disclosure forms with the State Board of Elections, which the defendant knew were incomplete, were not true and were not correct.

> And further, that the defendant acted with the intent to conceal from the State Board of Elections and the public accurate information about his receipt and use of campaign money, and that he acted for the purpose of obstructing or hindering the proper enforcement of the campaign finance reporting laws of this state.

During deliberations, the jury asked the trial court for the definition of "intent to defraud." The trial court then instructed the jury:

> . . . Intent to defraud means an intention to deceive another person and to induce such other person in reliance upon such deception to give up something or to forego something.
>
> In the context of this case regarding this element, that is the third element of the crime charged, the State must prove that the defendant acted with deceit by misrepresenting material facts to the State Board of Elections, and that he did so with the intent that the State Board of Elections in relying upon such deception would forego the proper enforcement of the campaign finance laws of this state.

Defendant argues that these instructions "expanded the purpose of the concealment" by eliminating the requirement, set out in the indictment, that defendant was obstructing "public access to information" and "reform[ing] the question to center around the State Board of Elections, whether they [sic] relied upon [defendant's] deception, and whether the defendant interfered with the duties of the State Board of Elections." The indictment stated:

> The jurors for the State upon their oath present that on or between January 1, 2000, and January 31, 2007, in Wake County, the defendant named above unlawfully, willfully and feloniously did, in secret and with malice, and with deceit and intent to defraud, obstruct public justice in his role as a candidate for the North Carolina House of Representatives by the way in which he concealed and failed to account for campaign contributions and expenditures. The defendant collected a substantial number and amount of campaign contributions, approximately $185,000 worth, and failed to report those campaign contributions as required by law to the North Carolina Board of Elections (The Board), and to the Campaign treasurer for the Thomas Wright Campaign Committee, also know [sic] as the Committee to Elect Thomas E. Wright, (collectively known as The Committee). The

> defendant converted those campaign contributions to his own use and benefit, and also failed to report the expenditures of those contributions as required by law to The Board and to the treasurer of The Committee. By failing to report the contributions and expenditures, as required by law, the defendant filed and caused to be filed a campaign disclosure report with The Board that were [sic] not complete, true, and correct, in that the reports did not disclose campaign contributions and expenditures of The Committee. By concealing the financial activities of the defendant's political committee(s) and by filing and causing to be filed campaign disclosures reports that the defendant knew were not complete, true, and correct, the defendant obstructed public access to information that the defendant was required to disclose and concealed his illegal campaign activity. This act was in violation of the Common Law and against the peace and dignity of the State.

According to defendant, while the indictment thus specified that he was obstructing public access to the information, the instructions, especially in response to the jury's inquiry, focused on obstructing the SBOE's access. We believe that this is a distinction without a difference.

The legislature has required candidates to file specified reports, including certain required information, with the SBOE. N.C. Gen. Stat. §§ 163-278.9, -278.11 (2009). The legislature has granted the SBOE "the duty and power" to "make statements and other information filed with it available to the public" and to "preserve reports and statements filed" with it for a period of 10 years. N.C. Gen. Stat. § 163-278.22(4), (5). The SBOE also has "the duty and power" to make investigations regarding statements filed with it, N.C. Gen. Stat. § 163-278.22(7), and to determine, within four months after each election, "whether the statement conforms to law and to the truth," N.C. Gen. Stat. § 163-278.24.

Thus, the means by which the public obtains access to information about a candidate's contributions and expenditures is through the reports filed with the SBOE. It is the responsibility of the SBOE to maintain the reports, provide public access to the reports, and to determine the accuracy of the reports to ensure that the public has accurate information. Consequently, a candidate obstructs the public's access to the information required by law by obstructing the access of the SBOE. When a candidate conceals information from the SBOE or deceives the SBOE, he necessarily also does so as to the

public. We, therefore, hold that the trial court's instructions did not improperly deviate from the charge in the indictment.

No error.

Chief Judge MARTIN and Judge ELMORE concur.

DAVID F. BRADLEY, INDIVIDUALLY, AND AS MINORITY SHAREHOLDER OF LAURA SEGAL & ASSOCIATES, INC., PLAINTIFF v. LAURA F. BRADLEY, INDIVIDUALLY, AND AS MAJORITY SHAREHOLDER OF LAURA SEGAL & ASSOCIATES, INC., AND LAURA SEGAL AND ASSOCIATES, INC., DEFENDANT

No. COA09-1074

(Filed 3 August 2010)

1. Civil Procedure— setting order aside—voluntary dismissal—claims contained in counterclaim

The trial court did not abuse its discretion in setting aside plaintiff's voluntary dismissal of his claims seeking the judicial dissolution of Laura Segal & Associates, Inc. and the appointment of a receiver pursuant to Chapter 55 of the North Carolina General Statutes. Defendant's counterclaim asserted these same claims and was filed before plaintiff's notice of voluntary dismissal. Thus, plaintiff did not have the right to withdraw his claims without defendant's consent.

2. Corporations— judicial dissolution—summary judgment—no genuine issue of material fact

The trial court did not err in granting summary judgment on the issue of judicial dissolution of Laura Segal & Associates, Inc. (LSA). Pleadings of both parties asserted facts that supported the dissolution of LSA and there were no genuine issues of material fact as to whether the liquidation of LSA was reasonably necessary for the protection of the rights and interests of the parties.

3. Corporations— appointment of a receiver—reasonably necessary—summary judgment

The trial court did not abuse its discretion in appointing a receiver to wind up and/or liquidate Laura Segal & Associates, Inc. (LSA). As there was no genuine issue of material fact regarding whether dissolution of LSA was reasonably necessary for the

protection of the rights and interests of the parties, the trial court's appointment of a receiver to wind up and/or liquidate defendant LSA was not manifestly unsupported by reason.

Appeal by plaintiff from Orders entered 21 October 2008 and 29 December 2008 by Judge Robert P. Johnston and Judge Richard D. Boner, respectively, in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 February 2010.

Horack, Talley, Pharr & Lowndes, PA., by Keith B. Nichols, for plaintiff-appellant.

James, McElroy & Diehl, P.A., by Amy E. Simpson, for defendant-appellees.

STEELMAN, Judge.

Where defendant had asserted counterclaims seeking the judicial dissolution of Laura Segal & Associates, Inc. (LSA), and the appointment of a receiver pursuant to Chapter 55 of the North Carolina General Statutes, the trial court did not err in setting aside plaintiff's voluntary dismissal of the same claims contained in his complaint. Where the pleadings of both parties asserted facts that supported the dissolution of LSA, the trial court did not err in appointing a receiver to wind up or liquidate LSA.

I. Factual and Procedural Background

David F. Bradley (plaintiff) and Laura L. Bradley (defendant) are husband and wife, but are separated. Both are employees and shareholders of defendant LSA, a corporation organized and existing under the laws of North Carolina. LSA is a legal recruiting firm with offices in New York and Charlotte.

Defendant originally incorporated LSA in North Carolina on 7 August 1998, and owned 100% of the company. The parties married on 16 June 2001. After completing his M.B.A. in 2003, plaintiff began full-time employment with LSA. A series of stock transfers and corporate restructuring from 2004 to 2006 resulted in defendant owning 51% of the stock of LSA, and plaintiff owning 49% of the stock.

Defendant has been primarily responsible for the legal recruiting, hiring, training, marketing, and human resource tasks of LSA. She also serves as President and sole director of LSA.

While plaintiff serves as Vice-President and Chief Operating Officer, the parties disagreed about plaintiff's role in LSA and whether his services added to the worth of the company. They agree, however, that plaintiff was involved in the day-to-day operations and administration of LSA, was responsible for accounts payable and receivable and information technology, worked with LSA's accountant on state and federal tax matters for the company, and installed and maintained various computer and software components for the company, including the company's accounting and database software.

On 6 July 2006, plaintiff and defendant welcomed the birth of twin daughters. However, marital discord soon developed, has continued since early 2008, and this discord eventually spilled over into the management of LSA. Defendant alleged that plaintiff misappropriated corporate funds, and actively denied her adequate access to the books, records, and accounting software of LSA. She also alleged that plaintiff has used his access to LSA's e-mail system to access defendant's e-mails, including e-mails between her and her attorneys.

Plaintiff asserted that he was advised by counsel to deny defendant "unfettered access" to LSA's accounting software and its Encore database. Plaintiff admitted that as a result of his access to LSA's e-mails, he read one e-mail communication between defendant and her attorneys. Plaintiff asserts that defendant is trying to freeze him out of LSA, usurp the intellectual property of LSA, and his denial of access to the corporate books and records of LSA was motivated by fear that defendant would terminate his employment with LSA.

On 12 August 2008, plaintiff filed a verified complaint asserting three claims for relief: (1) judicial dissolution of LSA pursuant to N.C. Gen. Stat. § 55-14-30; (2) appointment of one or more receivers for LSA pursuant to N.C. Gen. Stat. § 55-14-31 and § 55-14-32 to "wind up and liquidate, or to manage, the business and affairs of Defendant Corporation[;]" and (3) monetary damages for breach of fiduciary duty, duty of good faith, and duty of loyalty and due care. The complaint affirmatively alleged that liquidation of LSA was necessary to protect plaintiff's rights and interests, that dissolution was the only method which would adequately address the harm to plaintiff, and that the appointment of a receiver was appropriate to either perform these tasks or to manage the business affairs of LSA.

The verified complaint also prayed that the trial court enter a temporary restraining order, a preliminary injunction, and a permanent injunction enjoining defendants from: (1) conducting a meeting

at which the rights, position, or ownership interest of plaintiff in LSA would be in any way changed, modified, or affected; and (2) initiating or participating in any act or omission that would alter the rights, positions, or ownership interest of plaintiff.

On 14 August 2008, an Order was filed granting a temporary restraining order by consent, which prohibited both plaintiff and defendant from taking any of the aforementioned actions with respect to one another. It also proscribed the transfer of any LSA funds or assets for the personal use of either party, and proscribed any disbursement of any unauthorized funds to either party.

On 21 August 2008, defendant filed a verified answer and counterclaims. In her counterclaims, defendant asserted two alternative claims for relief: (1) dissolution and liquidation of LSA pursuant to N.C. Gen. Stat. § 55-14-30; or (2) the judicial appointment of a receiver to "wind up and liquidate" the business and affairs of defendant LSA pursuant to N.C. Gen. Stat. §§ 55-14-31 and 55-14-32. Defendant also filed a Motion for Judgment on the Pleadings.

On 28 August 2008, a second Consent Order extending the temporary restraining order was entered. That same day, plaintiff filed a notice of voluntary dismissal as to his first and second claims for relief, without prejudice. On 11 September 2008, an Order was entered granting plaintiff's Motion for Preliminary Injunction, which prohibited either party from taking any action that would affect the rights, position, or ownership interest of either party, and established a procedure allowing the management of LSA's accounts receivable and payable without the parties having to directly interact with each other.

On 6 October 2008, defendant filed an amended motion to set aside plaintiff's voluntary dismissal pursuant to N.C.R. Civ. P. 60(b) as being void *ab initio* because defendant had sought the identical relief in her counterclaim. On 21 October 2008, plaintiff filed a reply to defendant's counterclaims and motions in which he denied that dissolution and liquidation of LSA was reasonably necessary for the protection of the rights or interests of both parties. On 21 October 2008, an Order was entered setting aside plaintiff's voluntary dismissal of his first two claims for relief.

On 26 November 2008, defendant filed a Motion for Summary Judgment upon her counterclaims for judicial dissolution or the appointment of a receiver to wind up and liquidate the business and

affairs of LSA. On 29 December 2008, an Order Granting Partial Summary Judgment was entered in favor of defendant, and a receiver appointed to wind up and/or liquidate LSA pursuant to Chapter 55 of the North Carolina General Statutes.

On 5 January 2009, plaintiff voluntarily dismissed his Third Claim for Relief without prejudice. Plaintiff appeals the orders setting aside the voluntary dismissal of his first two claims for relief and granting summary judgment on defendant's counterclaims. On 23 January 2009, the trial court granted plaintiff's Motion to Stay Proceedings during the pendency of plaintiff's appeal upon the posting of a bond.

II. Final Judgment

[1] As an initial matter, we must determine whether plaintiff's appeals are interlocutory in nature, or whether further developments in the case rendered the trial court's orders a final judgment. Typically, a grant of partial summary judgment is an interlocutory order from which there is ordinarily no right of appeal because it does not completely dispose of the case. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2009); *Curl v. American Multimedia, Inc.*, 187 N.C. App. 649, 652, 654 S.E.2d 76, 78–79 (2007). Likewise, our courts have consistently held that appeals from orders allowing a Rule 60 motion are interlocutory. *Robinson v. Gardner*, 167 N.C. App. 763, 767, 606 S.E.2d 449, 452, *cert. denied*, 359 N.C. 322, 611 S.E.2d 417 (2005).

The trial court's Order Granting Partial Summary Judgment to defendant disposed of all of defendant's counterclaims, as well as the first two claims in plaintiff's complaint. Plaintiff's voluntary dismissal of his remaining claim for relief on 5 January 2009 left no claims pending as to which a valid order could be entered. *Renner v. Hawk*, 125 N.C. App. 483, 489, 481 S.E.2d 370, 373, *cert. denied*, 346 N.C. 283, 487 S.E.2d 553 (1997); *see also Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 367, 555 S.E.2d 634, 638 (2001). Thus, the two orders before this Court on appeal constitute final judgments, and are subject to appellate review. N.C. Gen. Stat. § 7A-27(b) (2009).

III. Setting Aside the Voluntary Dismissal

Plaintiff argues that the trial court erred in setting aside plaintiff's voluntary dismissal of his first two claims. We disagree.

A. Standard of Review

In this case, the trial court set aside plaintiff's voluntary dismissal of his first and second claims for relief pursuant to N.C. R. Civ. P.

60(b)(4). Appellate review of an order ruling on a Rule 60(b) motion is limited to whether the trial court abused its discretion. *Harbin Yinhai Tech. v. Greentree Fin. Group, Inc.*, —— N.C. App. ——, ——, 677 S.E.2d 854, 861 (2009).

B. Voluntary Dismissal

A voluntary dismissal can be considered a "proceeding" allowing relief under Rule 60(b). *Carter v. Clowers*, 102 N.C. App. 247, 252-53, 401 S.E.2d 662, 665 (1991). Rule 60(b)(4) allows for relief from a judgment, order, or proceeding when it is "void." N.C. Gen. Stat. §1A-1, Rule 60(b)(4) (2009). "In the context of Rule 60(b)(4), a judgment is void 'only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered.' " *Chandak v. Electronic Interconnect Corp.*, 144 N.C. App. 258, 262, 550 S.E.2d 25, 28 (2001) (quoting *Burton v. Blanton*, 107 N.C. App. 615, 616, 421 S.E.2d 381, 382 (1992)) (emphasis added).

For the trial court to have properly vacated plaintiff's voluntary dismissal pursuant to Rule 60(b)(4), plaintiff cannot have had the authority to voluntarily dismiss his first two claims for relief. Ordinarily, a plaintiff may voluntarily dismiss his claims by filing a notice of dismissal at any time before he rests his case. N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2009); *Carter*, 102 N.C. App. at 250, 401 S.E.2d at 664.

However, it is well established that where a defendant asserts a counterclaim arising out of the same transaction alleged in the plaintiff's complaint, plaintiff loses the right to voluntarily dismiss the allegations upon which defendant's claim is based without defendant's consent. *Swygert v. Swygert*, 46 N.C. App. 173, 176-77, 264 S.E.2d 902, 905 (1980) (citing *McCarley v. McCarley*, 289 N.C. 109, 113, 221 S.E.2d 490, 493 (1976)). *See also Gardner v. Gardner*, 48 N.C. App. 38, 44, 269 S.E.2d 630, 633–34 (1980) (holding that plaintiff-husband was deprived of his right to voluntarily dismiss his action for divorce where defendant-wife had filed a counterclaim for alimony).

In the instant case, plaintiff's first two claims for relief are virtually identical to defendant's counterclaims. Both plaintiff's verified complaint and defendant's counterclaims asserted that the opposing party was engaging in conduct that jeopardized their respective rights and interests as a shareholder in LSA, that judicial dissolution of LSA was reasonably necessary for the protection of those rights and interests, and that the appointment of a receiver to wind up or liquidate

LSA was appropriate. Defendant's counterclaims clearly arise from the same transactions as plaintiff's claims.

Because defendant filed her answer and counterclaims before plaintiff filed the notice of voluntary dismissal of his first two claims, her right to have her claims adjudicated "supervened," and plaintiff no longer had the right to withdraw his first two claims without defendant's consent. *McCarley*, 289 N.C. at 113, 221 S.E.2d at 493. We find no case or statutory authority for plaintiff's contention that *McCarley* and its progeny should not be controlling where the issues presented to the court were the dissolution and liquidation of a corporation. The trial court did not abuse its discretion in setting aside plaintiff's voluntary dismissal of his first two claims.

This argument is without merit.

IV. Liquidation of Corporation

[2] Plaintiff argues that the trial court erred in granting summary judgment on the issue of judicial dissolution because genuine issues of material fact existed as to whether the liquidation of LSA was reasonably necessary for the protection of the rights and interests of the parties. We disagree.

A. Standard of Review

The standard of review for summary judgment is *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). "If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

B. Summary Judgment

"Summary judgment is appropriate if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Forbis*, 361 N.C. at 523-24, 649 S.E.2d at 385 (quoting N.C. Gen. Stat. 1A-1, Rule 56(c)). "If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to 'set forth specific facts showing that there is a genuine issue for trial.' " *Lowe v. Bradford*, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366 (1982) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(e)).

"A party is bound by his pleadings and, unless withdrawn, amended, or otherwise altered, the allegations contained in all plead-

ings ordinarily are conclusive as against the pleader. He cannot subsequently take a position contradictory to his pleadings." *Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E.2d 33, 34 (1964). An admission in a pleading has the same effect as a jury finding, and is conclusive upon the parties and the trial judge. *Buie v. High Point Associates Ltd. Partnership*, 119 N.C. App. 155, 158, 458 S.E.2d 212, 215, *cert. denied*, 341 N.C. 419, 461 S.E.2d 755 (1995).

A non-moving party may not defeat summary judgment by presenting subsequent sworn testimony, which contradicts the prior judicial admissions of his pleadings. *Rollins v. Miller Roofing Co.*, 55 N.C. App. 158, 162, 284 S.E.2d 697, 701 (1981). Nor may he or she use mere allegations or denials to create an issue of fact and defeat summary judgment. N.C. Gen. Stat. § 1A-1, Rule 56(e) (2009); *Weeks v. N.C. Dept. of Nat. Resources and Comm. Development*, 97 N.C. App. 215, 224, 388 S.E.2d 228, 233, *cert. denied*, 326 N.C. 601, 393 S.E.2d 890, (1990); *see also Nasco Equipment Co. v. Mason*, 291 N.C. 145, 152, 229 S.E.2d 278, 283 (1976).

By appointing a receiver to "wind up and/or liquidate" LSA, the trial court effectively ordered dissolution of defendant LSA. N.C. Gen. Stat. § 55-14-30(2) provides in part that judicial dissolution of a company in a proceeding brought by a shareholder is appropriate when:

> [I]t is established that (i) the directors or those in control of the corporation are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock[.]

N.C. Gen. Stat. § 55-14-30(2)(i) (2009). For dissolution to be a remedy under N.C. Gen. Stat. 55-14-30(2)(i), all three conditions listed in (i) must be met. *Foster v. Foster Farms, Inc.*, 112 N.C. App. 700, 706, 436 S.E.2d 843, 847 (1993). In the instant case, plaintiff is in sole possession or has sole access to LSA's accounting software and Cluen-Encore database system, and other client-server software. Plaintiff has refused to grant defendant, the 51% majority shareholder, access to these systems. Defendant contends that plaintiff has misused corporate funds, and continues to refuse to provide her access to these systems. The parties are clearly deadlocked regarding the financial management of the company, as well as the rights of each party to access information about the company's books and financial records.

See, *e.g.*, *Foster*, 112 N.C. App. at 707, 436 S.E.2d at 848 (finding a deadlock in the management of a corporation's affairs where plaintiff and defendant were the only directors and could not agree when the corporation should borrow money, preventing the corporation from borrowing money at all).

Plaintiff and defendant are the only two officers and shareholders of defendant LSA, and each party exclusively manages different aspects of the company's affairs. While defendant is the sole director, an injunction has maintained the status quo with respect to all personnel decisions, eliminating any ability defendant might ordinarily have to break the deadlock in the management of the corporation's affairs.

With respect to the third prong of N.C. Gen. Stat. § 55-14-30(2)(i), both plaintiff's complaint and defendant's verified answer and counterclaims state that judicial dissolution and liquidation of LSA is reasonably necessary for the protection of their respective rights and interests. Both further state that judicial dissolution and liquidation of LSA is the only method, which will adequately protect those rights and interests. As neither party has effectively withdrawn, amended, or otherwise altered these pleadings, these statements constitute judicial admissions that are binding on both parties. *Davis*, 261 N.C. at 686, 136 S.E.2d at 34. Plaintiff may not defeat summary judgment by presenting subsequent sworn testimony which contradicts the prior judicial admissions in his pleadings. *Rollins*, 55 N.C. App. at 162, 284 S.E.2d at 700. Therefore, judicial dissolution is the only method that will protect the respective interests of the parties, and it follows that the affairs of the corporation can no longer be conducted to the parties' mutual advantage. *Id.* The third requirement for judicial dissolution under N.C. Gen. Stat. § 55-14-30(2)(i) has been met. The trial court did not err in granting defendant's motion for summary judgment.

This argument is without merit.

V. Appointment of Receiver to Liquidate LSA

[3] Finally, plaintiff argues that the trial court abused its discretion in appointing a receiver to wind up and/or liquidate LSA. We disagree.

A. Standard of Review

Our review has produced no case law or statutory authority that supports plaintiff's contention that a *de novo* standard of review

should apply in this case. When properly on appeal, orders concerning the appointment of a receiver are reviewed under an abuse of discretion standard. *Barnes v. Kochhar*, 178 N.C. App. 489, 496, 633 S.E.2d 474, 478-89, *disc. review denied*, 360 N.C. 644, 638 S.E.2d 462, and *disc. review dismissed*, 360 N.C. 644, 638 S.E.2d 461 (2006).

"Abuse of discretion" has been defined by our Supreme Court as a showing that a trial court's actions were "manifestly unsupported by reason." *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998) (citing *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 832 (1985)). A trial court's discretionary ruling will only be upset on a showing that it was so arbitrary that it could not have been the result of a reasoned decision. *Id.*

B. Appointment of Receiver

Because there was no genuine issue of material fact regarding whether dissolution of LSA was reasonably necessary for the protection of the rights and interests of the parties, the trial court's appointment of a receiver to "wind up and/or liquidate" defendant LSA was not "manifestly unsupported by reason." *T.D.R.*, 347 N.C. at 503, 495 S.E.2d at 708.

This argument is without merit.

AFFIRMED

Judges BRYANT and BEASLEY concur.

JEFFREY PHILLIPS, D.V.M., PH.D., AND WIFE, DAWN PHILLIPS, PLAINTIFFS v. NORTH CAROLINA STATE UNIVERSITY, DEFENDANT

No. COA09-1720

(Filed 3 August 2010)

Tort Claims Act— lost profits from breeding horse—consequential damages

The full Industrial Commission did not err in its supplemental decision and order in a Tort Claims Act case by holding that plaintiffs were entitled to consequential damages amounting to the loss of profits from one breeding cycle in addition to the market value cost to replace their rare horse. The proper measure

of consequential damages in North Carolina (NC) for reproducing livestock is the value of the animal under NC law at the time of death and the consequential damages, if any, that a plaintiff may incur between the time of the death of the animal until such time that a replacement of like kind and quality can be found and purchased.

Appeal by plaintiffs and defendant from Decision and Order entered 5 October 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 June 2010.

Knott, Berger & Miller, L.L.P., by Kenneth R. Murphy, III, for plaintiff appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Amar Majmundar, for defendant cross-appellant.

HUNTER, JR., Robert N., Judge.

This case is before our Court a second time to determine whether Jeffrey Phillips, D.V.M., Ph.D., and his wife, Dawn Phillips (collectively "plaintiffs"), are entitled to the loss of profits from the lost opportunity to breed their rare horse, Menetti, over the remainder of her reproductive years. After review, we affirm the Supplemental Decision and Order entered by the Full Commission, and hold that plaintiffs are entitled to consequential damages amounting to the loss of profits from one breeding cycle in addition to the market value cost to replace Menetti.

I. FACTUAL AND PROCEDURAL HISTORY[1]

On 3 May 2004, plaintiffs brought their rare broodmare Knabstrupper horse, Menetti, for boarding at the Equine Educational Unit ("EEU"), a horse breeding management facility operated by North Carolina State University ("defendant"). The EEU boards broodmares like Menetti while they are bred. Menetti was a young broodmare in excellent health, and was boarded from 3 May to 25 May 2004, during which time Justine Smith, a managing supervisor at the EEU, and other EEU employees were exclusively responsible for the care of Menetti.

1. This case is the second time this Court has addressed these facts, and therefore the history set forth within is abbreviated. For a more complete discussion of the facts and procedural history, see *Phillips v. North Carolina State University*, No. COA08-1029, 2009 WL 2371088 (N.C. Ct. App. Aug. 4, 2009) (unpublished) [*Menetti I*].

During this time, the temperatures in Raleigh consistently climbed above 90 degrees Fahrenheit, with high humidity and low amounts of precipitation. On the evening of 25 May 2004, within one hour of being released from the EEU, Menetti died during transport in a horse trailer to the home of plaintiffs. Two pathologists from the North Carolina State University School of Veterinary Medicine, Dr. Kevin Douglas Woolard and Dr. Donald J. Meuten, performed a necropsy (animal autopsy) on Menetti the morning following her death. Drs. Woolard and Meuten made clinical findings which were indicative of dehydration and led them to the conclusion that Menetti likely died as a result of heat stress.

In *Menetti I*, this Court affirmed in part the rulings from below holding defendant was the direct and proximate cause of Menetti's death through negligence. However, on the issue of compensatory damages, this Court found that the Full Commission did not consider the Deputy Commissioner's findings of fact or conclusions regarding plaintiffs' lost opportunity to breed Menetti. Accordingly, we held:

> [A]s the Commission's findings are insufficient to determine whether the proper measure of compensatory damages should include Plaintiffs' lost opportunity to breed Menetti, we remand this matter to the Full Commission with instructions to make findings of fact and conclusions of law concerning the issue of Plaintiffs' lost opportunity to breed Menetti.

Menetti I, 2009 WL 2371088, at *8.

Upon remand, the Full Commission considered further the Deputy Commissioner's findings of fact:

> 62. The economic value of a foal carried by a Knabstrupper mare comparable to Menetti is conservatively valued at $9,000.
>
> . . . .
>
> 70. As of April 13, 2007, the date of trial of this matter, there were no Knabstrupper mares comparable to Menetti available for sale in the United States, a comparable horse could only be purchased in Europe, the exchange rate between the Euro and the U.S. dollar was approximately a 1:1.33 ratio, and the total cost to replace Menetti with a comparable Knabstrupper mare was approximately $50,000 in U.S. currency.

On 5 October 2009, the Full Commission entered its Supplemental Decision and Order, finding in part that Menetti's foals were val-

ued at $9,000 each, and that plaintiffs were entitled to the loss of profit from one breeding cycle (i.e., one foal) in addition to the $50,000 replacement cost of Menetti, totaling $59,000 in compensatory damages.

On 6 November 2009, plaintiffs timely filed notice of appeal to this Court, arguing that the Full Commission erred by awarding plaintiffs consequential damages from the loss of profits of only one breeding cycle as the proper measure of consequential damages for the lost opportunity to breed Menetti. On 16 November 2009, defendant timely filed a cross-appeal, arguing the Full Commission erred in awarding any consequential damages.

II. ANALYSIS

A. Jurisdiction and Standard of Review

This appeal is properly before this Court from a final decision of the North Carolina Industrial Commission pursuant to N.C. Gen. Stat. § 7A-29(a) (2009). When considering an appeal from the Industrial Commission under the Tort Claims Act, this Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision. *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998). Pursuant to N.C. Gen. Stat. § 143-293, a claimant may appeal the decision of the Full Commission, but such appeal shall be for errors of law only and findings of fact of the Commission shall be conclusive if there is any competent evidence to support them. N.C. Gen. Stat. § 143-293 (2009). However, when the Full Commission's findings of fact " 'are insufficient to determine the rights of the parties, the [C]ourt may remand to the Industrial Commission for additional findings.' " *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 512 (2004) (quoting *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982)). This Court's review of the Industrial Commission's conclusions of law is *de novo*. *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996).

B. Compensatory Damages

Plaintiffs argue that the Full Commission erred in concluding that the proper compensatory damages owed by defendant are the lost profit for only one breeding cycle. Plaintiffs contend that the consequential damages should include an amount sufficient to replace the

lost opportunity to breed Menetti during the remainder of her breeding years, as previously ordered by Deputy Commissioner Taylor. Defendant argues that the Full Commission erred in awarding plaintiffs $9,000 in consequential damages for the loss of one breeding cycle when there was no evidence presented to establish that plaintiffs either (1) had replaced Menetti with another horse, (2) were attempting to replace Menetti, or (3) had established a reasonable time period in which to do so.

After review, we hold that the award for one breeding cycle was supported by competent evidence, and that the Full Commission's findings on this issue support its conclusions of law. We accordingly affirm the Supplemental Decision and Order of the Full Commission.

The issues on appeal concerning consequential damages revolve around the following findings entered by the Full Commission in its Supplemental Decision and Order:

> 1. Immediately after Menetti's death, a veterinarian harvested the animal[']s ovaries to determine if any impregnated embryo could be saved by fertilizing with another mare. The post mortem procedure revealed Menetti was not impregnated at the time of her death.
>
> 2. Rebecca Pennington's appraisal includes a substantial allowance for the fact that Menetti's genetic characteristics greatly increasing [sic] her value as a broodmare and that a comparable broodmare is marketed rarely. Pennington located only one comparable Knabstrupper for sale in the European market. No testimony establishes when this mare became available on the market. The record only discloses that Pennington, upon her engagement as an expert witness, was able to locate one comparable Knabstrupper for sale in the European Market when preparing her appraisal in 2005.
>
> 3. No testimony at trial established whether Plaintiffs: (1) had replaced Menetti with a comparable broodmare, or [(2)] were capable of replacing Menetti. Additionally, no testimony was proffered establishing a reasonable period of time in which to replace Menetti under the particular facts and circumstances of this civil action.
>
> 4. While Pennington's highly credible testimony establishes the value of Menetti's future foals at $9,000 each, the record is devoid of evidence as to the future costs associated with the

pregnancy and delivery of foals from which profit can be determined over Menetti's expected brood life.

In drawing its first finding of fact, the Full Commission considered the testimony of Dr. Carlos Pinto, a doctor of veterinary medicine and an assistant professor at the North Carolina State University College of Veterinary Medicine, who attempted to harvest a viable impregnated embryo from Menetti to determine any further worth of the carcass. In support of its second finding of fact, the Full Commission considered the testimony of Rebecca Pennington, a Certified Equine Appraiser and President of the American Knabstrupper Association, who performed the valuation and determined the replacement value of Menetti for plaintiffs. As to its third finding of fact, the Full Commission determined from examination of the record that no testimony was presented as to whether plaintiffs had replaced Menetti, were capable of replacing Menetti, or had established a reasonable time period for obtaining a replacement. In drawing its fourth finding of fact, the Full Commission examined the record and found no evidence as to future costs associated with the pregnancy and delivery of foals from which profit could be determined over Menetti's remaining reproductive years.

This evidence is clearly competent to support the Full Commission's findings, and as a result, these findings are binding under our standard of review. We next examine *de novo* whether the Full Commission applied the correct law, and whether the findings support the Full Commission's conclusions.

In its Supplemental Decision and Order, the Full Commission concluded as a matter of law:

> 1. The measure of damages for loss of livestock is the value of the animal alive just prior to its loss, minus the value, if any, of the animal's carcass when there is evidence of value of the carcass. *Griner v. Smith*, 43 N.C. App. 400, 259 S.E.2d [383] (1979).
>
> 2. Plaintiffs[] contend their consequential damages include the present value of the loss of Menetti's future foals is not well taken. As Plaintiffs' contention appears to be an issue of first impression in North Carolina, persuasive authority for the proper determination of damages in a breeding animal is found in *Snyder v. Bio-lab, Inc.*, 405 N.Y.S.2d 596, 597-98 (1978) (emphasis added) (considering the proper damages for cows). The *Snyder* Court held:

a. As with personal property generally, the measure of damages for injury to, or destruction of, an animal is the amount which will compensate the owner for the loss and thus return [the owner], monetarily, to the status . . . before the loss. Where the animal has a market value, the market value at the time of the loss . . . will generally be the measure applied. Any special value, particular qualities, or capabilities are generally considered as factors making up the market value. ***For example, when an owner has received the market value of an animal, he will have been compensated for any use he might have made of the animal for breeding purposes.*** The market value may be enhanced because the animal is carrying unborn young, but the young have no value apart from the mother. . . .

i. . . . .

ii. In addition, plaintiffs are entitled to recover the loss of profit **for the time period required to replace** the slaughtered cows with cows of equal quality.

iii. . . .

iv. The fair market value of the slaughtered cows does not adequately compensate the plaintiffs for their loss. They are entitled to the profit that the 39 cows, the best milk[] producers in the herd, would have generated until replacement cows of equal quality were available. Proof establishes that replacement cows of comparable quality were available in the market 3 months subsequent to the accident. . . .

3. The decision in *Snyder* is supported by other persuasive authority. In *Missouri v. Farmers Ass'n v. Kempker*, 726 S.W.2d 723, 726 (1987) (emphasis added), the Supreme Court of Missouri held that "there may be *no recovery for future milk and calf production* ***of a cow which has been disposed of, after a replacement of comparable capacity has been or could have been acquired***." The Supreme Court of Utah has also reached the same measure of damages in *Park v. Moorman Mfg. Co.*, 121 Utah 339 (1952), stating that "damages include both the market value of the animals destroyed and lost profits for the period in which there was a loss of use before the replacements could prudently be obtained."

> 4. Given these persuasive authorities the applicable damages in the instant case as consequential damages are the loss of profits from Menetti's foal for the period from the date of loss until a comparable replacement has been or could have reasonably been acquired. The application of this measure of damages is entirely consistent with the long articulated principle of law in this State that the duty to mitigate damages requires that an injured plaintiff in a tort action must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. ***Applying the stated law, Plaintiffs have proven by the greater weight of the evidence the loss of profit for one breeding cycle.*** N.C. Gen. Stat. §§ 143-291 through -300.1A.

(Emphasis added.)

We believe the Full Commission's reasoning in its conclusions of law is sound. The cases cited by the Full Commission appear to be in accordance with the general rule. *See generally* O.H. Webster, Annotation, *Measure and elements of damages, in action other than one against carrier, for conversion, injury, loss, or destruction of livestock*, 79 A.L.R.2d 677 § 10 (1961); *see also McPherson v. Schlemmer*, 749 P.2d 51 (Mont. 1988) (cow breeders entitled to fair market value and lost profits from time cows killed until replacement cows of like quality could reasonably be purchased by plaintiffs). Moreover, the measure of consequential damages for livestock stated by the Full Commission appears to be in accordance with existing law in North Carolina. *King v. Britt*, 267 N.C. 594, 597, 148 S.E.2d 594, 597 (1966) (where a plaintiff is injured by the tortious conduct of a defendant, "the plaintiff is entitled to recover the present worth of all damages naturally and proximately resulting from [the] defendant's tort"); *Phillips v. Chesson*, 231 N.C. 566, 571, 58 S.E.2d 343, 347 (1950) ("The objective of any proceeding to rectify a wrongful injury resulting in loss is to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money."); *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 547-48, 356 S.E.2d 578, 586 (1987) ("As part of its burden, the party seeking damages must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty."). *Lumber Co. v. Power Co.*, 206 N.C. 515, 522, 174 S.E. 427, 431 (1934) ("Where the profits lost by defendant's tortious conduct, proximately and naturally flow from his act and are reasonably definite and certain, they are recoverable; those which are speculative and contingent, are not.").

Nevertheless, plaintiffs cite two cases in support of the argument that they are entitled to consequential damages in an amount equivalent to the loss of profits from the future opportunity to breed Menetti over her remaining reproductive years. In the first case plaintiffs cite, the North Carolina Supreme Court held that the defendant was negligent in delivering the wrong cleaning compound to clean the floors of the plaintiff's grocery store, resulting in the contamination of the store's inventory and closure of the store for several months. *See Champs Convenience Stores v. United Chemical Co.*, 329 N.C. 446, 406 S.E.2d 856 (1991). Plaintiffs were awarded damages, including lost profits for the period the grocery store was closed for cleanup as well as overhead expenses for rent and mortgage payments. *Id.* at 459-64, 406 S.E.2d at 864-66. The second case plaintiffs cite is *Huff v. Thornton*, 287 N.C. 1, 213 S.E.2d 198 (1975), where the plaintiff's home was struck and damaged by a truck negligently driven by defendant; and our Supreme Court held that the plaintiffs were entitled to compensation for the loss of use of their home while it was being repaired (i.e., comparable lodging and moving cost), as well as the difference in their home's market value before and after being struck.

We decline to apply these holdings to this case. The cases cited by plaintiffs do not deal with the loss of profits from animals or livestock. Each concerns damages derived from the tortious loss of profits due to lost use of real property. Real property is different from livestock, which is personal property, because real property is incapable of producing offspring. Thus, since we believe the authority cited by the Full Commission is more convincing, we hold the proper measure of consequential damages in this State for reproducing livestock is: (1) the value of the animal under North Carolina law at the time of death, and (2) the consequential damages, if any, that a plaintiff may incur between the time of the death of the animal until such time that a replacement of like kind and quality can be found and purchased. We now apply this rule to the case *sub judice*.

Concerning the first measure of damages, this Court has held that a horse raised for home use or for profit should be considered "livestock." *County of Durham v. Roberts*, 145 N.C. App. 665, 670, 551 S.E.2d 494, 498 (2001). This Court has further held that the appropriate measure of damages for the loss of livestock is the value of the animal alive just prior to its loss, minus the value, if any, of the carcass when there is evidence of the value of the carcass. *Griner*, 43 N.C. App. at 409, 259 S.E.2d at 389. Given that we have already held in *Menetti I* that the Full Commission properly found and concluded that the value of Menetti was $50,000, we next consider the conse-

quential damages under the second prong for which we previously remanded this case.[2]

Here, plaintiffs offered evidence supporting an award of the replacement market value of Menetti, plus any consequential damages arising from the time of Menetti's death until a replacement could prudently be obtained in accordance with the rule stated above. Rebecca Pennington testified that, as of 25 June 2005, there were no Knabstrupper mares comparable to Menetti available for sale in the U.S., and that a comparable horse could be purchased in Europe. The time of Menetti's death until Ms. Pennington's location of a comparable replacement was a little over one year. Since plaintiffs offered evidence showing that Menetti likely could have produced one foal during the year of replacement,[3] we conclude that there was competent evidence of consequential damages equaling the loss of profits from one breeding cycle, $9,000. These are the damages awarded by the Full Commission in the Supplemental Decision and Order. Since the Full Commission's findings support its conclusions of law, the Full Commission's damages award must be affirmed under our standard of review. Plaintiffs' argument is accordingly overruled.

III. CONCLUSION

Because plaintiffs adduced sufficient evidence showing that they were entitled to consequential damages for one year, the findings of fact set forth by the Full Commission in the Supplemental Decision and Order are supported by competent evidence. These findings support the Full Commission's conclusions of law, and accordingly, the Supplemental Decision and Order of the Full Commission must be

Affirmed.

Judges STEELMAN and STEPHENS concur.

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2. Defendant contends in this appeal that the compensatory damages for the replacement of Menetti should now be reduced to $45,639.00, the original valuation of Menetti by Rebecca Pennington. In accordance with N.C.R. App. P. 10(a) (2010), the scope of our review is limited to the consideration of the assignments of error set out in the record on appeal. Because the $50,000 market valuation compensatory replacement damages for Menetti has not been assigned as error in the record at any point until now, the compensatory damages for the replacement value of Menetti must be left undisturbed as the law of the case. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008) ("[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.").

3. *Menetti I*, 2009 WL 2371088, at *3.

THE ESTATE OF HARRY KAY BURGESS, JR., BY THE EXECUTRIX OF HIS ESTATE FRANCES LOUISE BURGESS, AND FRANCES LOUISE BURGESS, IN HER INDIVIDUAL CAPACITY, PLAINTIFFS v. RAYMOND HAMRICK, IN HIS OFFICIAL CAPACITY AS CLEVELAND COUNTY SHERIFF, PAUL LEIGH, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS A SHERIFF'S DEPUTY OF CLEVELAND COUNTY, LIBERTY MUTUAL GROUP D/B/A LIBERTY MUTUAL INSURANCE COMPANY, DEFENDANTS

No. COA09-1690

(Filed 3 August 2010)

1. Appeal and Error— interlocutory orders and appeal—governmental or sovereign immunity—substantial right affected

The Court of Appeals addressed the merits of defendants' appeal from the trial court's denial of their motion for summary judgment, despite the interlocutory nature of the appeal. Issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review.

2. Immunity— public duty doctrine—discretionary acts—indirect harm—shield from liability

The trial court erred in denying defendants' motion for summary judgment in a negligence action. The public duty doctrine applied to shield defendant police officers from liability in their official capacities for their discretionary acts that indirectly caused harm to plaintiff's decedent.

3. Immunity— public duty doctrine—no applicable exception

The trial court erred in denying defendants' motion for summary judgment in a negligence action. The public duty doctrine applied to shield defendant police officers from liability for their alleged negligence and no exception to the public duty doctrine applied.

4. Immunity— sovereign immunity—public officer—mere negligence

The trial court erred in denying defendant police officer's motion for summary judgment in a negligence action. Defendant was a public officer being sued in his individual capacity, and he was entitled to immunity for his actions which were not corrupt, malicious, or outside the scope of his official duties.

Appeal by defendants from order entered 18 November 2009 by Judge Nathaniel J. Poovey in Cleveland County Superior Court. Heard in the Court of Appeals 12 May 2010.

The Bumgardner Law Firm, by Thomas D. Bumgardner, for plaintiffs-appellees.

Womble Carlyle Sandridge & Rice, PLLC, by Sean F. Perrin, for defendants-appellants.

HUNTER, Robert C., Judge.

Defendants appeal from the trial court's order denying their motion for summary judgment. After careful review, we reverse and remand.

Background

On the evening of 12 October 2007, Cleveland County Sheriff's Deputy Paul Leigh ("Deputy Leigh") responded to an alleged incident of domestic violence at 210 Cedar Street in Shelby, North Carolina. When Deputy Leigh arrived at the scene, he spoke with Frances Burgess ("plaintiff") in her driveway concerning her call to the police. Plaintiff claimed that her husband, Harry Burgess ("Mr. Burgess"), was intoxicated and had hit her. In her deposition, plaintiff stated: "I told [Deputy Leigh] that [Mr. Burgess] was drunk, highly drunk. I said, he's drunk, he's crazy, he's seeing things. . . ." Upon visual inspection, Deputy Leigh did not see any evidence of physical violence perpetrated against plaintiff. Plaintiff asked Deputy Leigh to arrest her husband, but he responded that he could not do so since there was no evidence that a crime had been committed. Deputy Leigh offered to drive plaintiff to the magistrate's office so that she could "swear out a warrant" against her husband. Plaintiff declined the offer but asked Deputy Leigh to come in the house and speak with Mr. Burgess.

Deputy Leigh entered the living room of the house and observed that Mr. Burgess was calmly sitting on the couch. Deputy Leigh engaged in a conversation with Mr. Burgess and, according to his deposition testimony, Mr. Burgess "spoke to [him] in a respectful manner about the situation." Deputy Leigh further testified that Mr. Burgess' "speech seemed fine" and he made no inconsistent responses to questions asked. Plaintiff claimed in her deposition that there was a bottle of liquor in plain site and that at one point Mr. Burgess fell down the stairs in the garage.

According to Deputy Leigh, plaintiff told Mr. Burgess that he had to "go somewhere for the night." Deputy Leigh then offered to give Mr. Burgess a ride "to a motel or wherever he needed to go." Mr. Burgess stated that he did not have any relatives close by and agreed to go to a motel. As they left the house, Mr. Burgess asked Deputy Leigh, " 'do I drive or do you drive?' " Deputy Leigh responded, "no, you ride with me. I'll take care of you." Mr. Burgess walked out of the house without assistance and sat in the back of the police car. Deputy Leigh claimed that he told plaintiff that he was giving Mr. Burgess a ride to the Days Inn located on Highway 74, but plaintiff claimed in her deposition that she did not know where Deputy Leigh was taking her husband; she assumed he was being taken to jail or to a hospital due to his inebriated condition.

Deputy Leigh transported Mr. Burgess to the Days Inn, which was approximately three miles from Mr. Burgess' house. A motel clerk, who was standing outside the Days Inn, asked Deputy Leigh if he needed assistance, and Deputy Leigh stated "[t]hat Mr. Burgess was possibly going to get a room at the hotel." At that point, Mr. Burgess asked Deputy Leigh to give him a ride back home, to which Deputy Leigh responded: "I am not a taxi service." Mr. Burgess then asked Deputy Leigh to let him out of the back seat. Mr. Burgess exited the vehicle and Deputy Leigh drove away from the Days Inn. Shortly thereafter, Deputy Leigh received a dispatch requesting his presence at another location. Approximately two hours later, Deputy Leigh was notified that Mr. Burgess had been struck by a car while attempting to cross Highway 74. Mr. Burgess died on 31 October 2007. The coroner's report indicated that Mr. Burgess' blood alcohol level was .37.

On 20 January 2009, plaintiff was appointed as executrix of her husband's estate. On 20 July 2009, plaintiff filed a Second Amended Complaint[1] against Cleveland County Sheriff Raymond Hamrick in his official capacity, Deputy Leigh in his official and individual capacity, and Liberty Mutual Group d/b/a Liberty Mutual Insurance Company (collectively "defendants"). Plaintiff asserted a negligence cause of action as well as a claim for wrongful death on behalf of the estate of Mr. Burgess. Plaintiff also sued defendants for negligent infliction of emotional distress. On 21 October 2009, defendants filed a motion for summary judgment claiming, *inter alia*, that the public duty doctrine and sovereign immunity barred plaintiff's claims. On 30 October 2009, plaintiff filed a response to defendants' motion for summary judgment as well as a cross-motion for summary judgment.

1. Plaintiff's original complaint is not contained in the record on appeal.

On 18 November 2009, Judge Nathaniel J. Poovey issued an order denying the parties' motions for summary judgment. Defendants timely appealed to this Court.

Interlocutory Nature of Appeal

[1] Defendants in this case moved for summary judgment on the basis of the public duty doctrine and sovereign immunity. An order denying a motion for summary judgment is interlocutory because it "does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). As a general rule this Court does not review interlocutory orders; "[h]owever, an appeal based on the public duty doctrine 'involves a substantial right warranting immediate appellate review.' " *Estate of McKendall v. Webster*, 195 N.C. App. 570, 572, 672 S.E.2d 768, 770 (2009) (quoting *Cockerham-Ellerbee v. Town of Jonesville*, 176 N.C. App. 372, 374, 626 S.E.2d 685, 687 (2006)). Additionally, "this Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review" pursuant to N.C. Gen. Stat. § 1-277(a). *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999). Accordingly, we address the merits of defendants' appeal despite its interlocutory nature.

Standard of Review

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). A grant of summary judgment is reviewed *de novo* by this Court. *Falk Integrated Technologies, Inc. v. Stack*, 132 N.C. App. 807, 809-10, 513 S.E.2d 572, 574 (1999). On appeal, this Court must determine: " '(1) whether there is a genuine issue of material fact and (2) whether the movant is entitled to judgment as a matter of law.' " *McCoy v. Coker*, 174 N.C. App. 311, 313, 620 S.E.2d 691,693 (2005) (quoting *NationsBank v. Parker*, 140 N.C. App. 106, 109, 535 S.E.2d 597, 599 (2000)). All inferences of fact are made in favor of the nonmoving party. *Id.* "For the case at bar, we must discern whether, upon review of the evidence in a light most favorable to plaintiff's claims, judgment as a matter of law should have been entered in favor of defendants upon the assertion of the defense[] of the public duty doctrine . . . ." *Lassiter v. Cohn*,

168 N.C. App. 310, 315, 607 S.E.2d 688, 691, *disc. review denied*, 359 N.C. 633, 613 S.E.2d 686 (2005).

Discussion

I. Application of the Public Duty Doctrine

[2] In a claim for negligence, there must exist a "legal duty owed by a defendant to a plaintiff, and in the absence of any such duty owed the injured party by the defendant, there can be no liability." *Hedrick v. Rains*, 121 N.C. App. 466, 469, 466 S.E.2d 281, 283 (internal citation omitted), *aff'd per curiam*, 344 N.C. 729, 477 S.E.2d 171 (1996). "[W]hen the public duty doctrine applies, the government entity, as the defendant, owes no *legal* duty to the plaintiff." *Blaylock v. N.C. Dep't of Correction*, —— N.C. App. ——, ——, 685 S.E.2d 140, 143 (2009), *disc. review denied*, 363 N.C. 853, 693 S.E.2d 916 (2010).

Our Supreme Court first adopted the public duty doctrine in *Braswell v. Braswell*, 330 N.C. 363, 370-71, 410 S.E.2d 897, 901 (1991) (internal citation omitted), stating:

> The general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals. This rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act.

In *Braswell*, a woman was killed by her estranged husband and her son, as administrator of his deceased mother's estate, filed suit against the county sheriff, alleging that the sheriff had negligently failed to protect the plaintiff's mother from foreseeable harm. *Id.* at 366, 410 S.E.2d at 899. The Supreme Court rejected the plaintiff's argument and concluded that the public duty doctrine shielded the sheriff from liability. *Id.* at 371-72, 410 S.E.2d at 901-02.

After *Braswell*, the application of the public duty doctrine in this State expanded and was "interpreted to apply to public duties beyond those related to law enforcement protection." *Lassiter*, 168 N.C. App. at 316, 607 S.E.2d at 692; *see generally Moses v. Young*, 149 N.C. App. 613, 616-17, 561 S.E.2d 332, 334-35 (providing in depth analysis of case law since *Braswell*), *disc. review denied*, 356 N.C. 165, 568 S.E.2d 199 (2002). In *Lovelace v. City of Shelby*, 351 N.C. 458, 526 S.E.2d 652 (2000), however, our Supreme Court "sought to reign in the expansion of the public duty doctrine's application to other gov-

ernment agencies and ensure it would be applied in the future only to law enforcement agencies fulfilling their 'general duty to protect the public,' and thus reasserted the principles of *Braswell*." *Lassiter*, 168 N.C. App. at 317, 607 S.E.2d at 692 (quoting *Lovelace*, 351 N.C. at 461, 526 S.E.2d at 654).

This Court recently held in *Scott v. City of Charlotte*, —— N.C. App. ——, ——, 691 S.E.2d 747, 752 (2010):

> Though our courts have both expounded upon and narrowed the application of the public duty doctrine since 1991, *Braswell* and its progeny have not wavered from the general principle that when a police officer, acting to protect the general public, indirectly causes harm to an individual, the municipality that employs him or her is protected from liability. This principle is grounded in the notion that an officer's duty to protect the public requires the officer to make discretionary decisions on a regular basis, whether it be responding to an alleged threat by an abusive spouse or clearing the scene of a car accident.

In *Scott*, we held that the public duty doctrine applied to bar plaintiff's negligence claims against the City of Charlotte where police officers did not call for medical assistance when Mr. Scott was pulled over on suspicion of drunk driving. *Id.* at ——, 691 S.E.2d at 755. Mr. Scott appeared "to be physically impaired in some respect[,]" but he did not ask the officers to call for medical assistance and the evidence indicated that he declined medical assistance when asked if he needed it. *Id.* at ——, 691 S.E.2d at 749. Upon further inquiry, the officers determined that Mr. Scott was having a reaction to medications he was taking for high blood pressure and medications related to a stroke he suffered the previous spring. *Id.* The officers called Mr. Scott's wife and requested that she come pick Mr. Scott up. *Id.* The officers then took Mr. Scott's car keys and left him in a Pep Boys parking lot to wait for his wife. *Id.* Unbeknownst to the officers, Mr. Scott was suffering from a stroke and he later collapsed in the Pep Boys parking lot and died the following day. *Id.* at ——, 691 S.E.2d 749-50. This Court held that the officers, while engaging in their duties to protect the general public, performed discretionary acts that indirectly caused harm to Mr. Scott and that the public duty doctrine was, therefore, applicable. *Id.* at ——, 691 S.E.2d at 753. Furthermore, in *Scott*, this Court rejected the argument that application of the public duty doctrine is strictly limited to situations where the plaintiff is injured by the acts of a third party. *Id.* at ——, 691 S.E.2d at 751-52.

In the present case, Deputy Leigh was engaged in his role as a police officer protecting the general public when he arrived at the home of plaintiff and Mr. Burgess on 12 October 2007. Upon determining that there was no evidence that a crime had been committed, Deputy Leigh attempted to diffuse the situation between plaintiff and Mr. Burgess since plaintiff claimed that Mr. Burgess was drunk and had hit her. Plaintiff also asserted her desire for Mr. Burgess to spend the night elsewhere. Deputy Leigh, in his discretion, then offered to transport Mr. Burgess to a family member's home or a motel. Mr. Burgess opted to spend the night at a motel and Deputy Leigh took him to the nearby Days Inn. It is undisputed that Deputy Leigh left Mr. Burgess at the entrance of the Days Inn and did not observe him check in or accompany him to his room; however, plaintiff has failed to establish that a legal duty existed for Deputy Leigh to continue to supervise Mr. Burgess after escorting him to the Days Inn. Deputy Leigh made a discretionary decision, to leave Mr. Burgess at the front door to the Days Inn. Arguably, Mr. Burgess was indirectly harmed as a result of that decision. Nevertheless, the instant case presents the type of factual scenario that gives rise to application of the public duty doctrine. As stated *supra*, this Court recently held that the public duty doctrine serves to shield defendants from liability where "a police officer, acting to protect the general public, indirectly causes harm to an individual" through his discretionary acts. *Id.* at ——, 691 S.E.2d at 751. Accordingly, we hold that the public duty doctrine applies in this case to shield defendants Hamrick and Leigh from liability in their official capacities.

II. Application of the Exceptions to the Public Duty Doctrine

[3] Plaintiff argues that, if the public duty doctrine is applicable, the two recognized exceptions apply.

> There are two generally recognized exceptions to the public duty doctrine: (1) where there is a *special relationship* between the injured party and the police, for example, a state's witness or informant who has aided law enforcement officers; and (2) when a municipality, through its police officers, creates a *special duty* by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered.

Braswell, 330 N.C. at 371, 410 S.E.2d at 902 (emphasis added) (citation and quotation marks omitted).

First, we must determine if a special relationship existed between Deputy Leigh and Mr. Burgess.

> Those instances where our Courts have intimated that a special relationship exists relate to some affirmative step taken by the police. These steps either provide a *quid pro quo* with a state's witness or informant where a plaintiff would rely on an agreement with law enforcement, the basis of which most likely includes bargained for police protection in exchange for inculpatory testimony or information . . . .

Lassiter, 168 N.C. App. at 320, 607 S.E.2d at 694. Mr. Burgess was not a State's witness or informant for purposes of the special relationship exception, nor was there any understood agreement or *quid pro quo*. Therefore, we hold that no special relationship existed in this situation.

Plaintiff further argues that Mr. Burgess was in police custody when he was transported to the Days Inn. "This Court has previously held that a 'special relationship' exists when the plaintiff is in police custody." *Multiple Claimants v. N.C. Dep't of Health & Human Servs.*, 176 N.C. App. 278, 293, 626 S.E.2d 666, 676 (2006) (citing *Hull v. Oldham*, 104 N.C. App. 29, 38, 407 S.E.2d 611, 616 (1991)), *aff'd as modified*, 361 N.C. 372, 646 S.E.2d 356 (2007). An individual may be in custody if there is "a restraint on freedom of movement of the degree associated with a formal arrest." *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405 (1997). "To determine whether a person is in custody, the test is whether a reasonable person in the suspect's position would feel free to leave." *Id.* Based on the undisputed evidence of the interaction between Mr. Burgess and Deputy Leigh, we hold that Mr. Burgess was never in police custody. Deputy Leigh told plaintiff and Mr. Burgess that he saw no reason to arrest Mr. Burgess. Deputy Leigh then gave Mr. Burgess a ride in the police car, but at no time was Mr. Burgess handcuffed or restrained in any way. A reasonable person in that situation would not feel that he or she was in police custody. Plaintiff's argument is without merit.

Plaintiff also claims that the special duty exception applies in this case. We disagree. Before departing for the Days Inn, Mr. Burgess asked how they were going to proceed to the motel, and Deputy Leigh responded: "[Y]ou ride with me. I'll take care of you." This statement was not a specific promise of police protection; rather, these words constituted no more than "general words of comfort and assurance . . . ." *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902. Even

assuming, *arguendo*, that Deputy Leigh's statement was a specific promise, the promise could not possibly be construed to mean that Deputy Leigh would ensure that no harm came to Mr. Burgess that entire evening. If the words were, in fact, a promise, then the promise was to transport Mr. Burgess to the Days Inn safely, a promise which was fulfilled.

In sum, the public duty doctrine is applicable in this case, and there is no exception that would result in imposition of liability. Consequently, the trial court erred in denying defendants' motion for summary judgment with respect to the negligence claims asserted as well as the claim for wrongful death.

III. Individual Capacity Claim

[4] Plaintiff in the present case brought suit against Deputy Leigh in his individual capacity. Deputy Leigh is a public official for purposes of application of sovereign immunity. *Marlowe v. Piner*, 119 N.C. App. 125, 128, 458 S.E.2d 220, 223 (1995).

"[I]f a public officer is sued in his individual capacity, he is entitled to immunity for actions constituting mere negligence, but may be subject to [personal] liability for actions which are *corrupt, malicious or outside the scope of his official duties*." *Epps v. Duke University*, 116 N.C. App. 305, 309, 447 S.E.2d 444, 447 (1994) (emphasis added).

> The essence of the doctrine of public official immunity is that public officials engaged in the performance of their governmental duties involving the exercise of judgment and discretion, and acting within the scope of their authority, may not be held liable for such actions, in the absence of malice or corruption.

Price, 132 N.C. App. at 562, 512 S.E.2d at 787. "A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *In re Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984). " 'An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.' " *Id.* at 313, 321 S.E.2d at 890-91 (quoting *Givens v. Sellars*, 273 N.C. 44, 50, 159 S.E.2d 530, 535 (1968)).

Upon review of the record, it is clear that Deputy Leigh's actions were not corrupt, malicious, or outside the course and scope of his

authority. Deputy Leigh attempted to intervene and defuse a potential domestic violence situation by taking Mr. Burgess to a motel where he could spend the night. Deputy Leigh dropped Mr. Burgess off at the Days Inn as he agreed to do. Consequently, plaintiff's claims against Deputy Leigh in his individual capacity cannot stand and the trial court erred in denying defendants' motion for summary judgment with respect to Deputy Leigh in his individual capacity.

Conclusion

We hold that the public duty doctrine applies in this case as a complete bar to plaintiffs' claims against defendants Hamrick and Leigh in their official capacities. Furthermore, plaintiffs' claims against Deputy Leigh in his individual capacity are without merit. Consequently, the trial court erred in denying defendants' motion for summary judgment. Because our holding disposes of all of plaintiffs' claims, we need not discuss defendants' remaining arguments with regard to sovereign immunity.

Reverse and Remand.

Judges GEER and STEPHENS concur.

APPLE TREE RIDGE NEIGHBORHOOD ASSOCIATION, HARRY MORALES, JANICE ROBINSON, ROBERT BARBOUR, MITCHELL MURRAY AND WIFE, SHERRY J. MURRAY, AF SNELLING AND WIFE, FRANCES SNELLING, ROBIN HENDRICK AND WIFE MARIE HENDRICK, IRIS JETER, TONI CAICEDO AND MARIE SAMEK, PLAINTIFFS V. GRANDFATHER MOUNTAIN HEIGHTS PROPERTY OWNERS CORPORATION, INC., GISELE WEISMAN, HARLEY L. DAVIS, KATHRYN E. TATE, JAY MALLIN, DAVID ROBINSON AND WIFE, ESTHER ROBINSON, MARC HARRIS AND WIFE, TERRI HARRIS, WALTER I. GRAHAM AND WIFE, DENISE GRAHAM, THERESIA HAUGHER, BRUCE O. FOWLER AND WIFE, JEAN FOWLER, CHUCK STRICKLAND, HESSEL VERHAGE AND WIFE, LAURA VERHAGE, TERRY BUCHANAN, SCOTT A. WITTER AND WIFE, KAREN STOKLEY WITTER, PAUL TURNER, ALEXANDER HALLMARK, ROYALL A. YOUNT, JR., CRAIG A. MINEGAR AND WIFE, JUDITH M. MINEGAR, NANCY G. KORA, JAMES BRENNAN, JS GLASGOW, LYNDA B. CORN, RALPH O. MARSH, B. CONRAD JOHNSTON TRUST AND CHERRY B. JOHNSTON TRUST, ARTHUR WORD, AND WIFE, DOROTHY WORD, MICHAEL J. CASTANO AND WIFE, MARY W. CASTANO, THOMAS VINCENT AND WIFE, ANN VINCENT, DOUGLAS MCKAY, JR., JAMES F. GODFREY, DANNY SUTCLIFFE, LARRY SUTCLIFFE, ALICE J. SCOGGINS, ROBERT H. RIGBY, CAMBRIDGE INVESTORS, INC., JOHN R. HOFFMAN, JR., QUEEN FAMILY LIMITED PARTNERSHIP, ROY A. POWELL, JR., LOUISE P. TURNER, LEE H. WITT AND WIFE, ANNABELL WITT, GUY M. TARRANT, JR., JOE C. SUMMERLIN, JR. AND WIFE, BERNICE A. SUMMERLIN, JAMES O. KINDARD, SR., AND ALBERT J. DOOLEY, SR., DEFENDANTS

No. COA09-1410

(Filed 3 August 2010)

Compromise and Settlement— settlement agreement—subdivision access—reformation

The trial court erred by granting plaintiffs' motion for reformation and enforcement of a settlement agreement involving access by a private road through one subdivision to a new subdivision. The changes, which were made to conform with current width and grade requirements, essentially created a new agreement and imposed upon defendant Wiesman an obligation she had not undertaken.

Appeal by defendant Gisele Weisman from order entered 12 June 2009 by Judge Dennis J. Winner in Avery County Superior Court. Heard in the Court of Appeals 11 May 2010.

Turner Law Office, PA, by John A. Turner, for plaintiff-appellees.

Vetro & Lundy, P.C., by M. Shaun Lundy, for defendant-appellant Gisele Weisman.

Andresen & Arronte, PLLC, by Julian M. Arronte, for defendant-appellee JS Glasgow.

STEELMAN, Judge.

The trial court improperly granted plaintiffs' motion to reform material terms of a voluntary settlement agreement, *i.e.* to change the location of the right-of-way, increase the width of the right-of-way, expand the temporary construction easements for the cut and fill areas, and substantially increase the cost of such construction, and then enforced the modified agreement against defendant Weisman. The trial court's order must be reversed.

I. Factual and Procedural Background

Apple Tree Ridge Subdivision (ATR Subdivision) was developed in 1973 by Frank Kershaw (Kershaw) and is located on the south slope of Grandfather Mountain in Avery County. Kershaw built and maintained a private road within the subdivision called "Wild Apple Drive" in order to provide access to that property from U.S. Highway 221. The deeds from Kershaw to the initial owners in ATR Subdivision conveyed to each property owner a perpetual right-of-way and easement over the subdivision roads to U.S. Highway 221. Harry Morales, Mitchell Murray, Bob Barbour, Janice Robinson, AF Snelling, Robin and Marie Hendrick, and Marie Samek (collectively, plaintiffs) own property located in ATR Subdivision and on 11 July 2007 filed a complaint against Grandfather Mountain Heights Property Owners Corporation, Inc., and Gisele Weisman (Weisman), individually.

The complaint alleged that Weisman, the developer and owner of Grandfather Mountain Heights Subdivision[1] (GMH Subdivision) attempted to use Wild Apple Drive to access GMH Subdivision from U.S. Highway 221 and instructed the other property owners in the subdivision to do the same. Plaintiffs alleged that no right-of-way had been conveyed to any owner of property in GMH Subdivision. Weisman had previously contacted Morales and informed him of her intentions to bulldoze extensions and widen the road across his lots to make the road suitable for GMH Subdivision as well as to extend it to have access to land she was in the process of developing. Morales attempted to stop Weisman from entering his property by constructing a barrier across his lots. Weisman threatened to forcibly remove this barrier and gave Morales a deadline of 15 July 2007 to remove it.

1. Property adjoining ATR Subdivision to the east.

Plaintiffs requested a declaratory judgment confirming that Wild Apple Drive and all roads contained in ATR Subdivision were for the sole and exclusive use of the property owners located within the subdivision. Plaintiffs also requested a temporary restraining order and a preliminary injunction. Plaintiffs alleged claims for civil trespass, unfair and deceptive trade practices, and punitive damages. On 10 September 2007, Weisman and Grandfather Mountain Heights Property Owners Corporation, Inc. filed a motion to require joinder of necessary parties pursuant to Rule 19 of the North Carolina Rules of Civil Procedure. Weisman requested joinder of all property owners within ATR Subdivision and the owners of the property located south of ATR Subdivision whose title originated from D.O. Gragg, including an undeveloped area known as "Woodmont Properties."[2] Weisman's motion was granted and sixty-six parties were added as defendants. Sherry J. Murray, Frances Snelling, Iris Jeter, and Toni Caicedo were added as plaintiffs. On 13 December 2007, plaintiffs filed an amended complaint alleging claims that were virtually identical to those contained in the original complaint. Weisman filed an answer denying the material allegations of plaintiffs' amended complaint and requested that a declaratory judgment be entered confirming that defendants had the right to access their property from U.S. Highway 221 through ATR Subdivision.

On 20 October 2008, the parties attended a mediated settlement conference and reached an agreement (settlement agreement). The material terms of the settlement agreement were that the GMH Subdivision owners would obtain permanent access over Wild Apple Drive in return for executing the ATR Subdivision Road Maintenance Agreement for Wild Apple Drive. This was the only requirement set forth pertaining to GMH Subdivision in the settlement agreement. Additional terms were applicable to the Woodmont property owners: (1) the owners had to execute the ATR Subdivision Road Maintenance Agreement for Wild Apple Drive; (2) they had to accept certain restrictions[3] on the development of their property; and (3) access to Woodmont would be by a new road diverting from Wild Apple Drive "at or before" its intersection with Morales' driveway to a new right-of-way along the common boundary of the Morales and

2. Weisman owned both a nine and thirteen acre tract of land in Woodmont, in addition to her GMH property.

3. The agreed upon restrictions were: not more than one single-family dwelling was permitted on each of the properties; none of the properties could be subdivided or otherwise reconfigured; no street lights were to be erected on the relocated road; and the Woodmont lots were required to comply with the "Dark Sky" initiatives.

Witter properties. Woodmont property owners had to assume responsibility for the cost of constructing and maintaining the new road. The construction plan for the relocation of the road had to be approved by both Morales and Witter, and had to be constructed so as to move the least amount of earth possible. Further, the settlement agreement provided that the relocated road "shall be built in conformity with all applicable governmental regulations."

The settlement agreement was signed by plaintiffs, plaintiffs' attorney, Weisman individually and in her capacity as President of Grandfather Mountain Heights Property Owners Corporation, Inc., and defendants' attorney. While the proposed consent order and road maintenance agreement were being circulated to the parties, a number of complications arose. Plaintiffs retained Richard Clark (Clark), a grading consultant, to review the proposed right-of-way. Clark stated that the proposed new roadway would have a section of road with a proposed grade of approximately 23 percent along the existing ground. This grade did not comply with the maximum grade requirements of 13-18 percent as set forth in the "current conventional standards for new road construction." In addition, Tommy Burleson, the Director of the Avery County Planning & Inspections Department, informed the parties that the new road would have to comply with the North Carolina State Building Code:

> This "new" road would . . . have to meet the requirements of the North Carolina State Building Code: Fire Code Volume V, Chapter 5 Fire Service Features, Section 503 "Fire Apparatus Access Roads". In which, Section 503.2.1 dimensions would require a minimum of (20) twenty-feet wide, unobstructed right of way and of which would also have to meet [] maximum grade limits and maximum slope specification for the cut and fill areas.

The topography of the proposed right-of-way required an adjustment of its placement and additional temporary construction easements for cut and fill areas. Clark recommended that the proposed right-of-way be relocated 30 feet from the negotiated starting point to a narrow strip of land adjacent to both the Morales and Witter properties. To implement these recommendations, Morales, and fellow ATR Subdivision property owners Hessel and Laura Verhage, acquired the necessary land and signed a Supplemental Access Easement Agreement[4] that would facilitate the modifications.

4. The Supplemental Access Easement Agreement stated that the Morales, Verhages, and the Witters agreed to execute a non-exclusive supplemental access easement to "accommodate the modification of the New Right-of-Way so as to conform it

Weisman refused to sign the consent order because the construction of the road on a relocated easement would cost at a minimum an additional $40,000.00. On 5 June 2009, plaintiffs filed a motion for reformation and enforcement of the settlement agreement and requested that the trial court reform the terms of the settlement to reflect the relocation of the right-of-way as set forth in Clark's proposal and order enforcement of the agreement against Weisman. On 12 June 2009, the trial court entered an order granting plaintiffs' motion on the basis that the settlement agreement demonstrated by clear, cogent, and convincing evidence that there was "a meeting of the minds of the parties as to their intention to establish a legally sufficient right-of-way for a new road" and that the parties were acting under mutual mistake as to the legal sufficiency of the twelve-foot-wide road easement. The trial court reformed the terms of the settlement agreement to conform the new right-of-way with the maximum grade requirements and North Carolina State Building Code as articulated in Clark's proposal and set forth in the Supplemental Access Easement Agreement. The trial court ordered that the settlement agreement be enforced against Weisman, notwithstanding her objections. Weisman appeals.

II. Reformation and Enforcement of Settlement Agreement

Weisman contends the trial court erred by granting plaintiffs' motion for reformation and enforcement of the settlement agreement. We agree.

Our Supreme Court has stated "compromise agreements, such as the mediated settlement agreement reached by the parties . . . are governed by general principles of contract law." *Chappel v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001) (citation omitted). "[S]ince contract interpretation is a question of law, the standard of review on appeal is *de novo*." *Cabarrus Cty. v. Systel Bus. Equip. Co.*, 171 N.C. App. 423, 425, 614 S.E.2d 596, 597 (citations omitted), *disc. review denied*, 360 N.C. 61, 621 S.E.2d 177 (2005).

It is a well-settled principle of contract law that in order to have "a valid and enforceable contract between parties, there must be a meeting of the minds of the contracting parties upon all essential terms and conditions of the contract." *O'Grady v. Bank*, 296 N.C. 212, 221, 250 S.E.2d 587, 594 (1978) (citations omitted). "[T]he parties

to the recommendations of the Richard Clark proposal" and to comply with the North Carolina State Building Code. The agreement also expanded the temporary construction easements for the cut and fill areas.

must assent to the same thing in the same sense, and their minds must meet as to all the terms." *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974) (quotation omitted). Essential terms of a contract include the parties, the subject matter of the agreement, and the price to be paid under it. *Connor v. Harless*, 176 N.C. App. 402, 405, 626 S.E.2d 755, 757 (2006), *disc. review denied*, 361 N.C. 219, 642 S.E.2d 247 (2007).

Plaintiffs sought to make material alterations to the essential terms of the settlement agreement, *i.e.* change the location of the new right-of-way, increase the width of the right-of-way, expand the temporary construction easements for the cut and fill areas, and increase the cost of construction by a minimum of $40,000.00, through the equitable remedy of reformation based upon mutual mistake. "Reformation is a well-established equitable remedy used to reframe written instruments where, through mutual mistake or the unilateral mistake of one party induced by the fraud of the other, the written instrument fails to embody the parties' actual, original agreement." *Metropolitan Property & Cas. Ins. Co. v. Dillard*, 126 N.C. App. 795, 798, 487 S.E.2d 157, 159 (1997) (quotation omitted).

> To reform a contract, and then enforce it in its new shape, calls for a much greater exercise of the power of a chancellor than simply to set the transaction aside. Reformation is a much more delicate remedy than rescission. . . . *A court of equity cannot, and should not undertake to make a new contract between the parties by reformation*; it may by cancellation or rescission relieve a party from an alleged contractual obligation or liability, which he has in fact not undertaken or incurred; *it cannot, however, impose upon him a liability which he has not assumed, or an obligation which he has not undertaken.*

Crawford v. Willoughby, 192 N.C. 269, 272, 134 S.E. 494, 496 (1926) (citations omitted and emphasis added); *see also* 7 Joseph M. Perillo, *Corbin on Contracts* § 28.45, at 282 (revised edition 2002) ("Contracts are not reformed for mistake; writings are. The distinction is crucial. With rare exceptions, courts have been tenacious in refusing to remake a bargain entered into because of a mistake. . . . [C]ourts give effect to the expressed wills of the parties. They will not second-guess what the parties would have agreed to if they were not dealing under a mistake. Such a situation may be the basis for avoiding the contract, not reforming it.").

In the settlement agreement in the instant case, the parties specifically agreed that the relocation of the right-of-way would be as follows:

> The [right-of-way] upon the property of Harry Morales . . . shall be relocated to begin at or before the intersection of Wild Apple Drive with the Morales' driveway; the [right-of-way] shall be moved to the southeast. The centerline of the [right-of-way] shall follow the property line of Morales and Witter from the approximate mid-point of Witter's northwest line to Witter's northernmost corner. The width of the right-of-way as it crosses Morales and Witter shall be 12 feet[.]

The proposed relocation did not comply with section 503 of the North Carolina State Building Code. Plaintiffs sought to alter the language in the settlement agreement to conform to Clark's recommended modifications:

> By beginning the transition to the new right-of-way at a point along Wild Apple Drive within Lot 15A . . . about thirty feet from the negotiated beginning point, the amount of fill required to meet maximum grade requirements would be reduced by approximately two-thirds, and the resulting impacted areas within the servient properties would likewise by greatly reduced.

The primary change required a widening of the right-of-way to an unobstructed width of twenty feet. "The new construction would need room for a retaining wall and/or temporary construction easement to allow fill to be placed on the sides of the new roadway (Morales and Witter properties)." At the hearing, plaintiffs' counsel conceded that the cost of the recommended modifications would increase by a minimum of $40,000.00. Counsel argued "well, Your Honor, these Woodmont tracts as the mediated settlement agreement provides and the description of them comprise more than thirty-seven (37) acres of property. I don't think forty thousand dollars ($40,000.00) is too much of a burden in order to have the benefit." However, such a determination cannot be made by plaintiffs' counsel, but only by the parties to the settlement agreement.

Although we recognize that there was a specific provision within the settlement agreement which stated that the new roadway "shall be built in conformity with all applicable governmental regulations," we refuse to permit a trial court to use reformation to essentially create a new agreement between the parties and impose upon Wiesman

a liability which she had not assumed, or an obligation which she had not undertaken. *Crawford*, 192 N.C. at 272, 134 S.E. at 496.

Our Supreme Court has specifically stated:

> [S]ettlement of claims is favored in the law and mediated settlement as a means to resolve disputes should be encouraged and afforded great deference. Nevertheless, given the consensual nature of any settlement, *a court cannot compel compliance with terms not agreed upon or expressed by the parties in the settlement agreement.*

Chappel, 353 N.C. at 692, 548 S.E.2d at 500 (internal citations omitted and emphasis added).

By reforming the language in the settlement agreement to reflect Clark's recommended modifications to the proposed right-of-way and enforcing the agreement against Weisman, the trial court "compel[led] compliance with terms not agreed upon or expressed by the parties in the settlement agreement." *Id.* This practice is contrary to the law of North Carolina. The trial court erred by granting plaintiffs' motion to reform and enforce the settlement agreement.

Because we hold the trial court erred by granting plaintiffs' motion for reformation and enforcement of the settlement agreement on this basis, it is not necessary to address defendant's remaining assignments of error. The order of the trial court is reversed.

REVERSED.

Judges WYNN and CALABRIA concur.

STATE OF NORTH CAROLINA v. RENNY DEANJELO MOBLEY

No. COA09-975

(Filed 3 August 2010)

1. Evidence— hearsay—business records exception—authentication—no abuse of discretion

The trial court did not abuse its discretion in a counterfeit controlled substances case in admitting under N.C.G.S. § 8C-1, Rule 803(6) an audio recording of a phone call made from the booking area of a police station. The call was properly authenti-

cated where testimony revealed the caller's voice was similar to defendant's, the caller identified himself as "Little Renny" (Renny being defendant's first name), and the caller dialed the same number as defendant's later calls from the jail. Moreover, even assuming *arguendo* that the trial court erred in admitting the recording, defendant failed to demonstrate prejudice.

2. Drugs— conspiracy to sell counterfeit controlled substance—substantial evidence—motion to dismiss properly denied

The trial court did not err in denying defendant's motions to dismiss the charge of conspiracy to sell a counterfeit controlled substance. The circumstances of defendant initiating contact with the undercover officers and brokering the drug buy provided substantial evidence to support defendant's conviction.

Appeal by plaintiff from judgment entered 11 February 2009 by Judge James W. Morgan Mecklenburg County Superior Court. Heard in the Court of Appeals 27 January 2010.

Attorney General Roy Cooper, by *Assistant Attorney General Larissa S. Williamson for the State.*

James N. Freeman, Jr., for defendant-appellant.

STEELMAN, Judge.

The trial court did not abuse its discretion in admitting the 19 September 2007 booking-area phone call under Rule 803(6) where testimony revealed the caller's voice was similar to defendant's, the caller identified himself as "Little Renny," and the caller dialed the same number as defendant's later calls from the jail. The circumstances of defendant initiating contact with the undercover officers and brokering the drug buy provide substantial evidence to support defendant's conviction of conspiracy to sell a counterfeit controlled substance.

I. Factual and Procedural Background

On 19 September 2007, Stephen Whitesel (Whitesel), an undercover narcotics officer with the Charlotte-Mecklenburg Police Department, conducted a street-level "buy bust" operation in the Westover Patrol Division of Mecklenburg County. The operation's arrest team followed closely in a "take down van" as Whitesel and his partner, Officer Dan Kellough (Kellough), drove to Watson Drive attempting to purchase crack cocaine or marijuana.

At or around 2:45 p.m., Whitesel and Kellough turned on to Watson Drive and saw defendant standing near a crowd gathered on a porch. As the officers approached the house, defendant "hollered and told [the officers] to turn around" and pointed to a place to park. Kellough parked the vehicle and Whitesel video-taped the drug buy with a hidden camera. Whitesel observed defendant approach a man, later identified as Rakeem McCullough (McCullough), who then walked into a nearby apartment and returned with a plastic bag.

Defendant and McCullough approached Whitesel on the passenger side of the vehicle and defendant asked Whitesel, "what do you need?" Whitesel stated, "just 40," which denoted forty dollar's worth of crack cocaine. McCullough was hesitant about the deal, but defendant stated that "these guys are straight, they ain't no police, they're straight." With defendant's reassurance, McCullough produced two small plastic baggies, each containing one rock of a "hard white substance." Whitesel paid McCullough forty dollars in marked bills for what the officers believed to be crack cocaine. A subsequent laboratory analysis revealed that it was .15 grams of a counterfeit controlled substance, not crack cocaine.

The officers drove away from defendant and gave the signal for the "take down units" to intercede, describing both defendant and McCullough as subjects for arrest. After defendant and McCullough were taken into custody along with two other men, Whitesel and Kellough identified defendant and McCullough as the persons who sold them crack cocaine. Defendant was transported to the Mecklenburg County jail. Defendant was charged with conspiracy to sell and deliver cocaine. A positive identification (PID) number is given to individuals as part of the intake process at the Mecklenburg County jail. The number consists of an inmate's fingerprint number and the last four digits of their social security number. If an inmate makes a phone call, they must first enter their PID number. Individuals still in the booking area have not yet been issued a PID number.

Inmates' telephone calls are recorded and the recordings are kept in the regular course of business at the Mecklenburg County jail. Although the county jail contracts with an outside company for the recording equipment, the recordings are unalterable and stored on-site at the jail. Once a call is recorded, it is tagged with "[t]he PID number, the area of the facility the call came from, the telephone it came from, the date, time, the number dialed" and can be transferred to a compact disk for use at trial.

Sergeant Jamie Brantley (Brantley) was employed by the Mecklenburg County Sheriff's office on 19 September 2007 and was assigned to monitor inmate telephone calls and create disks of those calls. Brantley made a compilation of the calls made from the booking area on 19 September 2007, which would have included any call defendant made before being issued a PID number. Brantley cross-referenced the compilation to the later calls listed under defendant's PID number and identified a call from the booking area on 19 September 2007 that matched the telephone number from defendant's later calls and featured an inmate voice similar to that of the defendant. At trial, Whitesel testified that he recognized defendant as being the caller in the call made from the booking area on 19 September 2007.

In the call made from the booking area, the caller identified himself as "Little Renny." The caller also stated that "I gave the little n——— the sh— to give him," and that "me, Mark and that other little n———" got arrested.

This case came on for trial on 9 February 2009. Defendant was tried for conspiracy to sell a counterfeit controlled substance. At the close of State's evidence and again at the close of defendant's evidence, defendant's motion to dismiss was denied.

The jury found defendant guilty of conspiracy to sell a counterfeit controlled substance. Defendant pled guilty to habitual felon status and was sentenced to 92 to 120 months imprisonment.

Defendant appeals.

II. Recording of Call from Booking Area

[1] In his first argument, defendant contends that under N.C. Gen. Stat. § 8C-1, Rule 901(a), the telephone conversation submitted as State's Exhibit 13 under Rule 803(6) was not authenticated and that the admission of evidence constituted reversible error. We disagree.

A. Standard of Review

Under Rule 803, cases are conflicting as to the appropriate standard of review. We review the trial court's determination to admit or exclude evidence for abuse of discretion. *State v. Williams*, 363 N.C. 689, 701, 686 S.E.2d 493, 501 (2009); *State v. Smith*, 315 N.C. 76, 97, 337 S.E.2d 833, 846 (1985). We refuse to overturn a judgment for abuse of discretion unless "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." *Williams*, 363 N.C. at 701, 686 S.E.2d at 501 (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

B. Admission of State's Exhibit 13

Defendant contends that the State failed to authenticate the 19 September 2007 booking-area call because the caller could not be identified as defendant. Defendant argues that Brantley was not qualified to match the caller's voice to defendant's voice and a caller identifying himself as "Little Renny" was insufficient to establish that the caller was in fact defendant, Renny Mobley.

The booking-area call was marked as State's Exhibit 13 and admitted into evidence as a business record exception to the hearsay rule under Rule 803(6). Defendant's objection to the evidence on the grounds that the call could not be authenticated under Rule 901 was overruled. The evidence was supported by testimony from the record's custodian, Sergeant Brantley.

Rule 803(6) states in part that a business record is "[a] memorandum, report, record, or data compilation, in any form" of information provided by or from a person with knowledge and kept in the course of regular business activity as shown by the testimony of the custodian or other qualified witness. N.C. Gen. Stat. § 8C-1, Rule 803(6) (2009).

An audio recording admitted under Rule 803 must nevertheless be authenticated under Rule 901. *State v. Stager*, 329 N.C. 278, 315-16, 406 S.E.2d 876, 897–98 (1991). Rule 901 permits authentication by evidence sufficient "to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2009). Thus, the issue is whether there is competent evidence that the booking-area caller was defendant.

A caller's identity may be established by testimony connecting the voice on the recording with defendant or by some circumstantial evidence. *State v. Williams*, 288 N.C. 680, 698, 220 S.E.2d 558, 571 (1975); N.C. Gen. Stat. § 8C-1, Rule 901(a). A witness' testimony as to the identity of the declarant "based on personal knowledge is all that is required to authenticate a tape recording." *Stager*, 329 N.C. at 317, 406 S.E.2d at 898. Sergeant Brantley testified that inmates' calls are recorded in the normal course of business and kept at the Mecklenburg County Jail according to the inmates' PID number. The call identified by Sergeant Brantley was made to the same number as

defendant's subsequent calls and featured a voice similar to defendant's subsequent calls. Whitesel, the undercover officer who interacted with defendant during the drug buy, also identified defendant as the caller in State's Exhibit 13.

In the booking-area call, the caller identified himself as "Little Renny," which includes defendant Renny Mobley's first name. The caller related that "me, Mark and that other little n———" got arrested and refers again to the "little n———-" as the person who handled the substance. This is substantially similar to the circumstances of defendant's arrest. The State contended that the caller was referring to himself (defendant), Mark Murphy (Murphy), and McCullough. The fourth man taken into custody was given a citation for possession of drug paraphernalia and released at the scene. Only defendant, Murphy, and McCullough were arrested for conspiring to sell a substance, which only McCullough handled.

This circumstantial evidence authenticated the caller's identity in State's Exhibit 13. The trial court did not abuse its discretion in admitting the call into evidence. *Stager*, 329 N.C. at 318, 406 S.E.2d at 899.

Even assuming arguendo that the trial court admitted State's Exhibit 13 in error, defendant failed to demonstrate how the admission of the recording was prejudicial. N.C. Gen. Stat. 15A-1443(a) (2009). Whitesel and Kellough each testified that defendant was present at the drug buy. Whitesel and Kellough testified that defendant initiated contact with the officers, directed their car where to park, and brokered the sale by first asking Whitesel what he wanted and then encouraging McCullough to complete the sale. Based on Whitesel and Kellough's testimony and for the reasons stated *infra* regarding representation of the substance sold to Whitesel, there was substantial other evidence that defendant was guilty of conspiracy to sell a counterfeit controlled substance. Admission of State's Exhibit 13 was not prejudicial. *Id.*; *State v. Morgan*, 329 N.C. 654, 659, 406 S.E.2d 833, 835 (1991).

This argument is without merit.

IV. Motion to Dismiss

[2] In his second argument, defendant contends that the trial court erred in denying his motions to dismiss because there was insufficient evidence that defendant knew the controlled substance sold to Officer Whitesel was counterfeit. We disagree.

A. Standard of Review

We review denial of a motion to dismiss criminal charges *de novo*, to determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Substantial evidence is relevant evidence that a reasonable mind would find adequate to support a conclusion. *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). We must consider evidence in a light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

B. Conspiracy to Sell a Counterfeit Controlled Substance

Defendant was convicted of conspiracy to sell a counterfeit controlled substance under N.C. Gen. Stat. § 90-95(a)(2), which states that it is unlawful to "create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance." Criminal conspiracy is an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means and may be proven by direct or circumstantial evidence. *State v. Diaz*, 155 N.C. App. 307, 319, 527 S.E.2d 523, 531 (2002), *cert. denied*, 357 N.C. 464, 586 S.E.2d 271 (2003), *and cert. denied*, 357 N.C. 659, 590 S.E.2d 396 (2003), *and cert. dismissed*, —— N.C. ——, 632 S.E.2d 496 (2006).

A counterfeit controlled substance is "[a]ny substance which is by any means intentionally represented as a controlled substance." N.C. Gen. Stat. § 90-87(6)(b) (2009). Evidence that a counterfeit controlled substance has been intentionally represented as a controlled substance includes:

> 1. The substance was packaged or delivered in a manner normally used for the illegal delivery of controlled substances.
>
> 2. Money or other valuable property has been exchanged or requested for the substance, and the amount of that consideration was substantially in excess of the reasonable value of the substance.
>
> 3. The physical appearance of the tablets, capsules or other finished product containing the substance is substantially identical to a specified controlled substance.

N.C. Gen. Stat. § 90-87(6)(b).

Defendant argues that N.C. Gen. Stat. § 90-95(a)(2) requires defendant to knowingly have misrepresented a counterfeit controlled substance as an actual controlled substance. *State v. Bivens*, —— N.C. App. —— S.E.2d ——, (June 1, 2010) (No. COA09-483). *Bivens* held that "N.C. Gen. Stat. § 90-87(6) . . . requires only that the substance be 'intentionally represented as a controlled substance[,]' not that a defendant have specific knowledge that the substance is counterfeit." *Id.* at ——, ——, S.E.2d at —— (quoting N.C. Gen. Stat. § 90-87(6)(b)).

Whitesel asked for a "40," which denoted forty dollars worth of crack cocaine. McCullough then produced a hard, white substance packaged in two "small corner [baggies]." Both Whitesel and Kellough believed the substance sold to Whitesel was crack cocaine.

There is substantial circumstantial evidence that defendant intentionally represented the substance sold to Officer Whitesel as a controlled substance under N.C. Gen. Stat. § 90-87(6)(b). The substance was packaged in "small corner [baggies]," a practice normally used to deliver crack cocaine. N.C. Gen. Stat. § 90-87(6)(b)(1). Whitesel paid forty dollars for .15 grams of the substance. N.C. Gen. Stat. § 90-87(6)(b)(2). The two rocks of hard, white substance sold to Whitesel appeared to two veteran narcotics officers to be crack cocaine. N.C. Gen. Stat. § 90-87(6)(b)(3). Based on this evidence, a reasonable jury could infer that defendant intentionally represented the substance sold to Whitesel as a controlled substance and that the substance was therefore a counterfeit controlled substance.

Further, there is substantial evidence that defendant conspired with McCullough to sell a counterfeit controlled substance. Whitesel and Kellough's testimony demonstrated that defendant initiated contact with the officers and directed them where to park. Defendant spoke briefly with McCullough, who then entered a nearby apartment and emerged carrying a plastic bag which contained the substance. Both defendant and McCullough approached Whitesel, but it was defendant who brokered the deal, asking Whitesel what he wanted. When McCullough hesitated to complete the sale, defendant reassured him that Whitesel and Kellough were "straight, they ain't no police, they're straight." From these circumstances, a jury could reasonably infer that defendant conspired with McCullough to sell the substance.

The State was required to prove that defendant conspired to "create, sell or deliver . . . a counterfeit controlled substance." N.C.

Gen. Stat. § 90-95(a)(2). Based on the packaging and delivery of the substance and the conduct of defendant, there is substantial evidence that defendant conspired to sell or deliver a counterfeit controlled substance. *Morgan*, 329 N.C. at 659, 406 S.E.2d at 835; *Bivens*, ––– N.C. App. at –––, ––– S.E.2d at –––.

This argument is without merit.

NO ERROR.

Judges McGEE and BEASLEY concur.

REGIONS BANK, Plaintiff v. BAXLEY COMMERCIAL PROPERTIES, LLC, BAXLEY DEVELOPMENT, INC. and BRANDON BAXLEY, Individually, Defendants

No. COA09-488

(Filed 3 August 2010)

1. Appeal and Error— interlocutory orders and appeal—substantial right—possibility of inconsistent verdicts

The Court of Appeals had jurisdiction over an appeal from an interlocutory order denying defendant's motion to set aside the trial court's entry of judgment and default judgment as to only one of three defendants. The order affected a substantial right under N.C.G.S. § 7A-27(d) based upon the possibility of inconsistent verdicts upon the same facts.

2. Appeal and Error— preservation of issues—failure to raise at trial

Although defendant contended the county clerk of superior court lacked jurisdiction under N.C.G.S. § 1A-1, Rules 55(b)(2) and 60(b)(4) to enter default, defendant did not properly preserve these arguments under N.C. R. App. P. 10(b)(1) by failing to raise them at trial.

Appeal by defendant Baxley Development, Inc. from order entered 28 January 2009 by Judge Carl R. Fox in Superior Court, Wake County. Heard in the Court of Appeals 15 October 2009.

McGuireWoods LLP, by Christian M. Kennedy, for plaintiff-appellee.

Baxley Development, Inc.[1]

STROUD, Judge.

Baxley Development, Inc. ("defendant BDI") appeals from a trial court's order denying its motion to set aside an entry of default and default judgment in favor of Regions Bank ("plaintiff"). For the following reasons, we affirm.

I. Background

Defendants BDI and Brandon Baxley ("defendant Baxley") executed separate guaranty agreements guaranteeing full and prompt payment of two promissory notes ("promissory notes") executed by Baxley Commercial Properties, LLC ("defendant BCP") and delivered to plaintiff, in the amounts of $1,127,750 and $296,500, respectively. On 15 August 2008, plaintiff filed suit against defendants BDI, BCP, and Baxley. The complaint alleged two breach of contract claims against defendant BCP for default under both promissory notes. The complaint further alleged that all amounts in both promissory notes were due; defendant BCP was indebted to plaintiff in the principal amount, plus accrued fees, interest and attorney's fees and costs; plaintiff had made demand from defendant BCP for payment of the indebtedness; and defendant BCP had failed or refused to pay. Plaintiff also made claims against defendant BDI and defendant Baxley as guarantors of the promissory notes. Defendants were served with plaintiff's complaint on 19 August 2008.

On 18 September 2008, defendant Baxley filed a motion to extend time to answer plaintiff's complaint with the Wake County Clerk of Superior Court's office on behalf of himself, defendant BCP, and defendant BDI. The clerk of court granted the extension of time to answer for defendant Baxley only and explained to Mr. Baxley that he would have to obtain an attorney to get the extensions for the two

1. On 28 May 2009, defendant BDI's appellate counsel James H. Hughes of Hoof & Hughes, PLLC, filed a brief with this Court on behalf of defendant BDI. However, on 18 August 2009, Mr. Hughes was permitted by this Court to withdraw as counsel of record for defendant BDI. Thus, defendant BDI was originally represented by counsel on appeal. However, we do not identify defendant BDI as proceeding *pro se* because "in North Carolina a corporation must be represented by a duly admitted and licensed attorney-at-law and cannot proceed *pro se* unless doing so in accordance with" certain exceptions which are not applicable here. *Lexis-Nexis, Div. of Reed Elsevier, Inc. v. Travishan Corp.*, 155 N.C. App. 205, 209, 573 S.E.2d 547, 549 (2002).

corporate entities. On 19 September 2008, an individual representing himself as an attorney went to the Wake County Clerk of Superior Court's office seeking an extension of time on behalf of defendant BDI and defendant BCP, pursuant to the original motion to extend time to answer filed by defendant Baxley the day before. As this individual did not file a new motion on behalf of defendant BCP or defendant BDI, the clerk did not grant an extension of time as to either defendant BDI or defendant BCP.

On 29 September 2008, plaintiff filed motions for entry of default and default judgment against defendant BDI. On 1 October 2008, the Assistant Clerk of Wake County Superior Court granted plaintiff's motions. On 4 November 2008, defendant BDI moved to set aside the entry of default and default judgment. This motion was heard in Superior Court, Wake County on 26 January 2009. The trial court denied defendant's motion by written order dated 28 January 2009. Defendant BDI filed timely notice of appeal on 28 January 2009.

II. Grounds for Appellate Review

[1] Defendant BDI first contends that this Court has jurisdiction to hear its appeal pursuant to N.C. Gen. Stat. § 7A-27(b). In the alternative, defendant BDI contends that this Court has jurisdiction over this appeal because it is an appeal from an interlocutory order that affects a substantial right pursuant to N.C. Gen. Stat. §§ 1-277 and 7A-27(d). In the alternative, defendant BDI asks this Court to consider its appeal as a petition for a writ of certiorari, pursuant to N.C.R. App. P. 21(a)(1). Plaintiff makes no argument contesting this Court's jurisdiction.

N.C. Gen. Stat. § 7A-27(b) (2009) sets forth the right to appeal as follows:

> From any final judgment of a superior court, other than the one described in subsection (a) of this section, or one based on a plea of guilty or nolo contendere, including any final judgment entered upon review of a decision of an administrative agency, appeal lies of right to the Court of Appeals.

"A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Atkins v. Beasley*, 53 N.C. App. 33, 36, 279 S.E.2d 866, 869 (1981) (citation and quotation marks omitted). Here, defendant BDI appeals from the trial court's denial of defendant BDI's motion to set aside the trial court's entry of judgment and default judgment as to

only one of three defendants. The trial court's order disposed of the case as to defendant BDI only, leaving plaintiff's claims against defendant Baxley and defendant BCP "to be judicially determined[.]" *See id.* Therefore, the trial court's order denying defendant BDI's to set aside the entry of default and default judgment was not a final judgment. *See Blackwelder v. State Dep't of Human Resources*, 60 N.C. App. 331, 333, 299 S.E.2d 777, 779 (1983) ("A ruling is interlocutory in nature if it does not determine the issues but directs some further proceeding preliminary to final decree.").

N.C. Gen. Stat. § 7A-27(d) and N.C. Gen. Stat. § 1-277 provide "that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978) (citation and quotation marks omitted). "The reason for these rules is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division." *Id.* "Our courts generally have taken a restrictive view of the substantial right exception[,]" and "[t]he burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order." *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001) (citations omitted). Defendant BDI contends that this appeal affects a substantial right "in that upholding the default judgment against BDI brings about the possibility of inconsistent verdicts upon the same facts." We agree.

We have previously held that "[t]he right to avoid the possibility of [multiple] trials on the same issues can be a substantial right that permits an appeal of an interlocutory order when there are issues of fact common to the claim appealed and remaining claims." *Allen v. Sea Gate Ass'n*, 119 N.C. App. 761, 763, 460 S.E.2d 197, 199 (1995); *see Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982) (stating that "the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue"). Based entirely upon the answer filed by defendant Baxley, defendant BDI alleged in its motion to set aside the entry of default and default judgment that it had a meritorious defense. Defendant Baxley's answer raised a defense as follows:

1. The notes attached to the Plaintiff's complaint as Exhibits A and B were secured by a deed of trust given to Regions Bank by BCP on property located in Charleston County, South Carolina (the "Property").

2. The fair market value of the Property is far in excess of all amounts Plaintiff contends is owed by BCP on the notes.

3. Upon information and belief, plaintiff has commenced foreclosure proceedings on the Property, but has failed to complete said foreclosure.

4. Pursuant to NCGS §26-7, Brandon Baxley and Baxley Development, Inc, guarantors of the notes attached to the Plaintiff's complaint as Exhibits A and B, hereby give notice to Regions Bank to use all reasonable diligence to realize upon the securities which it holds for the obligations and to proceed to a conclusion on the foreclosure it has commenced upon the property securing the notes.

5. To the extent that the plaintiff fails to act in accordance with the notice set out above, Brandon Baxley and Baxley Development, Inc[.] should be discharged from their obligations as guarantors to the notes pursuant to NCGS §26-9, and, pleads said discharge as a bar to Plaintiff's recovery in this action against them.

Thus, guarantors defendant Baxley and defendant BDI raise the same defense: they are not liable as guarantors because plaintiff failed to complete foreclosure proceedings against real property given to plaintiff by defendant BCP as security for the promissory notes. The trial court denied defendant BDI's motion to set aside entry of default and default judgment, making defendant BDI liable to plaintiff as guarantor. However, the ongoing case in the trial court against defendants Baxley and BCP involves the same issues and facts raised in defendant BDI's appeal. Thus, if the default against BDI were reversed, there would be another trial on the same issues as to BDI, which could result in a verdict which is not consistent with the verdict in the earlier trial as to defendants Baxley and BCP. Therefore, this interlocutory appeal affects a substantial right, and, accordingly, we address the merits of defendant BDI's appeal.

III. Motion to Set Aside Entry of Default and Default Judgment

[2] Defendant BDI contends that the Wake County Clerk of Superior Court lacked jurisdiction under N.C. Gen. Stat. § 1A-1, Rule 55(b) to

enter default because defendant Baxley made a proper appearance on behalf of all three defendants on 18 September 2008 prior to the expiration of the time to answer or otherwise plead. Citing N.C. Gen. Stat. § 1A-1, Rule 60(b)(4), defendant BDI concludes that since entry of default by the clerk of court was in error, the clerk of court's default judgment "is void as a matter of law[,]" and the trial court's denial of defendant BDI's motion to set aside entry of default and default judgment was in error and should be reversed.

Defendant BDI in its written motion to set aside entry of default and default judgment brought forth only one argument to the trial court supporting its motion:

> 3. Brandon Baxley's attempt to obtain an extension of time on behalf of Baxley Development, Inc. constitutes excusable neglect as set forth in Rule 60(b) of the Rules of Civil Procedure.

Defendant BDI's argument in its written motion is clearly based upon N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2008) ("On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or *excusable neglect*[.]") (emphasis added); *see Estate of Teel by Naddeo v. Darby*, 129 N.C. App. 604, 607, 500 S.E.2d 759, 762 (1998) ("A party moving to set aside a judgment under [Rule 60](b)(1) must show not only mistake, inadvertence, surprise or excusable neglect, but also the existence of a meritorious defense.").

However, defendant BDI's brief before this Court bases its argument upon N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) ("On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) The judgment is void[.]"); *see Gibby v. Lindsey*, 149 N.C. App. 470, 473, 560 S.E.2d 589, 591 (2002) (Pursuant to Rule 60(b)(4), "[a] defendant may be relieved from a final judgment, including a default judgment, if the judgment is void.").

As the record on appeal contains no transcript from the 26 January 2009 hearing on defendant BDI's motion to set aside entry of default and default judgment in the record on appeal, we have to assume that the argument in defendant BDI's written motion was the same argument defense counsel presented to the trial court at the hearing upon defendant BDI's motion. In order to preserve an issue for appellate review, the appellant must have raised that specific

issue before the trial court to allow it to make a ruling on that issue. N.C.R. App. P. 10(b)(1). As defendant BDI failed to raise its Rule 60(b)(4) argument before the trial court in its written motion, it cannot "swap horses between courts in order to get a better mount [on appeal]." *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (citations and quotation marks omitted), *cert. denied*, 350 N.C. 848, 539 S.E.2d 647 (1999). Therefore, defendant BDI did not properly preserve its Rule 60(b)(4) argument for appellate review. Defendant BDI also raises no argument in its brief before this Court as to Rule 60(b)(1) and it is deemed abandoned. *See* N.C.R. App. P. 10(b)(1).

Defendant BDI further contends that because defendants made an appearance, Rule 55 mandates that all defendants should have been served with written notice of the default judgment hearing at least three days prior to that hearing. *See* N.C. Gen. Stat. § 1A-1, Rule 55(b)(2) (2009) ("If the party against whom judgment by default is sought has appeared in the action, that party (or, if appearing by representative, the representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application."). Since defendant BDI was not served with notice three days prior to that hearing, it argues that the trial court erroneously denied its motion to set aside entry of default and default judgment. However, defendant BDI also failed to raise this issue before the trial court. Defendant BDI's written motion to set aside entry of judgment and default judgment does not contain any contention regarding an error in notice as to the default judgment hearing. *See* N.C.R. App. P. 10(b)(1).

As defendant BDI's arguments were not properly preserved for appellate review, we affirm the trial court's denial of defendant's motion to set aside entry of default and default judgment.

AFFIRMED.

Judges STEPHENS and BEASLEY concur.

STATE OF NORTH CAROLINA v. RICKY CLAYTON, DEFENDANT

No. COA09-987

(Filed 3 August 2010)

1. Appeal and Error— oral notice of appeal insufficient—satellite-based monitoring hearing—certiorari

Defendant at the time of his satellite-based monitoring hearing did not have any indication that his oral notice of appeal was improper; however in the interest of justice and to expedite the decision in the public interest, the Court of Appeals granted defendant's request to consider his brief as a petition for writ of *certiorari* and addressed the merits of his appeal.

2. Satellite-Based Monitoring—probation violation—jurisdiction

The trial court lacked jurisdiction to order defendant to enroll in satellite-based monitoring (SBM) for a period of ten years following a probation violation where the trial court had previously held an SBM hearing and ordered that defendant was not required to enroll in SBM.

Appeal by defendant from order entered on or about 5 March 2009 by Judge James W. Morgan in Superior Court, Lincoln County. Heard in the Court of Appeals 10 December 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Peter A. Regulski, for the State.

Robert W. Ewing, for defendant-appellant.

STROUD, Judge.

Ricky Clayton ("defendant") appeals from an order enrolling him in satellite-based monitoring ("SBM"). Because the hearing to determine defendant's eligibility for SBM and his enrollment in SBM for a period of ten years was not based on a reportable conviction but on a probation violation, we vacate the trial court's order.

On 13 August 2007 in Mecklenburg County, defendant was charged with two counts of statutory rape; one count of statutory sexual offense with a person thirteen years of age; and three counts of taking indecent liberties with a child. On 21 and 28 August and 11 September 2007, defendant submitted to a psychological evaluation conducted by William M. Tyson, Ph.D., of Blue Ridge Behavior

Systems, Inc. Dr. Tyson prepared a report dated 12 March 2008 in which he concluded, in part, that "[t]his defendant appears to be a mild risk for a community-based program of rehabilitation. Treatment should be conducted in the context of judicially imposed contingencies. Monitoring and supervision of his activities will be required. The usual practices of probation supervision should be adequate to this purpose." On 22 April 2008, defendant pled guilty to two counts of indecent liberties with a child and all the other charges were dismissed. The trial court sentenced defendant to two consecutive terms of imprisonment, each with a minimum term of 13 months and a maximum term of 16 months. Defendant's sentence was suspended and he was placed on probation for 36 months, with the first six months designated as intensive probation. The trial court's order notes that defendant had been convicted of a "reportable conviction" as defined by N.C. Gen. Stat. § 14-208.6(4). On 19 May 2008, pursuant to N.C. Gen. Stat. § 14-208.40B, defendant was brought back before the Superior Court, Mecklenburg County to determine his eligibility for SBM ("2008 SBM hearing"). Apparently in reliance on Dr. Tyson's report or a Department of Correction ("DOC") "risk assessment" not included in the record on appeal, the State commented that defendant did "not qualify after the [DOC] assessment[,]" as DOC "did not find that he was a high risk for re-offending." The trial court then ordered that defendant "is not subject to electronic monitoring." At defendant's request, the trial court transferred defendant's probation to Lincoln County.

On 21 July 2008, defendant was charged with a violation of his probation in Lincoln County. The violation report alleged that since being placed on probation, defendant had accessed an e-mail account which contained several photographs of a nude adult woman. On 4 August 2008, defendant stipulated to the probation violations and the trial court modified the judgments, placing defendant on house arrest with electronic monitoring for 90 days and ordering that there be "no computer equipment in the residence."[1]

On 5 March 2009, defendant appeared in Superior Court, Lincoln County for a hearing which was noticed and scheduled as a probation

1. It is not clear how the allegations by the probation officer would amount to a violation of the conditions of defendant's probation, as the only special conditions that defendant was ordered to observe during his probation were to (1) register as a sex offender; (2) participate in any evaluations or treatments as the trial court ordered; (3) not communicate with, be in the presence of, or be found in or on the premises of the victim of the offense; and (4) not reside in a house with any minor child. However, defendant stipulated to violating his probation.

violation hearing, but at which defendant's eligibility for SBM was evaluated for a second time ("2009 SBM hearing"). The State argued that the situation had changed since the 2008 SBM hearing in Mecklenburg County, as defendant had violated his probation and the DOC had performed a STATIC 99 assessment of defendant which indicated that he was "high risk." Defense counsel argued that Dr. Tyson had determined that defendant was a "mild risk" and, therefore, defendant should not be placed on SBM. At the hearing, the trial court made the following findings:

> At this point in time, at a hearing May 19th 2008 the Honorable Gentry Caudill found that he was not subject to electronic monitoring. The case was transferred to Lincoln County. Since that time he had a probation violation and the nature of that violation was sexual in nature . . . .

The trial court entered a "Judgment/Order or Other Deposition" which ordered that "defendant be placed on GPS monitoring for a period of ten years."[2] Defendant gave notice of appeal in open court.

[1] We first address the grounds for appellate review of defendant's appeal. Recently, this Court in *State v. Brooks* held "that oral notice pursuant to N.C.R. App. P. 4(a)(1) is insufficient to confer jurisdiction on this Court[,]" for defendants appealing from a trial court's order requiring enrollment in an SBM program. —— N.C. App. ——, ——, 693 S.E.2d 204, 206 (2010). "Instead, a defendant must give notice of appeal pursuant to N.C.R. App. P. 3(a) as is proper 'in a civil action or special proceeding[.]' " *Id.* N.C.R. App. P. 3(a) requires written notice of appeal to be filed with the clerk of superior court and copies to be served on all other parties. Defendant failed to comply with N.C.R. App. P. 3(a), as he only gave oral notice of appeal at the 2009 SBM hearing and there is no written notice of appeal in the record, which was served on the State. "The provisions of Rule 3 are jurisdictional, and failure to follow the requirements thereof requires dismissal of an appeal." *Stephenson v. Bartlett*, 177 N.C. App. 239, 241, 628 S.E.2d 442, 443 (citations and quotation marks omitted), *disc. review denied*, 360 N.C. 544, 635 S.E.2d 58 (2006). Therefore, we are compelled to dismiss defendant's appeal. However, defendant citing *State v. Bare*, —— N.C. App. ——, 677 S.E.2d 518 (2009) in his brief, requests that, should we find his "oral notice of appeal pursuant to Rule

2. The trial court did not use the form order which is intended for use for SBM hearings, AOC-CR-816, Rev. 12/08, but instead used a general form, AOC-CR-305, Rev. 7/95.

4(a)(1) of the Rules of Appellate Procedure was not sufficient because [it] is a civil case," that we treat his brief as a petition for writ of certiorari. We note that this Court's decision in *Bare*, which held that North Carolina's SBM statutes were a civil and regulatory regime rather than punishment, was decided on 16 June 2009. *Id.* at ——, 677 S.E.2d at 524. This Court further explained in *State v. Singleton*, —— N.C. App. ——, ——, 689 S.E.2d 562, 565-66 (2010), which was decided on 5 January 2010, that, "for purposes of appeal, a SBM hearing is not a 'criminal trial or proceeding' for which a right of appeal is based upon N.C. Gen. Stat. § 15A-1442 or N.C. Gen. Stat. § 15A-1444" but jurisdiction to hear appeals from SBM hearings is based on N.C. Gen. Stat. § 7A-27. Here, defendant's oral notice of appeal was given on 5 March 2009, more than three months before *Bare*, ten months before *Singleton*, and more than a year and two months before this Court made its decision in *Brooks* on 18 May 2010, holding that appeals taken from SBM proceeding must be in writing. Therefore, defendant at the time of his SBM hearing did not have any indication that notice of appeal pursuant to N.C.R. App. P. 4(a)(1) was improper. Accordingly, "[i]n the interest of justice, and to expedite the decision in the public interest," *Brooks*, —— N.C. App. at ——, 693 S.E.2d at 206, we grant defendant's request to consider his brief as a petition for writ of certiorari and address the merits of his appeal.

[2] Defendant first contends and the State concedes that the trial court lacked jurisdiction to order defendant to enroll in SBM for a period of ten years following a probation violation, where the trial court had previously held a SBM hearing and ordered that defendant was not required to enroll in SBM. Even though defendant did not raise the issue of whether the trial court had subject matter jurisdiction at trial, this issue may be raised "for the first time on appeal." *State v. Reinhardt*, 183 N.C. App. 291, 292, 644 S.E.2d 26, 27 (2007) (citation omitted). "[W]hether a trial court has subject matter jurisdiction is a question of law, which is reviewable on appeal *de novo*." *State v. Black*, —— N.C. App. ——, ——, 677 S.E.2d 199, 202 (2009) (citation and quotation marks omitted). This Court has recently stated that

> [j]urisdiction is '[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it.' Black's Law Dictionary 869 (8th ed. 2004). The court must have subject matter jurisdiction, or '[j]urisdiction over the nature of the case and the type of relief sought,' in order to decide a case. *Id.* at 870. 'A universal principle as old as the law

> is that the proceedings of a court without jurisdiction of the subject matter are a nullity.' *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964). The General Assembly 'within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State.' *Bullington v. Angel*, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941). 'Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction.' *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975), overruled on other grounds by *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982).

State v. Wooten, 194 N.C. App. 524, 527, 669 S.E.2d 749, 750 (2008), *disc. review denied*, 363 N.C. 138, 676 S.E.2d 308 (2009).

N.C. Gen. Stat. §§ 14-208.40A and 14-208.40B (2009) set forth the procedures for SBM hearings.

> N.C. Gen. Stat. § 14-208.40A applies in cases in which the district attorney has requested that the trial court consider SBM during the sentencing phase of an applicable conviction. *See* N.C. Gen. Stat. § 14-208.40A(a). N.C. Gen. Stat. § 14-208.40B applies in cases in which the offender has been convicted of an applicable conviction and *the trial court has not previously determined whether the offender must be required to enroll in SBM. See* N.C. Gen. Stat. § 14-208.40B(a).

State v. Kilby, ––– N.C. App. –––, –––, 679 S.E.2d 430, 432-33 (2009) (emphasis added). As this SBM determination was not made when defendant was sentenced, it is controlled by N.C. Gen. Stat. § 14-208.40B, which in pertinent part provides that

> (a) When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), and there has been no determination by a court on whether the offender shall be required to enroll in satellite-based monitoring, the Department shall make an initial determination on whether the offender falls into one of the categories described in G.S. 14-208.40(a).
>
> (b) If the Department determines that the offender falls into one of the categories described in G.S. 14-208.40(a), the district attorney, representing the Department, shall schedule a hearing in superior court for the county in which the offender resides . . . .

N.C. Gen. Stat. § 14-208.40B. During this hearing, the trial court makes the determination as to the offender's eligibility for SBM. *See* N.C. Gen. Stat. § 14-208.40B(c).

Here, on 19 May 2008, the trial court held defendant's 2008 SBM hearing pursuant to N.C. Gen. Stat. § 14-208.40B. Thus, the trial court had "previously determined whether the offender must be required to enroll in SBM." *Kilby*, N.C. App. at ——, 679 S.E.2d at 433; N.C. Gen. Stat. § 14-208.40B(a). As a result of the 2008 SBM hearing, the trial court did not order defendant to enroll in SBM.[3]

Although there may have been procedural deficiencies in the 2008 SBM hearing and order, this appeal is based upon the order resulting from defendant's 2009 SBM hearing conducted in Superior Court, Lincoln County on 5 March 2009. The trial court did not have any basis to conduct another SBM hearing, where it had already held an SBM hearing based upon the same reportable convictions in 2008. The record contains no indication that between 19 May 2008 and 5 March 2009 defendant was convicted of another "reportable conviction" which could trigger another SBM hearing based upon the new conviction. It appears from the record that defendant was summoned for the 2009 SBM hearing to Superior Court, Lincoln County in relation to a probation violation, and the trial court based the enrollment of defendant in SBM for ten years on his "probation violation" and the fact that "the nature of that violation was sexual in nature." However, a probation violation is not a crime in itself, much less a "reportable conviction." *See* N.C. Gen. Stat. § 14-208.6(4). There is no indication in the record that DOC followed the notice requirements of N.C. Gen. Stat. § 14-208.40B(b), nor did the trial court make the findings of fact required by N.C. Gen. Stat. § 14-208.40B(c). Therefore, the trial court did not have jurisdiction to conduct the 2009 SBM hearing or to order defendant to enroll in SBM for a period of 10 years. *Wooten*, 194 N.C. App. at 527, 669 S.E.2d at 750. The SBM statutes do not provide for reassessment of defendant's SBM eligibility based on the same reportable conviction, after the initial SBM determination is made

3. It appears that the trial court in the 2008 SBM hearing did not adhere to the procedural mandates in N.C. Gen. Stat. § 14-208.40B. There is no indication in the record that the trial court made any of the findings of fact required by N.C. Gen. Stat. § 14-208.40B(c). Further, the trial court may have considered Dr. Tyson's psychological evaluation report as a DOC "risk assessment" in its evaluation of defendant's eligibility for SBM pursuant to N.C. Gen. Stat. § 14-208.40B(c). However, the State did not appeal from the 2008 SBM order denying its request for SBM enrollment, so we have no jurisdiction to consider the 2008 SBM order. N.C.R. App. 10(b)(1). In addition, the State makes no argument on appeal that the order from the 2008 SBM hearing was in error.

based on that conviction. To the contrary, this Court has stated in *Kilby* that N.C. Gen. Stat. § 14-208.40B(a) allows the trial court to hold an SBM hearing only where "the trial court has not previously determined whether the offender must be required to enroll in SBM." —— N.C. App. at ——, 679 S.E.2d at 433. Accordingly, we vacate the trial court's order enrolling defendant in SBM for a period of 10 years. As we have granted defendant the relief he requested, we need not address defendant's remaining arguments challenging the trial court's enrollment of defendant in SBM.

VACATE.

Judges HUNTER, JR., Robert N. and ERVIN concur.

STATE OF NORTH CAROLINA v. WADE DWAYNE FRAZIER

No. COA10-19

(Filed 3 August 2010)

Criminal Law— expungement—effective date of statute

An order of expungement was reversed where the offense occurred well before the effective date of the expungement statute.

Appeal by the State from order entered 30 September 2009 by Judge John E. Nobles, Jr., in Craven County Superior Court. Heard in the Court of Appeals 24 May 2010.

Attorney General Roy Cooper, by Assistant Attorney General E. Michael Heavner, for the State.

Chesnutt, Clemmons, Peacock & Long, P.A., by Steven N. Long, for defendant.

ELMORE, Judge.

At issue is a 2009 order of expungement of Wade Dwayne Frazier's (defendant) 1998 charge of accessory after the fact to murder. We hold that the order of expungement was granted in error and reverse the order; the charge will remain on defendant's record.

On 16 February 1998, defendant, as a 16-year-old, pled guilty to the felony offense of accessory after the fact to murder. On 25 March 2009, defendant filed a petition pursuant to Session Law 2008-214. At the time defendant filed his petition, Session Law 2008-214 established that N.C. Gen. Stat. § 14-50.30(a) would read, in pertinent part:

> Whenever any person who has not yet attained the age of 18 years and has not previously been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States or the laws of this state or any other state, pleads guilty to or is guilty of (i) a Class H felony under this Article or (ii) an enhanced offense under G.S. 14-50.22, the person may file a petition in the court where the person was convicted for expunction of the offense from the person's criminal record.

2008 N.C. Sess. 2008-214, § 3. On the same date that the petition was filed, it was heard by the Honorable Russell J. Lanier in Craven County Superior Court, who entered an order to expunge defendant's criminal conviction, ruling that defendant met the required qualifications of N.C. Gen. Stat. 14-50.30(a). On 21 August 2009, defendant filed a motion to enforce Judge Lanier's order of expungement. On 24 August 2009, the State filed a motion to reconsider the order granting expungement.

On 16 September 2009, the Honorable John E. Nobles, Jr., heard both motions. He denied the State's motion to reconsider and granted defendant's motion to enforce Judge Lanier's order to expunge. He ordered the State Bureau of Investigation, Criminal Information and Identification Section, to comply with the 25 March 2009 order, which required the expungement of the charge from the records of the court and law enforcement agencies, including the State and Federal Bureaus of Investigation. The State filed a petition for Writ of Certiorari on 7 October 2009, which we granted.

The trial court erred by misapplying the expungement statute. The expungement statute in question is part of the North Carolina Street Gang Suppression Act, which codified Article 13A, and explicitly states that the "act becomes effective December 1, 2008, and applies to offenses committed on or after that date." 2008 N.C. Sess. 2008-214, § 6. As defendant's original offense date was 6 February 1995, the offense occurred well before 1 December 2008. Therefore,

there was no statutory basis for the trial court's granting defendant's petition for expungement.[1]

Because defendant's original charge of accessory after the fact to murder occurred before the effective date of N.C. Gen. Stat. § 14-50.30 as it existed at the time defendant petitioned for expungement, the Craven County Superior Court lacked statutory authority to expunge the charge from defendant's record. As such, we reverse the order to expunge, and we remand for further proceedings.

Reversed and remanded.

Chief Judge MARTIN and Judge BRYANT concur.

DOROTHY HARRIS, PLAINTIFF v. CLARENCE BAREFOOT, LUCIA CASTALDO, AND RICHARD CLYDE, JOINTLY AND SEVERALLY, DEFENDANTS

No. COA09-1313

(Filed 3 August 2010)

Animals— dog attacks—knowledge of vicious propensities —summary judgment

The trial court did not err by granting summary judgment in favor of defendants in a negligence case arising out of an attack by two dogs on plaintiff postal worker. Plaintiff failed to show defendant dog owners knew or should have known of the vicious propensities of their dogs.

Appeal by plaintiff from judgments entered 22 June 2009 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 11 March 2010.

Washington & Pitts, P.L.L.C., by Marshall B. Pitts, Jr., for plaintiff.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Thomas M. Buckley and Suzanne R. Walker, for defendant Castaldo.

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1. We note that the General Assembly later amended the North Carolina Street Gang Suppression Act, effective 1 December 2009, so that its provisions "appl[y] to *petitions* for expunctions filed on or after" 1 December 2009. 2009 N.C. Sess. 2009-577, § 11 (emphasis added).

Pope & Tart, by P. Tilghman Pope, for defendant Barefoot.

ELMORE, Judge.

On 5 July 2005, Dorothy Harris (plaintiff) was delivering mail for the United States Postal Service at 3362 Meadowlark Road in Harnett County when she was attacked by two dogs.

Per her deposition, plaintiff relates the events of the incident as follows: plaintiff had delivered a package to 3362 Meadowlark Road, which was located directly across the street from the home of Clarence Barefoot (defendant Barefoot). She then walked back up the driveway toward the road and saw two dogs barking at her from across the street near the Barefoot home. Within a matter of seconds, she was surrounded by the two dogs, knocked to the ground, and bitten repeatedly. Plaintiff later described the dogs as a Rottweiler named Riley, belonging to defendant Barefoot, and an Australian Heeler/Border Collie mix dog named Dusty, belonging to Lucia Castaldo (defendant Castaldo). Defendant Castaldo and Dusty were visiting defendant Barefoot, defendant Castaldo's grandfather, when the attack allegedly occurred. As a result of the attack, plaintiff sustained numerous injuries, including more than twenty injuries, including bite marks, lacerations, and skin tears.

In her deposition, defendant Castaldo stated that she was on the back patio of the Barefoot home with Riley and Dusty when she heard barking and screaming from across the street, at which point she and the two dogs jumped up and ran toward the sound. Defendant Castaldo stated that she ran behind the dogs toward the street and that the dogs were out of her sight for a few seconds as they rounded to corner of the Barefoot home. When she arrived across the street near 3362 Meadowlark Road, she found plaintiff, who seemed to have suffered dog bites. Defendant Castaldo then performed first aid and took plaintiff to the hospital.

Plaintiff brought suit against defendants, alleging negligence.[1] Both defendants filed motions for summary judgment, and the trial court granted those motions on 23 June 2009 and 30 June 2009. Plaintiff now appeals.

Plaintiff argues that the trial court erred in granting summary judgment because there existed genuine issues of material fact as to

1. Plaintiff also brought suit against Richard Clyde, who resides at 3362 Meadowlark Road, but voluntarily dismissed those claims on 25 March 2009; he is not involved in the appeal at hand.

whether defendants knew or should have known of the vicious propensities of their dogs. Summary judgment is proper "when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). "Where the pleadings and proof disclose that no cause of action exists, summary judgment is properly granted." *Joslyn v. Blanchard*, 149 N.C. App. 625, 628, 561 S.E.2d 534, 536 (2002) (citation omitted). In evaluating a trial court's grant of summary judgment, "[e]vidence presented by the parties is viewed in the light most favorable to the non-movant." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citation omitted).

For a plaintiff's negligence action to survive a defendant's motion for summary judgment,

> a plaintiff must set forth a prima facie case (1) that defendant failed to exercise proper care in the performance of a duty owed plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances.

Strickland v. Doe, 156 N.C. App. 292, 294, 577 S.E.2d 124, 128 (2003) (quotations and citation omitted). In this case, plaintiff must set forth that the dogs possessed a vicious propensity and that defendants knew or should have known of this propensity. *Swain v. Tillett*, 269 N.C. 46, 51, 152 S.E.2d 297, 301 (1967). "If the plaintiff establishes that an animal is in fact vicious, the plaintiff must then demonstrate that the owner knew or should have known of the animal's dangerous propensities." *Ray v. Young*, 154 N.C. App. 492, 494, 572 S.E.2d 216, 219 (2002). The test of liability of the owner does not contemplate the intentions of the animal but whether the owner should know from past conduct that the animal is likely, if not restrained, to do an act in which the owner could foresee injury to person or property. *Id.* at 494-95, 572 S.E.2d at 219.

Plaintiff argues that defendant Barefoot knew or should have known that his dog could have posed a danger to others because Rottweilers are aggressive and dangerous by nature, and that defendant Barefoot's treatment of the dog—keeping the dog tethered in his yard most of the time—not only shows that he knew the dog could be violent, but also contributed to the dog's vicious nature. The facts,

however, do not support any of these contentions. While our courts have found that Rottweilers are aggressive by nature and that it might be negligent not to keep them restrained, *Hill v. Williams*, 144 N.C. App. 45, 55, 547 S.E.2d 472, 478 (2001), plaintiff has not presented any evidence showing that Riley was indeed a Rottweiler. Plaintiff consistently refers to the dog as a "ninety-pound Rottweiler," but failed to forecast any evidence as to the dog's actual weight or breed. Defendant Barefoot stated that the dog weighed forty-five pounds and was a mixed breed dog, including some Rottweiler ancestry. Even taking the evidence in the light most favorable to plaintiff, as we must, we find no basis to infer the breed of the dog as a Rottweiler. As such, plaintiff's argument related to the dog's breed must fail.

Regarding defendant Barefoot's treatment of Riley, evidence showed that he tethered Riley for 18-20 hours a day to prevent him from running into the street and injuring himself. Plaintiff claims that this shows knowledge that Riley was dangerous and contributed to his vicious nature. In support of this contention, plaintiff relies on an expert and Humane Society literature to show that tethering a dog for this long of a period creates a dangerous environment and does not allow the dog to be properly "socialized," resulting in a dog's being more aggressive than it otherwise would have been. However, this expert never examined Riley, nor did she speak to anyone who had firsthand knowledge of how Riley behaved; her testimony instead was based on general behavior information from other dogs that are tethered for long periods of time. Thus this evidence does not tend to show that Riley possessed a vicious propensity or that defendant Barefoot's treatment contributed to a vicious propensity.

Again, even taking the evidence in the light most favorable to the non-movant, the facts seem to support strongly the conclusions that Riley lacked a vicious nature and that defendant Barefoot had no reason to know of a vicious propensity. One of defendant Barefoot's neighbors stated, in her deposition, that she had never seen Riley at the Barefoot home; the other, her husband, only saw Riley on one occasion. They both stated that they had never heard any barking from Riley and that they had not heard of any situations in which Riley had attacked a person or property. Plaintiff, who delivered mail to the area daily, also stated that she had never seen Riley, had not seen Riley display any vicious behavior toward others, and had not heard of Riley displaying vicious behavior. Defendant Barefoot stated that Riley had not exhibited any vicious propensities toward any other animals or person nor had he been involved in any altercations

with any other animals or persons. This evidence suggests not only that Riley did not have a vicious nature, but also that defendant Barefoot did not have reason to suspect such conduct. Thus, plaintiff has failed to present any evidence showing Riley's vicious propensity or that defendant Barefoot knew or should have known of such a vicious propensity.

Similarly, plaintiff argues that defendant Castaldo knew or should have known that her dog Dusty possessed a vicious propensity because, again, the Australian Heeler/Border Collie mix is an aggressive breed, and her means of restraining the dog shows her knowledge that the dog was dangerous. However, the only evidence presented by plaintiff that the Australian Heeler/Border Collie mix is generally known to have propensities for aggression comes from an article on Wikipedia.com, an online source that can be changed at any time by any user.[2] In contrast to plaintiff's Wikipedia article, Defendant Barefoot presented admissible evidence that Dusty did not have aggressive tendencies. Defendant Barefoot testified that he had not observed Dusty getting into fights with other dogs or any other aggressive tendencies. Defendant Castaldo also testified that Dusty did not show any prior aggressive behavior and had not behaved viciously toward any person or animal. The *Hill* standard that a defendant may have a duty to restrain a dog based upon the general propensities of a particular breed of dog again does not apply, as plaintiff failed to forecast competent evidence that the Australian Heeler/Border Collie mix is a breed generally know to have a vicious propensity. *See Hill*, 144 N.C. App. at 55, 547 S.E.2d at 478.

Plaintiff's argument that defendant Castaldo's means of restraining Dusty shows knowledge of a violent propensity is also without factual support. The evidence on which this claim is based is the testimony of an expert who never personally observed the dog; her tes-

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2. "Wikipedia.com [is] a website that allows virtually anyone to upload an article into what is essentially a free, online encyclopedia. A review of the Wikipedia website reveals a pervasive and, for our purposes, disturbing series of disclaimers, among them, that: (i) any given Wikipedia article 'may be, at any given moment, in a bad state: for example it could be in the middle of a large edit or it could have been recently vandalized;' (ii) Wikipedia articles are 'also subject to remarkable oversights and omissions;' (iii) 'Wikipedia articles (or series of related articles) are liable to be incomplete in ways that would be less usual in a more tightly controlled reference work;' (iv) '[a]nother problem with a lot of content on Wikipedia is that many contributors do not cite their sources, something that makes it hard for the reader to judge the credibility of what is written;' and (v) 'many articles commence their lives as partisan drafts' and may be 'caught up in a heavily unbalanced viewpoint.' " *Campbell ex. rel. Campbell v. Sec'y of Health and Human Serv.*, 69 Fed. Cl. 775, 781 (2006).

timony was, again, that excessive tethering and poor socialization leads to a dangerous environment for a dog and can make it more dangerous. This does nothing to show a vicious propensity or defendant Castaldo's knowledge of a vicious propensity. Defendant Castaldo testified that she only brought Dusty with her on three visits to her grandparents' home. Plaintiff did not show evidence on how Dusty was kept at defendant Castaldo's primary residence in Atlanta, Georgia. Plaintiff points only to the three occasions in which Dusty was brought to the grandparents' house to substantiate her argument of "excessive tethering."

Plaintiff also claims that defendant Castaldo should have known from Dusty's habit of chasing horses and trucks that she was aggressive and needed to be restrained. While Dusty may have run behind horses and trucks, there is no evidence that she ever harmed persons or property or was vicious in nature when so doing. Plaintiff presented no evidence that Dusty had vicious propensity or that defendant Castaldo knew or should have known of a vicious propensity. As such, this argument is without merit.

Affirmed.

Judges JACKSON and STROUD concur.

WALTER E. HELLER, PLAINTIFF v. RUSSELL P. SOMDAHL, MARY JONES, AND DENVER JONES, DEFENDANTS

No. COA09-1016

(Filed 3 August 2010)

Alienation of Affections— motion for directed verdict—evidence sufficient

The trial court did not err in an alienation of affections case by denying defendant's motion for a directed verdict at the close of all of the evidence where the evidence established more than a scintilla of evidence supporting each element of the claim.

Appeal by defendant Mary Jones from judgment entered 21 November 2008 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 10 March 2010.

No brief was submitted for plaintiff-appellee.

Merritt, Flebotte, Wilson, Webb & Caruso, PLLC by Daniel R. Flebotte, for defendant-appellant Mary Jones.

STEELMAN, Judge.

Where evidence established more than a scintilla of proof for every element of plaintiff's alienation of affections claim, the trial court did not err in denying defendant's motion for directed verdict.

I. Factual and Procedural Background

On 2 May 2007, Walter E. Heller (plaintiff) filed an alienation of affections action against Mary Jones (defendant). Plaintiff alleged that defendant's malicious and intentional acts contributed directly to a loss of affections by encouraging, through intoxication, coercion, and persuasion, plaintiff's wife, Barbara Heller (Ms. Heller), to engage in an adulterous relationship with Russell P. Somdahl (Somdahl). The case was heard before a jury in Onslow County Superior Court commencing on 14 October 2008. Defendant moved for a directed verdict at the close of plaintiff's evidence. This motion was denied. After defendant presented evidence, defendant renewed her motion for directed verdict. The motion was again denied. The jury found defendant liable on the alienation of affections claim and awarded plaintiff compensatory and punitive damages. Defendant appeals.

II. Denial of Motion for Directed Verdict

In four assignments of error, defendant argues that her motions for directed verdict were improperly denied pursuant to N.C. R. Civ. P. 50(a) and 50(b)(1) because plaintiff testified that he was not seeking monetary relief and because the evidence, taken in a light most favorable to plaintiff, was insufficient to survive defendant's motions for directed verdict. We disagree.

A. Standard of Review

In examining a trial court's denial of defendant's motion for directed verdict, our *de novo* inquiry is whether the evidence, taken in a light most favorable to plaintiff, provides more than a scintilla of evidence to support each element of plaintiff's claim. *Ward v. Beaton*, 141 N.C. App. 44, 47, 539 S.E.2d 30, 33 (2000), *cert denied*, 353 N.C. 398, 547 S.E.2d 431 (2001). If that burden is satisfied, the motion for directed verdict should be denied, and the claim will be submitted to the jury. *Id.*

Because defendant presented evidence after the denial of her motion to dismiss at the close of plaintiff's evidence, defendant waived appellate review of the denial of that motion, and our review is limited to the trial court's denial of defendant's motion to dismiss at the close of all evidence. *Stallings v. Food Lion, Inc.*, 141 N.C. App. 135, 137, 539 S.E.2d 331, 332 (2000).

B. Alienation of Affections

The elements of an alienation of affections action are: (1) a marriage with genuine love and affection; (2) the alienation and destruction of the marriage's love and affection; and (3) a showing that defendant's wrongful and malicious acts brought about the alienation of such love and affection. *Litchfield v. Cox*, 266 N.C. 622, 623, 146 S.E.2d 641, 641 (1966).

1. Genuine Love and Affection

An alienation of affections claim requires plaintiff to prove that a happy marriage with genuine love and affection existed between plaintiff and his spouse. *Id.* The marriage need not be a perfect one, but plaintiff's spouse must have had "*some* genuine love and affection for him" before the marriage's disruption. *Brown v. Hurley*, 124 N.C. App. 377, 381, 477 S.E.2d 234, 237 (1996). Absent such a showing, an alienation of affections claim will fail. *Shaw v. Stringer*, 101 N.C. App. 513, 516, 400 S.E.2d 101, 103 (1991).

Plaintiff presented evidence that he was married to Ms. Heller, and that the Heller family was "happy" and "loving, just a normal all around family." Ms. Heller testified that before the marriage's disruption, "I was very much in love with [plaintiff]. He was very much in love with me." Plaintiff "always came home into the house after work and kissed [Ms. Heller] [on] the back of the neck." The Hellers participated in the Marine Corps Ball "and [other] stuff like that." Plaintiff and Ms. Heller had intercourse "three to four times per week." When plaintiff was deployed to Iraq, the couple talked nearly every day and sent regular e-mails. To friends of the family, Ms. Heller "appear[ed] to be a normal and happy wife," and the couple had a "warm, loving relationship."

2. Alienation of Love and Affection

An alienation of affections claim also requires that some of the marriage's love and affection be alienated and destroyed. *E.g.*, *Jones v. Skelly*, 195 N.C. App. 500, 507, 673 S.E.2d 385, 390 (2009). The alien-

ation and destruction element is proved by showing "interference with one spouse's mental attitude toward the other, and the conjugal kindness of the marital relation." *Id.* (quoting *Darnell v. Rupplin*, 91 N.C. App. 349, 350, 371 S.E.2d 743, 744 (1988)). The loss can be full or partial and can be accomplished through one act or a series of acts. *Darnell*, 91 N.C. App. at 354, 371 S.E.2d at 747. Even if a plaintiff's spouse retains feelings and affections for a plaintiff, an alienation of affections claim can succeed. *Jones*, 195 N.C. App. at 509, 673 S.E.2d at 391 (plaintiff's return to marital home does not preclude successful alienation of affections claim).

Ms. Heller testified that after her affair with Somdahl, her relationship with plaintiff became "different" and "strained." Ms. Heller's phone calls and e-mails to plaintiff during his deployment in Iraq became quicker and shorter, and plaintiff noticed "distance and more distraction" from his wife. Upon learning of his wife's infidelity, sexual intercourse between plaintiff and Ms. Heller ceased. Ms. Heller acted "very timid, very scared" toward her husband. Plaintiff testified that "his marriage ha[d] been violated." He also expressed his belief that "there is no regaining the intimacy and trust to the level that we had." "[Ms. Heller] couldn't be honest, [and] she couldn't be open" after her infidelity.

3. Wrongful and Malicious Causation by Defendant

An alienation of affections claim must lastly establish that defendant's wrongful and malicious actions caused the alienation of plaintiff's spouse. *Hutelmyer v. Cox*, 133 N.C. App. 364, 369, 514 S.E.2d 554, 558-59, *disc. review denied*, 351 N.C. 104, 541 S.E.2d 146 (1999), *appeal dismissed*, 351 N.C. 356, 542 S.E.2d 211 (2000). "There must be active participation, initiative or encouragement on the part of the defendant in causing one spouse's loss of the other spouse's affections for liability to arise." *Peake v. Shirley*, 109 N.C. App. 591, 594, 427 S.E.2d 885, 887 (1993). Some cases have required that the defendant's actions be performed with the intent to cause alienation, *Darnell*, 91 N.C. App. at 350, 371 S.E.2d at 745, but more recent cases have required only that the defendant acted intentionally in a way that will *probably* affect plaintiff's marital relationship, *Jones*, 195 N.C. App. at 508, 673 S.E.2d at 391. Defendant's actions must be a proximate cause of the spouse's alienation. *Nunn v. Allen*, 154 N.C. App. 523, 533, 574 S.E.2d 35, 42 (2002), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 630 (2003); *see generally Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 344-45, 162 N.E. 99, 100-01 (1928). Proximate cause does not require that defendant's actions be the sole cause of alien-

ation; rather, defendant's actions must be only a "controlling or effective cause." *Nunn*, 154 N.C. App. at 533, 574 S.E.2d at 42 (quoting *Heist v. Heist*, 46 N.C. App. 521, 523, 265 S.E.2d 434, 436 (1980)). Therefore, we must decide whether all the evidence presented, taken in a light most favorable to plaintiff, provides more than a scintilla of evidence that defendant's actions were a controlling or effective cause of Ms. Heller's alienation toward plaintiff and were such that a reasonable person in defendant's position would believe that Ms. Heller's affections would probably be alienated.

Plaintiff presented evidence that defendant arrived at the marital home and "[tried] to drag [Ms. Heller] off." Defendant called plaintiff's home and told plaintiff that it was "none of [his] business what his wife did" and that Ms. Heller was "a grown woman." Plaintiff also presented evidence that defendant threatened Ms. Heller. Ms. Heller testified that "if I broke Mr. Somdahl's heart, [defendant and defendant's spouse] were going to break my legs, make sure my children were hurt, [and] my husband would find out about it." Ms. Heller testified that defendant prevented plaintiff from talking with Ms. Heller by "[moving] [her] phone around the house so [Ms. Heller] would get bad reception." Ms. Heller testified that Somdahl purchased a ring for her, but defendant took the ring from Ms. Heller, "put [it] on . . . and said [Ms. Heller] wasn't going to get it until [she] was separated and divorced from [plaintiff]." Evidence also indicated that defendant "[arranged] all sorts of activities . . . to keep [Ms. Heller] away from [her] husband." Defendant testified that she allowed Ms. Heller, who she knew did not drink alcohol responsibly, to attend defendant's party at which alcohol was served. Defendant also testified that during at least part of Ms. Heller's relationship with Somdahl, defendant was aware Ms. Heller was married and resided in the marital home.

The evidence, taken in a light most favorable to plaintiff, established all elements of an alienation of affections claim. The evidence showed: (1) that the Hellers had a happy, healthy marriage with affection and love; (2) that the affections of Ms. Heller were destroyed and alienated when she retreated physically and emotionally from the relationship; and (3) that defendant engaged in conduct, such as encouraging Ms. Heller's adulterous relationship with Somdahl and preventing communication between plaintiff and Ms. Heller, that would probably affect plaintiff's marital relationship with his wife.

Defendant presents as an issue, but does not argue, the question of whether the trial court erred in denying defendant's motion for directed verdict because plaintiff testified he did not want monetary

relief. We deem that argument to be abandoned and do not consider it. N.C. R. App. P. 28(b)(6).

III. Conclusion

We hold that the evidence, taken in the light most favorable to plaintiff, established more than a scintilla of evidence supporting each element of plaintiff's alienation of affections claim against defendant. The trial court did not err in denying defendant's motion for a directed verdict at the close of all the evidence.

NO ERROR.

Judges BRYANT and BEASLEY concur.

IN THE MATTER OF J.A.G.

No. COA09-462-2

(Filed 3 August 2010)

1. Juveniles— delinquency—subject matter jurisdiction

The trial court had subject matter jurisdiction over a delinquency proceeding where the juvenile court counselor did not file a juvenile delinquency petition within fifteen days of receiving the original complaint, but a second complaint identical in substance to the first was received and a delinquency petition was timely filed.

2. Juveniles— delinquency—adjudication—requirements not met

An adjudication of delinquency was reversed and remanded where the trial court did not comply with the requirements of N.C.G.S. § 7B-2407(a) before accepting an admission by the juvenile.

Appeal by juvenile from orders entered 2 December 2008 by Judge M. Patricia DeVine in Orange County District Court. This case was originally heard in the Court of Appeals 14 October 2009. *See In re J.A.G.*, 2010 N.C. App. Lexis 228 (2010) (unpublished). Upon remand by order from the North Carolina Supreme Court, filed 16 June 2010. *See In re J.A.G.*, —— N.C. ——, —— S.E.2d —— (2010).

Richard Croutharmel for appellant-juvenile.

Attorney General Roy Cooper, by Assistant Attorney General Barbara A. Shaw and Assistant Attorney General LaToya B. Powell, for the State.

ELMORE, Judge.

This Court initially heard J.A.G.'s appeal from an order entered 2 December 2008 denying J.A.G.'s motion to dismiss and an order entered 2 December 2008 adjudicating J.A.G. delinquent. *See In re J.A.G.*, 2010 N.C. App. Lexis 158 (2010) (unpublished). A unanimous panel of this Court vacated the orders based upon the trial court's lack of jurisdiction to consider the delinquency petition filed by the Orange County Department of Juvenile Justice and Delinquency Prevention (DJJDP). We based our decision on this Court's decision in *In re D.S.*, —— N.C. App. ——, 682 S.E.2d 709 (2009) (*D.S. II*).

After we rendered our decision in *In re J.A.G.*, the Supreme Court reversed *In re D.S.* DJJDP petitioned our Supreme Court for discretionary review pursuant to N.C. Gen. Stat. § 7A-31. The Supreme Court entered the following order, certifying it to this Court:

> The Court allows the State's petition for discretionary review for the limited purpose of remanding to the Court of Appeals for reconsideration in light of our decision in In re D.S. No. 273PA09 (June 17, 2010). By order of the Court in conference, this 16th of June 2010.

Upon remand and after further review, we affirm the trial court's order denying J.A.G.'s motion to dismiss on the basis of subject matter jurisdiction, but we vacate the adjudication order.

Background

This Court previously outlined the background leading to this appeal:

> On 15 August 2008, juvenile J.A.G. took and used without permission a golf cart that was the personal property of an apartment complex in Carrboro. On 12 September 2008, the Orange County Department of Juvenile Justice and Delinquency Prevention (DJJDP) filed juvenile delinquency petitions alleging that J.A.G. had committed the acts of felony larceny, misdemeanor injury to personal property, and misdemeanor resist, delay, and obstruct an officer.

On 15 October 2008, J.A.G. moved to dismiss the juvenile petitions, arguing that the district court lacked subject matter jurisdiction over the petitions because the juvenile court counselor had missed the fifteen-day deadline for filing the petitions. The district court granted J.A.G.'s motion. However, apparently at the DJJDP's behest, the sheriff's office submitted a new complaint on 30 October 2008, alleging that J.A.G. had committed the same criminal acts on 15 August 2008 as the original complaint. This time, the juvenile court counselor filed the petition the next day, on 31 October 2008. J.A.G. again moved to dismiss based on a lack of subject matter jurisdiction. However, the trial court denied the motion, explaining that it was proper for the State to "come back again after a dismissal and do it right[.]" J.A.G. countered that allowing the State to ask complainants for new complaints after the statutory deadline on the original complaint had passed would "render that statute meaningless because anybody could just . . . miss the window and refile it." The following colloquy ensued:

THE COURT: That point is well taken, but it seems to me that there might be certain kinds of cases that had larger, longer time, more unsatisfactory time, untenable time between when they would get something and act on it. What I'm trying to say is there might be some cases that when it's dismissed it really is gone because of time's passage. In this case, it seems to me it was a rather narrow window in the first place. In other words, how many—I don't remember the first time—

[J.A.G.'s COUNSEL]: Well, there's a statutory window for everything no matter what the—

THE COURT: Yes, sir, but the facts of this case were that they missed the deadline by how many days? Do you remember?

[J.A.G.'s COUNSEL]: Several.

THE COURT: Within a week. My point is not months or—I think in some areas it's—that's been known to happen. In any event, this is an interesting question of law, and so let's see about that; but, I'm—I'm not willing to allow your motion to dismiss when my perception is the State did what—did the right thing in coming back to do it right.

In re J.A.G. at *1-*3.

[1] J.A.G. first argues that the trial court did not have subject matter jurisdiction to adjudicate him delinquent and subsequently to enter a disposition order. He argues that, pursuant to N.C. Gen. Stat. § 7B-1703, the juvenile court counselor had only fifteen days from the time she received the initial complaints to file the juvenile delinquency petition. Section 7B-1703 states, in relevant part, the following:

> (a) The juvenile court counselor shall complete evaluation of a complaint within 15 days of receipt of the complaint, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor. The juvenile court counselor shall decide within this time period whether a complaint shall be filed as a juvenile petition.
>
> (b) Except as provided in G.S. 7B-1706, if the juvenile court counselor determines that a complaint should be filed as a petition, the counselor shall file the petition as soon as practicable, but in any event within 15 days after the complaint is received, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor. The juvenile court counselor shall assist the complainant when necessary with the preparation and filing of the petition, shall include on it the date and the words "Approved for Filing", shall sign it, and shall transmit it to the clerk of superior court.

N.C. Gen. Stat. § 7B-1703(a)-(b) (2009).

When we first heard the case, we followed this Court's opinion in *D.S.*, which held that § 7B-1703 was jurisdictional in nature and any failure to comply with the time limits set out in § 7B-1703 deprived the trial court of subject matter jurisdiction over the delinquency petition. *In re D.S.*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2010) (*D.S. I*). In its opinion reversing our decision in *D.S.*, the Supreme Court clearly stated that § 7B-1703's timing requirements are not "prerequisites for the district court to obtain subject matter jurisdiction in a juvenile delinquency case." *D.S. II* at ___, ___ S.E.2d at ___. The Supreme Court suggested that, like other Chapter 7B timeline requirements, the § 7B-1703 timelines are "directory, rather than mandatory." *Id.* at ___, ___ S.E.2d at ___ (citing *In re C.L.C.*, 171 N.C. App. 438, 443-45, 615 S.E.2d 704, 707-08 (2005) (referring to General Statute sections 7B-906(a) (scheduling of the initial post-disposition custody review hearing), 7B-907(c) (filing of

permanency planning petition), and 7B-907(e) (filing of petition to terminate parental rights))).

D.S. II does not directly address what should happen when, as here, the State first fails to meet the § 7B-1703 deadline for filing a petition after receiving the complaint, but later receives a second complaint that is identical in substance to the first complaint, and timely files a juvenile petition based on the second complaint.[1] This strategy runs counter to two of the purposes underlying the juvenile delinquency statutes: "providing swift, effective dispositions" and "encourag[ing] the court and others involved with juvenile offenders to proceed with all possible speed in making and implementing determinations required by this Subchapter." N.C. Gen. Stat. § 7B-1500 (2007). However, in *D.S. II*, the Supreme Court explained that "[n]othing in these statutory provisions indicates our legislature's intent to elevate the expediency of the [juvenile court counselor]'s intake obligations over these other articulated purposes[.]" *D.S. II* at ——, —— S.E.2d at ——. It strikes us that permitting juvenile court counselors to refile a petition when they miss the statutory deadline discourages them from "proceeding with speed in making and implementing determinations" of juvenile delinquency. Regardless, the Supreme Court

> conclude[d] that the natural and ordinary meaning of the phrase, "when the complaint is received," is the date on which the [juvenile court counselor]'s office receives *a document* alleging that a juvenile is delinquent, and we further conclude that nothing about "the context requires [this phrase] to be construed differently."

D.S. II at ——, —— S.E.2d at —— (quoting *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 82, 347 S.E.2d 824, 828 (1986)) (emphasis added). Here, the juvenile court counselor received "a document" alleging that J.A.G. was delinquent, which meets the Supreme Court's definition of a complaint. The juvenile court counselor then filed a juvenile petition based on that document within the fifteen-day deadline. Accordingly, we hold that the trial court complied with the requirements of N.C. Gen. Stat. § 7B-1703.[2] "We continue, however, to caution courts and parties that by failing to comply with the legislature's

1. It does not appear that the State appealed the trial court's initial dismissal for lack of subject matter jurisdiction.

2. We note that J.A.G. did not argue that he was prejudiced by the trial court's action.

mandates, they are disregarding the best interests of the children involved." *C.L.C.* at 444, 615 S.E.2d at 707.

[2] Because we held that the trial court lacked subject matter jurisdiction to enter the adjudication and disposition orders, we did not address the merits of J.A.G.'s case. He argues that the trial court failed to fully comply with the requirements of N.C. Gen. Stat. § 7B-2407(a) before accepting J.A.G.'s admission. We agree, and we reverse and remand on that ground.

"[T]he determination as to whether a juvenile's admission is a product of an informed choice as required by N.C.G.S. § 7B-2407(b), at a very minimum, is predicated upon the six mandatory requirements specifically listed in N.C.G.S. § 7B-2407(a)." *In re T.E.F.*, 359 N.C. 570, 574, 614 S.E.2d 296, 298 (2005). Section 7B-2407(a) allows a court to

> accept an admission from a juvenile only after first addressing the juvenile personally and:
>
> (1) Informing the juvenile that the juvenile has a right to remain silent and that any statement the juvenile makes may be used against the juvenile;
>
> (2) Determining that the juvenile understands the nature of the charge;
>
> (3) Informing the juvenile that the juvenile has a right to deny the allegations;
>
> (4) Informing the juvenile that by the juvenile's admissions the juvenile waives the juvenile's right to be confronted by the witnesses against the juvenile;
>
> (5) Determining that the juvenile is satisfied with the juvenile's representation; and
>
> (6) Informing the juvenile of the most restrictive disposition on the charge.

N.C. Gen. Stat. § 7B-2407(a) (2009).

Here, the trial court failed to inform J.A.G. of the most restrictive disposition on the charge, or that his admission waived his right to confront the witnesses against him, or that he had a right to remain silent and that anything he said could be used against him. The State concedes that the trial judge omitted three of the six mandatory

requirements listed in § 7B-2407(a). Accordingly, we reverse the adjudication and disposition orders and remand to the trial court.

Reversed and remanded.

Judges STEELMAN and HUNTER, JR., Robert N., concur.

STATE OF NORTH CAROLINA v. THERON INMAN, DEFENDANT

No. COA09-1151

(Filed 3 August 2010)

Appeal and Error— notice of appeal—not in record—appeal dismissed—not treated as petition for writ of certiorari

Defendant's appeal from the trial court's order requiring him to enroll in lifetime satellite-based monitoring was dismissed where the record contained no written notice of appeal. The Court of Appeals declined to treat defendant's purported appeal as a petition for writ of *certiorari* as defendant's brief did not contain the requisite documentation.

Appeal by defendant from order entered on or about 26 March 2009 by Judge Charles H. Henry in Superior Court, Onslow County. Heard in the Court of Appeals 25 February 2010.

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

Greene & Wilson, P.A., by Thomas Reston Wilson, for defendant-appellant.

JACKSON, Judge.

On or about 2 March 2007, Theron Inman ("defendant") pleaded guilty to ten counts of indecent liberties with a child. On or about 29 August 2007, defendant received a suspended sentence of sixty months of supervised probation for every two counts of indecent liberties with a child; in other words, defendant received a total of 300 months of supervised probation. On or about 26 March 2009, the trial court concluded that defendant had committed an aggravated offense

and ordered defendant to enroll in satellite-based monitoring ("SBM") for life. Defendant appeals the order requiring him to enroll in SBM. However, the record contains no written notice of appeal. Pursuant to our holding set forth in *State v. Brooks*, 204 N.C. App. 193, 195, 693 S.E.2d 204, 206 (2010), we are bound to dismiss the case *sub judice*. In *Brooks*, we explained as follows:

> In light of our decisions interpreting an SBM hearing as not being a criminal trial or proceeding for purposes of appeal, we must hold that oral notice pursuant to N.C.R.App. P. 4(a)(1) is insufficient to confer jurisdiction on this Court. Instead, a defendant must give notice of appeal pursuant to N.C.R.App. P. 3(a) as is proper in a civil action or special proceeding. N.C.R.App. P. 3(a) requires that a party file notice of appeal with the clerk of superior court and serve copies thereof upon all other parties. *Because the record on appeal does not contain a written notice of appeal filed with the clerk of superior court, which was served upon the State, this appeal must be dismissed.*

Id. (emphasis added) (internal citations, quotation marks, and brackets omitted). *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.").

Although we acknowledge the proposition that "[t]his Court does have the authority pursuant to North Carolina Rule of Appellate Procedure 21(a)(1) to 'treat the purported appeal as a petition for writ of certiorari,' " which we may exercise in our discretion, we decline to treat defendant's attempted appeal as a petition for writ of *certiorari*. *Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2008) (declining to treat the plaintiff's defective notice of appeal—naming for review only one summary judgment order—as a petition for writ of *certiorari* to review two summary judgment orders) (quoting *State v. SanMiguel*, 74 N.C. App. 276, 277–78, 328 S.E.2d 326, 328 (1985)). Appellate Rule 21 provides that a "writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists . . . ." N.C. R. App. P. 21(a)(1) (2007). However, a petition for writ of *certiorari* must be filed "with the clerk of the court of

the appellate division to which appeal of right might lie[,]" and the petition must contain "a statement of the reasons why the writ should issue[.]" N.C. R. App. P. 21(b), (c) (2007). *See State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 321 (2005) (declining to treat the defendant's brief as a petition for writ of *certiorari* because of the requirements of Rule 21, notwithstanding the defendant's request to do so in a footnote). Defendant's brief does not contain the requisite documentation to meet the requirements set forth by our Appellate Rules for consideration of a writ of *certiorari*. Accordingly, we decline to consider the merits in the case *sub judice*.

For the foregoing reasons, we dismiss.

Dismissed.

Judge ELMORE concurs.

Judge STROUD dissents in a separate opinion.

STROUD, Judge, dissenting.

Because I believe defendant's purported appeal should be treated as a writ of certiorari, I respectfully dissent and would affirm the trial court order.

"This Court does have the authority pursuant to North Carolina Rule of Appellate Procedure 21(a)(1) to treat the purported appeal as a petition for writ of certiorari" which we may grant in our discretion. *Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2008) (citations and quotation marks omitted). The majority notes that "a petition for writ of certiorari must be filed 'with the clerk of the court of the appellate division to which appeal of right might lie[,]' and the petition must contain 'a statement of the reasons why the writ should issue[.]' " I conclude that defendant's brief meets these requirements as it was filed with the clerk of this Court and sets forth defendant's reasons why this Court should grant the requested relief. In addition, this Court has previously considered purported appeals as petitions for writs of certiorari in other cases. *See State v. SanMiguel*, 74 N.C. App. 276, 277-78, 328 S.E.2d 326, 328 (1985) ("[T]he record does not contain a copy of the notice of appeal or an appeal entry showing that appeal was taken orally. In our discretion we treat the purported appeal as a petition for writ of certiorari and pass upon the merits of the questions raised." (citations omitted)). As

I would treat defendant's purported appeal as a petition for a writ of certiorari, which I would grant, I will address the merits of defendant's case on appeal.

In assignment of error number seven defendant contended that the trial court had "insufficient evidence" defendant committed an "aggravated offense" as defined by N.C. Gen. Stat. § 14-208.6. However, defendant abandoned this assignment of error in his brief by failing to make any substantive argument regarding the sufficiency of the evidence or even to make an argument regarding what is required to show an "aggravated offense." *See* N.C.R. App. P. 28(a) ("Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief are deemed abandoned."). I therefore cannot consider defendant's assignment of error regarding conviction of an "aggravated offense" based upon the crimes for which he was convicted.

In his brief, defendant argues only that the trial court failed in concluding he had committed an "aggravated offense" because the court's decision violated *ex post facto* provisions, double jeopardy protections, and defendant's right to a trial by jury. Because these are the only issues argued, these are the only issues I can consider.

As we recently stated in *State v. Yow*,

> We are thus left with the same constitutional arguments we have previously addressed and must therefore affirm the trial court's order as these arguments have all been rejected. See *State v. Hagerman*, —— N.C. App. ——, ——, 685 S.E.2d 153, 155 (2009) ("[T]he imposition of SBM, as a civil remedy, could not increase the maximum penalty for defendant's crime. The State did not need to present any facts in an indictment or prove any facts beyond a reasonable doubt to a jury in order to subject defendant to SBM."); *State v. Wagoner*, —— N.C. App. ——, ——, 683 S.E.2d 391, 400 (2009) ("As we have already held that SBM is a civil regulatory scheme, and not a punishment, double jeopardy does not apply." (citation omitted)); *State v. Bare*, —— N.C. App. ——, ——, 677 S.E.2d 518, 531 (2009) ("Defendant has failed to show that the effects of SBM are sufficiently punitive to transform the civil remedy into criminal punishment. Based on the record before us, retroactive application of the SBM provisions do not violate the ex post facto clause.")

State v. Yow, ––– N.C. App. –––, ––––, 693 S.E.2d. 192, 194 (2010). Therefore, the only arguments which defendant presented on appeal have been previously determined by this Court in decisions which are controlling authority. *In re 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." (citations omitted)). I would therefore affirm the trial court order.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 AUGUST 2010)

ANTONELLIS v. CUMBERLAND CNTY. SCH. BD. OF EDUC. No. 09-1618	Cumberland (09CVS3727)	Affirmed
BARFIELD v. MATOS No. 09-1711	Mecklenburg (07CVS20233)	Dismissed
BLACKARD PROPERTIES v. GARCIA No. 09-1529	Alamance (08CVD2780)	Vacated and Remanded
BRADLEY v. GAY No. 09-1723	Halifax (08CVS68)	Affirmed
CANADY v. N.C. COASTAL RES. No. 09-545	New Hanover (07CVS4295)	Affirmed
DANIEL v. GULLZAR No. 09-1644	Wake (07CVS17159)	Affirmed in part; vacated and remanded in part
DAVID v. SOSSOMAN No. 09-1453	Macon (07CVS23)	No Error
DRAPER v. YELVINGTON No. 10-34	Johnston (08SP448)	Dismissed
DUCKWORTH v. SGL CARBON No. 09-1100	Indus. Comm. (240103)	Affirmed
EARP v. QUINLAN No. 09-578	Durham (08CVS6391)	Affirmed in Part and Reversed in Part
FARLOW v. FARLOW No. 09-714	Guilford (08CVS7623)	Reversed in part; Dismissed in part
FAULCON v. N.C. ADMIN. OFFICE OF THE COURTS No. 10-128	Indus. Comm. (766857)	Affirmed
FEDERATED FIN. CORP. OF AM. v. ROWELL No. 10-282	Wake (08CVD9162)	Dismissed in part; affirmed in part
FENNELL v. FENNELL No. 09-481	Pasquotank (05CVD235)	Reversed and Remanded
GIDCO, INC. v. COUNTRY LANE, LLC No. 09-1612	Johnston (08CVS3771)	Affirmed
GRAPHIC PACKAGING v. GILBERTSON No. 09-1372	Guilford (08CVS14296)	Affirmed

GUZMAN v. GORE No. 09-1241	Stokes (08CVS860)	Affirmed
HARBOR BAPTIST CHURCH v. CITY OF CHARLOTTE No. 10-3	Mecklenburg (09CVS5598)	Affirmed
IN RE C.N.C.B. No. 10-342	Burke (07J162)	Affirmed
IN RE D.K. No. 10-251	Buncombe (05JA482)	Affirmed
IN RE D.P., D.P., T.P. No. 10-191	Mecklenburg (06JT511-513)	Affirmed
IN RE E.A.B. No. 10-319	Cleveland (08JT203)	Affirmed
IN RE E.K.B. No. 10-407	Randolph (09JT54)	Affirmed
IN RE H.A.B. No. 10-167	Burke (08J22-25)	Reversed and Remanded
IN RE J.D.A. No. 10-225	Randolph (08JT22)	Affirmed
IN RE J.M. & J.J. No. 10-273	Robeson (02JA185) (02JA06)	Vacated and remanded
IN RE Z.M.S. No. 10-277	Surry (07J83)	Vacated and remanded
JACOBS v. KABA ILCO CORP. No. 09-1527	Indus. Comm. (798617)	Dismissed
LEE v. ALLSTATE INS. CO. No. 09-1694	Cumberland (09CVS2353)	Reversed
LITTLE v. N.C. DEP'T OF ENV'T No. 09-441	Cabarrus (06CVS3215)	Affirmed
OWEN v. EUBANKS No. 09-1210	Transylvania (08CVS334)	Affirmed
PHILLIPS v. PHILLIPS No. 09-1059	Rowan (04CVD1355)	Vacated and remanded
PINKNEY v. HMS HOST USA, INC. No. 09-393	Mecklenburg (07CVS12928)	Affirmed
RAIN TREE v. BRADFORD No. 09-1385	Transylvania (02CVD396)	Affirmed
STATE v. ARCHIE No. 09-434	Cleveland (06CRS57172)	No prejudicial error

STATE v. BLUE RIDGE TANK CO., INC. No. 09-1025	Wake (08CVS11186)	Dismissed
STATE v. CAPOTE No. 09-1204	Hoke (08CRS51240-43) (08CRS51236-39)	No error in part, remanded in part, and reversed in part
STATE v. CHESTANG No. 09-1500	Sampson (08CRS988)	No prejudicial error in part; No error in part; Remanded for correction of clerical error
STATE v. DAVIS No. 09-1552	Mecklenburg (05CRS239736) (05CRS245718)	New trial
STATE v. GLADDEN No. 09-626	Cabarrus (05CRS2084) (04CRS8967) (04CRS12008) (05CRS2087) (04CRS9284) (04CRS13160) (04CRS8966) (04CRS9285)	No Error
STATE v. HARRISON No. 09-1334	Cumberland (06CRS65715) (09CRS2020-2022) (06CRS67436) (06CRS65710-13) (09CRS2014-2018)	No Error
STATE v. JACOBS No. 09-1225	Sampson (07CRS52445) (07CRS52558) (07CRS52440) (07CRS52443)	No Error
STATE v. MATOS No. 09-1196	Wake (08CRS175)	No Error
STATE v. MITCHELL No. 09-1479	Cumberland (03CRS55284)	Reversed
STATE v. RATLIFF No. 09-1147	Rutherford (08CRS701032)	Affirmed
STATE v. SCOTT No. 09-1668	McDowell (08CRS50066)	No Error
STATE v. SLYCORD No. 09-1229	Randolph (07CRS8)	No Error

STATE v. SMITH No. 09-1393	Martin (08CRS50271-72) (08CRS1277)	No Error
STATE v. STEWART No. 09-555	Mecklenburg (06CRS223676) (06CRS223674)	No Error
STATE v. WHITE No. 09-1575	Cumberland (09CRS657) (08CRS64728)	No Error
STATE v. WILLIAMS No. 09-1052	Lenoir (08CRS2061) (08CRS51336-37)	Reversed and ordered new trial in part and no error in part
STATE v. WINDSOR No. 09-713	Catawba (05CRS56577)	Affirmed in part; no prejudicial error in part
STATE v. WOOD No. 10-16	Randolph (05CRS55173-74)	No Error

BOBBY RAY SEAGRAVES, PLAINTIFF v. DONALD L. SEAGRAVES AND WIFE, CINDY T. SEAGRAVES; HOWARD S. IRVIN, TRUSTEE; AND BUILDINGS, INC., A NORTH CAROLINA CORPORATION, DEFENDANTS

AND

IN THE MATTER OF THE ESTATE OF: PAULINE CORA MCELROY SEAGRAVES

NO. COA09-302

NO. COA09-402

(Filed 17 August 2010)

1. Appeal and Error— voluntary dismissal—counterclaim pending—dismissal not prejudicial—appeal not interlocutory

Plaintiff did not abandon his appeal from a partial summary judgment in a wills case where he took a voluntary dismissal of his remaining issues while a counterclaim from defendants was pending. Because of the counterclaim, voluntary dismissal of plaintiff's remaining claim was improper without defendants' consent, which was not given; however, defendants' counterclaim proceeded to trial and there was no prejudice. Also, the appeal was not from an interlocutory order because there were no further issues pending when plaintiff filed the notice of appeal.

2. Wills— undue influence—fiduciary relationship—non-existent at time of will—in existence when property later transferred

Summary judgment was not proper on one instance of undue influence in a wills case where the caveators contended that a fiduciary relationship existed that created the rebuttable presumption of undue influence. A fiduciary relationship did not exist between the propounder and his mother when she executed her will, but defendants admitted the existence of such a relationship when a tract of land originally willed to a brother was conveyed to the propounder.

3. Wills— undue influence—evidence not sufficient

Considering the factors in *In re Will of Andrews*, 299 N.C. 52, the caveators did not forecast any relevant, admissible evidence from which a jury could reasonably decide that decedent was acting under the influence of propounder and not under her own free will when she executed her will.

4. Wills— undue influence—testamentary capacity

The trial court did not err by granting propounder's motion for summary judgment on the issue of testamentary capacity. The caveators' general testimony about the decedent's deteriorating health and mental confusion was not sufficient to show that she lacked testamentary capacity at the time she executed her will.

5. Notaries Public— authority of notary public—testimony sufficient

The trial court did not err by denying the caveators' motions for directed verdict and judgment notwithstanding the verdict in a wills case on the issue of whether the paralegal who notarized the will was a licensed notary public. The testimony established that she was authorized to administer oaths under statute.

6. Appeal and Error— preservation of issues—failure to appeal

Plaintiff's failure to appeal from an order denying a motion to continue meant that the issue was not preserved for appellate review.

Appeal by Plaintiff in case 07 CVD 96 from order entered 17 September 2008 by Judge Paul C. Ridgeway in Superior Court, Cabarrus County. Appeal by Caveators in case 06 E 616 from order entered 17 September 2008 by Judge Paul C. Ridgeway and judgment entered 7 January 2009 by Judge Michael E. Beale in Superior Court, Cabarrus County. Heard in the Court of Appeals 17 September 2009. As the issues presented in these appeals involve common questions of law, we have consolidated the appeals pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 40.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.A., by James R. DeMay, for Plaintiff-Appellant and Caveators-Appellants.

Weaver, Bennett & Bland, P.A., by Michael David Bland, for Defendants-Appellees and Propounder-Appellee.

STEPHENS, Judge.

This matter presents two separate but related actions which have been consolidated on appeal. The first action, *Seagraves v. Seagraves*, 07 CVD 96, arises from the *inter vivos* transfer of certain real property by Pauline Seagraves ("Pauline" or "Decedent"). The second action, *In the Matter of the Estate of: Pauline Cora McElroy Seagraves*, 06 E 616, involves a caveat to Decedent's will.

I. Procedural History and Factual Background

Decedent Pauline Seagraves and her husband, Paul Seagraves ("Paul"), had four sons, Harold Seagraves ("Harold"), Bobby Seagraves ("Bobby" or "Plaintiff"), Paul Wayne Seagraves ("Wayne"), and Donald Seagraves ("Donald" or "Propounder"). In September 2000, Paul and Pauline executed reciprocal wills by which they devised all of their real property first to each other and then to their sons in four equal shares. Paul died on 3 January 2001. Before their deaths, Paul and Pauline resided on Gold Hill Road in Concord, North Carolina, where they owned approximately 81 acres of property. After Paul's death, Pauline lived alone on the Gold Hill Road property until June 2004, when a caretaker was hired to assist her during the day.

On 20 September 2004, Donald drove Pauline to her attorney's office in Charlotte, North Carolina. Pauline met with attorneys H. Edward Knox ("Mr. Knox"), Frances Knox ("Ms. Knox"), and Kara McIvor to execute a new will (the "Will") and to execute a power of attorney in favor of Donald. The execution of the Will was videotaped. Pauline's Will changed the disposition of Pauline's estate from the 2000 will, which divided Pauline's estate equally among her four sons. The new Will devised Pauline's property as follows: 65.5 acres to Donald, 14.1 acres to Bobby, and the 1.6 acre homesite to Harold and Wayne.

In March 2005, Donald hired a surveyor to survey Pauline's property in order to allocate a 3.2 acre tract out of the 14.1 acres devised to Bobby under the Will. Attorney Fletcher Hartsell, Jr. ("Mr. Hartsell") prepared the 3.2 acre deed and testified in an affidavit that Pauline had requested him to prepare the deed so that Donald could have a right-of-way to his residence after her death.

On 16 April 2005, Pauline was hospitalized for, *inter alia*, a urinary tract infection and complaints of an "altered level of awareness, nausea, and vomiting." On the second day of Pauline's hospital stay, her mental status returned to baseline. Pauline's medical records provide that "[t]he etiology of her mental status change was thought to be secondary to acute delirium secondary to her urinary tract infection."

On 25 May 2005, Pauline signed the deed for the 3.2 acre tract, conveying this property to Donald and his wife, Cindy Seagraves ("Cindy"). In June 2005, after the deed to the 3.2 acre tract had been

executed and notarized, Mr. Hartsell met privately with Pauline and again discussed her reasons for the conveyance before he recorded the deed. The deed to the 3.2 acre tract was recorded on 19 July 2005.

Pauline presented to the Ardsley Medical Group in Concord, North Carolina, on 2 June, 14 September, and 14 November 2005 for regular checkups. Pauline's medical records from these visits show minor ailments, but contain no mention of dementia or of any diminished mental capacity. On 30 November 2005, Pauline was seen by Dr. Sylvie Bastajian ("Dr. Bastajian") and was given a physical examination. Dr. Bastajian found that other than "some residual post nasal drip[,]" Pauline was "doing okay." Dr. Bastajian testified in an affidavit that on every occasion she examined Pauline, "she was a pleasant, elderly patient who was in command of her mental faculties."

In November 2005, Donald again commissioned the surveyor to survey an 8.9 acre tract of Pauline's property, which at the time had been allotted to be received by Bobby under the Will. On 30 November 2005, Pauline signed a deed for the 8.9 acre tract and conveyed this property to Donald and Cindy. The 8.9 acre tract adjoined the previously conveyed 3.2 acre tract and the home of Donald and Cindy. In his deposition, Donald testified that he asked Pauline for the additional acreage so that his property could qualify as farmland for tax purposes.

In December 2005, Harold, Bobby, Wayne, and their families learned of the conveyances to Donald and Cindy and of the execution of the Will. This revelation further exacerbated the already strained relationship between Pauline and her children and their spouses. Pauline died on 25 August 2006 at the age of 92.

On 10 January 2007, Bobby filed a complaint[1] in Cabarrus County District Court against Donald and Cindy. On 8 February 2007, Bobby filed an amended complaint which added Howard S. Irvin and Buildings, Inc. (collectively with Donald and Cindy, "Defendants") as Defendants. In the amended complaint, Bobby asserted the following causes of action: (1) the exercise of undue influence over Pauline by Donald and Cindy which resulted in Pauline's transfer to Donald and Cindy of tracts of land earlier devised to Bobby under Pauline's Will; (2) the commission of constructive fraud by Donald and Cindy resulting in the same transfers; (3) an action to set aside a deed of trust

1. The record on appeal does not contain the original complaint and contains only the civil summons issued on 10 January 2007.

against the 8.9 acre tract of land held by Howard Irvin for the benefit of Buildings, Inc.; and (4) a constructive trust against the funds loaned by Buildings, Inc. On 28 February 2007, Defendants filed an answer and asserted counterclaims for (1) slander of title, (2) slander, and (3) unfair trade practices. On 22 June 2007, however, Defendants filed a notice of dismissal[2] for the second and third counterclaims, leaving only the counterclaim for slander of title to be decided by the trial court. On 4 October 2007, Bobby moved to transfer the matter from district court to superior court, and this motion was granted on 13 November 2007.

On 19 July 2007, Harold, Wayne, and Bobby (collectively "Caveators") filed a Caveat to the probate of Pauline's Will. The Caveators alleged that Decedent lacked testamentary capacity when she executed the Will, and that the Will was procured through undue influence. That same day, Fred A. Biggers, the Cabarrus County Clerk of Superior Court, entered an order suspending further proceedings in relation to Decedent's estate. The parties were aligned by order entered in superior court on 13 August 2007, which named Harold, Wayne, and Bobby as Caveators, and Donald as Propounder.

On 21 July 2008, Propounder and Defendants filed a joint motion for summary judgment in both cases 07 CVD 96[3] and 06 E 616. A hearing was held on both matters at the 2 September 2008 session of the Cabarrus County Superior Court, the Honorable Paul C. Ridgeway presiding. On 17 September 2008, Judge Ridgeway granted summary judgment in favor of Propounder in 06 E 616. This order determined that there were no genuine issues of material fact regarding the Caveators' allegations of undue influence, duress, and lack of testamentary capacity. Caveators filed notice of appeal from the trial court's order of summary judgment on 26 September 2008. This matter went to trial on the issue of *devisavit vel non*[4] at the 15 September 2008 Civil Session of Cabarrus County Superior Court, the Honorable Michael E. Beale presiding. The jury returned a verdict that the Will was executed according to law and was the Last Will and

2. The pleading contained in the record and entitled "Notice of Stipulation of Dismissal of Second and Third Counterclaims by Defendants" is dated 22 June 2007, but this document is not file stamped.

3. Although case number 07 CVD 96 was properly transferred to superior court, the case caption on the superior court's order for partial summary judgment from which Appellants appeal cites this case as "07 CVD 96."

4. The latin phrase "*devisavit vel non*" refers to a determination of whether a will is valid. *In re Will of Campbell*, 155 N.C. App. 441, 450, 573 S.E.2d 550, 558 (2002).

Testament of Pauline Seagraves. Judge Beale entered judgment upon the jury's verdict on 7 January 2009. Caveators filed notice of appeal from the trial court's judgment on 3 February 2009.

On 17 September 2008, the trial court also granted partial summary judgment for Defendants in 07 CVD 96 on all issues related to the 3.2 acre deed, leaving the issues related to the 8.9 acre deed for the jury to decide. Plaintiff made a motion to continue the trial on the remaining issues involving the 8.9 acre deed in order to immediately appeal from the trial court's order of partial summary judgment. Plaintiff's motion was denied. Plaintiff did not appeal from the trial court's denial of his motion to continue. On 19 September 2008, Plaintiff voluntarily dismissed his remaining claims regarding the 8.9 acre tract. Trial proceeded on Defendants' remaining counterclaim for slander of title. On 28 September 2008, the trial court signed a judgment for directed verdict in favor of Plaintiff on this issue.[5] Plaintiff filed notice of appeal from the trial court's 17 September 2008 order of partial summary judgment on 7 October 2008.[6] Defendants did not appeal from the trial court's entry of directed verdict on their counterclaim.

II. Discussion

A. Standard of Review

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2008). "Where a motion for summary judgment is supported by proof which would require a directed verdict in [the movant's] favor at trial he is entitled to summary judgment unless the opposing party comes forward to show a triable issue of material fact." *In re Will of Edgerton*, 29 N.C. App. 60, 63, 223 S.E.2d 524, 526 (1976). Summary judgment should be entered cautiously. *Volkman v. DP Associates*, 48 N.C. App. 155, 157, 268 S.E.2d 265, 267 (1980). However, if the party with the burden of proof

5. Although the trial court's judgment entering a directed verdict for Plaintiff is file stamped, the stamp is too faint to read, and thus we cannot determine the actual date the judgment was entered.

6. The record indicates that the trial court also filed a separate order on 11 September 2008 granting summary judgment in favor of Defendant, Buildings, Inc., on all claims against Buildings, Inc. Plaintiff filed notice of appeal from this order on 7 October 2008. This appeal is not before us.

cannot prove the existence of each essential element of its claim or cannot produce evidence to support each essential element, summary judgment is warranted. *Steel Creek Dev. Corp. v. James*, 300 N.C. 631, 638, 268 S.E.2d 205, 210 (1980). "[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

B. Abandonment of Plaintiff's Appeal

[1] In 07 CVD 96, Defendants argue that Plaintiff abandoned his right to appeal from the trial court's order granting partial summary judgment when Plaintiff took a voluntary dismissal of the remaining issues. Specifically, Defendants contend that Plaintiff's voluntary dismissal was improper and also that the order granting partial summary judgment was interlocutory, and thus, not immediately appealable. We are not persuaded by Defendants' contentions.

Rule 41 of the North Carolina Rules of Civil Procedure provides that "an action or any claim therein may be dismissed by the plaintiff without order of court . . . by filing a notice of dismissal at any time before the plaintiff rests his case[.]" N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2008). However, a plaintiff may not dismiss his action by filing a notice of dismissal if to do so would defeat the rights of a defendant who has theretofore asserted some ground for affirmative relief, even though the plaintiff acts before resting his case. *McCarley v. McCarley*, 24 N.C. App. 373, 376, 210 S.E.2d 531, 533 (1975), *rev'd in part on other grounds*, 289 N.C. 109, 221 S.E.2d 490 (1976) (expressly agreeing with the Court of Appeals' Rule 41 holding). Upon defendant's demand for affirmative relief, defendant's right to have his claim adjudicated in the case "has supervened . . . and plaintiff thereby loses the right to withdraw allegations upon which defendant's claim is based without defendant's consent." *McCarley*, 289 N.C. at 113, 221 S.E.2d at 493 (internal citation and quotation marks omitted). "Where defendant sets up a claim for affirmative relief against plaintiffs arising out of the same transactions alleged by plaintiffs, plaintiffs cannot take a voluntary dismissal under Rule 41 without the consent of defendant." *Maurice v. Hatterasman Motel Corp.*, 38 N.C. App. 588, 592, 248 S.E.2d 430, 433 (1978); *see Swygert v. Swygert*, 46 N.C. App. 173, 177, 264 S.E.2d 902, 904-05 (1980) (Where a counterclaim is filed which arises out of the same transaction alleged in the complaint, plaintiff thereby loses the right to withdraw

allegations upon which defendant's claim is based by taking a voluntary nonsuit without defendant's consent.).

In 07 CVD 96, the trial court granted partial summary judgment for Defendants on Plaintiff's claims regarding the 3.2 acre tract of land. The trial court's order left for further resolution the Plaintiff's claim as to the 8.9 acre tract and Defendants' slander of title counterclaim. Thus, because Defendants' counterclaim remained pending after the entry of partial summary judgment, Plaintiff was not permitted to take a voluntary dismissal of his remaining claim without Defendants' consent. Defendants did not consent to Plaintiff's dismissal in this matter, and thus voluntary dismissal of Plaintiff's remaining claim was improper.

Defendants, however, have failed to demonstrate any prejudice they suffered by the improper dismissal of Plaintiff's remaining claim. After Plaintiff's voluntary dismissal, Defendants' counterclaim proceeded to trial; Defendants presented evidence in support of their counterclaim; and upon Plaintiff's motion, the trial court entered a directed verdict in his favor after determining that the evidence, taken in the light most favorable to Defendants, was insufficient as a matter of law to be submitted to the jury. *See Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (setting out the standard of review for directed verdict). Although the trial court ruled in favor of Plaintiff on Defendants' counterclaim, Defendants have not argued that this ruling was a consequence of the improper voluntary dismissal of Plaintiff's claim. Thus, we are disinclined to disturb the trial court's order on this basis where Defendants have shown no injury resulting therefrom.

In addition, Defendants have failed to show that the trial court's order was interlocutory. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Interlocutory orders are generally not immediately appealable to this Court. *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 311 (1999).

Plaintiff filed a notice of appeal from the trial court's order of partial summary judgment on 7 October 2008. At that time, there were no remaining issues pending before the trial court, and thus there was no further action required by the trial court "in order to settle and deter-

mine the entire controversy." *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. Accordingly, the trial court's order was not interlocutory when Plaintiff filed notice of appeal. Having determined that Plaintiff's appeal is properly before us, we now address the merits of this appeal.

C. Undue Influence

[2] The Appellants in both matters argue that the trial court erred in granting summary judgment on the issue of undue influence. Because the arguments on the issue of undue influence in both matters are substantially the same, we address these arguments together. Specifically, Caveators and Plaintiff argue that genuine issues of material fact existed as to whether Donald and Cindy Seagraves exercised undue influence over Decedent in order to procure the 3.2 acre tract of land and to coerce her into executing the Will.

"Undue influence is defined as 'a fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result.'" *In re Will of Dunn*, 129 N.C. App. 321, 328, 500 S.E.2d 99, 103-04 (quoting *In re Estate of Loftin and Loftin v. Loftin*, 285 N.C. 717, 722, 208 S.E.2d 670, 674-75 (1974)), *disc. review denied*, 348 N.C. 693, 511 S.E.2d 645 (1998).

> Something must operate upon the mind of a person allegedly unduly influenced which has a controlling effect sufficient to destroy the person's free agency and to render the instrument not properly an expression of the person's wishes, but rather the expression of the wishes of another or others. It is the substitution of the mind of the person exercising the influence for the mind of the [person executing the instrument], causing him to make [the instrument] which he otherwise would not have made.

Hardee v. Hardee, 309 N.C. 753, 756, 309 S.E.2d 243, 245 (1983).

"There are four general elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert influence; (3) a disposition to exert influence; and (4) a result indicating undue influence." *Dunn*, 129 N.C. App. at 328, 500 S.E.2d at 103-04 (internal citation and quotation marks omitted). Our Supreme Court has enumerated the following factors as being probative on the issue of undue influence:

1. Old age and physical and mental weakness.

2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.

3. That others have little or no opportunity to see him.

4. That the will is different from and revokes a prior will.

5. That it is made in favor of one with whom there are no ties of blood.

6. That it disinherits the natural objects of his bounty.

7. That the beneficiary has procured its execution.

In re Will of Andrews, 299 N.C. 52, 55, 261 S.E.2d 198, 200 (1980) (internal citations and quotation marks omitted).

i. Presumption of Undue Influence for Fiduciaries

Plaintiff and Caveators contend that a fiduciary relationship existed between Donald and Pauline and that this created a presumption of undue influence for the execution of the Will and the deed to the 3.2 acre tract. For the following reasons, we do not agree that a fiduciary relationship existed at the time of the execution of the Will. However, in light of Defendants' admission in their answer to Plaintiff's amended complaint and counterclaims, we agree that such a relationship did exist at the time of Pauline's conveyance to Donald of the deed to the 3.2 acre tract.

"When a fiduciary relationship exists between a propounder and testator, a presumption of undue influence arises and the propounder must rebut that presumption." *In re Estate of Ferguson*, 135 N.C. App. 102, 105, 518 S.E.2d 796, 799 (1999). In *Ferguson*, this Court held that no fiduciary relationship existed between the testator and propounder where the testator executed a power of attorney naming the propounder "attorney-in-fact contemporaneously with the execution of her will." *Id.* at 105, 518 S.E.2d at 798. This Court noted that the evidence indicated that the testator delivered the power of attorney to the propounder more than 18 months after the execution of her will and that the evidence did not indicate that the propounder served as the testator's attorney-in-fact at the time the testator executed her will. *Id.* Thus, we held that the trial court in *Ferguson* "did not err by failing to instruct the jury that [the p]ropounder bore the burden of proof regarding the issue of undue influence." *Id.* at 106, 518 S.E.2d at 799.

Our analysis in the present matter is informed by the holding in *Ferguson*. Pauline executed a power of attorney in favor of Donald contemporaneously with the execution of the Will. The evidence indicates that Donald did not learn of the power of attorney until after it was executed. As we held in *Ferguson*, this alone does not establish the existence of a fiduciary relationship. Moreover, the power of attorney was not recorded until 19 July 2006, almost two years after the Will was executed. Finally, there is no evidence that Donald ever served as Pauline's attorney-in-fact. Accordingly, we hold that as a matter of law, a fiduciary relationship did not exist between Donald and Pauline at the time Pauline executed the Will.

With regard to the conveyance of the deed to the 3.2 acre tract, however, Defendants admit in their answer to the amended complaint and counterclaims that

> [o]n the date the above described deeds [to the 3.2 and 8.9 acre tracts] were executed and signed, Defendant Donald L. Seagraves held a position of trust and confidence in that he was the Attorney in Fact for the Decedent/Grantor. Upon information and belief, Defendant Donald L. Seagraves had assumed the management of many of her business affairs at or prior to that time.

Thus, by Defendants' admission, a fiduciary relationship existed between Donald and Pauline at the time of the conveyance of the deed to the 3.2 acre tract, creating a rebuttable presumption of undue influence. *See Ferguson*, 135 N.C. App. at 156, 518 S.E.2d at 799. Accordingly, summary judgment was not proper on the issue of the conveyance of the 3.2 acre tract due to the existence of genuine issues of material fact. Therefore, the trial court's order granting partial summary judgment in 07 CVD 96 is reversed.

ii. Caveat Proceeding

[3] [T]he burden of proving undue influence is on the caveator and he must present sufficient evidence to make out a [p]rima facie case in order to take the case to the jury. The test for determining the sufficiency of the evidence of undue influence is usually stated as follows: [i]t is generally proved by a number of facts, each one of which, standing alone, may have little weight, but taken collectively may satisfy a rational mind of its existence.

Andrews, 299 N.C. at 55, 261 S.E.2d at 200 (internal citations omitted). "A caveator need not demonstrate every factor named in *Andrews* to prove undue influence, as [u]ndue influence is generally

proved by a number of facts, each one of which standing alone may be of little weight, but taken collectively may satisfy a rational mind of its existence." *In re Will of Jones*, 362 N.C. 569, 576, 669 S.E.2d 572, 578 (2008) (internal citation and quotation marks omitted).

With regard to the first factor, "[o]ld age and physical and mental weakness[,]" *Andrews*, 299 N.C. at 55, 261 S.E.2d at 200, Caveators point to the fact that Pauline was born on 29 January 1914, and thus was 90 years old when she executed the Will. Bobby's wife, Linda Seagraves ("Linda"), testified in an affidavit that beginning in 2003, Pauline became very confused and had occasional delusions about being visited by her late husband, Paul. Linda's testimony is unsupported by specific details, and without more, is insufficient to establish that Pauline was a person subject to influence or that Pauline's mental health was weak.

In July 2004, two months before she met with her attorney to execute the Will, Pauline's medical problems included diastolic blood pressure dysfunction, occasional pulmonary congestion, back pain, and footdrop in the past. Her medical records also indicate that she tired easily and was depressed about "not being able to get around." Although these medical problems do not reflect on Pauline's mental capacity, we neverthless conclude that the first *Andrews* factor weighs in favor of Caveators.

As to the second factor, "[t]hat the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision[,]" *id.*, Caveators argue that Donald and Cindy lived approximately 1,500 feet from Pauline. Caveators have not shown, however, that Donald and Cindy resided "in the home" or that Pauline was subject to their "constant association and supervision." *Jones*, 362 N.C. at 575, 669 S.E.2d at 577. Crystal Seagraves ("Crystal"), Bobby's daughter-in-law, testified in an affidavit that "[i]t was my impression that during this period of time, Pauline was like Donnie's child. Everything that Pauline did was very controlled by Donnie. Pauline often appeared to me to be very afraid to talk about her family." Crystal did not specify exactly when "this period of time" occurred, however, and thus her testimony is insufficient to establish that Donald and Cindy subjected Pauline to their constant association and supervision at the time Pauline executed the Will. Caveators' evidence in support of this factor includes only events that occurred months or years *after* the execution of the Will.

Caveators presented no evidence that Donald and Cindy subjected Pauline to their constant supervision prior to or during September 2004. *See In re Will of Sechrest*, 140 N.C. App. 464, 469, 537 S.E.2d 511, 515 (2000) (stating our Court's inquiry as whether, "at the time the testat[rix] executed [her] last will and testament, [her] own wishes and free will had been overcome by another"), *disc. review denied*, 353 N.C. 375, 547 S.E.2d 16 (2001). Although evidence of undue influence at a reasonable time before and after the execution of a will is relevant, *see generally In re Will of Wadsworth*, 30 N.C. App. 593, 595, 227 S.E.2d 632, 633 (1976) ("On the issue of testamentary capacity, it is proper to show the mental condition of the maker at a reasonable time before and after the execution of the purported will."), evidence of Donald and Cindy's conduct after the execution of the contested Will alone is insufficient to satisfy the Caveators' burden, particularly when Caveators' evidence is not specific as to how long after the Will's execution such conduct occurred.

With regard to factor three, "[t]hat others have little or no opportunity to see [Decedent,]" *Andrews*, 299 N.C. at 55, 261 S.E.2d at 200, Caveators contend that Donald and Cindy shielded Pauline from the other members of the family. However, Caveators' individual depositions establish that all family members had free and unrestricted access to Pauline in 2004, 2005, and 2006. In his deposition, Wayne testified that he lived in Apex, North Carolina, and that after his father died in 2001, he visited his mother, "[a]s often as I could when I could get away from my business." Wayne stated that he occasionally stayed with his mother and that he brought his wife and daughter along on these visits. Furthermore, Wayne testified that he "talked to Mom a lot on the phone." Bobby testified that he used to visit his mother "[t]wo or three times a week[,]" and that he often stopped by after work. Bobby stated that Donald never attempted to prevent him from visiting Pauline until "[t]he last 30 days there[,]" but up until that time, Bobby, his wife, "and any of the members of the family came and went as they pleased over there[.]" Additionally, Harold testified that he resided in Colorado Springs, Colorado, but his work brought him to Raleigh several times a year, so he would visit Pauline whenever he was in North Carolina beginning when his father died in 2001 and up until his mother's death in 2006. Also, Harold and his family visited Pauline in the summer of 2005 and spent approximately ten days with her. Harold testified that he was able to communicate effectively with his mother when he saw her and when they spoke over the telephone.

Caveators also offered the testimony of Cabarrus County Sheriff's Deputy, Wade Gray ("Deputy Gray"), in support of this factor. In a deposition, Deputy Gray testified about an incident in which Cindy

> called and complained that all three of [Pauline's] boys had gone up to the house carrying guns and was threatening her and Donnie and that she wanted them off the property. She didn't want them coming around, that they had power of attorney over the property, and they were not welcome to be there.

Although offered in support of this factor, we fail to see how this incident supports Caveators' argument that Donald and Cindy improperly excluded other members of the family from seeing Pauline. In their brief, Caveators describe Cindy's complaint to the sheriff's department as "ridiculous." If Caveators mean to assert that Cindy fabricated the story about their carrying guns to Pauline's home, there is no evidence in the record to support such an assertion. On the other hand, if Caveators did in fact come to Pauline's home "carrying guns" and this was meant as a threatening gesture, Cindy's reaction was reasonable. Moreover, there is absolutely no evidence regarding when this incident occurred. Thus, there is no evidence that Donald and Cindy denied other members of the family access to Pauline, and Caveators' own testimony indicates that they had unfettered access to visit with and speak to Pauline. Accordingly, factor three also weighs against Caveators' contention.

As to factor four, "[t]hat the will is different from and revokes a prior will[,]" *id.*, Propounder and Caveators each acknowledge that in September 2000, Paul and Pauline executed reciprocal wills devising their estates to each other, or to their four sons in shares of equal value if their spouse predeceased them. Although the record does not include a copy of Pauline's 2000 will, because Propounder and Caveators recognize the existence of this will, we conclude that factor four weighs in Caveators' favor.

Factor five, "[t]hat it is made in favor of one with whom there are no ties of blood[,]" *id.*, weighs against Caveators as the Will is in favor of her four natural children, regardless of whether the children's shares are equal. Similarly, factor six, "[t]hat it disinherits the natural objects of [Decedent's] bounty[,]" *id.*, also weighs against Caveators as Pauline's Will divides her property solely among her four children.

Lastly, the seventh factor, "[t]hat the beneficiary has procured [the will's] execution[,]" *id.*, weighs against Caveators' argument as well. All of the evidence from those individuals with personal knowledge of the execution of the Will supports Propounder's contention that he did not procure the Will. Ms. Knox testified by affidavit that Pauline "was very upset and hurt by the manner in which her three older children, Harold, Wayne, and Bobby, treated her and acted as if they had a right to dictate how she disposed of her property[,]" and that Ms. Knox was "absolutely certain that Pauline Seagraves on September 20, 2004, was of sound mind and was not acting under the duress or the influence of any other person." Furthermore, Ms. Knox testified that "[n]one of [Pauline's] children had any input or control over her decision-making process, and none of them were present on any occasion when I discussed these issues with her."

Caveators' remaining evidence that Propounder procured the execution of the Will is inadmissible and irrelevant. Caveators presented the testimony of Deputy Gray to demonstrate that Donald had procured the execution of Pauline's Will. Deputy Gray testified that sometime after Paul's death

> [Pauline] came out and said, "Well, Donnie threatened me."
>
> I said, "He threatened you? What did he threaten you with? What's he going to do?"
>
> "Well, he said if I didn't sign some paperwork and change the will and tell people what he tells me to say that he's going to put me in a nursing home. He says, 'I got power of attorney. I can do what I want to.' He said, 'Bobby, Wayne, Harold, can't none of them stop me.' "

Deputy Gray's testimony contains double hearsay,[7] as Deputy Gray not only testified about statements allegedly made by Pauline, but also about statements allegedly made by Donald to Pauline. For Deputy Wade's testimony to be admissible in evidence, both Donald's and Pauline's statements must fall within an exception to the rule prohibiting hearsay. Pauline's statement to Deputy Gray is admissible under the state of mind exception to the hearsay rule. *See* N.C. Gen. Stat. § 8C-1, Rule 803(3) (2008) ("A statement of the declarant's then

7. Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and is inadmissible unless it is subject to a recognized exception. N.C. Gen. Stat. § 8C-1, Rule 801 (2008).

existing state of mind" is not excluded by the hearsay rule.). Donald's statement, however, does not fall within any exception to the hearsay rule and is thus not admissible as evidence that Donald threatened Pauline.

If, however, Donald's statement was admissible as nonhearsay,[8] this evidence is still not probative of the exercise of undue influence at the time of the execution of the Will. Deputy Gray stated that his conversation with Pauline occurred "before she actually got totally wheelchair-bound" and sometime "after Paul died[.]" The evidence indicates that Pauline became completely wheelchair-bound after a fall she suffered approximately seven weeks before her death on 25 August 2006. Prior to that fall, Pauline was still able to get up and use the restroom with a little help.[9] Accordingly, the incident to which Deputy Gray testified could have occurred at any point between 3 January 2001 and July 2006. This broad time frame is insufficient to establish that Pauline felt threatened at the time she executed her Will in September 2004 or that Donald procured the execution of the Will.

Caveators have not forecast any relevant, admissible evidence from which a jury could reasonably decide that when she executed her Will on 20 September 2004, Pauline was not acting of her own free will, but rather was acting under the undue influence of Propounder. Of the factors enumerated by our Supreme Court, only factors one and four support Caveators' argument that the Will was procured by the exercise of undue influence on the part of Propounder and his wife. Although these factors are not exclusive in proving undue influence in the execution of a document, we conclude that these factors as well as the entire "combination of facts, circumstances and inferences," *Andrews*, 299 N.C. at 56, 261 S.E.2d at 200, do not leave any issue of material fact to be resolved on the question of undue influence in the execution of the Will. Moreover, Caveators' evidence is

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8. "When evidence of such statements by one other than the witness testifying is offered for a proper purpose other than to prove the truth of the matter asserted, it is not hearsay and is admissible." *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990).

9. Although Pauline's medical records from 19 March 2004 indicate that she was brought into the physician's office complaining of "several days of illness, a decreased appetite, some lethargy, weakness, and inability to stand[,]" subsequent medical records and testimony reflect that it was only after her fall seven weeks prior to her death that her health began to rapidly deteriorate and she became completely wheelchair-bound.

completely lacking in temporal specificity, and thus was insufficient to submit the issue of undue influence to the jury. Accordingly, Caveators' argument on this issue is overruled.

D. Testamentary Capacity

[4] In their next argument, Caveators contend that the trial court erred in granting Propounder's motion for summary judgment on the issue of testamentary capacity. We disagree.

> An individual possesses testamentary capacity—the capacity to make a will—if the following is true: [She] (1) comprehends the natural objects of [her] bounty, (2) understands the kind, nature and extent of [her] property, (3) knows the manner in which [she] desires [her] act to take effect, and (4) realizes the effect [her] act will have upon [her] estate.

Sechrest, 140 N.C. App. at 473, 537 S.E.2d at 517. The presumption is that "every individual has the requisite capacity to make a will, and those challenging the will bear the burden of proving, by the greater weight of the evidence, that such capacity was wanting." *Id.*

> However, to establish testamentary incapacity, a caveator need only show that one of the essential elements of testamentary capacity is lacking. *In re Will of Kemp*, 234 N.C. 495, 499, 67 S.E.2d 672, 675 (1951). "It is not sufficient for a caveator to present 'only general testimony concerning testator's deteriorating physical health and mental confusion in the months preceding the execution of the will, upon which [a caveator] based [her] opinion[] as to [the testator's] mental capacity.' " *In re Will of Smith*, 158 N.C. App. 722, 725, 582 S.E.2d 356, 359 (2003) (citation omitted). A caveator needs to present specific evidence " "relating to testator's understanding of his property, to whom he wished to give it, and the effect of his act in making a will at the time the will was made." " *Id.* (citations omitted).

In re Will of Priddy, 171 N.C. App. 395, 397, 614 S.E.2d 454, 457 (2005).

In the present matter, Caveators submitted a video recording of the execution of the Will which they argue "shows a very confused 90 year old woman who is barely able to respond to her attorney's leading questions and who is not even aware how she is devising her estate." Caveators contend that the following exchange alone

between Pauline and Mr. Knox was sufficient to submit the issue of testamentary capacity to the jury:

> [Mr. Knox:] I think you're leaving Donnie the balance of the farmland, is that correct?
>
> [Pauline:] Well, I, that would be right, I reckon.
>
> [Mr. Knox:] Okay, well, you can't reckon. I want to make certain that is what you're doing. I know you don't know how many acres are left, but—"
>
> [Pauline:] No, I don't. I don't. I really don't know how many acres is [sic] left.
>
> [Mr. Knox:] But other than the home place to Wayne and Harold and giving Bobby the approximately 14 acres, you will the balance of it to Donnie, is that correct? Did I confuse you by the way I asked the question? You're going to give the home place, the amount you surveyed out, the house, to Wayne and Harold. You're going to give Bobby about 14 acres, he's already gotten about 1 acre, is that correct? And the rest of the land that you own is going to Donnie?
>
> [Pauline:] Yeah, what were they supposed to get to start with? 21 acres or 22 acres?
>
> [Mr. Knox:] Well[.]
>
> [Pauline:] But I thought Bobby and Donnie could just have Wayne and Bob—Harold's share.
>
> [Mr. Knox:] OK, have you surveyed out Bobby's acreage, is that what you surveyed out? So you've surveyed out the 14 acres for Bobby, is that correct?
>
> [Pauline:] Yeah, it's been—it's been surveyed.
>
> [Mr. Knox:] So what I'm asking you is that you own a tract of land with a house on it, right?
>
> [Pauline:] Yeah.
>
> [Mr. Knox:] And that house you left to Wayne and Harold, and you surveyed out Bobby's 14 acres, and I want to make certain that you understand with no question that you're leaving Donnie who has an interest in the farm, the balance of the land.
>
> [Pauline:] That might cause some confusion now.

After reviewing the video of the foregoing exchange, we do not share Caveators' opinion that Pauline's statements are probative of her testamentary incapacity. This exchange alone is insufficient to establish that Pauline lacked testamentary capacity at the time she executed the Will. Furthermore, viewed in its entirety, the video does not support Caveators' argument. The continuing colloquy between Pauline and Mr. Knox reveals Pauline stating that she had told two of her sons how she planned to change her will and "they didn't like it." She also stated that Donald told Pauline not to execute a will while he was not there, and Pauline responded, "I think I'm a grown woman." Pauline stated under oath that she knew exactly what she was doing and that her Will contained her wishes for her property. Additionally, Pauline asked Mr. Knox, "Can they protest this and get anywhere?"

Mr. Knox testified in an affidavit that none of Pauline's family members were present when he personally examined Pauline, nor were they present when the Will was executed. Mr. Knox testified further that Pauline expressed to him "that her son, Donnie Seagraves, had looked after her since her husband died and that he had farmed the land his entire life. She indicated that two of her sons, Wayne and Harold, had moved away and she rarely saw them." Finally, Mr. Knox testified that he was "firmly convinced that on September 20, 2004, Pauline Seagraves was of sound mind and was acting of her own free will in executing her Last Will and Testament which set forth her wishes and desire for the disposition of her property." This evidence establishes testamentary capacity, not incapacity.

In addition to the video of the Will execution, Caveators contend the medical evidence discussed supra establishes that Pauline experienced "constant delusions." Contrary to Caveators' contention, however, the medical evidence presented in this matter falls short of establishing Pauline's mental incapacity. Viewed in the light most favorable to Caveators, the medical evidence establishes only that Pauline experienced an "altered level of awareness" when she was hospitalized on 16 April 2005, seven months after she executed the Will, but that her mental state returned to "baseline" the following day.

The only other evidence of Pauline's impaired mental state is the testimony of Linda Seagraves, in which Linda claims Pauline "would sometimes have delusions that she was being visited by her husband and would call Donnie 'Paul.' " Linda's testimony is unsupported by

specific details and is completely lacking in temporal specificity. Without more, such testimony is insufficient to establish Pauline's mental incapacity.

In *In re Estate of Whitaker*, 144 N.C. App. 295, 547 S.E.2d 853 (2001), the only evidence presented by the caveators to rebut the presumption of the testator's capacity was caveators' joint affidavit containing various statements regarding the testator's mental health. *Id.* at 299, 547 S.E.2d at 857. The caveators "presented only general testimony concerning testator's deteriorating physical health and mental confusion in the months preceding the execution of the will, upon which [caveators] based their opinions as to [her] mental capacity." *Id.* at 298, 547 S.E.2d at 857 (internal citation and quotation marks omitted). This Court held that "such evidence fail[ed] to show that a testatrix failed to recognize the natural object of her bounty where the evidence indicates that she not only acknowledged them as such, she explained . . . that she did not want to leave them anything. . . ." *Id.* at 300, 547 S.E.2d at 857 (internal citation and quotation marks omitted). Finally, we noted that the evidence established that the testator "knew the identity of her daughters, knew the identity of the caveators, and that Whitaker affirmatively expressed her desire to disinherit caveators because they 'had not done anything for her.' " *Id.*

As we held in *Whitaker*, Caveators' general testimony concerning Pauline's deteriorating health and mental confusion is insufficient to show that she lacked testamentary capacity at the time she executed her Will. Accordingly, Caveators' argument is overruled.

E. Devisavit Vel Non

[5] Caveators also argue that the trial court erred in denying their motions for directed verdict and judgment notwithstanding the verdict on the issue of *devisavit vel non*. We disagree.

Pursuant to N.C. Gen. Stat. § 31-18.1(a)(4) (2009), an attested written will may be probated "[u]pon a showing that the will has been made self-proved in accordance with the provisions of G.S. [§] 31-11.6." "In order to make a will self-proving, there must be a notary's verification that (1) the testator signed the will in the notary's presence and declared it to be his or her last will and testament and (2) two persons witnessed the testator sign the will." In *re Will of Yelverton*, 178 N.C. App. 267, 271, 631 S.E.2d 180, 182 (2006).

At trial, Ms. Knox testified that she saw Pauline sign the Will, that the execution was witnessed by two attorneys in her office, and "then

it was notarized by Amanda Walker, who was a paralegal in our firm at the time." Caveators contend that Propounder presented no evidence that Amanda Walker was a licensed notary public "authorized to administer oaths under the laws of the state where execution occurs." N.C. Gen. Stat. § 31-11.6 (2009).

Caveators, however, ignore Ms. Knox's testimony that "I do know of my own knowledge that Amanda Walker was one of our senior paralegals and was a notary in Mecklenburg County at that time and notarized numerous documents in our office." Furthermore, Ms. Knox testified that, "Well, I do know of a fact that she was a licensed notary, North Carolina at the time because we checked all of our notaries' certifications in our office." This testimony was sufficient to establish that Amanda Walker was authorized to administer oaths pursuant to N.C. Gen. Stat. § 31-11.6. As the qualification of the notary was Caveators' only challenge to the trial court's denial of their motions for directed verdict and judgment notwithstanding the verdict, Caveators' argument is overruled.

F. Motion to Continue

[6] Finally, Plaintiff argues that the trial court erred in denying his motion to continue the trial on the claims involving the 8.9 acre deed so that Plaintiff could file an immediate appeal from the trial court's entry of partial summary judgment. The trial court denied Plaintiff's motion to continue in open court on 15 September 2008. Plaintiff did not appeal from the trial court's order, and thus Plaintiff has not preserved this issue for appellate review. N.C. R. App. P. 3(a). Accordingly, Plaintiff's argument is dismissed.

III. Conclusion

For the foregoing reasons, the order of the trial court in 07 CVD 96 is reversed, and the order and judgment of the trial court in 06 E 616 are affirmed.

REVERSED in part; AFFIRMED in part.

Judges HUNTER, JR. and BEASLEY concur.

STATE OF NORTH CAROLINA v. JOHN LEWIS WRAY, JR.

No. COA09-304

(Filed 17 August 2010)

1. Appeal and Error— preservation of issues—defendant's right to counsel at trial—no objection required

The Court of Appeals had jurisdiction to hear defendant's argument that the trial court erred in finding that defendant had forfeited his right to counsel at trial and was required to represent himself. Defendant was not required to object to the trial court's ruling in order to preserve the issue for appeal.

2. Constitutional Law— Sixth Amendment right to counsel—not forfeited

The trial court erred by ruling that defendant had "forfeited" his right to representation by counsel. There was evidence in the record that defendant was not competent to represent himself, the record did not establish that defendant engaged in the kind of serious misconduct associated with forfeiture of the right to counsel, defendant's misbehavior was the same evidence that cast doubt on his competence, and defendant was given no opportunity to be heard or to participate in the hearing at which the trial court ruled that he had forfeited his right to counsel.

STEPHENS, Judge, concurring.

Appeal by Defendant from judgment entered 16 July 2008 by Judge Forrest D. Bridges in Cleveland County Superior Court. Heard in the Court of Appeals 3 September 2009.

Attorney General Roy Cooper, by Assistant Attorney General Michael D. Youth, for the State.

Faith S. Bushnaq, for Defendant.

BEASLEY, Judge.

John Wray, Jr. (Defendant) appeals from judgment entered on convictions of possession with intent to sell or deliver cocaine, and having attained habitual felon status. We reverse and remand.

Defendant was arrested in May 2007 for possession with intent to sell or deliver cocaine and sale of cocaine, both offenses alleged to have occurred on 27 September 2006. On 16 July 2007 a Cleveland County Grand Jury indicted him for these offenses and for habitual felon status. Pretrial hearings were conducted on 6 November 2007, 8 January 2008, 5 February 2008, 16 April 2008, and 6 June 2008. Defendant was tried at the 14 July 2008 Criminal Session of Superior Court in Cleveland County, North Carolina. On 15 July 2008 the jury returned a verdict of guilty of possession with intent to sell or deliver cocaine, but was unable to reach a verdict on the sale charge. On 16 July 2008 Defendant was found to have attained habitual felon status. He was sentenced to a term of 136 to 173 months in prison.

Jurisdiction and Standard of Review

[1] After the verdicts were announced, Defendant gave notice of appeal in open court and proper appellate entries were made. An appellate defender was appointed by the trial court to represent Defendant on 22 July 2008. Appellate counsel timely prepared and filed the record on appeal and the briefs in this matter.

This court has jurisdiction over this matter based upon N. C. Gen. Stat. § 15A-979(b). The chief ground of appeal in this matter concerns the trial court's finding that Defendant had forfeited his right to counsel at trial and was required to represent himself. The State argues that the court lacks jurisdiction to hear this issue under the Rules of Appellate Procedure because the matter was not preserved by timely objection to the court's order by Defendant under N.C. R. App. P. 10 (b)(1). "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion[.]" N.C. R. App. P. 10 (b)(1). The State asserts that under *State v. Garcia*, 358 N. C. 382, 410, 597 S.E.2d 724, 745 (2004), even "structural errors" must be preserved. *Id.* at 411, 597 S.E.2d at 745.

For reasons discussed hereinafter, we disagree with the State's position that Defendant was required to object to the court's ruling that Defendant forfeited his right to counsel. As such, we proceed to the merits of Defendant's appeal.

In effect, the State's position would mandate that a defendant, representing himself, would have to object to a trial court's ruling as to the right to counsel, and then represent himself. For a defendant who is exhibiting characteristics of mental illness, this requires a depth of intellectual prowess which a defendant would be unlikely to

possess. Thus, the State's position is impractical and would prevent review by this State's appellate courts of a trial court's decision to deny appointed counsel, even though the right to counsel is a fundamental right under the Sixth Amendment of the United States Constitution and the North Carolina Constitution. *See State v. James*, 111 N.C. App. 785, 789, 433 S.E.2d 755, 757 (1993) (right to counsel is a fundamental right).

Given the procedural posture of this case, and the timing of the United States Supreme Court's decision in *Indiana v. Edwards* 554 U.S. 164, 171 L. Ed. 2d 345 (2008), discussed *infra*, N.C. Gen. Stat. § 15A-1446(d)(19) (2007) of our General Statutes specifically allows review of this issue presented in this appeal. The holding of *Edwards* applies retroactively to the case *sub judice*, because this appeal is before us on direct review. *State v. Zuniga*, 336 N.C. 508, 513, 444 S.E.2d 443, 446 (1994); *see Teague v. Lane*, 489 U.S. 288, 103 L. Ed. 2d 334 (1989). Although it is not impossible, it is unlikely that the trial court applied *Edwards* in this case, even though *Edwards* was decided about a month before Defendant's trial. As a result, we assume that the trial court and Defendant were unaware of the significance of *Edwards* to the proceedings below. Moreover, we need not speculate as to whether the trial court correctly applied the pre-*Edwards* standards, because this proceeding was tried post-*Edwards* and *Edwards* is controlling.

Where significant changes in the law occur during the pendency of a trial, Rule 10 (b)(1) of the N. C. Rules of Appellate Procedure permits review of issues that "by rule or law [are] deemed preserved". N.C. R. App. P. 10(b)(1). Section 15A-1446(d)(19) allows for appellate review of a trial court's order where "[a] significant change in law, either substantive or procedural, applies to the proceeding leading to the defendant's conviction or sentence and retroactive application of the changed legal standard is required." N.C. Gen. Stat. § 15A-1446(d)(19). The State's argument that this Court should not review Defendant's assignment of error on this issue because the Defendant failed to object is overruled.

Because our analysis involves a question of law under section 15A-1446(d), we review this issue *de novo*. *See Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) ("It is well settled that *de novo* review is ordinarily appropriate in cases where constitutional rights are implicated."); *Carson v. Carson*, —— N.C. App. ——, —— 680 S.E.2d 885, 888 (2009) (matters of law reviewed *de novo*).

[2] Defendant argues on appeal that the trial court erred by ruling that he had "forfeited" his right to representation by counsel, on the grounds that there was evidence that Defendant was not competent to represent himself. We agree.

Resolution of the issues raised on appeal requires consideration of the right to counsel, waiver of the right to counsel, forfeiture of the right to counsel, competence to waive the right to counsel, and competence to proceed without counsel.

"The right to counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution. A part of this right includes the right of an indigent defendant to appointed counsel. N.C. Gen. Stat. § 7A-450 [(2007)]." *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000) (citing *State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977), and *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963)). In certain situations a defendant may lose this right:

> Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture. "Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right.". . . "[A] defendant who misbehaves in the courtroom may forfeit his constitutional right to be present at trial," and "a defendant who is abusive toward his attorney may forfeit his right to counsel."

Montgomery, 138 N.C. App. at 524-25, 530 S.E.2d at 69 (quoting *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d. Cir. Pa. 1995), and *United States v. McLeod*, 53 F.3d 322, 325 (11th Cir. Ala. 1995)).

The right to counsel is guaranteed by the Sixth Amendment to the U.S. Constitution. "The construction placed by the United States [S]upreme [C]ourt upon the United States [C]onstitution is binding upon all[.]" *State ex rel. Taylor v. Vann*, 127 N.C. 243, 249, 37 S.E. 263, 265 (1900). "[F]ederal law, as defined by the Supreme Court, may be either a generalized standard enunciated in the Court's case law or a bright-line rule designed to effectuate such a standard in a particular context." *Kennaugh v. Miller*, 289 F.3d 36, 42 (2d Cir. N.Y. 2002).

> Thus in *Gilchrist* [*v. O'Keefe*, 260 F.3d 87 (2d Cir. N.Y. 2001),] we considered whether a state court unreasonably refused to assign

> new counsel to a criminal defendant who physically assaulted his court-appointed attorney. In examining the difference between waiver and forfeiture of the right to counsel, we first noted that the Supreme Court had not spoken on the question of forfeiture of this right[.] . . . We then recognized, however, that the Court, through its general precedents . . . had established that the right to counsel is fundamental. The remaining question . . . [was] whether the state court's failure to appoint new counsel was an unreasonable application of this more general precedent[.] We concluded that it was not.

Kennaugh, 289 F.3d at 43 (citations omitted).

"However, with the exception of decisions of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State." *State v. Adams*, 132 N.C. App. 819, 820, 513 S.E.2d 588, 589 (1999) (citing *State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984)) (holding that state courts should treat "decisions of the United States Supreme Court as binding and accord[] to decisions of lower federal courts such persuasiveness as these decisions might reasonably command").

Although the United States Supreme Court has never directly addressed forfeiture of the right to counsel, the Court's other holdings demonstrate reluctance to uphold forfeiture of a criminal defendant's U.S. Constitutional rights, except in egregious circumstances. For example, in *Illinois v. Allen*, 397 U.S. 337, 25 L. Ed. 2d 353 (1970), the defendant "argue[d] with the judge in a most abusive and disrespectful manner," told the trial court that "you're [the judge] going to be a corpse here" and "tore the file which his attorney had and threw the papers on the floor." When the defendant continued this behavior after being warned, the trial court "ordered the trial to proceed in the petitioner's absence." *Allen*, 397 U.S. at 340-41, 25 L. Ed. 2d at 357. On appeal, the Supreme Court stated:

> Although mindful that courts must indulge every reasonable presumption against the loss of constitutional rights, we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.

Id. at 343, 25 L. Ed. 2d at 357 (citations omitted). More recently, in *Giles v. California*, —— U.S. ——, ——, 171 L. Ed. 2d 488, 494 (2008), the defendant appealed following a trial at which hearsay statements were introduced under a purported "exception" to the Sixth Amendment's confrontation right, based on a defendant's misconduct:

> [The Court] held that the admission of [the witness'] unconfronted statements at Giles' trial did not violate the Confrontation Clause as construed by *Crawford [v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004)] because *Crawford* recognized a doctrine of forfeiture by wrongdoing. It concluded that Giles had forfeited his right to confront [the witness] because . . . his intentional criminal act made [her] unavailable to testify.

Id. The Court "decline[d] to approve an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter" and held that:

> [T]he guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider "fair." It is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values. The Sixth Amendment seeks fairness . . . through very specific means (one of which is confrontation) . . . [and] "does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts."

Id. at ——, 171 L. Ed. 2d at 505 (quoting *Crawford*, 541 U.S. at 54, 158 L. Ed. 2d at 177). We conclude that, notwithstanding the absence of directly controlling United States Supreme Court precedent, the Court has generally applied a presumption against the casual forfeiture of U.S. Constitutional rights.

Additionally, the federal and state courts that have addressed forfeiture have restricted it to instances of severe misconduct.

> In extreme cases, some courts have found that a defendant forfeited the right to counsel[.]. . .n.23 [citing] *United States v. Thomas*, 357 F.3d 357, 363 (3rd Cir. Pa. 2004) (defendant threatened his attorney, was verbally abusive to him, tore up his correspondence, refused to cooperate in producing a witness list, hung up on him during a telephone conversation, [and] attempted to force him to file frivolous claims); *United States v. Leggett*, 162 F.3d 237, 240, 250 (3rd Cir. Pa. 1998) (defendant forfeited right to

> counsel where he punched lawyer, knocked him to the ground, then began to choke, scratch and spit on him); *United States v. Travers*, 996 F. Supp. 6, 17 (S.D. Fla. 1998) (finding forfeiture resulted from defendant's "persistently abusive, threatening, and coercive" dealings with his attorneys . . .); *United States v. McLeod*, 53 F.3d 322, 325-26 (11th Cir. Ala. 1995) (defendant forfeited his right to counsel where he was abusive toward his attorney, threatened to harm him and sue him, and asked him to engage in unethical conduct).

Gladden v. State, 110 P.3d 1006, 1012 (Alaska Ct. App. 2005). A leading case on this issue, noted that "the right to counsel has long been considered 'fundamental.' " *Goldberg*, 67 F.3d at 1097 (citing *Gideon*, 372 U.S. 335, 9 L. Ed. 2d 799) (right to counsel so fundamental that it is binding on the states through the doctrine of incorporation). The Court held that:

> Recognizing the difference between forfeiture and waiver by conduct is important. First, because of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct. . . . We have never explicitly adopted a pure forfeiture analysis[.] . . . Even if we were to accept a forfeiture argument, which as we have noted requires extremely serious misconduct, the facts of this case would not support such a result.

Goldberg, 67 F.3d at 1101-02 (internal quotation marks omitted). The general consensus has been that "an accused may forfeit his right to counsel by a course of serious misconduct towards counsel that illustrates that lesser measures to control defendant are insufficient to protect counsel and appointment of successor counsel is futile. . . . Forfeiture of counsel should be a court's last resort[.]" *King v. Superior Court*, 132 Cal. Rptr. 2d 585, 588 (Cal. 3d Dist. Ct. App. 2003).

The issue was addressed by this Court in *State v. Montgomery*, in which the defendant was successively represented by four different lawyers: two court-appointed attorneys and two privately retained attorneys. When the trial court denied a withdrawal motion by defendant's second privately retained attorney, the defendant twice disrupted court with profanity and received two 30 day jail sentences for contempt of court. During trial, the defendant threw water at his privately retained attorney. He received another 30 day contempt sentence, and was charged with simple assault. In these factual circumstances, this Court held that "defendant forfeited his right to counsel and the trial court did not err by requiring him to proceed *pro se*[,]"

State v. Montgomery, 138 N.C. App. 521, 523, 530 S.E.2d 66, 68 (2000), and held:

> defendant was disruptive in the courtroom on two occasions, resulting in the trial being delayed. . . . [D]efendant refused to cooperate with [retained counsel] and assaulted him, resulting in an additional month's delay in the trial. Such purposeful conduct and tactics to delay and frustrate the orderly processes of our trial courts simply cannot be condoned. Defendant, by his own conduct, forfeited his right to counsel[.]

Id. at 525, 530 S.E.2d at 69 (citations omitted). Thus, North Carolina has also found forfeiture where the defendant engaged in serious misconduct. Other North Carolina cases have used the term "forfeiture" but have addressed factually distinguishable situations that do not depend on a determination that the defendant has engaged in deliberate serious misconduct.

Competence to Waive Representation by Counsel

The United States Supreme Court recently addressed the relationship between the right to self-representation and the competence to waive the right to counsel:

> The two cases that set forth the Constitution's "mental competence" standard, specify that the Constitution does not permit trial of an individual who lacks "mental competency." *Dusky* defines the competency standard as including both (1) "whether" the defendant has "a rational as well as factual understanding of the proceedings against him" and (2) whether the defendant "has sufficient present ability to *consult with his lawyer* with a reasonable degree of rational understanding." *Drope* repeats that standard[.] . . . Neither case considered the mental competency issue presented here, namely, the relation of the mental competence standard to the right of self-representation.

Indiana v. Edwards, 554 U.S. 164, —, 171 L. Ed. 2d 345, 352 (2008) (quoting *Dusky v. United States*, 362 U.S. 402, 402, 4 L. Ed. 2d 824, 824 (1960); and *Drope v. Missouri*, 420 U.S. 162, 171, 43 L. Ed. 2d 103, 113 (1975)). The *Edwards* Court considered the situation of "a criminal defendant [who] has sufficient mental competence to stand trial" and "whether the Constitution permits a State to . . . insist[] upon representation by counsel at trial—on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented. . . . [We] conclude that the answer to this question is yes."

Edwards, 554 U.S. at —, 171 L. Ed. 2d at 355. The Court held that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who . . . are not competent to conduct trial proceedings by themselves." *Id.* at —, 171 L. Ed. 2d at 357.

In *State v. Lane*, 362 N.C. 667, 669 S.E.2d 321 (2008), the Supreme Court of North Carolina applied *Edwards*, remanding to the trial court for determination of whether:

> (1) At the time defendant sought to represent himself in this matter, did he come within the category of "borderline-competent" (or "gray-area") defendants, . . . defined by the Supreme Court of the United States as parties "competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceed ings by themselves"?

Id. at 668, 669 S.E.2d at 322 (citing *Edwards*, 554 U.S. at —, 171 L. Ed. 2d at 357). The Court directed the trial court to proceed to the second issue "if the first inquiry is answered in the affirmative":

> (2) Given that the United States Constitution permits judges to preclude self-representation for defendants adjudged to be "borderline-competent" based on a "realistic account of the particular defendant's mental capacities," the court shall consider whether the court in its discretion would have precluded self-representation for defendant and appointed counsel for him pursuant to *Indiana v. Edwards*, and if so, whether in this case defendant was prejudiced by his period of self-representation.

Id.

In the instant case, we conclude that the record fails to support the trial court's ruling that Defendant had forfeited his right to appointed counsel. We reach this conclusion for several reasons. First, the record includes significant evidence that Defendant may be a person whose competence is in the "gray area" discussed in *Edwards*. Secondly, the record does not establish that Defendant engaged in the kind of serious misconduct associated with forfeiture of the right to counsel. Thirdly, the evidence of Defendant's misbehavior is the same evidence that casts doubt on his competence. Finally, Defendant was given no opportunity to be heard or to

participate in the hearing at which the trial court ruled that he had forfeited his right to counsel.

Defendant's representation by counsel was addressed at several pretrial hearings. Defendant was originally represented by Colin McWhirter, who was appointed on 1 June 2007, and was allowed to withdraw following a hearing conducted 6 November 2007. The record indicates the tape recording of the proceedings was lost, but those in attendance recall that McWhirter was allowed to withdraw because of a breakdown in the attorney-client relationship between Defendant and McWhirter. Following McWhirter's withdrawal, the court appointed D.M. Schweppe to represent Defendant.

A hearing was conducted on 8 January 2008 at which Schweppe moved to withdraw due to a conflict of interest, and informed the trial court that Defendant might be called as a defense witness for another of Schweppe's clients. Defendant responded somewhat incoherently that he "[didn't] know what Mr. Schweppe's talking about[]" and that:

> DEFENDANT: I had a $500 misdemeanor bond for possession. On my motion of discovery it's got habituals with the same offense numbers as on my original papers—make my bond double $10,000. My charge was in district [court]. They took my case out of district court, put in superior on 7/16—true bill indictment. I never got served on this. I mean, I got served a paper from the magistrate. I came to court November 6th. I addressed the Court with the papers I had with nobody's signatures on them—failure to appear. I was out on a $500 bond. I've been in jail 106 days now. I ain't had no probably [sic] cause hearing or nothing. . . . [T]hose people over there in the annex say my paperwork is invalid.

The trial court granted Schweppe's request to withdraw due to a conflict of interest, and appointed John Church to represent Defendant. However, the issues raised by Defendant at this hearing—the nature and severity of the charges against him, the validity of the charging documents filed against Defendant, the circumstances of his incarceration, the legality of his being in jail, the amount of bond, questioning its increase from $500 to $10,000—continued to preoccupy Defendant during successive pretrial hearings.

The next pretrial hearing was conducted on 5 February 2008. At this hearing, Defendant asked the trial court to remove Church as his attorney, because Church had not visited him promptly after being

appointed, and had "talked hateful" to Defendant's wife. Defendant repeatedly insisted that he "don't supposed to be in jail" and told the court that the order for arrest charging him with failure to appear was invalid, that he was not charged as an habitual felon, that he had been indicted twice for the same charge, that the use of "ink pens" on certain charging documents was a violation of law, and that he was "maced and sprayed" while in custody. The trial court and defense counsel discussed the fact that Defendant had written each of them letters every day, asserting that he should not be in jail, and Church complained that Defendant had "accused [him] of entering into a conspiracy with Colin McWhirter and somebody from the District Attorney's office to keep him in jail." Defendant's response did nothing to clarify the legal issues:

> DEFENDANT: . . . I don't supposed to be in jail. Now, if I got all the proof laying right here in front of this table, I don't supposed to be in jail, why is they still—still holding me in jail? I mean, can—can anybody pull up this FTA and see all this condition under these papers? They should state it on there.

Defendant and Church then quarreled in court about when Church visited Defendant in jail, what transpired during the visit, and what Church had told Defendant about his case. Church complained that Defendant "contradicts everything I say, Judge." At this point, the trial court ruled that he would grant Church's request to withdraw and explained to Defendant:

> THE COURT: . . . You have been through three of the best lawyers in Cleveland County. You have demonstrated that you are unwilling or unable to work with them in the preparation of your defense. . . . I believe you're a slow learner for some reason. If you fail to cooperate with your next lawyer, I want you to understand by that failure, you will forfeit your right to court-appointed counsel. Do you understand that?

(emphasis added). Defendant's response did not demonstrate his understanding of the trial court's warning; instead, he raised the subject of self-representation:

> DEFENDANT: Sir, with due respect, I don't want no lawyer. I want to represent myself. Save the State some money. I don't want no lawyer.
>
> . . . .

> THE COURT: Do you understand what a mistake you're about to make?
>
> DEFENDANT: I'm just charged with some misdemeanors, sir.

The trial court again explained to Defendant that he was charged with felony offenses and as an habitual felon, and that he faced up to forty years in prison. The court warned Defendant of the consequences of self-representation, and asked if Defendant understood them. Defendant's answer was still not responsive to the trial court's concerns:

> DEFENDANT: Okay. Since I'm representing myself, I mean, I've been in here. I went to a nurse and a doctor and she knows about that bone disease in my leg—my right ankle. I mean, I've been in here a hundred and forty days . . . [C]an I get a bond reduction? . . . I mean, I don't understand why I'm in jail and I don't supposed to be in jail.

The trial court ruled:

> THE COURT: I'm still going to appoint Mr. Ditz for the time being, to represent him. . . . [I]f he still wants to waive his right to court appointed counsel, I'll let that matter come back in front of another Court[.] . . . In the event that he wishes to represent himself, Mr. Ditz will still be kept on the case as standby counsel, because frankly, it is obvious to me that Mr. Wray is incapable of representing himself effectively.

(emphasis added). Following Ditz's appointment, Defendant wrote letters to the court stating that he did not wish to be represented by Ditz. A hearing was conducted on 16 April 2008 at which Ditz asked the trial court to clarify Defendant's situation with respect to counsel. Ditz explained to the trial court, "Your Honor, if I could give a little bit of background. I've represented Mr. Wray on other cases and have never really had a problem with them. But this case in particular, I'm the fourth attorney." The court explained to Defendant that he did not have a right to demand substitute counsel, and that he needed to choose between self-representation or representation by Ditz. In response, Defendant complained that he "don't supposed to be in jail" and that Ditz would not meet with him in jail. The court tried unsuccessfully to direct Defendant to focus on the question of representation rather than other issues:

> THE COURT: What do you want to do about your attorney situation? Do you want Mr. Ditz to represent you?

> DEFENDANT: He ain't even come and talked to me; how I gone be ready for a trial? I got a bone disease in my right ankle. I can't get no help or nothin' over there. The nurses, they aware of my situation. . . . My order for arrest sheet didn't have no signature of a judge or magistrate. . . .
>
> THE COURT: So what do you want to do about your trial? I can't understand what you want to do about your lawyer situation. . . .
>
> DEFENDANT: I keep my lawyer. I'll work with Mr. Ditz. . . .
>
> MR. DITZ: . . . I have tried to talk to Mr. Wray about his cases. . . . But every time I try to talk to him about the case, he wants to talk about all these other matters that really aren't at issue. . . .

Defendant then engaged the court in further discussion about his arrest for failure to appear and whether he was properly notified of his court date. The trial court reminded Defendant that these matters were "water under the bridge. The question is, do you want a trial tomorrow with Mr. Ditz?" Defendant consulted with Ditz and informed the court that he would be willing to be represented by Ditz, provided he could view the video that law enforcement officers had taken of the drug buy in his case. However, when Defendant learned that he would have to wait one more day to see the video, Defendant inexplicably changed his mind:

> THE COURT: I apologize, I did tell you tomorrow, so does that change anything for you?
>
> DEFENDANT: As a matter of fact, it does. . . . [T]his is my life right here, and I see Mr. Ditz—He's speculating on my case like, me and him, so I'd rather not have.

The trial court explained to Defendant again that his choice was either self-representation or representation by Ditz, and that Defendant might be subject to implied waiver of counsel:

> THE COURT . . . If you can't get along with your lawyer . . . you can be found to have waived your right to court-appointed counsel and you'll be representing yourself, even if you don't want to represent yourself. . . .
>
> DEFENDANT: I don't need Mr. Ditz as my attorney.
>
> THE COURT: Do you want to represent yourself?
>
> DEFENDANT: No.

THE COURT: You want a different court-appointed attorney?

DEFENDANT: Uh-huh (affirmative).

The court required Ditz to continue to represent Defendant, and ordered that the earlier pretrial hearings be transcribed, to facilitate the court's determination of whether Defendant should receive new appointed counsel.

Defendant then told the court that he did not want to be represented by Ditz, and wanted to represent himself. The court reminded Defendant of the possible prison sentence he faced and asked him whether he was certain that he wanted to represent himself, and Defendant replied with a *non-sequitur*. The trial court ruled that, because Defendant kept changing his mind and would not state unequivocally that he wanted to appear *pro se*, the court would not remove Ditz, but would order the earlier hearings transcribed for use at a future hearing.

The last pretrial hearing was conducted almost two months later, on 6 June 2008. The hearing was in response to Ditz's motion to withdraw as Defendant's counsel, and the transcript consists primarily of the court's ruling. The trial court recited the history of Defendant's representation by McWhirter, Schweppe, Church, and Ditz, and noted that Schweppe had withdrawn due to a conflict of interest, but that McWhirter and Church were allowed to withdraw due to deterioration in the attorney-client relationship. The court stated that Ditz was "being removed from the case, once again because there has been a total deterioration in the attorney/client relationship." The trial court ruled in relevant part that:

> THE COURT: The apparent source of the conflict . . . relates to the Defendant's apparent obsession with certain matters pertaining to the circumstances of his being in custody. . . . Defendant insists upon contending that he should not be in jail, that he is actually charged with a misdemeanor rather than a felony, that the order for his arrest was invalid because it was not signed . . . that a computer print out shows . . . different court dates, and therefore he should not have been . . . arrest[ed] for his failure to appear on one of those court dates.

(emphasis added). The trial court stated that Defendant had been warned that his failure to "cooperate with counsel in the preparation of his defense" could result in "a forfeiture of his right to counsel" and that:

> THE COURT: In any event, the Defendant's conduct has been of such a nature so as to amount to and justify a forfeiture of his right to court-appointed counsel. . . .
>
> The Court concludes that this Defendant, by his conduct, has now forfeited his right to court-appointed counsel . . . and that the Defendant proceed to trial *pro se*. . . .
>
> Since I'm entering this order, I'm directing that the matter be rescheduled for trial during a term of court which I will preside over, simply because I don't want to subject any other judge to the horrors of having to deal with Mr. Wray representing himself. . . .
>
> (addressing Defendant): What that means is, is you're going to get to represent yourself[.] . . But I'm not finding that you have waived counsel and you're choosing to represent yourself, I'm finding that by your conduct you have forfeited your right to court-appointed counsel. You have misbehaved to the point that I'm taking away your right to a court-appointed lawyer.

(emphasis added).

We conclude that the record raises questions about Defendant's competence to represent himself. Defendant appeared not to grasp his legal situation and was unable to focus on pertinent legal issues. Indeed, the trial court explicitly stated it was "obvious" that Defendant was incapable of representing himself effectively.

Further, although the record indicates that Defendant was disagreeable, suspicious, and obsessed with legally irrelevant matters pertaining to his incarceration and may have indeed been disruptive and inappropriate by his gestures, tone and manners by which he addressed his counsel and the court, the record before us does not establish that Defendant's difficult personality constituted the kind of serious misconduct that would justify allowing his counsel to withdraw on the grounds that Defendant had forfeited his right to counsel. There is no evidence that Defendant used profanity in court, threatened counsel or court personnel, was abusive, or was otherwise inappropriate. We conclude that the record fails to establish that Defendant engaged in serious misconduct. Moreover, the evidence of Defendant's misbehavior is the same evidence that is pertinent to the issue of his competence. That is, the Defendant's misbehavior consists of his "apparent obsession" with irrelevancies, rather than abusive or disruptive actions.

In this regard, we note that the trial court did not articulate the nature of Defendant's misbehavior.

> Defendant's next contention is that there is no showing in the record as to what specific acts and conduct were relied upon by the court as the basis for the action taken. This contention also has merit. . . . The basis of the order appears to be the court's finding: "[T]hat the defendant in this case, by his words and conduct, refuses to cooperate with his court-appointed attorney[.]" . . . Whether the 'words and conduct' refer solely to defendant's act of voluntarily standing, other acts or statements not reflected by the record, or a combination of circumstances is not made to appear.

State v. Dickerson, 9 N.C. App. 387, 390-91, 176 S.E.2d 376, 378 (1970) (citations omitted).

Finally, we are concerned about the summary nature of the court's ruling. The record establishes that, at the time the trial court ordered Defendant to proceed *pro se*, the Defendant had not been in court for seven weeks, and had not been before Judge Bridges for four months. No sworn testimony or evidence was introduced at this hearing, and the court did not question Defendant about his current understanding of his legal situation. Defendant had no chance to respond to his counsel's motion to withdraw, and was provided no opportunity to testify or otherwise participate in the hearing before the trial court's order. Defendant's participation in the hearing consisted entirely of the following remarks, made after the trial court ruled that he had lost the right to appointed counsel:

> DEFENDANT: Your Honor, you said I'm going to represent myself, right?
>
> THE COURT: Yes, sir.
>
> DEFENDANT: Well, could I put in for a file for bond reduction on my case? I mean, I got a bone disease in my leg and the nurse over there in the ward—I've brought this up several times in front of you. I mean, you can put me on house arrest. I live right behind the courthouse. I'll come to court.

We are aware of this Court's recent holding in *State v. Boyd*, —— N.C. App. ——, 682 S.E.2d 463 (2009), *dis. review denied*, N.C. ——, 691 S.E.2d 414 (2010). In *Boyd*, defendant's first appointed counsel was allowed to withdraw when counsel "refus[ed] to file motions for recusal of one superior court judge and subpoena of another." *Id.*

at ——, 682 S.E.2d at 465. Defendant then filed a motion seeking recusal of a trial judge, "which stated in its entirety" that the judge "Has [sic] Fixed One Trial Already, I Have Proof[.]" *Id.* His second appointed trial counsel also asked to be allowed to withdraw, and filed a motion that stated in relevant part:

> 4. That during [our] meeting the Defendant was totally uncooperative with the undersigned counsel to the extent said counsel was unable to prepare any type of defense to the charges.
>
> 5. That during said meeting the Defendant stated to the undersigned counsel that he did not wish for said counsel to represent him at the trial of these matters and requested of counsel to ask the Court to be released in these matters.
>
> . . . .
>
> 9. . . . Defendant came into the undersigned counsel's office, whereupon, said counsel again, attempted to explain to the Defendant that his case would be tried, by a jury . . . and in order for said counsel to properly represent the Defendant he needed to assist counsel in the preparation of his defense. Whereas, the Defendant repeatedly told the undersigned counsel that "this case was not going to be tried," and that if counsel could not represent him in the way he (the Defendant) wanted him to, then he (the Defendant) did not wish for this counsel to represent him in these matters. The Defendant further stated to the undersigned counsel that he (the Defendant) "did not trust" the undersigned counsel and did not wish for said counsel to represent him at the trial of these matters.

Id. On this record, the trial court granted defense counsel's motion to withdraw and "instructed defendant that his trial was to begin at two o'clock that afternoon, and that he would have to represent himself if he could not locate counsel. When defendant did not procure private counsel, the trial court appointed Mr. Barnes as standby counsel and the trial proceeded." *Id.* This Court found no error in the trial court's failure to make a formal inquiry into the defendant's waiver of counsel.

We note significant differences between *Boyd* and this case:

Mr. Boyd explicitly threatened that the "case was not going to be tried," showing an intention to disrupt the court's schedule.

The record indicates that, at the time the trial court ruled on counsel's motion to withdraw, Mr. Boyd supported the motion.

> Mr. Boyd filed apparently frivolous motions accusing the trial court of misconduct.
>
> The trial court engaged in a dialog with Mr. Boyd before ruling.
>
> The opinion in *Boyd* does not indicate an issue regarding the defendant's competence to waive counsel.
>
> This Court chose to employ a "forfeiture" analysis in the Boyd opinion, . . . but the trial court did not use the term.

In contrast, in the instant case (1) there is no evidence that Defendant threatened to disrupt or prevent trial of his case; (2) Defendant was given no opportunity to ratify or reject his counsel's motion to withdraw, or to be heard on the matter; (3) there is evidence raising the issue of Defendant's competence to proceed *pro se*; and, (4) the trial court expressly ruled that Defendant forfeited the right to counsel by his misbehavior. We conclude that *Boyd* does not control the outcome of the instant case.

We conclude that (1) the record contains evidence, not least of which is the trial court's explicit statement, suggesting that Defendant may not have been competent to proceed *pro se*; (2) Ditz had represented Defendant in prior cases and Defendant had not exhibited the confusion nor lack of cooperation as in the present matters; (3) the record does not support a conclusion that Defendant engaged in misconduct sufficiently egregious to warrant forfeiture of his right to counsel; (4) the record evidence of misbehavior is essentially the same as the evidence of Defendant's possible incompetence; and (5) Defendant had no opportunity to be heard, present evidence, or respond to counsel's motion at the hearing wherein the trial court ruled that he had forfeited the right to counsel. We are well aware that the trial court may not have had the benefit of the U.S. Supreme Court's decision of *Indiana v. Edwards*. On the facts of this record, we conclude that the trial court erred by granting defense counsel's motion to withdraw and in ruling that Defendant had forfeited his right to counsel. We reverse and remand for further proceedings consistent with this opinion.

Reversed and Remanded.

Judge HUNTER, JR. concurs.

Judge STEPHENS concurs in separate opinion.

STEPHENS, Judge, concurring.

In light of the decision of the United States Supreme Court in *Indiana v. Edwards*, 554 U.S. 164, 171 L. Ed. 2d 345 (2008), I concur fully in the result reached by the majority in this case. I also concur in most of the reasoning of the majority in reaching this result. I write separately for two reasons: (1) to acknowledge the exceptionally difficult position of our trial judges in assessing and dealing with situations like those created by behavior similar to the behavior of this defendant, and (2) to express my lack of the conviction apparently felt by the majority that this defendant's behavior was motivated by his mental incompetence. While I agree that defendant's misconduct, based on the decisions of this Court and our Supreme Court upon which the majority relies, was not so serious as to lead to forfeiture of his right to counsel, I am not convinced that defendant did not engage in purposeful misbehavior designed to thwart the trial court in the orderly conduct of its business. My view that defendant acted with full awareness of the impropriety of his antics, at least on some occasions, is informed by the following description of his conduct at the 5 February 2008 pretrial hearing, over which Judge Bridges presided:

Defendant repeatedly interrupted Judge Bridges, despite being admonished time and again by Judge Bridges to "let me finish a sentence without interrupting me[.]"

Defendant persisted in arguing with the attorney who was representing him at the time about the way the attorney was handling the case. This attorney no longer wanted to try to help defendant. He explained to Judge Bridges that "I don't know if I want to listen to [defendant] over the course of this trial with the kind of language he's used toward me and the kind of attitude he's displayed toward[] me." He advised that defendant had accused him of "entering into a conspiracy" with defendant's previous attorney and the district attorney to keep defendant in jail. Following an extended argument between defendant and the attorney over when the attorney had visited defendant, the attorney told the court, "See, he contradicts everything I say, Judge."

Defendant made gestures with his hands when the Judge was addressing him on at least two occasions. In addition, he "appeared to make faces" when the Judge was talking to him. This behavior was independently observed and recorded by the court reporter.

I conclude from the transcript of this hearing that, at least on this occasion, defendant was disruptive and inappropriate. I further conclude from this transcript that defendant's misconduct and misbehavior resulted from more than his apparent obsession with his belief that he was wrongly incarcerated and charged only with misdemeanors. I cannot conclude that the evidence establishes only that defendant may be mentally incompetent. I conclude that there is some evidence that he was intentionally engaging in inappropriate behavior designed to disrupt court proceedings. As for defendant's behavior at the other pretrial hearings, which the majority characterizes as defendant's "'apparent obsession' with irrelevancies, rather than abusive or disruptive actions[,]" I note that at the appellate level, we are at a serious disadvantage to completely understand what goes on in a trial courtroom. The cold written record on appeal does not adequately capture the live environment of the courtroom, nor can we on this level, without the aid of experienced and observant court reporters who have the wherewithal to record non-verbal conduct, fully appreciate the demeanor and body language that helps the trial judge decide whether misconduct represents incompetence or shenanigans.

Behavior such as that at issue in this case puts our trial judges in frustrating and tenuous positions when they must try to maintain order in the courtroom and nonetheless assure that the rights of those who appear before them charged with crimes are not abridged. In my view, the able and respected trial judges who tried to deal with this defendant's behavior displayed enormous patience and bent over backward to ensure that defendant understood not only the nature of the charges against him, but also the consequence of his behavior regarding the issue of his representation—an issue which defendant made difficult, at best, for the judges to handle. Indeed, despite defendant's behavior at the 5 February 2008 pretrial hearing and the fact that, by that time, defendant "ha[d] been through three of the best lawyers in Cleveland County[,]" Judge Bridges appointed yet another attorney to assume defendant's representation. Not surprisingly to this writer, that attorney-client relationship did not last either.

Accordingly, while I concur that, under *Edwards*, certain of defendant's behavior raises an issue of defendant's competence to represent himself which must be addressed by the trial court, and while I reluctantly agree that not all of defendant's conduct was "sufficiently egregious to warrant forfeiture of his right to counsel[,]" I sympathize with this State's trial judges who must walk that fine line

between the right and the need to exercise control over courtroom proceedings, and the obligation to protect to the utmost the rights of criminal defendants in their courtrooms, especially the paramount right to competent legal representation.

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

No. COA09-370-2

(Filed 17 August 2010)

Motor Vehicles— driving while impaired—willful refusal to submit to chemical analysis—driving privileges improperly suspended

The trial court erred in upholding the Division of Motor Vehicle's revocation of petitioner's North Carolina driving privileges. A person's refusal to submit to chemical analysis must be willful in order to suspend that person's driving privileges and a form DHHS 3908 is not a substitute for a "properly executed affidavit" indicating that a person's refusal to submit to chemical analysis was willful, as required by N.C.G.S. § 20-16.2(c1). Because the Division did not receive a properly executed affidavit required by subsection (c1), the Division had no authority to revoke petitioner's driving privileges pursuant to N.C.G.S. § 20-16.2.

Appeal by Petitioner from order entered 22 October 2008 by Judge Henry E. Frye, Jr. in Superior Court, Wilkes County. This matter was originally heard in the Court of Appeals 27 October 2009. An opinion was filed by this Court on 19 January 2010, vacating the order of the Wilkes County Superior Court and remanding to the North Carolina Division of Motor Vehicles. Respondent filed a Petition for Rehearing on 23 February 2010. An order granting the Petition for Rehearing was filed on the 19th day of March 2010.

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

Attorney General Roy Cooper, by Assistant Attorney General Kathryne E. Hathcock, for Respondent-Appellee.

McGEE, Judge.

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

Officer Ratliff testified he then went to a magistrate to execute an affidavit concerning Petitioner's refusal to submit to a chemical analysis. Form DHHS 3907, titled "Affidavit and Revocation Report," was created by the Administrative Office of the Courts for this purpose. Form DHHS 3907 includes fourteen sections with an empty box before each section. The person swearing to the accuracy of the affidavit, having been "first duly sworn," checks the boxes relevant to the circumstances, and then signs the affidavit in front of an official authorized to administer oaths and execute affidavits. Section fourteen of form DHHS 3907 states: "The driver willfully refused to submit to a chemical analysis as indicated on the attached [form] ☐ DHHS 3908, ☐ DHHS 4003." 3 Officer Ratliff testified that he did not check the box for section fourteen and the affidavit he sent to the Division did not have the box for section fourteen checked. Therefore, the "Affidavit and Revocation Report" sent to the Division did not state that Petitioner had willfully refused to submit to a chemical analysis.

Upon receipt of the form DHHS 3907 sent by Officer Ratliff, the Division revoked Petitioner's North Carolina driving privileges. Petitioner requested a review hearing to contest the revocation,[1] and

1. Which served to postpone the suspension of Plaintiff's driving privileges until the outcome of the hearing had been determined. N.C.G.S. § 20-16.2(d). By order of the trial court, the postponement of the suspension was continued pending the outcome of Plaintiff's appeal.

a hearing was conducted on 20 November 2007 before Administrative Hearing Officer P.M. Snow. At this hearing, it was discovered that the copy of form DHHS 3907 received by the Division had an "x" in the section fourteen box. All the other boxes marked on the form DHHS 3907 contained check marks, not "x's." Petitioner's copy of the form DHHS 3907 did not contain the "x" in the box preceding section fourteen.

Hearing Officer Snow decided that the revocation of Petitioner's North Carolina driving privileges was proper, and Petitioner appealed to Wilkes County Superior Court, which affirmed the decision of Hearing Officer Snow. Petitioner then appealed to this Court. Our Court held that the Division lacked the authority to revoke Petitioner's North Carolina driving privileges, because the Division never received an affidavit indicating that Petitioner had willfully refused to submit to a chemical analysis of his blood alcohol level. We therefore vacated the order of the superior court affirming the decision of Hearing Officer Snow, and remanded to the Division for reinstatement of Petitioner's North Carolina driving privileges. *Lee v. Gore*, ___ N.C. App. ___, 688 S.E.2d 734 (2010) (filed 19 January 2010). Respondent filed a petition for rehearing in the matter on 23 February 2010, requesting our Court to reconsider certain issues. By order filed 19 March 2010, we granted Respondent's petition, limited to certain issues, and directed Respondent and Petitioner to submit briefs addressing the limited issues included in our order. We now file an amended opinion in this matter in light of the additional arguments presented in the parties' supplemental briefs. This opinion supersedes and replaces the opinion filed 19 January 2010, *Lee v. Gore*, ___ N.C. App. ___, 688 S.E.2d 734 (2010).

Analysis—Willful Refusal

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

N.C. Gen. Stat. § 20-1 (2006)[2] states: "The Division of Motor Vehicles of the Department of Transportation is established. This Chapter sets out the powers and duties of the Division." Therefore,

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

we must look to N.C. Gen. Stat. § 20-1 *et seq*. for the full scope of the duties and powers conferred upon the Division by the General Assembly. N.C. Gen. Stat. § 20-16.2 (2006) is the statute delineating the powers of the Division when a person has been charged with an implied-consent offense, and that person refuses to submit to a chemical analysis.

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

> the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license.

N.C.G.S. § 20-16.2 (emphasis added).[3]

Respondent argues that our Court should look to the title of N.C.G.S. § 20-16.2: "Implied consent to chemical analysis; mandatory revocation of license in event of refusal; right of driver to request analysis[,]" and to section (a) of that statute, which mandates that a person authorized to perform a chemical analysis must inform the suspect of certain rights before administering the chemical analysis. N.C.G.S. § 20-16.2(a) states, in part:

> Basis for Officer to Require Chemical Analysis; Notification of Rights.—Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense. Any law enforcement officer who has reasonable grounds to believe that the person charged has committed the implied-consent offense may obtain a chemical analysis of the person.
>
> Before any type of chemical analysis is administered the person charged shall be taken before a chemical analyst authorized to administer a test of a person's breath or a law enforcement officer who is authorized to administer chemical analysis of the breath, who shall inform the person orally and also give the person a notice in writing that:
>
> (1) You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your drivers license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.

N.C.G.S. § 20-16.2(a). Respondent contends that the Division is empowered to suspend driving privileges when "a person refuses to submit to chemical analysis[.]" Respondent's presentation of the requirements of N.C.G.S. § 20-16.2 seems to negate any requirement that the refusal be "willful." However, Respondent also states that N.C.G.S. § 20-16.2(d) "is nothing more than a statutory embodiment

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3. N.C. Gen. Stat. § 20-22 (2006) mandates that the provisions of N.C.G.S. § 20-1 *et seq.* apply equally to non-residents and residents alike.

of due process protections for persons accused of willfully refusing chemical analysis, and [the Division] is not prohibited from suspending a person's driving privilege without receipt of a 'properly executed affidavit.' "

The appellate decisions of our Courts make it clear that a person's refusal to submit to chemical analysis must be willful in order to suspend that person's driving privileges. *See Etheridge v. Peters*, 301 N.C. 76, 81, 269 S.E.2d 133, 136 (1980) (citation omitted) (willful refusal permitting suspension of driving privileges must include actions constituting " 'a conscious choice purposefully made' "); *Steinkrause v. Tatum*, — N.C. App. —, —, 689 S.E.2d 379, 381 (2009) ("N.C. Gen. Stat. § 20-16.2 . . . authorizes a civil revocation of the driver's license when a driver has *willfully* refused to submit to a chemical analysis.") (emphasis added); *State v. Summers*, 132 N.C. App. 636, 643-44, 513 S.E.2d 575, 580 (1999) ("A defendant's refusal to submit to the intoxilyzer test after being charged with DWI can give rise to civil proceedings to revoke defendant's driver license, but *only* if the refusal is a 'willful refusal.' *See* N.C. Gen. Stat. § 20-16.2.") (emphasis added); *In re Suspension of License of Rogers*, 94 N.C. App. 505, 510, 380 S.E.2d 599, 602 (1989) (matter remanded for findings regarding whether the petitioner's refusal to submit to chemical analysis was willful).

Respondent implicitly argues, however, that mere refusal of a chemical analysis must imply willfulness, and the Division may therefore revoke a person's driving privileges based solely on the fact that that person refused to take the test. If we were to adopt Respondent's reading of N.C.G.S. § 20-16.2, no proof of a "willful" refusal would be required for the Division to revoke a person's driving privileges; however, pursuant to N.C.G.S. § 20-16.2(c1)(5) a sworn affidavit indicating that person willfully refused chemical analysis would be required to trigger the Division's obligation to notify that person that his driving privileges had been suspended. Such a result cannot have been the intent of the General Assembly. *In re Mitchell-Carolina Corp.*, 67 N.C. App. 450, 452-53, 313 S.E.2d 816, 818 (1984) ("The rules of statutory construction provide that 'the language of a statute will be interpreted so as to avoid an absurd consequence. . . .' 'Where a literal reading of a statute "will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." ' ") (internal citations omitted).

Nor are we convinced by Respondent's argument that, because the form DHHS 3908 was sent to the Division along with the affidavit, and the form DHHS 3908 was marked "refused," the requirement that the sworn affidavit include an affirmative statement of Petitioner's willful refusal was satisfied.[4] Although form DHHS 3907 includes boxes to check indicating that either form DHHS 3908 or form DHHS 4003 is attached, nowhere in N.C. Gen. Stat. § 20-16.2 is it required that a form DHHS 3908 (or a form DHHS 4003) be incorporated in the affidavit mandated under N.C.G.S. § 20-16.2(c1). We hold that a form DHHS 3908 is not a substitute for a "properly executed affidavit" as required by N.C. Gen. Stat. 20-16.2(c1). This is not to indicate, however, that a form DHHS 3908, or other relevant documents, may not be attached to a properly executed affidavit. We hold only that the affidavit, in whatever form submitted, must indicate that a person's refusal to submit to chemical analysis was willful.

N.C.G.S. § 20-16.2 required that Officer Ratliff complete an affidavit indicating that Petitioner had willfully refused the chemical analysis, and that Officer Ratliff, before an "official authorized to administer oaths and execute [affidavits]," swear under oath to the truth of the information included in the affidavit. Officer Ratliff quite admirably and honestly informed Hearing Officer Snow that Officer Ratliff failed to check the box indicating Petitioner had willfully refused to submit to the chemical analysis before he executed the affidavit in front of the magistrate.[5] Therefore, the requirements of N.C.G.S. § 20-16.2(c1) were not met.

Respondent further argues that our Court did not properly consider the findings of fact from Hearing Officer Snow's 20 November 2007 decision. Respondent first contends that one of Hearing Officer Snow's rulings on a motion made by Petitioner was a finding of fact. In denying Petitioner's motion, Hearing Officer Snow ruled in part:

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4. Respondent states elsewhere in his brief that: "Although the test ticket states that the test was 'REFUSED,' because it does not include the word 'WILLFULLY,' the test ticket—and by extension, the affidavit—arguably does not state 'that the person willfully refused to submit to a chemical analysis.' N.C.G.S. § 20-16.2(c1)(5)." Respondent appears to state that the affidavit, along with the form DHHS 3908, does not constitute an unequivocal affirmation that Petitioner's refusal was "willful."

5. Respondent contends that the testimony of Officer Ratliff was ambiguous concerning whether he checked the box indicating Petitioner had willfully refused to submit to chemical analysis. Respondent's brief does not include citation to any testimony indicating ambiguity on this point. Our Court's thorough review of the record, including Officer Ratliff's testimony, shows no ambiguity. Officer Ratliff, by his clear and unambiguous statements, did not check the box on the affidavit indicating Petitioner willfully refused to submit to chemical analysis.

"The affidavits received from Officer Ratliff were Division exhibits One and Two. Exhibit Two, DHHS 3908, which is referred to in the affidavit . . . clearly shows a refusal stamped on the test ticket. Thereby giving the [D]ivision authority to revoke [P]etitioner's driving privilege." This ruling, which includes conclusions of law, is not a finding of fact. The only fact contained in this ruling is that the DHHS 3908 in this case was clearly marked "refused."

Respondent next directs our Court to findings of fact made by the superior court. First, these findings of fact are not relevant to Respondent's contention that we failed to properly consider the findings of Hearing Officer Snow, in that the findings were not made by Hearing Officer Snow. Second, the superior court is directed by statute to act as an appellate court, not as a trial court, in its review. N.C.G.S. § 20-16.2(e) states:

> Right to Hearing in Superior Court.—If the revocation for a willful refusal is sustained after the hearing, the person whose license has been revoked has the right to file a petition in the superior court for a hearing on the record. The superior court review *shall be limited to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license.*

N.C.G.S. § 20-16.2(e) (emphasis added). Because the superior court was acting as an appellate court, our Court does not review the additional findings of fact made by the superior court, which are surplusage, *id.*; *see also Meza v. Division of Soc. Servs.*, 364 N.C. 61, 65-73, 692 S.E.2d 96, 99-104 (2010); *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658-65, 599 S.E.2d 888, 894-98 (2004); *State v. Hensley*, —— N.C. App. ——, ——, 687 S.E.2d 309, 311 (2010); *Dew v. State ex rel. North Carolina DMV*, 127 N.C. App. 309, 310-11, 488 S.E.2d 836, 837 (1997), and Respondent had no right to appeal those findings. *See State v. Washington*, 116 N.C. App. 318, 320-21, 447 S.E.2d 799, 801 (1994).

Respondent argues that Hearing Officer Snow never "found that Officer Ratliff's affidavit was improperly executed." However, it is the province of our Court to determine the correctness of a hearing officer's conclusions of law; also, Respondent's contention is factually mistaken. Hearing Officer Snow included the following in his order:

> *Motion Number Two:* [Petitioner] contended the revocation was not valid because there were no facts supporting reasonable grounds that the petitioner had committed an implied-consent offense on the affidavit (Division Exhibit One). Therefore, he would offer a motion to rescind the revocation based on lack of reasonable grounds.
>
> *Ruling:* Motion Denied.
>
> *If the affidavits were the only evidence in this case the motion may be valid.* However, the officer's testimony is the state[']s best evidence in this case. *The lack of facts supporting reasonable grounds on the affidavit* will carry little weight in determining if reasonable grounds were present. (Emphasis added).

Respondent further argues that because N.C.G.S. § 20-16.2 states that the required sworn affidavit must include "[t]he results of any tests given or that the person willfully refused to submit to a chemical analysis[,]" (emphasis added), under N.C.G.S. § 20-16.2(c1)(5), no willful refusal was required to revoke Petitioner's driving privileges.

Respondent interprets the language of N.C.G.S. § 20-16.2(c1)(5) to mean that as long as the affidavit indicates that at least *one* of the two conditions has been met, the affidavit is sufficient. Respondent argues that, because the Division received a form DHHS 3908 that included "the results of any tests given," the requirements of N.C.G.S. § 20-16.2(c1)(5) were satisfied. First, in the present case *no* test was given. Petitioner refused to submit to chemical analysis. Second, were we to adopt Respondent's interpretation, the second part of N.C.G.S. § 20-16.2(c1)(5) would be rendered meaningless. *Wilkins v. N.C. State Univ.*, 178 N.C. App. 377, 379, 631 S.E.2d 221, 223 (2006) ("It is well established that 'a statute must be construed, if possible, to give meaning and effect to all of its provisions.' ") (internal citation omitted). Third, our appellate courts have consistently conducted a "willfulness" analysis when considering the issue of refusal to submit to chemical analysis. *See Etheridge*, 301 N.C. at 81, 269 S.E.2d at 136; *Steinkrause*, —— N.C. App. at ——, 689 S.E.2d at 381 ("N.C. Gen. Stat. § 20-16.2 . . . authorizes a civil revocation of the driver's license when a driver has *willfully* refused to submit to a chemical analysis.") (emphasis added); *Summers*, 132 N.C. App. at 643-44, 513 S.E.2d at 580 ("A defendant's refusal to submit to the intoxilyzer test after being charged with DWI can give rise to civil proceedings to revoke defendant's driver license, but *only* if the refusal is a 'willful refusal.' *See* N.C. Gen. Stat. § 20-16.2.") (emphasis added); *In re Suspension*

of License of Rogers, 94 N.C. App. 505, 510, 380 S.E.2d 599, 602 (1989) (matter remanded for findings regarding whether the petitioner's refusal to submit to chemical analysis was willful).

In the 20 November 2007 hearing conducted pursuant to N.C.G.S. § 20-16.2(d), Hearing Officer Snow concluded in his "Findings of Fact, Conclusions of Law and Decision" that any failure by Officer Ratliff to check the box for section fourteen on the affidavit could not have prejudiced Petitioner, and did not deprive the Division of the authority to revoke Petitioner's license. Hearing Officer Snow concluded, as a matter of law, that Petitioner willfully refused to submit to a chemical analysis and that "the Order of Revocation of the driving privilege of [Petitioner] is sustained."

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

When construing N.C.G.S. § 20-16.2, our Court has stated:

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

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

N.C.G.S. § 20-16.2 states in relevant part:

> (c1) Procedure for Reporting Results and Refusal to Division.—Whenever a person refuses to submit to a chemical analysis, a

> person has an alcohol concentration of 0.15 or more, or a person's drivers license has an alcohol concentration restriction and the results of the chemical analysis establish a violation of the restriction, the law enforcement officer and the chemical analyst *shall* without unnecessary delay *go before an official authorized to administer oaths and execute an affidavit*(s) stating []:
>
> . . . .
>
> (5) The results of any tests given or that the person willfully refused to submit to a chemical analysis.
>
> . . . . The officer shall immediately mail the affidavit(s) to the Division. If the officer is also the chemical analyst who has notified the person of the rights under subsection (a), the officer may perform alone the duties of this subsection.

N.C.G.S. § 20-16.2(c1) (emphasis added). "*Upon receipt of a properly executed affidavit required by subsection (c1)*, the Division shall expeditiously notify the person charged that the person's license to drive is revoked for 12 months[.]" N.C.G.S. § 20-16.2(d) (emphasis added).

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

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

The dissenting opinion would affirm the revocation of Petitioner's driving privileges and relies most directly on *Ferguson v. Killens*, 129 N.C. App. 131, 497 S.E.2d 722 (1998), where the Division failed to notify the petitioner that his license had been revoked until ninety-nine days after the petitioner had willfully refused submission to chemical analysis. *Id.* at 141, 497 S.E.2d at 727. In *Ferguson*, the

petitioner argued that his license should be reinstated because the Division had violated the mandate of N.C.G.S. § 20-16.2(d), requiring the Division, "[u]pon receipt of a properly executed affidavit required by subsection (c1), [to] expeditiously notify the person charged that the person's license to drive is revoked[.]" The *Ferguson* Court held that, even assuming the Division had violated the notification requirement of N.C.G.S. § 20-16.2(d), the petitioner's argument that his license should be reinstated failed for the following reasons: (1) the petitioner had not shown how any failure on the part of the Division to timely notify him of the revocation had prejudiced the petitioner, and (2) "G.S. 20-16.2(d) states that a license revocation for willful refusal must be sustained if the five conditions specified are met[,]" and "[n]one of these conditions has anything to do with 'expeditious notice.' " *Ferguson*, 129 N.C. App. at 141, 497 S.E.2d at 728.

The facts in *Ferguson* are distinguishable from the present case, and *Ferguson* does not control our analysis or our holding in this matter. First, the petitioner in *Ferguson* made no showing concerning how untimely notification had prejudiced him in any manner, because all the requirements for revoking the petitioner's license pursuant to N.C.G.S. § 20-16.2 had been met. There was no argument in *Ferguson* that the affidavit providing the Division with the authority to revoke the petitioner's license was defective in any way. Therefore, the petitioner's license had been properly revoked.[6] Any untimely notification of the revocation did not deprive the petitioner of the opportunity to challenge the bases for the revocation, nor did the petitioner demonstrate how an untimely notification could have prejudiced him in any other manner.

In the case before us, we have held that a necessary *requirement* for the revocation of Petitioner's driving privileges had not been met: the Division never received an affidavit indicating Petitioner had willfully refused chemical analysis. This corresponds to one of the five requirements for revocation for willful refusal referenced in *Ferguson*, specifically N.C.G.S. § 20-16.2(d)(5): "The person willfully refused to submit to a chemical analysis." Unlike the facts in *Ferguson*, the prejudice to Petitioner in this case is clear: Petitioner had a right to drive in the State of North Carolina. Because the Division erred by revoking Petitioner's North Carolina driving privileges without first receiving a properly executed affidavit stating Petitioner

6. Though, due to the petitioner's request for a hearing, the revocation was suspended until the outcome of the hearing had been determined. N.C.G.S.

had willfully refused chemical analysis, Petitioner's right to drive in North Carolina was to be suspended by the Division.

More importantly, unlike the situation in *Ferguson*, the five requirements necessary for a hearing officer to uphold a revocation or suspension, N.C.G.S. §§ 20-16.2(d) (1) to (5), are not relevant to our analysis. We have held that the Division had no authority to suspend Petitioner's driving privileges in the first instance because the Division never received "a properly executed affidavit required by subsection (c1)[.]" N.C.G.S. § 20-16.2(d). Because Petitioner's driving privileges were suspended without authority, those sections of N.C.G.S. § 20-16.2(d) applying to Petitioner's right to a hearing before the Division, and those sections of N.C.G.S. § 20-16.2(d) applying to the requirements for sustaining the suspension, including N.C.G.S. §§ 20-16.2(d) (1) to (5), are not relevant in this case. As Petitioner's driving privileges should not have been suspended in the first instance, no hearing before the Division should have ever occurred.

The dissenting opinion concludes that N.C. Gen. Stat. § 20-16.2(d) provides the right to a hearing and the hearing satisfies the constitutional due process requirement. The dissenting opinion agrees with Hearing Officer Snow that, even if it was an employee of the Division who " 'checked the block for item fourteen as counsel [for Petitioner] contended, this is not a fatal error as [P]etitioner has a remedy through the hearing process.' " As we have stated above, no cause for a hearing was ever properly triggered, as the Division never had the authority to suspend Petitioner's driving privileges.

We are unprepared to conclude that an error prejudicing Petitioner may be cured through a hearing that should not have occurred, because it was triggered by a suspension of Petitioner's driving privileges that should not have happened.[7] The Division did not have authority to suspend Petitioner's driving privileges based upon the affidavit it received from Officer Ratliff. Were we to hold otherwise, we would render meaningless the requirement that the Division first receive an affidavit attesting to a petitioner's willful refusal before suspending that petitioner's driving privileges based upon a willful refusal. The Division would be permitted to suspend any per-

7. For example, an appellate court may reverse or modify the final decision of an administrative body if the appellate court determines the final agency decision has prejudiced a petitioner because the final decision was "[m]ade upon unlawful procedure[.]" N.C. Gen. Stat. § 150B-51 (b)(3) (2009); *In re Appeal of Ramseur*, 120 N.C. App. 521, 523-24, 463 S.E.2d 254, 256 (1995).

son's driving privileges for willful refusal without first obtaining any evidence or attestation that a willful refusal had occurred. That person would then have to request a hearing in order to compel the State to present any evidence justifying the suspension. If the petitioner did not request a hearing, his driving privileges could be suspended without the Division ever having received any evidence of willful refusal. We do not believe this is contemplated in the clear language of N.C.G.S. § 20-16.2, nor do we believe this could have been the intent of the General Assembly in drafting that statute. We do not believe the General Assembly intended to grant the Division the authority to suspend driving privileges, or revoke a driver's license, without any indication that one of the bases for suspension or revocation required by N.C.G.S. § 20-16.2(c1) had occurred.

Finally, Petitioner argues in his brief that suspension of his driving privileges violated his due process rights under the United States Constitution. Because we have revoked the suspension of Petitioner's driving privileges on other grounds, we do not address Petitioner's due process argument. We do, however, restate that we find a properly executed affidavit stating willful refusal to be a prerequisite to any authority of the Division to suspend driving privileges based upon willful refusal. We therefore cannot agree with the dissenting opinion's apparent conclusion that the affidavit requirement is a mere "administrative procedure" in no manner "affecting the process due a petitioner." We find the facts of the cases cited in the dissenting opinion in support of this position distinguishable from the facts of our case.[8] We do not find that the holdings in the cases cited by the dissenting opinion compel a different result than we reach in this opinion.

We hold that the Division did not receive "a properly executed affidavit required by subsection (c1)" and, therefore, the Division had no authority to revoke Petitioner's driving privileges pursuant to N.C.G.S. § 20-16.2. Absent the authority to revoke Petitioner's license, there was also no authority pursuant to N.C.G.S. § 20-16.2 for the Division to conduct a review hearing, or for appellate review in the superior court.

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8. For example, in *In re Rogers*, 94 N.C. App. 505, 380 S.E.2d 599 (1989), cited in the dissent, our Court stated that "notification of a right is of little value if there is no remedy for the denial of the right. In the present case, however, any violation of petitioner's rights was unrelated to her alleged decision to refuse the [breathalyser] test." *Id.* at 508, 380 S.E.2d at 600. In the case before us, the violation of Petitioner's rights was directly related to his alleged willful refusal to submit to chemical analysis.

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

Vacated and remanded.

Judge BRYANT concurs.

Judge WYNN dissents with a separate opinion.

WYNN, Judge, dissenting.

In light of my reconsideration of this matter upon rehearing, I am inclined to dissent and afford our Supreme Court the opportunity to address the issue of first-impression presented by this case: What remedy is Petitioner entitled to where a law enforcement officer fails to follow the statutory mandate to "execute an affidavit(s) stating that: . . . the person willfully refused to submit to a chemical analysis"? N.C. Gen. Stat. § 20-16.2 (c1) (2009). The majority concludes that because the Division of Motor Vehicles ("DMV") did not receive a properly executed affidavit as mandated by the statute, the DMV was without authority to revoke Petitioner's driving privileges.

The issue here is what remedy Petitioner is entitled to for the error alleged. While the statutory provision here construed employs the word "shall," it does not prescribe the remedy for a violation, nor does it predicate the authority of the DMV on compliance with its terms. *See* N.C. Gen. Stat. § 20-16.2(d)(2009). In determining the consequences of such an error, it is worth considering that our cases distinguish between violations of administrative procedure and those affecting the process due to a petitioner.

This distinction was recognized in *Rice v. Peters, Comr. of Motor Vehicles*, 48 N.C. App. 697, 269 S.E.2d 740 (1980). The petitioner in *Rice* directed this Court to the statutory provision requiring the arresting officer to request that the person arrested submit to a breathalyzer test. *Id.* at 700, 269 S.E.2d at 742. Although the trial court's order indicated that petitioner refused to take the breathalyzer test, the petitioner argued that the trial court erred because its order lacked a "finding that he was requested to submit to the breathalyzer test after being informed of his statutory rights." *Id.* This Court affirmed the revocation, stating "[w]e do not believe the North

Carolina General Assembly intended by its enactment of G.S. 20-16.2(c) to prescribe such a rigid sequence of events as contended by [petitioner]." *Id.*

> The administrative procedures provided for in G.S. 20-16.2 are designed to promote breathalyzer tests as a valuable tool for law enforcement officers in their enforcing the laws against driving under the influence while also protecting the rights of the State's citizens. We hold the purpose of the statute to be fulfilled when the petitioner is given the option to submit or refuse to submit to a breathalyzer test and his decision is made after having been advised of his rights in a manner provided by the statute.

Id. at 700-01, 269 S.E.2d at 742 (citations and emphasis omitted).

We faced a similar problem in *In re Suspension of License of Rogers*, 94 N.C. App. 505, 380 S.E.2d 599 (1989). "Under G.S. 20-16.2(a)(6), petitioner had the right to select a witness to view the testing procedures . . . ." *Id.* at 507, 380 S.E.2d at 600. The record in Rogers showed that, although the actual testing occurred in the presence of the witness, the breathalyzer operator performed a simulator test prior to the witness's arrival. *Id.* The superior court ruled that "this statutory provision required the breathalyzer operator to perform the simulator test in the witness's presence and the failure to do so precluded respondent from revoking petitioner's license for her refusal to take the test." *Id.*

This Court disagreed, citing *Rice*. "In reviewing this revocation, the trial court could properly consider only those issues specified in G.S. 20-16.2(d) . . . ." *Id.* at 508, 380 S.E.2d at 600. We acknowledged that "notification of a right is of little value if there is no remedy for the denial of the right. In the present case, however, any violation of petitioner's rights was unrelated to her alleged decision to refuse the test." *Id.*

> Considerations of fairness and accuracy are not present . . . when a motorist refuses to take a test for wholly unrelated reasons. Under G.S. 20-16.2(a), a motorist impliedly consents to chemical analysis if he is charged with impaired driving. Revocation under the statute is a penalty for failing to comply with a condition for the privilege of possessing a license; it is not punishment for the crime for which the motorist was arrested.

Id. at 509, 380 S.E.2d at 601.

We again addressed the issue in *Ferguson v. Killens*, 129 N.C. App. 131, 497 S.E.2d 722, *appeal dismissed*, *disc. review denied*, 348 N.C. 496, 510 S.E.2d 382 (1998). The petitioner in *Ferguson* argued that, because the letter notifying him of the revocation was dated a full ninety days after the alleged refusal occurred, the "DMV did not 'expeditiously notify' him of his one-year license revocation as required by G.S. 20-16.2(d), [and] the revocation must be rescinded." *Id.* at 141, 497 S.E.2d at 727. This Court found that the alleged error was not prejudicial.

> Even if we assume that petitioner was not "expeditiously notif[ied]" as required by the statute, petitioner has made no showing that his failure to be expeditiously notified has prejudiced him. In addition, G.S. 20-16.2(d) states that a license revocation for willful refusal must be sustained if the five conditions specified are met. None of these conditions has anything to do with "expeditious notice." Petitioner's argument fails.

Id. at 141, 497 S.E.2d at 727-28.

The result in *Ferguson* is directly at odds with the majority's conclusion in the present case.[9] We held in *Ferguson* that the DMV's failure strictly to comply with the first sentence of subsection (d)—the same provision as is here construed—did not undermine the revocation of driving privileges when the petitioner could not demonstrate any prejudice. *See id.* Petitioner in the present case has not demonstrated that he was prejudiced in any way by the improperly executed affidavit that was received by the DMV.

Moreover, as we noted in *Ferguson*, the statute limits consideration at the hearing to specifically enumerated factors. *Id.* at 141, 497

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9. I read *Ferguson* differently from the majority primarily because the relevant statute prohibits the revocation of a driver's license pending the hearing, if the driver requests such a hearing. *See* N.C. Gen. Stat. § 20-16.2(d) ("If the person properly requests a hearing, the person retains his or her license, unless it is revoked under some other provision of law, until the hearing is held, the person withdraws the request, or the person fails to appear at a scheduled hearing."). Thus, because the petitioner in *Ferguson* requested a hearing, his license could not have been revoked under the statute until the conclusion of that hearing. *See Ferguson*, 129 N.C. App. at 134, 497 S.E.2d at 724 ("Petitioner requested an administrative review by a DMV hearing officer."). As in *Ferguson*, Petitioner in this case requested a hearing and thus retained his license pending a hearing. I therefore conclude that, like the petitioner in *Ferguson*, Petitioner suffered no prejudice except that attendant upon the hearing, at which he was given the opportunity to contest the revocation of his driving privileges on the basis of the willfulness of his refusal.

S.E.2d at 728. "None of these conditions has anything to do with 'expeditious notice.'" *Id.* Similarly, in this case, none of these conditions has anything to do with the sufficiency of the affidavit. *See* N.C. Gen. Stat. § 20-16.2(d). It follows that Petitioner can not assert the insufficiency of the affidavit as a ground upon which to invalidate the proposed revocation of his driving privileges.

I conclude by pointing out that N.C. Gen. Stat. § 20-16.2(d) provides the right to a hearing. "Such a hearing satisfies the constitutional due process requirement." *Montgomery v. North Carolina Dept. of Motor Vehicles*, 455 F. Supp. 338 (W.D.N.C. 1978), *aff'd*, 599 F.2d 1048 (4th Cir. 1979). On the basis of the precedents considered above, I agree with the DMV hearing officer who first heard Petitioner's case that "[e]ven if an employee of the Division checked the block for item fourteen as counsel contended, this is not a fatal error as the petitioner has a remedy through the hearing process." Accordingly, because I would affirm the revocation of Petitioner's driving privileges, I respectfully dissent and present to the Respondent the opportunity to appeal this issue as a matter of right to our Supreme Court.

STATE OF NORTH CAROLINA v. MANUEL MENDOZA, DEFENDANT

No. COA09-327

(Filed 17 August 2010)

Constitutional Law— Fifth Amendment—defendant's silence —improperly admitted—no plain error

The trial court erred in allowing the State to introduce evidence during its case in chief of defendant's pre-arrest silence and his post-arrest, pre-*Miranda* silence. As the only permissible purpose for such evidence was impeachment and defendant had not yet testified, the testimony was improperly admitted as substantive evidence of defendant's guilt. Moreover, the State's use of defendant's post-arrest, post-*Miranda* warnings silence was flatly forbidden. However, the error in admitting this testimony did not rise to the level of plain error given the substantial evidence pointing to defendant's guilt.

Appeal by defendant from judgment entered 10 September 2008 by Judge James Floyd Ammons, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 16 November 2009.

Attorney General Roy Cooper, by Assistant Attorney General Angel E. Gray, for the State.

Leslie C. Rawls for defendant-appellant.

GEER, Judge.

Defendant Manuel Mendoza appeals from the judgment convicting him of trafficking in cocaine by possession and trafficking in cocaine by transportation. Defendant contends that the trial court erred, at various points throughout the trial, in permitting the State to introduce evidence about defendant's silence both before and after he was arrested. Because defendant did not object to any of this testimony at trial, the plain error doctrine applies.

We agree with defendant's argument that the trial court erred in allowing the State to introduce evidence during its case in chief of defendant's pre-arrest silence and his post-arrest, pre-*Miranda* warnings silence. The only permissible purpose for such evidence is impeachment. Since defendant had not yet testified at the time the State presented the evidence, we conclude that this testimony could not have been used for impeachment, but instead was improperly admitted as substantive evidence of defendant's guilt. Likewise, the State's use of defendant's post-arrest, post-*Miranda* warnings silence was flatly forbidden under *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91, 96 S. Ct. 2240 (1976). Based on our review of the record, however, we have concluded that the error in admitting this testimony did not rise to the level of plain error given the substantial evidence pointing to defendant's guilt.

Facts

On 14 November 2007, at approximately 2:20 p.m., State Highway Patrol Trooper James F. Davis was dispatched to a one-car accident in Wayne County near the entrance of a subdivision. By the time he arrived, emergency medical technicians were already preparing to transport a passenger, Christie Dubois, from the scene. Trooper Davis did an initial visual assessment of the scene and noticed that the vehicle had some minor damage. He then spoke with defendant, who was waiting nearby and was the driver and owner of the car. Defendant explained that he had run off the road and hit a ditch. He had then pulled the car up to the entrance of the subdivision to get it out of the way. Trooper Davis issued defendant a citation for driving left of center.

Trooper Davis called for a tow truck and began filling out an accident report while he and defendant waited for the truck to arrive. During this time frame, Trooper Davis and defendant did not discuss much aside from questions related to completing the accident report, although, at some point, defendant mentioned that he and Dubois had been "moving some personal belongings" when the accident occurred.

When the tow truck arrived and Trooper Davis told defendant that his vehicle would be towed, defendant "seemed to get a little nervous, . . . kind of fidgety" and said that he "wanted to get some items out of it." Defendant went to the driver's side of the car and removed a plastic grocery bag. Trooper Davis noticed that defendant was trying to conceal the bag from him, putting it behind his back. Concerned for his safety, Trooper Davis approached and took the bag from defendant. Aside from some of defendant's clothes, the bag contained what Trooper Davis estimated to be at least a couple thousand dollars, all in bills. The actual amount was later determined to be $2,950.00: $600.00 in 100 dollar bills, $1,760.00 in 20 dollar bills, $490.00 in 10 dollar bills, and $100.00 in five dollar bills.

Immediately after Trooper Davis took the bag of clothes and money, he saw what he believed to be cocaine in two clear plastic bags "lying on the seat" in the back of the car. Trooper Davis informed defendant that he was under arrest for possession of drugs, handcuffed him, and sat him down beside the car. Trooper Davis then began to do a "general search of what [he] could see right at that point." On the floorboard behind the driver's seat, he found a blue cooler with more cocaine inside. After that, Trooper Davis called for more troopers to assist him.

Trooper Jock Smith and Trooper Williams arrived at approximately 3:00 p.m. The three troopers conducted a search of defenant's vehicle and found a total of 11 bags of cocaine, two digital scales, two crack pipes, and a box of .380 ammunition in the back seat of the vehicle.

Trooper Davis turned defendant over to Trooper Smith for processing. Trooper Smith advised defendant of his *Miranda* rights, searched him for weapons, and sat him in his patrol car. When Trooper Smith asked defendant where he got the cocaine, defendant replied that "he was in big trouble and he needed a lawyer before any questioning." Trooper Smith did not ask defendant any further questions.

Trooper Smith transported defendant to the Highway Patrol Station where he completed the chain of custody form and logged in the evidence, which included the money, cocaine, cooler, scales, pipes, and ammunition. Defendant was then taken to the Wayne County Detention Center. The money was eventually seized by the United States Marshals. The cocaine taken from defendant's vehicle was tested at the SBI crime lab and confirmed to be 339.3 grams of powder cocaine.

On 2 June 2008, defendant was indicted on one count of trafficking in cocaine by possession and one count of trafficking in cocaine by transportation. At trial, he testified on his own behalf. He explained that at the time of the accident, he was self-employed, doing sheet rock work and building garages and sheds. He was generally paid in cash for his jobs, and he also usually paid cash to the people who worked for him. Defendant said he informed Trooper Davis that the money in the grocery bag was "from working."

Defendant also explained that at the time of the accident, he was giving Dubois a ride because she had recently broken up with her boyfriend and had been evicted from the trailer where she lived. Defendant and Dubois had loaded some of her belongings into his vehicle and were on their way to pick up her daughter from school. According to defendant, when Dubois saw Trooper Davis arrive at the scene, she told defendant to run. He denied that the cocaine or cooler belonged to him. When asked if the cocaine belonged to Dubois, defendant claimed he had never seen it and did not know whose it was. He also said he had never seen the cooler before that day, but he believed Dubois put it in the car. He denied knowing that the scales were in the car.

The jury returned guilty verdicts on both charges on 10 September 2008. The trial court sentenced defendant to a term of 70 to 84 months imprisonment. Defendant timely appealed to this Court.

Discussion

Defendant argues on appeal that the trial court erred when it permitted the State to question certain witnesses about defendant's failure, prior to trial, to offer any explanation for the money and cocaine found in his car. Defendant contends that the admission of this testimony violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§ 19 and 23 of the North Carolina Constitution. The challenged testimony includes evi-

dence of defendant's pre-arrest silence presented during the State's case in chief; evidence of his post-arrest, pre-*Miranda* warnings silence presented during the State's case in chief; evidence of his pre-arrest silence presented during the State's rebuttal case; and evidence of his post-arrest, post-*Miranda* warnings silence presented during both the State's case in chief and cross-examination of defendant.

"Whether the State may use a defendant's silence at trial depends on the circumstances of the defendant's silence and the purpose for which the State intends to use such silence." *State v. Boston*, 191 N.C. App. 637, 648, 663 S.E.2d 886, 894, *appeal dismissed and disc. review denied*, 362 N.C. 683, 670 S.E.2d 566 (2008). In *Boston*, this Court explained that a defendant's pre-arrest silence and post-arrest, pre-*Miranda* warnings silence may not be used as substantive evidence of guilt, but may be used by the State to impeach the defendant by suggesting that the defendant's prior silence is inconsistent with his present statements at trial. *Id.* at 649 n.2, 663 S.E.2d at 894 n.2. A defendant's post-arrest, post-*Miranda* warnings silence, however, may not be used for any purpose. *Id.* at 648-49, 663 S.E.2d at 894. *See also Doyle*, 426 U.S. at 619, 49 L. Ed. 2d at 98, 96 S. Ct. at 2245 (holding that "use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment"). Because different law applies to the different circumstances surrounding the testimony challenged by defendant, we analyze each circumstance separately.

Defendant did not, however, object to the admission of any of this testimony at trial, and we, therefore, review the admission of the testimony only for plain error.[1] The plain error rule applies

> "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

1. Defendant, when describing factors that this Court should consider in determining whether any error in this case is prejudicial, cites to *Boston*. In *Boston*, however, the issue had been preserved for appeal, and this Court was required to determine whether the alleged error was harmless beyond a reasonable doubt. *Id.* at 652, 663 S.E.2d at 896. *Boston* did not address plain error.

> judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513, 103 S. Ct. 381 (1982)). In addition, "the plain error rule may not be applied on a cumulative basis, but rather a defendant must show that each individual error rises to the level of plain error." *State v. Dean*, 196 N.C. App. 180, 194, 674 S.E.2d 453, 463, *appeal dismissed and disc. review denied*, 363 N.C. 376, 679 S.E.2d 139 (2009).

Testimony about Defendant's Pre-Arrest Silence Elicited During State's Case in Chief

Defendant challenges several portions of the State's direct examination of Trooper Davis presented during its case in chief that related to defendant's pre-arrest silence. Defendant points to testimony by Trooper Davis regarding defendant's employment:

> Q. For the information regarding the—during the wreck report, did you have to get any information from Mr. Mendoza about what type of work he did or anything along those lines?
>
> A. No. There was nothing on the accident report that requires that. I didn't—I didn't question him about his employment or anything.

This testimony conveyed information about the accident report form and Trooper Davis' obligations with respect to completing the form. The testimony comments only on Trooper Davis' lack of questioning and not on defendant's pre-arrest silence and, therefore, was not erroneously admitted.

Defendant also points to the following testimony of Trooper Davis about defendant's silence:

> Q. When you found the cocaine, the first amount of cocaine, on the back seat, and you told Mr. Mendoza that he was being placed under arrest for the possession of drugs, did he act surprised?
>
> A. He didn't say anything, as I recall.
>
> . . . .

> Q. Did Mr. Mendoza ever—when you first seized the money from Mr. Mendoza, did he ever have an explanation for you as to why he was in possession of that large amount of money?
>
> A. No, ma'am.

This commentary on defendant's pre-arrest silence falls squarely under *Boston* and *Jenkins v. Anderson*, 447 U.S. 231, 65 L. Ed. 2d 86, 100 S. Ct. 2124 (1980).

In *Boston*, this Court determined, in a case of first impression, that "a defendant's Fifth Amendment right against self-incrimination, unlike a defendant's Fifth Amendment right to counsel, does not attach solely upon custodial interrogation" and held, therefore, that "a proper invocation of the privilege against self-incrimination is protected from prosecutorial comment or substantive use, no matter whether such invocation occurs before or after a defendant's arrest." 191 N.C. App. at 651, 663 S.E.2d at 896. Although the Court concluded that a defendant's pre-arrest silence may not be used for substantive purposes, the Court noted that it remains "clear that the State may use a defendant's pre-arrest silence for impeachment purposes if the defendant chooses to testify at trial." *Id.* at 651 n.4, 663 S.E.2d at 896 n.4. *Accord Jenkins*, 447 U.S. at 240-41, 65 L. Ed. 2d at 96, 100 S. Ct. at 2130 (holding "use of prearrest silence to impeach a defendant's credibility does not violate the Constitution").

The State essentially argues that because defendant ultimately testified, *Boston* and *Jenkins* do not apply. The State, however, cites no authority for the proposition that the State may present impeachment evidence in advance of a defendant's actually testifying. As this Court has previously recognized, the "main purpose of impeachment is to discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony." *Sterling v. Gil Soucy Trucking, Ltd.*, 146 N.C. App. 173, 178, 552 S.E.2d 674, 677 (2001). The State has failed to explain how Trooper Davis' testimony could have achieved the purpose of impeaching defendant's statements at trial without defendant's already having testified. *See also Jenkins*, 447 U.S. at 238, 65 L. Ed. 2d at 94, 100 S. Ct. at 2129 ("[I]mpeachment *follows* the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial." (emphasis added)); *Boston*, 191 N.C. App. at 649 n.3, 663 S.E.2d at 894 n.3 (noting State's purpose in eliciting testimony about defendant's pre-arrest silence "was clearly not to impeach" defendant's credibility or alibi where defendant did not testify at trial and presented no other evidence on her own behalf).

Alternatively, the State argues that, under *State v. Alkano*, 119 N.C. App. 256, 458 S.E.2d 258, *appeal dismissed*, 341 N.C. 653, 465 S.E.2d 533, 467 S.E.2d 898 (1995), the State's questions were permissible "to show the extent of [defendant's] unsolicited, spontaneous utterances." In *Alkano*, as this Court pointed out, the defendant "did not choose to remain silent. Without any interrogation whatever by the officers, defendant spontaneously made several inculpatory statements after being arrested." *Id.* at 260, 458 S.E.2d at 261. The Court held that the State was entitled to ask questions not only about what the defendant did say, but also about what he did not say during his spontaneous statements:

> The questions and the officers' responses concerning defendant's lack of explanation immediately followed their testimony concerning the unsolicited statements defendant *did* make during the fifteen minutes that it took to arrest defendant and transport him to the station. This line of questioning in-court by the prosecutor served only to show the extent of defendant's spontaneous utterances. We do not see how in-court questioning of the officers on the *extent* of defendant's statements violated either his federal or state constitutional right against compelled self-incrimination.

Id.

Here, defendant made a single post-arrest, post-*Miranda* warnings statement about being "in big trouble" and invoking his right to remain silent and his right to counsel in response to Trooper Smith's interrogation. The statements testified to by Trooper Davis occurred prior to the single utterance about being "in big trouble" and shed no light on the extent of that single utterance—stating the obvious—made a significant time later and in response to questioning by Trooper Smith. Instead, the State was simply doing what *Boston* forbids: pointing out to the jury that defendant chose to remain silent when in Trooper Davis' presence rather than provide the explanation proffered at trial. Consequently, *Alkano* is not applicable here.

In sum, Trooper Davis' testimony regarding defendant's silence was admitted as substantive evidence during the State's case in chief and not for the purpose of impeachment. Further, the testimony was not admitted to show the extent of any spontaneous statements. Therefore, under *Boston* and *Jenkins*, the admission of this testimony was error.

Since defendant did not object to the erroneous admission of this testimony, plain error applies. Our review of the record indicates that

abundant evidence pointed to defendant's guilt. A total of 339.3 grams of cocaine was found in defendant's car, which he was driving. This amount of cocaine was the most that Trooper Smith had seen in his 30 years with the Highway Patrol. The cocaine was in two plastic bags lying on the back seat, as well as in several plastic bags inside a cooler on the floorboard behind the driver's seat. Since Trooper Davis was able to easily spot the two bags lying on the back seat, a jury would likely conclude that defendant must have known the bags were there.

Along with the cocaine, the troopers discovered two crack pipes, two digital scales, and a box of .380 automatic ammunition. Trooper Davis explained to the jury that weighing drugs is the only reason people use the type of scales found in the car and that weighing the drugs matters because "[t]hat's how they get paid." Defendant was also in possession of $2,950.00 at the time of his arrest, approximately $800.00 of which was in his wallet and the remainder of which was in a plastic grocery bag that also contained some of defendant's clothing. Defendant tried to conceal the bag and money from Trooper Davis. Moreover, after learning that his car would be towed, defendant became "nervous" and "fidgety" and asked Trooper Davis if he could remove some items from the car.

Defendant had little explanation for the presence of the cocaine and drug paraphernalia in his car. Although defendant testified that he knew that clothing, blankets, a basket, and a television found in the car belonged to Dubois, he claimed that he did not know that the cocaine or scales were in the car, that he did not know who the cocaine belonged to, and that he "couldn't say" the cocaine belonged to Dubois. He did not provide any explanation for the crack pipes or the ammunition. Moreover, although defendant claimed that the money was related to his construction work—he was paid in cash and paid his workers in cash—defendant relied solely on his own testimony and did not present evidence from any customer or employee to corroborate his assertion.

In addition, once defendant chose to testify, in order to present his defense, he opened the door for the State to use his pre-arrest silence to impeach him. Therefore, the following cross-examination of defendant was properly permitted to impeach defendant's testimony:

> Q. And . . . you told—you didn't tell Trooper Davis that you got it from building garages and doing work for people, did you?

A. He didn't ask.

Q. But you did realize that he was seizing your money; is that correct?

A. No.

Q. He took it from you, didn't he?

A. But I didn't know I wasn't going to get it back.

In light of defendant's cross-examination testimony about his pre-arrest silence, defendant cannot show that the admission of Trooper Davis' testimony about defendant's pre-arrest silence tilted the scales against him.

Defendant argues, however, that the admission of Trooper Davis' testimony about defendant's pre-arrest silence forced defendant to later take the stand in his own defense. We disagree. In order to present his theory of the case—that the cocaine actually belonged to someone else—defendant had to take the stand. None of the State's witnesses presented any evidence that the cocaine belonged to Dubois or even that defendant was helping her move her belongings. Trooper Davis merely testified that he was aware that defendant and Dubois were "moving some stuff from one place to another."

Defendant was the only person who suggested to the jury that the cocaine belonged to someone else, such as Dubois. Without defendant's testimony, his counsel would have been unable to argue such a theory in closing argument. *See State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986) (noting counsel may argue facts in evidence and inferences which may be drawn from those facts, but counsel is prohibited from arguing facts not supported by evidence). Accordingly, absent defendant's testimony, no alternate explanation for the cocaine's being in his car could have been offered. *See also Alkano*, 119 N.C. App. at 262, 458 S.E.2d at 262 ("We cannot see how the officers' testimony about defendant's failure to give further explanatory statements made it any more necessary for him to testify than was already necessary to refute the officers' testimony on his inculpatory statements.").

Considering the sum of the evidence pointing to defendant's guilt and his own cross-examination, we believe that there is no reasonable probability that the jury would have returned a different verdict if Trooper Davis' testimony about defendant's failure to provide an explanation for the cocaine or money had not been admitted. Therefore, there was no plain error.

Testimony about Defendant's Post-Arrest, Pre-*Miranda* Warnings Silence Elicited During State's Case in Chief

Defendant also contends that the trial court erred in allowing the State to question Trooper Davis and Trooper Smith about defendant's silence after Trooper Davis arrested defendant but before Trooper Smith read him his *Miranda* rights:

> Q. Anyway, after Trooper Smith and Trooper Williams get there, while you're waiting on them, did Mr. Mendoza say anything to you or make any statements to you?
>
> [Trooper Davis]. (Negative indication.)
>
> . . . .
>
> Q. While you and Trooper Smith and Trooper Williams were searching Mr. Mendoza's vehicle, did he make any comments to you?
>
> [Trooper Davis]. No, ma'am, after—after I placed him under arrest I don't remember having any conversation with him.
>
> . . . .
>
> Q. When you first got there and he was there out on the scene and you all were searching and you were taking custody of the cocaine, did he ever make any statements about: That's not mine; I don't know how that got there?
>
> [Trooper Smith]. No, ma'am.

Like defendant's pre-arrest silence, defendant's post-arrest, pre-*Miranda* warnings silence could only be used for the purpose of impeachment and not, as occurred here, in the State's case in chief. *Boston*, 191 N.C. App. at 648, 663 S.E.2d at 894. Further, we cannot see how this silence—coming well before any spontaneous utterance by defendant—falls within the scope of *Alkano*. We, therefore, hold that this admission was error. For the same reasons set forth above, however, admission of the testimony did not rise to the level of plain error.

Testimony about Defendant's Pre-Arrest Silence Elicited During State's Rebuttal

Defendant next challenges testimony elicited from Trooper Davis by the State during its rebuttal case:

> Q. . . . When you took the bag, the plastic bag that had the money in it from the Defendant, I believe you testified that you did not know what was in the bag initially, as he was trying to conceal it from you. Did he say anything to you about what was in the bag as you took it and you began to open up the bag—
>
> A. No, ma'am.
>
> Q. —to see what was inside?
>
> A. He didn't make any comment to me about it.
>
> Q. After you saw that it was a large amount of money, did Mr. Mendoza ever make any comments to you?
>
> A. No, he didn't.
>
> Q. Did he make any comments about where the money had come from?
>
> A. No, ma'am.

It is unclear whether this testimony would be permitted by *Boston* and *Jenkins*. The State does not cite any authority that suggests referring to a defendant's silence in rebuttal necessarily constitutes using it for impeachment rather than as substantive evidence in the absence of a limiting instruction. Nor does defendant cite any authority for his contention that admission of such testimony does not constitute proper impeachment.

We need not, however, resolve that issue given the evidence described above and defendant's cross-examination. We hold that even if the admission of this testimony did not amount to impeachment, any prejudice did not rise to the level of plain error.

Testimony about Defendant's Post-Arrest, Post-*Miranda* Warnings Silence Elicited During State's Case in Chief and State's Cross-Examination of Defendant

Finally, defendant argues that the trial court erred in permitting the State to question Trooper Smith and defendant about defendant's post-arrest, post-*Miranda* warnings silence. Specifically, defendant challenges the following exchange that occurred during the State's direct examination of Trooper Smith:

> Q. When you had Mr. Mendoza in your vehicle, either after you had read him his rights or as you brought him down to the detention center for processing, did he ever make any voluntary statements to you?

> A. No, ma'am, just that he—he was in big trouble and that he needed a lawyer before any questioning.
>
> Q. I'm sorry, so you said that he was in big trouble? Did you say that to him or did he say that to you?
>
> A. He said that himself. Mr. Mendoza said that he was in big trouble and that he needed a lawyer before questioning.

Defendant also challenges the State's extensive questioning of defendant during cross-examination about (1) his failure to attempt to get his money back by contacting the DEA, explaining that he earned the money legitimately, and offering a list of names of people for whom he had worked; (2) his failure to tell the troopers about the source of the money; and (3) his failure to tell anyone, before trial, Christie Dubois' name or the name of her boyfriend.

Defendant does not specifically challenge the reference to his statement that he was "in big trouble," but we agree that the admission of the other challenged testimony concerning defendant's post-arrest, post-*Miranda* warnings silence, including defendant's invoking his right to refuse to answer questions until he had a lawyer,[2] violated *Doyle*. The United States Supreme Court held in *Doyle*, 426 U.S. at 618, 49 L. Ed. 2d at 98, 96 S. Ct. at 2245, that when a person under arrest has been advised of his *Miranda* rights, which include the right to remain silent, there is an implicit promise that the silence will not be used against that person. It is, therefore, a violation of a defendant's rights under the Fourteenth Amendment to the United States Constitution to subsequently impeach the defendant on cross-examination by questioning him about the silence. *Id.* at 619, 49 L. Ed. 2d at 98, 96 S. Ct. at 2245. *See also State v. Hoyle*, 325 N.C. 232, 235-37, 382 S.E.2d 752, 753-54 (1989) (applying *Doyle* and holding State's questioning detectives and defendant about defendant's post-arrest, post-*Miranda* warnings silence violated right to remain silent); *State v. Shores*, 155 N.C. App. 342, 351, 573 S.E.2d 237, 242 (2002) (same), *disc. review denied*, 356 N.C. 690, 578 S.E.2d 592 (2003). Thus,

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2. *See State v. Dix*, 194 N.C. App. 151, 155, 669 S.E.2d 25, 28 (2008) ("It is well settled that, during custodial interrogation, once a suspect invokes his right to counsel, all questioning must cease until an attorney is present or the suspect initiates further communication with the police."), *appeal dismissed and disc. review denied*, 363 N.C. 376, 679 S.E.2d 140 (2009). Defendant does not separately argue that the trial court erred in allowing testimony that he invoked his right to counsel. *See State v. Ladd*, 308 N.C. 272, 283-84, 302 S.E.2d 164, 172 (1983) ("[A] defendant *must* be permitted to invoke this right [to council] with the assurance that he will not later suffer adverse consequences for having done so.").

pursuant to *Doyle*, we hold that the State's questioning of Trooper Smith and defendant about defendant's post-arrest, post-*Miranda* warnings silence was error.

Alkano does not hold otherwise. Even though *Alkano* addressed post-arrest silence, the silence used in that case was pre-*Miranda* warnings silence and not, as is the case here, post-*Miranda* warnings silence. *Alkano*, therefore, does not apply. Moreover, here, the evidence shows that defendant made only one comment after his arrest about being in trouble and needing a lawyer. In *Alkano*, the defendant "spoke freely while in custody," 119 N.C. App. at 260, 458 S.E.2d at 261, making various inculpatory statements, but then at trial sought to provide a differing explanation for the events. Defendant's *single* comment that he was "in big trouble" at the same time he invoked his constitutional right to counsel and to remain silent did not open the door to the State's suggesting that, despite having invoked his right to remain silent, defendant should have spoken further regarding the explanations he provided at trial. Nonetheless, even though the admission of the post-arrest, post-*Miranda* warnings silence was error, for the reasons already given, we do not believe that this error amounted to plain error.

No error.

Chief Judge MARTIN and Judge ELMORE concur.

STATE OF NORTH CAROLINA v. DONJUAN SMITH

No. COA09-1640

(Filed 17 August 2010)

1. Constitutional Law— right to remain silent—prior statements—matters omitted

The trial court did not err in a prosecution for the first-degree murder of a child by allowing the State to impeach defendant with his failure to provide certain information to the police before trial. This case involved impeachment with prior inconsistent statements given to officers rather than the use of post-arrest silence. The testimony at trial would have been naturally included in the earlier statements, if true.

2. Criminal Law— instructions—alibi—evidence not sufficient

The trial court did not err by not instructing the jury on alibi in a prosecution for the first-degree murder of a child where the evidence was not sufficient to warrant an instruction. Defendant's testimony did not show that he was at a particular place which would have made it impossible for him to have committed the crime.

Appeal by Defendant from judgment and commitment entered 27 February 2009 by Judge A. Leon Stanback in Superior Court, Wake County. Heard in the Court of Appeals 26 May 2010.

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

Glover & Petersen, P.A., by James R. Glover, for Defendant.

STEPHENS, Judge.

I. Procedural History

On 3 June 2008, a Wake County grand jury indicted Defendant for first-degree murder in the death of Charvis Dublin, Jr. ("Junior"), a two-year-old child. A superseding indictment for this offense was issued on 26 January 2009. Defendant was tried, non-capitally, during the 23 February 2009 Criminal Session of Wake County Superior Court, the Honorable A. Leon Stanback presiding. On 27 February 2009, a jury found Defendant guilty of first-degree murder under the felony murder rule. Judge Stanback sentenced Defendant to a term of life imprisonment without parole. From the judgment and commitment, Defendant appeals.

II. Factual Background

At trial, the State's evidence tended to show the following: In March 2008, Dolisha Nicole Campbell ("Campbell") moved to Raleigh, North Carolina with her two children. Junior, her youngest child, was two years old at the time and described as "a happy, normal child who liked to play[,]" and "a sweet child."

In May 2008, Campbell was working as a traveling assistant manager for Cici's Pizza, which required her to rotate between different locations in Smithfield, Wilson, Cary, and Goldsboro, North Carolina. Campbell typically worked 15-hour shifts, which began at 9:00 a.m. and ended around midnight. Defendant, Campbell's boyfriend at the time, watched Junior during the day while Campbell went to work and Campbell's oldest child, Dezarea, went to school.

On the morning of 14 May 2008, Campbell gave Junior a bowl of cereal and some juice while Defendant walked Dezarea to the bus stop for school. Campbell then left for work around 8:15 or 8:30 a.m., leaving Junior in Defendant's care. During the time Campbell spent with Junior that morning, she did not notice anything unusual about his appearance or demeanor, and Junior had not recently been ill.

A few hours later, Campbell attempted to call Defendant twice on his cell phone between 10:00 a.m. and noon, but received no answer. Defendant answered the third call, and Campbell asked him, "[H]ow is everything?" Defendant responded that "everything's okay[,]" and told Campbell that Junior was asleep.

Between 2:00 and 3:00 p.m., Defendant called Campbell back and told her that Junior was not breathing. When she asked Defendant why Junior was not breathing, Defendant replied that Junior had vomited after eating some pizza and then stopped breathing. Thereafter, Defendant seemingly changed his mind, and told Campbell that Junior was breathing and that Junior was sleeping. Campbell asked Defendant if he was sure that Junior was okay, and he replied, "[Y]eah." Campbell asked Defendant if she needed to come home, and Defendant told her "no."

The next time Campbell spoke to Defendant was when he called Campbell around 7:00 p.m. Defendant told Campbell that he was at the neighbor's home and that Junior was "not breathing at all." Campbell became hysterical, started yelling, "[W]hat happened, what happened[,]" and asked Defendant whether he had called for an ambulance. Defendant stated that he had called 911. Campbell hung up the phone and drove straight to the hospital.

When Campbell first saw Junior, he was lying on a hospital bed wearing only a diaper, and "[h]is skin looked yellowish. He looked like he was asleep. He just looked stiff like he wasn't moving." A nurse told Campbell that the hospital had done everything they could and that it did not look like Junior was "coming back." When Campbell asked the nurse what she meant by that, the nurse told her that Junior was dead.

While at the hospital, Defendant initially told Campbell that all he did was give Junior some Cici's pizza and then Junior threw up. Campbell replied, "[S]o my son died because he ate Cici's pizza?" Campbell then asked Defendant whether Junior had choked. Defendant answered "no" and told Campbell, "He just threw up, I laid

him down and he just stopped breathing." When Campbell pressed Defendant for answers about how Junior stopped breathing, Defendant stated that Junior had thrown up, but this time, he added that he gave Junior a bath and that Junior had drowned. Defendant next told Campbell that he sat Junior on the toilet and that Junior had "passed out." Beyond these explanations, Defendant never indicated to Campbell that anything else had happened to Junior.

Taneka Shontel Hinton ("Hinton"), Campbell's next door neighbor and friend, testified that Defendant would often bring Campbell's children to Hinton's apartment to play with Hinton's two children. On 14 May 2008, between 9:00 and 10:00 a.m., Defendant took Junior to Hinton's apartment to play with Hinton's son. Hinton did not notice anything unusual about Junior's appearance and did not see any bruises on his face or arms. Junior appeared "normal" that morning and was quiet, as usual. Defendant and Junior stayed at Hinton's apartment for about an hour and left sometime before 11:00 a.m.

At approximately 6:30 p.m., Defendant returned to Hinton's apartment, carrying Junior in his arms. Ernestine Hinton ("Ernestine"), Hinton's sister, and Connie Hinton ("Connie"), Hinton's mother, answered the door, and both thought Junior was asleep. Defendant asked if he could lay Junior down on the bed, then took Junior straight to the back bedroom. Defendant called Campbell from the bedroom. Ernestine and Connie overheard Defendant telling Campbell that Junior needed to go to the hospital because he was sick. When Defendant hung up the phone, Defendant asked Ernestine to come look at Junior because "he wasn't acting right." When Ernestine went into the bedroom, Junior was lying on the bed, and "[h]is eyes [were] halfway open and his mouth was open a little bit." Ernestine knew immediately that Junior was dead because "he was lying there motionless[.]" Ernestine picked up Junior's arm to check for a pulse "and it was real limp" and "he was cold[.]" She lifted up Junior's shirt to check for movement, and "[h]is chest looked like it was pressed in or something[.]" Ernestine called Connie into the room, and Connie also noticed that Junior "didn't look right." Connie touched Junior's face and hands, which were "cold" and "stiff." Connie told Ernestine to call 911. Defendant walked out of the room and said, "[O]h, God, how am I going to tell this girl that her baby's dead?"

Ernestine called 911 and gave the phone to Defendant. Defendant told the 911 operator that he had given Junior some Cici's pizza and

something to drink, which made Junior sick. Defendant then gave the phone to Connie, who attempted to perform CPR based on instructions from the 911 operator. When Connie lifted up Junior's shirt to perform CPR, she saw bruises on his chest that "looked like [a] fist print." Connie was hesitant to touch Junior because of the bruises, but the 911 operator told her to go ahead with the CPR. As she administered CPR, Connie heard something that sounded like water moving around in Junior's chest.

While Connie was administering CPR, Defendant was pacing around the room, putting his hands on his head, and acting nervous. Ernestine believed that Defendant was "putting on" and "wasn't acting like most people would act if they knew that a child that they cared about or really loved wasn't breathing[.]" One minute, Defendant would appear to be calm and the next minute, he would "try and make himself cry." Connie also believed Defendant was "too calm[,]" and was wondering why Defendant did not try to help her by holding the phone. At one point while she was administering CPR, Connie heard Defendant say, "I got to get that CD. That's slamming[,]" referring to a music video that was playing on the television in the living room.

Defendant answered the door and directed the emergency medical technicians with the Raleigh Fire Department to the back bedroom. The firefighters had received the 911 dispatch at 7:24 p.m. and were the first to arrive on the scene. They immediately checked Junior's vital signs and determined he had no pulse and was not breathing. They continued to administer CPR and attempted to use a defibrillator unit, but "[t]he machine did not detect any shockable rhythm." When EMS arrived, the firefighters lifted Junior's body and carried him outside to the ambulance and placed him on a stretcher. As they lifted Junior, "brownish dark fluid" began to run out of his mouth and nose. While paramedics worked on Junior, Defendant told one of the firefighters that Junior became sick after eating pizza and that Junior fell asleep after Defendant cleaned him up. Defendant was very "nervous" and "inquisitive" and wanted to know what was happening in the ambulance. Defendant told bystanders in the parking lot that "he didn't do anything wrong[,]" and that "these people [are] going to think that I did it."

Although Junior still had no pulse or heartbeat and was not breathing, the paramedics continued CPR on the way to Wake Medical Center ("WakeMed") in Raleigh, which is normal protocol for

a child under the age of eighteen. Junior arrived at WakeMed around 7:30 p.m., still cold and not breathing, but the medical staff at the hospital continued CPR because he was a child. After about 30 or 45 minutes, Junior was pronounced dead. The nurses who administered CPR to Junior noticed bruises on both sides of his ribs, which they reported to Child Protective Services, as they are required to do by law.

After speaking to the hospital staff, Detectives Zeke Morse and K.A. Copeland (collectively, "the detectives"), with the Raleigh Police Department, asked whether there was anything Defendant wanted to say about possibly hurting the child, leaving the child unattended, or the child having hurt himself by mistake. They then informed Defendant that the neighbors believed Junior was already dead when Defendant brought Junior to their apartment and that an autopsy would determine the specific cause of his death. At this point, Defendant became emotional and told the detectives that he believed Junior had drowned. Defendant stated that after Junior threw up, he put Junior in the bathtub and then left him unattended for about ten minutes while he talked to a friend on his phone. When he returned, Junior was lying face down in the water and was unresponsive. Defendant then laid Junior on the bed, and Junior began making a "raspy noise[,]" while trying to breathe. Junior's eyes were open but he was not blinking. At this point, Defendant knew Junior was dead, and he panicked. Defendant got Junior dressed and took him to the neighbor's home. Defendant initially told the neighbors that Junior was asleep, but then asked them to look at Junior because he did not look right. Upon looking at Junior, the neighbors discovered he was dead.

At 12:50 a.m., Defendant was placed under arrest and advised of his *Miranda* rights, which he waived. At 1:21 a.m., Detective Copeland re-entered the interview room and asked Defendant "if he had done anything to the child to cause his death." Defendant repeatedly stated, "I did not hit, kick or hurt [Junior] in any way that would have caused his death." After the interview, Defendant was transported to the Wake County jail. The next day, on 15 May 2008, Detective Morse and Detective William Gill retrieved Defendant from the Jail and transported him back to the police station, where he was charged with first-degree murder based upon information obtained from the medical examiner's office.

Dr. John D. Butts, Chief Medical Examiner for the State of North Carolina, performed an autopsy on Junior on 15 May 2008. Dr. Butts

observed several "dime[-sized]" bruises located in clusters around Junior's body. A significant number of these bruises were located in the left upper chest area, and additional clusters were on the left side of his back and on each side of his lower chest and upper abdominal area. There was also minor bruising on the inside of Junior's thighs. Dr. Butts explained that while some bruising can be caused by CPR, it is not normally as extensive as the bruising he observed on Junior. In addition, "an individual being resuscitated has lost their blood pressure so they don't move blood." Thus, "[i]t's very unusual to see any kind of bruising from CPR in someone whose heart has already stopped unless they get the heart going again."

The internal examination revealed severe injuries to Junior's internal organs and "free blood" within the abdominal cavity. A large hemorrhage or blood clot was present over the right surface of the liver and there were tears on the inside of the liver, which caused the bleeding in the abdominal cavity. Additional hemorrhaging was present in some of the structures that support the bowels and intestines, in tissues along the back of the abdomen, and along the adrenal gland on top of the kidneys. There were bruises on the inner surfaces of both sides of the scalp toward the back of Junior's head and bleeding over the surface of his brain. The areas of bruising on the scalp were indicative of blows to the head that had ruptured blood vessels.

Dr. Butts determined from this autopsy that Junior suffered trauma to his chest, abdomen, and head and that the injuries to the abdomen most likely killed him. Dr. Butts stated that in his medical opinion, these injuries were neither self-inflicted nor accidental. Only "very solid types of blows[,]" with enough pressure to rupture organs, could have caused Junior's injuries. The bruises also appeared to be fresh and had likely been inflicted within the past several hours, as opposed to days. While Dr. Butts could not determine the precise time of Junior's death, the damage to the liver suggested that he lived for some time following these injuries, possibly for a few hours.

Defendant testified at trial and presented a different account of the events leading up to Junior's death. Defendant testified that on the morning of 14 May 2008, he fed Junior two slices of pizza and a garlic roll, which Junior ate fairly quickly. Defendant then gave Junior some ice water, which Junior drank, and thereafter, began to spit up and soil his diaper. Defendant cleaned him up, took off the diaper, and started filling the bathtub with water. He then noticed that Junior was defecating on the couch, so he got some wipes and carried Junior

into the bathroom. Defendant put Junior in the bathtub, and at 5:00 p.m., Defendant's cell phone rang, which alerted him that his friend from New York was outside. The person waiting outside was a fellow gang member, known only to Defendant as "Eric," who was also Defendant's drug supplier.

Defendant went outside and gave Eric $500 in cash to pay for one pound of marijuana, leaving Junior alone in the bathtub. Defendant testified that he sold marijuana because he was a member of the "Eastside Bounty Hunter" sect of the Bloods and had to put a certain amount of money into a "kitty" each week. Defendant remained outside with Eric for 20 minutes. When he returned to the apartment, he found Junior face down in the bathtub. He picked Junior up and wiped him down with a towel but Junior did not respond. Defendant then dressed Junior and took Junior to Hinton's apartment. At that time, Junior felt like a "noodle" and his eyes were half-way shut. Defendant took Junior into the bedroom, called Campbell at work, and told her that Junior was not responding, and Campbell became hysterical. Defendant hung up the phone and called Ernestine into the room, and upon seeing Junior, she immediately called for her mother, who told her to call 911.

While Connie administered CPR, Defendant went into the living room and began pacing back and forth and reconstructing what happened in his mind. Defendant denied that he had looked at or commented about a music video on the television. Defendant heard water in Junior's chest while Connie was administering CPR, and he believed Junior had drowned. Defendant testified that he did not tell the police about his meeting with Eric because he did not want police to know that he was a gang member or that he sold drugs and because Campbell had warned him not to leave the kids alone. He denied that he had hit, kicked, punched, or otherwise hurt Junior in any way.

Defendant also testified that Campbell's apartment was located in the territory of the "Crips" gang, which is a rival gang of the Bloods. Defendant made it publicly known that he was a Blood and claimed that some guys had previously threatened him. On rebuttal for the State, Officer Rico Boyce of the Raleigh Police Department testified that he worked as a gang officer on the gang suppression unit for three years and that he was familiar with the Bloods and Crips territories in Raleigh. Officer Boyce testified that Campbell's apartment complex was located in an area heavily controlled by the Bloods. To his knowledge, the Crips did not have any territories near the apartment.

III. Discussion

[1] Defendant argues the trial court erred by allowing the State to impeach Defendant with his failure to provide information about his alleged meeting with Eric to the police or the prosecution before trial. Specifically, Defendant contends this form of impeachment violated Defendant's constitutional rights to be free from self-incrimination and to due process of law. We disagree.

"It is well-established under both the United States and the North Carolina Constitutions that post-*Miranda* silence may generally not be used to impeach the defendant on cross-examination." *State v. Fair*, 354 N.C. 131, 156, 557 S.E.2d 500, 518 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002); *accord Doyle v. Ohio*, 426 U.S. 610, 619, 49 L. Ed. 2d 91, 98 (1976) ("[I]t would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial[.]"). However, "[w]hen the defendant chooses to speak *voluntarily* after receiving *Miranda* warnings, . . . the rule in *Doyle* is not triggered." *Fair*, 354 N.C. at 156, 557 S.E.2d at 518.

> *Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.

Anderson v. Charles, 447 U.S. 404, 408, 65 L. Ed. 2d 222, 226 (1980) (emphasis added).

In *Doyle*, Doyle was arrested and charged with selling "marihuana to a local narcotics bureau informant." *Doyle*, 426 U.S. at 611, 49 L. Ed. 2d at 94. Doyle, unaware that narcotics agents were following him, was scheduled to meet the informant and sell him "marihuana." *Id.* at 612, 49 L. Ed. 2d at 94. The narcotics agents were unable to see the actual transaction take place between Doyle and the informant. *Id.* After the alleged transaction, a narcotics agent arrested Doyle, read Doyle his *Miranda* rights, and searched Doyle's vehicle with a warrant. *Id.* Doyle never made a statement to the police or the prosecution after his arrest or before his trial. *Id.* At trial, Doyle took the stand and admitted all but the most crucial element of the State's case, "who was selling marihuana to whom." *Id.* at 612-13, 49 L. Ed. 2d at 95. According to Doyle, the informant had framed him. *Id.* at

613, 49 L. Ed. 2d at 95. Doyle testified that the real arrangement was for the informant to sell Doyle the marijuana, but at the last minute Doyle changed his mind and tried to back out of the deal. *Id.* Doyle stated that the informant got angry and threw money into Doyle's car to frame Doyle for selling marijuana to the informant. *Id.* "[Doyle's] explanation of the events presented some difficulty for the prosecution, as it was not entirely implausible and there was little if any direct evidence to contradict [Doyle's story]." *Id.* On cross-examination, the prosecutor asked Doyle why he had not told his story to the narcotics agents sooner. *Id.* at 61314, 49 L. Ed. 2d at 95. The Supreme Court held "that the use for impeachment purposes of petitioner['s] silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." *Id.* at 619, 49 L. Ed. 2d at 98 (emphasis added).

Unlike in *Doyle*, the present matter does not involve the use of a defendant's post-arrest silence for impeachment. If a defendant chooses not to remain silent, then

> [c]ross-examination can properly be made into why, if the defendant's trial testimony regarding his alibi is true, he did not include in his earlier statement the relevant information disclosed at trial. Conversely, cross-examination on prior inconsistent statements is improper if it is intended to elicit meaning from, or comment on, the defendant's exercise of his or her right to remain silent.

Fair, 354 N.C. at 156, 557 S.E.2d at 519 (internal citations omitted).

"[The] next step in that analysis is to determine whether the admission of the challenged testimony is consistent with the rules of evidence regarding prior inconsistent statements." *Id.* at 157, 557 S.E.2d at 519. To be considered a prior inconsistent statement under the North Carolina Rules of Evidence, the prior statement must have eliminated "a material circumstance presently testified to which would have been natural to mention in the prior statement." *Id.* Thus, a defendant's prior inconsistent statement is properly used to impeach his trial testimony when it would have been natural for defendant to include the information revealed at trial in his prior statement. *Id.* at 158-59, 557 S.E.2d at 520.

Defendant in the instant case voluntarily spoke to law enforcement officers and offered varying explanations for how Junior came to stop breathing. Defendant first told police officers that Junior had thrown up after eating pizza and stopped breathing after falling

asleep. Defendant later told officers that Junior had drowned when Defendant left him unattended while Defendant was talking on the phone. At trial, Defendant mentioned for the first time a meeting with a fellow gang member named Eric. Thus, while *Doyle* involved the use of the defendant's post-arrest silence for impeachment, the case *sub judice* involves the use of Defendant's prior inconsistent statements, which is permissible.

Defendant testified on direct examination that he left Junior alone and unattended in a bathtub while Defendant conducted business outside the apartment with his marijuana supplier, a man he knew only as Eric. On cross-examination, the following exchange took place:

> [Prosecutor]: Who is this Eric person that you told us about yesterday? Who is he to you?
>
> [Defendant]: One of my blood friends slash connect. It is who I purchase my marijuana from.
>
> . . . .
>
> [Prosecutor]: You talked to Detective Morse and Detective Copeland for almost three hours the day that Junior died; correct?
>
> [Defendant]: Yes, ma'am.
>
> [Prosecutor]: And you never mentioned anyone named Eric to them, did you?
>
> [Defendant]: No, ma'am.
>
> [Prosecutor]: Not even when they came back and actually charged you with the death of that child did you mention anyone named Eric[?]
>
> [Defense Counsel]: Objection. I need to be heard on that, your [H]onor.

Outside the presence of the jury, defense counsel stated that it was unclear as to which "charge" the prosecutor was referring. The prosecutor responded that she was specifically referring to statements Defendant made when he spoke to Detectives Morse and Copeland after waiving his rights. Defendant's objection was overruled. The State's cross-examination of Defendant proceeded as follows:

[Prosecutor]: When you were speaking to Detective Morse and Detective Copeland when they came back into that room and charged you with the death of Junior, you didn't tell them anything about Eric at that time, did you?

[Defense Counsel]: No objection to that question.

[Defendant]: No, ma'am.

[Prosecutor]: And it's been nine months since this occurred; is that correct?

[Defendant]: Yes, ma'am.

[Prosecutor]: And in that nine months you have never told anyone.

[Defense Counsel]: Objection, your Honor.

The Court: Overruled.

[Prosecutor]: You have never told anyone about Eric until yesterday; is that correct?

[Defense Counsel]: Objection, your Honor. The defendant's not required to speak to anyone, your Honor.

The Court: Overruled.

[Prosecutor]: Did you ever contact the DA's office?

[Defense Counsel]: Objection, your Honor. The defendant doesn't have to talk to the DA's office, your Honor.

[Defendant]: No.

[Prosecutor]: So no one had any way to know that there was an Eric they needed to investigate until yesterday.

[Defense Counsel]: Objection. Including Fifth Amendment grounds, your Honor, and Sixth Amendment grounds.

The Court: Overruled.

The clear implication from the prosecutor's questions is "why, if the defendant's trial testimony regarding his alibi is true, he did not include in his earlier statement the relevant information disclosed at trial." *Fair*, 354 N.C. at 156, 557 S.E.2d at 519. Defendant's alleged meeting with Eric while Junior was allegedly in the bathtub would have been natural to include in Defendant's prior statements made to law enforcement officers. *See id.* Thus, Defendant's prior inconsis-

tent statements were properly used to impeach Defendant's testimony at trial. Defendant's argument is overruled.

IV. Alibi

[2] Defendant also argues that the trial court erred in denying Defendant's request to instruct the jury on alibi. We disagree.

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).

"An alibi is simply a defendant's plea or assertion that at the time the crime charged was perpetrated he was at another place and therefore could not have committed the crime." *State v. Hunt*, 283 N.C. 617, 619, 197 S.E.2d 513, 515 (1973). If a defendant has requested an alibi instruction and there is sufficient evidence to raise an issue as to alibi, the trial court must give the instruction. *Id.* at 622, 197 S.E.2d at 517; *accord State v. McLawhorn*, 270 N.C. 622, 630, 155 S.E.2d 198, 204 (1967) ("To entitle a defendant to a charge on alibi there must be evidence that at the time the crime was committed he was at a particular place which would make it *impossible for him* to have committed the crime."). Moreover, "a defendant's mere denial that he was at the place when the crime was committed is insufficient to justify the giving of an instruction on alibi." *State v. Green*, 268 N.C. 690, 692, 151 S.E.2d 606, 608 (1996). "If the evidence does not reasonably exclude the possibility of the presence of defendant at the scene of the alleged crime, it is not error to fail to instruct the jury on the law of alibi." *Id.*

In *Green*, the defendant was convicted of assault with a deadly weapon. *Id.* at 691, 151 S.E.2d at 607. At trial, the victim testified that the defendant had cut her across the face with a knife. *Id.* The defendant, the sole witness for the defense, testified that he did not cut the victim and did not see the victim on the day she was cut. *Id.* Our Supreme Court found no error in the trial court's decision not to

charge the jury on alibi for two main reasons. *Id.* at 692, 151 S.E.2d 608. First, the defendant's testimony "as to his whereabouts on the day [the victim] was cut [was] merely incidental to his denial that he cut [the victim.]" *Id.* Second, based on the evidence presented at trial, it was unknown the exact time the victim was cut. *Id.* "In view of this uncertainty, even if defendant's testimony as to his whereabouts [were] accepted as true, the jury might still have found that he" cut the victim. *Id.* Accordingly, an instruction on alibi was not necessary. *Id.*

In the present case, at the charge conference, Defendant requested that the trial court instruct the jury on alibi and tendered a written copy of the pattern jury instruction. The State objected on the ground that the evidence did not support such an instruction. The trial court agreed with the State's argument and declined to give the instruction.

Similar to *Green*, Defendant's alibi defense at trial rested entirely on Defendant's testimony that he did not injure Junior and that Defendant left Junior unattended in the bathtub for an extended period of time while Defendant was out of the apartment. Like *Green*, Defendant's testimony is "merely incidental to his denial" that he harmed Junior and is not sufficient to warrant an instruction on alibi. *Id.* Moreover, the fact that Defendant might have left Junior unattended in a bathtub for 20 minutes does not lead to the impossibility of his being the perpetrator, particularly since the precise timing of the incident was not determined, and Defendant had exclusive custody of Junior for several hours before his death. Defendant's testimony does not show "at the time the crime was committed he was at a particular place which would make it impossible for him to have committed the crime." *McLawhorn*, 270 N.C. at 630, 155 S.E.2d at 204. Therefore, "even if defendant's testimony as to his whereabouts [were] accepted as true, the jury might still have found that he" killed Junior. *Green*, 268 N.C. at 692, 151 S.E.2d at 608.

Accordingly, the trial court did not err by denying Defendant's requested instruction on alibi. Defendant's argument is overruled. We conclude that Defendant received a fair trial, free of error.

NO ERROR.

Judges STEELMAN and HUNTER, JR. concur.

STATE OF NORTH CAROLINA v. KHURAM ASHFAQ CHOUDHRY

No. COA09-773

(Filed 17 August 2010)

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

Defendant's constitutional issue regarding cross-examination of an officer about a missing witness was not considered where it was raised for the first time on appeal.

2. Evidence— hearsay—statement against penal interest—no corroborating evidence

The trial court did not abuse its discretion by holding that an absent witness's hearsay statement to police was not admissible as a statement against penal interest where there was no evidence corroborating the witness's account and the witness had a motive to give a false statement.

3. Evidence— hearsay—catchall exception—no circumstantial guarantees of trustworthiness

The statement of a missing witness to a police officer was not admissible under the catchall hearsay provision where it lacked circumstantial guarantees of trustworthiness.

4. Evidence— open door—not applicable

The State did not open the door to the statement of a missing witness to a police officer where the State did not offer any portion of the statement into evidence and consistently argued for its exclusion.

5. Evidence— statement of accomplice—excluded—no prejudicial error

There was no prejudice shown from the exclusion of a statement by a missing accomplice where defendant argued that his primary defense was that the missing accomplice acted alone in assaulting the victim, but the case was submitted to the jury under the acting in concert theory.

6. Criminal Law— conflict of interest—hearing and waiver by defendant

There was no conflict of interest in a first-degree murder prosecution where the trial court did not conduct an evidentiary hearing concerning the defense attorney's prior representation of defendant's girlfriend in unrelated matters. The trial court conducted a hearing in which defendant was fully advised of the facts and waived any possible conflict of interest.

Judge BEASLEY dissents.

Appeal by defendant from judgment entered 19 September 2008 by Judge Henry W. Hight, Jr. in Durham County Superior Court. Heard in the Court of Appeals 13 January 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Melissa L. Trippe, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

STEELMAN, Judge.

The statement of a co-defendant who absconded prior to trial was not admissible under a hearsay exception where there was no corroborating evidence to support its admission. Where the State did not offer any portion of the co-defendant's statement into evidence, it did not "open the door" to the admission of the statement. Defendant waived any possible conflict of interest on the part of his trial attorney.

I. Factual and Procedural Background

On the evening of 3 November 2002, Khuram Choudhry (defendant), Umar Malik (Malik), and Hasan Sokoni (Sokoni) drove to a BP gas station where Rana Shazad Ahmed (Shazad) was employed as a manager to confront him about calling defendant's residence and cursing defendant's mother and sister[1]. The gas station was closing so they drove to Shazad's apartment complex and waited in the parking lot. When Shazad arrived, defendant and Malik jumped out of the vehicle and ran after him. An altercation ensued. Sokoni, who was sitting in the backseat of the vehicle, heard sounds "like balls being hit" but could not see the confrontation. Shazad was hit in the head several times with a baseball bat. Defendant and Malik returned to the

1. Anne Choudhry, defendant's sister, was romantically involved with Malik at the time of this incident. The couple were subsequently married.

vehicle and they drove away. Defendant subsequently called Michelle Wahome (Wahome), his girlfriend, and stated that "Shazad's gone. Shazad's dead." Defendant stated that they went to Shazad's residence to "F—- him up." Defendant had a "bat or a stick" and hit Shazad. Malik then got the "bat or stick" and repeatedly hit Shazad in the head so hard he fell to the ground. Defendant stated that he was not worried about being apprehended by the police, but that he had left his Newport cigarette pack at the scene.

At approximately 7:30 a.m. the next morning, Shazad's roommate found him unconscious, unresponsive, and bleeding on a concrete landing to the apartment complex. 911 was called. When paramedics arrived, they observed that Shazad's eyes were swollen shut and bruised, which indicated that it had been "quite a while since he had been . . . assaulted." The paramedics also found a congealed mass of blood on the back of Shazad's head. Shazad was transported to Duke Hospital where he subsequently died. The cause of death was blunt force trauma to the head.

At the crime scene, police recovered a coin, a pack of Newport cigarettes, and a hair sample. There were no fingerprints found on the cigarettes and the hair sample found was that of the victim. The blood collected from the scene did not belong to Malik or defendant.

Malik and defendant were subsequently arrested on 27 September 2006, approximately four years after the crime. After waiving his *Miranda* rights, Malik gave a statement to the police implicating himself in Shazad's murder. Malik stated that defendant was in the vehicle when the beating occurred. After police interviewed Malik, officers informed defendant that Malik had told them what had transpired. Defendant responded, "That's a lie." Defendant denied any knowledge of the incident.

On 15 September 2008, defendant was tried for first-degree murder. Malik, his co-defendant, absconded to Pakistan and failed to appear for trial. During the State's case, Officer Cates testified that he had taken the statement by Malik, but did not testify as to the contents of that statement. The State marked his investigative report[2] as exhibit No. 57 for identification purposes, but did not offer it into the evidence. After the State's direct examination, defense counsel requested that he be able to cross-examine Officer Cates regarding the contents of Malik's statement and made an offer of proof as to

2. The contents of Malik's statement were contained in this report.

Officer Cates's testimony outside of the presence of the jury. The State objected on the basis of hearsay. The trial court sustained the State's objection. The jury found defendant guilty of first-degree murder. The trial court sentenced defendant to life imprisonment without parole. Defendant appeals.

II. Malik's Statement to Police

In his first argument, defendant contends that the trial court erred by sustaining the State's objection to defense counsel's cross-examination of Officer Cates concerning the contents of Malik's statement to police as hearsay. We disagree.

A. Alleged Constitutional Violation

[1] Defendant first argues that by sustaining the State's objection to the cross-examination of Officer Cates regarding Malik's statement, his federal and state constitutional due process right to present a defense were violated. However, defense counsel failed to present any constitutional argument to the trial court. It is well-settled that constitutional error will not be considered for the first time on appeal. *State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005) (citation omitted). Further, our Supreme Court has held that where the Rules of Evidence apply and can resolve the issue presented, the appellate court does not consider constitutional arguments. *State v. Tucker*, 331 N.C. 12, 29, 414 S.E.2d 548, 557 (1992); *see also State v. Agee*, 326 N.C. 542, 546, 391 S.E.2d 171, 173 (1990); *State v. Creason*, 313 N.C. 122, 127, 326 S.E.2d 24, 27 (1985). Defendant's constitutional argument is dismissed.

B. Statement Against Penal Interest

[2] Defendant next argues that Malik's statement was admissible under the hearsay exception pursuant to N.C. Gen. Stat. § 8C-1, Rule 804(b)(3) as a statement against penal interest.

N.C. Gen. Stat. § 8C-1, Rule 804(b) provides:

> *(b) Hearsay exceptions.*—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (3) Statement Against Interest.—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against

> another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.

N.C. Gen. Stat. § 8C-1, Rule 804(b)(3) (2009).

In *State v. Dewberry*, this Court set forth the requirements for the admission of a hearsay statement under N.C. Gen. Stat. § 8C-1, Rule 804(b)(3):

> Admission of evidence under the provision of Rule 804 (b)(3) concerning criminal liability requires satisfying a two prong test: 1) the statement must be against the declarant's penal interest, and 2) the trial judge must find that corroborating circumstances insure the trustworthiness of the statement. *State v. Kimble*, 140 N.C. App. 153, 157, 535 S.E.2d 882, 885 (2000). In order for a hearsay statement to pass the first prong of the test, it must actually subject the declarant to criminal liability, *State v. Singleton*, 85 N.C. App. 123, 129, 354 S.E.2d 259, 263 (1987), and it "also must be such that the declarant would understand its damaging potential" (i.e. that a reasonable man in declarant's position would not have said it unless he believed it to be true). *State v. Tucker*, 331 N.C. 12, 25, 414 S.E.2d 548, 555 (1992).
>
> In order to satisfy the second prong, there needs to be "some other independent, nonhearsay indication of the trustworthiness" of the statement. *State v. Artis*, 325 N.C. 278, 305-06, 384 S.E.2d 470, 485 (1989), *vacated and remanded on other grounds by Artis v. North Carolina*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). "The determination of whether the trustworthiness of the statement is indicated by corroborating circumstances is a preliminary matter to be decided by the trial judge." *State v. Wardrett*, 145 N.C. App. 409, 415, 551 S.E.2d 214, 218 (2001) (citation omitted).

166 N.C. App. 177, 181, 600 S.E.2d 866, 869 (2004). The State concedes that Malik's custodial statement meets the first prong of this analysis. Therefore, we focus our analysis on the second prong.

" 'The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true.' " *Tucker*, 331 N.C. at 27, 414 S.E.2d at 556 (quoting N.C. Gen. Stat. § 8C-1, Rule 804(b)(3), comment). It is well-

settled that the trial court has broad discretion in determining the reliability of the declaration. *State v. Haywood*, 295 N.C. 709, 729, 249 S.E.2d 429, 442 (1978). Factors to be considered include "spontaneity, relationship between the accused and the declarant, existence of corroborative evidence, whether or not the declaration had been subsequently repudiated and whether or not the declaration was in fact against the *penal interests* of the declarant." *Id.*

In the instant case, defendant argued he should be able to cross-examine Officer Cates regarding Malik's statement to the police. The content of the statement was as follows:

> the decedent had been calling his spouse and being vulgar to her and saying what he wanted to do sexually and that Malik stated that he, Choudhry and Hasan, went to the decedent's residence only to speak to him; however, during the meeting, the decedent pulled out a firearm. Malik stated that he knocked the firearm out of the decedent's hands. Then Choudhry allegedly picked up the firearm and fled to the vehicle. And Malik explained that the decedent next retrieved a ball bat and swung it at him, that the bat got caught in his hoodie and he was successful in taking it away. Malik explained that after he gained control over the bat that he swung and struck the decedent several times; however, because of the darkness he wasn't aware of where on the body he was striking the victim, but only that he was making contact.

In the instant case, there was no evidence presented at trial to corroborate Malik's account of events. The only witness present at the scene of the murder who testified was Sokoni. Sokoni testified that on 3 November 2002, defendant, Malik, and he drove to the BP gas station. While in the vehicle, defendant and Malik were "talking about Shazad talking bad about [defendant's] mother and sister" and were "pretty upset." After leaving the BP station, they drove to Shazad's apartment complex so they could "chastise him when he [got] off of work." Shazad subsequently pulled into the parking lot. Defendant and Malik immediately "jumped out of [the] car and ran after Shazad[.]" Sokoni heard sounds like "balls being hit" two or three times, but could not see the confrontation. Defendant and Malik were gone for only a "minute or two" and then ran back to the vehicle. Sokoni allegedly did not ask what had happened. Sokoni did not mention defendant having a firearm and stated that defendant and Malik ran back to the vehicle at the same time.

The murder weapon was never recovered because defendant disposed of the bat on Interstate Highway 85 during a trip to Virginia. At trial, Wahome testified that when defendant called her that evening after the beating, he stated that "he had a bat or a stick or something and he hit Shazad and he said [Malik] got the stick or the bat and just kept hitting him."

Without some "other independent, nonhearsay indication of the trustworthiness" of the statement sought to be admitted, our appellate courts have upheld the trial court's ruling excluding such evidence. *See State v. Reeb*, 331 N.C. 159, 172, 415 S.E.2d 362, 369 (1992); *State v. Brown*, 335 N.C. 477, 484-85, 439 S.E.2d 589, 594 (1994); *State v. Pickens*, 346 N.C. 628, 642, 488 S.E.2d 162, 170 (1997). Further, Malik had a motive to give a false statement. *See Dewberry*, 166 N.C. App. at 182, 600 S.E.2d at 870 ("The existence of a motive for declarant to have offered a false statement will be evidence arguing against its admission."). Malik and defendant were friends at the time of the incident. Malik was also romantically involved with defendant's sister and had married her by the time he gave his statement to police. An examination of Malik's statement shows that not only was Malik exculpating defendant, but was also attempting to establish a possible defense, *i.e.* that he acted in self-defense.

Based upon the fact that there was no evidence presented to corroborate Malik's account of events and that Malik had a motive to give a false statement, the trial court did not abuse its discretion in holding that Malik's hearsay statement to police was not admissible under N.C. Gen. Stat. § 8C-1, Rule 804(b)(3). *See Wardrett*, 145 N.C. App. at 415, 551 S.E.2d at 218 ("As with other exceptions to the hearsay exclusionary rule, the trial judge (on *voir dire*) must apply a threshold test to determine in his sound discretion whether the declaration bears the indicia of trustworthiness." (quotation and alteration omitted)).

This argument is without merit.

C. Catchall Provision

[3] Defendant alternatively argues that Malik's statement was admissible under the catchall provision of N.C. Gen. Stat. § 8C-1, Rule 804(b)(5). We disagree.

At the outset, we note that admission of hearsay under Rule 804(b)(5) is more stringent than under the enumerated exceptions.

State v. Levan, 326 N.C. 155, 163, 388 S.E.2d 429, 433 (1990). N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) provides:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) (2009). The guidelines for admission of hearsay testimony under Rule 804(b)(5) are well-settled. Once the trial court determines that the declarant is unavailable, a six-part inquiry must be conducted to determine admissibility:

> (1) Whether the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and of its particulars;
>
> (2) That the statement is not covered by any of the exceptions listed in Rule 804(b)(1)-(4);
>
> (3) That the statement possesses "equivalent circumstantial guarantees of trustworthiness";
>
> (4) That the proffered statement is offered as evidence of a material fact;
>
> (5) Whether the hearsay is "more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable means"; and
>
> (6) Whether "the general purposes of [the] rules [of evidence] and the interests of justice will best be served by admission of the statement into evidence."

State v. Ali, 329 N.C. 394, 408, 407 S.E.2d 183, 191-92 (1991) (quotation omitted). At trial, the State argued Malik's statement "has . . . not

one iota of trustworthiness about it." Hearsay statements "may be admissible under the residual exception if it possesses 'circumstantial guarantees of trustworthiness' equivalent to those required for admission under the enumerated exceptions." *State v. Smith*, 315 N.C. 76, 94, 337 S.E.2d 833, 844-45 (1985). As we have held above, Malik's statement does not possess circumstantial guarantees of trustworthiness.

This argument is without merit.[3]

D. Opening the Door

[4] Defendant lastly argues that the trial court erred in sustaining the State's objection to defendant using Malik's statement to cross-examine Officer Cates on the basis that the State "opened the door" by eliciting testimony from Officer Cates regarding defendant's response to Officer Cates informing him that he had received a statement from Malik. We disagree.

> It is well-settled law in North Carolina that "[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981). Under this doctrine, commonly referred to as "opening the door," the courts of this State have consistently held that if the State introduces into evidence part of a statement made by a defendant, the defendant is entitled to have the rest of the statement introduced, even if self-serving, so long as the statements are part of the same verbal transaction. *State v. Vick*, 341 N.C. 569, 578-79, 461 S.E.2d 655, 660 (1995); *State v. Weeks*, 322 N.C. 152, 167, 367 S.E.2d 895, 904 (1988).

State v. Safrit, 145 N.C. App. 541, 549, 551 S.E.2d 516, 522 (2001). In the instant case, the State did not offer any portion of Malik's statement into

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3. We note the trial court did not make specific findings of fact and conclusions of law with regard to its ruling excluding Malik's statement. However, defendant raised no objection at trial and does not argue in his brief that a new trial is warranted on this ground. We are therefore precluded from reviewing this issue. N.C.R. App. P. 10(b)(1). Further, our Supreme Court has held that even when the trial court has failed to make findings and conclusions as to whether a statement contained "equivalent circumstantial guarantees of trustworthiness" necessary for admission under the exceptions to the hearsay rule, the appellate court should review the record and make our own determination. *State v. Valentine*, 357 N.C. 512, 518, 591 S.E.2d 846, 853 (2003).

the evidence, and consistently argued for its exclusion as discussed *supra*. The "opening the door" doctrine is not applicable to this case.

E. Prejudice

[5] Even assuming *arguendo* that the trial court erred by sustaining the State's objection to the use of Malik's statement, defendant has not shown prejudice. *See State v. Jordan*, 130 N.C. App. 236, 241, 502 S.E.2d 679, 682 (1998) ("[I]n order for the defendant to be entitled to a new trial, he must show that the error in excluding the statement prejudiced him to the extent that had the error not been committed, a different result would have been reached at trial."), *cert. denied*, 350 N.C. 103, 531 S.E.2d 828 (1999). Defendant argues that he was unduly prejudiced because his primary defense was that "Malik acted alone in hitting the victim with the baseball bat." However, this case was submitted to the jury under an acting in concert theory.

"Under the principle of acting in concert, a person may be found guilty of an offense if he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Wilson*, 322 N.C. 117, 141, 367 S.E.2d 589, 603 (1988) (citation omitted). Overwhelming evidence tended to show defendant and Malik sought out Shazad to "F— him up" on 3 November 2002 and that defendant was present while the beating occurred, resulting in Shazad's death. Defendant has failed to show that a different result would have been reached had Malik's hearsay statement been admitted into evidence.

III. Conflict of Interest

[6] In his second argument, defendant contends that the trial court erred by failing to conduct an evidentiary hearing concerning his attorney's possible conflict of interest due to his prior representation of Wahome in unrelated matters. We disagree.

> A criminal defendant subject to imprisonment has a Sixth Amendment right to counsel. *Argersinger v. Hamlin*, 407 U.S. 25, 37, 32 L. Ed. 2d 530, 538 (1972). The Sixth Amendment right to counsel applies to the states through the Fourteenth Amendment of the United States Constitution. *State v. James*, 111 N.C. App. 785, 789, 433 S.E.2d 755, 757 (1993). Sections 19 and 23 of the North Carolina Constitution also provide criminal defendants in North Carolina with a right to counsel. *Id.* The right to counsel includes

> a right to "representation that is free from conflicts of interests." *Wood v. Georgia*, 450 U.S. 261, 271, 67 L. Ed. 2d 220, 230 (1981).

State v. Mims, 180 N.C. App. 403, 409, 637 S.E.2d 244, 247-48 (2006). When a possible conflict of interest is brought to the attention of the trial court, our appellate courts have required the following:

> [W]hen the court becomes aware of a potential conflict of interest with regard to a defendant's retained counsel, especially when the person with the potentially compelling interest is known to be a prosecution witness . . . the district judge shall conduct a hearing to determine whether there exists a conflict of interest[.] . . . In addition, the trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given the opportunity to express his or her views.

James, 111 N.C. App. at 791, 433 S.E.2d at 758-59 (quoting *United States v. Alberti*, 470 F.2d 878, 881-82 (2d Cir. 1972), *cert. denied*, 411 U.S. 919, 36 L. Ed. 2d 311 (1973)). The failure to conduct such an inquiry has been held to be reversible error. *Id.* at 791, 433 S.E.2d at 759. However, we note that "the Sixth Amendment right to conflict-free representation can be waived by a defendant, if done knowingly, intelligently and voluntarily." *Id.*

In the instant case, the prosecutor informed the trial court that in June 2003, defense counsel had represented Wahome with regard to criminal charges that were reduced to common law forgery. Defendant appeared along with Wahome in a videotape taken in the store where the criminal conduct occurred, but was not charged. Defense counsel asserted that there was no conflict and that he did not intend to question Wahome about that particular incident. The trial court then conducted the following colloquy with defendant:

> The Court: Mr. Choudhry, I'm going to ask you some questions. You don't need to keep your hand raised. If you don't understand any question I ask you, tell me and we'll go over it again until you do. Are you able to hear and understand me?
>
> Witness: Yes.
>
> . . . .
>
> The Court: It has been indicated to this Court that a person may be called in as a witness in this case who was at some time in the past represented by your attorney, Mr. Williams. That witness being, is this Renee Wright?

Mr. Williams: No. It's Michelle Wahome.

The Court: Michelle Wahome. Michelle Wahome.

. . . .

The Court: You understand that?

Witness: Yes.

. . . .

The Court: . . . Did you understand that Ms. Wahome might testify in this case and that Mr. Williams had represented her in the past?

Witness: Yes, sir.

The Court: Did you have any concerns about whether or not Mr. Williams can appropriately represent you in this case because he represented a witness for the State in the past?

Witness: No.

The Court: Are you satisfied with his representation of you to this point?

Witness: Yes.

The Court: And even in light of the fact that he represented a future witness in this case, do you desire for him to continue as your attorney in this matter?

Witness: Yes.

The Court: And do you want to talk to him or me to make any further inquiry of him about his participation in that prior case or are you satisfied where you are?

Witness: Satisfied.

The Court: Okay. Thank you, sir. . . .

Upon being advised of a potential conflict of interest, the trial court took "control of the situation" and conducted a hearing, in which "defendant [was] fully advised of the facts underlying the potential conflict and [was] given the opportunity to express his or her views." *Id.* Defendant waived any possible conflict of interest. This argument is without merit.

Defendant does not argue his remaining assignments of error and they are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6).

NO ERROR.

Judge McGEE concurs.

Judge BEASLEY dissents in a separate opinion.

BEASLEY, Judge dissenting.

As to Defendant's argument that the trial court erred by failing to conduct an evidentiary hearing to address the possible conflict of interest due to his attorney's prior representation of the State's witness Michelle Wahome, in unrelated matters, I believe that the trial court did not properly conduct an inquiry, fully informing Defendant of the specific potential conflict of interest such that Defendant was able to knowingly, intelligently, and voluntarily make a decision regarding counsel. I, therefore, respectfully dissent.

"[W]here a trial court becomes aware of even the 'mere possibility' of a conflict of interest prior to the conclusion of a trial, the trial court must conduct a hearing to determine whether the conflict will deprive a defendant of his Sixth Amendment right to counsel." *State v. Mims*, 180 N.C. App. 403, 410, 637 S.E.2d 244, 248 (2006) (citing *State v. Hardison*, 126 N.C. App. 52, 55, 483 S.E.2d 459, 461 (1997)).

The trial court conducted an inquiry, informing Defendant that his attorney previously represented Michelle Wahome, a State's witness, on unrelated charges. Defendant appeared in a videotape with Wahome in the transaction for which she was later convicted of common law forgery. The trial court also informed Defendant that Wahome "might testify" and asked whether Defendant "had concerns" about Wahome's possible testimony to which Defendant indicated he did not, nor did Defendant have concerns that his attorney formerly represented Wahome, and Defendant indicated that he was satisfied with his attorney's services. Defendant declined the trial court's invitation to speak with his attorney or to the court about the attorney's prior representation of Wahome.

Our Court in *State v. James*, 111 N.C. App. 785, 433 S.E.2d 755 (1993), held that " 'the trial judge should see that the defendant is **fully advised of the facts underlying the potential conflict** and is given the opportunity to express his or her views.' " *Id.* at 791, 433 S.E.2d at 759 (quoting *United States v. Alberti*, 470 F.2d 878, 881-82 (2d Cir. 1972) (emphasis added)). In assessing the consequences about which a defendant should be informed, our Court further noted:

> We believe representation of the defendant as well as a prosecution witness (albeit in another matter) creates several avenues of possible conflict for an attorney. Confidential communications from either or both of a revealing nature which might otherwise prove to be quite helpful in the preparation of a case might be suppressed. Extensive cross-examination, particularly of an impeaching nature, may be held in check. Duties of loyalty and care might be compromised if the attorney tries to perform a balancing act between two adverse interests.

Id. at 790, 433 S.E.2d at 758.

In the case *sub judice*, the trial court did not specifically inform Defendant of the consequences the attorney's potential conflict of interest might impose upon Defendant. The trial court did not inform Defendant that if Wahome testified, as she did, that if Defendant's attorney examined her, the attorney might be prohibited from zealously questioning her about the 2003 events for which she was convicted or about any information garnered from his representation of Wahome, which might have been detrimental to Wahome or detrimental or beneficial to Defendant. It is unclear however, whether the attorney did not question Wahome about the forgery conviction because of confidential matters preventing him from seeking to impeach her character for truthfulness or because he did not wish to implicate Defendant for his involvement with Wahome in the 2003 incident by opening the door for the State's witness to provide greater detail about Defendant's involvement.

It is not enough for the trial court to ask Defendant if he "ha[d] any concerns about whether or not Mr. Williams [Defendant's attorney] [could] appropriately represent [Defendant] in this case because he represented a witness for the State in the past" without informing Defendant about the possible consequences a potential conflict of interest might bear on Defendant's attorney's ability to zealously represent him. In determining whether a conflict existed, it would not be enough for the trial court to rely on Defendant's attorney to explain the consequences, especially if a conflict actually exists. *See State v. Ballard*, 180 N.C. App. 637, 643, 638 S.E.2d 474, 479 (2006) (rejecting the State's argument that defense counsel had adequately advised the defendant on the implications of the conflict of interest because "it is the *trial court*, not the conflicted defense counsel . . . which must 'see that the defendant is fully advised' " on these matters (quoting *James*, 111 N.C. App. at 791, 433 S.E.2d at 758).

Because I believe that the trial court did not properly conduct a hearing to inform Defendant of the consequences of any potential conflict of interest and because Defendant was not fully informed, he did not knowingly, intelligently, and voluntarily waive any such conflict. Accordingly, Defendant argues that he is therefore entitled to a new trial, but this case is unlike *James* because here, as discussed above, the record does not "clearly show[] on its face that the conflict adversely affected counsel's performance[.]" *James*, 111 N.C. App. at 791, 443 S.E.2d at 759 (presuming prejudice because it was clear from the record that an actual conflict of interest existed). I would remand for the trial court to conduct an evidentiary hearing. *See Mims*, 180 N.C. App. at 411, 637 S.E.2d at 249 (citing *Hardison*, 126 N.C. App. at 58, 483 S.E.2d at 462) (remanding the matter to the trial court for an evidentiary hearing to address whether the defendant's attorney had a conflict where such could not be determined from the face of the record).

PENNY CUMMINGS, PLAINTIFF v. AGNES ORTEGA, M.D. AND WOMEN'S HEALTH CARE SPECIALISTS, DEFENDANTS

No. COA09-1491

(Filed 17 August 2010)

1. Appeal and Error— untimely notice of appeal—appeal dismissed—certiorari granted

Plaintiff's motion to dismiss defendants' appeal of an order allowing plaintiff's motion to set aside the verdict in a medical malpractice action was allowed as defendants' notice of appeal was untimely. However, the Court of Appeals granted defendants' petition for writ of *certiorari* to review the merits of the appeal fully. Defendants' appeal from the trial court's order denying defendants' motion for reconsideration was timely and was not dismissed.

2. Appeal and Error— standard of review—abuse of discretion—orders entered pursuant to Rules 59 and 60

An abuse of discretion standard applied to defendant's appeal of the trial court's orders allowing plaintiff's motion to set aside the verdict pursuant to Rule 60(b) of the North Carolina Rules of

Civil Procedure and granting a new trial pursuant to Rule 59(a) in a medical malpractice action.

3. Trials— juror misconduct—jury verdict set aside—new trial granted—no abuse of discretion

The trial court in a medical malpractice action did not abuse its discretion by setting aside a jury verdict in favor of defendants pursuant to Rule 60(b) of the North Carolina Rules of Evidence and awarding plaintiff a new trial pursuant to Rule 59(a). The trial court did not consider inadmissible evidence contained in juror affidavits submitted to impeach the jury verdict and thus, neither committed legal error nor abused its discretion in setting aside the verdict and refusing to reconsider its decision.

Appeal by defendants from an order entered 13 April 2009 by Judge Steve A. Balog in Harnett County Superior Court. Heard in the Court of Appeals 12 May 2010.

The Neighbors Law Firm, P.C., by Patrick E. Neighbors, for plaintiff appellee.

Crawford & Crawford, L.L.P., by Renee B. Crawford, Robert O. Crawford III, and Arienne P. Blandina, for defendant appellants.

HUNTER, JR., Robert N., Judge.

Agnes Ortega, M.D., and Women's Health Care Specialists ("defendants") appeal from a Rule 59(a) order setting aside a jury verdict in favor of defendants on 16 December 2008. The verdict found no negligent acts by defendant in a medical malpractice action filed by Penny Cummings ("plaintiff"). Defendants subsequently filed a Rule 60(b) Motion for Reconsideration and Relief from Order which the trial court denied on 10 July 2009.

On appeal, defendants contend that the trial court erred by considering juror affidavits to impeach the verdict of the jury and award plaintiff a new trial pursuant to Rule 59. Furthermore, defendants contend that the juror affidavits contain inadmissible evidence, and as such, the trial court committed legal error by relying on that evidence to grant a new trial. After review, we conclude that the trial court did not consider inadmissible evidence contained in the affidavits, and therefore neither committed legal error, nor abused its discretion in setting aside the verdict and in refusing to reconsider its decision.

I. Factual Background

Plaintiff consulted defendants for gynecological problems for which defendant Dr. Agnes Ortega had treated her for approximately 8 years. In May of 2002, plaintiff underwent a diagnostic laparoscopy for infertility. During the surgical procedure which involved the use of a needle to cauterize, open, and explore cysts on the ovaries, plaintiff's right external iliac artery was inadvertently lacerated. Defendants controlled the bleeding and plaintiff recovered temporarily; subsequently, plaintiff began suffering from pain and other ailments regarding her right leg.

Plaintiff filed a medical malpractice action against defendants on 18 May 2005 seeking damages for her alleged injuries. Plaintiff alleged and defendant denied that the leg injuries claimed were a result of the surgical procedure and the inadvertent laceration. Defendants alleged that any injuries resulting from the inadvertent laceration were fully healed, and the leg ailments were caused by other medical issues from which plaintiff suffered.

On 1 December 2008, plaintiff's civil action was called for trial in Harnett County Superior Court, Judge Steve A. Balog presiding. After preliminary discussions between counsel and the bench, the Court instructed the prospective jurors as follows:

> Because of your special status here right now as prospective jurors, later after our trial jurors are chosen it is important that you remember that during your time here, it is your duty not to talk among yourselves about the proceedings in this court or about this case here for trial. You must understand that neither the Court, the parties, the witnesses, the lawyers, nor anyone else interested or involved in these matters may have any private contact or conversation with you during your time here. This should not be regarded as mere aloofness, but as a wise precaution against improper contact or influence or the appearance of that. If you need anything for your comfort or otherwise, approach the bailiff. He can help you, and if he can't help you enough, needs my assistance, I'll get involved. But he should be able to handle just about everything that you may need.
>
> The parties in the cases to be tried this week are entitled to jurors who approach their cases with an open mind, and agree to keep their minds open until a verdict is reached. Jurors must be as free as humanly possible from bias, prejudice or sympathy, and

> must not be influenced by preconceived ideas, either as to facts or as to the law. You must not form an opinion or express an opinion about any case that is here for trial.

After this instruction, *voir dire* of the jurors began and lasted for three days before the jury was impaneled. At each of the 12 recesses the court took before impaneling the jury, the judge gave the following admonitions to the jury:

> Follow the instructions I've given you throughout the trial. I remind you of those, not to talk about the case among yourselves or with anyone else. Don't have any contact whatsoever with the people interested or involved in this matter. Don't conduct any independent research into matters or issues that may be raised by this trial. Don't form or express any opinions about the case.

After impaneling the jury, the judge further instructed the jury as to their conduct during deliberations as follows:

> While you serve as a juror in this case, you must obey the following rules. First, you must not talk about the case among yourselves. The only place this case may be talked about is in the jury room, and then only after I tell you to begin your deliberations at the conclusion of the trial. You don't talk about the case while it's going on. You don't talk about the case until I tell you that you can at the end of the trial when you begin your deliberations in the jury room.
>
> Second, you must not talk about this case with anyone else, including members of your family or your co-workers, or allow anyone else to talk with you or say anything in your presence about this case. As I said, that includes your family members, people that you are close to that will be curious about what you are doing and what's going on, and you have to enforce with them that you can't talk about the case. I believe I mentioned earlier that after the trial is over and you've been released, you will be able to talk about it at that point, but you can't until that time.
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> If anyone communicates or attempts to communication with you or in your presence about this case, you must notify me of that fact immediately through one of the bailiffs.
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> Third, while you sit as a juror in this case, you're not to form an opinion about the outcome of this case, nor are you to express to anyone any opinion about the case until I tell you to begin your deliberations at the conclusion of the trial.

> Fourth, you must not talk or communicate in any way with any of the parties in this case, the witnesses, the lawyers, or other persons interested or involved in this case. This rule applies inside as well as outside the courtroom and the courthouse, and it prohibits any type of conversation, whether about the evidence in this case, or about the weather, or just the other conversations to pass the time of day.
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> . . . .
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> Fifth, you must not read about this case in the newspaper or listen to any radio or television broadcasts of this case, if there is such a thing. Your verdict must be based exclusively on what is brought out in this courtroom.
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> Sixth, you must not make any independent inquiry or investigation by any means into matters or issues raised by this trial, including books, magazines, law books, encyclopedias, the Internet, anything and everything else. You get all your information right here.
>
> Each of you must obey each of these rules to the letter. Unless you do so, there is no way the parties can be assured of absolute fairness and impartiality.
>
> It is your duty, both while the trial is in progress and while it is in recess and while you're in the jury room, to see that you remain a fair and impartial trier of the facts. If you violate these rules, you violate an order of the Court, and this is contempt of court and could subject you to punishment as provided by law.

A two-week jury trial followed and at each of the sixty recesses that were held, the judge admonished the jurors using substantially the same admonition as used during jury selection quoted above.

After the close of evidence, the jurors were instructed by the judge on the substantive elements of the law and a unanimous verdict was reached and judgment was entered in favor of defendants on 16 December 2008.

On 18 December 2008, plaintiff's counsel was contacted by juror Rachel Simmons ("Simmons"), who alleged substantial juror misconduct prior to the taking of any evidence in the trial. Simmons provided by an affidavit, the following testimony:

I, Rachel Simmons, avow that the following is true and correct:

> I served on the jury for the legal case Cummings v. Ortega. I believe that significant juror misconduct occurred during the trial. Upon my recollection, on December 4, 2008, prior to any evidence introduced by the plaintiff, Juror No. 8 [Githens], while in the jury deliberation room, and in the presence of myself and other jurors, made the statement to the effect that his mind was made up, and that the other jurors could agree with him or they would sit there through the rest of the year. He subsequently stated that he wished the plaintiff, Ms. Cummings, would have died, and we wouldn't have to be sitting there at all. He also attempted to discuss the case prior to deliberations with several jurors present, at which point another juror reprimanded him.
>
> These statements interfered with my thought process about the evidence during the plaintiff's case, and I believe it interfered with the other jurors as well during deliberation, as they began realizing any discussion about the evidence was futile, and they didn't want to continue serving through the holidays. In my opinion, there was not a full and frank discussion of the evidence.

On 12 January 2008, a corroborating affidavit was provided by another juror, Joel Murphy ("Murphy"):

I, Joel Murphy, swear that the following is true and correct:

> I served on the jury for the legal case Cummings v. Ortega. Prior to actual deliberation on the evidence in this case, Juror No. 8 made statements that his mind was made up and no matter what the evidence he wasn't going to change it. This statement had a chilling effect on other jurors. He also exhibited extremely disruptive behavior and was especially discourteous to the female jurors in the case, to the extent that I believe it affected their ability to express their opinions about the evidence. I believe several jurors did not engage in full discussion of the evidence because they didn't want to sit through the holidays in a futile attempt to discuss the evidence with him.

On 14 January 2009, plaintiff filed a motion to set aside the verdict pursuant to Rule 59(a) of the North Carolina Rules of Civil Procedure. In the motion, plaintiff alleged that after the jury was selected, the trial court gave N.C.P.I., Civ. 100.20 at every recess. Plaintiff further alleged, based on information obtained from the aforementioned affidavits of Jurors Murphy and Simmons, that Juror

Githens "prior to any evidence, held an inelastic position as to the outcome of the case, and tainted the entire jury pool by threatening that he would stonewall the case through the holidays until the end of the year unless the jurors agreed with him" and that Githens sent text messages during the trial. Moreover, plaintiff's Rule 59 motion asserted that the entire jury disregarded the trial court's instructions and engaged in misconduct by failing to report Githens' misconduct.

In considering plaintiff's motion, the trial court reviewed the affidavits of jurors Simmons and Murphy and found them to be admissible as to matters relating to juror misconduct that occurred prior to deliberation. The court further found that the "matters within the submitted affidavits that relate to extraneous matters and certain matters occurring after the commencement of deliberation of the jury, inadmissible, and has not considered those matters with regard to the Plaintiff's Motions." Based on these parts of the affidavits, the trial court set aside the jury verdict by an order filed on 13 April 2009 and granted a new trial pursuant to North Carolina Rule of Civil Procedure 59(a), subsections (1) (trial irregularity), (2) (jury misconduct), and (5) (manifest disregard of jury).

In response to the trial court's order, defendants obtained an affidavit from Juror Githens on 17 April 2009. In his affidavit, Githens avers, in pertinent part, as follows:

> 8. I am providing this affidavit because I cared deeply about serving as a juror on this trial and feel very distressed that my conduct has been construed by the court to cast any doubt upon the fairness of this trial to either party.
>
> 9. Except as set out in Paragraph 12, I do not recall making the specific statements that my fellow jurors allege I made.
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> 10. However, if I did make such statements, they were made only to my fellow jurors while in the jury room. I know this because I certainly never spoke at any time to anyone else about the case until after the verdict was returned and we were discharged as a jury.
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> 11. In addition, any such statements made to my fellow jurors in the jury room would not have been intended to be taken literally. Any such comments certainly would not have been intended to sway, intimidate or persuade any other jurors during the evidence portion of the trial. If anything, such comments would have

been only a reflection of my state of mind at the time at having to anticipate a three-week trial.

12. I do recall making a general statement to the effect that, "once my mind was made up, I would not change it." However, I did not state that I had made up my mind before any evidence was presented, because I had not. The affidavits of Mr. Murphy and Ms. Simmons are inaccurate.

13. Any such statements by me also were not, and should not be construed as, an accurate statement of how I intended to conduct myself as a juror or how I did conduct myself as a juror regarding my duties to listen to and consider all of the evidence and the law before rendering my verdict.

14. Any such statements by me were not, and should not be construed as an accurate statement of how I reached my verdict.

Based on this affidavit, defendants filed a motion for reconsideration and relief from order, pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure on 15 April 2009. In that motion, defendants allege that the trial court improperly considered Simmons' and Murphy's affidavits. Defendant's motion was denied on 10 July 2009.

II. Jurisdiction and Standard of Review

[1] Plaintiffs filed a motion to dismiss defendants' appeal in part because defendant's notice of appeal of the 13 April 2009 order allowing plaintiff's motion to set aside the verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(a) was not filed until 21 July 2009, well over 30 days after entry of the order. Under N.C.R. App. P. 3(c)(3), the time for taking appeal was tolled for all parties until disposition of plaintiff's motion to set aside the verdict. The order granting plaintiff's Rule 59(a) motion was entered on 13 April 2009. Defendants had an immediate right to appeal from the 13 April 2009 order, as it granted a new trial. Although an order granting a new trial is interlocutory, defendants had a right to immediate appeal pursuant to N.C. Gen. Stat. §§ 7A-27(d)(4) and 1-277(a), because the trial court's order allowed a new trial. However, instead of filing a notice of appeal, defendants filed their motion for reconsideration pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 on 15 April 2009. N.C.R. App. P. 3 does not toll the time for taking an appeal during the pendency of a Rule 60 motion, so defendants' appeal of the 13 April 2009 order should have been filed no later than 30 days after 15 April 2009. Defendants essentially concede this point in their response to plaintiff's motion to dis-

miss the appeal as to the 13 April 2009 order. Although the trial court also certified "this matter" for immediate appeal under N.C. Gen. Stat. § 1A-1, Rule 54, such certification was unnecessary as to the 10 July 2009 order, because defendants had a right to immediate appeal under N.C. Gen. Stat. § 7A-27(d)(4). Also, Rule 54 certification is intended to permit review of an interlocutory order but cannot extend the time for taking an appeal, so the Rule 54 certification cannot confer jurisdiction as to the appeal from the 13 April 2009 order, which was not timely filed. *See DKH Corp. v. Rankin-Patterson Oil Co., Inc.*, 348 N.C. 583, 500 S.E.2d 666 (1998) ("We have held that N.C.G.S. § 1-277 and N.C.G.S. § 7A-27(d) allow an appeal to be taken from an interlocutory order which affects a substantial right although the appeal may be interlocutory."). Therefore, we must allow plaintiff's motion to dismiss defendants' appeal as to the 13 April 2009 order, as it was not timely filed. Defendants' appeal from the 10 July 2009 order denying defendants' motion was timely, so it is not dismissed.

Defendants have also filed a petition for certiorari pursuant to N.C.R. App. P. 21(a) for review of the 13 April 2009 order. Our Supreme Court has determined that this Court has authority to grant certiorari where a notice of appeal was not timely filed.

> Appellate Rule 21(a)(1) provides: "The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments . . . of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action." Construing [Appellate Rule 27(c) and Appellate Rule 21(a)(1)] together, we conclude that 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. *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997).

We believe it is appropriate to allow defendants' petition for certiorari to review the merits of this appeal fully. As defendants have argued, there is no prejudice or surprise to the plaintiff from allowing review of the 13 April 2009 order, in conjunction with the 10 July 2009 order. Essentially the same issues are raised as to both orders. Although the notice of appeal was technically filed 68 days late, it was filed only 11 days after entry of the 10 July 2009 order. Apparently all parties initially failed to realize that the notice of appeal was late as to the 10 July 2009 order, as all parties stipulated in the record on appeal that defendants' notice of appeal was "timely." All of the issues

arising under both orders have been fully briefed by the parties. Defendants also note that this Court has recognized that the appropriate procedure in this situation would have been to file their Rule 60 motion with the trial court after giving appeal from the order of 13 April 2009, and the trial court would still have had limited jurisdiction to consider the Rule 60 motion for the purpose of indicating how it would rule upon the motion. In *Hall v. Cohen*, we explained this procedure as follows:

> As a general rule, an appellate court's jurisdiction trumps that of the trial court when one party files a notice of appeal unless the case has been remanded from the appellate court for further determination in the trial court. The trial court retains limited jurisdiction to indicate how it is inclined to rule on a Rule 60(b) motion.
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> Upon the appellate court's notification of a Rule 60(b) motion filed with the trial court, this Court will remand the matter to the trial court so the trial court may hold an evidentiary hearing and indicate "how it [is] inclined to rule on the motion were the appeal not pending." This practice allows the appellate court to "delay consideration of the appeal until the trial court has considered the [Rule] 60(b) motion. [So that upon] an indication of favoring the motion, appellant would be in position to move the appellate court to remand to the trial court for judgment on the motion and the proceedings would thereafter continue until a final, appealable judgment is rendered." Arguments pertaining to the grant or denial of the motion along with other assignments of error could then be considered by the appellate court simultaneously.

177 N.C. App. 456, 458, 628 S.E.2d 469, 471 (2006) (citations omitted). As the trial court already considered the Rule 60 motion, our granting of certiorari accomplishes the same result as the procedure approved by *Hall*. Although the correct procedure was not followed, we have the benefit of the trial court's ruling upon the Rule 60 motion, which permits us to review all of the issues on appeal. We therefore grant defendants' petition for certiorari in our discretion to permit review of the 13 April 2009 order in conjunction with the appeal from the 10 July 2009 order.

[2] Plaintiff contends appellate review of an order of a trial court granting or denying a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure is limited to the question of whether the record discloses a manifest abuse of discretion or that

the ruling was clearly erroneous. *Worthington v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982); *Pinckney v. Van Damme*, 116 N.C. App. 139, 447 S.E.2d 825 (1994). Appellate review of Rule 60 motions is also subject to review under the abuse of discretion standard. *Sawyer v. Goodman*, 63 N.C. App. 191, 303 S.E.2d 632 (1983).

Defendant contends that the applicable standard of review for this matter is *de novo* review on the basis that the improper admission of the affidavits by Simmons and Murphy constitute an error of law because the affidavits referred to Githens' state of mind. *See Selph v. Selph*, 267 N.C. 635, 148 S.E.2d 574 (1966) and *Stone v. Baking Co.*, 257 N.C. 103, 125 S.E.2d 363 (1962) (Both cases provide that, where the trial judge based his decision to grant a new trial solely upon evidence which, under prior decisions of the Court, is incompetent, our Court must review the trial court's decision *de novo* to determine whether the court committed an error of law.).

Because the outcome of the appeal turns on the standard of review we employ to analyze the issues on appeal, we will briefly explain why we employ the abuse of discretion standard in this matter. In considering both a Rule 59(a) motion and a Rule 60 motion, a trial judge, as opposed to the appellate courts, is in a better position to assess the effect which any trial irregularity or juror misconduct may have on both the outcome of a trial and the fairness of the procedures. The trial judge is an observer to the events which he adjudicates. When evaluating a Rule 59(a) motion, there is always a tension between the duty of the judge to uphold the integrity of the jury's verdict as part of the parties' constitutional right to a jury trial and the duty of the judge to ensure that all parties receive a fair trial as part of the constitutional right to due process and impartial procedures. The balancing of the interests required in making this decision is usually case specific.

With regard to the trial court's review of the jurors' affidavits to grant plaintiff a new trial, we note that the trial judge is presumed to be capable of distinguishing competent evidence from incompetent evidence. *See Blackwell v. Hatley*, —— N.C. App. ——, ——, 688 S.E.2d 742, 745-46 (2010) (providing that " '[w]here both competent and incompetent evidence is before the trial court, we assume that the trial court, when functioning as the finder of facts, relied solely upon the competent evidence and disregarded the incompetent evidence.' When sitting without a jury, the trial court is able to eliminate incompetent testimony, and the presumption arises that it did so.' ") (citations omitted).

In the present case, the trial court's order specifically provided that the court did not consider "matters within the submitted affidavits that relate[d] to extraneous matters and certain matters occurring after the commencement of deliberation of the jury[.]" Moreover, we note that the trial court had an opportunity to observe the members of the jury before and during trial and faithfully instructed them to refrain from talking about the case and refrain from forming an opinion about the outcome of the case until all of the evidence had been presented and the jury retired for deliberation. Finally, the trial court's order finds specifically that its decision was not founded on a conclusion of the mental processes of the jurors regarding substantive law or evidence during deliberations and does not rest on these considerations. It is obvious the trial court was aware of the limitations contained in Rule 60(b) which generally prevent the court from reviewing juror affidavits to impeach the jury verdict. However, because the affidavits include more than merely information regarding the mental processes of the jurors, we do not think it necessary to engage in a *de novo* review. Based on this Court's long held presumption of the trial court's capability to distinguish competent evidence from incompetent evidence, we disagree with defendants' contention and hold that the proper standard of review in this case is abuse of discretion.

" 'It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge.' " *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (quoting *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982)). " ' "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." ' "*Crocker v. Roethling*, 363 N.C. 140, 156, 675 S.E.2d 625, 636 (citations omitted), *reh'g denied*, 363 N.C. 381, 678 S.E.2d 236 (2009).

[3] In awarding a new trial, the trial court specifically evaluated the affidavits as they related to irregularity, juror misconduct and the disregard of the court's instructions pursuant to North Carolina Rule of Civil Procedure 59(a). Upon review, all the affidavits evince that some jurors began discussing the merits of the case before deliberations began, against the repeated instructions of the court. This fact appears uncontested. Furthermore, it appears from all affidavits that after such discussions had taken place, that no juror reported to the

trial judge, any misconduct which was against the repeated instructions of the court. While none of the juror affidavits specifically discuss these factors and attempt to evince obviously incompetent matters which a judge should not consider under Rule 60(b), the factual inference that remains is that some jurors discussed the case before deliberations and no juror reported these discussions to the trial judge. For purposes of Rule 59(a) these acts would qualify as competent evidence to show a trial irregularity, misconduct of the jury, or manifest disregard by the jury of the instructions of the court.

The fact that a few jurors may have begun commenting on evidence before deliberations, against the instructions of the court, is manifest disregard of the instructions. However, because no other juror reported to the trial judge before the deliberations began when the harm could have been remedied, any harm arising from these predeliberation discussions cannot be easily remedied after the verdict. While the preliminary discussions of evidence by one or more jurors is improper, the failure of any of the twelve jurors to bring it to the attention of the judge is more serious, because it creates an impression that the jurors cannot understand what the judge is repeatedly telling them and cannot conform their conduct to the repeated instructions. If a jury cannot follow this simple instruction that was designed to ensure the fairness of the judicial process, then it becomes problematic as to whether the jurors could understand and follow the complex instructions on liability and damages. Jury instructions regarding the procedures to be used during a trial are not incantations to give a ritual appearance of justice, but a practical, meaningful guide to lay persons in the procedures they must employ in reaching a decision. Not every violation of a judge's instruction merits a new trial; however, this conduct is placed on a sliding scale which is balanced by the trial judge's discretion and duty to ensure a fair trial. Our law does not draw a bright line test for resolving the tension between preserving the integrity of a jury verdict and overturning a verdict when the fairness of the judicial process is brought into question. We find that the abuse of discretion standard on this evidence is the proper standard to employ under these narrow facts. We believe the trial judge understood the substantial costs to the parties and the courts in overturning a jury verdict. However, where the trial judge finds that the fairness of the judicial process has been breached under Rule 59(a), he has the broad discretion to balance these competing concerns to achieve a just result, and our case law

does not allow us to vacate this decision absent manifest abuse. *See Davis*, 360 N.C. at 523, 631 S.E.2d at 118.

Likewise, when ruling on defendants' Rule 60 motion for reconsideration of its Rule 59 motion, the trial court took careful consideration of Githens' affidavit and used its proper discretion to weigh the credibility of the competing affidavits of Simmons and Murphy (which were given shortly after trial) and of Githens, who proffered his affidavit after the judge's initial order for a new trial months after the initial trial had concluded. We note that juror Githens does not affirmatively state that he did not make the pre-deliberation comments to the other jurors and instead avers that he does not remember making the comments, but if he did, it could not have been understood in the manner in which the two other jurors had comprehended it. Based on his ruling, the trial judge did not find this evidence convincing, nor do we. The trial court was within its discretion when it clearly articulated on 10 July 2009, that it "evaluated the aforementioned affidavits only as they relate to the extraneous prejudicial information to the jury, and not related to the juror's mental processes, or to the effect upon any juror's mind or emotions as influencing him or her to assent to or to dissent from the verdict."

While the statements of Githens made before the presentation of any evidence may or may not have had a prejudicial impact on plaintiff, the fact that any discussion of his comments of whatever nature took place and were not reported to the judge by one or more jurors touches on the fairness of the trial process. We affirm the decision of the trial judge.

IV. Conclusion

The trial court properly exercised its discretion in granting plaintiff's motion pursuant to Rule 59(a) and denying defendants' motion pursuant to Rule 60(b). For the reasons stated herein, we hold that on these facts, the trial court did not err by admitting juror affidavits and considering them as a factor in awarding a new trial. For the reasons stated herein, we affirm.

Affirmed.

Judges McGEE and STROUD concur.

STATE OF NORTH CAROLINA v. RYAN MARCUS KIRBY

No. COA09-1631

(Filed 17 August 2010)

1. Homicide— second-degree murder—motion to dismiss—self defense

The trial court did not err by denying defendant's motion to dismiss a second-degree murder charge where defendant had contended that he acted in self-defense. The evidence presented at trial (of an earlier altercation, defendant arming himself and looking for the victim, the size disparity between defendant and the victim, the physical evidence, questions about the credibility of defendant's witnesses, and defendant's flight after the shooting) was sufficient to allow a reasonable juror to infer that defendant was the aggressor.

2. Evidence— prior crimes or bad acts—selling drugs

The trial court properly admitted evidence in a homicide prosecution that defendant had been selling drugs in the area where the shooting occurred on the day of the shooting. The evidence was relevant to refute defendant's claim of self-defense.

Appeal by defendant from judgment entered 17 April 2009 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 12 May 2010.

Attorney General Roy Cooper, by Assistant Attorney General W. Wallace Finlator, Jr., for the State.

Sofie W. Hosford for defendant appellant.

HUNTER, JR., Robert N., Judge.

Ryan M. Kirby ("defendant") appeals his conviction of voluntary manslaughter for which he was sentenced to a term of 69 to 92 months' imprisonment. On appeal, defendant asserts that (1) the trial court erred by denying defendant's motions to dismiss the charge of second-degree murder for insufficient evidence that defendant did not act in self-defense; and (2) the trial court erred by allowing the State to ask defendant on cross-examination if he had been selling

1. Defendant also asserts in his reply brief that the State's argument contains assertions not in the record. Since we do not rely on these assertions to make our decision, we decline to address them.

drugs in the area earlier in the day prior to the shooting.[1] After review, we conclude that the trial court did not err.

I. FACTUAL BACKGROUND

On 1 November 2007, defendant was involved in a shoot-out on South Street in Raleigh, North Carolina, with Joseph Dunn ("Dunn") resulting in his death. Defendant was charged with second-degree murder. Defendant entered a plea of not guilty and was tried before a jury on 13 April 2009.

At trial, the State's evidence tended to show the following: Chris Braswell ("Chris") testified that he was walking up the street when he heard a lot of hollering and cussing from the area behind him on South Street. Chris observed that the source of the commotion was located in front of a little store on South Street and involved defendant and Dunn. Although Chris did not witness the shooting, he testified that "the shorter man appeared to have a gun and was pointing it at the bigger man." After hearing gunshots, Chris called 911.

Officer Charlie Jacobs ("Jacobs") of the Raleigh Police Department responded to the call which reported a shooting on South Street in Raleigh, North Carolina, at 2:00 p.m. on the afternoon of 1 November 2007. Upon arriving at the scene, he found Dunn lying down beside the curb. Jacobs witnessed Dunn as he took his last breath and died. Jacobs did not see a gun in the vicinity of Dunn; however, he did see a black ski mask with a little face on it beside the victim.

The State also presented the testimony of Francis Manachino, ("Manachino"). Manachino said that he saw two men, one standing behind the other. Manachino testified that defendant was wearing a heavy coat and had Dunn in a half nelson in complete submission. He also stated that he believed that it was clear that Dunn, given his smaller frame and submissive position, could not retaliate while in a half nelson. Manachino testified that he made eye contact with defenant, but that he became afraid and looked away. A second later, he heard six gunshots. While he did not witness the shooting itself, Manachino testified that after the shooting, he saw Dunn lying lifeless on the ground. Manachino also stated that he recognized Dunn as the smaller man who had been held by defendant in a half nelson moments earlier.

Danny Weston ("Weston") testified that on the afternoon of 1 November 2007, he was working a roofing job on South Street. While talking to his boss about the job, Weston heard gunshots. Weston

threw himself onto the ground underneath a truck. From this vantage point, he saw defendant picking up cartridges off the ground. Weston testified that defendant had a heavy coat on and a hood over his head with fur lining. After defendant had picked up the cartridges, he ran toward a nearby convenience store.

Mary Williams Ellison ("Ellison") testified that on 1 November 2007, she was at her home across the street from the scene of shooting, watching a movie, when she heard arguing. When Ellison looked out the window, she saw Dunn and defendant yelling at each other. Ellison testified that the men argued for approximately five to six minutes about a woman. During the argument, Ellison heard Dunn say to defendant, "Whatever. She was with me last night. So she was with you. You ain't the only one that she was with." Then she saw Dunn walk off towards South Street. Ellison testified that there was another person with defendant, but that Dunn was alone. After Dunn walked away from defendant, Ellison witnessed defendant go into a house located at 518 West Lenoir Street next door to the crime scene, then come back out and open up the trunk of a car and retrieve a black coat with a hood and orange lining inside. Ellison further testified that she saw defendant walk toward South Street and that she heard gunshots a few minutes after defendant walked off. After hearing the shots, Ellison walked in the direction of the gunshots and saw Dunn lying on the ground. Ellison testified that she never saw Dunn with a gun. After returning to her house, Ellison saw defendant and an unnamed man running from South Street where the shooting had taken place. At this time, she heard the unnamed man say to defendant: "Yo, yo, man, you need to go ahead and get on out of here." Ellison heard defendant say, "I'm about to be out" as he was running away.

Dr. Thomas Clark, the forensic pathologist who performed the autopsy on Dunn, testified that there were two gunshot wounds present on Dunn's body. The first wound was located behind the right side of the head above the ear. Dr. Clark testified that the bullet that inflicted the first wound entered Dunn's head causing damage to the brain. Dr. Clark testified that the first gunshot wound caused Dunn's death. In addition, Dr. Clark testified that the second bullet entered the right side of Dunn's upper chest, fractured Dunn's clavicle, and caused physical damage, but absent the gunshot wound to the head, this shot would not have resulted in death.

Furthermore, firearms examiner and Special Agent Beth S. Desmond of the North Carolina State Bureau of Investigation, testi-

fied that she received the evidence from the 1 November 2007 crime scene. This evidence included a .38 revolver which was recovered from an ivy bush at a drug house, two live rounds, four fired cartridge cases, two fired .380 cartridge cases, and two fired bullets. Agent Desmond testified that the two fired .380 cartridge cases could not have been used in a .38 revolver. However, Agent Desmond further determined that the two bullets taken from Dunn's body were fired from the .38 revolver found at the crime scene. Moreover, gunshot residue testing of the .38 revolver compared to residue found on Dunn revealed that Dunn had either fired a firearm, handled a discharged firearm, or was near a firearm that had been recently fired. However, it could not be definitively determined that Dunn had fired a weapon. Residue testing also found gunshot residue on a North Face jacket that was recovered from defendant.

In addition, Detective Timothy Fanney ("Fanney") investigated the house at 519 West Lenoir Street where Mary Ellison testified that she saw defendant and the unnamed man after the shooting. Fanney described the house as a "drug house" and noted that investigators found a small amount of marijuana and crack cocaine in the house. On a footpath near the house, Fanney found the .38 caliber gun in an ivy bush near the "drug house." The gun contained four fired shells in the cylinder and two unfired shells. Fanney advised that a revolver does not eject shotgun shells, but noted that the .38 caliber revolver smelled as though it had been recently fired. Fanney also testified that investigators found a cell phone inside the "drug house" with the name "Kirb" displayed on the face. Fanney further noted that examination of latent fingerprints on the gun indicated that defendant had touched the .38 caliber revolver, which was collected by Fanney as evidence at the crime scene.

Law enforcement officers located defendant approximately three hours after the shooting. After being taken into custody and read his *Miranda* rights, defendant was questioned by Detective Robert LaTour. Defendant told LaTour that Dunn approached him and began to argue with him about a girl named Shameka. Defendant also said that he felt disrespected by Dunn because he was wearing a "Scream" mask with red on it, like blood, because defendant was a member of the Blood gang and Dunn was a member of the Folk gang.

About 10 minutes after defendant's argument with Dunn, defendant stated that he and a friend walked to a nearby convenience store to purchase a soft drink. At this time, defendant took a gun out of

what he referred to as a "stash." Defendant stated that he brought the gun with him because he knew that the Folk gang, of which Dunn was a member, was known for robbing people, and if something happened, he wanted to be able to protect himself. Defendant also told Detective LaTour that, while en route to the store, Dunn approached him and said that the boss of the Folk gang did not want defendant around their territory anymore. In response to Dunn's remark, defendant told Detective LaTour that he stated to Dunn that the Folk gang could not tell him what to do. Detective LaTour testified that defendant told him that as he turned around and started to walk away from Dunn, Dunn grabbed defendant from behind with his left arm. Defendant further told Detective LaTour that Dunn ordered him to show his hands, held a gun to defendant's head, and stated that he was going to kill defendant. At this point, defendant pulled a gun out of his pocket with his right hand, switched it to his left hand, spun around, and he and Dunn both fired their guns. Defendant told Detective LaTour that after he saw Dunn fall to the ground, he ran to West Lenoir Street where he threw his .38 caliber revolver into a vacant lot. Defendant, subsequently, ran to his car and drove away from the scene alone.

Detective LaTour noted that defendant signed his *Miranda* form with his right hand and testified that defendant had identified himself as right-handed in the past. However, during his interrogation, defendant stated that, although right-handed, he shoots with his left hand. Detective LaTour also made a photographic lineup that included defendant and his friend Keenan Henderson ("Keenan"). Keenan was positively identified by Ellison as the person who was with defendant on the day of the shooting.

During defendant's case, defense counsel argued and presented evidence that defendant shot Dunn in self-defense. Keenan testified on defendant's behalf. During his testimony, he stated that he and defendant were together at 519 West Lenoir Street on the day of the shooting. Keenan further testified that Dunn approached defendant and began to argue with him about a female.

Approximately fifteen minutes after the argument, Dunn approached Keenan and defendant as they were walking to the store. Dunn and defendant began arguing again, at which point Keenan stated that he walked away from the two men. Keenan testified that while his back was turned away from the men, he heard the sound "clink, clink," whereupon, he turned around and saw Dunn standing

behind defendant holding a gun to defendant's head. Dunn held defendant in a choke hold with his left arm and held the gun to the right side of defendant's head. Keenan stated that Dunn and defendant argued for approximately five minutes before defendant jerked away from Dunn and the men began firing their guns. Keenan stated that he heard about five gunshots while running back to the 519 West Lenoir Street house.

Sheena Alford ("Alford") also testified on defendant's behalf that she saw Dunn grab defendant and put a gun to his head, at which point, shots were fired and she ran home. Alford also testified that she did not speak with police about what she had seen.

Finally, defendant took the stand in his own defense. Defendant testified that Keenan approached him on the day of the shooting and stated that Dunn wanted to talk to him about a female. Defendant replied that he did not want to argue about a female and went back inside the house. Defendant further testified that approximately 10 to 15 minutes later, he and Keenan went to the store on South Street, around the corner from the 519 West Lenoir Street house. While leaving the store, defendant noticed Dunn walking toward him. According to defendant, Dunn approached him and asked, "So what are we going to do, beef or make money?" To which defendant walked away from Dunn and responded, "Man, are you still on that crazy stuff," and "Man, forget that." Then, defendant stated that he heard the click of a gun, and Dunn grabbed defendant from behind with his left arm and placed the gun to his head. Defendant testified that at this point, he started to pray while Dunn was threatening to kill defendant. However, defendant testified that he remembered that he had a gun when Dunn demanded that defendant show his hands. At this point, defendant took his gun out of his right pocket and the men began to shoot at each other. Defendant testified that he shot Dunn twice before running away from the scene. Defendant further stated that Dunn was still shooting at him while defendant was running away. Moreover, defendant testified he shot Dunn only because he believed Dunn was going to kill him.

During the State's cross-examination, defendant admitted that he kept a gun hidden in a vacant lot and stated that he had retrieved his gun and placed it in his North Face jacket prior to walking to the store. Defendant also admitted that he was a member of the Blood gang and had been selling drugs earlier in the day in the vicinity of the shooting. He further asserted that he was both taller and weighed

twice as much as Dunn. Finally, defendant admitted that, after the shooting, he threw his gun in the woods and did not call 911 for help or to report the incident to police.

After the close of the evidence, the jury, after being properly instructed by the trial court, returned a verdict of voluntary manslaughter. The trial court sentenced defendant to 69 to 92 months' imprisonment. Defendant gave timely notice of appeal. This Court has jurisdiction to review defendant's appeal as it is an appeal as of right from a final judgment of the Wake County Superior Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2009).

II. CONTENTIONS ON APPEAL

On appeal, defendant asserts the following assignments of error: First, he asserts that the trial court erred by denying his motion to dismiss the charge of second-degree murder based on a contention that the State's evidence was insufficient to refute defendant's evidence of perfect self-defense. Secondly, defendant argues that the trial court incorrectly admitted irrelevant evidence that defendant had been selling drugs earlier on the day of the shooting.

III. Motions to Dismiss for Insufficiency of Evidence

[1] Defendant contends that the trial court erred by denying his motion to dismiss the charge of second-degree murder and asks this Court to vacate his conviction of voluntary manslaughter on the ground that he acted in self-defense. For the reasons stated below, we disagree and affirm the trial court's denial of the motion.

In ruling on a motion to dismiss for insufficiency of evidence, the trial court need only determine "whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998). This Court applies *de novo* standard of review when considering whether the State presented substantial evidence to establish each element of the offense and demonstrate that defendant was the perpetrator. *State v. Hart*, 179 N.C. App. 30, 39, 633 S.E.2d 102, 108 (2006), *reversed on other grounds*, 361 N.C. 309, 644 S.E.2d 201 (2007).

In considering a motion to dismiss, the trial court must consider all evidence in the light most favorable to the State and give the State the benefit of every reasonable inference that can be drawn from the evidence. *State v. Primes*, 314 N.C. 202, 333 S.E.2d 278 (1985). Also, in determining if the evidence in question is substantial, the State must

only establish that a reasonable mind might find the evidence adequate to support a conclusion. *State v. Burton*, 108 N.C. App. 219, 224, 423 S.E.2d 484, 487, *disc. review denied*, 333 N.C. 576, 429 S.E.2d 574 (1993).

In the case at bar, defendant does not dispute that he shot Dunn, nor does he argue that the State has failed to prove the elements of voluntary manslaughter. Instead, defendant asserts that he was justified in his actions based on his contention that he was completely justified in killing Dunn because he acted in perfect self-defense. A person acts in perfect self-defense where the following elements are supported by the evidence:

> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. McAvoy, 331 N.C. 583, 595, 417 S.E.2d 489, 497 (1992).

To negate a claim of self-defense, the State need only prove beyond a reasonable doubt the non-existence of either of the first two elements. For example, the State must prove that either defendant had no belief that it was necessary to kill the deceased in order to escape death or great bodily injury, or that such belief was unreasonable because the circumstances as they appeared to defendant were insufficient to create such a belief in the mind of a person of ordinary firmness. *State v. Reid*, 335 N.C. 647, 670-71, 440 S.E.2d 776, 789 (1994). "To survive a motion to dismiss, the State must therefore present sufficient substantial evidence which, when taken in the light most favorable to the State, is sufficient to convince a rational trier of fact that defendant did not act in self-defense." *State v. Ammons*, 167 N.C. App. 721, 726, 606 S.E.2d 400, 404 (2005).

Considering only the undisputed facts in the case, it is reasonable that a jury could infer that defendant did not kill Dunn in self-defense, but rather armed himself with a .38 revolver and went looking for Dunn in order to settle an altercation over a female that began earlier in the day. For instance, the State presented eyewitness testimony from Mary Ellison which tended to show that defendant and Dunn were involved in an argument. Ellison further testified that she saw Dunn walk off, thus separating himself from the altercation. Subsequently, Ms. Ellison saw defendant go into the house at 518 West Lenoir Street, come back out and take a black coat out of a car in front of the house and walk toward South Street, which was in the same direction that Dunn had walked minutes earlier.

Defendant, on the other hand, testified that he was merely going to the store to purchase a soft drink with Keenan. However, defendant admitted that he retrieved his gun before going to the store and put it in his North Face jacket to conceal it. Based on these facts alone, it is reasonable to infer that defendant was preparing for a violent altercation with Dunn when he armed himself with a .38 caliber revolver and subsequently walked in the same direction as Dunn. As such, the evidence presented during trial, taken in the light most favorable to the State, was sufficient to convince a rational trier of fact that defendant did not act in self-defense.

Moreover, taken in the light most favorable to the State, it is reasonable to conclude that Dunn may not have intended to engage in a fight with defendant. Although defendant testified that Dunn grabbed him from behind and held a gun to his head, the State presented the testimony of Manachino, who testified that he saw a big man wearing a heavy coat holding a smaller man in front of him in a half nelson and in complete submission. The State's evidence further showed that Manachino told Detective LaTour that the bigger guy was about five feet eleven inches in height and was wearing a puffy, parka-style jacket. Manachino also testified that the smaller guy had dread locks and was about six inches shorter that the bigger male. The State presented the testimony of Detective LaTour that on the night he interviewed defendant, defendant was approximately six feet one or two inches in height and weighed approximately 275-280 pounds. Given that Manachino was close enough to hear an exchange between Dunn and defendant, which he gave in a statement to Detective LaTour, it is logical for the jury to infer that he was close enough to accurately perceive the significant size disparity between defendant and Dunn.

The physical evidence presented by Dr. Clark tended to show that the gunshot wound that killed Joseph Dunn was located behind the right side of the head above the ear. This location is consistent with being shot from behind by a taller man holding a gun with his right hand. In addition, defendant told the jury he shot Joseph with his left hand. However, Detective LaTour told the jury that he noticed that defendant used his right hand when he signed his *Miranda* form and noted that defendant had previously identified himself as right-handed in past records.

After reviewing the transcript, it appears that defendant's witnesses' credibility was called into question numerous times throughout the trial. For instance, defendant presented two witnesses, Keenan and Shenna Alford, who claim to have witnessed the shooting and both of whom state that Dunn grabbed defendant from behind and put a gun to his head. However, we note, based on the State's cross-examination of the witnesses, that both witnesses were clearly defendant's friends and that neither witness called 911 or reported the incident to authorities. Moreover, Detective LaTour testified that during his interview, Keenan initially denied being present at the scene of the shooting, but later admitted to being at the scene. Witness credibility is an issue for the jury, and based on the aforementioned evidence, it is reasonable to infer that the jury could question the veracity of Keenan's and Alford's statements during trial.

In addition, based on our Supreme Court's ruling in *State v. Watson*, 338 N.C. 168, 181, 449 S.E.2d 694, 702 (1994) *(overruled on other grounds*, *State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724 (1995)) (holding that flight permits a jury to reasonably infer that the defendant harbors a sense of guilt inconsistent with a killing justified by self-defense), defendant's conduct after the shooting could have led the jury to reasonably infer that defendant did not shoot Dunn in self-defense. Defendant fled the scene and threw the .38 caliber revolver into a nearby field immediately after shooting Dunn. Defendant's flight after the shooting is clear evidence from which the jury could reasonably infer that defendant knew that he had not killed in self-defense, otherwise he would have stayed and waited for the police to come, or he would have called the police himself.

Moreover, the physical evidence presented at trial showed that four bullets were fired from defendant's .38 revolver, but that defendant testified to the jury that he only fired twice. The evidence further showed that defendant told Detective LaTour that he retrieved the .38

revolver from a hidden "stash" immediately before walking with Keenan toward South Street; however, defendant told the jury he had been carrying the gun all day. The issue of defendant's credibility is one to be determined by the jury. It is reasonable given the inconsistency of defendant's statements with the evidence in the record, that the jury simply did not believe defendant's version of events.

Defendant contends that his motion to dismiss should have been granted because the State's evidence was sufficient only to raise a mere suspicion that defendant committed the offense, but did not negate that he acted in self-defense. Defendant's contention is not supported by the record. The State presented witness testimony, along with physical evidence, that was clearly sufficient viewed in the light most favorable to the State to survive defendant's motion to dismiss. In fact, the evidence presented was sufficient to allow a reasonable juror to infer that, far from being the victim, defendant could have been seen as the aggressor given his conduct before and after the shooting. As such, the trial court properly denied defendant's motion to dismiss because there was sufficient evidence presented to establish the elements of the crime, and it could be reasonably determined that defendant was not acting in self-defense.

IV. RELEVANCE OF EVIDENCE THAT DEFENDANT SOLD DRUGS PRIOR TO SHOOTING DUNN

[2] Defendant next contends that the trial court erred by admitting allegedly irrelevant evidence that defendant had been selling drugs in the vicinity of the shooting on 1 November 2007. We disagree.

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2009). Whether evidence is relevant is a question of law, thus we review the trial court's admission of the evidence *de novo*. *See State v. Hightower*, 168 N.C. App. 661, 667, 609 S.E.2d 235, 239, *disc. review denied*, 359 N.C. 639, 614 S.E.2d 533 (2005). Defendant bears the burden of showing that the evidence was erroneously admitted and that he was prejudiced by the error. N.C. Gen. Stat. § 15A-1443(a) (2009); *State v. Moses*, 350 N.C. 741, 762, 517 S.E.2d 853, 866-67 (1999).

Defendant argues that, even if the evidence is deemed relevant, it should have been excluded under N.C. Gen. Stat. § 8C- 1, Rule 403 (2009). North Carolina Rule of Evidence 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substan-

tially 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."

In the case at bar, the evidence presented at trial tended to show that both defendant and Dunn were members of gangs in the area. The State presented evidence by Manachino, who testified to seeing a bigger man, who can be reasonably inferred to be defendant, peddling drugs earlier in the day. Defendant claims that the State's cross-examination of him with regard to his gang affiliation and drug dealing was meant solely to be unfairly prejudicial and disparage him in the eyes of the jury.

However, a trial court's ruling will be reversed on appeal "only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Jone*s, 347 N.C. 193, 213, 491 S.E.2d 641, 653 (1997). Demonstrating gang affiliation and the selling of illegal drugs is clearly relevant to show that defendant could have had a different objective in mind when the altercation took place and could refute defendant's claim of self-defense. Defendant presents no evidence that this is not a reasonable conclusion and that the trial court abused its discretion in any way. Consequently, defendant's assignment of error is without merit, and the trial court did not err.

V. CONCLUSION

For the reasons stated herein, we conclude that the trial court did not commit error by denying defendant's motion to dismiss the charge of second-degree murder based on defendant's contention that he acted in perfect self-defense. Moreover, we conclude that the trial court properly admitted evidence that defendant had been selling drugs on 1 November 2007 in the area where the shooting occurred. As such, we hold that defendant received a fair trial, free of prejudicial error.

No error.

Judges McGEE and STROUD concur.

STATE OF NORTH CAROLINA v. JAMES EDD LIGON, JR.

No. COA09-747

(Filed 17 August 2010)

1. Evidence— lay opinion testimony—content of pictures

The trial court did not commit plain error in a sexual exploitation of a minor and taking indecent liberties with a child case in allowing lay opinion testimony regarding the content of photographs. Additionally, the trial court did not abuse its discretion in admitting a police incident report which stated that "photo's [sic] had juvenile's female private's [sic] showing." Such statement was a "shorthand statement of fact" previously deemed admissible by our Supreme Court.

2. Evidence— lay opinion testimony—subjects of photographs

The trial court did not commit reversible error in a sexual exploitation of a minor and taking indecent liberties with a child case by allowing testimony that the subjects of photographs taken by defendant did not know that they were being photographed because the statements did not bear on defendant's guilt or innocence.

3. Evidence— lay opinion testimony—statement inconsistent with photographs

The trial court did not err in a sexual exploitation of a minor and taking indecent liberties with a child case in admitting a detective's statement that defendant's explanation of why he took certain photographs was not consistent with what the photographs depicted.

4. Evidence— hearsay—opened door—corroboration a fact—no prejudicial error

The trial court did not commit plain error in a sexual exploitation of a minor and taking indecent liberties with a child case in allowing statements of the victim and the babysitter, neither of whom testified, into evidence. Defendant opened the door to allow the State to ask questions concerning the investigation into a scratch on the victim's leg and testimony regarding the victim's age merely corroborated a fact which the jury could have

deduced from other evidence. Even assuming *arguendo* that it was error to admit the statement, defendant could not demonstrate that a different result would have been reached absent the error.

5. Appeal and Error— preservation of issues—motion to dismiss—failure to renew motion at close of all evidence

Defendant did not renew his motion to dismiss the charge of taking indecent liberties with a child at the close of all the evidence and thus failed to preserve for appellate review his argument that the trial court erred in denying his motion to dismiss the charge.

6. Sexual Offenses— first-degree sexual exploitation—insufficient evidence—motion to dismiss improperly denied

The trial court erred by denying defendant's motion to dismiss the charge of first-degree sexual exploitation of a minor because the photographs taken by defendant of a minor child did not depict any sexual activity.

Appeal by defendant from judgment entered 26 June 2006 by Judge Zoro J. Guice, Jr. in Superior Court, Buncombe County. Heard in the Court of Appeals 8 December 2009.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.

Brian Michael Aus, for defendant-appellant.

WYNN, Judge.

A person commits the offense of first degree sexual exploitation of a minor if he uses, employs, induces, coerces, encourages, or facilitates a minor to engage in sexual activity.[1] In the present case, Defendant James Edd Ligon, Jr., was convicted of first degree sexual exploitation of a minor and taking indecent liberties with a child based on several photographs he took of a minor female. Because these photographs do not meet the statutory definition of "sexual activity," we reverse Defendant's conviction for first degree sexual exploitation of a minor. We uphold, however, Defendant's conviction on the charge of taking indecent liberties with a child.

The police first became interested in Defendant when they were notified by employees at two separate businesses, Eckerd Drugs and

1. N.C. Gen. Stat. § 14-190.16 (2009).

Walgreens, that Defendant sought to have questionable photographs developed. Walgreens has a policy against printing photographs depicting full frontal nudity, sexual activity, pornography, or child pornography. Three of the photographs that Walgreens withheld from Defendant's order depicted the five-year-old child whom we refer to by the pseudo-initials, A.B.

One picture showed A.B., wearing shorts, sitting on a bench with her legs spread apart. Another picture showed the photographer's hand pulling away the leg of A.B.'s shorts revealing the crotch area underneath her pants. A third picture showed A.B. pulling up the leg of her own shorts with the fingers of her other hand in her crotch area. Due to the lighting in the photographs, it could not be determined whether the pictures showed A.B.'s private parts or underpants.

Detective Paula Barnes met with Defendant twice about the photographs. In an interview on 31 October 2005, Detective Barnes asked Defendant if he knew the girl depicted in the photographs. Defendant said he did, and that she lived just up the street from him. Defendant told Detective Barnes that the reason he had taken the photographs of A.B. was that his dog had jumped into her lap and had scratched her on her inner thigh. Defendant told Detective Barnes that he was concerned about lawsuits, and he wanted to document that there was no serious injury.

At some point, Detective Barnes confirmed with A.B. and with her parents that she had been scratched by Defendant's dog. The mother told Detective Barnes that the scratch was on the upper thigh; the child said it was on the lower thigh.

Detective Barnes asked Sergeant David Lee Romick, a detective sergeant with the Asheville Police Department, for his assistance in interviewing Defendant. On 17 November 2005, Sergeant Romick interviewed Defendant. He showed Defendant all of the photographs, including the photographs of A.B. that had been withheld by Walgreens. Defendant told Sergeant Romick that he had taken the photographs of A.B. because his dog had scratched her upper thigh, and he was trying to avoid a lawsuit.

Sergeant Romick then accused Defendant of taking the pictures of A.B. in order to stimulate himself. "You looked at these photographs, and you would masturbate while looking at these photographs of this little girl." Defendant began to cry and get upset. He did not disagree with Sergeant Romick. Defendant said he was sick

and needed help. He agreed to speak further with Detective Barnes about the photographs.

Defendant then told Detective Barnes that he used his other photographs, specifically pictures depicting a young woman in a red bikini, for masturbation material. Defendant indicated that he realized he had a problem, and he asked where he could go to get help. Detective Barnes then asked Defendant whether he would have used the photographs of A.B. for masturbation, had he been allowed to take them home. Defendant said he would have.

Defendant was tried on 20-23 June 2006 for taking indecent liberties with a child and first degree sexual exploitation of a minor. The State presented the evidence summarized above. Defendant introduced testimony from his neighbor, John Livingston, who stated that he saw A.B. playing with Defendant's dog on the day she was allegedly injured. Livingston testified that he heard her yell, and when he looked in her direction, he saw Defendant's dog in her lap while she was sitting on a bench. Livingston testified that he saw the dog jump away and A.B. looking on her leg as though "maybe something happened to her." Livingston went back inside, and did not see anyone taking pictures.

Defendant testified in his own defense. He admitted taking the photographs of A.B., but explained that the only reason he did so was to protect himself from lawsuits. Defendant testified that the pictures were not taken for any kind of sexual gratification. He admitted that he had masturbated to photographs similar to those of the female in the red bathing suit, but he denied having told Detective Barnes that he masturbated to those particular pictures. He said that when he told Detective Barnes he needed help, he meant he needed legal help with this case. Defendant also introduced the testimony of his mother, with whom he lives, three people from the congregation at his church, and his girlfriend.

Defendant's counsel moved to dismiss all charges at the close of the State's case. The trial court denied the motion to dismiss the charge of taking indecent liberties with a child, but reserved ruling on the charge of first degree sexual exploitation of a minor. Defense counsel presented evidence and, at the close of all the evidence, renewed his motion to dismiss the charge of sexual exploitation of a minor. The trial court denied the motion. The jury found Defendant guilty of taking indecent liberties with a child and first degree sexual exploitation of a minor.

On appeal, Defendant argues that the trial court erred by: (I) permitting various witnesses to give their opinions regarding the photographic evidence; (II) admitting hearsay statements of A.B. and her babysitter; (III) denying Defendant's motion to dismiss the charges due to insufficient evidence; and (IV) failing to instruct the jury on second-degree sexual exploitation of a minor.

I. Opinion Testimony Regarding the Photographs

[1] Defendant first argues that the trial court erred in allowing lay opinion testimony regarding the content of the pictures. Defendant concedes that he did not object at trial to the witnesses' characterization of the pictures. We therefore review the admission of this testimony for plain error. *See* N.C. R. App. P. 10(a)(4) (2010). "Under the plain error standard of review, defendant has the burden of showing: '(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.' " *State v. Jones*, 358 N.C. 330, 346, 595 S.E.2d 124, 135 (2004) (quoting *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997)), *cert. denied*, *Jones v. North Carolina*, 543 U.S. 1023, 160 L. Ed. 2d 500 (2004).

Defendant also argues that the trial court erred in admitting the Police Incident Report which states that "photo's [sic] had juvenile's female private's [sic] showing." Defendant objected at trial to the admission of the report. We therefore review the trial court's admission of this evidence for abuse of discretion. *State v. Buie*, 194 N.C. App. 725, 730, 671 S.E.2d 351, 354, *disc. rev. denied*, 363 N.C. 375, 679 S.E.2d 135 (2009). Defendant argues that each opinion as to what the photographs depicted was prejudicial because the jury would have determined that the pictures were not sexual in nature and consequently found Defendant not guilty.

There is nothing in the record indicating that any of the witnesses testified as an expert. The question is therefore whether the testimony regarding the contents of the photographs was admissible as lay opinion. Pursuant to the North Carolina Rules of Evidence, admissible lay opinion testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2009).

The record shows no evidence that the testifying witnesses perceived the behavior depicted in the photographs first-hand. Although

their opinions as to what the pictures showed were based on their perceptions of the *photographs*, the helpfulness of those opinions to the jury, which was in no worse position to evaluate the pictures, is questionable. We must determine the extent to which a witness may testify to his observations of a photograph that is equally available to the jury.[2]

In *State v. Fulton*, 299 N.C. 491, 263 S.E.2d 608 (1980), our Supreme Court considered the admissibility of an officer's opinion that the tread design shown in a photograph of shoe tracks found near a crime scene and the tread design on the bottom of defendant's tennis shoes were identical. The Court held that the admission of this testimony was error. *Id.* at 494, 263 S.E.2d at 610. Because no effort had been made to qualify the witness as an expert, it followed "that his opinion was inadmissible because the jury was apparently as well qualified as the witness to draw the inferences and conclusions from the facts that [the officer] expressed in his opinion." *Id.*[3]

We consider also *State v. Alexander*, 337 N.C. 182, 446 S.E.2d 83 (1994). Defendants in *Alexander*, alleged that "the trial court erred when it allowed Officer Frank to testify that a photograph shown to him at trial showed 'small openings that appeared to be buckshot' on Corey Hill's arm."[4] *Id.* at 190, 446 S.E.2d at 88. Defendants argued that the testimony constituted inadmissible lay opinion. *Id.* Our Supreme Court disagreed, holding the statements to be admissible as "shorthand statements of fact"—i.e. "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time." *Id.* at 191, 446 S.E.2d at 88 (quoting *State v. Spaulding*, 288 N.C. 397, 411, 219 S.E.2d 178, 187 (1975), *vacated in part*, *Spaulding v. North Carolina*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976)). The Court in *Alexander* indi-

2. For a comprehensive review of how various jurisdictions determine the admissibility of testimony identifying the defendant in surveillance video footage, *see State v. Belk*, ___ N.C. App. ___, ___, 689 S.E.2d 439, 441-42 (2009), *disc. review denied*, 364 N.C. 129, ___ S.E.2d ___ (2010). However, regarding the case on review, we do not find these cases particularly relevant to the question of the admissibility of testimony interpreting images depicted in a still photograph where the identity of the defendant is not an issue.

3. The Court held this to be harmless error beyond a reasonable doubt because expert testimony was also offered to support the same conclusion. *Fulton*, 299 N.C. at 494-95, 263 S.E.2d at 610.

4. "Corey Hill had already testified that his wounds were caused by 'glass coming through the window from the shotgun blast.' " *Alexander*, 337 N.C. at 190, 446 S.E.2d at 88.

cated that the officer's interpretation of the photograph need not even be correct. *Id.* at 191, 446 S.E.2d at 89.

With these principles in mind, we turn to the facts of the case before us. Defendant argues that the following constitutes improper lay opinion testimony: statements that the photographs were "disturbing," "graphic," "of a sexual nature involving children," "objectionable," "concerning" to the witness, and that Defendant pulled away the minor's pant leg to get a "shot into the vaginal area." Defendant argues that such statements were not admissible as "shorthand statements of fact." Defendant argues that the photographic evidence was either sexual in nature or it was not, and no specialized training was necessary to discern what the pictures showed.

Defendant concedes that he failed to object to the testimony when it was offered. We are directed to no case finding prejudicial error in admitting testimony regarding the contents of a still photograph where the testimony was not objected to at trial. After careful review, we hold that the alleged error in allowing the State's witnesses to testify to their reactions to the photographs does not rise to the level of plain error.

Defendant did object to the admission of the Police Report, where Officer Driver wrote "photo's [sic] had juvenile's female private's [sic] showing." During *voir dire*, the following colloquy occurred between the prosecutor and Officer Driver:

> Q: And did you record all of the information contained in this report? Is this your writing?
>
> A: Yes, sir, it is.
>
> Q: And the language that is contained on Page 2, [including "photo's had juvenile's female private's showing"], this is your language and your writing?
>
> A: Yes, sir.
>
> Q: Where did you obtain this information that you put on Page 2?
>
> A: I wrote that as an overview of what—a baseline of information. I talked with—I just didn't know anything about this case. I walk in. I spent 15 or 10 minutes with the manager. I tried to fill it out as quickly as I can, get some basic information on there, and then pass that on to the appropriate investigator.

Q: So the language on Page 2, then, is how you personally viewed this incident?

A: At the time, yes, sir.

It is clear from this testimony that the officer's notation constituted a shorthand rendition of his observations. The report reflects the officer's instantaneous conclusions of the mind as to the appearance of the pictures. We therefore hold that the statement was a "shorthand statement of fact" such as has been deemed admissible by our Supreme Court. *See Alexander*, 337 N.C. at 191, 446 S.E.2d at 88.[5]

[2] Defendant next argues that testimony that the subjects of his pictures did not know that they were being photographed constituted improper lay opinion. Assuming this was error, still the error does not rise to the level of reversible error because Defendant cannot show any prejudice resulting from the jury's possible belief that the subjects of his pictures were unaware. Such statements do not bear on his guilt or innocence of the offenses charged. *See* N.C. Gen. Stat. § 14-202.1 (2009) (indecent liberties with a child); N.C. Gen. Stat. 14-190.16 (2009) (first degree sexual exploitation of a minor).

[3] Defendant next argues that the trial court erred in admitting Detective Barnes' statement that Defendant's explanation was not consistent with what the photographs depicted. Defendant infers from this that Detective Barnes testified that Defendant was lying. Defendant argues that an opinion as to the credibility of a witness is not helpful to the jury's determination of a fact in issue.

In support of this argument, Defendant cites *State v. Gobal*, 186 N.C. App. 308, 651 S.E.2d 279 (2007), *aff'd per curiam*, 362 N.C. 342, 661 S.E.2d 732 (2008). However, *Gobal* is factually distinguishable. In *Gobal*, the testimony at issue constituted improper vouching—i.e. one witness testified that another was telling the truth. *Gobal*, 186 N.C. App. at 318-19, 651 S.E.2d at 286. We there noted that "our Supreme Court has determined that when one witness 'vouch[es] for the veracity of another witness,' such testimony is an opinion which

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5. We note that the cases the *Alexander* Court relied upon involved a witness's first-hand observations, whereas *Alexander* itself involved a witness's perception of a photograph. *See State v. Spaulding*, 288 N.C. at 411, 219 S.E.2d at 187; *State v. Williams*, 319 N.C. 73, 78, 352 S.E.2d 428, 432 (1987). There is an inconsistency between *Fulton* and *Alexander*, since lay opinion testimony that would run afoul of the former could be rendered admissible by the latter. Nonetheless, we are bound by *Alexander's* extension of the "shorthand statements of fact" concept to witnesses' observations of photographs.

is not helpful to the jury's determination of a fact in issue and is therefore excluded by Rule 701." *Id.* at 318, 651 S.E.2d at 286 (quoting *State v. Robinson*, 355 N.C. 320, 335, 561 S.E.2d 245, 255, *cert. denied*, *Robinson v. North Carolina*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002)). Defendant does not point to any such vouching in the present case.

We conclude that the trial court did not commit prejudicial error in permitting witnesses to testify regarding the photographic evidence.

II. Hearsay Statements of A.B. and the Babysitter

[4] Defendant next argues that the trial court committed plain error in allowing statements of A.B. and the babysitter, neither of whom testified, into evidence. The statements in question were offered during the testimony of Detective Barnes and during cross-examination of Defendant. Detective Barnes testified that she learned from A.B. that she was five-years-old at the time of the incident. A.B. told Detective Barnes that she had been scratched by the dog on her shin. The babysitter told Detective Barnes that A.B. had been scratched on her inner thigh. No objections were made to Detective Barnes' testimony. The prosecutor asked Defendant more about these same statements on cross-examination.

Defendant now argues that the statements were hearsay offered to prove that A.B. was five-years-old, A.B. was scratched on the shin, and there was no legal reason for Defendant to have taken the photographs of A.B.'s upper thigh. Defendant asserts that these out-of-court statements were offered for their truth and met no exception to the prohibition on the admission of hearsay evidence. Defendant also argues that these unproven hearsay statements were used by the prosecutor to impeach the credibility of Defendant on cross-examination. Defendant maintains that the admission of these statements constituted prejudicial error.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2009). "Hearsay is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-1, Rule 802 (2009). Notwithstanding, "[t]he law 'wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself.' " *State v. Warren*, 347 N.C. 309, 317, 492 S.E.2d 609, 613 (1997) (quoting *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981)), *cert. denied*, *Warren v. North Carolina*, 523 U.S.

1109, 140 L. Ed. 2d 818 (1998). "Opening the door refers to the principle that where one party introduces evidence of a particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal thereof, even though the rebuttal evidence would be incompetent or irrelevant had it been offered initially." *State v. Sexton*, 336 N.C. 321, 360, 444 S.E.2d 879, 901, *cert. denied*, *Sexton v. North Carolina*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994).

During defense counsel's cross-examination of Detective Barnes, the following exchange took place:

> Q: . . . But it's possible that he—that he's telling the truth about the dog scratching the little girl?
>
> A: It's a possibility.
>
> Q: It's a possibility. And it's a possibility that you explored, because you spoke to [A.B.] and you spoke to the parents, and you confirmed that she had been scratched by the dog, didn't you?
>
> A: Yes, I did.
>
> Q: So the child had been scratched by the dog, and he did take pictures. And the story that he did tell you was an accurate story, at least to the point that the child had been scratched by the dog. Where the child had been scratched is somewhat in dispute, correct?
>
> A: Correct.
>
> Q: Everybody confirmed that the dog jumped up on the child and scratched the child?
>
> A: Correct.
>
> . . . .
>
> Q: And everything in your investigation verified those facts that the child had been scratched. At the time of the photos, he went and told the babysitter about it. Everything was verified, wasn't it?
>
> A: Yes, it was.

During redirect examination of Detective Barnes, the State asked more about the investigation of the scratch on A.B.'s leg. It was during this latter examination that the testimony was offered that Defendant now argues was impermissible hearsay. We hold Defendant opened the door to allow the State to ask related questions

concerning the investigation into the scratch on A.B.'s leg. *See Warren*, 347 N.C. at 317, 492 S.E.2d at 613.

Defendant also argues that the trial court erred in admitting hearsay to establish A.B.'s age. Defendant did not object to this evidence when it was offered at trial. We are persuaded by the State's argument that there was no dispute below about A.B.'s age. Indeed, during defense counsel's direct examination of Defendant, counsel—referring to one of the photographs—asked: "This is you, James, taking a child that's five years old" and pulling aside her pants? Defendant replied, "Yes." Moreover, the jury could see for itself from the photographs that A.B. was not an adult when the pictures were taken. Thus, the testimony merely corroborated a fact which the jury could deduce from other evidence. Consequently, assuming *arguendo* that it was error to admit the statement, Defendant cannot demonstrate that a different result would have been reached absent the error. We hold that the trial court did not commit prejudicial error in admitting the contested hearsay statements of A.B. and her babysitter.

III. Defendant's Motion to Dismiss

[5] In his next argument, Defendant acknowledges that by failing to renew his motion to dismiss the indecent liberties charge at the close of all the evidence, he has failed to preserve that claim of error. N.C. R. App. P. 10(a)(3) (2010). He requests this Court to suspend the Rules, pursuant to Rule 2, to address his claim that the trial court erred in denying his motion to dismiss the charge of taking indecent liberties with a child. We decline the invitation to suspend the Rules, and hold that Defendant has failed to preserve his claim of error regarding the charge of taking indecent liberties with a child. *See State v. Richardson*, 341 N.C. 658, 676-77, 462 S.E.2d 492, 504 (1995).

[6] We now turn to Defendant's argument that the trial court erred in denying his motion to dismiss the charge of first degree sexual exploitation of a minor. The test of the sufficiency of the evidence in a criminal case is whether "there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. 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.* On review, the evidence must be viewed in the light most favorable to the State, giving the State the benefit of all reasonable inferences that can be drawn from the evidence. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67,

75-76, 430 S.E.2d 913, 918-19 (1993)), *cert. denied*, *Fritsch v. North Carolina*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

In North Carolina, first degree sexual exploitation of a minor is criminalized by N.C. Gen. Stat. § 14-190.16 which provides:

> (a) Offense.—A person commits the offense of first degree sexual exploitation of a minor if, knowing the character or content of the material or performance, he:
>
> (1) Uses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity;

N.C. Gen. Stat. § 14-190.16 (2009). "Sexual activity" is elsewhere defined as "masturbation" or "touching in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of a human female." N.C. Gen. Stat. § 14-190.13(5)(a), (c) (2009).

Defendant argues that none of the photographs show any sexual activity. The State maintains that the picture depicting A.B. pulling up the leg of her shorts while the fingers of her other hand are in her pubic area is sufficient evidence for the jury to find a depiction of masturbation. The State argues further that, along with the other evidence, the jury could infer that defendant coerced or encouraged A.B. to touch herself for the purpose of producing a photograph depicting such activity. The State contends that the photograph of Defendant pulling aside A.B.'s shorts depicts "touching" that meets the statutory definition of sexual activity.

Simply stated, the pictures do not depict any sexual activity. North Carolina does not provide a statutory definition of masturbation. However, the dictionary defines the word as "[e]xcitation of the genital organs, usually to orgasm, by manual contact or means other than sexual intercourse." *The American Heritage Dictionary* 771 (2d College ed. 1985).[6] This definition is not satisfied by a photograph of A.B. merely having her hand in proximity to her crotch area. The other picture, depicting Defendant's hand, shows him touching A.B.'s shorts, not her body. This does not satisfy the definition of touching her "genitals, pubic area, or buttocks" as required by statute.

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6. *Compare Young v. State*, 242 S.W.3d 192, 198, n.7 (Tex. App. 2007) (providing the The American Heritage Dictionary definition and the Webster's New Universal Unabridged Dictionary definition).

Regarding the picture of A.B. pulling aside her own shorts with her other hand near her crotch area, the State argues that,

> viewing this photograph[] along with the evidence that defendant took photographs of other female juveniles, including one in which he focused on the juvenile's vaginal area; masturbated to photographs he took of the young woman in the red bathing suit; began crying when Detective Barnes asked him if he would have masturbated to the photographs of [A.B.] had Walgreens given them to him; admitted to Detective Barnes that he would have masturbated to the photographs of [A.B.] had Walgreens given them to him; and admitted he was sick and needed help, gives rise to a reasonable inference that defendant induced, coerced, encouraged, or facilitated [A.B.] to touch herself for the purpose of producing a photograph depicting such activity.

It is obvious that by compounding the prejudice attendant upon each of these unsavory facts the State could accumulate enough disgust to convince a jury that Defendant had committed some moral offense. We cannot overlook, however, the unpleasant fact that none of these allegations points to any illegal behavior. Defendant's use of his photographs for the purpose of masturbation does not prove that the photographs themselves depict masturbation, or that the behavior can be inferred from them. Viewing the evidence in the light most favorable to the State, we hold that the pictures cannot support a conviction of first degree sexual exploitation of a minor.

This result should not be misinterpreted as a declaration of Defendant's innocence. We are quite disturbed by the picture of Defendant pulling away the leg of A.B.'s shorts to photograph the area revealed. But we cannot ignore that the State failed to procure the testimony of the alleged victim in this case. Indeed, the State presented no evidence that Defendant had done anything to satisfy the statutory definition of prohibited sexual conduct. *See* N.C. Gen. Stat. § 14-190.16 (2009). We are barred from reading the statute broadly enough to prohibit Defendant's conduct because we are compelled to construe this statute strictly. *See State v. Hernandez*, 188 N.C. App. 193, 202, 655 S.E.2d 426, 432 (2008). If our legislature had intended to criminalize such behavior as Defendant's, it certainly could have done so.

Because we hold that the trial court erred in denying Defendant's motion to dismiss the charge of first degree sexual exploitation of a minor, we need not reach Defendant's argument that the trial court

erred in not instructing the jury on second-20-degree sexual exploitation of a minor.

In sum, we uphold Defendant's conviction for taking indecent liberties with a child. However, we reverse Defendant's conviction on the charge of first degree sexual exploitation of a minor.

No error in part, reversed in part, and remanded for resentencing.

Judges CALABRIA and BEASLEY concur.

Judge WYNN concurred in this opinion prior to 9 August 2010.

JEFFREY MEIER, PETITIONER v. CITY OF CHARLOTTE AND CITY OF CHARLOTTE ZONING BOARD OF ADJUSTMENT, RESPONDENTS

No. COA09-1081

(Filed 17 August 2010)

Appeal and Error— untimely appeal—subject matter jurisdiction

A *de novo* review revealed that the trial court erred in a zoning case by determining that the Board of Adjustment had subject matter jurisdiction to hear petitioner's untimely appeal. The MacVean letter was a specific order, requirement, decision, or determination referenced in Section 5.110(1) of the Charlotte Code, and thus, petitioner should have noted his appeal from the interpretation of the MacVean letter within 30 days of 7 March 2008.

Appeal by respondents from order entered 12 June 2009 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 February 2010.

Moretz & Skufca, PLLC, by Ronald A. Skufca, for petitioner-appellee.

K&L Gates, LLP, by Collin W. Brown and John H. Carmichael, for respondent-appellant.

ERVIN, Judge.

Respondents City of Charlotte and the City of Charlotte Zoning Board of Adjustment appeal from an order entered by the trial court finding that Petitioner Jeffrey Meier had filed an appeal to the Board of Adjustment in a timely manner; that the Board of Adjustment had "subject matter jurisdiction to hear Petitioner's . . appeal;" and that the Board of Adjustment "should not have dismissed Petitioner's . . . appeal" as untimely and remanding this case to the Board of Adjustment for the purpose of hearing "Petitioner's application for appeal on the merits as soon as the same may be calendared for hearing and no later than sixty (60) days from the date hereof." After careful consideration of the record in light of the applicable law, we conclude that the trial court's order should be reversed.

I. Factual Background

Petitioner resides at 1568 Clayton Drive in Charlotte, North Carolina. In 2006, Dancy Properties, LLC purchased a lot located at 1562 Clayton Drive, which is adjacent to the lot owned by Petitioner. In 2007, Dancy commenced construction of a single-family residence at 1562 Clayton Drive. During the construction process, Petitioner questioned the extent to which the structure's height complied with provisions of the applicable zoning ordinance. As a result of Petitioner's inquiry and a similar question posed by Dancy, a hold was placed on the certificate of occupancy for 1562 Clayton Drive until the zoning-related issues were resolved.

Charlotte's interim Zoning Administrator, Keith MacVean, agreed to meet with the interested parties in order to resolve the questions which had arisen with respect to the structure's height. In February 2008, Mr. MacVean and Katrina Young, Mr. MacVean's successor, made separate visits to the lot located at 1562 Clayton Drive with a Dancy representative and Petitioner's attorney. At those meetings, which occurred during the construction process, the parties walked around the property and discussed how the measurements necessary to apply the height restrictions in the zoning ordinance should be made. In addition, Dancy provided site plans and architectural drawings that contained information concerning the height and location of the structure for Mr. MacVean's consideration. Mr. MacVean and Ms. Young explained that a letter would be sent notifying Dancy and Petitioner of the manner in which the zoning ordinance would be interpreted and the extent to which additional documentation would be needed so that the builder could obtain a certificate of occupancy.

On 28 February 2008, after having "visited the property located at 1562 Clayton Drive" and "reviewed all pertinent site plans and elevations," Mr. MacVean mailed his final interpretation to Joe Dancy of Dancy Properties and Petitioner's counsel. In his letter, MacVean explained that, according to Section 9.205 of the Charlotte Code, the "maximum height in the R-5 Zoning District is 40 feet." Mr. MacVean also noted that "[f]ootnote six (6) to chart 9.205(1) . . . allows a building which abuts a residential use to exceed the 40 foot height limitation as long as the side and rear yards abutting the residential use are increased by one (1) foot for every foot of building above 40 feet." The letter quoted the definition of "height" set out in the zoning regulations as:

> The vertical distance between the average grade at the base of a structure and the highest part of the structure, but no[t] including sky lights, and roof structures for elevators, stairways, tanks, heating, ventilation and air-conditioning equipment, or similar equipment for the operation and maintenance of a building.

Based upon this definition, Mr. MacVean informed Dancy that "the two side yards and rear yard must be increased for the portions of the building that exceed[ed] 40 feet as measured from the average grade at the base of the building;" however, Mr. MacVean concluded that "[t]he setback from the street is not required to be increased" and that:

> Based on the drawings you have submitted the height of the building along the left side as measured from the average grade is 49'-6''3/8 inches. Since this height is 9'-6''3/8 inches over the allowed 40 feet the corresponding side yard for the portion of the building over 40 feet must be increased by at least nine and [a] half feet to 14'1/2 feet.
>
> Along the rear elevation your drawings indicate the proposed building height will be 49[']-11''½ inches as measured from average grade along this side of the building. This will require the rear yard to be increased by ten feet to 45 feet for the portions of the building over 40 feet.
>
> Along the right side of the building the drawings submitted indicate that the height of the proposed building as measured from average grade along this side is 43'-8''3/16 inches. This will require that the side yard be increased from five feet to nine for the portion of the building over 40 feet.

> The drawings for the right side indicate a step back in the building elevation. The site plan and building elevations need to be revised to indicate the height and the distance from the property line to the portion of the building closest to the property line.
>
> Although, some portions of the building exceed forty (40) feet in height, the zoning ordinance is not violated when the corresponding side and rear yards are increased accordingly. Since the corresponding side and rear yards have been increased as required your construction does not violate the maximum height requirement of the R-5 district.

Finally, Mr. MacVean noted that, "before a certificate of occupancy can be released[,] a sealed survey indicating the distances from the structure to the property lines as well as the height of the structure must be submitted" for the purpose of "verify[ing] that the site measurement[s] you have provided are correct."

On 2 April 2008, Petitioner's counsel sent an e-mail to Ms. Young inquiring about the status of the "height review." In his e-mail, Petitioner's counsel referenced his understanding that the builder would provide a "sealed survey to support the calculations he previously provided to [Mr. MacVean]." On the same date, Ms. Young responded that she had not heard anything from Dancy and would forward the final survey information to Petitioner's counsel upon receipt. On 17 April 2008, Petitioner's counsel e-mailed Ms. Young again for the purpose of inquiring whether she had received a final survey from Dancy. Ms. Young responded that Dancy had not yet provided the final survey and stated that a hold had been placed on the issuance of a certificate of occupancy that would remain in effect until the survey had been provided. In response, Petitioner's counsel stated that a survey crew had been on the site on 3-4 March 2008, that the purchasers of the home intended to move in on 1 May 2008, that he believed that Dancy "intend[ed] to provide the survey contemporaneously with the inspection for the" certificate of occupancy, and that he wished to "review and discuss the situation with [Ms. Young] once [she] receive[d] the survey." Ms. Young replied that "Mr. Dancy has been made aware of what is required in a letter sent by [Mr.] MacVean;" that "[o]nce the survey is presented and a determination is made[,] either party, if they disagree with the decision, may appeal that decision to the Board;" and that she would "be happy to provide you with a copy of the survey once it is submitted."

In May 2008, Dancy provided a sealed survey to the Planning Department. On 20 May 2008, Ms. Young sent an e-mail to Petitioner's counsel, to which a copy of the survey was attached, in which she stated that, "[b]ased on [Mr.] MacVean's letter dated February 28, 2008, the right side of the structure is also in compliance." In response, Petitioner's counsel sent an e-mail to Ms. Young in which he argued that "[t]he problem we continue to have in this matter is that the surveyor has measured the left side setback to the side of the main house structure rather than to the side of the carport/bonus room structure." In light of his belief that the use of this approach to measuring the left side setback rested on an incorrect interpretation of the applicable zoning regulation, Petitioner's counsel "request[ed] that you rescind the approval set forth in your email below and require the builder to provide the proper side setback."

On 23 May 2008, Petitioner submitted an appeal to the Board of Adjustment. At the 24 June 2008 hearing, the first issue that the parties were asked to address was the timeliness of Petitioner's appeal. At the conclusion of the proceedings, the Board of Adjustment adopted an order providing that the MacVean letter "constituted a decision regarding Code Section 9.205(1)," Petitioner's appeal was not filed within thirty days of the MacVean letter, and, as a result, it did not have jurisdiction to hear Petitioner's appeal. In light of its conclusion that Petitioner had not noted his appeal in a timely fashion, the Board of Adjustment did not reach Petitioner's substantive challenges to the Planning Department's decision.

On 23 September 2008, Petitioner filed a petition for writ of *certiorari* with the Mecklenburg County Superior Court. On 1 June 2009, a hearing was held before the trial court, which concluded that Petitioner's appeal was timely filed, that the Board had subject matter jurisdiction to hear the appeal, and that the appeal should not have been dismissed. In addition, the trial court directed the Board of Adjustment to hear Petitioner's appeal on its merits within sixty days from the date of its order. On 9 July 2009, Respondents noted an appeal to this Court from the trial court's order.

II. Legal Analysis

On appeal, Respondents argue that the trial court erred by determining that the Board of Adjustment had subject matter jurisdiction to hear Petitioner's appeal. In essence, Respondents argue that the MacVean letter was a specific "order, requirement, decision or determination" as defined in Section 5.101(a) of the Charlotte Code and

that, since Petitioner failed to appeal the Zoning Administrator's interpretation within thirty days of 7 March 2008, which is the latest date by which Petitioner's counsel should have received the MacVean letter, Petitioner lost the right to challenge the manner in which the Planning Department applied the City's zoning ordinance to the structure located at 1562 Clayton Drive. We agree.

According to well-established principles of North Carolina law, boards of adjustment do not have subject matter jurisdiction over appeals that have not been timely filed. *Water Tower Office Assoc. v. Town of Cary Board of Adjustment*, 131 N.C. App. 696, 698, 507 S.E.2d 589, 591 (1998). The extent to which a board of adjustment has jurisdiction to hear an appeal is a question of law. *In re Soc'y for the Pres. of Historic Oakwood v. Bd. of Adjustment of Raleigh*, 153 N.C. App. 737, 740, 571 S.E.2d 588, 590 (2002). In the event that a board of adjustment decision is alleged to rest on an error of law such as an absence of jurisdiction, the reviewing court must examine the record *de novo*, as though the issue had not yet been determined. *Whiteco Outdoor Adver. v. Johnston County Bd. of Adjustment*, 132 N.C. App. 465, 470, 513 S.E.2d 70, 74 (1999).[1]

Section 3.501(12) of the Charlotte Code provides that "the Planning Director and the employees under his or her control" may "render interpretations of the provisions of [the Zoning Ordinance]."[2] Section 5.103 of the Charlotte Code specifies that "[a] notice of appeal . . . shall be properly filed by a person aggrieved with the decision of the Zoning Administrator . . . within thirty (30) days of the decision." The crux of Petitioner's argument for the right to appeal from the Zoning Administrator's decision to the Board of Adjustment is that the MacVean letter was not a final determination from which an appeal could properly be taken. In support of this argument, Petitioner points to that portion of the MacVean letter which states that, "before a certificate of occupancy can be released a sealed sur-

1. In view of the fact that we are required to review Respondents' challenge to the trial court's order *de novo*, Petitioner's contention that "there was no competent, material and substantial evidence on the record to support the Board's finding of fact that the [MacVean letter] was an order, requirement, decision, or determination on the matter of the height requirement" and his argument that the Board of Adjustment failed to consider various statements made in the MacVean letter and in Ms. Young's 17 April 2008 e-mail in determining whether Petitioner had noted a timely appeal need not be addressed because they rest on a misapprehension of the applicable standard of review.

2. The parties do not appear to dispute the fact that the Zoning Administrator is an employee under the control of the Planning Director and authorized to provide interpretations for purpose of Section 3.501(12) of the Charlotte Code.

vey indicating the distances from the structure to the property lines as well as the height of the structure must be submitted . . . to verify that the site measurement[s] you have provided are correct" and argues that this additional language constitutes a recognition that the MacVean letter was not a "specific order, requirement, decision, or determination made . . . by the Zoning Administrator" or his authorized designee. Furthermore, Petitioner argues that he was entitled to rely on the statement in Ms. Young's 17 April 2008 e-mail to the effect that, once "a determination is made[,] either party, if they disagree with the decision, may appeal that decision to the Board."

By his own admission, Petitioner sought an interpretation of the Zoning Ordinance as applied to the structure under construction at 1562 Clayton Drive that addressed "the noticeable height of the structure" and addressed "whether the height of the structure complied with all applicable zoning ordinances regarding maximum height . . . ." The MacVean letter explicitly dealt with the issue of whether the structure complied with the height-related requirements contained in the Charlotte zoning ordinance by explaining the methodology utilized to determine the structure's compliance "along the left side," "along the rear elevation," and "along the right side" before concluding that the "construction [did] not violate the maximum height requirement of the R-5 district." In essence, the MacVean letter amounted to an evaluation of the extent to which the structure as proposed and as described in the site plans and architectural plans submitted for review by the interim Zoning Administrator complied with the relevant provisions of the Charlotte zoning ordinance. The effect of the MacVean letter was to inform Dancy that, in the event that the structure was built as outlined in the site plans and architectural drawings, it would pass muster for zoning compliance purposes. As a result, Petitioner's contention that the determination set out in the MacVean letter was purely tentative in nature rests upon a misreading of the document in question.

Contrary to Petitioner's contention that the MacVean letter was merely "the view, opinion or belief of the administrative official," we conclude that it was a "specific order, requirement, decision, or determination" referenced in Section 5.110(1) of the Charlotte Code. Pursuant to Section 3.501(12) of the Charlotte Code, MacVean had the authority to render an official interpretation of the relevant provisions of the zoning ordinance. In addition, it is clear that Mr. MacVean was exercising that authority in the 28 February 2008 letter. For example, the subject line set out in the MacVean letter indicates that

it concerns an "Interpretation of Section 9.205(1)." At the beginning of the 28 February 2008 letter, Mr. MacVean expressly stated that "[t]he Planning Department is providing the following interpretation of Section 9.205 Development Standards for Single Family Districts." Finally, the text of the MacVean letter states, in no uncertain terms, that, despite the fact that "some portions of the building exceed forty (40) feet in height, the zoning ordinance is not violated when the corresponding side and rear yards are increased accordingly" and that, "[s]ince the corresponding side and rear yards have been increased as required[,] your construction does not violate the maximum height requirement of the R-5 district." As a result, the language of the MacVean letter is clearly couched in determinative, rather than advisory, terms, compelling the conclusion that it is an "order, decision, requirement, or determination" of the type that is subject to appeal pursuant to Section 5.110(1) of the Charlotte Code.

Although Petitioner attempts to analogize this case to *Historic Oakwood*, 153 N.C. App. at 739, 571 S.E.2d at 589, we are not persuaded that this decision is controlling. In *Historic Oakwood*, a zoning supervisor, at the request of the City Attorney, issued a memorandum stating his opinion concerning the status of a proposed building and the use to be made of that proposed building under the City of Raleigh's zoning ordinance. On appeal, this Court was required to determine whether the zoning supervisor's memorandum constituted an appealable decision. In concluding that it was not appealable, this Court looked to the document's text in order to determine whether the memorandum was an actual "decision" or "merely" an "advisory" response. *Id.* at 743, 571 S.E.2d at 591-92. At the conclusion of that process, we found that the distinguishing feature of an appealable "order, decision, or determination," as compared to an advisory opinion, was that the former "must have some binding force or effect for there to be a right of appeal under" N.C. Gen. Stat. § 160A-388(b), while the latter is "merely the view, opinion, or belief of the administrative official." *Id.* at 742-43, 571 S.E.2d at 591. Since the memorandum at issue in *Historic Oakwood* did not affect any of the parties' legal rights and was nothing more than a "response to a request" by the City Attorney, we concluded that the memorandum had no binding force and was not appealable to the board of adjustment. *Id.* The situation at issue here is very different.

Unlike the situation at issue in *Historic Oakwood*, the parties who initially sought the interpretation at issue were the builder and an adjacent property owner, both of whom had a definite interest in

the outcome of the dispute. In other words, a proper determination of the extent to which the structure complied with the applicable zoning restrictions clearly affected the rights of both parties. Furthermore, Mr. MacVean's determination that the "construction does not violate the maximum height requirement of the R-5 district" was definitive and authoritative rather than tentative. In essence, Mr. MacVean determined that, in the event that the structure was built in accordance with the site plans and architectural drawings submitted for his review, it would not violate applicable zoning restrictions. Although Petitioner is correct in arguing that the MacVean letter did not result in the issuance of a permit or certificate of occupancy, it did allow Dancy to complete construction with the assurance that, if the structure was built in substantial compliance with the site plans and architectural drawings upon which the MacVean letter was based, Dancy would not have to confront the risk that the structure as built would be found out of compliance with applicable zoning requirements. As a result, the MacVean letter, unlike the memorandum at issue in *Historic Oakwood*, involved a determination made by an official with the authority to provide definitive interpretations of the Charlotte zoning ordinance concerning the manner in which a specific provision of the zoning ordinance should be applied to a specific set of facts that was provided to parties with a clear interest in the outcome of a specific dispute. For that reason, we conclude that the MacVean letter was an "order, requirement, decision, or determination" within the meaning of Section 5.101(1) of the Charlotte Code and was subject to appeal to the Board of Adjustment.[3]

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3. Petitioner contends that the reference to the necessity for a "sealed survey indicating the distances from the structure to the property lines as well as the height of the structure" as a precondition for obtaining a certificate of occupancy in the MacVean letter and Ms. Young's 17 April 2008 e-mail precludes the MacVean letter from being treated as an "order, requirement, decision, or determination" for purposes of Section 5.101(1). Petitioner's argument overlooks the difference between the purpose for which the interpretation set forth in the MacVean letter was provided and the reason that the "sealed survey" was required as a precondition for the issuance of a certificate of occupancy. At bottom, the purpose of the "sealed survey" requirement was to ensure that the structure was completed in accordance with the site plans and architectural drawings provided in connection with the process that led to the issuance of the interpretation embodied in the MacVean letter. In other words, the purpose of the "sealed survey" requirement was to ensure that the structure that Dancy completed had been constructed consistently with the representations that Dancy had made. Nothing about the inclusion of the "sealed survey" requirement in the MacVean letter or in Ms. Young's 17 April 2008 e-mail suggests that the Planning Department reserved the right to alter the interpretation of the relevant provisions of the zoning ordinance as set out in the MacVean letter following receipt of the "sealed survey."

Finally, Petitioner argues that he reasonably relied on the language of Ms. Young's 17 April 2008 e-mail to the effect that, "[o]nce the survey is presented and a determination is made[,] either party, if they disagree with the decision, may appeal that decision to the Board," to mean that he could appeal any disputed issue to the Board of Adjustment after the "sealed survey" had been received and reviewed by the Planning Department. Ms. Young's e-mail will not, however, bear the weight that Petitioner seeks to place on it. Instead, Ms. Young's e-mail simply states that Dancy "has been made aware of what is required" in the MacVean letter and that, "[o]nce the survey is presented and a determination is made," either party "may appeal . . . to the Board" "if they disagree with the decision." Taken in context, Ms. Young's e-mail clearly means that Dancy had been given an outline of what was expected in the MacVean letter, that the survey would reveal whether Dancy had complied with the interpretation of the relevant provisions of the zoning ordinance outlined in the MacVean letter, and that, in the event that either party disagreed with the Planning Department's determination of the extent to which the structure as actually built complied with the zoning regulations as interpreted in the MacVean letter, that issue was subject to appeal to the Board of Adjustment.[4]

In his appeal to the Board of Adjustment, Petitioner advanced two substantive arguments. First, Petitioner argued that, in her 20 May 2008 e-mail, Ms. Young "approved a measurement from the left property line to the side of the main house structure rather than to the side of the carport/bonus room structure." Secondly, Petitioner argues that "Ms. Young takes the position that the'height' of a structure is measured to multiple points on the structure[,]" which is "clearly incorrect, as the Ordinance unambiguously states that height is measured to 'the highest point of the structure.' " Neither Mr. Young's 17 April 2008 e-mail nor Ms. Young's 20 May 2008 e-mail addressed the issue of how the height of a structure or side or rear setback lines should be determined under the zoning ordinance. Instead, the assertions set out in Petitioner's appeal are obvious challenges to the determinations enunciated in the MacVean letter, which

4. This reading of the 17 April 2008 e-mail is consistent with Ms. Young's view of what she wrote. Ms. Young clearly stated during the hearing concerning Petitioner's appeal that the 28 February 2008 letter was an interpretation letter and that the 20 May 2008 e-mail "was a compliance letter saying that, based on the information provided, it's in compliance." According to Ms. Young, "the interpretation is how we do the measurement," "[t]he compliance is, okay, based on the survey, the structure is in compliance." Ms. Young emphasized that "they're two separate departments and they're two separate issues."

clarified the manner in which the height-related provisions in the zoning ordinance would be applied to the structure and explained the methodology that would be utilized to determine that the structure complied with the relevant provisions of the zoning ordinance, rather than challenges to Ms. Young's determination that Dancy had completed the structure consistently with the interpretation of the zoning ordinance set out in the MacVean letter.[5] As a result, what Petitioner really wanted to challenge in his appeal to the Board of Adjustment was the interpretation of the zoning ordinance set out in the MacVean letter rather than the extent to which the structure had been built in accordance with the approach outlined in the MacVean letter.[6] Since Petitioner did not seek to raise the sort of issue contemplated in Ms. Young's 17 April 2008 e-mail, he is not entitled to rely on that communication to support a belated challenge to the interpretive and methodological issues addressed in the MacVean letter.

Section 5.103(1) of the Charlotte Code provides that an aggrieved party must file an appeal within thirty days of the interpretive decision. The appeal period begins to run as soon as the aggrieved party receives actual or constructive notice of the interpretative decision. *Allen v. City of Burlington*, 100 N.C. App. 615, 618-19, 397 S.E.2d 657, 660 (1990). Petitioner's counsel admitted having received the MacVean letter within one week of 28 February 2008. Thus, Petitioner should have noted his appeal from the interpretation of the relevant provisions of the zoning ordinance embodied in the MacVean letter within 30 days of 7 March 2008. Because Petitioner failed to appeal from the interpretation contained in the MacVean letter in a timely manner, we conclude that the trial court erred by ruling that the Board had subject matter jurisdiction to consider Petitioner's appeal and that this matter should be remanded for consideration of Petitioner's appeal on the merits. As a result, the trial court's order should be, and hereby is, reversed.

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5. Although Petitioner notes in his brief that the measurements set out in the sealed survey differed from those on the site plan and architectural drawings submitted in connection with the process that led to the issuance of the MacVean letter, the fact that he does not challenge Ms. Young's determination that the information provided by the sealed survey indicated that the structure had been built in conformity with the approach outlined in the MacVean letter strongly suggests that those differences are not material.

6. Petitioner concedes as much in his brief, where he states that, "[a]fter receiving the zoning administrator's determination of May 20, 2008, Petitioner filed an appeal to the [Board of Adjustment] on May 23, 2008, objecting to the protocol utilized by the zoning administrator in determining that the structure located at 1562 Clayton was in compliance with applicable zoning ordinances."

REVERSED.

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

STATE OF NORTH CAROLINA v. DAVE ANTHONY HUDSON

No. COA09-1421

(Filed 17 August 2010)

1. Search and Seizure— crossing center line—probable cause for stop

The trial court's unchallenged finding that defendant twice crossed the center and fog lines in his truck was sufficient to support the conclusion that an officer had reasonable suspicion for a traffic stop.

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

Defendant did not preserve for appellate review the question of whether a traffic stop was unreasonably extended where his motion to suppress was based only on a contention about the stop that was resolved by an unchallenged finding. His attempts to challenge for the first time on appeal the duration of the stop, the circumstances surrounding the consent, or the scope of the search were not considered.

3. Drugs— constructive possession—trunk of car on car carrier

The evidence of constructive possession was sufficient to convict defendant of possession of marijuana with intent to sell and deliver where defendant was driving a car carrier that included among the cars being transported a Mercedes with marijuana in the trunk. While defendant's possession of the car was not exclusive in the sense that he did not own it, the State presented other evidence from which an inference of defendant's knowledge could be drawn.

4. Drugs— maintaining vehicle for keeping marijuana—driver of car carrier—drugs in trunk of car

There was sufficient evidence to convict defendant of maintaining a vehicle for the keeping of a controlled substance where

a car with marijuana in the trunk was found on a car carrier driven by defendant. The issue of constructive possession was resolved elsewhere, and defendant's possession of the car over several days, including stops and resumptions during the trip from Miami to New York, was substantial evidence that defendant was maintaining the vehicle to keep or sell marijuana from the time he loaded it onto his car carrier until he was stopped by law enforcement.

5. Criminal Law— refusal of jury's request to view evidence— no plain error

The trial court did not commit plain error in a marijuana prosecution by not submitting defendant's written statement to the jury upon their request. Given the facts and incriminating circumstances of the case, there was not a reasonable possibility of a different result had the error not been committed.

Appeal by Defendant from judgment entered 19 May 2009 by Judge William C. Griffin Jr. in Wilson County Superior Court. Heard in the Court of Appeals 12 April 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert T. Hargett, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Charles K. McCotter, Jr., for Defendant.

BEASLEY, Judge.

Dave Anthony Hudson (Defendant) appeals from judgment entered on his convictions of possession with the intent to sell and deliver marijuana and maintaining a vehicle for the keeping of a controlled substance. We conclude that there is no error.

On 18 May 2009, Defendant filed a motion to suppress all evidence gathered as a result of the traffic stop from which the possession and maintaining a vehicle charges arose. The motion was denied that same date, and the trial began immediately thereafter.

On 23 October 2008, Corporals Joshua Bissette and Jimmy Renfrow of the Wilson County Sheriff's Office were patrolling I-95. Around 8:40 p.m., Bissette saw Defendant driving a freight liner transfer truck with a car carrier that had a high Department of Transportation identification number, indicating possible drug activity and prompting him to advise Renfrow of Defendant's approach.

Renfrow followed Defendant for about two miles and observed his tractor trailer cross the center dividing line of the northbound lanes and weave back over the fog line two times. Renfrow stopped the truck, and Defendant exited with his hands in the air and his back to the officer. Defendant produced his driver's license, registration, and log book as requested. Bissette then arrived and performed a license and registration check while Defendant sat with Renfrow in his patrol car. Finding the information valid, Bissette approached Renfrow's car to return Defendant's license, registration, and log book, whereupon he asked to see the bills of lading for the vehicles on his truck. Bissette noted that Defendant was sweating, although it was forty degrees outside, and acting nervously. The bills of lading matched the cars being transported, but the one for a white 2007 Mercedes Benz convertible raised Bissette's suspicions. It referenced "Eddie" as the contact person for both pick-up and drop-off of the car and listed the same phone number for both. The pick-up location was listed as "Opa Locka Blvd and 143" in Miami, Florida, and the drop-off address was listed as "Gun Hill Road" in Bronx, New York. Bissette testified that this bill of lading stood out because the others contained full names of the companies or individuals sending and receiving the vehicle and specific addresses from and to which the car was being delivered. At that point, the officers returned Defendant's documentation, and Renfrow advised Defendant that he was free to go. As Defendant stepped out of the patrol car, Bissette asked for consent to search the tractor trailer, and at 9:19 p.m., Defendant signed a form indicating he was giving his consent, "knowingly and voluntarily," to the search of his "truck and manifest (cars on car carrier)."

The officers found no illegal substances in the cab and then began to search the cars on the carrier. The carrier's proximity to the interstate railing, however, prohibited them from opening the vehicles' doors, and Bissette asked Defendant to drive to a closed gas station at the next exit so they could offload the cars, search them, and load them back onto the carrier. Defendant agreed, but when the officers attempted to search the Mercedes, they learned that Defendant had provided them only a limited access valet key, which would not open the trunk. The officers, however, were able to access the trunk by opening the convertible roof, whereupon they smelled marijuana and saw a large bag, which contained what was later identified by the State Bureau of Investigation as 7.5 pounds of marijuana. Defendant was arrested and, after Bissette read him his *Miranda* rights, agreed to make a statement and signed a waiver of rights. Defendant's excul-

patory statement was read to the jury. Defendant offered no evidence but made motions to dismiss at the end of the State's case and the close of all the evidence, which were denied. The jury found Defendant guilty as charged, and Defendant duly noted his appeal.

I. Motion to Suppress

Defendant challenges the trial court's denial of his motion to suppress all evidence resulting from the illegal stop and detention. The standard of review for a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. *State v. Hernandez*, 170 N.C. App. 299, 303, 612 S.E.2d 420, 423 (2005). "[T]he trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120-21 (2002) (citation omitted). However, its "conclusions of law regarding whether the officer had reasonable suspicion . . . to detain a defendant [are] reviewable *de novo*." *State v. Hudgins*, 195 N.C. App. 430, 432, 672 S.E.2d 717, 718 (2009) (internal quotation marks and citations omitted).

A. Reasonable Suspicion for the Stop

[1] Defendant first contends that his motion to suppress should have been allowed because law enforcement made the initial stop without any reasonable, articulable suspicion of criminal activity. Specifically, Defendant claims that the trial court's finding that Renfrow observed "Defendant's rig cross[] the northbound center line twice and the fog line twice" over a two-mile stretch was insufficient to support a reasonable suspicion as to Defendant's involvement in criminal activity. We disagree.

In relation to whether the stop of Defendant's vehicle was constitutional, the trial court found the following:

> 1, Wilson County Deputies Renfrow and Bissette were working an "I-95 traffic detail" in separate vehicles; 2, Bissette first observed the Defendant's tractor-trailer car hauler northbound on I-95; 3, Bissette's attention was called to the Defendant's vehicle because the driver was "driving the mirror," among other things; 4, Bissette communicated to Renfrow by Nextel Direct Connect about what he had observed and he then left I-95; 5, thereafter, Renfrow entered I-95 and picked up the Defendant's vehicle which he followed two miles; 6, during this time the Defendant's rig crossed the northbound center line twice and the fog line twice[.]

Defendant does not assign error to any of the foregoing; thus, these unchallenged findings of fact " 'are deemed to be supported by competent evidence and are binding on appeal.' " *Hudgins*, 195 N.C. App. at 432, 672 S.E.2d at 718 (citation omitted). Accordingly, we review the trial court's order only to determine whether the findings of fact support the legal conclusion that Renfrow's stop of Defendant was constitutional under the circumstances.

We review the constitutionality of the stop pursuant to the Fourth Amendment's protection "against unreasonable searches and seizures." *State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (2008). "A traffic stop is a seizure . . . [and] is permitted if the officer has a reasonable, articulable suspicion that criminal activity is afoot." *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (internal quotation marks and citations omitted). This Court has held the observation of a vehicle twice crossing the highway's center line provided probable cause to justify an officer's stop for the "readily observable" traffic violations.[1] *See State v. Baublitz*, 172 N.C. App. 801, 806-07, 616 S.E.2d 615, 619-20 (2005) (holding the stop of defendant's vehicle for a traffic infraction was constitutional because the officer had "observed defendant's vehicle twice cross the center line of the highway, in violation of N.C. Gen. Stat. § 20-146(a)").

In the instant case, the trial court found that Defendant's truck crossed the center line of I-95 and pulled back over the fog line twice while Renfrow followed him. Accordingly, as in Baublitz, the officer witnessed Defendant's commission of a statutory violation under N.C. Gen. Stat. § 20-146(a). *See* N.C. Gen. Stat. § 20-146(a) (2007) (requiring vehicles to be driven "upon the right half of the highway"). Therefore, his observation of Defendant twice crossing the center and fog lines provided Renfrow with probable cause to stop Defendant's truck. Where only a reasonable suspicion was required, Renfrow was clearly justified in stopping Defendant by meeting the higher standard of probable cause. Thus, we hold that the trial court's unchallenged finding that Defendant crossed the center and fog lines twice is sufficient to support its conclusions that Renfrow had a reasonable suspicion to stop Defendant's vehicle and did not violate constitutional principles in so doing.

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1. While "reasonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected," it remains "a less demanding standard than probable cause." *Styles*, 362 N.C. at 414, 415, 665 S.E.2d at 439, 440. Therefore, "probable cause is sufficient, but not necessary, for a traffic stop." *Id.* at 416 n.1, 665 S.E.2d at 440 n.1.

B. Duration of the Detention

[2] Defendant next contends that the seizure was unreasonably extended and that any evidence obtained thereafter was tainted by the illegality of a detention that exceeded the permissible scope of an investigatory traffic stop. Defendant continues that his consent to the search was accordingly not voluntary because it was tainted by a prolonged detention and that he remained seized when he consented, such that the traffic stop had not given way to a consensual encounter. Defendant also argues that, notwithstanding the question of voluntariness, such consent would have been invalidated because the officers went beyond the spatial and temporal scope thereof when they asked him to drive the car carrier to the next exit ramp and unload the cars at a closed gas station, thereby exceeding the parameters of any consensual encounter.

However, Defendant's written motion stated only that "[t]he stop was made without any reasonable or articularable [sic] suspicion that criminal activity was afoot," as the sole grounds for suppression of "all evidence arising out of and flowing from the illegal stop of . . . [his] motor vehicle and the subsequent search" thereof. Defendant's affidavit in support of his motion to suppress likewise focused entirely on the circumstances leading up to the traffic stop and argued only that he "did not cross the center line at any time in violation of NC General Statutes," a dispute that was resolved by the trial court's unchallenged finding of fact number six. Furthermore, defense counsel elicited no testimony at the suppression hearing to support any ground for his motion other than the theory that the stop was unreasonable.

While the State presented evidence tending to describe the initial seizure, the nature of the temporary detention, and Defendant's signing of the consent to search form, Defendant raised no facts, by way of either cross-examination or presentation of evidence, to contest the duration of the stop, the voluntariness of the consent, or the scope of any consent granted. In fact, Defendant's cross-examination of Renfrow concerned only the time frame during which Bissette first followed the car carrier up to the point at which the trailer began to move back and forth across the white center line of I-95. Defense counsel's final statement to the trial court further indicated that the sole ground for the suppression motion related to the circumstances leading up to the stop: "Your Honor, I just don't feel that what happened, I mean the officer just testified that there were two

cars beside [Defendant]. He slides over, then slides back. What's he supposed to do? I mean, I don't think there was any reason to stop the vehicle."

Under the provisions of N.C. Gen. Stat. § 15A-977(a), a motion to suppress "must state the grounds upon which it is made," and "must be accompanied by an affidavit containing facts supporting the motion." N.C. Gen. Stat. § 15A-977(a) (2007). On a related note, the trial court is not required to make findings of fact when there is no conflicting evidence as to the issue in question. *See State v. Bowden*, 177 N.C. App. 718, 721, 630 S.E.2d 208, 211 (2006) (holding trial court's failure to make findings of fact associated with denial of defendant's suppression motion was not reversible error where defendant did not present any evidence of his own and no apparent conflict arose from the State's evidence). Moreover, the North Carolina Rules of Appellate Procedure require that a party's trial court motion state the "specific grounds" for the desired ruling "if the specific grounds were not apparent from the context." N.C. R. App. P. 10(b)(1); *see also State v. Smith*, 178 N.C. App. 134, 139, 631 S.E.2d 34, 38 (2006) (concluding defendant failed to preserve for review his claim that trial court erred in denying his motion to suppress confession under *Miranda*, where defendant raised different ground of due process at trial); *State v. Holliman*, 155 N.C. App. 120, 124, 573 S.E.2d 682, 686 (2002) (holding defendant waived assignment of error by arguing at trial that evidence should be suppressed on grounds of coercion but argued on appeal that the statement should have been suppressed for lack of probable cause). Here, the only theory advocated by Defendant that was apparent from the context was that the discovery of the marijuana was tainted by an unconstitutional traffic stop. Where Defendant impermissibly raises additional theories as grounds for suppression, different from those argued at trial, he did not properly preserve his remaining assignments of error for appellate review and waived these arguments. *See Holliman*, 155 N.C. App. at 123, 573 S.E.2d at 685 ("[W]here 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 appellate courts."). Thus, we do not consider his attempt to challenge, for the first time, the admissibility of the evidence based on the duration of the stop, the circumstances surrounding the consent, or the scope of the search.

II. Motion to Dismiss

Defendant contends that the trial court erred in denying his motion to dismiss both counts of the indictment on the ground of insufficient evidence to support his convictions. Upon review of a motion to dismiss challenging the sufficiency of the evidence, we question "whether there is substantial evidence of each essential element of the offense charged." *State v. Borkar*, 173 N.C. App. 162, 165, 617 S.E.2d 341, 343 (2005). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Patterson*, 335 N.C. 437, 449-50, 439 S.E.2d 578, 585 (1994) (citations omitted). We view the evidence in the light most favorable to the State, entitling it to all reasonable inferences that may be drawn therefrom, and resolve any contradictions in its favor. *State v. Sumpter*, 318 N.C. 102, 107, 347 S.E.2d 396, 399 (1986). However, "[i]f the evidence is sufficient only to raise a suspicion or conjecture . . . the motion should be allowed." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002).

A. Possession with the Intent to Sell and Deliver Marijuana

[3] Defendant contends that there was insufficient evidence to convict him of possession with the intent to sell and deliver marijuana. After thorough review of the record, we disagree.

To convict a defendant of possession with the intent to sell and deliver, the State must prove: (1) possession of a substance, (2) which is a controlled substance, and (3) intent to sell or distribute that controlled substance. *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001); *see also* N.C. Gen. Stat. § 90-95(a)(1) (2007). Defendant argues that the State failed to produce sufficient evidence that he possessed, either actually or constructively, the marijuana found in the white Mercedes.

Here, the State proceeded upon a theory of constructive possession. *See State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (" '[F]or possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials.' Proof of nonexclusive, constructive possession is sufficient."). "A defendant constructively possesses contraband when he or she has 'the intent and capability to maintain control and dominion over' it[,]" whether "alone or jointly with others." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citations omitted). However, "[u]nless a defendant has exclusive possession of the place where the contra-

band is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession." *Id.* Examples of incriminating circumstances include a defendant's nervousness or suspicious activity in the presence of law enforcement. *See*, *e.g.*, *State v. Butler*, 356 N.C. 141, 147, 567 S.E.2d 137, 141 (2002); *Carr*, 122 N.C. App. at 373, 470 S.E.2d at 73. Still, whether sufficient evidence of incriminating circumstances exists to prove constructive possession depends on the circumstances, and the specific facts of each case rather than any single factor will control; the question is ordinarily one for the jury. *See State v. Alston*, 193 N.C. App. 712, 716, 668 S.E.2d 383, 386-87 (2008), *aff'd per curiam*, 363 N.C. 367, 677 S.E.2d 455 (2009).

> In car cases, not only is ownership sufficient, but
>
> [a]n inference of constructive possession can also arise from evidence which tends to show that a defendant was the custodian of the vehicle where the controlled substance was found. In fact, the courts in this State have held consistently that the "driver of a borrowed car, like the owner of the car, has the power to control the contents of the car." Moreover, power to control the automobile where a controlled substance was found is sufficient, in and of itself, to give rise to the inference of knowledge and possession sufficient to go to the jury.

State v. Dow, 70 N.C. App. 82, 85, 318 S.E.2d 883, 886 (1984) (citations omitted). In *State v. Munoz*, 141 N.C. App. 675, 541 S.E.2d 218 (2001), this Court held that the evidence was sufficient to establish that the driver constructively possessed cocaine discovered in a car on his car carrier. The defendant had bills of lading for a van on the carrier and other vehicles he had transported but no such document for the car in which the drugs were found; the car had been under his control from the time it was loaded onto his carrier until he was stopped six days later; a fax listed a fictitious location as the drop-off address; and the trooper had to obtain the keys for the cars from the defendant in order to conduct the search. *Id.* at 685-86, 541 S.E.2d at 224.

Here, as in *Munoz*, "[a]n inference that [D]efendant had knowledge of the presence of the [marijuana] can be drawn from [D]efendant's power to control the [Mercedes]." *Id.* at 685, 541 S.E.2d at 224. The Mercedes had been under Defendant's exclusive control since it was loaded onto his car carrier in Miami two days prior to his arrest. Like the trooper in *Munoz*, Bissette also testified that Defendant had keys to every car on the carrier and, in fact, removed the cars from

the carrier himself so they could be searched. While Defendant's possession of the Mercedes was not exclusive in the sense that he did not own it but, rather, picked it up from an individual named "Eddie," the State here, as in *Munoz*, "presented other evidence from which an inference of [D]efendant's knowledge could be drawn." *Id.* Defendant displayed suspicious behavior when stopped by Corporal Renfrow by exiting the truck with his back to the officer and hands up, seemingly unusual activity for someone who was merely transporting cars and committed a minor traffic offense. Bissette testified that Defendant was "nervous acting," hands shaking when he handed over his information, and sweating Renfrow despite the forty-degree weather. Bissette "could see [Defendant's] carotid artery pulsating out of his neck" as Renfrow climbed into the cab of the truck. The suspect bill of lading referencing a contact person named only "Eddie" and lacking specific addresses for both pick-up and drop-off locations further contributed to the suspicious circumstances. Most suspiciously, Defendant had fully functional keys for each car on the carrier except the Mercedes. Bissette testified that Defendant gave the officers a "fob" key to the Mercedes, but the key regularly hidden inside this type of valet key was missing, which prevented its user from opening the trunk which housed 7.5 pounds of marijuana.

Defendant argues any inference of knowledge and constructive possession was negated by his lack of proximity to a car owned by another person, being shipped under a bill of lading, where he had a key to the vehicle but not the trunk containing the bag in which marijuana was found. We conclude, however, the specific facts taken in combination, which need not "rule out every hypothesis of innocence," and viewed in a light most favorable to the State are sufficient to prove other incriminating circumstances and constitute substantial evidence of constructive possession. *Scott*, 356 N.C. at 596, 573 S.E.2d at 869. Thus, we hold the State presented sufficient evidence on the element of possession to overcome Defendant's motion to dismiss. Our conclusion also summarily dismisses Defendant's additional argument that the trial court erred by instructing the jury on constructive possession.

B. Maintaining a Vehicle

[4] Defendant also argues that there was insufficient evidence to convict him of maintaining a vehicle for the keeping of a controlled substance. We disagree.

It is unlawful for any person "[t]o knowingly keep or maintain any . . . vehicle . . . which is used for the keeping or selling of [controlled substances]." N.C. Gen. Stat. § 90-108(a)(7) (2007). "This statute prohibits the maintaining of a vehicle only when it is used for 'keeping or selling' controlled substances." *State v. Mitchell*, 336 N.C. 22, 32, 442 S.E.2d 24, 29 (1994). The term " 'keep' therefore denotes not just possession, but possession that occurs over a duration of time." *Id.* at 32, 442 S.E.2d at 29-30. The totality of the circumstances controls, and whether there is sufficient evidence of the "keeping or maintaining" element depends on several factors, none of which is dispositive. *State v. Bowens*, 140 N.C. App. 217, 221, 535 S.E.2d 870, 873 (2000).

Defendant first contends that the State failed to prove the knowledge element of the crime. However, our conclusion that the State presented substantial evidence to show Defendant was in constructive possession of the marijuana disposes of this argument. Defendant also disputes that the State offered sufficient evidence that he "kept or maintained" the vehicle. He claims "there is no evidence whatsoever that the possession of marijuana in the vehicle occurred over a duration of time or that [he] used the vehicle on any prior occasion to keep or sell controlled substances." The State's evidence, however, directly contradicts this argument.

The bill of lading for the Mercedes in which the marijuana was discovered shows that Defendant picked up the vehicle from Eddie on 21 October 2008. Defendant maintained possession as the authorized bailee of the vehicle continuously and without variation for two days before being pulled over on the evening of 23 October 2008. Having stopped to rest overnight on at least one occasion during that time period, he retained control and disposition over the vehicle and then resumed his planned route with the car carrier. These facts are clearly distinguishable from those in *Mitchell* and other cases where possession of a vehicle was truly temporary or occurred on only one occasion. Here, Defendant's possession of the Mercedes spanned several days, including stops and resumptions of the New York bound trip from Miami, and thus indisputably occurred over a duration of time. In light of the foregoing, the State presented substantial evidence that Defendant was transporting the Mercedes to keep or sell the marijuana contained therein and, therefore, maintained the vehicle for that purpose from the time he loaded it onto his car carrier until he was stopped by law enforcement two days later. Accordingly,

we conclude that the trial court did not err in denying Defendant's motion to dismiss.

III. Defendant's Statement

[5] In his final argument on appeal, Defendant argues that the trial court committed plain error by failing to submit his written statement to the jury. We disagree.

During trial, Defendant's exculpatory statement was read to the jury in redacted form and entered into evidence as Exhibit 8. During deliberations, the jury requested to see any evidence that the trial court deemed it could see. The trial court erroneously informed the jury that Defendant's statement was never offered into evidence, and that it would therefore be inappropriate to let them have it but that they could see anything that was received as an exhibit. Defendant contends that the trial court violated N.C. Gen. Stat. § 15A-1233(b), which provides: "Upon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence." N.C. Gen. Stat. § 15A-1233(b) (2007). However, given the facts and incriminating circumstances of the instant case, we are unpersuaded that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A- 1443(a)(2007). Accordingly, this argument is without merit.

For the foregoing reasons, we conclude that the trial court did not err in denying the motion to dismiss and Defendant's trial was free from prejudicial error.

No error.

Chief Judge MARTIN and Judge JACKSON concur.

STATE OF NORTH CAROLINA v. CHERRON WOOTEN

No. COA09-1551

(Filed 17 August 2010)

Stalking— misdemeanor stalking—sufficient evidence— motion to dismiss properly denied

The trial court did not err in denying defendant's motion to dismiss the charge of misdemeanor stalking as there was substantial evidence presented on each essential element of the offense, including that defendant harassed the victim "on more than one occasion," acted "without legal purpose," and intended to place the victim in reasonable fear.

Appeal by Defendant from judgment entered 19 February 2009 by Judge Arnold O. Jones, II in Wayne County Superior Court. Heard in the Court of Appeals 12 April 2010.

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

Kimberley P. Hoppin, for Defendant.

BEASLEY, Judge.

Cherron Wooten (Defendant) appeals from judgment entered on his conviction of misdemeanor stalking and argues that the trial court erred in denying his motion to dismiss on the ground of insufficient evidence. Because we conclude that, in the light most favorable to the State, there was substantial evidence presented on each essential element of the offense, we hold the trial court did not err in denying Defendant's motion to dismiss.

On 17 January 2007, Defendant was charged with misdemeanor stalking for harassing Danny Keel on specific occasions between 1 November 2006 and 16 January 2007. The Wayne County District Court found Defendant guilty, and he appealed to Superior Court. Keel had become the building inspector for the Town of Mt. Olive at the time Defendant was constructing a building on property he owned in the town. Keel had never met Defendant before receiving a call from him in the spring of 2006. During that conversation, Defendant revealed his desire to operate a florist, whereupon Keel told him that the property was located in a residential area and did not have the zoning necessary for a commercial building. Keel did not

hear from Defendant for a few months thereafter, but beginning 1 November 2006, Defendant sent the first of several faxes to the town offices, complaining generally about discriminatory treatment he was receiving, with primary emphasis on Keel.

The first fax was addressed to the Town of Mt. Olive (town), and not to Keel specifically, but refered to Keel's secretary by name and mentioned "the inspector." The letter indicated that Defendant, "with the permission of the Ku Klux Klan Members of Mt. Olive" wanted to change the classification of his building. Keel replied by letter two days later, informing Defendant that changing his building's classification should not be a problem and apprised him of the steps Defendant needed to take to comply with the North Carolina Building Code. Keel testified that the conditions placed on Defendant in order to proceed were not Keel's own rules but those imposed by the town zoning ordinance and state building code.

The second fax sent by Defendant, while addressed to the NAACP, was faxed to the town offices on 7 December 2006 and refered almost exclusively to Keel. Defendant wrote that "Danny Kill [sic] holds a public position only because he's a white man" and that he "has stirred up problems in the black community with his Keel-a-Niger [sic] attitude." This fax used the moniker "Mr. Kill-a-Niger," or similar variant thereof, multiple times, and Keel believed that the "ugly name" was addressed to him. Keel testified that he "was really, really becoming concerned about [Defendant's] attitude and the names he was calling [him]." Defendant sent a third fax to town hall after Keel and Wayne County inspector, Joe Nassef, conducted an electrical inspection of Defendant's building and noted three problems that needed to be cured. This fax, received from Defendant on 19 December 2006, stated that Keel had a personal problem with Defendant and "has persuaded Joe Nasive [sic] to join forces with him." Defendant further indicated that he had to buy a shotgun to protect himself from them. Although the fax listed no addressee, Keel believed it was directed to him because the first line in the body of the fax addressed him and Mr. Nassef. Keel testified that he was "very threatened" by Defendant's reference to a shotgun and that he and his family were frightened by the continuous faxes with Keel's name in them.

Defendant's fourth fax was received at town hall on 11 January 2007 but addressed to "Danny E. Keel," listing Keel's home address and home phone number at the top. This fax was also copied to "Mr.

Keel-a-Nigger" and referenced both that name and "Danny Keel" in the body of the letter, much of which was written in bold and enlarged type and repeatedly accused Keel of lies and discrimination. Keel testified that this fax led him to be fearful, not only for himself, but also for other town employees that had been involved in the situation because it referenced several of them therein. At that point, all of the county inspectors were informed not to go to Defendant's building anymore "because of the threatening letters that were being received." Keel testified that in Defendant's final fax before charges were brought, Defendant's name and phone number appeared at the top, but Defendant also used the pseudonym, "The Gay-Ku-Klux-Klan-Fax-Man," to indicate from whom the fax was sent. The first two addressees are "Mr. Keel-a-Nigger" and Danielle, Keel's daughter who was living in Greenville while attending East Carolina University (ECU) at the time. Although Defendant wrote "[t]his is no threat to you," his letter specifically referenced Keel's mother and father and frightened Keel and his wife regarding their daughter's safety. The language also alluded to Defendant's family being joined with Keel's by mentioning Keel's widowed mother and stated that allowing his building to sit would give him time "to learn you, your family and your Mama." Defendant wrote that this attitude was his response to Keel having "pissed in [his] cornflakes." Keel filed charges that day.

Defendant represented himself but did not testify, and made motions to dismiss the charge for lack of evidence at the close of the State's evidence and again at the close of all the evidence, both of which were denied by the trial court. The jury found Defendant guilty of stalking, and he timely appealed to this Court.

Defendant's sole argument on appeal is that the trial court erred in denying his motion to dismiss, claiming that the State presented insufficient evidence that he committed the offense of stalking. Defendant contends that the State failed to present sufficient evidence that Defendant harassed Keel "on more than one occasion," acted "without legal purpose," and intended to place Keel in reasonable fear. We disagree.

In reviewing a motion to dismiss which challenges the sufficiency of the evidence, "the question for this Court is whether there is substantial evidence of each essential element of the offense charged." *State v. Borkar*, 173 N.C. App. 162, 165, 617 S.E.2d 341, 343 (2005). "If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98,

261 S.E.2d 114, 117 (1980). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Frogge*, 351 N.C. 576, 584, 528 S.E.2d 893, 899 (2000) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)).

> In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. . . . Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

State v. Barnes, 334 N.C. 67, 75-76, 430 S.E.2d 914, 918-19 (1993) (internal quotation marks and citations omitted).

Defendant was charged and convicted for stalking under N.C. Gen. Stat. § 14-277.3, which provides that the offense of misdemeanor stalking occurs when a person

> willfully on more than one occasion follows or is in the presence of, or otherwise harasses, another person without legal purpose and with the intent to do any of the following:
>
> (1) Place that person in reasonable fear either for the person's safety or the safety of the person's immediate family or close personal associates.
>
> (2) Cause that person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment, and that in fact causes that person substantial emotional distress.

N.C. Gen. Stat. § 14-277.3(a) (2007).[1] The warrant for Defendant's arrest alleged that he acted for the purpose of causing Keel to reasonably fear the safety of himself, his immediate family, and his close personal associates. Therefore, where there was no allegation that Defendant followed or was in the presence of Keel, the State was

1. This statute was repealed by 2008 N.C. Sess. Law 167, § 1, effective 1 December 2008. A new statute, N.C. Gen. Stat. § 14-277.3A, applies to offenses occurring on or after 1 December 2008, 2008 N.C. Sess. Law 167, § 3, but the version in effect in 2006 and thus relevant to this appeal is cited here.

required to prove that Defendant (i) acted willfully; (ii) harassed Keel on more than one occasion; (iii) without legal purpose; and (iv) intended to place Keel in reasonable fear, as set forth in subsection (1). *See* N.C. Gen. Stat. § 14.277.3(a)(1).

Defendant first argues that the State presented insufficient evidence that Defendant harassed Keel on more than one occasion.

The applicable statute defines "harasses" or "harassment" to mean "knowing conduct, including . . . facsimile transmission . . . directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." N.C. Gen. Stat. § 14-277.3(c). Our Court has further defined several of the terms used in the statutory definition, including "torment," as "[t]o annoy, pester, or harass," and "terrorize," as "[t]o fill or overpower with terror; terrify." *State v. Watson*, 169 N.C. App. 331, 337, 610 S.E.2d 472, 477 (2005) (internal quotation marks omitted) (quoting *The American Heritage College Dictionary* 1428, 1401 (3d ed. 1997)).

Defendant contends that none of his first four faxes could constitute harassment in this case because they were not directed specifically at Keel. Defendant argues that only the final fax of 16 January 2007 was actually addressed to Keel, presenting just a single occasion of potential harassment, and thus, falls outside the scope of § 14-277.3. The penultimate fax, however, was clearly "directed" at Keel as well. Although this fax was purportedly "To: W. Carrol Turner," the town attorney, it is Keel's mailing information and telephone number that appears at the top in the inside address, which is commonly used to identify the recipient to whom a letter should be routed. Moreover, the fax was copied to "Mr. Keel-a-Nigger" and focuses on Keel throughout. While these two faxes alone constitute the "more than one occasion" necessary to come within the confines of the statute, the second and third faxes—although respectively addressed to the NAACP and an unnamed person—were also transmitted to town hall and refer mostly to Keel. Notwithstanding the fact that the first fax merely mentions "the inspector" and, instead, focuses on Keel's secretary, each fax refers to Keel in some unfavorable way. When the address lines are considered in context with the body of these faxes, it is clear that the State presented substantial evidence for a reasonable juror to conclude, beyond a reasonable doubt, that Defendant directed most, if not all, of these communications to Keel.

The text of section 14-277.3 requires that the communication at issue "torment[], terrorize[], or terrif[y]" the person to whom the communication is directed. N.C. Gen. Stat. § 14-277.3(c). This section, as applied by our courts in the criminal context, generally has involved some type of habitual stalking with numerous instances of contact over a period of time. *See State v. Stephens*, 188 N.C. App. 286, 655 S.E.2d 435 (defendant convicted of felony stalking after following and otherwise harassing victim), *disc. rev. denied*, 362 N.C. 370, 662 S.E.2d 389 (2008); *Borkar*, *supra* (defendant's motion to dismiss charge of misdemeanor stalking properly denied when there was evidence defendant had, *inter alia*, watched the victim and her family and recorded their license tag numbers); *State v. Watson*, 169 N.C. App. 331, 610 S.E.2d 472 (2005) (conviction for felony stalking found constitutional and upheld when defendant had been leaving notes, calling, and driving by victim for approximately five years).

Defendant next argues that none of these first four faxes tormented, terrorized, or terrified Keel and thus could not be deemed "harassment." After testifying to having been "caught by surprise" by the first fax, Keel said that the second fax, when Defendant began to call Keel "an ugly name," caused him to become very concerned about Defendant's attitude. As to the third fax, which included Defendant's reference to purchasing a shotgun, Keel testified that he felt very threatened for himself, Mr. Nassef, and his family. He stated:

> Well, if you have someone that says they're going to buy a shotgun, you don't know what they're going to do. You don't know whether they're going to be waiting in an alley for you or something . . . it just really put me in a bad position, and it also put my family in a bad position . . . and we became somewhat frightened because of this [sic] continuous faxes that were, you know, coming with my name on it, you know; it just really concerned me.

Keel described his concerns generated by the fourth fax, addressed to Keel's home, where he lived with his wife and children:

> Well, once again, it just has a lot of—a lot of reference in there directed to me that led me to be threatened, and led to me to be fearful, not only myself, but other town employees that have been involved in the situation. It references the town manager, the mayor, the county inspectors, the city inspector, Kenny Talton, and, you know, it just really—made me feel at—you know, I mean I was upset about it; I mean that was really—it was really getting bad, I thought, at this point. It was really um . . . causing me to stress.

Although Defendant does not contest that the fifth fax did not torment, terrorize, or terrify Keel, the evidence shows that this last communication clearly falls within the definition of "harassment." Keel testified that the town secretary was nearly crying when she delivered the fax to him, and after reading it Keel "was just so frightened." He said, "I just immediately was frightened for my—for my family, because the letter directly, directly addresses my family, and names my family in it. And it was just very threatening to me and it was obvious where it came from." Frightened for his daughter's safety, Keel even called ECU police and the Greenville Police Department because he "couldn't get in contact with her quick enough to find out if she was okay" and called his mother to check on her as well.

Although Defendant makes much of the fact that Keel, when cross-examined about the first four faxes individually, agreed that most did not contain a direct threat, nothing in the statutory definition of "harassment" or our Court's interpretation thereof limits the offense of stalking to direct threats. However, Keel testified that he felt that the fourth message was "an indirect threat from the overall content of the letter." In addition, Keel testified that the fourth facsimile "led [him] to be threatened, and led [him] to be fearful[.]" As to the fifth and final message, Keel said that he "was just so frightened[,]" that he "immediately was frightened for [his]—for [his] family," and that this last communication "was just very threatening to [him.]" Any discrepancy in Keel's testimony was for the jury to resolve. The State presented an abundance of evidence from which a rational juror could easily find that these last four faxes alarmed, intimidated, or terrified Keel. Keel's actions also manifest a fear provoked by the threatening facsimiles. Based upon the fourth message, Keel and his coworkers were advised no longer to visit defendant's property for inspections. Following receipt of the fifth transmission, Keel called his wife and his mother to ensure that they were safe; he also contacted the Greenville police and the ECU police because he was unable to reach his daughter, who was a student at ECU. Keel's testimony demonstrates that, on a minimum of two occasions, Keel was placed in reasonable fear for his personal safety as well as that of his immediate family members or coworkers. *See* N.C. Gen. Stat. § 14-277.3(a)(1). Furthermore, the racially-charged language of the final faxes, in addition to the references to Keel's home address and family members, served "no legitimate purpose." N.C. Gen. Stat. § 14-277.3(c).

Even though Keel admitted during cross-examination that the first four facsimile transmissions did not contain direct threats, his testimony nonetheless supported the threatening and harassing nature of the last two messages. Therefore, we conclude that, in the light most favorable to the State, Defendant, through this series of facsimile transmissions directed specifically at Keel, tormented, terrorized, or terrified Keel on more than one occasion.

Defendant next contends that the State failed to offer sufficient evidence that these allegedly harassing faxes were sent "without legal purpose," as each fax "had the legitimate purpose of responding to some action or correspondence directed to [Defendant]." We disagree.

Defendant claims that the legitimate purpose of each fax was related to the ongoing permitting and inspection process in which he was engaged with the town and, specifically, aimed to communicate the frustrations and perceived racial bias he experienced throughout. However, Defendant's contention that he intended only to report his problems with Keel or respond directly to correspondence he had received from various public officials is undermined by the fact that two of the faxes were also addressed to Keel himself and a third specified no recipient at all. Even if the communications purported to apprise other individuals of Defendant's complaints, the profane language, references to the Ku Klux Klan and impending shotgun purchase, and involvement of Keel's family, as directed at Keel in these faxes, served no legitimate purpose. Given the language used by Defendant and the haphazard manner by which these letters were sent or copied to various individuals through the town hall fax machine, a reasonable juror could find that Defendant did not truly have the legitimate purpose of raising a grievance or responding directly to correspondence he had received. Accordingly, we conclude that the State presented substantial evidence that Defendant acted without legal purpose, and the matter was appropriately left for resolution by the jury.

Finally, Defendant argues that there was insufficient evidence that Defendant intended to place Keel in reasonable fear. We disagree.

"It is well-established that " '[i]ntent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred.' " *State v. Brown*, 177 N.C. App. 177, 188, 628 S.E.2d 787, 794 (2006) (quoting *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974)). In the context of N.C. Gen. Stat. § 14-277.3, this Court has advised that the trial courts should

"instruct the jury as to the definition of 'reasonable fear' to ensure that an objective standard, based on what frightens an ordinary, prudent person under the same or similar circumstances, is applied rather than a subjective standard which focuses on the individual victim's fears and apprehensions." *State v. Ferebee*, 137 N.C. App. 710, 717, 529 S.E.2d 686, 690 (2000).

As mentioned above, Defendant's second letter was addressed to the NAACP but also sent by fax to town hall without specifying to whom it should be distributed but focusing its contents entirely on Keel. Defendant's third fax was also transmitted to town hall without specifying an addressee but referring to Keel several times and discussing his intention to purchase a shotgun. Defendant's failure to specify any specific town hall recipient for these faxes could have led a reasonable juror to believe that Defendant's intent was not that the appropriate person learn of his grievances but that the faxes end up in Keel's hands and place him in reasonable fear. The fourth fax, responding to the town attorney's letter to Defendant but copied to Keel and addressed to his home, appears to speak to Mr. Turner. The jury, however, could have rationally concluded that Defendant would not have copied Keel on that fax or included his home address at the top unless he intended to intimidate Keel through the constant references to "Mr. Keel-a-Nigger," strong language, and use of bold, italic, underlined, and enlarged type. Finally, there is no dispute the State presented sufficient evidence that the fifth fax was intended to place Keel in reasonable fear for his safety, the safety of his immediate family, or the safety of his close personal associates.

Defendant argues that the necessary element was not Keel's potential subjective fear but, rather, Defendant's intent to cause objective reasonable fear. The State, however, presented not only Keel's own testimony as to the effect of Defendant's faxes upon him but also the testimony of Keel's wife and evidence that the town secretary was near tears as she handed Keel the last fax. Moreover, all county inspectors were informed not to go to Defendant's building after the fourth fax was received. Thus, the evidence shows that these faxes concerned individuals other than Keel and supports a finding that it was accordingly reasonable for Keel to fear for the safety of himself, his family, and close personal associates. Additionally, the State offered each fax into evidence, and they were published to the jury as exhibits, from which the jurors could objectively deduce from the communications themselves whether Keel's fear was reasonable. Finally, the trial court did indeed instruct the jury that the definition

of "reasonable fear" is "that which frightens an ordinary prudent person under the same or similar circumstances."

Viewed in the light most favorable to the State, we conclude that the evidence was sufficient to allow the jury to find Defendant had the intent to place Keel in reasonable fear for his safety or the safety of his immediate family or colleagues on multiple occasions. We note that the instant case is unique in that it presents only five points of contact, all by facsimile directed to the victim's workplace, with the accuser agreeing that the first four did not contain a direct threat. This situation diverges from those instances in which our courts historically have applied the stalking statute.

Accordingly, we hold that the State presented sufficient evidence of each element of the crime of stalking pursuant to N.C. Gen. Stat. § 14-277.3(a), in that the fourth and fifth faxes were indeed threatening, notwithstanding Keel's admission that the first four messages were not direct threats, and it was appropriate for the trial court to present the charge against Defendant to the jury. Therefore, the trial court did not err in denying Defendant's motions to dismiss.

No Error.

Chief Judge MARTIN and Judge JACKSON concur.

PIERCE BUTLER IRBY, III, AND WIFE, CINDY BAKER IRBY v. GAIL WILKINS FREESE F/K/A GAIL BRINN WILKINS, AND JOSEPH P. CLARK, TRUSTEE FOR TRULIANT FEDERAL CREDIT UNION

No. COA09-1224

(Filed 17 August 2010)

1. Laches— declaratory judgment—violation of restrictive covenants—prompt and undue delay

The trial court erred in a declaratory judgment action by concluding that plaintiffs' claims to enforce certain restrictive covenants and seeking damages for violations of those restrictions was barred by the equitable defense of laches. Plaintiffs acted promptly and without undue delay upon learning of the existence of the grounds for their claim. Although compliance

with the statute of limitations is not determinative on the issue of laches, the fact that plaintiffs filed their complaint well within the applicable statute of limitations further supported their position.

2. Appeal and Error— additional issues not addressed— mootness

Plaintiff's additional arguments in a declaratory judgment action were not addressed based on the Court of Appeals' holding that their claim was not barred by laches.

Appeal by Plaintiffs from judgment entered 4 May 2009 by Judge Jesse B. Caldwell, III in Superior Court, Mecklenburg County. Heard in the Court of Appeals 11 February 2010.

Kenneth T. Davies for Plaintiffs.

K&L Gates LLP, by Roy H. Michaux, Jr., for Defendants.

STEPHENS, Judge.

This matter arises out of a 12 February 2008 action brought by Plaintiffs to enforce certain restrictive covenants encumbering Defendant Gail Wilkins Freese's ("Freese") property and seeking damages for violations of those restrictions. Following a bench trial, on 4 May 2009, the trial court entered judgment denying Plaintiffs' claims and dismissing Plaintiffs' action with prejudice, concluding that Plaintiffs' action was barred by the equitable doctrine of laches. For the reasons set forth below, we reverse and remand.

I. Factual Background and Procedural History

Pierce Butler Irby, III and his wife, Cindy Baker Irby ("Plaintiffs"), filed a complaint on 12 February 2008 seeking a declaratory judgment that restrictive covenants encumbering the neighboring residential lot owned by Freese and Joseph P. Clark, as Trustee for Truliant Federal Credit Union (collectively, "Defendants"), were valid and enforceable. Plaintiffs also sought damages for Defendants' alleged breach of such restrictions, as well as preliminary and permanent injunctive relief prohibiting Freese from further construction in breach of the covenants and requiring Freese to reconstruct the residence on the lot to comply with the covenants.[1] Defendants filed an answer on 15 April 2008 asserting affirmative defenses, including the

1. At trial, however, Plaintiffs elected to pursue only injunctive relief and offered no evidence of monetary damages.

equitable defense of laches. On or about 11 December 2008, Plaintiffs filed an amended complaint adding allegations that Freese violated side setback restrictions, in addition to violating the front setback restrictions alleged in the original complaint. Defendants filed an answer to the amended complaint on 5 February 2009 reasserting laches as a defense.

This matter came on for trial during the 9 February 2009 Civil Session of Mecklenburg County Superior Court, the Honorable Jesse B. Caldwell, III presiding. The findings of fact contained in the trial court's judgment are not in dispute and are summarized below. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (Findings of fact which are not contested are "presumed to be supported by competent evidence and [are] binding on appeal.").

Freese[2] is the record owner of a portion of Lot 5, Block 3B ("Freese Property") located at 717 Queens Road in the Myers Park neighborhood in Charlotte, North Carolina. Plaintiffs are the owners of Lot 7, Block 3B of Myers Park, which is located approximately 100 feet from the Freese Property.

Restrictive covenants (the "Restrictions") applicable to Lot 5 first appeared in a deed from The Stephens Company, recorded 17 May 1915. The Restrictions include a provision that "[n]o residence erected on the property shall be nearer the property line adjoining Queens Road than Fifty (50) feet, nor . . . nearer either of the side property lines than Fifteen (15) feet." Similar restrictions are applicable to all of the lots in Blocks 3A and 3B pursuant to a uniform scheme of development and run with the land. The deed to the Freese Property makes no reference to the Restrictions. Plaintiffs, however, were given a copy of deed restrictions applicable to their property at the time they purchased it.

In September 2007, Freese and her husband, Howard Freese (collectively, the "Freeses"), commenced construction of an addition to the east side of their home on Lot 5 consisting of a two-story living area and a garage with living area over it (the "Addition"). The Freeses did not have actual knowledge of the Restrictions when they began construction, and they did not consult with an attorney or an architect. Grading and ground level site work on the Addition took place in October and November 2007, and vertical construction was commenced on 1 December 2007. As of the end of November 2007,

2. Freese's former name, Gail Brinn Wilkins, is the name on the recorded deed.

the Freeses had expended $180,489.57 in connection with construction of the Addition.

The vertical framing on that portion of the Addition in front of the existing house reflected a structure that was obviously closer than 50 feet to Queens Road and was observed by Plaintiffs at least by the middle of December 2007. Vertical construction of the Addition was also noticed by Dr. Tom Masters, the president of the Myers Park Homeowners Association ("HOA") at the time, in December 2007.

Plaintiff Pierce Irby ("Irby") contacted the Charlotte City Planning & Zoning Office and the Building Inspections Department, and learned in early January 2008 that the Addition conformed to all zoning requirements and that he should consider investigating any violation of any restrictive covenants that may be applicable to the Freese Property. On 14 January 2008, Anne Schout ("Schout") of the HOA notified Irby that properties in Myers Park had deed restrictions that were "policed" by other neighbors in the subdivision and that each resident in the subdivision could bring an action to make the offending property owner comply with the deed restrictions. These restrictions were found in the original deeds generated in the sale of the property from the developer to the first owners. On 17 January 2008, Irby learned that the restrictions applicable to the Freese Property included a front setback requirement of 50 feet and a side setback requirement of 15 feet, and that the Addition was "definitely in violation of the front setback with their Addition started in the front yard."

Between 17 January and 15 February 2008, the Board of Directors of the HOA agreed that the HOA would fund a portion of this litigation. During the last week of January 2008, Plaintiffs first met with an attorney and Schout to discuss their right to enforce the Restrictions on the Freese Property. They were advised that they had the right to enforce the Restrictions and agreed to bring the current action. This was the first time Plaintiffs had sufficient knowledge to make an informed decision on their available remedies and how to proceed.

Even though the Addition clearly was in violation of the front setback Restrictions, the Freeses did not have actual notice that the Addition was objectionable or that it might be in violation of the Restrictions until Plaintiffs' complaint was served on 15 February 2008. At that time, the project was completely dried in, the interior framing had been completed with the stairwell and walls in place, and the electrical and rough plumbing were complete. The heating system

and duct work were in place, and the garage portion of the Addition and the living area above were within two weeks of completion. Work was on schedule, and the residential portion was to be completed by the end of April 2008.

From 1 December 2007 to 15 February 2008, the Freeses had expended $305,087.56 on the Addition. Another $115,000.00 was due by 1 March 2008 for work under contract and materials already purchased. On 29 March 2008, Plaintiffs' counsel and representatives of the HOA met with the Freeses and Defendants' attorney. Plaintiffs and the HOA observed that the Addition on the east side of Lot 5 appeared to be closer than 15 feet to a wall located across the rear of the adjoining Lot 4. Plaintiffs' counsel requested the right to have the Freese Property surveyed, which was granted. The survey was delivered to Plaintiffs on or about 4 May 2008 and showed that the Addition was slightly over 20 feet from Queens Road and within six to seven feet from the rear line of Lot 4 in Block B. The survey also reflected that the Addition conformed to the setbacks imposed on the Freese Property under the applicable City of Charlotte zoning regulations.

In a letter to Defendants dated 20 May 2008, Plaintiffs alleged a side yard violation under the Restrictions. Approximately seven months later, in December 2008, Plaintiffs sought and obtained leave to amend their complaint to assert an additional claim regarding the side yard setback violation. As of 20 May 2008, the contractor's work on the Addition was substantially complete, and as of 21 May 2008, the amount expended on the Addition totaled $504,418.12.

The living area above the garage and the garage portion of the Addition are parts of integrated electrical, plumbing, and HVAC systems, part of an integrated roof system, and portions of the living area extend slightly beyond the front wall of the original home, including an internal stairwell in the residential portion that cannot be moved and meet building code requirements. The garage structure and the living area above cannot be segregated from the remainder of the Addition due to the integrated components including the roof system, load bearing foundations, and the heating, cooling, electrical, and plumbing systems, all of which would have to be torn out and replaced at substantial expense.

The trial court concluded that although Freese had constructive notice of the Restrictions, Plaintiffs failed to act timely to notify Defendants of their concerns regarding the Addition after Plaintiffs knew or should have known that they had a legal right to object.

Therefore, the trial court ruled that Plaintiffs' claim was barred by the equitable doctrine of laches. On 4 May 2009, the trial court entered judgment denying Plaintiffs' claim for injunctive relief and dismissing Plaintiffs' action with prejudice. From this judgment, Plaintiffs appeal.

II. Standard of Review

"[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). Where, as in the present case, the trial court's findings are not contested, the findings are "presumed to be supported by competent evidence and [are] binding on appeal." *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. The trial court's conclusions of law are reviewable *de novo*. *Shear*, 107 N.C. App. at 160, 418 S.E.2d at 845.

III. Equitable Defense of Laches

[1] Plaintiffs argue that the trial court erred in concluding that their claims are barred by the equitable defense of laches. Specifically, Plaintiffs contend they acted promptly to enforce their rights after becoming aware of their right to enforce the Restrictions against Defendants and that any delay was not unreasonable. We agree.

> To establish the affirmative defense of laches, our case law recognizes that 1) the doctrine applies where a delay of time has resulted in some change in the condition of the property or in the relations of the parties; 2) the delay necessary to constitute laches depends upon the facts and circumstances of each case; however, the mere passage of time is insufficient to support a finding of laches; 3) the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke the doctrine of laches; and 4) the defense of laches will only work as a bar when the claimant knew of the existence of the grounds for the claim.

MMR Holdings, LLC. v. City of Charlotte, 148 N.C. App. 208, 209-10, 558 S.E.2d 197, 198 (2001). The burden of proof is on the party who pleads the affirmative defense of laches. *Taylor v. City of Raleigh*, 290 N.C. 608, 622, 227 S.E.2d 576, 584 (1976).

It is undisputed in the present case that Plaintiffs became concerned about the construction of the Addition as early as 1 December 2007, but did not file their complaint until 12 February 2008. The determination of whether Plaintiffs' delay in acting on their concern was unreasonable so as to constitute laches depends on the facts and circumstances specific to this matter. *Teachey v. Gurley*, 214 N.C. 288, 294, 199 S.E. 83, 88 (1938) (The determination of what delay will constitute laches depends on the facts of each case.). We find instructive to our determination the holdings of the following cases:

In *East Side Builders v. Brown*, 234 N.C. 517, 67 S.E.2d 489 (1951), the defendants altered the construction of their single-family residence in late 1940 or early 1941 and converted it into a two-family residence in violation of applicable restrictions. *Id.* at 518-19, 67 S.E.2d at 489-90. The defendants claimed that they had no knowledge of the violations or that the violations were objectionable until served with plaintiffs' complaint seeking to enforce the restrictions on 12 September 1950. Our Supreme Court held that the plaintiffs' claim was not barred by laches despite the nine-to-ten-year delay in filing the complaint after defendants violated the restrictions. *Id.* at 521, 67 S.E.2d at 491-92. The Court concluded that because the plaintiffs did not learn of the conversion until after it was completed, the plaintiffs' delay in bringing the action did not prejudice defendants. Thus, the defendants "were not entitled to a judgment as of nonsuit on the ground of laches." *Id.* at 521, 67 S.E.2d at 491; *see Phoenix Ltd. P'ship v. Simpson*, ___ N.C. App. ___, ___, 688 S.E.2d 717, 726 (2009) (Plaintiff's claim for specific performance of contract for defendants to sell certain real property to plaintiff was not barred by defense of laches based on plaintiff's three-year delay in asserting claim where defendants were prejudiced only by the increase in value of the property); *Sunbelt Rentals, Inc., v. Head & Enquist Equip., L.L.C.*, 174 N.C. App. 49, 63, 620 S.E.2d 222, 232 (2005) (Where plaintiff commenced an action for misappropriation of trade secrets on 13 July 2000 despite having knowledge of the defendants' improper conduct as early as November 1999, there was no unreasonable delay in bringing the action.); *but see Farley v. Holler*, 185 N.C. App. 130, 132, 647 S.E.2d 675, 678 (2007) (Owners of roadfront lots brought action against other subdivision residents, seeking relief in equity to reopen a different street in order to diffuse extra flow of traffic on road from new development; owners' claim was barred by laches after a nine-year delay in bringing the claim resulted in both a change in the condition of the property through $100,000.00 in repairs to the closed

street and a change in the relations of the parties through the changing of the owners of the lots in the subdivision; there was no justification, explanation, or reason for the delay, and lot owners were aware of the existence of their claim when the street was closed.).

In the present case, the trial court found the following in determining that Plaintiffs' delay was unreasonable: (1) that Plaintiffs reside approximately 100 feet from the Freese Property and observed construction in the front of the residence by the middle of December 2007; (2) that before 25 December 2007, Irby contacted the Charlotte City Planning & Zoning Office and the Building Inspections Department and learned that the Addition conformed to all zoning requirements and that he should consider investigating any violation of applicable restrictive covenants that may encumber the Property; (3) that on 14 January 2008, a representative of the HOA notified Irby that properties in Myers Park were subject to deed restrictions that are enforced through legal action by other neighbors in the subdivision; (4) that on 17 January 2008, Irby was advised that the Restrictions applied to the Freese Property, including the front and side setback requirements; (5) that between 17 January and 15 February 2008, the HOA agreed to fund a portion of this litigation; (6) that Plaintiffs first met with an attorney in January 2008; and (7) that the Freeses first received actual notice that the Addition was considered to be in violation of the Restrictions when served with Plaintiffs' complaint on 15 February 2008.

These facts do not support the trial court's conclusion that Plaintiffs' action was barred by laches. On the contrary, these facts establish that Plaintiffs acted promptly and without undue delay once learning of the existence of the grounds for their claim. *See MMR Holdings*, 148 N.C. App. at 210, 558 S.E.2d at 198 ("[T]he defense of laches will only work as a bar when the claimant knew of the existence of the grounds for the claim."). In December 2007, after observing the construction in the front of the Freese Property that appeared to violate the front setback requirements, Plaintiffs took reasonable steps in order to ascertain what claim, if any, they may have against Defendants. Plaintiffs inquired with the Charlotte City Planning & Zoning Office, the Building Inspections Department, the HOA, and their attorney, and filed their complaint, all in a matter of two months. Moreover, Plaintiffs filed their action within one month of receiving confirmation on 17 January 2008 that the Addition violated the setback requirements. Thus, any delay by Plaintiffs in bringing this action was not unreasonable.

In addition, our Courts have found that the statute of limitations applicable to a given action can be informative in answering the issue of whether delay in asserting an action is unreasonable. *See*, *e.g.*, *Creech v. Creech*, 222 N.C. 656, 24 S.E.2d 642 (1943). In *Creech*, our Supreme Court stated that "the tendency is to measure laches by the pertinent statute of limitations wherever the latter is applicable to the situation and not to regard the delay of the actor to assert the right within that period effective as estoppel, unless upon special intervening facts demanding that exceptional relief." *Id.* at 663, 24 S.E.2d at 647. In *Teachey*, the Court stated:

> Whenever the delay is *mere neglect to seek a known remedy or to assert a known right*, which the defendant has denied, *and is without reasonable excuse*, the courts are strongly inclined to treat it as fatal to the plaintiff's remedy in equity, even though much less than the statutory period of limitations, if an injury would otherwise be done to the defendant by reason of the plaintiff's delay.

Teachey, 214 N.C. at 294, 199 S.E. at 88 (emphasis added).

The applicable statute of limitations in the present case is six years. N.C. Gen. Stat. § 1-50(a)(3) (2009) (The statute of limitations to bring an action for "injury to any incorporeal hereditament" is six years.); *see Hawthorne v. Realty Syndicate, Inc.*, 43 N.C. App. 436, 440, 259 S.E.2d 591, 593 (1979) (stating that statute of limitations for enforcing a restrictive covenant is six years). Although compliance with the statute of limitations is not determinative on the issue of laches, the fact that Plaintiffs filed their complaint well within the applicable statute of limitations provides further support for their position. We conclude that once Plaintiffs confirmed Freese's violation of the Restrictions and knew they had the legal right to enforce the Restrictions against Freese, Plaintiffs did not neglect to pursue their remedy and to assert their rights.

We hold that Plaintiffs' claim was not barred by the equitable defense of laches. Accordingly, we reverse and remand this matter to the trial court for a determination on the merits.

[2] Plaintiffs also contend that because Freese had constructive notice of the violations, she was a knowing wrongdoer and is barred from asserting an equitable defense by the doctrine of unclean hands. *See Hurston v. Hurston*, 179 N.C. App. 809, 814, 635 S.E.2d 451, 454 (2006) ("[H]e who comes into equity must come with clean hands;

otherwise his claim to equity will be barred by the doctrine of unclean hands."). Because of our holding that Plaintiffs' action is not barred by laches, we need not address Plaintiffs' remaining argument.

REVERSED and REMANDED.

Judges CALABRIA and GEER concur.

STATE OF NORTH CAROLINA v. WILLIAM MICHAEL MACK, DEFENDANT

No. COA09-672

(Filed 17 August 2010)

1. Homicide— second-degree—car chase—sufficient evidence

The trial court did not err by denying defendant's motion to dismiss a charge of second-degree murder where defendant's passenger died in a car crash that followed their theft of televisions from a store and a police chase. Defendant drove extremely dangerously in order to evade arrest; the argument that he lacked malice because he experienced no problems until he encountered police spikes views the evidence in the light most favorable to defendant rather than the State.

2. Appeal and Error— preservation of issues—general objection at trial

A general objection at trial did not preserve for appeal the issue of whether the trial court should have allowed a question that implied that defendant had committed theft in the past. Moreover, given the circumstances and the evidence, defendant did not show that he was prejudiced by the testimony.

Appeal by defendant from judgment entered 10 December 2008 by Judge Nathaniel J. Poovey in Gaston County Superior Court. Heard in the Court of Appeals 16 November 2009.

Attorney General Roy Cooper, by Assistant Attorney General Jess D. Mekeel, for the State.

James N. Freeman, Jr. for defendant-appellant.

GEER, Judge.

Defendant William Michael Mack appeals from the judgment and commitment entered on (1) his convictions of second degree murder; misdemeanor hit and run failure to stop with resulting death; felony fleeing to elude arrest with motor vehicle; failure to stop at a red light; resisting, obstructing, or delaying a public officer; and failure to heed a light and siren; and (2) his guilty pleas to felony breaking and entering; felony larceny; conspiracy to commit felony breaking and entering and larceny; and driving while license revoked. On appeal, defendant focuses on his conviction of second degree murder.

Defendant primarily argues that the trial court erred in denying his motion to dismiss the charge of second degree murder on the grounds that the State failed to present sufficient evidence of malice. We hold that the trial court properly denied the motion to dismiss given the State's evidence that defendant, whose license had been revoked, drove extremely recklessly in order to elude arrest after breaking and entering and loading his car with stolen televisions.

Facts

The State's evidence tended to show the following facts. On the night of 23 January 2007, defendant and his friends Joshua Earl Proby and Jerrick Bernard Boulware "were getting high" in Charlotte and decided to go to Shelby. As they were driving along Highway 29/74 in a borrowed Ford Focus, they passed a Bestway Rent-to-Own store. Defendant, who was driving, saw flat-screen televisions inside, commented that it "looked interesting," and asked Proby and Boulware if they wanted to "hit it." When Proby responded that he just wanted to "chill," defendant asked him if he was scared. Proby said "no" and told defendant to turn the car around.

Defendant went back to Bestway and pulled up in front of the store. Proby got out of the car, found a brick, and threw it through a window, shattering the glass. Proby and defendant then went inside and passed televisions out through the window to Boulware to put in the car. They loaded five flat-screen televisions in the trunk of the Focus and placed one 42-inch flat-screen television in the back seat. The men could not get the trunk of the car to shut. Nevertheless, the men got back into the car—defendant in the driver's seat, Proby in the passenger seat, and Boulware in the back seat with the television—and began traveling on Highway 29/74 back towards Charlotte.

At approximately 1:25 a.m., Officer Ross L. Hoffman of the Lowell Police Department was traveling westbound on Highway 29/74 when

he was notified by dispatch of "an alarm with a glass break" at the Bestway store. Anticipating that the robbers might have chosen to travel eastbound on Highway 29/74 after leaving Bestway, Officer Hoffman pulled into a left turn lane and prepared to make a U-turn to travel eastbound.

While waiting in the left turn lane, Officer Hoffman saw defendant's vehicle traveling eastbound in his direction at a speed greater than the posted speed limit of 50 miles per hour. Officer Hoffman activated his radar unit, which indicated that the car was going 65 miles per hour. As defendant's vehicle passed him, Officer Hoffman also noticed that the back windows were darkly tinted and the lid of the trunk was open.

After Officer Hoffman turned into the eastbound lane and pulled behind defendant's vehicle, he saw what appeared to be electronic equipment in the trunk of the vehicle. Defendant then quickly moved into a left turn lane and entered a shopping center even though the businesses were closed, which further heightened the officer's suspicions. As Officer Hoffman turned into the shopping center behind defendant, he activated his blue lights. Defendant immediately "stomped the accelerator and took off."

Defendant got back on the highway traveling eastbound with Officer Hoffman following in pursuit. At one point, defendant drove eastward in the westbound lane for approximately 500 to 700 feet before returning to the eastbound lane. Defendant, who was traveling between 90 and 95 miles per hour, also sped through a red traffic light without stopping. Defendant and Officer Hoffman passed through four more intersections during the chase, the traffic light at each being green. Proby testified that he told defendant several times to pull over so they could get out and run, but defendant said he could "do it."

Officer Hoffman alerted dispatch that he was in pursuit of a vehicle with subjects he believed to be involved in the reported Bestway breaking and entering. As Officer Hoffman and defendant approached the intersection of Wesleyan Drive and Wilkinson Boulevard, two officers of the Cramerton Police Department blocked the intersection with their vehicles to prevent any other vehicles from entering the intersection. After defendant and Officer Hoffman passed through that intersection, the officers followed Officer Hoffman to assist in the pursuit. Meanwhile, Officer Carl Moore of the Lowell Police Department positioned his patrol car at the intersection of Highway

29/74 and Lakewood Drive. Officer Moore blocked off traffic at the intersection and covered the two eastbound lanes of Highway 29/74 with tire deflation spikes.

As Officer Hoffman approached the intersection of Highway 29/74 and Lakewood Drive, he saw blue lights and he heard Officer Moore say over the radio, " 'I got spikes out.' " Officer Hoffman slowed his vehicle to prevent running over the spikes. Defendant, going at least 90 miles per hour, swerved to the left to avoid the spikes, jumped across the median, briefly drove eastward in the westbound lane, and "jumped back across the median and began a series of out-of-control maneuvers." The car "skidded to the right, went off the right side of the road, [came] back to the left side of the road, and went back to the right side of the road." It then collided with a 10-foot-high embankment on the right side of the road, spun so that the back of the car hit trees, and "rolled over on its top" while still spinning.

Officer Hoffman notified dispatch that the pursued car had crashed and rolled and that he was going to check the car for injured occupants. As Officer Hoffman approached, defendant crawled from underneath the opposite side of the car and began running east down Highway 29/74. Proby also escaped the car and began running up the embankment. The officers chased defendant on foot, but stopped pursuing him when defendant ran into the woods. A K-9 unit arrived and, within minutes, found defendant hiding behind a tree approximately 50 yards from the crash site. Defendant was then taken into custody.

At the crash site, officers found several car parts, CDs, and televisions scattered along the roadway. Because of the force of the collision, two of the televisions were compressed so tightly in the trunk that officers could not remove them. Officers noticed a black tennis shoe protruding out of the back window of the vehicle. Because the darkly tinted windows prevented the officers from seeing inside the vehicle, an officer broke the window, and they discovered Boulware pinned beneath the 42-inch television in the back seat. Boulware's body was upside down, with his head sticking out of the back window, "just barely missing" the ground.

Emergency responders from the Cramerton Volunteer Fire Department arrived shortly afterwards and removed the doors from the car. Unable to remove Boulware from the wreckage, the paramedics attached a lead to his leg to check for a pulse. Finding no pulse, the paramedics pronounced him dead. An autopsy determined

that Boulware died from head trauma—multiple brain hemorrhages "due to force of his head striking different objects in the car: The seat, the roof, a door, whatever happened to be close to his head wherever he was sitting."

Defendant was charged with second degree murder, felony hit and run failure to stop with personal injury, driving while license revoked, failure to heed a light or siren, resisting a public officer, felony fleeing to elude arrest with motor vehicle, failure to stop at a steady red light, felony breaking and entering, felony larceny, and felony conspiracy to commit felony breaking and entering and felony larceny. He pled guilty to the charges of misdemeanor driving while license revoked, felony breaking and entering, felony larceny, and felony conspiracy to commit breaking and entering and larceny.

Defendant proceeded to trial on the remaining charges. The jury found defendant guilty of second degree murder, misdemeanor hit and run failure to stop with resulting death, felony fleeing to elude arrest with motor vehicle, failure to stop at a steady red light, misdemeanor resisting a public officer, and failure to heed a light or siren. The court consolidated all the charges and sentenced defendant to a single presumptive-range term of 220 to 273 months imprisonment. Defendant timely appealed to this Court.

I

[1] On appeal, defendant first contends that the trial court erred in denying his motion to dismiss the charge of second degree murder. When a defendant moves to dismiss a charge based upon insufficiency of the evidence, "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 defedant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). The trial court considers the evidence in the light most favorable to the State, drawing all reasonable inferences and resolving any conflicts in the evidence in the State's favor. *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009).

The essential elements of second degree murder are "the (1) unlawful killing (2) of a human being (3) with malice, but without premeditation and deliberation." *State v. Vassey*, 154 N.C. App. 384, 390, 572 S.E.2d 248, 252 (2002), *disc. review denied*, 356 N.C. 692, 579 S.E.2d 96, *cert. denied*, 357 N.C. 469, 587 S.E.2d 339 (2003).

Defendant only challenges the sufficiency of the State's evidence as to the element of malice.

Our Supreme Court has emphasized that "[i]ntent to kill is not a necessary element of second-degree murder, but there must be an intentional act sufficient to show malice." *State v. Brewer*, 328 N.C. 515, 522, 402 S.E.2d 380, 385 (1991). *See also State v. Lang*, 309 N.C. 512, 524-25, 308 S.E.2d 317, 323 (1983) ("While an intent to kill is not a necessary element of murder in the second degree, that crime does not exist in the absence of some intentional act sufficient to show malice and which proximately causes death."). In the context of an automobile accident, this requirement means that the State must prove "that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind." *State v. Rich*, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000).

Not all recklessness is sufficient to support a second degree murder charge. As our Supreme Court stated in *Rich*, "[t]he distinction between 'recklessness' indicative of [second degree] murder and 'recklessness' associated with manslaughter 'is one of degree rather than kind.' " *Id.* at 393, 527 S.E.2d at 303 (quoting *United States v. Fleming*, 739 F.2d 945, 948 (4th Cir. 1984), *cert. denied*, 469 U.S. 1193, 83 L. Ed. 2d 973, 105 S. Ct. 970 (1985)). *See also id.* at 395, 527 S.E.2d at 304 (observing that "the difference between the type of malice at issue in [a second degree murder case] and culpable negligence is the degree of recklessness that would support a finding of each").

" 'Standing alone, culpable negligence supports the submission of involuntary manslaughter.' " *Id.* (quoting *Brewer*, 328 N.C. at 523, 402 S.E.2d at 386). Our courts have defined "culpable negligence" sufficient to support an involuntary manslaughter charge as " 'such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.' " *State v. Wade*, 161 N.C. App. 686, 690, 589 S.E.2d 379, 382 (2003) (quoting *State v. Weston*, 273 N.C. 275, 280, 159 S.E.2d 883, 886 (1968)), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 33 (2004).

With respect to "the level of recklessness required for second-degree murder," we must not confuse "such a high degree of recklessness with mere culpable negligence." *Rich*, 351 N.C. at 394, 527 S.E.2d at 303. "[W]hen that negligence is accompanied by 'an act which imports danger to another [and] is done so recklessly or wan-

tonly as to manifest depravity of mind and disregard of human life,' then it is sufficient to support a second-degree murder charge." *Id.* at 395-96, 527 S.E.2d at 304 (quoting *State v. Trott*, 190 N.C. 674, 679, 130 S.E. 627, 629 (1925)).

While most of the decisions upholding a second degree murder conviction arising out of a motor vehicle collision have involved the defendant's driving while impaired, this Court in *State v. Bethea*, 167 N.C. App. 215, 219, 605 S.E.2d 173, 177 (2004), *cert. denied*, 362 N.C. 88 (2007), rejected the argument made by defendant, in this case, that the State cannot prove the necessary level of recklessness without evidence of impairment: "[O]ur courts have not found driving under the influence to be the only evidence capable of proving malice." The Court explained that "[w]hile driving under the influence is certainly evidence sufficient to prove malice, defendant's actions in the instant case, motivated by an attempt to elude law enforcement by driving in an extremely dangerous manner, is an equally reckless and wanton act, which evidences 'a mind utterly without regard for human life and social duty and deliberately bent on mischief.' " *Id. (quoting State v. McBride*, 109 N.C. App. 64, 68, 425 S.E.2d 731, 733 (1993)). Thus, *Bethea* found the State presented sufficient evidence of malice when the defendant drove "in an extremely dangerous manner"—driving at speeds up to 100 miles per hour, speeding through a red light and stop signs, crossing into the oncoming traffic lane several times, and turning his lights off on dark, rural roads—and he did so for the unlawful purpose of eluding law enforcement. *Id.*

Bethea was followed in *State v. Lloyd*, 187 N.C. App. 174, 652 S.E.2d 299 (2007), *cert. denied*, 363 N.C. 586, 683 S.E.2d 214 (2009). In *Lloyd*, the Court also concluded that sufficient evidence of malice existed when the defendant, who knew his license was suspended, drove extremely dangerously in an effort to avoid arrest for having stolen the vehicle he was driving. *Id.* at 179-80, 652 S.E.2d at 302. As the police gave chase, the defendant drove 85 to 90 miles per hour, passed several cars in a no-passing zone despite oncoming traffic, forced a car off the road, and collided with a station wagon whose occupants subsequently died. *Id.* at 176, 652 S.E.2d at 300.

This case is virtually indistinguishable from *Bethea* and *Lloyd*. Just as in those two cases, defendant, whose license was revoked, drove extremely dangerously in order to evade arrest for breaking and entering and larceny. The State presented evidence that when an officer attempted to stop defendant, because of the stolen televisions

in his trunk, defendant fled, driving more than 90 miles per hour, passing through a red light without stopping, and traveling the wrong way on a highway—all with the vehicle's trunk lid open and with a passenger pinned by a large television and unable to exit the vehicle. Thus, under *Lloyd* and *Bethea*, the trial court properly denied defendant's motion to dismiss.

Defendant, however, argues that he lacked the necessary malice because Proby was the one who told him to flee and because all but one of the lights were green, there was no traffic on the road to be endangered, and he experienced no problems until he encountered the spike strips. This argument views the evidence in the light most favorable to defendant, rather than the State. Defendant was free to argue all this evidence to the jury, but it was up to the jury to decide what credibility and weight to give it. Because the State presented evidence of both a high level of recklessness combined with the intentional act of fleeing to elude arrest, the trial court properly allowed the charge of second degree murder to proceed to the jury.

II

[2] Defendant also contends that the trial court erred under Rule 404(b) of the Rules of Evidence by allowing Proby to answer the State's question about the identity of the people to whom Proby and defendant planned to sell the televisions. The following exchange occurred during Proby's direct examination:

> Q. And what were you going to do with the TVS?
>
> A. Sell them.
>
> Q. Who were you going to sell them to?
>
> A. We had numerous people we sold them to.
>
> [DEFENSE COUNSEL]: Objection. Move to strike.
>
> THE COURT: The objection is overruled. Motion to strike is denied.
>
> Q. . . . Go ahead. Who were you going to sell them to?
>
> A. We sell them to Jamaicans, Arabs. Mostly Arab.

Immediately afterward, the trial court sustained defendant's objection to the State's asking Proby *how many times* he and defendant had sold stolen televisions in the past.

The State's question, defendant now argues, was "clearly irrelevant," and Proby's response left a "highly inflammatory and unduly prejudicial impression before the jury that [defendant] must have committed robberies on a regular basis." Defendant argues the testimony allowed the State to "paint [defendant] with a broad brush as a 'bad person' who committed numerous robberies in the past, as evidenced by the people he sold these stolen TVS to."

We question whether defendant's objection at trial was sufficient to preserve this issue for review. " '[A] general objection, if overruled, is ordinarily not effective on appeal.' " *State v. White*, 104 N.C. App. 165, 170, 408 S.E.2d 871, 874 (1991) (quoting *State v. Hamilton*, 77 N.C. App. 506, 509, 335 S.E.2d 506, 508 (1985), *disc. review denied*, 315 N.C. 593, 341 S.E.2d 33 (1986)). " 'This rule serves to facilitate proper rulings and to enable opposing counsel to take proper corrective measures to avoid retrial.' " *Id.*, 408 S.E.2d at 874-75 (quoting *State v. Catoe*, 78 N.C. App. 167, 168, 336 S.E.2d 691, 692 (1985), *disc. review denied*, 316 N.C. 380, 344 S.E.2d 1 (1986)).

Under Rule 10(b)(1) of the Rules of Appellate Procedure, "to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, *stating the specific grounds* for the ruling the party desired the court to make if the specific grounds were not apparent from the context." (Emphasis added.)[1] Here, it is not readily apparent from the context whether defendant was objecting on Rule 404(b) grounds or on some other basis such as Proby's answer being non-responsive to the question.

Even assuming, however, that the issue was preserved, defendant has not shown that he was prejudiced by this testimony. Defendant pled guilty to breaking and entering, larceny, and conspiracy. There is no dispute that the car was packed with stolen televisions. Nor is there any real dispute as to the dangerousness of defendant's driving during the police chase. Given the larceny of numerous televisions, defendant's being an instigator of the theft, the circumstances of the chase, and the fact that defendant's passenger died as a result of the force of the impact during the crash that ended the chase, there is no "reasonable possibility that . . . a different result would have been reached" by the jury absent the suggestion that defendant and Proby had previously sold stolen televisions. N.C. Gen. Stat. § 15A-1443(a) (2009). *See State*

1. Under the recently amended Rules of Appellate Procedure, the former Rule 10(b) is now Rule 10(a). Because defendant filed notice of appeal prior to 1 October 2009, the effective date of the amended rules, we refer to Rule 10(b).

v. McDonald, 130 N.C. App. 263, 267-68, 502 S.E.2d 409, 413 (1998) (holding that even if irrelevant, admission of evidence of prior break-in was harmless when there was undisputed evidence that defendant brandished handgun and threatened to shoot victim if she did not move away from her door and defendant took victim's money).

No error.

Chief Judge MARTIN and Judge ELMORE concur.

REBECCA DAVIS, PLAINTIFF v. MARGARET SWAN, DEFENDANT

No. COA09-321

(Filed 17 August 2010)

Child Custody and Support— custody—same sex family—best interest of child standard

Uncontested findings supported the trial court's conclusion that the biological parent of a child born to a same sex couple had acted inconsistently with her constitutionally protected exclusive parental status in creating a family with her partner. The best interest of the child standard was appropriately applied.

Appeal by defendant from order entered 8 October 2008 by Judge Gary S. Cash in Superior Court, Buncombe County. Heard in the Court of Appeals 29 September 2009.

Sharon Thompson Law Group, by Sharon A. Thompson; and Patterson Harkavy LLP, by Burton Craige and Narendra K. Ghosh, for plaintiff-appellee.

Northen Blue, L.L.P., by Carol J. Holcomb, Vicki L. Parrott, and Samantha H. Cabe, for defendant-appellant.

WYNN, Judge.

Defendant Margaret Swan appeals from an order granting Plaintiff Rebecca Davis joint legal custody and secondary physical custody of Swan's biological child ("minor child"). Swan argues that the trial court erred by applying the best interest standard to the child custody dispute between the parties. Because the record shows that

Swan acted inconsistently with her constitutionally protected right to exclusive care and control of the minor child, we affirm the trial court's decision to apply the best interest of the child standard.[1]

On 21 September 2007, Davis filed a complaint seeking joint legal and physical custody of the minor child and an order regarding child support. Swan, the minor's biological mother, filed a motion to dismiss, answer, and counter claim for custody and attorney's fees on 19 December 2007. The trial court conducted a hearing on 21 and 22 July 2008, and entered an order on 8 October 2008 containing the following relevant findings of fact:

> 1. Plaintiff and Defendant had a personal relationship from October 1996 to April 2005. The parties considered themselves committed domestic partners, purchased a home together, and resided there from February 1999 until May 2005.
>
> 2. The parties decided to have a child together and began actively pursuing parenthood in the Spring of 2000. They decided Defendant would be the one to get pregnant for several reasons, including but not limited to, the fact that Defendant had the better health insurance, she wanted to be a stay-at-home parent, and Defendant was in good health.
>
> 3. . . . Defendant became pregnant in the Fall of 2003 after a second in vitro fertilization attempt.
>
> 4. Plaintiff was involved with Defendant in her attempts to get pregnant, including reviewing possible donors, going to most doctor visits, being there with Defendant during various insemination procedures and two in vitro fertilization procedures, all of which occurred over an approximately three year period.
>
> 5. Plaintiff went with Defendant to every one of her doctor appointments while Defendant was pregnant, as well as attending a Bradley birth class and breast feeding class with Defendant.
>
> 6. A baby shower was given on April 24, 2004 at the parties' residence for both Defendant and Plaintiff.
>
> 7. On May 28, 2004, Defendant gave birth to a baby girl whom the parties chose to name [minor child] SWAN-DAVIS, a name that combined both parties' last names.

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1. *Mason v. Dwinnell*, 190 N.C. App. 209, 226, 660 S.E.2d 58, 69 (2008).

8. Plaintiff was at the hospital with Defendant during [minor child]'s delivery and birth.

9. Defendant and Plaintiff sent out birth announcements announcing "the birth of our daughter" and stating that the two . . . were the "proud parents."

10. The minor child calls Plaintiff "Mom" and she calls Defendant "Mama."

11. The parties together planned a nursery for [minor child] and Plaintiff's mother made the curtains and other things for the nursery.

12. Since [minor child]'s birth, Plaintiff has attended a baby sign language class, swimming, soccer and gymnastics classes, and most of [minor child]'s pediatrician and dentist appointments.

13. Defendant admits that Plaintiff was involved in the day-to-day parenting of [minor child] since her birth until the date of the parties' separation and that the parties shared decision-making, care-taking and financial responsibilities for [minor child] from her birth until the parties separated, to the extent that Plaintiff was not at work and was available to do so.

14. In 2004 Defendant appointed Plaintiff as guardian of the minor child in her Last Will and Testament.

15. In 2006, after the parties' [sic] separated, Defendant signed an Authorization to Consent to Health Care for Minor and a Power of Attorney for Child Care.

16. Plaintiff has provided financial assistance to Defendant following the separation of the parties for the minor child's extra-curricular activities.

17. Plaintiff made the arrangements for, filled out the paperwork and paid for [minor child]'s preschool, swim classes, soccer and gymnastics.

18. Defendant admits that both Defendant and Plaintiff held themselves out to the community as both being parents to [minor child] prior to the parties' separation.

19. Defendant helped [minor child] make Mother's Day cards for Plaintiff in 2006 and 2007.

. . . .

21. The parents of both parties were recognized by the parties and others as the grandparents of the minor child.

22. Both parties shared household expenses and child expenses and agreed that Defendant would claim the minor child as a dependent for tax purposes.

23. The parties did not sign a Parenting Agreement.

24. In April 2004 they executed powers of attorney and wills. In her will, Defendant named Plaintiff as guardian for the minor child.

25. Plaintiff has paid for the minor child's attendance at Asheville Montessori School.

26. The parties jointly decided to create a family and intentionally took steps to identify Plaintiff as a parent of the minor child.

27. Defendant encouraged, fostered and facilitated the emotional and psychological bond between Plaintiff and the minor child up until the parties' separation.

. . . .

32. Defendant testified that, prior to and at the time of [minor child]'s birth, she assumed both of the parties would be parents to [minor child].

33. Since June 2005[,] when the parties physically separated, they have shared physical custody of their daughter. From June 2005 through December 2007, Plaintiff had physical placement of [minor child] for an average of eleven overnights per month.

34. In September 2007, Defendant referred to Plaintiff as [minor child]'s "other mother" on her page in MySpace.com.

Based on these findings, the trial court made the following conclusions of law with respect to custody:

2. . . . . [T]he Court concludes that Defendant made the choice, with respect to Plaintiff's relationship to the minor child, to act in a manner inconsistent with her constitutionally-protected right to custody, care, and control of the minor child and her right to exclusively make decisions concerning said child.

3. The Court's determination that Defendant has acted in a manner inconsistent with her constitutionally-protected parental rights is supported by clear and convincing evidence.

> 4. Since the Court concludes that Defendant has acted in a manner inconsistent with her constitutionally-protected parental rights, the standard this Court should apply, and has applied, to determine custody is the "best interest of the child."
>
> . . . .
>
> 6. It is in the best interests of the minor child that the parties have joint legal custody, that Defendant have primary physical custody, and Plaintiff have secondary physical custody.

Further, the trial court awarded Swan and Davis joint legal custody of the minor child—Swan primary physical custody, and Davis secondary physical custody.

Swan appeals, arguing that Davis failed to demonstrate by clear and convincing evidence that Swan acted inconsistently with her constitutionally protected status as the minor child's legal parent. Swan further argues that the trial court's findings of fact do not support its conclusion that Swan acted inconsistently with her constitutionally protected right to exclusive care and control of the minor child, in violation of her parental rights under the 9th and 14th Amendments to the U.S. Constitution.

"In child custody cases, where the trial judge has the opportunity to see and hear the parties and witnesses, the trial court has broad discretion and its findings of fact are accorded considerable deference on appeal." *Westneat v. Westneat*, 113 N.C. App. 247, 250, 437 S.E.2d 899, 900-01 (1994) (quoting *Smithwick v. Frame*, 62 N.C. App. 387, 392, 303 S.E.2d 217, 221 (1983)). "[T]he trial court's findings of fact are conclusive if there is evidence to support them, even though the evidence might sustain a finding to the contrary." *Raynor v. Odom*, 124 N.C. App. 724, 729, 478 S.E.2d 655, 658 (1996). Whether the findings of fact support the trial court's conclusions of law is reviewed *de novo*. *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008).

In *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), our Supreme Court established that the best interest of the child standard applies in a custody dispute between a legal parent and a non-parent when clear and convincing evidence demonstrates that the legal parent's conduct has been inconsistent with his or her constitutionally protected status. *Id.* at 79, 484 S.E.2d at 534. The Court reasoned:

> A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child.

Id. (citations omitted). Further, the Court explained that while conduct warranting termination of parental rights[2] was clearly conduct inconsistent with constitutionally protected status, "[o]ther types of conduct, *which must be viewed on a case-by-case basis*, can also rise to this level so as to be inconsistent with the protected status of natural parents." *Id.* at 79, 484 S.E.2d at 534-35 (emphasis added).

Also, the trial court must consider the intent of the legal parent, in addition to her conduct. "[I]t is appropriate to consider the legal parent's intentions regarding the relationship between his or her child and the third party during the time that relationship was being formed and perpetuated." *Estroff v. Chatterjee*, 190 N.C. App. 61, 69, 660 S.E.2d 73, 78 (2008).

> Intentions after the ending of the relationship between the parties are not relevant because the right of the legal parent [does] not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the party's separation she regretted having done so.

Id. at 70-71, 660 S.E.2d at 79 (citations and internal quotation marks omitted).

In *Mason v. Dwinell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008), this Court applied the analysis articulated in *Price* to review a trial court order awarding permanent joint legal and physical custody to the defendant, the minor child's biological parent, and the plaintiff, her former domestic partner. *Id.* at 211, 660 S.E.2d at 60. On review, this Court held that the following findings of fact supported the trial court's conclusion that the biological parent acted inconsistently with her constitutionally protected right to exclusive care and control of the minor child:

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2. N.C. Gen. Stat. § 7B-1111 (2007) sets forth the statutory grounds for the termination of parental rights, including abuse, neglect and abandonment.

> (1) both plaintiff and defendant jointly decided to create a family unit; (2) defendant intentionally identified plaintiff as parent; (3) the sperm donor was selected based upon physical characteristics similar to those of plaintiff; (4) the surname of plaintiff was used as one of the child's names; (5) plaintiff participated in the pregnancy and the birth of the child; (6) there was a baptism ceremony where both plaintiff and defendant were identified as parents; (7) plaintiff was identified as a parent on school forms; (8) they functioned together as a family unit for four years; (9) after the relationship between plaintiff and defendant ended, the defendant allowed plaintiff the functional equivalent of custody for three years; (10) defendant encouraged, fostered, and facilitated an emotional and psychological bond between plaintiff and the child; (11) plaintiff provided care and financial support for the child; (12) the child considered plaintiff to be a parent; (13) plaintiff and defendant shared decision-making authority with respect to the child; (14) plaintiff was [sic] a medical power of attorney for the child; (15) the parties voluntarily entered into a parenting agreement; and (16) defendant intended to create between plaintiff and the child a permanent parent-like relationship.

Heatzig v. Maclean, 191 N.C. App. 451, 459-60, 664 S.E.2d 347, 353-54 (summarizing findings of fact in *Mason*, 190 N.C. App. at 222-23, 660 S.E.2d at 67) *appeal dismissed*, *review denied*, 362 N.C. 681, 670 S.E.2d 564 (2008). Analogizing the facts of *Mason* to those in *Price*, this Court stated:

> While this case does not involve the biological mother's leaving the child in the care of a third person, we still have the circumstances of [a parent] intentionally creating a family unit composed of herself, her child and, to use the Supreme Court's words, a "*de facto* parent." . . . [T]he findings establish that [the legal parent] intended—during the creation of this family unit—that this parent-like relationship would be permanent, such that she "induced [non-parent and minor] to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated."

Mason, 190 N.C. App. at 225-26, 660 S.E.2d at 68 (quoting *Price*, 346 N.C. at 83, 484 S.E.2d at 537).

This Court in *Estroff v. Chatterjee*, however, affirmed an order dismissing a non-parent plaintiff's claim for joint custody of the two children born to the defendant (her former partner) and the children's

legal parent. This Court held that the trial court's findings of fact "reflect[ed] that [the legal parent] did not choose to create a family unit with two parents, did not intend that [the plaintiff] would be a '*de facto* parent,' . . . and did not allow [the plaintiff] to function fully as a parent." *Estroff*, 190 N.C. App. at 74, 660 S.E.2d at 81. Additionally, this Court stated that the following findings of fact by the trial court supported dismissal: (1) the defendant made her own decision to have a child, chose the sperm donor independently, "and asked only if [the plaintiff] had any objection to sharing her home with children"; (2) the defendant did not hold out to others that she and plaintiff were planning to raise the children together; (3) the defendant objected to others referring to plaintiff as the children's "mom" and told the plaintiff "that she, [plaintiff,] was and always would be their only mother"; and (4) the parties never discussed or entered into any agreements or took any actions to confer on the defendant parental or custodial rights. *Id.* at 74, 660 S.E.2d at 81.

Here, the trial court made numerous findings of fact, which are unchallenged on appeal, that demonstrate Swan's intent jointly to create a family with Davis and intentionally to identify her as a parent of the minor child. These findings indicate that the parties jointly decided to have a child and that Swan would be the one to get pregnant, that Davis helped choose the sperm donor and attended doctor's appointments, that the parties had a baby shower and planned the minor's nursery together, that Swan allowed Davis to be present during the minor child's delivery and birth, that the parties sent out birth announcements referring to the minor child as "our daughter" and listing Swan and Davis as her "proud parents", and that the minor child's last name "SWAN-DAVIS" combines both parties' surnames. Additionally, the parents of both parties were recognized as the minor child's grandparents.

Similar to this Court's determination in *Mason*, the trial court's findings in this case reveal that the parties largely "functioned as if they were both parents[.]" *Mason*, 190 N.C. App. at 223, 660 S.E.2d at 67. The minor child referred to Swan as "mom" and to Davis as "mama"; Davis was involved in the day-to-day parenting and financial support of the minor child from the time of her birth until the parties separated. Even after separation, Davis continued to provide financial support for the minor child, including paying for the minor's private schooling and her extracurricular activities, and the minor child spent an average of eleven overnight visits per month with Davis. Although the parties did not execute a parenting agreement, Swan

appointed Davis as the minor's guardian in her last will and testament and signed an Authorization to Consent to Health Care for Minor and a Power of Attorney for Child Care.

Perhaps most importantly, the trial court found "the parties jointly decided to create a family and intentionally took steps to identify Plaintiff as a parent of the minor child"; Swan "encouraged, fostered, and facilitated the emotional and psychological bond between [Davis] and the minor child up until the parties' separation"; and Swan "testified that, prior to and at the time of [minor child]'s birth, she assumed both of the parties would be parents to [minor child]. Here, as in *Price* and *Mason*, the trial court's findings "establish that [the legal parent] intended—during the creation of this family unit—that this parent-like relationship would be permanent, such that she 'induced [non-parent and minor] to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated." *Mason*, 190 N.C. App. at 225-26, 660 S.E.2d at 68 (quoting *Price*, 346 N.C. at 83, 484 S.E.2d at 537).

Further, because the aforementioned findings, uncontested and thus binding on appeal, support the trial court's conclusion that Swan's conduct was inconsistent with her constitutionally protected parental right to exclusive care and control of the minor child, we need not address Swan's remaining arguments on appeal.

In conclusion, because the trial court's findings of fact are supported by clear, cogent, and convincing evidence and those findings in turn support its conclusion that Swan acted inconsistently with her constitutionally protected parental status, we find Swan's arguments on appeal to be without merit.

Affirmed.

Judges CALABRIA and ELMORE concur.

Judge WYNN concurred in this opinion prior to 9 August 2010.

IN RE K.J.L.

[206 N.C. App. 530 (2010)]

IN THE MATTER OF: K.J.L.

No. COA08-284-3

(Filed 17 August 2010)

1. Termination of Parental Rights— grounds—neglect

The trial court did not err by concluding that grounds existed to terminate respondent mother's parental rights under N.C.G.S. § 7B-1111(a)(1) based on neglect and the probability of repetition of neglect. Respondent failed to abide by the dispositional order, failed to maintain a stable residence, failed to follow through with program services including parenting classes, and failed to maintain gainful employment.

2. Constitutional Law— effective assistance of counsel—failure to demonstrate prejudice

Respondent mother did not receive ineffective assistance of counsel and her guardian *ad litem* did not breach his duty to protect her interests in a termination of parental rights case. Respondent failed to demonstrate any prejudice from her alleged deficient representation in light of the overwhelming evidence of grounds to terminate her parental rights.

Appeal by respondent mother from an order entered on or about 15 January 2008 by Judge Mary F. Covington in District Court, Davidson County. Heard in the Court of Appeals 23 July 2008. An opinion was filed 19 August 2008. *See In re K.J.L.*, 192 N.C. App. 272, 665 S.E.2d 504 (2008). A petition for rehearing was allowed on 30 September 2008 and amended to allow for additional briefs on 1 October 2008. By opinion filed on 16 December 2008, a divided panel of this Court vacated the order terminating respondent's parental rights, replacing the opinion filed on 19 August 2008. *See In re K.J.L.*, 194 N.C. App. 386, 670 S.E.2d 269 (2008). The North Carolina Supreme Court, by opinion filed 18 June 2009, reversed this Court and remanded for "consideration of the parties' remaining assignments of error." *See In re K.J.L.*, 363 N.C. 343, 677 S.E.2d 835 (2009).

Charles E. Frye, III, for petitioner-appellee Davidson County Department of Social Services; Laura B. Beck, for appellee Guardian ad Litem.

Robert W. Ewing, for respondent-appellant.

STROUD, Judge.

This Court in *In re K.J.L.*, 194 N.C. App. 386, 389-91, 670 S.E.2d 269, 271-72 (2008) vacated the order terminating respondent's parental rights on two separate grounds: (1) the trial court did not initially have subject matter jurisdiction to issue the adjudication order, as the summonses to the parents were not properly "issued[,]" and "the adjudication order was essential to the trial court's subject matter jurisdiction" in the termination proceeding; and (2) the trial court also lacked subject matter jurisdiction over the termination of parental rights proceeding because "no summons was issued to the juvenile and no summons was served upon or accepted by the guardian ad litem for the juvenile." Our North Carolina Supreme Court, in *In re K.J.L.*, 363 N.C. 343, 348, 677 S.E.2d 835, 838 (2009), reversed the majority decision of this Court, on the basis of Judge Robert C. Hunter's dissenting opinion, and held that

> [b]ecause the purpose of the summons is to obtain jurisdiction over the parties to an action and not over the subject matter, summons-related defects implicate personal jurisdiction. Any deficiencies in the issuance and service of the summonses in the neglect and [termination of parental rights] proceedings at issue in this case did not affect the trial court's subject matter jurisdiction, and any defenses implicating personal jurisdiction were waived by the parties.

This case comes before this Court on remand for the purpose of deciding the remaining issues not addressed by the majority opinion in *In re K.J.L.*, 194 N.C. App. 386, 670 S.E.2d 269 (2008). Respondent argues that (1) the trial court erred in concluding that grounds existed to terminate her parental rights; (2) she received ineffective assistance of counsel; and (3) that her guardian ad litem breached his duty to protect her legal interests. We will present below pertinent facts to provide context for these remaining substantive issues.

I. Background[1]

On 28 March 2006, the Davidson County Department of Social Services ("DSS") filed a petition alleging that K.J.L. was a neglected and dependent juvenile. DSS stated that it had provided case management services to respondent since September 2005 "in an effort to

1. The substance of the factual background and analysis is taken from Judge Robert C. Hunter's dissenting opinion *In re K.J.L.*, 194 N.C. App. 386, 670 S.E.2d 269 (2008) (Hunter, Robert C., J., dissenting).

alleviate chronic neglect." According to DSS, respondent was found to be in need of services due to her inability to parent K.J.L., as well as her inability to protect the child. DSS alleged that respondent had "significant mental health issues" and cited a 8 March 2006 psychological evaluation which diagnosed respondent as suffering from "Anxiety Disorder, Depression, and Other Personality Disorder with Immature and Passive Dependent Features." DSS further alleged that respondent suffered from "diabetes mellitus, type 1[,]" and "[a]s a result of mismanagement of her disease, there are concerns that she cannot take proper care of herself, much less her child."

DSS claimed that respondent had received counseling services but shown no improvement in her parenting skills. DSS further claimed that respondent had "received instruction from various professionals since [K.J.L.'s] birth regarding techniques for the care of her child; however, she has displayed significant difficulty in retaining such information and putting it into practice with the child." DSS asserted that respondent's inability to develop and retain parenting skills had impacted K.J.L.'s development.

DSS further stated in the petition that respondent and K.J.L. had resided in a homeless shelter since September 2005. DSS claimed that shelter staff had "voiced numerous concerns about [respondent's] ability to live on her own and have advised against her moving into independent housing." The staff expressed concerns about respondent's "lack of parenting capacity" and believed allowing her to leave the shelter would place K.J.L. at risk of harm. DSS alleged that the shelter staff had "often 'overlooked' the [respondent's] problematic behaviors because of their concern that, on her own, she could not appropriately parent her child."

DSS further alleged that respondent had no income for the three months prior to the petition filing and had been deemed "'unemployable,' due to her limited commitment to securing and maintaining employment." Additionally, DSS noted respondent's relationship with K.J.L.'s father, a registered sex offender and alcoholic. DSS stated that homeless shelter staff had smelled alcohol on his breath on occasion when he was transporting respondent, and respondent had maintained a relationship with the father despite DSS's concerns about K.J.L.'s safety when in his presence. On 3 April 2006, DSS obtained custody of K.J.L. by non-secure custody order.

On 8 September 2006, K.J.L. was adjudicated neglected based on stipulations made by respondent and the father. The court continued

custody of K.J.L. with DSS. The court ordered that the permanent plan for the child be reunification, but further ordered that if "significant progress is not made by . . . respondent in the next six (6) months, an alternative option sh[ould] be considered." To address respondent's issues, the court ordered that respondent: (1) attend individual counseling with Daymark Recovery Services; (2) maintain a suitable residence; (3) maintain gainful employment; and (4) follow any and all recommendations of her physician, and sign a release so that DSS could monitor her medical conditions.

A permanency planning review hearing was held on 8 January 2007. The trial court found that respondent: (1) had been padlocked out of her apartment for nonpayment of rent; (2) had lost her job at National Wholesale and had not worked since; (3) had not exhibited that she could take proper care of herself; and (4) continued to exhibit her lack of parenting skills, noting that respondent attempted to feed K.J.L. inappropriate foods, had to be prompted to tend to K.J.L. during visitation, and was easily distracted. Accordingly, the court authorized DSS to cease reunification efforts with respondent and changed the plan for the child to termination of parental rights and adoption.

On 12 April 2007, DSS filed a petition to terminate respondent's parental rights. DSS alleged that respondent had neglected K.J.L. within the meaning of N.C. Gen. Stat. § 7B-101(15), and that it was probable that there would be a repetition of neglect if the child was returned to respondent's care. Additionally, DSS alleged that K.J.L. had been placed in the custody of DSS and that respondent, for a continuous period of six months immediately preceding the filing of the petition, had failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so, pursuant to N.C. Gen. Stat. § 7B-1111(a)(3).

The trial court held the hearing on the petition to terminate respondent's parental rights on 6 and 13 December 2007. By order entered 15 January 2008, the trial court concluded that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (3) to terminate respondent's parental rights. The court further concluded that it was in the juvenile's best interests that respondent's parental rights be terminated. Respondent gave notice of appeal.

II. Grounds For Termination

[1] Respondent argues that the trial court erred by concluding that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) to termi-

nate her parental rights. Respondent contends that the trial court failed to make sufficient findings of fact to support its conclusion that she neglected the juvenile. Specifically, respondent asserts that the trial court failed to make a finding that K.J.L. was neglected at the time of the termination hearing. We are not persuaded by respondent's argument.

N.C. Gen. Stat. § 7B-1111 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.*, *D.M.D.*, *S.J.D.*, *J.M.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), *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9, 10 (2001)).

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) (2007). "A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997) (citing *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984)). However, "a prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *Ballard*, 311 N.C. at 713-14, 319 S.E.2d at 231.

In the instant case, K.J.L. was adjudicated a neglected juvenile on 8 September 2006. In the dispositional order, the trial court ordered respondent to take certain actions in order to be reunified with K.J.L. However, respondent failed to abide by the dispositional order. The trial court found in the termination order that since the dispositional hearing, respondent had "failed to take significant and meaningful action to comply with the prior Orders of the Court." The trial court

found that respondent had failed to maintain a stable residence. Of note, the trial court found that respondent was often in arrears on her rent, and since 31 August 2006, there had been seven summary ejectment actions filed against respondent. Also, respondent had agreed to attend parenting classes. However, the trial court found that respondent had been terminated from the Community Links Program because she failed to "follow through" with the program's services. The court further found that respondent failed to attend or complete any other parenting classes. Respondent was also ordered to maintain gainful employment. The trial court found that respondent failed to do so. Based on these findings, the court concluded that because of respondent's conduct, there likely would be a repetition of neglect should K.J.L. be returned to her care.

Respondent also challenges the validity of the court's findings regarding the adjudication of neglect due to the trial court's alleged lack of jurisdiction. However, as stated above, our Supreme Court ruled that the trial court had jurisdiction to adjudicate K.J.L. as a neglected juvenile. *See In re K.J.L.*, 363 N.C. 343, 677 S.E.2d 835 (2009). Otherwise, respondent does not argue that the trial court erred in making any of the findings of fact supporting its conclusion of neglect. Therefore, the findings of fact are deemed to be supported by sufficient evidence, and are binding on appeal. N.C.R. App. P. 28(b)(6); *see also In re P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 404-05 (2005) (concluding respondent had abandoned factual assignments of error when she "failed to specifically argue in her brief that they were unsupported by evidence"). Accordingly, we conclude that the trial court's findings of fact were sufficient to support its conclusion that respondent had neglected the juvenile, and there was a probability of repetition of neglect should the child be returned to respondent's care.

Since grounds exist pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) to support the trial court's order, the remaining ground found by the trial court to support termination need not be reviewed by the Court. *Taylor*, 97 N.C. App. at 64, 387 S.E.2d at 233-34.

III. Ineffectiveness of Counsel and Guardian Ad Litem

[2] Next, we address respondent's arguments that she received ineffective assistance of counsel and that her guardian ad litem breached his duty to protect her legal interests. Respondent bases her arguments on the following statement made by counsel during closing arguments at the termination hearing:

> Uh, this child was taken into custody, as I recall, it was basically because [respondent] had nowhere to live, and because there [were] concerns about her medical condition, seizures, and leaving the child unattended. The Court has heard this evidence. There still seems to be two major concerns, and—and while, uh, *I cannot argue that there's not statutory grounds that exist for termination*, uh, I would hope the Court would find that those are not sufficient to be in the best interests.

(Emphasis added.) Respondent asserts that counsel "capitulated to the petitioner's allegations" and deprived her of a right to have a trial on the merits. Respondent further asserts that her guardian ad litem failed to protect her interests when he did not object to counsel's stipulation. *See* N.C. Gen. Stat. § 7B-1101.1(e) (2007) (a guardian ad litem should "ensure that the parent's procedural due process requirements are met"). Again, we are not persuaded by respondent's arguments.

"Parents have a 'right to counsel in all proceedings dedicated to the termination of parental rights.' " *In re L.C., I.C., L.C.*, 181 N.C. App. 278, 282, 638 S.E.2d 638, 641 (quoting *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996)), *disc. review denied*, 361 N.C. 354, 646 S.E.2d 114 (2007). "This statutory right includes the right to effective assistance of counsel." *In re Dj.L., D.L., & S.L.*, 184 N.C. App. 76, 84, 646 S.E.2d 134, 140 (2007) (citing *In re L.C., I.C., L.C.*, 181 N.C. App. at 282, 638 S.E.2d at 641; *In re Oghenekevebe*, 123 N.C. App. at 436, 473 S.E.2d at 396). "To prevail in a claim for ineffective assistance of counsel, respondent must show: (1) her counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) her attorney's performance was so deficient she was denied a fair hearing." *In re J.A.A. & S.A.A.*, 175 N.C. App. 66, 74, 623 S.E.2d 45, 50 (2005) (citing *In re Oghenekevebe*, 123 N.C. App. at 436, 473 S.E.2d at 396).

In *In re Dj.L.*, this Court stated that:

> This Court has previously determined that alleged deficiencies did not deprive the respondent of a fair hearing when the respondent's counsel 'vigorously and zealously represented' her, was familiar 'with her ability to aid in her own defense, as well as the idiosyncrasies of her personality,' and 'the record contain[ed] overwhelming evidence supporting termination[.]'

In re Dj.L., D.L., S.L., 184 N.C. App. at 86, 646 S.E.2d at 141 (quoting In re *J.A.A. & S.A.A.*, 175 N.C. App. at 74, 623 S.E.2d at 50). As in *In*

re Dj.L and *In re J.A.A.*, we conclude that "[c]ounsel's representation, while not perfect, was vigorous and zealous." *In re Dj.L.*, *D.L.*, *S.L.*, 184 N.C. App. at 86, 646 S.E.2d at 141. Counsel represented respondent at every stage of this case, beginning with the adjudicatory hearing. Counsel presented two witnesses at the hearing, including the respondent, and cross-examined each witness presented by petitioner. Regarding counsel's supposed "capitulation," it is clear from the record that the court did not consider counsel's statement an admission. Foremost, we conclude that respondent has failed to demonstrate any prejudice from her alleged deficient representation in light of the overwhelming evidence of the existence of grounds to terminate her parental rights. Thus, we would hold that respondent's ineffective assistance of counsel claim fails, as does her related claim concerning her guardian ad litem.

IV. Conclusion

For the foregoing reasons, we hold there were sufficient grounds to support termination of respondent's parental rights, and she was sufficiently represented by counsel and guardian ad litem. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges MCGEE and HUNTER, Robert C., concur.

IN THE MATTER OF: R.N.

No. COA09-1406

(Filed 17 August 2010)

Juveniles— delinquency—crimes against nature—insufficient evidence—vacated and remanded

The trial court erred in denying defendant juvenile's motion to dismiss the charge of crimes against nature as there was insufficient evidence that penetration occurred during the first of two alleged incidents. Defendant's adjudication based on a second incident was vacated and remanded to the trial court to conduct a hearing to reconstruct the pertinent portion of a witness's testimony.

IN RE R.N.

[206 N.C. App. 537 (2010)]

Appeal by juvenile from orders entered 19 March 2009 and 14 April 2009 by Judge Polly D. Sizemore in Guilford County District Court. Heard in the Court of Appeals 28 April 2010.

Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for the State.

Kimberly P. Hoppin for juvenile-appellant.

HUNTER, Robert C., Judge.

Juvenile R.N. ("Richard") appeals from the trial court's orders adjudicating him delinquent and ordering a Level 2 disposition.[1] The juvenile petition in this case alleged that Richard committed two distinct acts constituting a crime against nature: licking the alleged victim's genital area and placing his penis in her mouth. Richard's sole argument on appeal is that the trial court should have dismissed the juvenile petition for insufficient evidence that penetration—the essential element of a crime against nature—occurred during either alleged incident. We agree with Richard's contention with respect to the first alleged act and, therefore, reverse that portion of his adjudication. With respect to the second incident, defects in the transcript make meaningful appellate review of the sufficiency of the evidence impossible. Accordingly, we remand the case to the trial court to reconstruct the relevant portion of the testimonial evidence.

Facts

The State's evidence tended to establish the following facts at the adjudication hearing: In August 2008, Richard, who was 12 at the time, was living with his mother, his two siblings, his aunt and her three children, and his grandparents in a mobile home in Guilford County, North Carolina. Sometime in August 2008, Richard called his cousin "Dana" (seven) into the bedroom he shared with his brother "James" (nine) and his cousin "Sam" (13). Richard was on the top bunk of the bunk bed and Dana got onto the top bunk with him. Also in the room were James, on the bottom bunk, and Sam, on his bed next to the bunk beds. The lights were off, James was playing video games, and Sam was reading a book with a flashlight. While Richard and Dana were on the top bunk, Richard pulled down Dana's pants, pushed her head into the wall, and "licked" her genital area. Richard, with his pants "half-way down," also forced Dana's head down to his "private area." Dana told Richard to stop and then left the bedroom.

1. Pseudonyms are used throughout this opinion to protect the minors' privacy and for ease of reading.

After leaving the bedroom, Dana told her mother that Richard had "put his mouth on her private area." Dana then told her grandmother that Richard "touch[ed] [her] on her private parts." On 4 September 2008, Nydia Rolon, with Family Services of the Piedmont, Child Advocacy Center, interviewed Dana. Dana told Ms. Rolon that when she got into bed with Richard, he pulled the covers over her head, pulled down her pants and "started licking her private area." Dana also told Ms. Rolon that Richard pushed her head down into his "private area" and that she could see his "private area." Dana was also interviewed by Lasonya Tuttle, a social worker with the Guilford County Child Protective Services ("CPS"). Dana told Ms. Tuttle that Richard "licked her private" and that he "put her head in his private area."

The State filed two juvenile delinquency petitions, alleging that Richard had committed a crime against nature and misdemeanor sexual battery. The trial court held an adjudication hearing on 16 January 2009 on the delinquency petitions. At the close of the State's evidence, Richard moved to dismiss both charges for insufficient evidence. The court dismissed the sexual battery charge but denied the motion with respect to the charge of crime against nature. At the conclusion of all the evidence, Richard renewed his motion to dismiss and the court again denied the motion. The court subsequently entered an adjudication order on 19 March 2009 finding Richard delinquent. After conducting a disposition hearing, the court entered an order on 14 April 2009 imposing a Level 2 disposition. Richard timely appealed to this Court.

Discussion

In his sole argument on appeal, Richard contends that the trial court erred in denying his motion to dismiss the crime against nature charge for insufficient evidence. In the same manner as adult defendants, "juveniles 'may challenge the sufficiency of the evidence by moving to dismiss the juvenile petition.' " *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001) (quoting *In re Davis*, 126 N.C. App. 64, 65-66, 483 S.E.2d 440, 441 (1997)). The juvenile's motion to dismiss should be denied "[i]f there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the [juvenile] committed it . . . ." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). Substantial evidence is that amount of relevant evidence sufficient to persuade a rational juror to accept a particular conclusion. *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The evidence must be con-

sidered in the light most favorable to the State, and the State is entitled to every reasonable inference of fact that may be drawn from the evidence. *In re Bass*, 77 N.C. App. 110, 115, 334 S.E.2d 779, 782 (1985). Contradictions and discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

"When the evidence raises no more than 'a suspicion or conjecture as to either the commission of the offense or the identity of the [juvenile] as the perpetrator of it, the motion should be allowed.' " *Heil*, 145 N.C. App. at 28, 550 S.E.2d at 819 (quoting *Powell*, 299 N.C. at 98, 261 S.E.2d at 117). The existence of only circumstantial evidence, however, does not warrant dismissal. *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 919 (1993). When the evidence is circumstantial, "the court must consider whether a reasonable inference of [the juvenile]'s guilt may be drawn from the circumstances." *Id.* If so, "it is then within the court's fact-finding function to determine 'whether the facts, taken singly or in combination, satisfy [the court] beyond a reasonable doubt' that the juvenile is delinquent." *Heil*, 145 N.C. App. at 29, 550 S.E.2d at 819 (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965)).

The juvenile petition in this case alleged that Richard was a delinquent juvenile for having committed a "crime against nature" in violation of N.C. Gen. Stat. § 14-177 (2009). The offense of "crime against nature is sexual intercourse contrary to the order of nature." *State v. Harward*, 264 N.C. 746, 746, 142 S.E.2d 691, 692 (1965). The essential element of the offense "is 'some penetration, however slight, of a natural orifice of the body.'" *Heil*, 145 N.C. App. at 29, 550 S.E.2d at 819-20 (quoting *State v. Whittemore*, 255 N.C. 583, 585, 122 S.E.2d 396, 398 (1961)) (emphasis omitted); *accord State v. Joyner*, 295 N.C. 55, 66, 243 S.E.2d 367, 374 (1978) (holding that "penetration by or of a sexual organ is an essential element" of crime against nature). The requisite penetration, however, "is not limited to penetration by the male sexual organ." *Joyner*, 295 N.C. at 66, 243 S.E.2d at 374. N.C. Gen. Stat. § 14-177 is "broad enough to include all forms of oral and anal sex" involving penetration. *State v. Stiller*, 162 N.C. App. 138, 140, 590 S.E.2d 305, 307, *appeal dismissed and disc. review denied*, 358 N.C. 240, 596 S.E.2d 19 (2004).

The juvenile petition in this case alleged that Richard committed two distinct acts constituting a crime against nature: (1) "licking the gentials [sic] area of the victim, . . . while she was fully clothed" and

(2) "placing his penis in her mouth . . . ." Richard challenges the sufficiency of the evidence with respect to both acts.

As for the first act, Richard contends that even if there is evidence that he licked Dana's genital area "while she was fully clothed," such an act does not constitute a crime against nature because her being fully clothed necessarily prevented "any act of penetration by or of a sexual organ." While we do not agree with Richard's categorical assertion that penetration of the female genitalia can never occur when the victim is fully clothed, we do agree that the evidence in this case is insufficient to sustain Richard's adjudication based on the first act alleged in the petition.

In *Whittemore*, 255 N.C. at 585, 122 S.E.2d at 397, the defendant was convicted of committing a crime against nature. On appeal, the defendant argued—as Richard does here—that the trial court erred in denying his motion to dismiss for insufficient evidence of penetration. The Supreme Court summarized the evidence with respect to penetration as follows:

> "[The alleged victim] testified that [defendant] invited her into an uninhabited house. 'He then told me to pull off my pants. . . . . I pulled my pants below my knees. After I pulled my panties down below my knees, he put his privates *against* mine. He was laying on his back and made me lay down on him. I stayed inside the house about two or three minutes before he told me to pull my panties down. After he went in the house, he pulled his trousers off of one leg and laid down flat on his back on the floor. He made me put my hands on his privates and he put his hand *on* my privates. He kept it there about two or three minutes; he just left it there. After he had done that for two or three minutes, he put his mouth on my breast and after that he put it *on* my privates and kept his mouth there about one or two minutes. He just left it there . . . . He had his privates *at* my privates rubbing it up and down. I said *at*. He did that about one or two minutes . . . .' "

Id. at 586, 122 S.E.2d at 398 (emphasis added). The Supreme Court concluded that this "evidence [wa]s insufficient to establish the 'penetration' necessary for a conviction" under N.C. Gen. Stat. § 14-277 and thus the defendant's motion to dismiss "should have been allowed." *Whittemore*, 255 N.C. at 586, 122 S.E.2d at 398.

Here, Dana testified at trial that Richard "licked [her] private . . . ." In addition to Dana's testimony, Dana's mother testified that

Richard "put his mouth on [Dana's] private area," and Dana's grandmother testified that Richard "touch[ed] [Dana] on her private parts." Ms. Rolan, with the Child Advocacy Center, also testified about her interview with Dana, stating that Dana told her that Richard "pulled down her pants and started licking her private area." Similarly, Ms. Tuttle, a CPS social worker, testified that Dana told her during their interview that Richard had "licked her private."

This testimony is indistinguishable from the evidence in *Whittemore*. Although the defendant in *Whittemore* placed his hand, his mouth, and his "privates" "on," "at," or "against" the alleged victim's "privates," thus establishing physical contact, there was no evidence indicating that defendant penetrated the alleged victim's genitalia. So too, here, even when viewing the evidence in the light most favorable to the State, the evidence merely shows that Richard "licked [Dana's] private"; that he "put his mouth on [Dana's] private area"; or, that he "touch[ed] her on her private parts." (Emphasis added.)

As our Supreme Court has held, cunnilingus, which is defined as the "stimulation by the tongue or lips of any part of a woman's genitalia[,]" may occur without penetration of the female genitalia. *State v. Ludlum*, 303 N.C. 666, 672, 281 S.E.2d 159, 162 (1981). Thus, the evidence tending to show that Richard "licked" Dana's "private area" does not, without more, support a reasonable inference that penetration occurred. *Whittemore*, 255 N.C. at 586, 122 S.E.2d at 398. The trial court, therefore, erred in denying Richard's motion to dismiss the charge of crime against nature based on the allegation that he "lick[ed] the gentials [sic] area of the victim . . . ."

Richard also contends that there is insufficient evidence that he "plac[ed] his penis in [Dana's] mouth," the second act alleged in the juvenile petition as constituting a crime against nature. At trial, Dana's testimony did not include anything about Richard placing his penis in her mouth. After testifying about Richard licking her "private," Dana was asked twice whether Richard "d[id] anything else to [her]," and each time she said "No." Neither Dana's mother nor grandmother—who both testified that Richard "licked" Dana's "privates"—testified about whether Richard placed his penis in Dana's mouth.

As both Richard and the State point out, the only evidence bearing on whether Richard placed his penis in Dana's mouth is the testimony of Ms. Rolon and Ms. Tuttle. Ms. Rolon testified that Dana told her during their interview that "[Richard] forced her head down to his

private" and that "she had seen his private area when he forced her head down to his private area." Ms. Tuttle also testified about her interview with Dana:

> When I first talked with, um, [Dana], ah, she's the first child I interviewed; she told me that um, [Richard] had put his, put her head down his private area and put his hands around her neck. And I asked her if there was penetration and she told me there was *(Indistinct Muttering)* penetration.[2]

(Emphasis added.)

To the extent that both Ms. Rolon and Ms. Tuttle testified that Richard forced Dana's head down to his "private area" and that Dana saw his "private area," this testimony is insufficient under *Whittemore*. Even when viewing the evidence in the light most favorable to the State and resolving all conflicts in the evidence in its favor, evidence indicating that Richard forced Dana's head down to his "private area" and that Dana saw his "private area" does not support a reasonable inference that Richard put his penis in Dana's mouth. *See Whittemore*, 255 N.C. at 586, 122 S.E.2d at 398 (holding that witness's testimony that defendant "put [his mouth] on my privates" was insufficient to support inference that penetration occurred).

Ms. Tuttle further testified, however, that she asked Dana directly whether "there was penetration" when Richard forced her head down to his "private area." Although Ms. Tuttle indicated that Dana answered the question, her response is not fully transcribed. The transcript reads: "*And I asked her if there was penetration and she told me there was (Indistinct Muttering) penetration.*" As Richard points out, due to the parenthetical statement inserted by the transcriber—"(Indistinct Muttering)"—it is impossible to determine the import of Ms. Tuttle's testimony.[3] She could have said that "there was [no] penetration." On the other hand, she could have said that "there was [some] penetration." In short, however, the transcript is unclear as to Ms. Tuttle's testimony regarding whether there was—or was not—penetration.

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2. We note that the State, in its brief, inappropriately replaces the italicized portion of Ms. Tuttle's testimony with an ellipsis and asserts that Ms. Tuttle "testified that the victim told her that penetration occurred."

3. According to the stenographer's "[d]isclaimer," the microphone at the witness stand was not working properly and thus "[a]ll witnesses [we]re extremely difficult to hear and understand."

Richard argues on appeal that because it is not possible to determine, based on the record before us, what Ms. Tuttle said at trial, there is insufficient evidence to support his adjudication and his delinquency adjudication must be reversed. Richard's contention ignores his responsibility as the appellant to ensure that any reporting errors in the transcript are corrected in order to provide for meaningful appellate review. *See State v. Fox*, 277 N.C. 1, 28, 175 S.E.2d 561, 578 (1970) ("[T]he primary duty of preparing and docketing a true and adequate transcript of the record and case on appeal in a criminal case rests upon defense counsel . . . ."). As our Supreme Court has cautioned, "[d]efense counsel and the district attorney, as officers of the court, have an equal duty to see that reporting errors in the transcript are corrected. *This duty does not, however, embrace the right to perpetuate and then take advantage of transcript mistakes*." *State v. Robinson*, 327 N.C. 346, 360, 395 S.E.2d 402, 410 (1990) (internal citation omitted) (emphasis added).

Once Richard discovered the error in the transcript, it was his duty to correct it by requesting a hearing to reconstruct the substance of Ms. Tuttle's testimony. *See State v. Lawrence*, 352 N.C. 1, 16, 530 S.E.2d 807, 817 (2000) (approving trial court's holding a hearing to reconstruct missing testimony where State drafted narrative of witnesses' testimony, witnesses testified that narrative accurately reflected their trial testimony, and court reporter reviewed her notes regarding objections and cross-examination), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001). Consistent with Rule 9(c)(1) of the Rules of Appellate Procedure, the parties should have prepared a narrative of Ms. Tuttle's testimony. We note that this process would have been relatively simple in this case as the record indicates that Ms. Tuttle's testimony was primarily—if not exclusively—based on her written report from her interview with Dana.

Because we cannot determine from Ms. Tuttle's testimony whether penetration occurred, we cannot meaningfully review the sufficiency of the evidence to withstand Richard's motion to dismiss. Consequently, we vacate Richard's adjudication and remand this case to the trial court to conduct a hearing to reconstruct the pertinent portion of Ms. Tuttle's testimony. On remand, the parties may stipulate to the narrative, or, if the parties cannot agree, the trial court may settle the record. *See State v. Wray*, 35 N.C. App. 682, 690, 242 S.E.2d 635, 639 (explaining that where the parties cannot agree that transcript is "absolutely correct," the trial court may settle record), *appeal dismissed and disc. review denied*, 295 N.C. 263, 245 S.E.2d

780 (1978). *See also State v. DeLeon*, 127 Wis.2d 74, 79, 377 N.W.2d 635, 638 (Wis. Ct. App. 1985) (holding that under federal rule where transcript is defective, "the parties should first attempt to prepare an agreed statement of the record on appeal . . . . Then, if any dispute remains as to what occurred, the difference shall be submitted to and settled by the trial court.").

Reversed in part; vacated and remanded in part.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA v. REGINA FELICIA DAVIS

No. COA09-1589

(Filed 17 August 2010)

1. Sentencing— statutory mitigating factors—failure to provide evidence—defense counsel comments not evidence

The trial court did not err by failing to find statutory mitigating factors where defendant was sentenced outside the presumptive range in a case involving multiple offenses arising from defendant flagging a victim down for a ride and then fleeing the vehicle with the victim's personal belongings. Defendant failed to present any evidence supporting the factors, and comments by defense counsel were not evidence and were not sufficient to carry defendant's burden of proof of mitigating factors.

2. Damages and Remedies— restitution—no stipulation—unsupported restitution worksheet

The trial court erred by ordering defendant to pay $2,539.06 in restitution to six individuals and the Bank of Southside Virginia. Defendant did not stipulate to the amounts awarded, and a restitution worksheet, unsupported by testimony or documentation, was insufficient to support an order of restitution.

Appeal by defendant from judgments entered 23 July 2009 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 14 April 2010.

Attorney General Roy Cooper, by Assistant Attorney General G. Mark Teague, for the State.

Hartsell & Williams, P.A., by Christy E. Wilhelm, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Regina Felicia Davis ("defendant") pled guilty to the following: four counts of financial card theft; one count of first-degree burglary; one count of robbery with a dangerous weapon; one count of attempted common law robbery; one count of attempted common law robbery with a dangerous weapon; one count of common law robbery; one count of assault inflicting serious injury; two counts of larceny from person; two counts of misdemeanor larceny; one count of injury to real property; two counts of financial card fraud; and one count of simple assault. The trial court consolidated the offenses for sentencing into one Class D felony and one Class H felony.[1] Defendant was subsequently sentenced to 116 to 148 months' imprisonment for the Class D felony and 12 to 15 months' imprisonment for the Class H felony, to be served consecutively. Defendant appeals these sentences and the trial court's order that she pay $2,539.06 in restitution to seven victims including the Bank of Southside Virginia. On appeal, defendant specifically argues that the trial court erred by (1) failing to find any factors in mitigation of defendant's sentence, when uncontroverted evidence of statutory mitigation factors was presented; and (2) ordering restitution, when the evidence presented was insufficient to support its entry. After review, we conclude that the trial court erred only in its entry of restitution, and as such, vacate the trial court's order for restitution and affirm the sentence imposed.

I. Factual and Procedural Background

Defendant was indicted on 6 April 2009, 4 May 2009, and 1 June 2009 for the above-mentioned offenses. Subsequently, defendant entered into a plea arrangement in which she pled guilty to all of the

1. The trial court consolidated the following offenses for sentencing into a Class D felony: one count of common law robbery with a dangerous weapon; one count of first-degree burglary; one count of common law robbery; and one count of attempted common law robbery with a dangerous weapon. Defendant was sentenced for a Class H felony based upon consolidation of the following offenses: four counts of financial card theft; one count of attempted common law robbery; two counts misdemeanor larceny; one count of injury to real property; two counts of financial card fraud; one count of simple assault; one count of assault inflicting serious injury; and two counts of larceny from the person.

offenses, which would be consolidated for sentencing purposes so she would be sentenced for one Class D felony and one Class H felony. Defendant stipulated to one aggravating factor that defendant was on pretrial release on another charge when the offenses were committed. Both the State and defendant stipulated that defendant was a prior Record Level III for sentencing purposes. Defendant stipulated to the factual basis for the plea agreement.

Defendant committed a series of offenses where, after flagging a victim down for a ride, she would flee the victim's vehicle with their personal belongings. Defendant's victims described defendant as being very pregnant at the time of the offenses. One victim agreed to give defendant a ride because of her pregnancy. In some instances, defendant would tell her victim that either her boyfriend abandoned her or that she was escaping an abusive boyfriend to gain entry into the vehicle.

At the sentencing hearing, the State told the trial court that defendant used her pregnancy to prey on the sympathy of her victims and take advantage of them. Counsel for defendant informed the court that defendant took responsibility for her actions but believed that the crimes could be attributed to her addiction to crack cocaine. Additionally, defendant had previously entered a drug treatment facility but failed to complete the required program. Counsel for defenddant acknowledged that the trial court had a wide range of discretion in imposing the sentence but asked the court to take into consideration defendant's situation and the economy.

On 23 July 2009, Judge Alan Z. Thornburg accepted the plea arrangement and sentenced defendant to consecutive sentences of 116 to 149 months' imprisonment for the offenses consolidated with the Class D felony and 12 to 15 months' imprisonment for the offenses consolidated with the Class H felony. The trial court found no factors in mitigation of defendant's sentence. Defendant was also ordered to pay $2,539.06 in restitution to six individuals and the Bank of Southside Virginia. On 29 July 2009, defendant gave timely notice of appeal. Our Court has jurisdiction to review defendant's appeal as it is a final judgment of the Buncombe County Superior Court pursuant to N.C. Gen. Stat. §§ 15A-1442(5a), (5b), -1444(a1) and -1446(d)(18) (2009).

II. Statutory Mitigating Factors

[1] Defendant first argues that the trial court erred by failing to find statutory mitigating factors based on her contention that uncontradicted evidence of statutory factors was presented. Defendant alleges that at sentencing, defense counsel presented uncontroverted evidence of several mitigating factors, including support in the community, taking responsibility for her actions, and support of her children. Defendant alleges that mitigating factors were not evident in the trial court's sentencing.

"A defendant has a right of appeal if he pleads guilty and [, as in the present case, his] sentence exceeds the presumptive [range] . . . and if the judge was required to make findings as to aggravating and mitigating factors[;]" however, defendant's appeal "is limited to the issue of whether the sentence entered is supported by the evidence introduced at the . . . sentencing hearing." *State v. Davis*, 58 N.C. App. 330, 332, 293 S.E.2d 658, 660 (1982), *disc. review denied*, 306 N.C. 745, 295 S.E.2d 482 (1982) (citing N.C. Gen. Stat. § 15A-1444(a1).

Here, defendant was sentenced to 116 to 149 months for the Class D felony, and 12 to 15 months for the Class H felony. The presumptive range for the Class D felony, prior record level III, is 82 to 103 months, and the presumptive range for a Class H felony, prior record level III, is 8 to 10 months. N.C. Gen. Stat. § 15A-1340.17 (2009). In the case at bar, defendant was sentenced outside of the presumptive range, therefore this Court must determine whether the sentence entered was supported by the evidence introduced during the sentencing hearing. *See* N.C.G.S. § 15A-1444(a1). This Court reviews a trial court's decision to sentence outside of the presumptive range for an abuse of discretion. *State v. Chavis*, 141 N.C. App. 553, 568, 540 S.E.2d 404, 415 (2000).

The judge weighs the credibility of evidence in support of mitigating factors and makes a determination of whether such factors exist. *State v. Canty*, 321 N.C. 520, 523, 364 S.E.2d 410, 413 (1988). "[D]efendant has the burden of proving by a preponderance of the evidence the existence of mitigating factors." *State v. Norman*, 151 N.C. App. 100, 105, 564 S.E.2d 630, 634 (2002). Defendant requested that the trial court find factors in mitigation, but did not present any evidence of these factors. In addition, defendant did not request that the trial court consider all of the factors she now argues on appeal.

> When a defendant fails to request that a trial court find a factor in mitigation, the trial court has a duty to find the factor "only when the evidence offered at the sentencing hearing supports the existence of a mitigating factor *specifically listed in N.C. Gen. Stat. § 15A-1340.4(a)(2)* [now N.C. Gen. Stat. § 15A-1340.16(e)] and when the defendant meets the burden of proof established in *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983)."

State v. Meynardie, 172 N.C. App. 127, 132, 616 S.E.2d 21, 25 (2005) (citation omitted). Under *Jones*, the defendant must prove by a preponderance of the evidence that " 'the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn,' and that the credibility of the evidence 'is manifest as a matter of law.' " *Id.* (quoting *Jones*, 309 N.C. at 220, 306 S.E.2d at 455).

Defendant argues that the trial court should have considered the following mitigating factors:

> (1) The defendant committed the offense under duress, coercion, threat, or compulsion that was insufficient to constitute a defense but significantly reduced the defendant's culpability.
>
> . . . .
>
> (3) The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense.
>
> (4) The defendant's age, immaturity, or limited mental capacity at the time of commission of the offense significantly reduced the defendant's culpability for the offense.
>
> . . . .
>
> (11) Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.
>
> . . . .
>
> (15) The defendant has accepted responsibility for the defendant's criminal conduct.

(16) The defendant has entered and is currently involved in or has successfully completed a drug treatment program or an alcohol treatment program subsequent to arrest and prior to trial.

(17) The defendant supports the defendant's family.

(18) The defendant has a support system in the community.

N.C. Gen. Stat. § 15A-1340.16(e) (2009).

When a statutory mitigating factor is supported by a preponderance of the evidence, the trial court must consider that factor in sentencing. *State v. Kemp*, 153 N.C. App. 231, 241, 569 S.E.2d 717, 723 (2002). Although defendant contends that the trial court erred by failing to find eight factors in mitigation, defendant failed to present any evidence to support the factors presented. Comments by defense counsel are not evidence and are not sufficient to carry defendant's burden of proof of mitigating factors. *Norman*, 151 N.C. App. at 106, 564 S.E.2d at 634.

The trial court is allowed "wide latitude in determining the existence of . . . mitigating factors." Error is committed by the trial court only when "no other reasonable inferences can be drawn from the evidence." *Canty*, 321 N.C. at 524, 364 S.E.2d at 413. In the case at bar, there is insufficient evidence to support defendant's contentions.

Defendant alleges that the trial court erred by failing to recognize that she accepted responsibility for her criminal conduct. A defendant acknowledges wrongdoing for the purpose of sentence mitigation when she "admits 'culpability, responsibility or remorse, as well as guilt.' " *State v. Godley*, 140 N.C. App. 15, 28, 535 S.E.2d 566, 575 (2000) (quoting *State v. Rathbone*, 78 N.C. App. 58, 67, 336 S.E.2d 702, 707 (1985)). At the sentencing hearing defendant told the trial court: "Your Honor, I'm sorry for what I did. I just have a drug problem. I didn't mean to harm anybody. I ask God every day for forgiveness for what I did. I have a four-month-old son, and I'm sorry." Although defendant apologized for her actions at trial, her statement did not lead to the "sole inference that [s]he accepted [and that] [s]he was answerable for the result of [her] criminal conduct." *Norman*, 151 N.C. App. at 106, 564 S.E.2d at 634.

Defendant also alleges that the trial court erred by failing to find that defendant supported her family and had a support system in the community. Defendant's counsel stated that defendant was a native of

the community where she was sentenced, was living with her mother and two young children, and had a relationship with her younger sister. There was no evidence presented that defendant was employed or any additional evidence to support her contentions.

Defendant also alleges that her drug addiction compelled her to commit many of the offenses; however, "[d]rug addiction is not *per se* a statutorily enumerated mitigating factor." *State v. Bynum*, 65 N.C. App. 813, 815, 310 S.E.2d 388, 390 (1984). Again, defendant's contentions are based only upon her attorney's statement, not evidence presented to the trial court. Defendant did not establish an essential link between defendant's drug addiction and the culpability for the offenses committed. Moreover, defendant did not establish that her drug addiction reduced her culpability for the offenses committed.

Based on the above analysis, we conclude that the sentence imposed by the trial court was supported by the evidence presented at the sentencing hearing, and we hold that the trial court did not abuse its discretion by failing to find factors in mitigation of defendant's sentence.

III. Orders of Restitution

[2] Defendant next avers that the trial court erred by entering judgment based on her contention that the evidence presented regarding restitution was insufficient to support entry of the orders of restitution. We agree.

The court ordered defendant to pay $2,539.06 in restitution to six individuals and the Bank of Southside Virginia. At the sentencing hearing, defendant failed to object to the order of restitution. However, it is well established that a restitution order may be reviewed on appeal despite no objection to its entry. *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004); *see also* N.C. Gen. Stat. § 15A-1446(d)(18) (2009).

"The amount of restitution ordered by the trial court must be supported by competent evidence presented at trial or sentencing." *State v. Mauer*, ___ N.C. App. ___, ___, 688 S.E.2d 774, 777 (2010). In the case at bar, the trial court ordered defendant to pay restitution in the amount of $2,539.06 to six individual victims and the Bank of Southside Virginia. The State concedes that there is no evidence in the record that the State introduced testimony or sworn affidavits to support its request for restitution. This Court has held that "[t]he unsworn statement of the prosecutor is insufficient to support the

amount of restitution ordered." *Shelton*, 167 N.C. App. at 233, 605 S.E.2d at 233 (citing *State v. Buchanan*, 108 N.C. App. 338, 423 S.E.2d 819 (1992)).

The State contends that defendant stipulated to the amount of restitution when defendant stipulated to the factual basis for the plea. Additionally, the State alleges that the specific amounts of restitution owed to the victims were incorporated into the stipulated factual basis by reference to the restitution worksheets submitted to the court. However, this Court has held that "a restitution worksheet, unsupported by testimony or documentation is insufficient to support an order of restitution." *Mauer*, ___ N.C. App. at ___, 688 S.E.2d at 778. In the instant case, defendant did not stipulate to the amounts awarded, and there was no evidence presented to support the restitution worksheets. Therefore, the trial court erred in awarding $2,539.06 in restitution.

IV. Conclusion

Based on the foregoing, we affirm the trial court's sentencing orders, but we vacate the trial court's restitution orders and remand to the trial court for a new hearing on restitution in accordance with this opinion.

Affirmed in part; vacated in part; and remanded.

Judges McGEE and STROUD concur.

STATE OF NORTH CAROLINA v. JULIE ANNE YENCER

No. COA09-1

(Filed 17 August 2010)

Constitutional Law— First Amendment—Establishment Clause—delegation of police power to religious institution

The trial court erred by denying defendant's motion to dismiss the charge of driving while impaired because Davidson College is a religious institution for the purposes of the Establishment Clause. Thus, the delegation of police power to Davidson College, pursuant to N.C.G.S. § 74G, was an unconstitutional delegation of an important discretionary governmental power to a religious institution in the context of the First Amendment.

STATE v. YENCER

[206 N.C. App. 552 (2010)]

Appeal by defendant from judgment entered 1 August 2008 by Judge Jesse B. Caldwell, III, in Superior Court, Mecklenburg County. Heard in the Court of Appeals 18 August 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins and Assistant Attorney General Tamara Zmuda, for the State.

Knox, Brotherton, Knox, & Godfrey, by Allen C. Brotherton, for defendant-appellant.

WYNN, Judge.

"A state may not delegate an important discretionary governmental power to a religious institution or share such power with a religious institution."[1] Defendant Julie Anne Yencer argues that the trial court erred by denying her motion to dismiss because Davidson College is a religious institution to which a delegation of state police power is unconstitutional. Because we are bound by precedent in cases holding Campbell University and Pfeiffer University to be religious institutions,[2] we must likewise conclude that Davidson College is a religious institution for purposes of the Establishment Clause.

This appeal arises from the arrest of Defendant on 5 January 2006 by Officer Wesley Wilson of the Davidson College Police Department for driving while impaired and reckless driving on a street adjacent to campus. On 21 June 2006, Defendant pled guilty in district court to driving while impaired. On 27 June 2006, Defendant gave written notice of appeal to the superior court, where she filed a pretrial motion to suppress evidence procured as a result of Officer Wilson's stop and seizure of Defendant.

At the suppression motion hearing, evidence tended to show that all members of the Davidson College Police Department are commissioned as police officers by the Attorney General of North Carolina pursuant to N.C. Gen. Stat. § 74G (2009).[3] Under § 74G-2(a), "[a]s part of the Campus Police Program, the Attorney General is given the

1. *State v. Pendleton*, 339 N.C. 379, 386, 451 S.E.2d 274, 278 (1994) (citing *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 74 L. Ed. 2d 297 (1982)), *cert. denied*, *North Carolina v. Pendleton*, 515 U.S. 1121, 132 L. Ed. 2d 280 (1995).

2. *Pendleton*, 339 N.C. at 389, 451 S.E.2d at 280; *State v. Jordan*, 155 N.C. App. 146, 154, 574 S.E.2d 166, 171 (2002), *appeal dismissed, disc. review denied*, 356 N.C. 687, 578 S.E.2d 321 (2003).

3. In its Amended Order Denying Motion to Suppress, the trial court erroneously cited "N.C.G.S. § 74E" as the statute delegating the State's police power to the

authority to certify a private, nonprofit institution of higher education . . . as a campus police agency and to commission an individual as a campus police officer." The evidence further tended to show that Davidson College is affiliated with the Presbyterian Church of the United States of America. The trial court also considered evidence of Davidson's statement of purpose, and Davidson officials testified about the college's relationship with the Presbyterian Church and the particular religion-based requirements for students. Based on this evidence, Defendant contended that Officer Wilson's exercise of police power, as an employee of Davidson College, violated the excessive entanglement prohibitions of the Establishment Clause of the First Amendment to the United States Constitution[4] and Article I, Sections 13 and 19, of the North Carolina Constitution.[5]

After hearing the evidence, the trial court entered an order on 21 May 2007, denying Defendant's motion to suppress and concluding that "although Davidson College is religiously affiliated, it is not a religious institution within the meaning of the First Amendment." To correct a clerical error, an Amended Order Denying Motion to Suppress was filed on 29 May 2007. On 20 March 2008, the State moved for revision of the amended order to accurately reflect the particular statute providing Davidson College Police Department with the authority to make arrests. After a 2 April 2008 hearing, the trial court denied the motion by order filed 21 May 2008. On 1 August 2008, Defendant pled guilty to driving while impaired and reserved her right to appeal.

On appeal, Defendant argues that the evidence before the trial court indicated that Davidson College is a religious institution, and

Davidson College Campus Police. However, "[a] judgment under appellate review will stand if the correct result was reached, even though it was based on faulty reasoning." *Burton v. Blanton*, 107 N.C. App. 615, 617, 421 S.E.2d 381, 383 (1992) (citation omitted). Prior to 28 January 2005, members of the Davidson College Campus Police were delegated the State's police power pursuant to N.C. Gen. Stat. § 74E (2005). However, on 28 July 2005, the General Assembly of North Carolina enacted legislation which automatically converted certifications of police agencies at educational institutions issued pursuant to § 74E to certifications issued pursuant to § 74G unless the educational institution elected to continue certification under § 74E. *See* Act of July 28, 2005, 2005 N.C. Sess. Laws 531. Davidson College did not elect to continue certification under § 74E. Therefore, at the time of the arrest on 5 January 2006, Officer Wilson was commissioned as a police officer and delegated the state's police power pursuant to § 74G.

4. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

5. Although Defendant cited Sections 13 and 19 of Article I of the North Carolina Constitution in her motion to suppress, Defendant's brief does not address this issue. Therefore, pursuant to N.C. R. App. P. 28(b)(6) (2010), that issue is abandoned.

thus the delegation of state police power to Davidson's campus police force pursuant to § 74G constituted an unconstitutional delegation of state police power.[6]

To determine whether the delegation of state police power to Davidson College under § 74G violated the Establishment Clause of the First Amendment, we are guided by the three-pronged analysis undertaken by the Supreme Court of the United States in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745 (1971), commonly referred to as the *Lemon* test. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an *excessive government entanglement* with religion." *Id.* at 612-13, 29 L. Ed. 2d at 755 (citations omitted) (emphasis added). A statute is unconstitutional if it fails to meet the requirements of any prong of the *Lemon* test. *Edwards v. Aguillard*, 482 U.S. 578, 583, 96 L. Ed. 2d 510, 518-19 (1987). Since neither of the first two prongs is at issue here, the question before us on appeal is whether the delegation of state police power to Davidson College, pursuant to §74G, runs afoul of the Establishment Clause by fostering an excessive government entanglement with religion.[7] *Lemon*, 403 U.S. at 613, 29 L. Ed. 2d at 755. Two earlier decisions, *State v. Pendleton*, 339 N.C. 379, 451 S.E.2d 274 (1994), and *State v. Jordan*, 155 N.C. App. 146, 574 S.E.2d 166 (2002), bind our determination of this issue.

In *Pendleton*, our Supreme Court held that § 74A (a predecessor of § 74G) unconstitutionally delegated state police power to a religious institution, Campbell University. 339 N.C. at 390, 451 S.E.2d at 281. Specifically, the Court noted that Campbell University's mission was to "[p]rovide students with the option of a Christian world view" and "[b]ring the word of God, mind of Christ, and power of the Spirit to bear in developing moral courage, social sensitivity, and ethical responsibility" as well as encourage creativity, provide a community of learning, and equip students with intellectual and professional

6. Here, while Defendant originally assigned error to several of the trial court's findings of fact, she did not bring those assignments forward in her brief. Therefore, Defendant's assignments of error regarding the findings of fact are abandoned pursuant to N.C. R. App. P. 28(b)(6) (2008).

7. Relying on *Larkin*, our courts have held that "a 'state may not delegate an important discretionary governmental power to a religious institution or share such power with a religious institution.' " *State v. Jordan*, 155 N.C. App. 146, 150, 574 S.E.2d 166, 169 (2002) (quoting *Pendleton*, 339 N.C. at 386, 451 S.E.2d at 278). Further, our Supreme Court has held that "police power is an important discretionary governmental power" that may not be delegated to a religious institution. *Pendleton*, 339 N.C. at 386, 451 S.E.2d at 279.

skills. *Id.* at 388, 451 S.E.2d at 279-80. The Court also referenced Campbell University's requirement that all undergraduates take at least one Judeo-Christian religion course, and its statement that it "is a Baptist university" whose purpose:

> arises out of three basic theological and Biblical presuppositions: learning is appointed and conserved by God as essential to the fulfillment of human destiny; in Christ, all things consist and find ultimate unity; and the Kingdom of God in this world is rooted and grounded in Christian community.

Id. at 390, 451 S.E.2d at 281.

Similarly, in *Jordan*, the defendant was charged with driving while impaired by a member of the Pfeiffer University Police Department who was commissioned pursuant to a precursor to § 74G, § 74E. 155 N.C. App. at 147, 574 S.E.2d at 167. This Court upheld the trial court's decision that § 74E unconstitutionally delegated state police power to a religious institution, Pfeiffer University. *Id.* at 154, 574 S.E.2d at 171. In support of its decision, this Court noted the school's strong affiliation with the United Methodist Church, its requirement that at least six of its forty-four trustees be church members, the university's decision to close its administrative offices every Wednesday morning during chapel services and to allow course credit for student attendance, and Pfeiffer's mission to be "a 'model church related institution preparing servant leaders for life long learning[.]' " *Id.* at 153-54, 574 S.E.2d at 170-71.

Like Pfeiffer and Campbell Universities, Davidson College has a strong religious affiliation. As the trial court stated in its findings of fact:

> 8. Davidson College is affiliated with the Presbyterian Church of the United States of America (PCUSA). This affiliation is voluntary.
>
> 9. Davidson College's historical relationship with the Presbyterian Church is memorialized in the college's Statement of Purpose. In part, the Statement of Purpose reads:
>
> Davidson College is an institution of higher learning established in 1837 by Presbyterians of North Carolina. Since its founding, the ties that bind the college to its Presbyterian heritage, including the historic understanding of Christian faith called The Reformed Tradition, have remained close and strong. The college is committed to this vital relationship . . . .

> The Christian tradition to which Davidson remains committed recognizes God as the source of all truth, and believes that Jesus Christ is the revelation of that God, a God bound by no church or creed. *The loyalty of the college thus extends beyond the Christian community to the whole of humanity and necessarily includes openness to and respect for the world's various religious traditions.* Davidson dedicates itself to the quest for truth and encourages teachers and students to explore the whole of reality, whether physical or spiritual, with unlimited employment of their intellectual powers. At Davidson, faith and reason work together in mutual respect and benefit toward growth in learning, understanding and wisdom. (Emphasis Added)[.]

In keeping with its "Christian tradition," Davidson's governing body retains significant religious ties. According to the college's by-laws, "[t]he ownership, management and control of Davidson College are vested in the Trustees of the College[.]" Of the forty-four trustees, twenty-four must be active members of the Presbyterian Church and be confirmed by their Presbyteries. Additionally, eighty percent of Davidson's trustees must be active members of a Christian church.

Moreover, the by-laws require that the President of Davidson College, who is ordinarily the President of the Trustees as well as the Board's chief operating officer, is "a loyal and active church member, whose life provides evidence of strong Christian faith and commitment . . . appropriately expressed by affiliation with the Presbyterian Church (USA) and active participation in the life of Davidson College Presbyterian Church." Although Davidson students, faculty, and staff are not required to attend religious services or have a particular religious affiliation, students are required to take a course in religion and the College's by-laws limit faculty and officer appointments to "Christian men and women" and "non-Christian persons who can work with respect for the Christian tradition even if they cannot conscientiously join it and who can live in harmony with the purpose of the College[.]"

Bound by the analysis in *Pendleton* and *Jordan*, we are compelled to conclude that Davidson College is a religious institution for the purposes of the Establishment Clause. Accordingly, we hold that the delegation of police power to Davidson College, pursuant to §74G, is an unconstitutional delegation of "an important discretionary governmental power" to a religious institution in the context of the First Amendment. *Pendleton*, 339 N.C. at 386, 451 S.E.2d at 279.

In passing, we acknowledge if we were starting afresh, without the benefit or burden of precedent in *Pendleton* and *Jordan*, there is evidence in the record to show that Davidson College is not a religious institution for Establishment Clause purposes. As the Supreme Court of the United States noted in *Tilton v. Richardson*:

> There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The 'affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age.' There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination . . . . Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students.

403 U.S. 672, 685-86, 29 L. Ed. 2d 790, 803 (holding the First Amendment was not violated by the Higher Education Facilities Act to the extent that it authorized monetary grants to church-related colleges and universities for the construction of facilities and buildings to be used for exclusively secular educational purposes) (internal citations and footnotes omitted).

Like the higher education institutions in *Tilton*[8] "with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education[,]" Davidson College is primarily an educational institution with well-established principles of academic freedom and religious tolerance. *Id.* at 687, 29 L. Ed. 2d at 804. As set forth in its Statement of Purpose, Davidson College's mission is not religious indoctrination but rather to "assist students in developing humane instincts and disciplined and creative minds for lives of leadership and service[.]"

We thus acknowledge the important distinction between an institution with religious influence or affiliation and one that is

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8. *Tilton* involved four church-related colleges and universities in Connecticut: Sacred Heart University, Annhurst College, Fairfield University, and Albertus Magnus College. *Id.* at 676, 29 L. Ed. 2d at 797.

pervasively sectarian. Nonetheless, we further recognize that our unanimous decision will not confer on Davidson College an appeal as a matter of right to our Supreme Court.[9] Accordingly, should Davidson College seek discretionary review of this decision by our Supreme Court, we urge our Supreme Court to grant such review, which will be without the constraints placed upon this Panel by *Pendleton* and *Jordan*.[10]

Reversed.

Judges STROUD and BEASLEY concur.

Judge WYNN concurred in this opinion prior to 9 August 2010.

DEBRA L. JARRELL AND JOHN JARRELL, PLAINTIFFS V. THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY; CAROLINAS MEDICAL CENTER, A FACILITY OF THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY; CAROLINA PHYSICIANS NETWORK, INC.; AND RONALD FONG SING, DO, DEFENDANTS

No. COA09-1518

(Filed 17 August 2010)

Costs— travel and trial testimony costs for out-of-state expert witnesses—lack of standing to challenge subpoenas

The trial court did not err in a medical negligence case by granting defendants' motion for costs and by awarding costs in the amount of $11,605.40 even though plaintiffs specifically disputed $5,715.40 in costs associated with the travel and trial testimony of out-of-state expert witnesses. Although plaintiffs contended that the subpoenas served upon the out-of-state expert

9. *Compare* N.C. Gen. Stat. § 7A-30 (2) (2007) (dissenting opinion of the N.C. Court of Appeals allows appeal as a matter of right to the N.C. Supreme Court), *with Hendrix v. Alsop*, 278 N.C. 549, 554, 180 S.E.2d 802, 806 (1971) ("[T]he General Assembly of North Carolina intended to insure a review by the Supreme Court of questions on which there was a division in the intermediate appellate court; no such review was intended for claims . . . on which that court rendered unanimous decision.").

10. While *Pendleton* and *Jordan* remain binding on this Court, we note that both decisions were rendered prior to the passage of § 74G, one of the stated purposes of which is to "assure, to the extent consistent with the State and federal constitutions, that [police] protection is not denied to students, faculty, and staff at private, nonprofit institutions of higher education originally established by or affiliated with religious denominations." *See* N.C. Gen. Stat. § 74G-2 (2009).

witnesses were ineffective to compel their attendance, plaintiffs lacked standing to challenge the validity of the subpoenas served on the non-party expert witnesses.

Appeal by Plaintiffs from order entered 8 July 2009 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 April 2010.

Charles G. Monnett, III & Associates, by Randall J. Phillips, for Plaintiffs-Appellants.

Shumaker, Loop & Kendrick, LLP, by Scott M. Stevenson, John D. Kocher, and Christian H. Staples, for Defendants-Appellees.

BEASLEY, Judge.

Debra L. Jarrell and John Jarrell (Plaintiffs) appeal from order granting Defendants' motion for costs and awarding costs in the amount of $11,605.40, specifically disputing that portion totaling $5,715.40 in costs associated with out-of-state expert witnesses. Because Plaintiffs lack standing to challenge the validity of these subpoenas served on the non-party expert witnesses, we affirm the trial court's award of costs in its entirety, including the amount subject to this appeal.

This matter arises out of a medical negligence action brought by Plaintiffs on 8 September 2006. Following trial in Mecklenburg County Superior Court, the jury returned a verdict in favor of Defendants. The trial court entered judgment for Defendants on 24 March 2009, reserving the issue of costs for later determination. Defendants filed a motion on 13 April 2009 seeking $30,204.10 in costs pursuant to N.C. Gen. Stat. §§ 6-20 and 7A-305 but, at the hearing, withdrew their request for certain costs outside the scope of N.C. Gen. Stat. § 7A-305 and amended the amount sought to $16,105.40. In an order entered 8 July 2009, the trial court granted Defendants' motion in part and ordered Plaintiffs to pay $11,605.40 in costs. Plaintiffs argue on appeal that the trial court lacked authority to award, and Defendants were accordingly not entitled to, the following: (1) $5,000 for the trial testimony of out-of-state expert witness Raul J. Rosenthal, M.D.; (2) $267.70 in travel expenses for Dr. Rosenthal's airfare from Ft. Lauderdale, Florida to Charlotte, North Carolina; and (3) $447.70 in travel expenses for out-of-state defense expert J. Stephen Scott, M.D.'s airfare from St. Louis, Missouri to Charlotte. We disagree.

Plaintiffs' sole argument is that the trial court erred in awarding travel and trial testimony costs for out-of-state expert witnesses whose appearances at trial were not subject to subpoena because the subpoenas served upon them were ineffective to compel their attendance. While "[a] trial court's taxing of costs is reviewed under an abuse of discretion standard," *Bennett v. Equity Residential*, 192 N.C. App. 512, 514, 665 S.E.2d 514, 516 (2008), Plaintiffs raise questions of statutory interpretation that would require "this Court [to] conduct[] a *de novo* review of the trial court's conclusions of law." *Morgan v. Steiner*, 173 N.C. App. 577, 579, 619 S.E.2d 516, 518 (2005). Before reaching Plaintiffs' statutory construction arguments, however, we must first determine whether they have standing to present them. Standing is also a question of law that we review de novo, *Musi v. Town of Shallotte*, —— N.C. App. ——, ——, 684 S.E.2d 892, 895 (2009), and "issues pertaining to standing may be raised for the first time on appeal," *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 879 (2002).

At the outset, we address Defendants' initial argument that the Discovery Scheduling Order (DSO) in this case expressly waived the statutory requirement that expert witnesses must testify pursuant to subpoena before the prevailing party may recover expert fees. On 21 January 2010, Defendants filed a motion to add the DSO to the printed record, which this Court granted on 25 March 2010. Upon review of the DSO, we acknowledge that paragraph 15 thereof provides that "[a]ll parties agree that experts need not be issued a subpoena either for deposition or for trial and waive that requirement of the statute as it may affect the recovery of costs." The DSO, however, was not considered by the trial court alongside Defendants' motion for costs, and their failure to raise any type of waiver or otherwise bring any portion of the DSO to the trial court's attention precludes us from considering this argument. *See* N.C.R. App. P. 10(b) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). Defendants' motion for costs makes no reference to the DSO; the transcript of the motion hearing lacks any indication that the issue was raised before the trial court; and the specific grounds now proffered by Defendants were not apparent from the context at the trial level. While we agree with Defendants that the express terms of the DSO would render inapplicable the statutory provisions detailing

recovery of expert witness costs, we must disregard this contention as it was not made before the trial court and turn to the statutory provisions related to expert witness fees. *See Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) (stating this Court has long held that "the law does not permit parties to swap horses between courts in order to get a better mount").

Because the instant case is governed by revised legislation not yet addressed by this Court, we begin with a brief introduction to the trial court's authority to award expert witness fees as costs. Previously, expert fees were not specifically provided for under N.C. Gen. Stat. § 7A-305(d), but " 'this Court [had] recognized that expert witness fees could be taxed as costs when a witness has been subpoenaed.' " *Bennett*, 192 N.C. App. at 516, 665 S.E.2d at 517 (quoting *Vaden v. Dombrowski*, 187 N.C. App. 433, 440, 653 S.E.2d 543, 547 (2007)). *Vaden* reasoned, "[p]ursuant to N.C. Gen. Stat. § 7A-305(d)(1) witness fees are assessable as costs as provided by law. This refers to the provisions of N.C. Gen. Stat. § 7A-314 which provides for witness fees where the witness is under subpoena." 187 N.C. App. at 440, 653 S.E.2d at 547 (citation omitted). However, in response to a lack of uniformity as to the propriety of taxing certain costs, "the General Assembly addressed the inconsistencies within our case law by providing that N.C. Gen. Stat. § 7A-305[(d)] is a 'complete and exclusive . . . limit on the trial court's discretion to tax costs pursuant to G.S. 6-20,' " effective 1 August 2007. *Id.* at 438 n.3, 653 S.E.2d at 546 n.3. The amended statute supplements the witness fees allowed under subsection (1) "as provided by law" by adding a specific provision for expert fees. Section 7A-305(d)(11) grants the trial court explicit statutory authority to award as discretionary costs "[r]easonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings." N.C. Gen. Stat. § 7A-305(d)(11) (2009).

Like subsection (1), § 7A-305(d)(11) must be understood in light of § 7A-314. We have held that § 7A-305(d)(1) "is to be read in conjunction with § 7A-314, which governs fees for witnesses." *Morgan*, 173 N.C. App. at 583, 619 S.E.2d at 520. Specifically, § 7A-314(a) provides that "[a] witness under subpoena . . . to testify before the court . . . shall be entitled to receive five dollars ($5.00) per day, or fraction thereof," and subsection (d) grants the court discretion to increase an expert witness's compensation. N.C. Gen. Stat. §§ 7A-314(a), (d) (2009). Our Supreme Court has held that "[a]s to expert witnesses, Section (d) modifies Section (a)," which means "Sections (a) and (d)

must be considered together." *State v. Johnson*, 282 N.C. 1, 27, 191 S.E.2d 641, 659 (1972). Thus, "[t]he modification relates only to the amount of an expert witness's fee; it does not abrogate the requirement that all witnesses must be subpoenaed before they are entitled to compensation." *Id.* at 28, 191 S.E.2d at 659. As § 7A- 305(d)(11) now codifies the trial court's authority to award discretionary expert witness fees (formerly read into subsection (1)) the statutory provision for expert witness fees must likewise be read in conjunction with § 7A-314. *See Smith v. Cregan*, 178 N.C. App. 519, 525, 632 S.E.2d 206, 210 (2006) ("Statutes dealing with the same subject matter must be construed *in pari materia*, and harmonized, if possible, to give effect to each."). Therefore, satisfying the requirements of § 7A-305(d)(11) by proving the fees they seek are "reasonable and necessary" does not automatically entitle Defendants to recover expert witness costs. Where § 7A-314 specifically authorizes the court to tax expert witness fees as costs, only "witness[es] under subpoena, bound over, or recognized" are included. Read *in pari materia*, with specific statutes prevailing over general ones, § 7A-314 limits the trial court's broader discretionary power under § 7A-305(d)(11) to award expert fees as costs only when the expert is under subpoena. *See Krauss v. Wayne County DSS*, 347 N.C. 371, 378, 493 S.E.2d 428, 433 (1997) ("Where 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; but, to the extent of any necessary repugnancy between them, the special statute will prevail over the general statute."). Thus, in the particular situation where an expert testifies without being subpoenaed, § 7A-314 controls as an exception to the general applicability of § 7A-305(d)(11).

This Court has applied § 7A-314 to reverse awards of expert fees as costs *when no subpoena existed*. *See*, *e.g.*, *Overton v. Purvis*, 162 N.C. App. 241, 250, 591 S.E.2d 18, 25 (2004) (deeming award of expert fees improper where "only witnesses who have been subpoenaed may be compensated" and nothing in the record nor any findings indicated that the experts were subpoenaed); *see also Greene v. Hoekstra*, 189 N.C. App. 179, 181, 657 S.E.2d 415, 417 (2008) ("[T]he cost of an expert witness cannot be taxed unless the witness has been subpoenaed."); *Wade v. Wade*, 72 N.C. App. 372, 384, 325 S.E.2d 260, 271 (1985) ("Unless an expert witness is subpoenaed, . . . the witness' fees are generally not recognized as costs."). In this case, however, the record shows that Defendants served both expert witnesses in

question, Drs. Rosenthal and Scott, with subpoenas to testify. To support their claim that the experts were subpoenaed for attendance at trial, Defendants attached to their motion for costs copies of the subpoenas and return receipts documenting delivery that prove, in pertinent part, Drs. Rosenthal and Scott were served with subpoenas to appear and testify by certified mail on 7 and 9 February 2009, respectively. Both expert witnesses appeared at trial and testified pursuant to the terms of the subpoena served upon them. Where Dr. Scott did not request compensation for his personal time, Defendants sought, and the trial court awarded, costs for the trial testimony time of only Dr. Rosenthal and travel expenses for both witnesses.[1]

Plaintiffs acknowledge that Defendants issued subpoenas to Dr. Rosenthal in Florida and Dr. Scott in Missouri but maintain that the service thereof is insufficient to satisfy § 7A-314, where the subpoenas themselves were ineffective to compel the attendance of the nonresident expert witnesses at trial. *See State v. Means*, 175 N.C. 820, 822, 95 S.E. 912, 913 (1918) ("The attendance of a nonresident witness cannot be enforced, even though summoned . . . ."). Thus, Plaintiffs concede the existence of the subpoenas but contest only their validity. The challenge they attempt to assert, however, belongs not to Plaintiffs but to the nonparty witnesses whose attendance was sought, and Plaintiffs accordingly lack standing to dispute the subpoenas' validity. *See Musi*, ––– N.C. App. at –––, 684 S.E.2d at 894 ("Standing 'refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter.'"); *see also* N.C. Gen. Stat. § 1A-1, Rule 45(c) (2009) (authorizing persons "*commanded to appear at a trial*" to object to a subpoena's validity based on, *inter alia*, procedural defects (emphasis added)); *In re Cree, Inc. Sec. Litig.*, 220 F.R.D. 443, 446 (M.D.N.C. 2004) (noting general proposition that "a party lacks standing to challenge a third-party subpoena"); 9A Charles Alan Wright &

1. Plaintiffs challenge the inclusion of travel expenses in the total costs award only on the basis that the subpoenas were ineffectual to compel the experts' attendance at trial. Plaintiffs do not challenge whether the trial court properly awarded the experts' actual travel expenses as costs under N.C. Gen. Stat. § 7A-305(d)(11), which grants the trial court discretion to award "[r]easonable and necessary fees of expert witnesses *solely for actual time spent providing testimony at trial*." N.C. Gen. Stat. § 7A-305(d)(11) (2009) (emphasis added). Where Plaintiffs do not contest the trial court's deviation from the travel reimbursement provisions of the uniform witness fees laid out in § 7A-314(b)(2), we do not address this discretionary award. *See* N.C. Gen. Stat. § 7A-314(b)(2) (2009) (detailing the rate or reimbursement for "[a] witness whose residence is outside the county of appearance and more than 75 miles from the place of appearance").

Arthur R. Miller, *Federal Practice and Procedure* § 2459 (3d ed. 1995) (stating a party ordinarily has no standing to challenge a subpoena issued to a non-party "unless the objecting party claims some personal right or privilege with regard to the documents sought"). The exception to this general rule can arise in the context of a subpoena *duces tecum* if a party has privilege over information requested, but Plaintiffs here are attempting to challenge the validity of a subpoena ad *testificandum*. Therefore, Plaintiffs cannot claim a legally cognizable interest in any materials sought because the subpoenas at issue solicit only expert testimony, and where Plaintiffs have cited no authority or grant of permission to act on behalf of the individuals named therein, they accordingly lack standing to contest whether the subpoenas were properly issued.

Likewise, Plaintiffs cannot raise as a defense to the motion for costs the invalidity of these subpoenas by asserting the rights of non-party expert witnesses—namely, that the subpoenas were ineffectual to compel the appearance of Drs. Rosenthal and Scott at trial. Because Plaintiffs lack standing to seek adjudication of the precise issue on which their appeal is based, we do not reach their affiliated arguments regarding statutory interpretation. As such, where Drs. Rosenthal and Scott were undisputedly served with subpoenas to testify at trial and Plaintiffs are not entitled to argue that their appearance was voluntary in fact, Defendants have met not only the requirements of § 7A-305(d)(11) but have also overcome the hurdle imposed by § 7A-314 "that the cost of an expert witness cannot be taxed unless the witness has been subpoenaed." *Green*, 189 N.C. App. at 181, 657 S.E.2d at 417. Accordingly, the statutory requirements for awarding expert witness fees as costs were satisfied with respect to Drs. Rosenthal and Scott. Thus, we affirm that related portion of the trial court's award of costs in the amount of $5,715.40, thereby affirming the total award of costs for Defendants in the amount of $11,605.40.

Affirmed.

Chief Judge MARTIN and Judge JACKSON concur.

STATE OF NORTH CAROLINA v. LAKENDRA SHERRELL GRADY, DEFENDANT

No. COA09-823

(Filed 17 August 2010)

Constitutional Law— right to confrontation—testimony about DNA testing done by another agent—harmless error

The trial court did not err in a first-degree murder and first-degree burglary case by admitting testimony by an SBI special agent about the results of DNA testing that had been conducted by another agent who did not testify. Even if the admission was error, it was harmless beyond a reasonable doubt based on the evidence's very limited probative impact and the overwhelming evidence of defendant's guilt.

Appeal by defendant from judgment entered 10 October 2008 by Judge Jerry Cash Martin in New Hanover County Superior Court. Heard in the Court of Appeals 14 January 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Steven M. Arbogast, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

GEER, Judge.

Defendant Lakendra Sherrell Grady appeals her conviction of first degree murder and first degree burglary. Defendant's sole contention on appeal is that the trial court erred in admitting testimony by an SBI special agent about the results of DNA testing that had been conducted by another agent who did not testify. Defendant argues that the admission of this testimony deprived defendant of her constitutional right of confrontation in violation of *Melendez-Diaz v. Massachusetts*, 577 U.S. 305, 174 L. Ed. 2d 314, 129 S. Ct. 2527 (2009). We conclude, however, that the admission of the testimony, even if error, was harmless beyond a reasonable doubt because of the evidence's very limited probative impact and the overwhelming evidence of defendant's guilt.

Facts

The State's evidence tended to show the following. On 21 January 2006, Johnny Odell Southerland, Jr. was telling people he had found a silver and black 9mm handgun in a field across from a school and

wanted to sell it. He offered to sell it to defendant for $250.00 if she met him later that day. In the late afternoon or early evening, defendant and Delicia "Dee-Dee" Hardwrich drove to Southerland's apartment, and defendant asked Southerland to show her the gun. When Southerland handed the gun to defendant in her car, defendant told him that "he was beat" and drove off without paying for the gun.

The next day, a group of people gathered at Hardwrich's sister's home. While they were playing the Grand Theft Auto video game, two of the men—Rufus Lamar Bowser and Darion Graham—indicated that they "had guns like on the game." Because Hardwrich did not believe them, they showed her the guns. Bowser had a Tec-9 assault rifle, and Graham had a .357 pistol. Hardwrich called defendant and told her that "they got this Tec-9 and you should come see it and you should bring the gun you got yesterday." Later, defendant arrived at Hardwrich's sister's house with the 9mm handgun. Eventually, the group's conversation turned to the possibility of robbing someone. Defendant mentioned that she knew Pervis Owens, Jr. and that he had "a lot of money and stuff."

After midnight, defendant left the house with Bowser, Graham, and Maurice Miller. At this point, Bowser had the Tec-9, Graham had the .357 pistol, and it was unclear who had the 9mm handgun. Defendant drove them around as they tried to find someone to rob. Defendant, Graham, and Miller wanted to rob a man named Nate, but Bowser said "no, he cool," so they kept driving. Next, they wanted to rob a local "gambling house," but when they found no one there, they left.

Bowser then turned to defendant and asked, "What about the dude you was talking about earlier?" Defendant responded, "That's the one I'm about to call right now." Defendant called Owens as they drove toward his house, but he did not answer the phone. When they arrived at his house, a lot of people were outside. They drove down another street, parked, and waited. Defendant kept trying to call Owens and eventually made contact.

Meanwhile, everyone in the car agreed that defendant would convince Owens to come outside his house. The three males, who would be waiting behind another house, would "rush" Owens when he came outside. Bowser still had the Tec-9, Graham had the .357 pistol, and Miller was in possession of the 9mm handgun. After Owens refused to leave his house, defendant told the others: "I go in the house, y'all come in and tell him to give it up." She said she would

leave the door open for them, but told them to wait about five minutes before entering.

A few minutes after defendant went inside Owens' house, Bowser and Miller followed with their faces covered with their shirts. Graham waited outside. When the men got inside, they found Owens asleep in a living room chair. Bowser cocked his gun and told Owens to "get up." Owens screamed, "No," and rushed at Bowser, knocking him to the ground. Bowser got to his feet and ran out of the house. As he was running, he heard a shot. When Miller came out of the house, he said, "[G]o," and the three males ran to Graham's house. Defendant arrived at Graham's house about 10 to 15 minutes later and told them that Owens was dead.

Later that morning, at about 7:00 a.m., Rose Samuel, Owens' next door neighbor, went outside and found Owens lying in front of his house. Although Samuel had heard a gunshot a little after 5:00 a.m., she had ignored it because she lived in a "bad neighborhood" and was accustomed to hearing gunshots. Samuel or someone else called 911. Owens had a weak pulse when the paramedics first checked him, but he had no vital signs by the time he was loaded into the ambulance. Owens was pronounced dead at the hospital at 7:44 a.m.

Dr. William Kelly performed Owens' autopsy. Dr. Kelly determined that Owens suffered a single gunshot wound that entered his left back in the left shoulder area. The bullet traveled left to right and downward, traversing his chest, penetrating the top of the left lung, and passing through the aorta and into the right lung before exiting the chest and lodging in his right arm. Dr. Kelly determined that Owens had bled to death.

Approximately one week after Owens' death, Detectives Andrew Korwatch and Chris Adams of the Wilmington Police Department spoke with Graham. As a result of their conversation, Graham turned over the 9mm handgun. Special Agent Jessica Rosenberg, an SBI firearms and toolmark technician, compared a bullet and shell casing test-fired from the 9mm handgun to the bullet recovered from Owens' body and a shell casing found by officers at Owens' house. Special Agent Rosenberg determined that the test-fired shell casing and the shell casing obtained from the crime scene were both fired from the 9mm handgun obtained from Graham. The bullets had similar characteristics, but the agent could not say that the 9mm handgun had in fact fired the bullet recovered from Owens' body.

Detective Lee Odham also reviewed a surveillance tape taken from Samuel's house—Samuel had installed a surveillance camera on her porch that fed to a VCR in her house. The audio of the camera had recorded a gunshot and a screen door slamming, as well as Owens saying, "No." Detective Odham testified that another voice could be heard saying "'Bro, Bro, where's your phone, Bro,' something to that effect." After receiving information that defendant was involved, Detective Odham brought Hardwrich to the police station. Hardwrich identified the voice on the tape as being defendant's, although, at trial, Hardwrich denied doing so.

Defendant was then brought in for questioning. Because she was 17, she was read her *Miranda* rights and given the required juvenile warnings. After indicating that she understood her rights, defendant made both oral and written statements—the interrogation was also videotaped. She admitted getting the 9mm handgun from Southerland. When it came to what happened inside Owens' house, she gave three different versions of what transpired. In the third version, she said that she, Bowser, Graham, and Miller "made a plan to rob Mr. Owens." Defendant explained that she went inside Owens' house and that the others were to come in five minutes later. Bowser entered the house first, with his Tec-9, and Miller followed with the 9mm handgun. There was a struggle inside the house, and Miller ended up shooting Owens. Everyone then ran away, including Graham, who had remained outside the house during the struggle and shooting. Defendant confirmed that these events occurred sometime between 5:15 and 5:20 a.m. on the morning of 23 January 2006.

Defendant was subsequently indicted for first degree burglary, robbery with a dangerous weapon, and first degree murder. At trial, Bowser, who had pled guilty to second degree murder and armed robbery in exchange for testifying, testified essentially consistent with the above. Hardwrich testified that defendant had taken the gun from Southerland, but also testified that defendant had not left with Bowser, Graham, and Miller. Southerland also testified, admitting that he told defendant he had a gun to sell and suggested she meet him at a particular location that night. Southerland testified that a car did arrive at that location and that he showed the gun to a woman in the car who took the gun without paying for it, saying, "You beat." Although he claimed at trial that he did not know whether the woman was defendant, he also admitted that he did not want to testify and that his testimony conflicted with what he had previously told Detective Odham. Defendant did not present any evidence at trial.

On 10 October 2008, the jury found defendant guilty of first degree burglary, robbery with a dangerous weapon, and first degree murder under the felony murder rule, with robbery with a dangerous weapon and first degree burglary as the underlying felonies. The court arrested judgment on the conviction of robbery with a dangerous weapon, combined for sentencing the convictions for first degree murder and first degree burglary, and sentenced defendant to a term of life imprisonment without parole. Defendant timely appealed to this Court.

Discussion

At trial, the State presented the testimony of Special Agent Christy Fischer, an SBI analyst, regarding the results of DNA testing done on blood found in holes in the trigger of the 9mm handgun turned over by Graham. SBI Special Agent Jill Applebee had actually conducted the testing, but was no longer working for the SBI at the time of the trial. Special Agent Fischer testified that based on her review of Special Agent Applebee's report, she believed that Special Agent Applebee had complied with all the required procedures for the testing. Special Agent Fischer also testified that she agreed with the results of Special Agent Applebee's testing, which had concluded that the predominant DNA profile from the blood on the 9mm handgun did not match the DNA profile of Owens or any profile contained in the North Carolina convicted offender indexes.

On appeal, defendant argues that the United States Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 577 U.S. 305, 174 L. Ed. 2d 314, 129 S. Ct. 2527 (2009), establishes that the admission of this testimony violated her constitutional right to confrontation. Even assuming, *arguendo*, that the testimony was admitted in error, we hold that the State has established that any error was harmless beyond a reasonable doubt. *See* 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 burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.").

Defendant gave both oral and written statements regarding the murder. In each of her three versions, she admitted being inside Owens' house when he was shot. In her final version, she admitted that she took Southerland's 9mm handgun, that she, Miller, Bowser, and Graham made a plan to rob Owens, that she entered Owens'

house first followed by Miller and Bowser (with Graham waiting outside), and that Miller shot Owens with the 9mm handgun she had obtained. This confession was further supported by testimony from Bowser, Hardwrich, Southerland, and the firearms expert.

Although defendant notes various inconsistencies in the testimony, the evidence was essentially undisputed that defendant was present during the shooting. The conflicts in the evidence identified by defendant include the differing stories told by defendant; whether defendant took the 9mm handgun from Southerland or someone else stole it; whether there were serious conversations about robbing someone at Hardwrich's sister's home or just casual discussions; whether defendant left alone or with Bowser, Graham, and Miller; and discrepancies about the time of the shooting. The DNA evidence, however, was not pertinent to any of these conflicts in the evidence. The testing merely suggested that Owens was not connected with the gun and precluded an argument by the defense that the State had not followed every possible lead.

Defendant argues, however, that "[t]he results of the DNA testing done by Jill Applebee provided some support for the State's theory of the facts, that Owens [sic] death was the result of being shot about 5:15 a.m. by Maurice Miller, using a 9 mm [sic] pistol that Defendant Grady gave to him before he went in the house." We do not see how that is the case. The DNA evidence regarding the blood on the 9mm handgun's trigger did nothing to address the discrepancy about the time of the shooting and did not identify the shooter. Moreover, on the question of who provided Miller with the 9mm handgun, the fact that the testing did not match the blood to defendant supported defendant's suggestion at trial that she had not been the source of the 9mm handgun.

In sum, even if we accept *arguendo* defendant's view that the evidence was in serious conflict, our review of the record indicates that there is no plausible basis for concluding that the DNA testing played any material role in the jury's decision to convict defendant. We note that 27 witnesses testified for the State over five days at defendant's trial. Special Agent Fischer's testimony lasted approximately 16 minutes, and defendant has challenged only a portion of that testimony. The challenged portion did not shed any light on the overarching issue: whether defendant was a participant in the robbery and, therefore, also in the felony murder.

Thus, absent the admission of the testimony, we conclude, beyond a reasonable doubt, that the jury would not have reached a different decision. *See State v. Locklear*, 363 N.C. 438, 453, 681 S.E.2d 293, 305 (2009) (finding Confrontation Clause violation harmless beyond reasonable doubt where "State presented copious evidence" of defendant's guilt); *State v. Galindo*, 200 N.C. App. 410, 415, 683 S.E.2d 785, 788-89 (2009) (finding Confrontation Clause violation harmless beyond reasonable doubt in light of "[d]efendant's own statement, in conjunction with the unchallenged testimony of law enforcement officers").

No error.

Judges CALABRIA and STEPHENS concur.

ITS LEASING, INC., PLAINTIFF v. RAM DOG ENTERPRISES, LLC, DEFENDANT

No. COA09-653

(Filed 17 August 2010)

1. Appeal and Error— change of venue—basis of ruling not specified—immediately appealable

An order changing venue affected a substantial right and was immediately appealable where the trial court did not specify the basis for its ruling and plaintiff claimed that it had a right to venue in Mecklenburg County.

2. Venue— change—discretionary basis—motion filed before answer

The trial court abused its discretion to the extent it allowed a change of venue on a discretionary basis under N.C.G.S. § 1-83(2) where defendant's motion, based on the convenience of the witnesses and the ends of justice, was filed before the answer and was thus premature. Upon remand, defendant may file the motion after filing its answer.

3. Venue— change as of right—error

The trial court erred to the extent that it based a change of venue on defendant having a right to venue in Haywood County.

Defendant did not state any legal basis for venue in Haywood County as of right in its motion or argue that claim on appeal, and plaintiff's argument that it had a right to venue in Mecklenburg County based on a contract provision only established that Mecklenburg County would have jurisdiction, but not exclusive jurisdiction.

Appeal by plaintiff from order entered 23 December 2008 by Judge Jesse B. Caldwell, III in Superior Court, Mecklenburg County. Heard in the Court of Appeals 29 October 2009.

Sellers, Hinshaw, Ayers, Dortch & Lyons, P.A., by Michelle Massingale, for plaintiff-appellant.

McLean Law Firm, PA, by Russell L. McLean, III, for defendant-appellee.

STROUD, Judge.

Plaintiff appeals from an order granting defendant's motion to change venue from Mecklenburg County to Haywood County. Because the trial court could not properly determine on a discretionary basis a motion for change of venue which was filed prematurely and because neither party has demonstrated a right to venue in either Mecklenburg County or Haywood County, we reverse.

On 26 June 2008, plaintiff filed its complaint against defendant in Mecklenburg County. On or about 17 July 2008, prior to filing an answer, defendant filed a motion requesting removal of the action pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b) to Haywood County, North Carolina, based upon "improper venue." The motion for change of venue alleged in pertinent part that:

2. Plaintiff is a corporation organized and existing under the laws of the State of North Carolina and is authorized to do business in North Carolina.

3. Defendant is a North Carolina Limited Liability Corporation with its principal place of business in Waynesville, Haywood County, North Carolina.

4. That the contract was entered into in Haywood County, North Carolina.

5. The convenience of witnesses and the ends of justice would be promoted by the change.

Plaintiff filed affidavits in opposition to defendant's motion; defendant did not file any additional affidavits and did not file an answer. On 23 December 2008, the trial court granted the motion for change of venue. The order did not state the basis for the change of venue but provided that "[a]fter considering the arguments of counsel, reviewing the pleadings and the contract involved, the Court has determined that the proper venue *either by right or in the court's discretion* should be Haywood County." (emphasis added).

[1] Analysis of this case, and even the determination of whether this interlocutory appeal is immediately appealable, is complicated by the fact that neither defendant's motion nor the trial court's order identified the specific basis for the change of venue, although one basis for the change of venue is of right and the other is discretionary. Also, an appeal from a discretionary ruling as to venue is interlocutory, does not affect a substantial right, and is not immediately appealable, *Kennon v. Kennon*, 72 N.C. App. 161, 164, 323 S.E.2d 741, 743 (1984); a determination of venue based upon a statutory right to venue in a particular county is immediately appealable. *Snow v. Yates*, 99 N.C. App. 317, 319, 392 S.E.2d 767, 768 (1990). However, the allegations of the motion make it clear that defendant was requesting a change of venue based upon N.C. Gen. Stat. § 1-83(2) (2007), which provides:

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

Defendant argues in its brief that the trial court's determination was entirely discretionary and does not claim that venue was improper in Mecklenburg County or that defendant had a right to venue in Haywood County. Defendant specifically argues that "[u]nder the venue statute of North Carolina, this case could be tried in either county. In the present case, Judge Caldwell exercised his

discretion and transferred this case to Haywood County."[1] However, although plaintiff conflates its arguments as to venue as of right and discretionary venue, plaintiff argues in its brief that it had a right to venue in Mecklenburg County pursuant to N.C. Gen. Stat. § 1-82 and by contract. Plaintiff states that

> [o]n February 24, 2006, in order to induce Plaintiff/Appellant to lease trailers to Defendant/Appellee, Defendant/Appellee completed a credit application. (R.p. 27-28). The Credit Application specifically states: Applicant agrees that the venue and jurisdiction for any such court action shall be properly at Charlotte, North Carolina, the principal place of business of the 'Companies,' unless otherwise notified. (R. p. 28). 'Companies' is defined as ITS Leasing, Inc., the Plaintiff/Appellant in this action. (R.p. 28).[2]

N.C. Gen. Stat. § 1-82 (2007) provides that "[i]n all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement." Plaintiff argues that "[t]he contract between the parties further mandates that the action be brought in the county of the Plaintiff/Appellant's principal place of business[,]" which was Mecklenburg County. As the parties have raised arguments both as to discretionary venue under N.C. Gen. Stat. § 1-83(2) and venue as of right under the contract, and the trial court did not specify the basis for its ruling, we must address both. Also, because plaintiff claims that it has a right to venue in Mecklenburg County, the trial court's order changing venue affects a substantial right of plaintiff and is thus immediately appealable. *Snow*, 99 N.C. App. at 319, 392 S.E.2d at 768.

I. Venue Under N.C. Gen. Stat. § 1-83(2)

[2] We will first consider the motion for change of venue as a discretionary determination based upon the "convenience of witnesses and the ends of justice" under N.C. Gen. Stat. § 1-83(2), as these are the grounds stated in defendant's motion. The timing of defendant's motion is controlling as to this issue.

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1. Defendant's brief does not identify any particular "venue statute of North Carolina." In fact, defendant's entire table of cases and authorities includes no statutes and only one case..

2. We take judicial notice pursuant to N.C. Gen. Stat. § 8C-1, Rule 201(b) (2007) that all of the city of Charlotte, North Carolina is in Mecklenburg County, North Carolina; the geographical basis for jurisdiction of the trial court is the county, not the city. *See* N.C. Gen. Stat. § 7A-41(a) (2007).

> Pursuant to N.C. Gen. Stat. § 1-83(2),
>
> '[t]he court may change the place of trial . . . [w]hen the convenience of witnesses and the ends of justice would be promoted by the change.' N.C.G.S. § 1-83(2) (1999). Whether to transfer venue for this reason, however, is a matter firmly within the discretion of the trial court and will not be overturned unless the court manifestly abused that discretion. *Roanoke Properties v. Spruill Oil Co.*, 110 N.C. App. 443, 429 S.E.2d 752 (1993).

Centura Bank v. Miller, 138 N.C. App. 679, 683, 532 S.E.2d 246, 249 (2000). "Moreover, 'motions for change of venue based on the convenience of witnesses, pursuant to section 1-83(2), must be filed after the answer is filed.' " *Smith v. Barbour*, 154 N.C. App. 402, 407, 571 S.E.2d 872, 876 (2002) (emphasis added and quoting *McCullough v. Branch Banking & Tr. Co.*, 136 N.C. App. 340, 350, 524 S.E.2d 569, 575-76 (2000)), *cert. denied*, —— N.C. ——, —— 599 S.E.2d 408-09 (2004); *accord*, *Thompson v. Horrell*, 272 N.C. 503, 505, 158 S.E.2d 633, 635 (1968) (holding that the defendant could not force removal "as a matter of right" and the trial court erred in attempting a discretionary transfer of venue before the defendant had filed his answer because "the occasion for the exercise of discretion will not arise upon the motion for removal for the convenience of witnesses and the promotion of justice[,]" until the allegations in the complaint "are traversed[.]" (citation omitted)). Defendant's motion, based upon the "convenience of the witnesses and the ends of justice," was filed prior to an answer and it was therefore prematurely filed. As the trial court abused its discretion to the extent that it prematurely made a discretionary ruling to remove the case to Haywood County, we believe that this Court must reverse and remand to the trial court for further proceedings. Of course, defendant may again file a motion for change of venue after filing its answer, and assuming that plaintiff does not have a right to venue in Mecklenburg County, the trial court could again determine in its discretion that a change of venue should be allowed. A similar situation was presented in *Atlantic Coast Line R. Co. v. Thrower*, where our Supreme Court noted that

> [t]his may seem to require a circuitous method of finally determining the venue for the trial of this cause when and after the plaintiff has been heard upon its motion, if it elects to renew it, in the Mecklenburg Superior Court. Be that as it may, we are required to interpret and declare the law as it is written—not as we may think it should be.

213 N.C. 637, 640, 197 S.E. 197, 199 (1938). Although the case before us is also taking a circuitous path, it is still the path which the law has determined and both this Court and the trial court must follow. To the extent that the trial court allowed the change of venue on a discretionary basis under N.C. Gen. Stat. § 1-83(2), the trial court abused its discretion and the order must be reversed.

II. Venue as of Right Under Contract

[3] We have already determined that the trial court could not remove the case to Haywood County in its discretion because an answer had not yet been filed. The only way the trial court could properly remove the case to Haywood County upon motion prior to filing of answer would be if venue in Mecklenburg County was improper and defendant could demonstrate a right to venue in Haywood County. The trial court's order concluded in the alternative that defendant had a right to venue in Haywood County, despite the fact that defendant did not state any legal basis for venue as of right in Haywood County in its motion. Also, as noted above, defendant has not argued before this Court that it has any *right* to venue in Haywood County. Thus, to the extent that the trial court found that defendant had a right to venue in Haywood County, it erred. However, plaintiff does assert a claim to venue as of right.

Plaintiff argues that it has a right to venue in Mecklenburg County, the county in which the complaint was filed, based upon the contract between the parties. Plaintiff argues defendant agreed to venue in Mecklenburg County by the provisions of the credit application, which are part of the contract between the parties. The credit application provides in pertinent part that:

> 2. If payment in full is not received by the due date, applicant shall owe, in addition to the invoice amount, a late/finance fee of 1.5% per month, or the maximum allowed by law, on all unpaid balances, plus costs of collection, including any attorney's fees, court costs, collection fees and any other reasonable costs that the 'Companies' may incur in recovering the amounts owed.
>
> 3. Applicant agrees that the venue and jurisdiction for any such court action shall be properly at Charlotte, North Carolina, the principal place of business of the 'Companies', unless otherwise notified.

The credit application was executed on behalf of defendant Ram Dog on 24 February 2006 by Terry Ramey, managing member. Defendant's

brief does not address the provisions of the credit application at all but states only that "[s]ince the lease contract did not specifically require venue to be in Mecklenburg County any disputes as to the convenience of witnesses or where the contract was entered is resolved by the discretionary decision of the trial judge hearing the motion to transfer." Defendant filed no affidavits in response to plaintiff's affidavits. Defendant's brief does not address plaintiff's allegations regarding the terms of the credit application.

William Todd Markham, salesman for plaintiff, provided an affidavit describing the execution of the credit application and lease agreement as follows:

> 7. Mr. Ramey paid the down payment here (his check #1483), completed and signed our credit application on February 24, 2006, all in Charlotte, North Carolina. Ramey made arrangements with his employees or agents to come to Charlotte to pick up the trailers.
>
> 8. We prepared the lease in accordance with the discussions we had in Charlotte, North Carolina and mailed the lease to RAMDOG ENTERPRISES, LLC, for signature. The lease agreement was signed by Brandy Lewelly, Office Manager for RAMDOG ENTERPRISES, LLC, on March 13, 2006 and was mailed back to our Charlotte, NC office. Pursuant to the lease terms, Ramey had already paid the first installment while in our Charlotte, NC office on February 24, 2006, even before the lease was actually signed.

The trial court did not make any findings of fact in its order and, as noted above, did not state the grounds for its ruling. As noted above, defendant did not demonstrate any right to have venue in Haywood County. However, plaintiff also has not demonstrated a right to venue in Mecklenburg County. Although the cases which address contract forum selection clauses normally deal with both jurisdiction and venue and the two issues are sometimes "blurred," the two inquiries are different. *See Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 144, 423 S.E.2d 780, 783 (1992) ("While *Gaither* was a case involving 'venue' as opposed to 'jurisdiction' and can be distinguished on that basis from the present case, as we have done, there is language in *Gaither* that blurs the two concepts. To the extent that the language in *Gaither* can be read to condemn forum selection clauses as depriving North Carolina courts of jurisdiction, that language is disavowed." (citing *Gaither v. Motor Co.*, 182 N.C. 498, 500-01, 109 S.E. 362, 364 (1921)), *overruled on other grounds* by N.C.

Gen. Stat. § 22B-3 (2007). However, in *Printing Services of Greensboro, Inc. v. American Capital Group, Inc.*, this Court addressed a provision in a contract which stated that "YOU AGREE THAT THIS LEASE HAS BEEN PERFORMED AND ENTERED INTO IN THE COUNTY OF ORANGE, STATE OF CALIFORNIA, YOU CONSENT TO JURISDICTION IN ORANGE COUNTY, YOU EXPRESSLY WAIVE ANY RIGHTS TO A TRIAL BY JURY." 180 N.C. App. 70, 74, 637 S.E.2d 230, 232 (2006). The Court held that this language did not indicate that "the parties agreed to venue *exclusively* in California, merely that a court in Orange County, California would have jurisdiction." *Id.* at 74-75, 637 S.E.2d at 232. (emphasis added). The Court explained that

> [t]he general rule is when a jurisdiction is specified in a provision of contract, the provision generally will not be enforced as a mandatory selection clause without some further language that indicates the parties intent to make jurisdiction exclusive. Indeed, mandatory forum selection clauses recognized by our appellate courts have contained words such as 'exclusive' or 'sole' or 'only' which indicate that the contracting parties intended to make jurisdiction exclusive.

Id. at 74, 637 S.E.2d at 232. (citation omitted). The same rationale applies to the contract provision at issue here. The parties agreed at most that "venue and jurisdiction . . . properly" would be in Charlotte, but not that the "sole," "exclusive," or "only" proper venue would be in Charlotte. As plaintiff has not demonstrated a contractual right to venue in Mecklenburg County, the trial court on remand may consider, at the appropriate time, a motion for change of venue, if defendant elects to pursue this issue again.

For the reasons stated above, the trial court's order is reversed and remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges STEPHENS and BEASLEY concur.

STATE OF NORTH CAROLINA v. JAMIEN M. MARSHALL

No. COA09-1416

(Filed 17 August 2010)

1. Criminal Law— instruction—constructive possession

The trial court committed prejudicial error in a possession of stolen goods case by instructing the jury on constructive possession. The evidence supported either actual possession or no possession, and such instruction served to relieve the State of its burden of proof.

2. Possession of Stolen Property— possession of stolen goods—larceny of motor vehicle—motion to dismiss—sufficiency of evidence

The trial court erred by denying defendant's motions to dismiss the charges of possession of stolen goods and larceny of a motor vehicle. There was no evidence that defendant actually or constructively possessed the stolen vehicle, and the jury's verdict as to possession of stolen goods was fatally inconsistent with its verdict of not guilty of larceny of the same vehicle.

3. Appeal and Error— additional arguments not considered —mootness

Defendant's additional arguments were not considered based upon the trial court's reversal of the possession of stolen goods conviction.

Appeal by defendant from judgment entered 20 May 2009 by Judge Christopher M. Collier in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 March 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General P. Bly Hall, for the State.

Daniel F. Read, for defendant-appellant.

JACKSON, Judge.

Jamien M. Mafrshall ("defendant") appeals his 20 May 2009 conviction for possession of stolen goods. For the reasons stated herein, we reverse.

On 27 March 2008, Frederick Stewart ("Stewart") drove his 2005 Chevy Suburban ("Suburban") to a gas station in order to purchase

some cigarettes. Stewart left the Suburban running while he went inside. When he left the convenience store, the Suburban was no longer there. Stewart went back inside to call the police and use his OnStar system to track the Suburban's location.

Officer Paul Blackwood ("Officer Blackwood") responded to Stewart's call. Once he arrived at the gas station, Officer Blackwood viewed the store's surveillance video footage and recognized defendant on the video. Officer Blackwood knew defendant "[w]ell enough to know him by face, by name, general area, where he hangs out, [and] his residence." According to Officer Blackwood, the video showed defendant exiting the convenience store after Stewart entered it. Defendant then walked behind a "white vehicle" before "running back towards the [Suburban]." The Suburban then left the gas station traveling in the direction of defendant's house. No one else appeared to be near the pumps or dressed in dark clothing as defendant had been.

After viewing the video, Officer Blackwood notified the primary officer that he thought they would find the Suburban at defendant's residence on Booker Avenue. Around this time, the officers also learned that OnStar had located the Suburban on Booker Avenue. The police went to Booker Avenue and found the Suburban parked on the street outside defendant's residence; this occurred within an hour or hour and a half of the larceny.

Defendant was charged with larceny of a motor vehicle and possession of stolen goods. At his 20 May 2009 trial, defendant testified that he drove his vehicle to the gas station that day, accompanied by two other people—LaQuanda and Jeremy. As defendant was pumping his gas, Jeremy jumped out of the car and into the Suburban. Defendant then drove to his girlfriend's house and had no knowledge that the Suburban subsequently was parked on Booker Avenue at his residence. Defendant did not confront Jeremy about the crime or tell anyone his version of events.

At trial, the State requested a jury instruction on constructive possession, to which defense counsel objected. Defense counsel stated, "I just don't think it applies, and it's obvious somebody possessed it. I don't see constructive anywhere." The trial court agreed with defense counsel and sustained the objection. However, once the jury began its deliberations, it sent two questions to the trial court: "(1) What is [the] legal definition of possession? [and] (2) If stolen goods are on your property[,] are you guilty of possession?" The trial

court heard from both attorneys. Defense counsel reiterated his view that "either [defendant's] the one who took [the Suburban] and he possessed it because he took it, or there is no constructive possession in this particular case." The trial court responded, "I understand your point. The only thing I can figure is perhaps they could believe that he did not drive the car away from the convenience store without his property. I don't know." The trial court then called the jury back to the courtroom and instructed it on constructive possession.

On 20 May 2009, the jury found defendant guilty of possession of stolen goods. However, it found defendant not guilty of larceny of a motor vehicle. Defendant appeals.

[1] Defendant's second argument, which we address first, is that the trial court erred by instructing the jury as to constructive possession, because the evidence supports either actual possession or no possession, there exists no evidentiary basis for an instruction as to constructive possession, and such instruction served to relieve the State of its burden of proof. We agree.

When the appealing party properly objects to jury instructions at trial, we review the instructions as a whole in order to ascertain whether, in context, an erroneous instruction likely misled the jury. We previously have explained that

> "[t]he [jury] charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed . . . . The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by [the] instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury."

State v. Hall, 187 N.C. App. 308, 316, 653 S.E.2d 200, 207 (2007) (quoting *State v. Blizzard*, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005)) (emphasis removed).

"A person is in constructive possession of a thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing." *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986) (citing *State v. Williams*, 307 N.C. 452, 455, 298 S.E.2d 372, 374 (1983)). "As with other questions of intent,

proof of constructive possession usually involves proof by circumstantial evidence." *Id.*

" 'Where [contraband is] found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession.' " *State v. McNeil*, 359 N.C. 800, 809, 617 S.E.2d 271, 277 (2005) (quoting *State v. Butler*, 356 N.C. 141, 146, 567 S.E.2d 137, 140 (2002)) (alteration in original). " 'However, unless the person has exclusive possession of the place where the [contraband is] found, the State must show other incriminating circumstances before constructive possession may be inferred.' " *Id.* at 810, 617 S.E.2d at 277 (quoting *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989)) (emphasis removed).

In the case *sub judice*, defendant argues that, because the jury found him not guilty of larceny as to the Suburban, it must have found that he did not actually possess the Suburban at the gas station. Therefore, the only time period in which defendant could have possessed the vehicle—in order to meet the possession element of possession of a stolen good—was when the Suburban was parked on Booker Avenue outside defendant's residence. Defendant contends that the Suburban's location on a public street is insufficient to demonstrate an "intent and capability to maintain control and dominion over" the vehicle, *Beaver*, 317 N.C. at 648, 346 S.E.2d at 480 (citing *State v. Williams*, 307 N.C. 452, 455, 298 S.E.2d 372, 374 (1983)), and that the State presented no other evidence to support constructive possession.

Although the State points us to certain evidence—a surveillance tape that showed defendant, identified by Officer Blackwood, at the gas station around the time that the Suburban was stolen; defendant's opportunity to observe the running, unoccupied Suburban; the fact that the Suburban was not stolen until defendant exited the gas station convenience store; and the subsequent discovery of the Suburban parked on the public street outside defendant's residence —as sufficient to demonstrate "other incriminating circumstances," this evidence implicates defendant's opportunity to steal the vehicle, not defendant's "intent and capability to maintain control and dominion over" the public street on which the Suburban was discovered.

In *Beaver*, *supra*, we found that there existed other incriminating circumstances sufficient to allow the issue of constructive possession to go to the jury. 317 N.C. 643, 346 S.E.2d 476. In that case,

marijuana was growing in a field near the defendant's house, but the defendant did not own the field. *Id.* at 649, 346 S.E.2d at 480. Nonetheless, our Supreme Court held that several circumstances permitted an inference of constructive possession: (1) police observed defendant in coveralls coming from the direction of the marijuana field; (2) defendant demonstrated knowledge of the field by directing officers as to the quickest way back to the house from the field and warning them of various obstacles along the path; (3) when police took defendant back to the house, defendant's mother stated, "I told you you'd get caught. I told you not to mess with that stuff[,]" to which defendant replied, "Shut up Mama, shut up Mama. They hadn't caught me in the fields. They hadn't caught me doing anything. Shut up[;]" and (4) "the fact that the path was cut by power machinery from the shed to the barn through approximately fifty-five yards of high dense weeds[.]" *Id.* at 649-50, 346 S.E.2d at 480-81. The *Beaver* Court concluded that there existed "substantial evidence that the defendant was in constructive possession of the marijuana seized at the time of his arrest." *Id.* at 649, 346 S.E.2d at 480.

Whereas the State's evidence in *Beaver* either demonstrated or implied that the defendant knew of, had access to, and actually accessed the secluded marijuana field in question, the evidence here shows only that defendant had an opportunity to steal the Suburban from the gas station. It neither demonstrates nor implies that defendant was aware that the Suburban was parked outside his residence, that he was at home during the hour or so during which the Suburban would have arrived on his street, that he regularly utilized that location for his personal use, nor that that portion of the public street was any more likely to be under his control than the control of other members of the public or other residents of that street. The Suburban's location on a public street clearly was not under the exclusive control of defendant, and the additional circumstances recounted by the State do not support an inference that defendant had "the intent and capability to maintain control and dominion over" the Suburban parked there. *Beaver*, 317 N.C. at 648, 346 S.E.2d at 480 (citing *State v. Williams*, 307 N.C. 452, 455, 298 S.E.2d 372, 374 (1983)). We hold that the trial court erred in instructing the jury on constructive possession because the evidence did not support such an instruction.

Although defendant has shown that the trial court erred in instructing the jury on constructive possession, we still must determine whether " 'such error was likely, in light of the entire charge, to

mislead the jury.' " *Hall*, 187 N.C. App. at 316, 653 S.E.2d at 207 (citation omitted) (emphasis removed). We think that it was.

The trial court provided the instruction on constructive possession only following a question from the jury. The instruction was isolated from the prior instructions, which potentially gave it greater weight. Considering that the jury was concerned about the specifics of possession, an instruction that detailed a standard less stringent than actual possession likely influenced the jury's determination that defendant's actions met the definition of possession. Therefore, the trial court's error was prejudicial, and defendant's conviction for possession of stolen goods is reversed.

[2] We also agree with defendant's third and fourth arguments—that the trial court erred by denying his motions to dismiss as there was insufficient evidence that he actually or constructively possessed the stolen vehicle and that the trial court erred by accepting the jury verdict as to possession of stolen goods because it was fatally inconsistent with its verdict of not guilty of larceny of the same vehicle—based upon our analysis *supra*.

[3] Because we reverse based upon defendant's second argument, we do not address his remaining contention—that the trial court committed plain error by allowing Officer Blackwood to testify that he knew defendant from numerous contacts.

Reversed.

Judges ELMORE and STROUD concur.

STATE OF NORTH CAROLINA v. DANIEL LEE KING

No. COA09-1659

(Filed 17 August 2010)

Search and Seizure— pat-down—defendant's cooperative behavior

A frisk of defendant that revealed methamphetamine, and subsequently cocaine and paraphernalia, was constitutional where defendant and his passenger looked at an officer in an odd manner as the officer passed their car, the officer stopped the car and defendant placed his hands outside his window as the officer

approached his car, defendant told the officer that there was a gun on the dashboard, and defendant removed his coat before leaving the vehicle despite chilly weather. Despite defendant's argument that his cooperative conduct exhibited nothing dangerous, the totality of the circumstances from the perspective of a law enforcement officer supported the conclusion that this officer had reasonable grounds to believe that his safety was in danger.

Appeal by Defendant from judgments entered 5 August 2009 by Judge Richard L. Doughton in Buncombe County Superior Court. Heard in the Court of Appeals 27 May 2010.

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

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for Defendant.

BEASLEY, Judge.

Daniel Lee King (Defendant) appeals pursuant to N.C. Gen. Stat. § 15A-979(b) from an order denying his motion to suppress any and all evidence obtained as a result of the traffic stop that preceded his arrest. For the reasons stated below, we affirm.

On 14 November 2008, Defendant was arrested for various offenses arising out of a traffic stop which was initiated by Officer James Wade Cecil of the Asheville Police Department. On 5 January 2009, Defendant was indicted for carrying a concealed weapon, displaying a fictitious tag, possession of drug paraphernalia, along with the aggravated felonies of maintaining a vehicle for keeping and selling a controlled substance and possession with intent to sell or deliver methamphetamine, marijuana, oxycodone, and cocaine. Defendant moved to suppress the evidence underlying the charges filed against him, and his motion came on for pretrial hearing on 5 August 2009.

Officer Cecil testified for the State at the suppression hearing. Cecil's recitation of the facts indicates that while conducting routine patrol around midnight on 14 November 2008, he observed Defendant driving a gold Chrysler Sebring. Cecil noticed that Defendant and his passenger were looking at the officer oddly and continued to look at him as they passed. Cecil entered the Sebring's plate information in

his computer to compare the tag with the DMV records, which revealed that the tag was registered to a two-door Nissan, not a Sebring. Cecil initiated a traffic stop. He noticed the driver holding both of his hands out of the window as he approached the vehicle, and without any question or inquiry, Defendant immediately told Cecil that he had a gun sitting on the dashboard. The small caliber handgun was retrieved by Cecil and disarmed by another officer who had arrived for assistance. Cecil then asked Defendant to exit the vehicle. Defendant complied but first removed the large, puffy coat he was wearing and left it inside the car. This raised the officer's suspicions because that particular day was "quite chilly." Leaving the passenger in the vehicle, Cecil led Defendant twenty-five to thirty feet back to his patrol car and conducted a pat-down search for safety purposes. The officer felt what he immediately recognized as a pill bottle in Defendant's pants pocket and asked him what it was. Defendant answered that it was "meth." Cecil then retrieved the bottle and, observing a substance therein that appeared to be crystal methamphetamine, they performed a full search of Defendant's person. The officer located a small plastic bag containing what he believed to be cocaine. Defendant was arrested for possession of methamphetamine and cocaine, handcuffed, and placed in the back of Cecil's patrol car. At that time, Cecil and other officers searched Defendant's vehicle, including his coat and a bag lying in the rear passenger area, and discovered more narcotics, drug paraphernalia, and another weapon.

The trial court issued oral findings consistent with the above-articulated facts and conclusions of law that the stop of the vehicle was based on reasonable suspicion and therefore lawful; the pat-down search of Defendant was lawful as a proper Terry frisk; and that the vehicle search was proper under *Arizona v. Gant*, 566 U.S. ——, 173 L. Ed. 2d 485 (2009), because it was reasonable for the officer to believe Defendant's car contained evidence of the offense of arrest. Further concluding that none of Defendant's Fourth Amendment rights had been violated, the trial court denied the suppression motion. Defendant then pled guilty to the offenses as charged but reserved his right to appeal the court's ruling on his motion to suppress the evidence. Defendant now appeals.

In addressing the denial of Defendant's suppression motion, we must limit our review to a determination of whether the trial court's findings of fact are supported by competent evidence and whether those findings support its conclusions of law. *State v. Cooke*, 306 N.C.

132, 134, 291 S.E.2d 618, 619 (1982). Here, Defendant poses no challenge to the trial court's findings of fact, which are therefore "deemed to be supported by competent evidence and are binding on appeal." *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (2004). Accordingly, our review is confined to the correctness of the trial court's ultimate legal conclusions, a question of law which is fully reviewable *de novo*. *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005).

Although Defendant assigned error to the conclusion that the initial seizure of his vehicle was lawful, he does not address the constitutionality of the stop in his brief and accordingly abandons this argument. *See* N.C.R. App. P. 28(a) ("Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned."). Rather, his sole challenge is that the pat-down search, or "weapons frisk" by Cecil was not supported by a reasonable suspicion that Defendant was presently armed and dangerous, such that the evidence discovered during the subsequent search of Defendant's person and vehicle constituted fruits of the poisonous tree and should have been suppressed as such. We disagree.

While warrantless searches are generally per se unreasonable under the Fourth Amendment, the United States Supreme Court recognized a limited exception in *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968). *See* U.S. Const. amend. IV (protecting "[t]he right of the people to be secure in their persons . . . against unreasonable searches"); *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69 (1994) ("[The Fourth Amendment] is applicable to the states through the Due Process Clause of the Fourteenth Amendment."). It is now well established that during a lawful stop, "an officer may conduct a pat down search, for the purpose of determining whether the person is carrying a weapon, when the officer is justified in believing that the individual is armed and presently dangerous." *State v. Sanders*, 112 N.C. App. 477, 480, 435 S.E.2d 842, 844 (1993) (citing *Terry*, 392 U.S. at 24, 20 L. Ed. 2d at 908). Thus, this Court has held:

> Although a routine traffic stop does not justify a protective search for weapons in every instance, once the defendant is outside the automobile, an officer is permitted to conduct a limited pat down search for weapons if he has a reasonable suspicion based on articulable facts under the circumstances that defendant may be armed and dangerous.

State v. Briggs, 140 N.C. App. 484, 488, 536 S.E.2d 858, 860 (2000). In determining the reasonableness of a weapons frisk, we are guided by the *Terry* standard, adopted by our Supreme Court in *State v. Peck*, 305 N.C. 734, 291 S.E.2d 637 (1982), and must resolve " 'whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.' " *Sanders*, 112 N.C. App. at 481, 435 S.E.2d at 844-45 (quoting *Peck*, 305 N.C. at 742, 291 S.E.2d at 642). Accordingly, "[t]he officer need not be absolutely certain that the individual is armed[.]" *Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909. Rather, the officer is "entitled to formulate 'common-sense conclusions' about 'the modes or patterns of operation of certain kinds of lawbreakers' " in reasoning that an individual may be armed. *State v. Butler*, 331 N.C. 227, 234, 415 S.E.2d 719, 723 (1992) (quoting *United States v. Cortez*, 449 U.S. 411, 418, 66 L. Ed. 2d 621, 629 (1981)). Ultimately, the determination of whether an officer was justified in conducting a pat-down frisk as a matter of self-protection hinges on the totality of the circumstances. *See id.* at 233, 415 S.E.2d at 722.

Here, Cecil approached Defendant's vehicle following a lawful traffic stop and initially became "kind of on guard" when he observed the driver, subsequently identified as Defendant, holding both of his hands out of the window. Unprompted by the officer, Defendant immediately notified Cecil that he had a gun sitting on the dashboard of the car. Cecil testified that the gun, thereafter determined to be a loaded .25-caliber handgun, raised his concerns "for officer's safety purposes." The fact that Defendant removed his coat before exiting the vehicle further aroused Cecil's suspicions, leading the trial court to find "that with the knowledge of the gun in the car and with the suspicious nature of taking the coat off, the officer told the defendant he was going to pat him down for officer's safety and proceeded to do a Terry pat-down." However, Defendant argues that it is these precise facts which rendered unreasonable Cecil's suspicion that Defendant was presently armed and dangerous because his actions demonstrate that "[h]e immediately took steps to show the officer that he did not want to pose any threat." Defendant maintains that his cooperative conduct exhibited nothing dangerous or potentially so and that the pat-down search was accordingly unwarranted. Attempting to minimize the impact that the loaded handgun could have had on a prudent officer's safety concerns, Defendant suggests that the discovery of an admittedly unconcealed weapon—which was then located and retrieved by law enforcement—could not support a reasonable

suspicion that he may still be presently armed and dangerous, i.e. that Defendant may have been in possession of another weapon. To the contrary, Cecil testified that he has been trained to treat situations in which there is one weapon with the awareness "that there could possibly be other weapons."[1] Moreover, Defendant cites no authority in support of the proposition that the discovery of one weapon would not justify a reasonable suspicion that a suspect may remain dangerous.

While it does not appear that our courts have addressed this exact argument, the United States Supreme Court and other jurisdictions have found the confirmed presence of a weapon to be a compelling factor. *See Michigan v. Long*, 463 U.S. 1032, 1050-51 & n.15, 77 L. Ed. 2d 1201, 1220-21 & n.15 (1983) (concluding a car frisk was supported by reasonable suspicion because one weapon had already been found and, noting the same analysis would apply to justify the frisk of the defendant's person conducted only after the knife was discovered, "the officers did not act unreasonably in taking preventive measures to ensure that there were no other weapons within [his] immediate grasp"); *United States v. Vinton*, 594 F.3d 14, 20 (D.C. Cir. 2010) (stating " '[t]he presence of one weapon may justifiably arouse concern that there may be more in the vicinity' " and thus concluding that "[a]lthough [the officer] removed this knife and placed it out of arm's reach on the roof of [the defendant's] car, he was justifiably concerned that additional weapons might be hidden elsewhere in the vicinity").

We agree that an already discovered weapon is a crucial factor supporting reasonable suspicion to conduct a *Terry* frisk, even where that weapon is secured and out of the defendant's reach. Moreover, Cecil was entitled to formulate "common-sense conclusions," based upon an observed pattern that one weapon often signals the presence other weapons, in believing that Defendant, who had already called the officer's attention to one readily visible weapon, might be armed. The combination of this loaded handgun, the late hour, the odd manner by which Defendant and his passenger continued to look at Cecil as they passed the officer, and the unusual gesture of Defendant placing his hands out of his window, gave rise to far more than a hunch that Defendant might have been armed. *Cf. State v. Young*, 148 N.C. App. 462, 468, 559 S.E.2d 814, 819 (2002) (considering the officer's testimony that "defendant's unusual behavior caused him to 'heighten

1. In fact, another weapon—a throwing knife—was indeed discovered on the floorboard in the rear of the vehicle.

[his] sense of safety' "). The totality of the circumstances "viewed from the common-sense perspective of a law enforcement officer," supports the conclusion that Cecil had reasonable grounds to believe that his safety was in danger, "even in the face of an otherwise cooperative defendant." *State v. McRae*, 154 N.C. App. 624, 630, 573 S.E.2d 214, 219 (2002). As such, we hold that the specific, articulable facts, as found by the trial court, are sufficient to support Cecil's reasonable suspicion that Defendant was armed and presently dangerous after exiting his vehicle and the conclusion that the pat-down frisk was constitutional.

Defendant contends that the bottle containing methamphetamine and the evidence uncovered in the resulting vehicle search should be suppressed, but he premises this challenge solely on the notion that the pat-down search of his person was unreasonable. Our conclusion that the frisk of Defendant was lawful disposes of this argument because the fruits therefrom were not poisoned by any constitutional violation under *Terry* and its progeny. Defendant does not address the trial court's conclusion that the vehicle search for evidence of the offense of arrest was proper under *Gant*, 566 U.S. ——, 173 L. Ed. 2d 485, and, therefore, we do not revisit that issue on appeal.

Accordingly, we affirm the trial court's denial of Defendant's motion to suppress.

Affirmed.

Judges GEER and JACKSON concur.

STATE OF NORTH CAROLINA v. BRIAN LAMONT HARGROVE

No. COA08-1538

(Filed 17 August 2010)

Appeal and Error— preservation of issues—failure to object at trial—double jeopardy

Although defendant contended the trial court erred by denying his motion to dismiss the charges of robbery with a dangerous weapon and noncapital first-degree murder based on double jeopardy when his prior trial on the same charges ended in a mistrial, defendant failed to preserve this claim by failing to

object to the trial court's termination of the first trial by a declaration of a mistrial.

Appeal by defendant from judgment entered 20 March 2008 and order entered 25 March 2008 by Judge Paul G. Gessner in Superior Court, Vance County. Heard in the Court of Appeals 18 August 2009.

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

Jarvis John Edgerton, IV, for defendant-appellant.

WYNN, Judge.

"[A] defendant is not entitled by reason of former jeopardy to dismissal of the charge against him, where he failed to object to the trial court's termination of his first trial by a declaration of mistrial."[1] In the present case, Defendant Brian Lamont Hargrove argues that the trial court erred in denying his motion to dismiss the charges against him on the grounds of double jeopardy, when his prior trial on the same charges ended with the declaration of a mistrial. Because Defendant failed to object to the declaration of a mistrial, Defendant failed to preserve his claim. We therefore dismiss Defendant's appeal.

On 25 July 2005 Defendant was indicted for robbery with a dangerous weapon and first degree murder. Defendant filed a motion to declare the case noncapital on 20 June 2006. On 25 July 2006, the Vance County District Attorney filed a motion consenting to declare the case noncapital. Defendant was first tried in February 2008. The State's evidence in that case tended to show the following:

Samir Harith Abdul Rasheed was found dead in his home on 29 March 2004. At the time his body was discovered, Rasheed was renting a mobile home on or near Vincent Hoyle Road. It was determined that Rasheed's death was caused by two gunshot wounds, one to the left cheek and one to the abdomen. At the scene, officers found several .357 SIG shell casings.

The State presented the testimony of Weldon Bullock, a captain with the Vance County Sheriff's Office. After discussing some of the ballistics evidence recovered from Rasheed's home, Bullock was asked to identify three other exhibits. These were three .357 SIG shell casings found beside a dirt path near Club Pond Road on 21 June

1. *State v. Lachat*, 317 N.C. 73, 85, 343 S.E.2d 872, 878 (1986).

2005. Bullock testified that all of these items were obtained from Officer Cordell.

The State later called J. M. Cordell. Cordell testified that in 2004 and 2005 he was employed as Chief Investigator with the Vance County Sheriff's Department. Cordell stated that the first time he went to Club Pond Road he was responding to a call from Detective Allman, who reported that he had observed a box of .357 SIG bullets on top of a refrigerator in a residence on Club Pond Road. Cordell went to the vicinity and found three spent .357 SIG casings on a dirt path that runs off the end of Club Pond Road. Cordell stated that Defendant was living in a nearby house at the time.

On cross-examination, Cordell stated that the investigative report on the shell casings found on Club Pond Road was part of the Sheriff's Department file in this case. Defense counsel told the trial court that the report and the photographs of the shell casings found on Club Pond Road had not been turned over by the State in discovery. The trial court instructed the prosecutor to produce the report, and declared a recess.

When court reconvened, the prosecutor informed the trial court that he was unable to locate any additional report or photographs. The judge informed the attorneys that he would see them in chambers. During the conference, the judge asked whether the State or Defendant was going to request a mistrial. Neither attorney moved for a mistrial at that time. Court reconvened and Defense counsel asked for another recess to research what to do at this point. The prosecutor stated that he had no objection to a recess, and asked to approach.

In the ensuing bench conference, the trial court informed Defense counsel that if he did not request a mistrial, then he would be engaging in *per se* ineffective assistance of counsel. The judge informed the prosecutor that he was unsure what effect a motion for a mistrial by the State would have on the case. Nevertheless, Defense counsel did not move for a mistrial.

On the record, but outside of the presence of the jury, the trial court explained that he could not allow the jury to consider evidence which had not been provided to Defendant, and he could not expect the jury to disregard "the connection between the discovery of the unique bullets on the refrigerator and the bullets that were allegedly used in the murder[.]" The judge then stated "the Court, of its own motion . . . would declare a mistrial in this case."

The jury was brought into the courtroom. The trial court explained that the law requires full disclosure by the State, and under these circumstances the judge would have to ask the jury to disregard Cordell's testimony. The trial court stated "I can't put you in that position, because it—it would be extremely difficult for anyone to remain fair and impartial, having heard some testimony which I consider to be critical in the case, and having to disregard that evidence with respect to the trial of the case." The trial court stated that it had therefore declared a mistrial. The trial court then dismissed the jury.

The State gave notice to Defendant that it intended to try him again on the same charges. On 6 March 2008 Defendant filed a motion to dismiss on the grounds of double jeopardy. A hearing on the motion was conducted on 13 March 2008. The judge reserved ruling on the motion. Defendant was tried at the 17 March 2008 Criminal Session of Vance County Superior Court. At trial, the State presented the testimony of, among others, Rashad Coleman, a witness to Defendant's shooting the victim. A jury found Defendant guilty of robbery with a dangerous weapon and second degree murder. On 25 March 2008 the trial court entered a written order denying Defendant's motion to dismiss.

On appeal, Defendant argues that the trial court violated his constitutional right to be free from double jeopardy. Defendant first argues that the trial court erred in declaring a mistrial in the absence of manifest necessity, thereby subjecting him to double jeopardy. Defendant argues further that the motion hearing court erred in failing to review the trial court's conclusion that it was impossible to proceed with the first trial in conformity with law.

Preliminarily we address the question of whether Defendant preserved the issue he now seeks to appeal. Our Supreme Court "held in *State v. Odom*, 316 N.C. 306, 341 S.E.2d 332 (1986), a noncapital case, that a defendant is not entitled by reason of former jeopardy to dismissal of the charge against him, where he failed to object to the trial court's termination of his first trial by a declaration of mistrial." *State v. Lachat*, 317 N.C. 73, 85, 343 S.E.2d 872, 878 (1986). Our Supreme Court indicated in *Lachat* that a different rule would apply in capital cases, when the trial court provided the defendant no opportunity to object by prior notice or warning. *Id.* at 85-86, 343 S.E.2d at 878-79.

Here, pursuant to the prosecutor's consent to Defendant's pre-trial motion to declare the case noncapital, Defendant's trial was

a noncapital case. *See id.* at 86, 343 S.E.2d at 879. (noting that the State's stipulation caused case to lose its capital nature); *see also* N.C. Gen. Stat. § 15A-2004(a) (2009) ("The State, in its discretion, may elect to try a defendant capitally or noncapitally for first degree murder[.]"). Defendant is therefore not entitled to the *Lachat* exception to the *Odom* waiver rule when the case is capital.

Defendant posits that *Lachat* provides an alternative avenue to the exception when a defendant does not have the opportunity to object to the declaration of a mistrial. Contrary to Defendant's assertion, however, Defendant clearly had the opportunity to object in this case. The trial court first raised the issue of a mistrial in chambers with the attorneys, and again at the bench-conference. Defense counsel was thereby notified that the trial court was considering a mistrial. The trial court then explained its decision to the attorneys on the record before the jury entered the courtroom and was informed of the mistrial. At no point during the conferences with the judge, during the trial court's announcement to the attorneys, or during the trial court's explanation to the jury did Defendant object to the mistrial. Nor did Defendant request an opportunity to be heard on the matter. By failing to object when his first noncapital trial was terminated, Defendant failed to preserve his claim that he is entitled by reason of former jeopardy to dismissal of the charges against him. *See Odom*, 316 N.C. at 311, 341 S.E.2d at 335.

APPEAL DISMISSED.

Judges STROUD and BEASLEY concur.

Judge WYNN concurred in this opinion prior to 9 August 2010.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 AUGUST 2010)

BLEVINS WORKSHOP, INC. v. WILLIAMS No. 09-1325	Alleghany (08CVD153)	New trial
CHLEBOROWICZ v. INLET POINT HARBOR BOAT OWNERS ASS'N No. 09-337	New Hanover (07CVS1479)	Affirmed in part, remanded in part
CROCKER v. CROCKER No. 09-501	Catawba (05CVD321)	Reversed and Remanded
CROSLAND ARDREY WOODS, LLC v. BEAZER HOMES CORP. No. 09-880	Mecklenburg (08CVS12240)	Affirmed
GARDNER v. MCLEAN FOODS, INC. No. 09-1373	NC Industrial Commission (780073) (632226)	Affirmed in Part, Reversed in Part and Remanded
IN RE FORECLOSURE OF GILMORE No. 09-1676	Forsyth (08SP2726)	Reversed
IN RE H.F. No. 10-259	Orange (07JA166)	Affirmed in part, reversed and remanded in part
IN RE J.T.S. No. 09-1398	Buncombe (08JB439)	Affirmed
IN RE K.S. & K.S. No. 10-371	Mecklenburg (07JT1055) (07JT1054)	Affirmed
IN RE M.T. No. 10-395	Guilford (06JT317)	Affirmed
IN RE N.M-B. No. 10-441	Mecklenburg (09JA572)	Affirmed
LAWRENCE v. ALEJANDRO No. 09-395	Durham (07CVS6052)	Reversed and Remanded
SLAWEK v. SLAWEK No. 09-1682	Henderson (00CVD598)	Affirmed

STATE v. ANDERSON No. 10-133	Mecklenburg (08CRS222035)	No Error
STATE v. ARMSTRONG No. 09-1649	Edgecombe (06CRS50822)	No Error
STATE v. BEAL No. 09-1318	Scotland (07CRS51845-46)	Dismissed
STATE v. BRATTON No. 09-1627	Forsyth (08CRS59127-30)	No prejudicial error
STATE v. GOMEZ No. 09-1392	Watauga (08CRS50297) (08CRS50300) (08CRS50291-92)	No prejudicial error
STATE v. HOBGOOD No. 10-55	Granville (07CRS53394)	New trial
STATE v. JACKSON No. 09-1231	Guilford (07CRS102528)	New trial
STATE v. JARRETT No. 09-1635	Jackson (07CRS50410-11) (07CRS50415) (07CRS2641)	New trial in part; vacated in part; no error in part
STATE v. LEWIS No. 08-1595	Avery (02CRS51201) (03CRS247) (02CRS51200)	Reversed and Remanded
STATE v. MILLNER No. 09-1538	Mecklenburg (08CRS220504) (08CRS220501-02)	No Error
STATE v. MINTON No. 10-85	Orange (09CRS51402)	No Error
STATE v. ROSS No. 09-1617	Lincoln (05CRS51310) (05CRS51328) (05CRS51314)	No Error
STATE v. RUCKER No. 09-1389	Forsyth (07CRS51937-39)	No Error
STATE v. WELCH No. 09-1512	Mecklenburg (08CRS213626)	No Error

STATE v. WILLIAMS No. 09-1095	Mecklenburg (08CRS40873) (08CRS210234)	Dismissed in part; no error in part
WARD v. JETT PROPS., LLC No. 09-1405	Forsyth (07CVD4315)	Affirmed
WOLTZ v. TAYLOR No. 09-847	Haywood (08CVS345) (07CVS923)	Affirmed

STATE OF NORTH CAROLINA v. NATHAN DARNELL WILLIAMSON

No. COA09-1475

(Filed 7 September 2010)

1. Robbery— inoperable gun—instruction—not given

Defendant was not entitled to an instruction on common law robbery or to the dismissal of two counts of robbery with a dangerous weapon where the jury was not presented with evidence that his gun was unloaded or inoperable.

2. Criminal Law— motion for appropriate relief—newly discovered evidence—truthfulness—burden not met

The trial court correctly determined that a defendant making a motion for appropriate relief did not meet his burden of proof in establishing that newly discovered evidence was probably true. The issue largely turned upon the credibility of a witness; such questions were best left for the trial court.

3. Criminal Law— motion for appropriate relief—newly discovered evidence—due diligence—burden not met

A defendant making a motion for appropriate relief based on newly discovered evidence did not establish due diligence where the State had placed a witness's statement in the courthouse mailbox of defendant's attorney the day before trial, defense counsel did not check his mailbox until the trial was over, and defense counsel independently interviewed the witness without asking the key question.

4. Criminal Law— motion for appropriate relief—newly discovered evidence—findings and conclusions—not written

The trial court did not err by failing to enter a written order containing its findings of fact and conclusions of law when it denied defendant's motion for appropriate relief. Neither statute nor precedent required written findings or conclusions, and there was no reason that oral findings and conclusions would frustrate appellate review.

Judge WYNN dissenting prior to 10 August 2010.

Appeal by defendant from judgment entered 6 May 2009 and order entered 17 June 2009 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 27 April 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Sharon Patrick-Wilson, for the State.

Christy E. Wilhelm, for defendant-appellant.

CALABRIA, Judge.

Nathan Darnell Williamson ("defendant") appeals from (1) a judgment entered upon a jury verdict finding him guilty of two counts of robbery with a dangerous weapon and (2) the trial court's denial of defendant's post-trial motion for appropriate relief ("MAR"). We find no error at trial and affirm the trial court's denial of defendant's MAR.

I. Background

On 13 June 2009, defendant and Dorsey Lemon ("Lemon") entered T&B Amusements ("T&B") in Winston-Salem, North Carolina. Upon entering, Lemon struck employee Cecil Sanderlin ("Sanderlin") in the head with a black semiautomatic pistol. Lemon then cocked the gun in Sanderlin's face and announced, "this is a robbery." During the course of the robbery, defendant and Lemon took between five and seven hundred dollars and a radio belonging to T&B employee Ann Cheek. Once the robbery was completed, Lemon returned the gun to its owner, Jabriel Bailey, who was acting as a lookout during the robbery. The gun was never recovered by police.

Detective Phillip Cox ("Det. Cox") of the Winston-Salem Police Department was assigned to investigate the robbery. Witnesses interviewed by Det. Cox identified defendant as a participant in the robbery. Based upon this identification, Det. Cox located defendant, who voluntarily agreed to provide a statement to him. In his statement, defendant admitted his involvement in the robbery. Defendant additionally told Det. Cox that Lemon carried the gun during the robbery and that Jabriel Bailey and Donte Crews were the lookouts.

Defendant was subsequently arrested and indicted for two counts of robbery with a dangerous weapon and one count of conspiracy to commit robbery with a dangerous weapon. Defendant's jury trial in Forsyth County Superior Court began on 5 May 2009, in the afternoon. At the close of the State's evidence, defendant made a motion to dismiss all charges. The trial court allowed the motion to dismiss

for the one count of conspiracy to commit robbery with a dangerous weapon but denied the motion for the two counts of robbery with a dangerous weapon. Defendant did not present any evidence.

At the charge conference, defendant's counsel requested a jury instruction on common law robbery, contending that the State failed to prove that the gun used was actually an operational weapon. The trial court refused defendant's request.

On 6 May 2009, the jury returned a verdict finding defendant guilty of two counts of robbery with a dangerous weapon. These convictions were consolidated and defendant was sentenced to a minimum of 45 months to a maximum of 63 months in the North Carolina Department of Correction.

Following his conviction, defendant filed an MAR on 18 May 2009, based upon allegedly new evidence. In the MAR, defendant asserted that on 4 May 2009, the State obtained a statement from Lemon that the handgun he used in the robbery was inoperable and unloaded, and that defendant's counsel, Michael Archenbronn, was not made aware of that statement until after defendant had been convicted and sentenced.

On 17 June 2009, the trial court conducted a hearing on defendant's MAR. At the hearing, it was established that after obtaining Lemon's statement that the gun used in the robbery was inoperable, the State placed a one-page report documenting Lemon's statement in defendant's counsel's mailbox located in the courthouse. Defendant's counsel did not check his mailbox either in the late afternoon on 4 May or at any time on 5 May. As a result, defendant's counsel did not obtain the State's report until after defendant had been convicted on 6 May 2009. However, defendant's counsel conceded that he had independently interviewed Lemon during the evening of the first day of trial, 5 May 2009.

Lemon testified at the hearing that the gun he used during the robbery was unloaded and missing a firing pin, making it inoperable. Lemon stated that he had not previously mentioned that the gun was inoperable "[b]ecause I robbed somebody and I had a gun. I didn't know— I didn't know the law, that even if it was broken, it could have been broken down to common law. I didn't know that. You know what I'm saying?" Defendant's counsel told the trial court that when he interviewed Lemon on 5 May, Lemon never mentioned that the gun was inoperable. Defendant's counsel also told the trial court that if he

had been aware of the information sooner, he would have called Lemon to testify at defendant's trial. The trial court denied defendant's MAR in open court. Defendant appeals.

II. Errors During Trial

[1] Defendant appeals, in part, from alleged errors during his trial. Specifically, defendant argues that the trial court erred by failing to instruct the jury on the lesser included offense of common law robbery and by denying defendant's motion to dismiss the robbery with a dangerous weapon charges. However, both arguments are essentially premised upon the evidence obtained after the trial tending to show that the gun was inoperable.

In *State v. Joyner*, our Supreme Court held that "where there is evidence that a defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon *and nothing to the contrary appears in evidence*, the presumption that the victim's life was endangered or threatened is mandatory." 312 N.C. 779, 782, 324 S.E.2d 841, 844 (1985). Defendant acknowledges that the jury was presented with no evidence at his trial that the gun was inoperable or unloaded. Since defendant presented no evidence at trial to rebut the presumption that the firearm used in the robbery was functioning properly, he was not entitled to either an instruction on common law robbery or dismissal of the two counts of robbery with a dangerous weapon. Defendant's arguments regarding errors during his trial are overruled.

III. Motion for Appropriate Relief

Defendant argues that the trial court erred by denying his MAR. We disagree.

A. Standard of Review

Upon review of the denial of a defendant's MAR, "this Court is bound by the trial court's findings of fact if they are supported by any competent evidence, and 'the trial court's ruling on the facts may be disturbed only when there has been a manifest abuse of discretion, or when it is based on an error of law.' " *State v. Doisey*, 138 N.C. App. 620, 627, 532 S.E.2d 240, 245 (2000) (quoting *State v. Harding*, 110 N.C. App. 155, 165, 429 S.E.2d 416, 423 (1993)).[1] To prevail on an MAR

1. The cases from our Courts involving a motion for appropriate relief exhibit different and conflicting standards of review. *Compare State v. Stevens*, 305 N.C. 712,

on the basis of newly discovered evidence, a defendant must establish the following factors:

> (1) that the witness or witnesses will give newly discovered evidence, (2) that such newly discovered evidence is probably true, (3) that it is competent, material and relevant, (4) that due diligence was used and proper means were employed to procure the testimony at the trial, (5) that the newly discovered evidence is not merely cumulative, (6) that it does not tend only to contradict a former witness or to impeach or discredit him, (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail.

Stukes, 153 N.C. App. at 773, 571 S.E.2d at 244 (citing N.C. Gen. Stat. § 15A-1415(c) (2001) and *State v. Britt*, 320 N.C. 705, 712-13, 360 S.E.2d 660, 664 (1987) *(superceded by statute on other grounds, as stated in State v. Defoe*, 364 N.C. 29, 35, 691 S.E.2d 1, 4 (2010)). At an MAR hearing, the defendant has the burden of establishing each of the facts essential to his claim by a preponderance of the evidence. N.C. Gen. Stat. § 15A-1420(c)(5) (2009).

In the instant case, the trial court determined that defendant did not provide sufficient evidence to establish three factors: (1) the second factor—that the evidence is probably true; (2) the fourth factor—that due diligence was used to procure the testimony at the trial; and (3) the seventh factor—that the evidence was of such a nature that a different result would probably have been reached on another trial.

B. Whether the Newly Discovered Evidence was Probably True

[2] Defendant was required to show that the newly discovered evidence was probably true. *Britt*, 320 N.C. at 713, 360 S.E.2d at 664. As the dissent acknowledges, it is for the trial court to assess the credibility of a witness. *State v. Garner*, 136 N.C. App. 1, 14, 523 S.E.2d 689, 698 (1999). However, the dissent argues that it was error to find that the evidence was probably not true when the evidence was uncontradicted at the hearing.[2]

In the instant case, Lemon made a statement to Det. Cox that the gun was inoperable and not loaded on 4 May 2009. This was appar-

720, 291 S.E.2d 585, 591 (1982) ("whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court"), *with State v. Stukes*, 153 N.C. App. 770, 773, 571 S.E.2d 241, 244 (2002) (abuse of discretion)

2. Defendant's brief does not make this argument.

ently the first time that he made that assertion, even though he had previously been charged with and pled guilty to robbery with a dangerous weapon for his conduct during the robbery. Lemon reiterated his assertion at the MAR hearing.

The evidence presented at the MAR hearing was far from being uncontradicted. Lemon had made an earlier statement to police and was interviewed by defendant's counsel during defendant's trial and made no mention of the gun being inoperable. Some of Lemon's testimony at the MAR hearing was as follows:

> Q. Did you ever tell your attorney that the gun you had that day didn't work?
>
> A. I believe I did, man, but I don't even remember who the attorney was. All he was telling me was that this robbery with a dangerous weapon was the best plea I had, that I need to take that.
>
> And I said, "I did the crime. Give me my time. I'm going to go on and get it over with and get this behind me."
>
> . . .
>
> Q. So it's your testimony today that you in fact told your attorney, who—was it Ron Short? Does that name ring a bell to you?
>
> A. I don't—I don't remember who he was. I don't—man, I don't remember nothing about what I told him, man.
>
> Q. You don't remember if you told him that the gun was inoperable?
>
> A. No, I ain't even going to say I was, because I don't even remember who this guy was.
>
> Q. You don't think that would have been an important fact to point out to your attorney?
>
> A. Man, I was just ready to get it over with, Sipprell.
>
> Q. So you pled guilty to robbery with a dangerous weapon?
>
> A. Because I robbed somebody and I had a gun. I didn't know—I didn't know the law, that even if it was broken, it could have been broken down to common law. I didn't know that. You know what I'm saying? I just—
>
> . . .
>
> Q. So now Jabriel was telling you that it was not—

A. Well, see, he showed me while he was telling me, no firing pin and no bullets.

Q. So Jabriel told you that when he gave you the gun.

A. Yeah, and I saw with my own eyes.

Q. And you didn't pass any of that information on to the police detectives in what you told them in that interview, did you?

A. And it don't look like I told them that the gun was broke, but I told them I got the gun from Jabriel.

Q. But you didn't tell that he told you it was—had no firing pin or that it was unloaded.

A. Yeah.

Q. You apparently didn't tell your attorney—

A. I didn't even tell them that the gun was broken.

Q. And you didn't tell your attorney that information, did you?

A. I mean, it doesn't say that in here, man.

. . .

Q. Right. And before—let me try and clear up something. I'm getting a little confused here. Before that last meeting, do you recall ever mentioning to anybody, law enforcement, prosecutor, anyone else, the government, that the gun did not work and was unloaded, that it was missing a firing pin and was unloaded?

A. I don't really remember if—

. . .

THE COURT: Okay. What kind of gun was it? Do you know?

THE WITNESS: I don't know what type it was or nothing like that. I don't remember. It was—it might have been in here.

THE COURT: Might have been what?

THE WITNESS: It might be in this statement.

THE COURT: Okay. I didn't see it. I was just wondering if you remember what kind of gun it was.

THE WITNESS: Nah. Nah. This all is just—I'm ready to go home, man. Are you going to let me go home?

The trial court stated that he could not find that the evidence was probably true. In doing so, he commented upon the demeanor of Lemon: "From Mr. Lemon's demeanor on the stand, Mr. Archenbronn, I can sure understand why you didn't call him as a witness after you interviewed him on the evening of, what, the 5th, or the 6th?" The combination of Lemon's prior statements, his refusal to answer whether he discussed the operability of the gun with his attorney, and his own plea of guilty to armed robbery demonstrate that his testimony that the gun was not operable was not uncontroverted.

The dissent correctly states that "[o]ur Courts have accordingly upheld the trial court's ruling on whether the probably true factor is met *when there is conflicting evidence upon which to make such a determination.*" (Emphasis in original). It goes on to assert that there was "no conflicting evidence regarding the condition of the gun." This is simply incorrect. Lemon's testimony, prior statements, and conduct were rife with contradictions. His prior statements failed to mention the inoperability of the gun. He also failed to mention the gun's inoperability when interviewed by defendant's counsel *during the trial* of the defendant. Even more disturbing and inexplicable is that Lemon apparently failed to mention that the gun was inoperable to his own counsel, and pled guilty to robbery with a dangerous weapon. As a result, we cannot say that the evidence was not uncontroverted at the MAR hearing.

Under these circumstances, we must defer to the trial court, who actually observed Lemon testify, as to whether the defendant met his burden of proof to establish the second factor of the *Britt* test. In the instant case, this issue largely turns upon the credibility of Mr. Lemon as a witness. Such questions are best left for the trial court, and not the appellate court. *See Garner*, 136 N.C. App. at 14, 523 S.E.2d at 698.

Under the dissent's analysis, any evidence presented, however incredible, would be sufficient, if uncontradicted, to satisfy the "newly discovered evidence" factor as set forth in *Britt*. We do not believe this to be the law. Evidence sufficient to establish a fact by the preponderance of the evidence pursuant to N.C. Gen. Stat. § 15A-1420(c)(5) must be credible evidence.

Finally, the dissent cites the case of *State v. Allen*, 317 N.C. 119, 124, 343 S.E.2d 893, 897 (1986) for the proposition that if there is some evidence that the firearm used in a robbery was not a dangerous weapon, it is for the jury to decide whether the firearm was a dangerous weapon. This proposition, while inherently correct in the con-

text of whether a judge should instruct the jury on the lesser offense of common law robbery in a trial, has no applicability in the current MAR proceeding. The issue before this Court is whether the defendant met his burden of proof in establishing that the "newly discovered evidence" was probably true. The trial court correctly determined that defendant failed to meet this burden.

C. Due Diligence

[3] Defendant was required to show that "due diligence was used and proper means were employed to procure the testimony at the trial." *Britt*, 320 N.C. at 713, 360 S.E.2d at 664. In finding that defendant failed to do so, the trial court noted that Lemon did not mention in his 5 May interview with defendant's counsel that the gun was inoperable and unloaded. The trial court also noted that defendant's counsel did not see the notice that was put in his mailbox on 4 May until after defendant was convicted. The trial court concluded that it could not find that defendant's counsel had exercised due diligence.

According to the testimony at the MAR hearing, the State interviewed Lemon on 4 May 2009 at approximately 11:05 p.m. The State represented to the trial court that at some point on the afternoon of 4 May 2009, a legal assistant left a one-page report in defendant's counsel's mailbox at the courthouse which read: "Dorsey Lemon said that the gun he had during the robbery did not work and was not loaded." The bottom of that report contained a Certificate of Service, which stated:

> I certify that I served a copy of this motion by:
>
> _____ delivering a copy personally to _____, attorney for defendant, or
>
> _____ placing a copy in the mail to _____, or
>
> _____ leaving a copy with the receptionist at the office of the attorney for the defendant,
>
> __x__ placing a copy in the defense attorney's mailbox maintained by the Clerk of Superior Court.

The report was filed and date stamped 3:12 p.m. on 4 May 2009. Defendant's counsel stated at the MAR hearing that he had checked his mailbox earlier on 4 May, but did not check it again later that day.

The next day, 5 May 2009, defendant's trial began shortly after 12:00 p.m. Prospective jurors were brought in and given initial instructions at 12:18 p.m. Jury selection commenced at 12:25 p.m. At 12:41 p.m., the court went into recess for lunch until 2:03 p.m. Defendant's counsel did not check his courtroom mailbox during the morning of 5 May or during the lunch recess.

After the court went into the evening recess on 5 May, defendant's counsel interviewed Lemon. Defendant's counsel told the trial court about this interview at the MAR hearing:

> Now, I will tell the court also what happened that—that evening, on Tuesday—Tuesday, on the 5th. I did actually meet with Mr. Dorsey Lemon. When I found out he was a witness, I went down to the jail and just basically said, you know, "Tell me what happened. I just want to hear the truth, and explain to me what you"—asked him if he spoke to the government. He said yes, he had talked to them. I just said, "Tell me what happened."
>
> . . .
>
> And he began to tell me what happened. Based upon what he told me, I concluded that he may not be the best witness for us. And I explained to [defendant], and we agreed that based upon how we were going to—our strategy conducting the trial, it wouldn't be probably the best to have him testify.
>
> However, Mr. Lemon never mentioned to me about the gun being inoperable.

This statement clearly indicates that defendant had access and opportunity to interview Lemon before defendant's trial was completed. Because Lemon had already made the statement about the inoperable nature of the gun to the State, a reasonable interview by defendant's counsel should have revealed this same information to defendant.

The dissent goes to considerable lengths to attack both the State's method of service of Lemon's statement and the State's supposed failure to mention the statement to defendant's counsel during the course of the trial. The dissent is particularly troubled by the following argument, made by the State during the charge conference:

> I think there is absolutely no evidence of anything other than robbery with a dangerous weapon in this case. There's no evidence that it was inoperable, no evidence that it was unloaded.

> The only evidence we have is that there was a gun displayed and they felt threatened and scared by that. I think there's no grounds for a common law instruction.

However, it is clear that this statement was made in reference to the evidence presented *during the course of defendant's trial*. As previously noted, defendant has conceded that there was no evidence presented at trial that the gun used during the robbery was inoperable, and the State's argument during the charge conference was consistent with that fact.

Additionally, neither the dissent, defendant's brief, nor defendant's counsel at the MAR hearing argue that placing the statement in defendant's counsel's mailbox was an invalid method of service. Rather, the argument put forth is that the delivery of the statement to defendant's counsel's mailbox was not the ideal form of service. As defendant's counsel argued at the MAR hearing:

> Your Honor, as I mentioned, it's true Mr. Sipprell—the government did leave—or his assistant did leave this notice in my box on May 4th. There's no contest that there was. I see it was date-stamped around 3:12.
>
> I'm not trying to say the government was hiding the ball on me, but I was with the government for three days—two days after that and it was never hand-delivered to me.

Defendant's counsel conceded that the State provided defendant with written notice of Lemon's statement within hours after the information was received by the State. Defendant's counsel had multiple opportunities to check his courthouse mailbox after Lemon's statement was delivered, but simply failed to do so. The dissent seeks to shift the blame for this to the State, but the State is not required to ensure that defendant's counsel actually received and reviewed information that was properly served upon him.

The evidence presented at defendant's MAR hearing fully supports the trial court's determination that defendant failed to establish the exercise of due diligence in procuring Lemon's statement. Lemon's statement was placed in the courthouse mailbox of defendant's counsel on 4 May 2009. Defendant's counsel failed to check his mailbox at the end of the day on 4 May and in the morning and during the lunch recess on 5 May. Most importantly, defendant's counsel independently interviewed Lemon on 5 May, *after Lemon had given the statement at issue to the State*. These facts were sufficient for the trial

court to conclude that defendant's counsel had not exercised due diligence in discovering the evidence provided by Lemon's statement.

Since defendant failed to establish at least two of the factors set forth in *Britt*, the trial court properly denied defendant's motion for appropriate relief. 320 N.C. at 712-13, 360 S.E.2d at 664. This assignment of error is overruled.

IV. The Trial Court's Oral Order

[4] Defendant argues that the trial court erred by failing to enter a written order containing its findings of fact and conclusions of law when it denied defendant's MAR. We disagree.

The procedural aspects of MAR proceedings are governed by N.C. Gen. Stat. § 15A-1420(c) (2009). The portions of that statute relevant to the proceedings in the instant case are as follows:

> (1) Any party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit. The court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact.
>
> . . .
>
> (4) If the court cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact. The defendant has a right to be present at the evidentiary hearing and to be represented by counsel. A waiver of the right to be present must be in writing.
>
> (5) If an evidentiary hearing is held, the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion.
>
> (6) A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443.
>
> (7) The court must rule upon the motion and enter its order accordingly. When the motion is based upon an asserted violation of the rights of the defendant under the Constitution or laws or treaties of the United States, the court must make and enter conclusions of law and a statement of the reasons for its

> determination to the extent required, when taken with other records and transcripts in the case, to indicate whether the defendant has had a full and fair hearing on the merits of the grounds so asserted.

N.C. Gen. Stat. § 15A-1420(c) (2009).

Both defendant and the dissent rely primarily upon *State v. McHone*, 348 N.C. 254, 499 S.E.2d 761 (1998) to support their contention that the trial court in MAR proceedings is required to make written findings of fact and conclusions of law. In *McHone*, the defendant appealed the trial court's summary denial, without a hearing, of his MAR. *Id.* at 256, 499 S.E.2d at 762. In his first argument, the defendant argued that because he asserted specific errors of constitutional law, he was entitled to a hearing on his MAR. *Id.* Our Supreme Court was unpersuaded by this argument, rejecting defendant's argument with, *inter alia*, the following analysis:

> N.C.G.S. § 15A-1420 provides that "[a]ny party is entitled to a hearing on questions of law or fact . . . *unless* the court determines that the motion is without merit." N.C.G.S. § 15A-1420(c)(1) (1997) (emphasis added). Subsection (c)(7) of the statute also provides that if a defendant asserts with specificity in his motion for appropriate relief that his conviction was obtained in violation of the Constitution of the United States, the defendant is entitled to have the trial court make conclusions of law and state its reasons before denying the motion. N.C.G.S. § 15A-1420(c)(7). However, we do not read subsection (c)(7) as an expansion either of defendant's right to be heard or his right to present evidence. Instead, this provision is merely a directive to the trial court to make written conclusions of law and to give its legal reasoning for entering its order, such that its ruling can be subjected to meaningful appellate review. Therefore, summary denial without conclusions and a statement of the trial court's reasoning is not proper where the defendant bases his motion upon an asserted violation of his constitutional rights.

Id. at 256-57, 499 S.E.2d at 762. After conducting further analysis of various portions of N.C. Gen. Stat. § 15A-1420(c), the *McHone* Court determined that the "[d]efendant's contention that he was entitled to a hearing and entitled to present evidence simply because his motion for appropriate relief was based in part upon asserted denials of his rights under the Constitution of the United States [was] without merit." *Id.* at 258, 499 S.E.2d at 763.

The dissent interprets the *McHone* Court's passing reference to the trial court's apparent directive to "make written conclusions of law and to give its legal reasoning for entering its order, such that its ruling can be subjected to meaningful appellate review" as creating binding precedent that requires written findings of fact and conclusions of law whenever the trial court enters an order regarding a defendant's MAR. Because the only question before the *McHone* Court was whether the defendant was entitled to an evidentiary hearing, we treat the *McHone* Court's statements regarding the nature of an order denying a defendant's MAR as dicta.

> [T]he doctrine of the law of the case contemplates only such points as are actually presented and necessarily involved in determining the case. The doctrine does not apply to what is said by the reviewing court, or by the writing justice, on points arising outside of the case and not embodied in the determination made by the court. Such expressions are *obiter dicta* and ordinarily do not become precedents in the sense of settling the law of the case.

Hayes v. Wilmington, 243 N.C. 525, 536, 91 S.E.2d 673, 682 (1956). "In every case what is actually decided is the law applicable to the particular facts; all other legal conclusions therein are but *obiter dicta*." *Id.* (internal quotations and citation omitted).

As previously noted, the *McHone* Court was not called upon to determine whether a trial court could deny a defendant's MAR with either oral or written findings of fact and conclusions of law; in fact, there were no questions regarding the trial court's order presented whatsoever. The questions before the *McHone* Court dealt strictly with whether a hearing was required at all. As a result, the *McHone* Court's reference to written conclusions of law did not create binding precedent on how to interpret the portion of N.C. Gen. Stat. § 15A-1420(c) directing the trial court to make findings of fact and conclusions of law.

Turning to the statute itself, we note, as does the dissent, that the statute makes no reference to "written" findings of fact or "written" conclusions of law. We decline to judicially create such a requirement, as it is a well-known rule of statutory construction 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." *State v. Jones*, 358 N.C. 473, 477, 598 S.E.2d 125, 128 (2004) (internal quotations and citation omitted).

Moreover, there is no reason why oral findings of fact and conclusions of law would frustrate our ability to conduct appellate review of the order. In the instant case, the trial court's order denying defendant's MAR appears in the transcript as follows:

> THE COURT: Okay. Well, first of all, I'll find the gun is not available. Mr. Jiraud Bailey, according to both the—Mr. Lemon's statement and the defendant, Mr. Williamson's statement, Mr. Jiraud Bailey got the gun back from Mr. Lemon during—right at the end of the robbery or shortly after it was over.
>
> . . .
>
> I'm going to find the defendant made the two statements that were introduced as A and B, and Mr. Lemon made the statement to police that were C; that during none of those three statements was there any mention of the gun being inoperable or not having a firing pin or being unloaded.
>
> Certainly, from what I've heard—and then I'll further find that the gun was returned—brought to the scene by Mr. Bailey, Jabriel Bailey, and was returned to Jabriel Bailey by Mr. Lemon shortly after the robbery; that Mr. Lemon did hold the gun during the robbery.
>
> That the defendant's role in the robbery was basically to get Mr. Lemon inside the door of the Joker Poker parlor, I guess you would say, or poker-machine parlor that was robbed, because the defendant's mother had played poker there before.
>
> Going on, though, as to the first point, one, the witness will give newly discovered evidence, yeah, I think that's newly—new evidence. It was not mentioned anytime before the 4th of May of nineteen—of 2009, so as of May 4th 2009, it was newly discovered evidence.
>
> Two, the newly discovered evidence is probably true. I cannot find that this evidence is probably true.
>
> From Mr. Lemon's demeanor on the stand, Mr. Archenbronn, I can sure understand why you didn't call him as a witness after you interviewed him on the evening of, what, the 5th, or the 6th?
>
> . . .
>
> Okay. Second, that the newly discovered evidence is competent, material, and relevant. It is certainly—whether or not the gun was

loaded or whether or not Mr. Lemon says the gun was loaded was competent, material, and relevant.

That due diligence was used and proper means were employed to procure the testimony at trial.

Well, Mr. Archenbronn, you interviewed Mr. Lemon on the evening of—during the middle of the trial on the evening of the 5th. Is that right?

MR. ARCHENBRONN: That is correct, Your Honor. I did.

THE COURT: Yeah. And I don't know what was said during the interview, but Mr. Lemon didn't mention to you that the gun was inoperable and unloaded, so—I mean, you did what you should do in interviewing Mr. Lemon.

As to whether you should have asked that question or not, I don't—you know, you hadn't seen the notice dated the 4th of May that was put in your box on the 4th of May. So I can't find that due diligence was used.

I will find the newly discovered evidence is not merely cumulative. The newly discovered evidence does not tend only to contradict a former witness or to impeach or discredit witnesses.

And I cannot find that the newly discovered evidence is of such a nature as to show that on another trial a different result would probably be reached—or will probably be reached and that the right will prevail.

And considering this, I do consider the fact that your client made two statements that were totally admissible, Mr. Archenbronn. I think when you look at the balance, those two statements were so overwhelming that any mistake in not putting this evidence in was probably harmless.

So, one, I don't think that Mr. Lemon is—the newly discovered evidence from Mr. Lemon is probably true.

And, two, I don't believe it would result in a new trial, and I'm not—I don't believe that you've shown that due diligence was used when you got it in your box on 5/4 and interviewed him on 5/5.

While our review of this order would be improved by having the trial court's order reduced to a written order in the record on appeal, it is difficult to discern how it makes meaningful appellate review of

the order impossible. The dissent asserts that the lack of a written order somehow frustrates our review, but it provides no reason for why this is so. Indeed, the dissent discusses the trial court's findings extensively in its analysis of the trial court's denial of defendant's MAR.

The plain language of N.C. Gen. Stat. § 15A-1420(c) contains no reference to written findings, and the absence of a written order does not frustrate our review of the trial court's denial of defendant's MAR, as the transcript contains the findings and conclusions the trial court orally made in open court. Consequently, we hold that while the best practice is for the trial court to enter a written order containing its findings of fact and conclusions of law, the trial court is not required to make written findings of fact or conclusions of law when it enters an order on a defendant's MAR. This assignment of error is overruled.

V. Conclusion

Because there was no evidence presented during defendant's trial that the gun used during the robbery of T&B was inoperable, defendant was not entitled to either a jury instruction on common law robbery or dismissal of the robbery charges. Thus, defendant received a fair trial, free from error. Because defendant's counsel failed to establish (1) that the newly discovered evidence was probably true, and (2) that he exercised due diligence in discovering Lemon's statement, the trial court properly denied defendant's MAR. While it is the best practice for the trial court to enter a written order with its findings of fact and conclusions of law when ruling on a defendant's MAR, this practice is not required by the MAR statute. Consequently, the order of the trial court denying defendant's MAR is affirmed.

No error at trial.

Affirmed.

Judge STEELMAN concurs.

Judge WYNN dissents by separate opinion.

Judge WYNN dissented prior to 10 August 2010.

WYNN, Judge, dissenting.

I agree with the majority that Defendant's trial was free of prejudicial error, *based on the evidence there presented*. Insofar as the majority implicitly recognizes that Defendant was entitled to an instruction on common law robbery, *based on evidence existing at the time of his trial*, I agree also with that conclusion. *See State v. Joyner*, 312 N.C. 779, 784, 324 S.E.2d 841, 845 (1985) (common law robbery instruction required when there was evidence rifle used during robbery was unloaded and missing firing pin). I disagree, however, that the trial court did not err in denying Defendant's Motion for Appropriate Relief ("MAR"). I disagree also that N.C. Gen. Stat. § 15A-1420 does not require the trial court to enter a written order ruling upon Defendant's MAR.

Defendant was tried and convicted for armed robbery based on his admitted involvement in the 13 June 2009 robbery of T&B Amusements in Winston Salem. Defendant's accomplice in the robbery, Dorsey Lemon, carried the gun that elevated this crime from common law robbery to robbery *with a dangerous weapon*. The gun used was never recovered. The day before Defendant's trial, prosecutors interviewed Lemon and learned that the gun he carried during the robbery was unloaded and inoperable.

The prosecutor created a report detailing Lemon's statement and left it in Defense counsel's mailbox at the courthouse the afternoon before Defendant's trial. Defense counsel interviewed Lemon during a recess after the first day of trial, but Lemon did not tell Defense counsel what he had told the prosecutor regarding the gun. Based on the information he learned from Lemon, the prosecutor chose not to call him at trial. Instead he stated to the trial court:

> I think there is absolutely no evidence of anything other than robbery with a dangerous weapon in this case. There's no evidence that it was inoperable, no evidence that it was unloaded. The only evidence we have is that there was a gun displayed and they felt threatened and scared by that. I think there's no grounds for a common law instruction.

Defense counsel did not discover the report until after Defendant had been convicted. Defendant filed an MAR alleging that he was entitled to a new trial on the basis of new evidence. The trial court denied the motion.

On appeal, Defendant argues that the trial court erred by (I) denying his motion to dismiss the charges; (II) denying his request for an

instruction on common law robbery; (III) denying his MAR; and (IV) failing to file a written order with findings of fact and conclusions of law.

I & II

As the majority recognizes, Defendant's arguments regarding errors at his trial rest on evidence which Defendant did not obtain until after his trial.

"Common law robbery is a lesser included offense of armed robbery[.]" *State v. Tarrant*, 70 N.C. App. 449, 451, 320 S.E.2d 291, 293 (1984).

> The critical difference between armed robbery and common law robbery is that the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened. The use or threatened use of a dangerous weapon is not an essential element of common law robbery.

State v. Peacock, 313 N.C. 554, 562-63, 330 S.E.2d 190, 195 (1985) (citations omitted).

When a person commits a robbery with what appears to be an operable firearm, and there is no evidence presented to the contrary, the law presumes that the firearm is a dangerous weapon. *Joyner*, 312 N.C. at 782, 324 S.E.2d at 844; *State v. Thompson*, 297 N.C. 285, 288-89, 254 S.E.2d 526, 528 (1979) (basing the presumption on the Court's reluctance to intimate "that a robbery victim should force the issue merely to determine the true character of the weapon."). When there is no evidence the gun is not dangerous, a defendant is not entitled to an instruction on common law robbery. *Joyner*, 312 N.C. at 783, 324 S.E.2d at 844. But,

> [i]f there is some evidence that the implement used was not a firearm or other dangerous weapon which could have threatened or endangered the life of the victim, the mandatory presumption disappears leaving only a permissive inference, which permits but does not require the jury to infer that the instrument used was in fact a firearm or other dangerous weapon whereby the victim's life was endangered or threatened.

State v. Allen, 317 N.C. 119, 124, 343 S.E.2d 893, 897 (1986).

Thus, North Carolina law states that when there is evidence that the implement used during a robbery was not in fact a dangerous weapon, the trial court is required to instruct the jury on common law

robbery. *Joyner*, 312 N.C. at 784, 324 S.E.2d at 845-46 (instruction on common law robbery must be given when there was some evidence that the rifle used during a robbery was unloaded and the firing pin was missing); *State v. Alston*, 305 N.C. 647, 651, 290 S.E.2d 614, 616 (1982) (instruction required when witness identified the gun used during a robbery as a BB gun); *State v. Frazier*, 150 N.C. App. 416, 419-20, 562 S.E.2d 910, 913-14 (2002) (instruction required when evidence was presented that gun used during robbery was unloaded). Without such an instruction, there is a possibility that a defendant could be convicted of a crime he did not commit. *See State v. Joyner*, 67 N.C. App. 134, 136, 312 S.E.2d 681, 682 (1984) (stating evidence gun was unloaded and inoperable "tended to prove the absence of an element of the offense charged"), *aff'd*, 312 N.C. 779, 324 S.E.2d 841 (1985). It is axiomatic that the State must satisfy the jury beyond a reasonable doubt of each element of the offense charged. *State v. McArthur*, 186 N.C. App. 373, 380, 651 S.E.2d 256, 260 (2007).

In the present case, the prosecutor at the time of Defendant's trial possessed evidence that the gun used during the robbery was unloaded and inoperable, evidence which tended to prove the absence of an element of the offense charged. Notwithstanding, the prosecutor told the trial court "there is absolutely no evidence of anything other than robbery with a dangerous weapon in this case." Based on the precedent discussed above, I must agree with the majority that there was no evidence *introduced at Defendant's trial* to support an instruction on the lesser-included offense of common law robbery. Likewise, there was no evidence at trial to indicate that Defendant was entitled to a dismissal of the charge of armed robbery.

III

Defendant next argues that the trial court erred in denying his MAR on the basis of newly discovered evidence.

To determine whether a defendant should prevail on an MAR on the basis of newly discovered evidence, the trial court must consider the following factors:

> (1) that the witness or witnesses will give newly discovered evidence, (2) that such newly discovered evidence is probably true, (3) that it is competent, material and relevant, (4) that due diligence was used and proper means were employed to procure the testimony at the trial, (5) that the newly discovered evidence is not merely cumulative, (6) that it does not tend only to contradict

> a former witness or to impeach or discredit him, (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail.

State v. Stukes, 153 N.C. App. 770, 773, 571 S.E.2d 241, 244 (2002). Defendant has the burden at an MAR hearing of establishing the facts essential to his claim by a preponderance of the evidence. N.C. Gen. Stat. § 15A-1420(c)(5) (2009).

In the present case, the trial court ruled that Defendant did not satisfy (1) the second factor: that the evidence is probably true; (2) the fourth factor: that due diligence was used to procure the testimony at trial; or (3) the seventh factor: that the evidence was of such a nature that a different result would probably have been reached on another trial. The majority discusses only the second and the fourth factor, upholding the trial court's order on the basis of the trial court's determination of probable truth and due diligence. Because I would reverse the trial court, my review is perforce more expansive.

1

Regarding the second factor: that the evidence is probably true, we have recognized that "[t]he trial court is in the best position to judge the credibility of a witness." *State v. Garner*, 136 N.C. App. 1, 14, 523 S.E.2d 689, 698 (1999), *appeal dismissed, disc. review denied*, 351 N.C. 477, 543 S.E.2d 500 (2000). Our Courts have accordingly upheld the trial court's ruling on whether the probably true factor is met *when there is conflicting evidence upon which to make such a determination*.[3] *See, e.g.*, *State v. Eason*, 328 N.C. 409, 435, 402 S.E.2d 809, 823 (1991) (recanted confession); *Britt*, 320 N.C. at 717, 360 S.E.2d at 666 (recanted testimony); *Garner*, 136 N.C. App. at 13, 523 S.E.2d at 698 (recanted confession); *State v. Riggs*, 100 N.C. App. 149, 156, 394 S.E.2d 670, 674 (1990) (conflicting testimony), *disc. review denied*, 328 N.C. 96, 402 S.E.2d 425 (1991); *State v. Hoots*, 76 N.C. App. 616, 618-19, 334 S.E.2d 74, 76 (1985) (recanted statements); *State v. Carter*, 66 N.C. App. 21, 31, 311 S.E.2d 5, 11

3. In this regard the probably true factor resembles the sixth factor: that the new evidence does not tend only to contradict a former witness. The probably true factor may thus be extraneous. *See State v. Britt*, 320 N.C. 705, 713, 360 S.E.2d 660, 664 (1987) (recognizing the test as "a modification of the '*Berry*' rule, initially set forth in *Berry v. State*, 10 Ga. 511 (1851) (setting forth essentially the same prerequisites but lacking the requirement that the newly discovered evidence be 'probably true')."), *superceded by statute on other grounds, as stated in State v. Defoe*, ___ N.C. ___, ___ 691 S.E.2d 1, 4 (2010).

(recanted testimony), *disc. review denied*, 310 N.C. 745, 315 S.E.2d 705 (1984); *State v. Thompson*, 64 N.C. App. 485, 492, 307 S.E.2d 838, 843 (1983) (conflicting testimony), *cert. denied*, 313 N.C. 513, 329 S.E.2d 399 (1985).

While the credibility of witnesses remains the exclusive province of the trier of fact, I can discern no valid basis upon which a witnesses' uncontradicted testimony might be dismissed by the trial court as incredible as a matter of law at an MAR proceeding. Recognizing the potential impact of cross-examination, I recognize also that a defendant's right to exculpatory evidence does not turn on any judicial determination that it is more likely true than not. *See State v. Elliott*, 360 N.C. 400, 415, 628 S.E.2d 735, 745-46 (recognizing prosecutor's duty to turn over favorable and material evidence), *cert. denied*, *Elliott v. North Carolina*, 549 U.S. 1000, 166 L. Ed. 2d 378 (2006).

In the present case, the trial court was confronted with no conflicting evidence regarding the condition of the gun.[4] There was therefore no valid basis under the precedents examined above for the trial court to conclude that Lemon's testimony was not probably true. The majority agrees that the trial court's determination of probable truth must be predicated on some conflicting evidence. The majority insists, however, that Lemon's "evidence at the MAR hearing was not uncontradicted." It is significant to point out that despite reciting two pages of testimony, the majority does not locate any evidence that *contradicted Lemon's statement that the gun was not loaded or operational.*

In sum, the determination of whether Lemon was telling the truth—i.e. whether the gun was in fact unloaded and inoperable—should be determined by a jury in a criminal proceeding, not by a trial judge using a preponderance of the evidence standard. *See Allen*, 317 N.C. at 125, 343 S.E.2d at 897 ("If . . . there is any evidence that the weapon was, in fact, not what it appeared to the victim to be, the jury must determine what, in fact, the instrument was."). Accordingly, I would hold, that the trial court erred in ruling that the new evidence was not probably true.

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4. The trial court observed at the MAR hearing that Defendant had identified the gun as a .38. Detective Poe testified at the MAR hearing that a .38 is a revolver, not an automatic as Lemon described. This inconsistency *of type* does not constitute a contradiction of Lemon's evidence that the gun was not loaded.

Regarding the fourth factor: that due diligence was used and proper means were employed to procure the testimony at the trial, the trial court noted that Lemon did not mention in his 5 May interview with Defendant's counsel that the gun was inoperable and unloaded. The trial court noted also that Defendant's counsel did not see the notice that was put in his mailbox on 4 May until after Defendant was convicted. The trial court concluded that it could not find that due diligence was employed.

Our Supreme Court has indicated that in requesting a new trial on the basis of newly discovered evidence, "both counsel and litigants are presumed to have been properly advised in preparing for trial, and this presumption is not to be lightly overthrown or rebutted." *State v. Lea*, 203 N.C. 316, 322, 166 S.E. 292, 295, *cert. denied*, *Lea v. North Carolina*, 287 U.S. 668, 77 L. Ed. 576 (1932). In defining the proper standard by which to test this presumption of diligence, the Court stated, "[i]f it should appear that the newly discovered evidence, 'by ordinary diligence, could have been discovered and used at the hearing, or was in possession of the counsel or agent of the party,' the application will be denied." *Id.* at 322, 166 S.E. at 295-96 (quoting *Matthews v. Joyce*, 85 N.C. 258, 267 (1881)).

In *State v. Stanley*, 74 N.C. App. 178, 327 S.E.2d 902, *disc. review denied*, 314 N.C. 546, 335 S.E.2d 318 (1985), this Court considered a challenge to the trial court's denial of a defendant's MAR. *Id.* at 184, 327 S.E.2d at 906. The defendant presented new testimony at the MAR hearing of a witness who had testified at trial. *Id.* This Court affirmed the denial of the defendant's MAR in part because the defendant had already had an opportunity to question the witness during the trial about the issue, and failed to do so. *Id.* at 185, 327 S.E.2d at 907. We concluded that this represented a lack of due diligence. *Id.*; *see also State v. Dixon*, 259 N.C. 249, 251, 130 S.E.2d 333, 334 (1963) (no error in denying MAR when defendant failed to question a testifying witness regarding the evidence).

Neither of these cases involved evidence that would have entitled the defendant to a different instruction at trial. In *Stanley*, the defendant sought to introduce evidence of a similar sexual encounter by another male with the female he was accused of raping. *Stanley*, 74 N.C. App. at 184, 327 S.E.2d at 906. This Court held that the new evidence was not relevant. *Id.* at 185, 327 S.E.2d at 907. The defendant in *Dixon* was convicted of driving while under the influence, and

sought a new trial after learning that his blood sample had been destroyed prior to trial. *Dixon*, 259 N.C. at 250, 130 S.E.2d at 334. Our Supreme Court held that the defendant did not establish a single one of the seven factors. *Id.* at 251, 130 S.E.2d at 334.

In *State v. Saults*, 299 N.C. 319, 261 S.E.2d 839 (1980), our Supreme Court considered a challenge to the trial court's denial of a defendant's MAR. In that case, the defendant was convicted as an accessory to arson. *Id.* at 320, 261 S.E.2d at 840. He later filed an MAR, presenting affidavits of witnesses which tended to contradict the evidence against him. *Id.* at 321, 261 S.E.2d at 840. The trial court denied the defendant a new trial on the basis of his lack of due diligence in discovering or utilizing the evidence. *Id.* at 322, 261 S.E.2d at 841.

On appeal, our Supreme Court recognized the new evidence as relevant to the defendant's guilt. *Id.* at 322-23, 261 S.E.2d at 841. The Court then framed the issue in terms of "whether [defendant] had sufficient information so that he *should have talked* to [the newly offered witnesses] some time before" his conviction. *Id.* at 323, 261 S.E.2d at 841. Considering the evidence in terms of when it became known to the defendant, the Court concluded that the defendant had no additional "reason to believe that [the new witnesses] had relevant information that could aid him in his defense." *Id.* at 323, 261 S.E.2d at 842. The Court therefore held that the defendant was entitled to a new hearing. *Id.* at 325, 261 S.E.2d at 843.

Our Supreme Court considered another MAR in *State v. Jones*, 296 N.C. 75, 248 S.E.2d 858 (1978). The *Jones* defendant was tried for arson based on the testimony of a witness who claimed that defendant threw kerosene on the floor of their shared apartment and started a fire. *Id.* at 76, 248 S.E.2d at 859. The defendant maintained that he returned home to find the apartment in flames. *Id.* at 77, 248 S.E.2d at 859. After his conviction, the defendant learned of a police report that indicated his clothing (which had been seized) showed no evidence of the presence of kerosene or other flammable accelerants. *Id.* at 78-79, 248 S.E.2d at 860.

The State argued on appeal that the defendant failed to show due diligence because he did not make a motion to compel discovery. *Id.* at 79, 248 S.E.2d at 861. Our Supreme Court disagreed, stating that there was nothing to put the defendant on notice of the report, and that the prosecutor "was under a continuing duty to disclose relevant, discoverable information as he received it." *Id.* at 79-80, 248 S.E.2d at

861. The Court concluded that "[t]he report was clearly, on these facts, a factor which defendant was entitled to have the jury consider." *Id.* at 80, 248 S.E.2d at 861. The Court therefore granted the defendant a new trial. *Id.*

In the present case, the State did not obtain Lemon's statement until the day before Defendant was tried. At so late an hour, Defendant had no reason to believe that the State had obtained any other relevant information that could aid him in his defense. Furthermore, the report was clearly a factor which Defendant was entitled to have the jury consider. Unlike *Stanley* and *Dixon* where the defendant had an opportunity at trial to question the witness, once the prosecutor here learned of Lemon's statement regarding the gun, he chose not to call Lemon to testify in Defendant's trial. Also unlike *Stanley* and *Dixon*, the evidence in this case would have required a different instruction at trial. *Allen*, 317 N.C. at 124, 343 S.E.2d at 897; *Joyner*, 312 N.C. at 784, 324 S.E.2d at 845. On the basis of *Saults* and *Jones*, I would hold that the trial court erred in concluding that Defendant failed to show due diligence in discovering the evidence.

Moreover, cases in which a defendant's failure to establish due diligence alone justified denying him a new trial consistently involve a defendant who *knew of the evidence when he was tried*. *See State v. Powell*, 321 N.C. 364, 371, 364 S.E.2d 332, 336, *cert. denied*, *Powell v. North Carolina*, 488 U.S. 830, 102 L. Ed. 2d 60 (1988); *State v. Cronin*, 299 N.C. 229, 244, 262 S.E.2d 277, 287 (1980). Generally, we have denied other defendants new trials only when additional factors were also lacking. *See State v. Person*, 298 N.C. 765, 771, 259 S.E.2d 867, 870 (1979) (defendant failed to establish new evidence was material, competent, or relevant, that it was not merely corroborative, a different result would be reached, and due diligence); *State v. Beaver*, 291 N.C. 137, 144, 229 S.E.2d 179, 183 (1976) (defendant failed to prove new evidence would not be merely cumulative, and due diligence); *Dixon*, 259 N.C. at 251, 130 S.E.2d at 334 (defendant established not one of seven factors); *Riggs*, 100 N.C. App. at 156-57, 394 S.E.2d at 674 (defendant failed to prove evidence was probably true, not merely cumulative, a different result would be reached, and due diligence); *Stanley*, 74 N.C. App. at 185, 327 S.E.2d at 906-07 (defendant failed to establish new evidence was relevant, and due diligence); *State v. Baker*, 65 N.C. App. 430, 447, 310 S.E.2d 101, 113 (1983) (defendant failed to show a different result would be reached, new evidence tended only to contradict a former witness, and due diligence), *cert.*

denied, 312 N.C. 85, 321 S.E.2d 900 (1984); *State v. Clark*, 65 N.C. App. 286, 293, 308 S.E.2d 913, 917 (1983) (defendant failed to show new evidence was not merely cumulative, different result would be reached, and due diligence), *disc. review denied*, 310 N.C. 627, 315 S.E.2d 693 (1984); *Thompson*, 64 N.C. App. at 492, 307 S.E.2d at 843 (defendant failed to show evidence was newly discovered, that it was not merely cumulative, that it was probably true, that a different result would be reached, and due diligence).

In the present case, there is no evidence that Defendant actually knew about Lemon's statement when he was tried. Under the precedents examined above, I would hold that Defendant is entitled to a new trial.

3

Regarding element No. 7: that the evidence was of such a nature that a different result would probably have been reached on another trial, the State argues that the jury had ample evidence with which to convict Defendant. At the end of the MAR proceeding, the trial court stated. "I think when you look at the balance, those two statements [i.e. Defendant's confession] were so overwhelming that any mistake in not putting this evidence in was probably harmless."

Harmless error analysis is not appropriate in evaluating a trial court's failure, in an armed robbery prosecution, to provide an instruction on the lesser included offense of common law robbery. A defendant tried for armed robbery is entitled to an instruction on the lesser included offense of common law robbery when some evidence is presented that the apparent gun was not in fact a dangerous weapon. *See Joyner*, 312 N.C. at 784, 324 S.E.2d at 845. Granting that a trial court errs when it fails to provide such an instruction, an analysis that asks only whether the verdict was affected would render our review of such errors meaningless.

Our Supreme Court recognized this principle in *State v. Alston*. Defendants in *Alston* were tried for armed robbery. 305 N.C. at 648, 290 S.E.2d at 614. The Court held that when evidence was presented that the gun wielded was not in fact a dangerous weapon (but a BB rifle), the trial court erred in failing to instruct the jury on the lesser included offense of common law robbery. *Id.* at 651, 290 S.E.2d at 616. Defendants were granted a new trial on the basis of that error *without any inquiry into whether the requested instruction would have affected the verdict. Id.*; *see also Frazier*, 150 N.C. App. at 419-20, 562 S.E.2d at 913-14 (no harmless error analysis).

In the present case, the inquiry of how the requested instruction would affect whether Defendant is convicted of armed robbery or common law robbery is for a jury to decide. *See Allen*, 317 N.C. at 124, 343 S.E.2d at 897. Because Defendant's request for an instruction on common law robbery would have been granted had the new evidence been considered, I would hold that the trial court erred in ruling that the evidence was not of such a nature that a different result would probably have been reached on another trial. The majority does not disagree that the trial court erred in applying a harmless error standard in considering this factor.

In light of the foregoing, I would hold that the trial court erred in ruling that Defendant failed to establish all seven factors of the relevant test. I would therefore reverse the trial court's order denying Defendant's MAR. Beyond the technical considerations of precedent addressed thus far, there is a more fundamental reason to grant Defendant a new trial in this case: to prevent manifest injustice.

The record demonstrates that the prosecutor obtained a statement from Dorsey Lemon that the gun he carried in the robbery was not operational. The prosecutor created a report detailing Lemon's statement, and left it in defense counsel's mailbox at the courthouse the afternoon before Defendant's trial. Aware of what Lemon would say at Defendant's trial, the prosecutor chose not to call him as a witness, and never mentioned his statement to defense counsel during Defendant's trial. This sequence of events leads to an obvious conclusion: at the time the prosecutor told the court that there was "absolutely no evidence" that the gun was unloaded and inoperable, he was aware that defense counsel did not know of the existing evidence to the contrary.

That the prosecutor could rely on the defense attorney's ignorance of exculpating evidence strongly suggests a patent unfairness in Defendant's trial. *See State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990) ("[T]he purpose of discovery under our statutes is to protect the defendant from unfair surprise[.]"), *cert. denied*, *Payne v. North Carolina*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991). I recognize that Defendant does not here allege any violation of his right to discovery under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). I cannot ignore the fact, however, that of the available methods of delivery, the one chosen by the prosecutor here was the one calculated least likely to ensure Defendant's actual notice. Though this practice may represent adherence to the strict letter of the law, it

also comes very near to violating the spirit of fair dealing articulated in *Brady*: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.* at 87, 10 L. Ed. 2d at 218. Indeed, the record in this case "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." *Id.* at 88, 10 L. Ed. 2d at 219.

The majority holds that defense counsel failed to establish that he exercised due diligence in discovering Lemon's statement. This conclusion penalizes Defendant for the conduct of his own attorney with no consideration given to the conduct of opposing counsel. I have found no case defining due diligence where a prosecutor engages in a subtle but deliberate attempt to forestall a defendant's discovery of existing exculpatory evidence. I believe that such a scenario demands a different calculus of due diligence than is here employed. The alternative is the perpetuation of such prosecutorial gamesmanship as appears in the facts of this case. If it is legal, that does not make it just.

IV

Defendant also argues that the trial court erred in failing to file a written order with findings of fact and conclusions of law. I believe this error also militates against affirming the trial court's disposition.

At the conclusion of the MAR hearing, the trial court instructed the prosecutor to draw up an order. Although the prosecutor indicated that such an order would be drafted, it does not appear that the order was ever filed.[5] There is thus no order disposing of Defendant's MAR in the record before us.

N.C. Gen. Stat. § 15A-1420 deals with the procedure on motions for appropriate relief. That statute, in pertinent part, states:

> (4) If the court cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact. . . .
>
> . . . .
>
> (7) The court must rule upon the motion and enter its order accordingly. When the motion is based upon an asserted violation

5. Defendant asserts in his brief "[t]he Court requested a written order, which was never filed." The State does not dispute that no order was filed, and does not explain the omission.

> of the rights of the defendant under the Constitution or laws or treaties of the United States, the court must make and enter conclusions of law and a statement of the reasons for its determination to the extent required, when taken with other records and transcripts in the case, to indicate whether the defendant has had a full and fair hearing on the merits of the grounds so asserted.

N.C. Gen. Stat. § 15A-1420(c) (2009). The State contends that the trial court is not required to make written findings of fact or conclusions of law when, as here, the motion is not based upon an asserted violation of the rights of the defendant under the Constitution, laws or treaties of the United States.

"When post-conviction relief is sought by way of a motion for appropriate relief in the Superior Court, that court ordinarily must make findings of fact and conclusions of law in its order granting or denying relief." *State v. Bush*, 307 N.C. 152, 168, 297 S.E.2d 563, 573 (1982). Our Supreme Court considered the relevant statute in *State v. McHone*, 348 N.C. 254, 499 S.E.2d 761 (1998). In the context of determining whether defendant was entitled to a hearing, the Court there stated:

> Subsection (c)(7) of the statute . . . provides that if a defendant asserts with specificity in his motion for appropriate relief that his conviction was obtained in violation of the Constitution of the United States, the defendant is entitled to have the trial court make conclusions of law and state its reasons before denying the motion. . . . *[T]his provision is merely a directive to the trial court to make written conclusions of law and to give its legal reasoning for entering its order*, such that its ruling can be subjected to meaningful appellate review.

Id. at 257, 499 S.E.2d at 762 (emphasis added). The Court thus read subsection (c)(7) to require a written order, although the word "written" does not appear in that subsection.

McHone does not, however, stand for the principle that a written order is required only where a constitutional violation is alleged, as the State contends. Rather, subsection (c)(4) must be read in conjunction with subsection (c)(7). *See id.* at 257, 499 S.E.2d at 763 ("[S]ubsection [(c)(7)] of the statute must be read *in pari materia* with the other provisions of the same statute."). Subsection (c)(4) specifies that when a trial court conducts an evidentiary hearing, it

must make findings of fact. N.C. Gen. Stat. § 15A-1420(c)(4). The first sentence of subsection (c)(7) states, without reference to any alleged constitutional violation, "[t]he court must rule upon the motion and enter its order accordingly." N.C. Gen. Stat. § 15A-1420(c)(7).

Following the reasoning in *McHone*, I believe that when the trial court makes findings of fact pursuant to subsection (c)(4), it must also file a written order stating those findings. It is only thereby "that its ruling can be subjected to meaningful appellate review." *McHone*, 348 N.C. at 257, 499 S.E.2d at 762. No such order appears in the record before us.

Moreover, I disagree with the State's assertion that the trial court's findings which appear in the transcript provide a sufficient basis to overlook this error. As the State acknowledges elsewhere, the correct standard of review for the trial court's disposition of an MAR requires us to consider an order entered by the trial court. *See State v. Stevens*, 305 N.C. 712, 719-20, 291 S.E.2d 585, 591 (1982) ("In reviewing orders entered pursuant to that act, this court held that the findings of fact of the trial judge were binding upon the petitioner if they were supported by evidence."); *State v. Baker*, 312 N.C. 34, 40, 320 S.E.2d 670, 675 (1984) ("Findings of fact made by a court in its order granting or denying a motion for appropriate relief are binding on appeal if supported by evidence in the record."). We are unable to follow the prescribed standard of review in the absence of a proper order.

It follows that the trial court erred in not filing a written order as required by N.C. Gen. Stat. § 15A-1420(c)(4) & (7). In the present case, this procedural error compounds the substantive errors discussed above. I would hold that the trial court erred by denying Defendant's MAR. Accordingly, I respectfully dissent from the majority's conclusion to the contrary.

STATE OF NORTH CAROLINA v. JAMES TILTON REGISTER, DEFENDANT

No. COA09-629

(Filed 7 September 2010)

1. Criminal Law— exclusion of family members from courtroom during minor victim's testimony—sexual offenses—possible reactions

The trial court did not err in a multiple sexual offenses case involving a child by excluding members of defendant's family from the courtroom during the minor victim's testimony. There was no authority that excluding supporters of both sides, while allowing other neutral individuals to remain including a high school class, was inconsistent with N.C.G.S. § 15-166 given that the issue was the possible reaction of family members.

2. Evidence— prior crimes or bad acts—sexual abuse of other children—remoteness in time—common plan

The trial court did not abuse its discretion by denying defendant's motion for a mistrial in a multiple sexual offenses case involving a child and by allowing testimony from four individuals who claimed that defendant had sexually abused them when they were children, even though the sexual acts occurred 14, 21, and 27 years prior to the start of the alleged abuse of this minor victim. The challenged testimony was admissible under N.C.G.S. § 8C-1, Rule 404(b) because it showed a strikingly similar pattern of sexually abusive behavior by defendant for 31 years, thus providing strong evidence of a common plan.

3. Evidence— expert witness testimony—vouching for credibility of minor victim—harmless error

The trial court erred in a multiple sexual offenses case involving a child by overruling defendant's objection and denying his motion to strike expert witness testimony that what the child said was "believable." Although the testimony constituted impermissible vouching for the credibility of the minor victim, defendant failed to show prejudice given the totality of evidence of defendant's guilt.

4. Sexual Offenses— motion to dismiss—sufficiency of evidence—child's inability to testify to exact dates

A *de novo* review revealed the trial court did not err by denying defendant's motion to dismiss the charges related to offenses alleged to have occurred in November and December 2006, including first-degree statutory sex offense, sexual activity by a substitute parent, taking indecent liberties with a child, and crimes against nature. A child's inability to testify accurately as to dates of alleged sexual abuse will not, by itself, necessarily require dismissal of the charges. The minor child offered some evidence that supported the November and December charges.

Appeal by defendant from judgments entered 15 January 2009 by Judge James F. Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 28 October 2009.

Attorney General Roy Cooper, by Assistant Attorney General Sonya M. Calloway-Durham, for the State.

Geoffrey W. Hosford for defendant-appellant.

GEER, Judge.

Defendant James Tilton Register appeals from judgments convicting him of one count of attempted first degree rape, three counts of first degree statutory sex offense, five counts of taking indecent liberties with a child, one count of sexual offense by a substitute parent, and one count of crime against nature. Although defendant argues that the trial court erred in excluding defendant's family members from the courtroom during the alleged victim's testimony, we hold that the trial court, acting pursuant to its authority under N.C. Gen. Stat. § 15-166 and § 15A-1034(a) (2009), did not abuse its discretion when it decided to exclude family members of both the alleged victim and defendant with the exception of the alleged victim's mother and step-father.

Defendant also contends that the court erred in allowing the testimony of four witnesses who asserted that defendant had sexually abused them when they were children. Because this evidence tended to show that defendant had engaged in strikingly similar conduct whenever he had access to young relatives of a wife, we hold that the testimony was properly admitted under Rule 404(b) of the Rules of Evidence even though it involved conduct extending over a very substantial period of time. We agree with defendant, however, that

the trial court erred in admitting testimony from the State's expert witness that the alleged victim was "believable." Nonetheless, given the extensive evidence of guilt, we must conclude that this error was harmless. Accordingly, we uphold the judgments entered below.

Facts

At trial, the State's evidence tended to establish the following facts. Catherine[1] was just starting third grade when her mother began dating defendant. He moved in with Catherine and her mother shortly afterwards, in October 2003. Catherine considered defendant to be her "real dad" because he was "the only thing [she] had close to a father because [her] father was not there."

Not long after defendant moved in, he began engaging in sexual acts with Catherine. After Catherine came home from school, defendant would have her sit in his lap, and he would put his hands on her hips and move her bottom around on his lap. As time progressed, defendant started "doing more things," including approximately 20 to 25 instances of cunnilingus, 15 to 20 instances of his rubbing his penis against her vagina, one instance of his rubbing his penis against her bottom, occasional times when defendant made her rub his penis with her hands, and one "tongue-kiss[]." These incidents occurred when defendant and Catherine were home alone while Catherine's mother was away at work and almost always in Catherine's mother's bedroom.

Sometime in the summer of 2005, following an argument with Catherine's mother, defendant moved out of the house and into a trailer about 15 minutes away. Catherine visited defendant at the trailer on some weekends. Defendant performed cunnilingus on her approximately five to 10 times during the visits. Additionally, defendant rubbed his penis on her vagina once while the two of them were staying at a hotel when defendant took Catherine on an overnight trip to visit the zoo.

Defendant and Catherine's mother eventually reconciled and were married in June 2006, after which defendant moved back into the house and continued to engage in sexual conduct with Catherine. Five to 10 more incidents occurred, mostly involving cunnilingus. Once, however, defendant made Catherine perform fellatio on him.

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1. The pseudonym "Catherine" is used throughout this opinion to protect the minor's privacy and for ease of reading.

On the evening of 24 January 2007, defendant had been rubbing his penis on Catherine's vagina for a few minutes when a friend of Catherine's called to tell her it was time to go to their dance class. Defendant answered the phone, and after the call, he continued to rub his penis on Catherine for a couple more minutes. Afterwards, according to Catherine, "there was stuff down there, sperm, down on [her] vagina" that "felt like slime, like grease" and "looked like slime, like gooey . . . like snot." Catherine cleaned herself up, changed clothes, and went to dance class.

After class, Catherine came home and told her mother that defendant "had been doing nasty stuff" to her. Her mother then took Catherine to Cape Fear Valley Hospital, where a rape examination was performed, and the police were contacted.

On 29 October 2007, defendant was indicted for one count of attempted first degree rape, one count of attempted first degree statutory sex offense, four counts of first degree statutory sex offense, seven counts of taking indecent liberties with a child, two counts of sexual activity by a substitute parent, two counts of crime against nature, and two counts of first degree statutory rape.

The case came on for trial on 12 January 2009, when Catherine was 13 years old. After the State rested, defendant moved to dismiss all charges based on insufficiency of the evidence. The trial court dismissed one count of attempted first degree statutory sex offense, one count of first degree statutory sex offense, one count of sexual offense by a substitute parent, two counts of indecent liberties with a child, one count of crime against nature, and two counts of first degree statutory rape. The court denied the motion as to one count of attempted first degree rape, three counts of first degree statutory sex offense, five counts of taking indecent liberties with a child, one count of sexual offense by a substitute parent, and one count of crime against nature.

The jury convicted defendant of all the remaining charges. The court sentenced defendant to concurrent presumptive-range terms of (1) 189 to 236 months for one count of attempted first degree rape and one count of taking indecent liberties with a child; (2) 19 to 23 months for one count of taking indecent liberties with a child; and (3) six to eight months for one count of crime against nature. The trial court also sentenced defendant to a presumptive-range term of 288 to 355 months for one count of first degree statutory sexual offense and one count of indecent liberties to run consecutive to the attempted

first degree rape sentence. Following that sentence is a consecutive presumptive-range term of 288 to 355 months for one count of first degree statutory sexual offense and one count of indecent liberties, which in turn is followed by a consecutive presumptive-range sentence of 288 to 355 months for one count of first degree statutory sexual offense, sexual offense by a substitute parent and one count of indecent liberties. Defendant timely appealed to this Court.

I

[1] Defendant first argues that when, "[u]nder the auspices of sequestering witnesses, the trial court excluded all of the members of [defendant's] family" during Catherine's testimony, the court denied defendant a "fair trial because, during this crucial testimony, he had no one there on his behalf as support." At trial, the State requested that a "sequestration order apply to all those with the exception of [the] investigator" and possibly Catherine's mother. The State explained to the trial court that Catherine was only 13, she had been even younger when the abuse occurred, and the State was "trying to . . . prevent her from having to have to testify in a hostile environment with [defendant's] family sitting behind him." In response, defense counsel offered, "I think you could keep it from being a hostile environment. . . . I expect . . . my client's family to—to act appropriately in the courthouse towards this witness."

The trial court then ruled that it would allow no one in the courtroom during Catherine's testimony except for her mother, her stepfather, and an investigator for each side. On the day of Catherine's testimony, defendant repeated his objection, but the trial court left its "ruling in effect." The court, however, permitted a high school class of juniors and seniors to observe the proceedings, including Catherine's testimony. Defendant argues that the trial court's decision to permit a high school class to observe Catherine's testimony further "illustrates the lack of a reasoned basis for the court's decision."

At the outset, we note that the State, in making its motion, misidentified the relief it was seeking as "sequestration." Sequestration refers to the exclusion of witnesses from the courtroom until they testify. *See* N.C. Gen. Stat. § 15A-1225 (2009) ("Upon motion of a party the judge may order all or some of the witnesses other than the defendant to remain outside of the courtroom until called to testify, except when a minor child is called as a witness the parent or guardian may be present while the child is testifying even

though his parent or guardian is to be called subsequently."). Here, the trial court did not just exclude witnesses, but rather excluded everyone except certain designated individuals and the high school class. The trial court's ruling was actually pursuant to the court's authority under N.C. Gen. Stat. § 15-166 and N.C. Gen. Stat. § 15A-1034(a).

N.C. Gen. Stat. § 15-166 provides that "[i]n the trial of cases for rape or sex offense or attempt to commit rape or attempt to commit a sex offense, the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case." N.C. Gen. Stat. § 15A-1034(a) also gives the trial court the authority to "impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings or the safety of persons present."

While defendant contends that the trial court's order was subject to the requirements for closing a courtroom set out in *Waller v. Georgia*, 467 U.S. 39, 81 L. Ed. 2d 31, 104 S. Ct. 2210 (1984), that decision related to the Sixth Amendment right to a public trial. *Id.* at 44, 81 L. Ed. 2d at 37, 104 S. Ct. at 2214. Defendant has not, however, argued that he was denied a public trial. Instead, without citing any authority, defendant asserts that (1) he was denied "a fair trial because, during this crucial testimony, he had no one there on his behalf as support[,]" (2) defendant "could not receive a fair trial when his family was forced out of the courtroom during the presentation of the State's most critical evidence[,]" (3) "[t]his ruling denied [defendant] due process of law[,]" and (4) a victim's being required to testify with a defendant's family present "is part of the adversarial process and part of guaranteeing criminal defendants a fair trial."

To the extent that defendant is arguing that he had a constitutional right to have his family present, that argument was not made at trial, and we will not, therefore, consider it for the first time on appeal. *See State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.").

With respect to non-constitutional arguments, defendant asserts that allowing members of the general public to remain while his "supporters" were excluded "is clearly not authorized" by N.C. Gen. Stat. § 15-166. We first note that whether a trial court could, under that statute, exclude only a defendant's "supporters" is not at issue in

this appeal. The trial court excluded "supporters" of both defendant and the alleged victim, with the exception of Catherine's mother and step-father.[2] Defendant has cited no authority that excluding "supporters" of both sides while allowing other neutral individuals to remain is inconsistent with N.C. Gen. Stat. § 15-166, and we have found none.

We do not believe that the language of the statute precludes such a ruling, especially in light of N.C. Gen. Stat. § 15A-1034(a), which grants the trial court authority to restrict access to the courtroom to ensure orderliness in the proceedings. Here, the State based its motion on its concern about Catherine, who was 13 years old, being confronted with "a hostile environment with [defendant's] family sitting behind him." The trial court chose to exclude everyone, not just defendant's family, with the exception of Catherine's mother. Our review of the transcript indicates that the trial court was very concerned about the potential for outbursts or inappropriate reactions by supporters of both defendant and the alleged victim, and the court in fact admonished family members at the start of the trial to control their reactions. While we do not judge a ruling in hindsight, we note that the trial court had to admonish family members at other times in the trial, and defendant even requested that the trial court take action.

As this Court pointed out in *State v. Dean*, 196 N.C. App. 180, 674 S.E.2d 453, *appeal dismissed and disc. review denied*, 363 N.C. 376, 679 S.E.2d 139 (2009), when it reviewed a trial court's decision to remove certain spectators from the courtroom, because a transcript is " 'an imperfect tool for conceptualizing the events of a trial,' " *id.* at 189, 674 S.E.2d at 460 (quoting *State v. Lasiter*, 361 N.C. 299, 305, 643 S.E.2d 909, 912 (2007)), we must leave "much . . . to the judgment and good sense of the judge who presides over [the trial]," " *id.* (quoting *State v. Laxton*, 78 N.C. 564, 570 (1878)).

In this case, the experienced trial judge was in a position to observe the dynamics of the courtroom and anticipate the possibility of a disruption by the families on both sides during the course of Catherine's testimony. Although we agree that it is unusual that the trial court allowed the high school class to stay, we cannot conclude that the trial judge's decision was unreasonable given that the issue

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2. The trial court's ruling allowed Catherine's step-father to stay, but the State states that only her mother was present. We have not been able to determine from the record whether the step-father in fact remained in the courtroom.

was the possible reaction of family members.[3] *See id.* at 190, 674 S.E.2d at 460 (finding no abuse of discretion when trial court removed four individuals from courtroom, including codefendant, because of concerns that jury would be intimidated and individuals were talking).

II

[2] We next address defendant's contention that the trial court erred in allowing testimony from four individuals who claimed that defendant had sexually abused them when they were children. The sexual acts occurred 14, 21, and 27 years prior to the start of the alleged abuse of Catherine. In addition to objecting, defendant, at the close of the State's evidence, moved for a mistrial based on the emotional state of the witnesses and the emotional impact of the testimony on those present in the courtroom. The trial judge denied defendant's motion, noting that he had not observed anything rising to the level of an emotional outburst that would unnecessarily or unduly prejudice the jury against defendant.

" 'We review a trial court's determination to admit evidence under N.C. R. Evid. 404(b) . . . for an abuse of discretion. An abuse of discretion occurs when a trial judge's ruling is manifestly unsupported by reason.' " *State v. Ray*, 197 N.C. App. 662, 672, 678 S.E.2d 378, 384 (quoting *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907, *appeal dismissed and disc. review denied*, 360 N.C. 653, 637 S.E.2d 192 (2006)), *temporary stay allowed*, 363 N.C. 587, 681 S.E.2d 341 (2009), *disc. review allowed*, 363 N.C. 810, 692 S.E.2d 626 (2010). Under Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident."

Rule 404(b) is a "rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). It is frequently observed that " 'North

3. Defendant has not suggested that he was prejudiced in any way by the presence of the high school class. Nor did he object at trial—his counsel's only comment was a reminder to the trial judge to explain to the jury that a class was present.

Carolina courts have been consistently liberal in admitting evidence of similar sex offenses in trials on sexual crime charges.' " *State v. Frazier*, 121 N.C. App. 1, 9, 464 S.E.2d 490, 494 (1995) (quoting *State v. Jacob*, 113 N.C. App. 605, 608, 439 S.E.2d 812, 813 (1994)), *aff'd*, 344 N.C. 611, 476 S.E.2d 297 (1996).

The first Rule 404(b) witness the State called was "Tiffany," whose aunt was married to defendant.[4] She testified that defendant had abused her in 1976 when she was about eight years old and visiting defendant and her aunt. Defendant had her perform fellatio on him at a drive-in movie. On a second occasion, he tried first to force her to perform fellatio, and, when she bit him, climbed on top of her and tried to take off her pants. She escaped and never visited the home again.

The second witness was Karen, whose mother was defendant's second wife. She testified that she was home alone one night with defendant in 1982 when she was 10 years old and her mother was working the third shift. She was sleeping in her mother's bed when she "was awoken in the middle of the night by a hand fondling [her] between [her] legs, and it was [defendant]." She got out of the bed as if to use the bathroom and went and hid in a utility closet. Soon afterwards, she went to live with her father so as "not to give him a chance again."

The third witness was Christopher, whose mother was defendant's third wife. According to Christopher, over a two-year period (from approximately 1987 through 1989), beginning when Christopher was in kindergarten, defendant had him perform fellatio on defendant, or defendant would masturbate the child. These incidents occurred two or three times a week in his mother's and defendant's bedroom while he was alone with defendant because his mother was working the second or third shift.

Christopher also testified about seeing defendant perform cunnilingus on his twin sister, Bonnie, and digitally penetrate her while Christopher performed fellatio on defendant. Bonnie testified as well, corroborating Christopher. She also testified that defendant fondled himself "and [made her] drink his pee."

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4. The pseudonyms "Tiffany," "Karen," "Christopher," and "Bonnie" are used throughout this opinion to protect the Rule 404(b) witnesses' privacy and for ease of reading.

Defendant argues that this testimony lacked sufficient temporal proximity for admission under Rule 404(b) because the testimony related to acts that took place 14, 21, and 27 years before the acts alleged to have occurred in this case. In support of this argument, defendant cites *State v. Jones*, 322 N.C. 585, 369 S.E.2d 822 (1988).

In *Jones*, the sexual conduct testified about pursuant to Rule 404(b) had occurred seven to 12 years before the conduct that was the subject of the trial. *Id.* at 589, 369 S.E.2d at 824. The trial court admitted the testimony under Rule 404(b) based on the similarities between the two alleged instances of abuse, including the age of the girls, that the defendant was living in the same home as the girls and held a position of authority, that the defendant had vaginal intercourse with both girls in the afternoons and at night, that during the relevant periods the defendant was also having a sexual relationship with adult female relatives of the girls, and that in both cases the defendant used a gun to threaten the girls. *Id.* at 586-87, 369 S.E.2d at 823. The trial court concluded that the witness' testimony was admissible to show a common plan or scheme. *Id.* at 587, 369 S.E.2d at 823.

On appeal, however, the Supreme Court held that the testimony of the prior acts should have been excluded "because the prior acts were too remote in time." *Id.* at 591, 369 S.E.2d at 825. The Court reasoned: "The period of seven years 'substantially negate[s] the plausibility of the existence of an ongoing and continuous plan to engage persistently in such deviant activities.' As such, the reasoning that gave birth to Rule 404(b) exceptions is lost." *Id.* at 590, 369 S.E.2d at 824 (internal citation omitted) (quoting *State v. Shane*, 304 N.C. 643, 656, 285 S.E.2d 813, 821 (1982)). The Court explained further:

> Evidence of other crimes must be connected by point of time and circumstance. Through this commonality, proof of one act may reasonably prove a second. However, the passage of time between the commission of the two acts slowly erodes the commonality between them. The probability of an ongoing plan or scheme then becomes tenuous. Admission of other crimes at that point allows the jury to convict defendant because of the kind of person he is, rather than because the evidence discloses, beyond a reasonable doubt, that he committed the offense charged.

Id.

Subsequent to *Jones*, our Supreme Court specifically limited the applicability of *Jones* to cases in which there has been a substantial lapse in time between instances of sexual misconduct:

> While a lapse of time between instances of sexual misconduct slowly erodes the commonality between acts and makes the probability of an ongoing plan more tenuous, *Jones*, 322 N.C. at 590, 369 S.E.2d at 824, the continuous execution of similar acts throughout a period of time has the opposite effect. When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan.

State v. Shamsid-Deen, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989). Consequently, the Court held that prior sexual acts occurring over a 20-year period "were not too remote to be considered as evidence of defendant's common scheme to abuse the victim sexually." *Id.*

Defendant, however, points to *State v. Delsanto*, 172 N.C. App. 42, 50-51, 615 S.E.2d 870, 875-76 (2005), in which this Court, based on *Jones*, concluded that the trial court had erred in admitting testimony from a witness that the defendant had sexually abused her 23 years earlier. The Court concluded: "Like in *Jones*, the extreme time lapse between the alleged instances of abuse merits against finding that defendant was engaged in an ongoing plan or scheme of sexual abuse. Because the evidence was admitted solely for the purpose of showing a 'scheme, plan, system or design,' and because of the lapse of twenty-three years, a significant period of time, the trial court erred in admitting this evidence." *Id.* at 51, 615 S.E.2d at 876.

In *Delsanto*, however, this Court also recognized, citing *State v. Jacob*, 113 N.C. App. 605, 439 S.E.2d 812 (1994), that evidence of instances of abuse occurring a substantial time earlier could still be evidence of a plan despite a lapse in time when the "defendant's plan was interrupted and then resumed" later. *Delsanto*, 172 N.C. App. at 52, 615 S.E.2d at 876. In *Jacob*, this Court explained that "[t]he remoteness factor must be examined carefully to determine whether the plan or scheme of molestation was interrupted or ceased due to underlying circumstances, and then resumed in a continual fashion." 113 N.C. App. at 611, 439 S.E.2d at 815.

The Court in *Jacob* concluded that evidence of the defendant's sexual abuse of the daughters of his first marriage was admissible in his trial for abusing the daughter of a second marriage 10 years later because the lapse of time was due to the defendant's having no access to his daughters from the first marriage after his divorce, the fact that the defendant did not have a daughter in his second marriage (which occurred the same year as his divorce) until four years after the mar-

riage, and the time necessary for his daughter to reach "a prepubescent age." *Id.* The Court held: "[C]ircumstances prevented the defendant from carrying out his plan to sexually molest his daughters for an extended period of time, however, once the opportunity presented itself, defendant resumed the sexual abuse. Accordingly, we conclude that the remoteness in time in the present case does not make [the earlier daughter's] testimony regarding defendant's prior sexual abuse inadmissible." *Id.* at 612, 439 S.E.2d at 816.

This Court subsequently applied this reasoning again in *Frazier*, 121 N.C. App. at 11, 464 S.E.2d at 495-96, in which there was evidence of 26 years of sexual abuse of various victims, but also gaps in time in which no abuse occurred. In *Frazier*, the challenged testimony came from Patricia and Susie, daughters of the defendant's wife, and Vickie, his daughter-in-law, who was 14 when she married the defendant's son. Patricia was sexually abused in 1966, while Vickie was abused from 1966 to 1968. There was then a gap of eight years until the defendant started abusing Susie in 1976 when she was 16. *Id.* During the eight-year period, the defendant did not have access to Patricia or Vickie. The abuse of Susie continued until 1985 when there was another gap for four years, while the defendant did not have access to Susie, but then the defendant started abusing one of the minor victims in the case on appeal, Susie's step-daughter. *Id.*

Relying on *Shamsid-Deen*, the Court noted that when, as in that case, similar acts have been performed continuously over a period of years, the passage of time served to prove, rather than disprove, the existence of a plan. *Frazier*, 121 N.C. App. at 11, 464 S.E.2d at 495. If "there is a period of time during which there is no evidence of sexual abuse, the lapse does not require exclusion of the evidence if the defendant did not have access to the victims during the lapse." *Id.* Because the witnesses all testified to similar forms of abuse spanning 26 years and the defendant did not have access to victims during the eight-year and four-year lapses in sexual misconduct, the Court concluded that the testimony of the earlier abuse was admissible. *Id.*, 464 S.E.2d at 496. *See also State v. Brooks*, 138 N.C. App. 185, 200, 530 S.E.2d 849, 858 (2000) (upholding admission of evidence of assault of first wife in trial for assault of second wife despite gap of 17 years because defendant was in prison for half of the time and had not had a period of marital discord and, therefore, " 'circumstances prevented the defendant from carrying out his plan [and intent to keep his wives from divorcing him] for an extended period of time, however once the

opportunity [or necessity] presented itself, defendant resumed [his initial intent]' " (quoting *Jacob*, 113 N.C. App. at 612, 439 S.E.2d at 815)).

We hold that this case falls within the holdings of *Jacob* and *Frazier*. The challenged testimony showed a strikingly similar pattern of sexually abusive behavior by defendant over a period of 31 years: (1) defendant was married to each of the witnesses' mothers or aunt, (2) the sexual abuse occurred when the children were prepubescent, (3) at the time of the abuse, defendant's wife was away at work while he was home looking after the children, and (4) the abuse involved fondling, fellatio, or cunnilingus, in most instances taking place in defendant's wife's bed. This evidence presents a traditional example of a common plan. While there was a significant gap of time between Christopher and Bonnie's abuse and Catherine's abuse, that gap was the result of defendant's not having access to children related to his wife.

Accordingly, under *Jacob* and *Frazier*, this testimony was admissible under Rule 404(b). "Nevertheless, under Rule 403, 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.' " *State v. Jacobs*, 363 N.C. 815, 823, 689 S.E.2d 859, 864 (2010) (quoting N.C.R. Evid. 403). "The exclusion of evidence under the Rule 403 balancing test lies within the trial court's sound discretion and will only be disturbed 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.* (internal quotation marks omitted). We hold, consistent with *Shamsid-Deen*, that the persistence of this conduct over time provided strong evidence of a common plan that the trial court could reasonably conclude, under Rule 403, outweighed any *unfair* prejudice.

Defendant has also argued based on the admission of this testimony that the trial court erred in denying his motion for a mistrial when, at the close of the Rule 404(b) testimony, Bonnie ran on in her testimony without a question pending, ultimately testifying that defendant made her "drink his pee." Defendant argues that "[a]t this point in the trial, the decorum in the courtroom vanished and the State's case deteriorated into a mud-slinging contest by the State's 404(b) witnesses toward [defendant]." Defendant acknowledges that we review a decision to deny a motion for a mistrial for abuse of

discretion. *See State v. Boyd*, 321 N.C. 574, 579, 364 S.E.2d 118, 120 (1988) ("The decision whether to grant a motion for mistrial rests within the sound discretion of the trial judge and will not ordinarily be disturbed on appeal absent a showing of abuse of that discretion."). Because we have held that the Rule 404(b) evidence was properly admitted and the only other factor cited by defendant as justifying a mistrial was Bonnie's testimony—which defendant has not challenged on appeal except under Rule 404(b)—we cannot conclude that the trial court abused its discretion when it denied the motion for a mistrial.

III

[3] Defendant next argues that the court erred in overruling defendant's objection and denying his motion to strike expert witness testimony that constituted "impermissible vouching for the credibility of the prosecutrix." At trial, Dr. Laura Gutman testified for the State as an expert witness in the field of pediatric child abuse. Although defendant claims that the challenged testimony occurred during the State's direct examination of Dr. Gutman, the transcript reveals that it occurred during defendant's cross-examination:

> Q. Okay; and, when you talked with [Catherine], there was no indication that she'd been penetrated vaginally, was there—when you spoke with her?
>
> A. When I spoke with her, she had minimal symptoms of a child who has had penetrative trauma; not—not quite none; just—they were not—not very—just that they were minimal.
>
> Q. Did she tell you she'd been penetrated?
>
> A. She described the rubbing; and, I would say that, as far as vaginal penetration, since the oral penetration—well, I'm not discussing that. I mean, I felt that that was very graphic and believable.
>
> [DEFENSE COUNSEL]: Objection to the terminology believable, Your Honor; motion to strike.
>
> THE COURT: Overruled.

Generally, expert testimony as to the believability of a witness is prohibited by Rules 405(a) and 608(a) of the Rules of Evidence. *See State v. Heath*, 316 N.C. 337, 342, 341 S.E.2d 565, 568 (1986) ("Rules 608 and 405(a), read together, forbid an expert's opinion as to the

credibility of a witness."). Specifically, Rule 405(a) provides that "[e]xpert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior." The commentary to Rule 608, which permits the credibility of a witness to be attacked or supported by opinion or reputation testimony as specified in Rule 405, emphasizes "that expert testimony on the credibility of a witness is not admissible."

Our Courts have found error when the trial court allowed expert testimony about a victim's believability. *See*, *e.g.*, *State v. Aguallo*, 318 N.C. 590, 598-99, 350 S.E.2d 76, 81 (1986) (concluding, where pediatrician testified, " 'I think she's believable,' " that admission of testimony was error because it "amounted to an expert's opinion as to the credibility of the victim"); *Heath*, 316 N.C. at 340, 341, 341 S.E.2d at 567, 568 (concluding that expert testimony that " '[t]here is nothing in the record or current behavior that indicates that [victim] has a record of lying' " was "fatally flawed").

The State, however, argues that "[a]lthough expert testimony that what a child said was 'believable' is generally erroneous, when the *purpose* for using the word 'believable' is something other than a comment on the credibility of the child at trial, the use of such words can be appropriate." The State points to *State v. O'Hanlan*, 153 N.C. App. 546, 555, 570 S.E.2d 751, 757 (2002), *cert. denied*, 358 N.C. 158, 593 S.E.2d 397 (2004), which quoted *State v. Marine*, 135 N.C. App. 279, 281, 520 S.E.2d 65, 66-67 (1999) (quoting *State v. Jones*, 339 N.C. 114, 146, 451 S.E.2d 826, 842, (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873, 115 S. Ct. 2634 (1995)): " 'On the other side of the coin, however, Rule 702 permits expert witnesses to explain the bases of their opinions. Thus, "a witness who renders an expert opinion may also testify as to the reliability of the information upon which he based his opinion." ' "

In *O'Hanlan*, however, this Court held that the expert witness had not improperly bolstered the victim's believability because the expert "explained how he concluded that she had been sexually assaulted through the physical evidence, the victim's statements, and her emotional condition." 153 N.C. App. at 555, 570 S.E.2d at 757-58. Similarly, in *Marine*, the Court concluded that the expert's testimony "went to the reliability of her diagnosis, not to [the victim's] credibility" because the testimony "simply [sought] to explain why [the expert] felt [the victim] had experienced a traumatic event: [the victim's] behavior and lack of sexual education convinced [the expert]

that the information she was using to formulate her opinion was reliable." 135 N.C. App. at 284, 520 S.E.2d at 68.[5]

Here, Dr. Gutman's testimony that Catherine was "believable" was not at all responsive to the question asked. Further, the testimony was not presented as a basis for Dr. Gutman's diagnosis. We hold, therefore, that the trial court erred in denying defendant's motion to strike the testimony.

Even though admission of this testimony was in error, defendant bears the burden of showing prejudice. In *State v. Davis*, 191 N.C. App. 535, 541, 664 S.E.2d 21, 25 (2008), this Court held that even when an expert had improperly vouched for the victim's testimony, there was "not a reasonable probability that the result in this case would have been different" had the statement been excluded, because "in addition to [the victim's] consistent statements and testimony that defendant had abused her sexually, the jury was able to consider properly admitted evidence of defendant's sperm found on [the victim's] skirt . . . . The jury also heard the testimony of [the victim] in the courtroom and . . . could therefore assess for themselves the credibility of [the victim]."

Likewise, in this case, in addition to Catherine's testimony, witnesses testified as to consistent statements that she made, and we have upheld the admissibility of the testimony of the State's Rule 404(b) witnesses, indicating that defendant had a longstanding plan of sexually abusing prepubescent children related to his wives. In addition, the State presented testimony from an SBI forensic DNA analyst that was sufficient to allow the jury to conclude that defendant had been the source of the semen on Catherine's underwear.

The analyst first explained to the jury that although finding extra genetic material on a person's jeans would not be unusual, finding extra genetic material on an intimate item like underwear would be unusual. She then informed the jury that after testing the genetic material which "definitely . . . came from semen" on Catherine's underwear, she had determined that there was a mixture of DNA profiles. There was no indication that there were more than two contributors of DNA on the underwear. The dominant profile belonged to Catherine.

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5. While the State also cites *State v. Bright*, 131 N.C. App. 57, 60, 505 S.E.2d 317, 319 (1998), *disc. review improvidently allowed*, 350 N.C. 82, 511 S.E.2d 639 (1999), the opinion relied upon was not a majority opinion. Two of the three judges ultimately concurred in the result, but they concluded that the expert's choice of words "constituted expert testimony as to [the victim's] credibility, and as such, was inadmissible." *Id.* at 63, 505 S.E.2d at 321 (Greene, J., concurring).

With respect to the other profile, the analyst testified that defendant could not be excluded as a contributor, explaining that that meant "his profile or his genetic alleles" are included in the mixture. The analyst further testified that "you'd have to look at 193 million other people to find somebody else that would be included . . . ." The analyst helped the jury understand the meaning of this data by explaining,

> The chance of selecting an unrelated individual at random . . . you would have to look at 193 million people to find one that would fit into that mixture. If we look at North Carolina, North Carolina consists of approximately 8 million people. You would have to take every man, woman and child out of North Carolina and refill it 25 times before you would find an individual that would fit into this mixture . . . .

In sum, we hold that the trial court erred in failing to strike Dr. Gutman's testimony that Catherine's description was "believable." Nonetheless, in light of the totality of the evidence presented by the State, we hold that the trial court's error in admitting that testimony was harmless.

IV

[4] Lastly, defendant contends that the trial court erred in denying defendant's motion to dismiss the charges relating to offenses alleged to have occurred in November and December 2006. These charges included one count each of first degree statutory sex offense, sexual activity by a substitute parent, taking indecent liberties with a child, and crime against nature. Defendant does not point to any particular element of these crimes as lacking in sufficient evidence to support them. Rather, he asserts that Catherine "clearly and unequivocally stated that no sexual acts occurred in November or December 2006."

"The denial of a motion to dismiss for insufficient evidence is a question of law, which this Court reviews *de novo*." *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (internal citation omitted). When a defendant moves to dismiss, "[o]nly evidence favorable to the State is considered and contradictions, even in the State's evidence, are for the jury and do not warrant a granting of the motion. When so considered, the motion should be denied when there is substantial evidence, direct, circumstantial or both from which the jury could find that the offense charged was committed and that the defendant perpetrated the offense . . . ." *State v. Cobb*, 295 N.C. 1, 11, 243 S.E.2d 759, 765 (1978).

Despite defendant's assertion to the contrary, evidence was presented at trial supporting the November and December charges. On direct examination, Catherine testified that the abuse "happened, like, November and December." She also nodded her head in the affirmative when the State asked her if defendant touched her in "November or December of 2006, right before [she] told" her mother.

On the other hand, there was also evidence indicating that no abuse occurred in November or December. On direct examination by the State, when asked about "the last time that [defendant] touched [her] sexually before [she] told" her mother, Catherine said "nothing really happened in October. So, it was just mostly like—like part of June and, like, July." The State specifically asked, "So, from [sic] the last event you recall and before you told your mom would have been in July?" To this question, Catherine responded, "Yeah. That's the only thing I remember that hap—like, that was—from the last time before was in, like, July or in September." Later, Catherine testified in addition, "I don't remember anything in November or December." On cross-examination, she explained, "I don't remember the exact dates, but I remember that it happened."

In *Frazier*, 121 N.C. App. at 17, 464 S.E.2d at 499, the Court recognized that a child's inability to testify accurately as to dates of alleged sexual abuse will not, by itself, necessarily require dismissal of the charges. In *Frazier*, the defendant had argued that "there was a fatal variance between the dates of abuse alleged in the indictments and the evidence presented at trial." *Id.* The Court rejected the defendant's argument, noting that "[i]n child sexual abuse cases, specificity regarding dates diminishes." *Id.* The Court also reiterated that " 'in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence.' " *Id.* (quoting *State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991)).

Here, Catherine offered some evidence that supported the November and December charges. In any event, under *Frazier*, her inability to remember precise dates was not sufficient to require dismissal of the charge, and the court did not err in denying defendant's motion.

No prejudicial error.

Judges ROBERT C. HUNTER and CALABRIA concur.

JULIE A. DEROSSETT, AND RICHARD A. SUTTON, PLAINTIFFS-APPELLANTS v. DUKE ENERGY CAROLINAS, LLC, JAMES HOLLIFIELD, LARRY JENKINS, AND ASSURANCE PLUS, INC., DEFENDANTS-APPELLEES

No. COA09-820

(Filed 7 September 2010)

1. Easements— secondary easement—consent judgment

The trial court did not err by concluding as a matter of law that Duke Energy owned a secondary easement across plaintiffs' property for the purpose of providing access to a utility easement. The literal language of a consent judgment created a secondary easement of the type found to exist by the trial court.

2. Easements— secondary easement—consent judgment—no ambiguity

The trial court did not err by concluding that no genuine issue of material fact existed concerning the extent to which a consent judgment created a secondary easement allowing Duke Energy to cross portions of plaintiff Freeman's property. The language of the consent judgment unambiguously referred to both an express primary easement encumbering the described strip of land and a secondary easement granting a right of ingress and egress to the property subject to the primary easement.

3. Easements— secondary easement—consent judgment—no ambiguity

The trial court correctly concluded that a consent judgment authorized Duke Energy to cross plaintiffs' property outside of the strip of land described in the primary easement in order to effectuate the purposes sought to be achieved by the consent judgment. The secondary easement created by the consent judgment was not patently ambiguous.

4. Parties— joinder—necessary parties—no error

The trial court did not err by denying plaintiffs' motion for reconsideration in an easement case. The trial court did not fail to require defendant to join all necessary and proper parties to the action because there were no other parties directly affected by the trial court's decision.

Appeal by plaintiffs from order entered 11 February 2009 by Judge James U. Downs. Heard in the Court of Appeals 19 November 2009.

McKinney & Tallent, P.A., by Eric W. Stiles, for Plaintiff-Appellants.

Coward, Hicks & Siler, P.A., by William H. Coward, for Defendant-Appellees.

ERVIN, Judge.

Plaintiffs Julie A. DeRossett and Richard A. Sutton appeal from the trial court's order granting partial summary judgment in favor of Defendant Duke Energy Carolinas, LLC. After a careful review of Plaintiffs' challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Factual Background

A. Substantive Facts

In 1942, Duke Energy's predecessor, Nantahala Power and Light Company, initiated condemnation proceedings against Margaret Jordan and Dixie Freeman for the purpose of obtaining an easement authorizing the construction and operation of an electric transmission line across a tract of property in which they owned interests located in Graham County, North Carolina.[1] At the conclusion of the condemnation proceeding, the parties entered into a consent judgment which granted an easement across the property of Ms. Jordan and Ms. Freeman to Nantahala.[2] During the pendency of the condemnation

1. According to the information contained in the record, Ms. Freeman owned the property in question subject to a retained life estate in favor of Ms. Jordan. For that reason, we will refer to the tract of property as Ms. Freeman's property throughout the remainder of this opinion.

2. The consent judgment was initially hand-written, certified by the Clerk of the Graham County Superior Court, and filed in Judgment Book H, Page 181. Subsequently, a typewritten version of the consent judgment was recorded at Book 45, Page 28 in the Graham County Register of Deeds office. The typewritten judgment is identical to the handwritten judgment, except that the former lacks the phrase "as described in the petition" immediately after the words "together with the rights of ingress and egress." Although Plaintiff contends that the trial court relied upon the typewritten rather than the handwritten version of the consent judgment in granting partial summary judgment in favor of Duke Energy, the parties appear to agree that the handwritten version of the consent judgment is the one upon which we should rely in deciding the issues that Plaintiffs have brought forward on appeal.

proceeding, Nantahala constructed the proposed transmission line across Ms. Freeman's property. Nantahala merged into Duke Energy Corporation in 1998, with the properties that had formerly been part of the Nantahala system coming under the ownership of Duke Energy Carolinas, LLC, in 2006 as part of a further corporate reorganization. Duke Energy Carolinas continues to operate the transmission line located on Ms. Freeman's property.

Since 1942, the property formerly held by Ms. Jordan and Ms. Freeman has been divided among multiple owners because of inheritance or sale to third parties. Plaintiffs own a small section of the property previously owned by Ms. Freeman. However, the tract of property specifically delineated in the condemnation petition does not include any of Plaintiffs' property. The remainder of Ms. Freeman's property, including the tract specifically described in the consent judgment, is owned by individuals who are not parties to this case. However, in order to access the right-of-way granted in the consent judgment for the purpose of maintaining the transmission line without traveling the length of the described easement, Duke Energy believes that it is entitled to cross property owned by Plaintiffs or others.

In 2006, Plaintiff Richard A. Sutton granted permission to James Hollifield and Larry Jenkins, who were acting as agents for Duke Energy, to use Plaintiffs' property to access the right-of-way granted in the consent judgment. Duke Energy's agents had already made an unsuccessful attempt to gain access to the right-of-way from individuals holding title to other portions of Ms. Freeman's property. After Defendant's agents entered Plaintiffs' property, altered a roadway, and destroyed a bridge leading to a residence located on Plaintiffs' property, Plaintiff Sutton revoked the permission to enter on to his property that he had previously granted to Duke Energy's agents.

B. Procedural Background

On 24 October 2006, Plaintiffs filed a complaint in Graham County District Court seeking to quiet title to their property and alleging that Duke Energy's agents had trespassed upon their property On 28 December 2006, Defendants filed a Motion to Dismiss. On 5 March 2007, Defendants filed an Answer; Counterclaims; and Motion for Preliminary and Permanent Injunction. On 10 May 2007, Plaintiffs filed a Reply to Defendants' Counterclaims.

On 4 April 2008, an order was issued transferring the case from the District Court to the Superior Court. Defendants filed a Motion for Summary Judgment and an affidavit by Sue C. Harrington on 22 July 2008. In response, Plaintiffs filed the affidavits of Ms. DeRossett and Mr. Sutton on 30 July 2008. Defendants' summary judgment motion was heard at the 2 February 2009 session of Macon County Superior Court.

On 9 February 2009, the trial court signed an order that was subsequently filed on 11 February 2009 granting Duke Energy's motion for partial summary judgment. In its order, the trial court declared that Duke Energy was "the owner of a secondary easement and right of way as set forth in the" consent judgment; found and determined "that said Judgment is not ambiguous;" construed the consent judgment, "as a matter of law, to include the right of [Duke Energy] and its agents to go over and across Plaintiffs' lands outside of the right of way strip described in said Judgment, for any and all purposes related to facilities within said right of way strip;" and found "that the reasonableness of the construction of the new bridge and the location of the access right of way on Plaintiffs' property is a jury question not resolved by this order." The trial court also certified its order for immediate appellate review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b).

On 13 February 2009, Plaintiffs filed a Motion for Reconsideration in which they alleged that the trial court had entered partial summary judgment in favor of Duke Energy without joining all necessary parties in violation of N.C. Gen. Stat. § 1A-1, Rule 19. The trial court denied Plaintiffs' reconsideration motion by means of an order that was signed on 25 March 2009 and filed on 1 April 2009. On 7 April 2009, Plaintiffs noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Standard of Review

This Court reviews orders granting partial summary judgment on a *de novo* basis. *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007), *disc. rev. denied*, 362 N.C. 180, 658 S.E.2d 662 (2008). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c).

> [Defendants] may show entitlement to summary judgment by (1) proving that an essential element of [Plaintiffs'] case is nonexistent, or (2) showing through discovery that [Plaintiffs] cannot produce evidence to support an essential element of [their] claim, or (3) showing that [Plaintiffs] cannot surmount an affirmative defense . . . . Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that [Plaintiffs] can at least establish a prima facie case at trial.

Draughon v. Harnett County Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (internal citations and quotations omitted), *aff'd*, 358 N.C. 131, 591 S.E.2d 521 (2004). During consideration of a summary judgment motion, "the evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Duke Energy Corp. v. Malcolm*, 178 N.C. App. 62, 64-65, 630 S.E.2d 693, 695, *aff'd per curiam*, 361 N.C. 111, 637 S.E.2d 538 (2006) (quoting *Bruce-Terminix Co. v. Zurich Insur. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

B. Analysis

On appeal, Plaintiffs advance a series of challenges to the trial court's order. Among other things, Plaintiffs contend that the trial court erred by determining that, as a matter of law, Duke Energy was the owner of a secondary easement[3] applicable to their property under the consent judgment; that the consent judgment was not ambiguous, so that there was no need for additional factfinding by a jury; that the consent judgment sufficiently described the secondary easement, so that it was not patently ambiguous and unenforceable; and that the other owners of the property formerly owned by Ms. Freeman were necessary parties whose participation was required by N.C. Gen. Stat. § 1A-1, Rule 19, as a precondition for the entry of a valid judgment.[4] We disagree.

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3. Duke Energy contends that the term "secondary easement" is inapt and that the interest in question "is most accurately viewed not as a separate interest, but rather, 'a natural incident to the easement itself.' " (quoting 3-1 Nichols on Eminent Domain § 11.08). However, for ease of reading, we will use the term "secondary easement" to describe the disputed interest in the remainder of this opinion.

4. Plaintiffs also argue that the original Nantahala condemnation petition did not support the creation of a secondary easement of the type found to exist in the trial court's order because the condemnation petition did not adequately describe that secondary easement. However, the statutory provisions governing the contents of con-

1. Construction of the Consent Judgment

[1] Initially, Plaintiffs argue that the trial court erred by concluding as a matter of law that Duke Energy owned a secondary easement granting ingress and egress to the primary easement based upon the language of the consent judgment. Stated simply, Plaintiffs contend that the plain language of the consent judgment does not grant a secondary easement or other right-of-way across Plaintiffs' property for the purpose of providing access to the utility easement. A careful review of the literal language of the consent judgment demonstrates that it does, contrary to Plaintiffs' argument, create a secondary easement of the type found to exist by the trial court.

At the time that the parties entered into the consent judgment, Plaintiffs' land was owned by Ms. Freeman, subject to a life estate reserved in favor of Ms. Jordan. Nantahala filed a condemnation petition for the purpose of obtaining an easement across the property in order to permit the construction and maintenance of a transmission line across Ms. Freeman's property. According to the condemnation petition, Nantahala sought "to acquire a right of way" and "[an] easement set forth and described in the petition" as "225 feet in width, and 692 feet in length, and extending 125 feet on the Southwest side and 100 feet on the Northeast side of the center line of the . . . transmission line as now located and established . . . on said property." According to the consent judgment entered for the purpose of resolving the condemnation proceeding, Nantahala was,

> adjudged to be the owner of an *easement* over and upon the lands of the respondents or *together with the rights of ingress and egress* described in the petition, and which easement is more particularly described as follows: *An easement or right of way*

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demnation petitions in effect at the time of the condemnation proceeding at issue in this case merely required the petition to "contain a description of the real estate which the corporation seeks to acquire." N.C. Gen. Stat. § 33-1716 (1939). Since Nantahala was only attempting to acquire the land on which the transmission line was to be located, the condemnation petition appears to have complied with the relevant statutory provision. In addition, any deficiency in Nantahala's petition should have been brought to the attention of the court at the time that the condemnation proceeding was in litigation. By entering into the consent judgment, Ms. Jordan and Ms. Freeman waived any right to challenge the adequacy of Nantahala's petition. *King v. Taylor*, 188 N.C. 450, 452, 124 S.E.2d 751, 751 (1924) (stating that a consent judgment "is in effect an admission by the parties that the decree is a just determination of their rights on the real facts of the case" and may not be "amended nor in any way waived without a like consent, nor can it be appealed from or reviewed on a writ of error"). Thus, Plaintiffs are not entitled to relief from the trial court's order on the basis of any alleged deficiency in the original condemnation petition.

> 225 feet in width and 692 feet in length, extending 125 feet on the southwest side and 100 feet on the northeast side of the line of the power or transmission line as now located and established by the petitioner on said property, said right of way and easement to be used for the purpose of erecting a power line and telephone line and for the purpose of constructing, maintaining and repairing said power lines, equipment and instrumentalities, which may be reasonably necessary for the transmission of electrical current and electrical energy and telephone communications, and for any and all purposes authorized by law.

(emphasis added) Many years after the entry of the consent judgment, Duke Energy acquired Nantahala's rights under the easement and Ms. Freeman's property passed into the hands of multiple persons, including Plaintiffs, so that the easement which crossed property under common ownership in 1942 crossed property owned by a number of different people in 2006.

"Consent judgments delineating easement rights are foremost contracts." *Malcolm*, 178 N.C. App. at 65, 630 S.E.2d at 695 (citing *Hemric v. Groce*, 154 N.C. App. 393, 397, 572 S.E.2d 254, 257 (2002)). In interpreting contracts:

> [T]he goal of construction is to arrive at the intent of the parties when the [contract] was [written]. Where a [contract] defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the [contract] are to be harmoniously construed, and if possible, every word and every provision is to be given effect . . . . [I]f the meaning of the [contract] 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.

Malcolm, 178 N.C. App. at 65, 630 S.E.2d at 695 (2006) (quoting *Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299-300, 524 S.E.2d 558, 563 (2000) (quotation marks and citation omitted)). A careful examination of the language of the consent judgment leads us to the conclusion that the only reasonable interpretation of the relevant contractual language is that it does, in fact, create a secondary easement authorizing Duke Energy to access

the transmission line across Ms. Freeman's property, including the land presently owned by Plaintiffs, for the purpose of repairing and maintaining that facility.

According to the consent judgment, the easement across Ms. Freeman's property was created for the purpose of allowing Nantahala to construct, maintain, or repair power lines on the property in question. However, "[t]he mere right-of-way for an electric transmission line would be of little value without the right to maintain and protect the line." *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 720-21, 127 S.E.2d 539, 542 (1962). Thus, the provisions of the consent judgment were undoubtedly intended to allow Nantahala to take reasonable actions to maintain and repair, as well as construct, the transmission line that crosses Ms. Freeman's property. Any other understanding of the provisions of the consent judgment would ignore the immense practical problems that would result from any attempt to limit Duke Energy's ability to cross Plaintiffs' property for the purpose of repairing and maintaining the transmission line in question[5] and deprive the references in the consent judgment to Nantahala's right to repair and maintain the transmission line, not to mention the right of ingress and egress granted in the consent judgment, of any practical meaning.

The literal language of the consent judgment makes explicit reference to granting Nantahala rights in the tract of property on which the transmission line was constructed "together with the rights of ingress and egress." In light of that language, we conclude that the trial court correctly determined that the consent judgment created two separate easements. First, the consent judgment expressly granted "[a]n easement or right of way 225 feet in width and 692 feet in length, extending 125 feet on the southwest side and 100 feet on the northeast side of the line of the power or transmission line[,]" in which the transmission line was to be located. Secondly, by granting "the rights of ingress and egress described in the petition," the easement set out in the consent judgment expressly authorized Nantahala to cross that portion of Ms. Freeman's property located outside the limits of the primary easement for appropriate purposes. The separate and distinct nature of "the rights of ingress and egress"

5. For example, limiting Duke Energy to accessing the transmission facilities by means of the property specifically delineated in the consent judgment could substantially increase the time and difficulty involved in repairing or maintaining the transmission line.

specified in the consent judgment is confirmed by the use of the words "together with," which clearly imply the grant of a right in the property owned by Ms. Freeman other than the right to occupy the strip of land on which the transmission line was to be built. The separate right of ingress and egress granted in the consent judgment allows Nantahala and its successors to construct, repair and maintain the transmission lines located on the land encumbered with the primary easement by entering upon other portions of Ms. Freeman's property to the extent necessary to obtain access to the property subject to the primary easement.[6]

In seeking to persuade us to reach a different result, Plaintiffs contend that the language of the consent judgment to the effect that Nantahala had received "an easement over and upon [Ms. Freeman's property] together with the rights of ingress and egress *described in the petition*" coupled with the absence of a separate description of any secondary easement in the original condemnation petition indicate that the consent judgment did not create a secondary easement (emphasis added). However, given that it was not necessary for the condemnation petition at issue here to contain a description of any property except the real estate that the utility sought to acquire, N.C. Gen. Stat. § 33-1716 (1939) (providing that a condemnation petition filed by a private condemnor must "contain a description of the real estate which the corporation seeks to acquire"), and given that the references to property "described in the petition" clearly refer to the primary rather than the secondary easement, we do not find this argument persuasive.[7] In addition, Plaintiffs emphasize the fact that the words "easement" and "right of way" as they appear in the easement are couched in the singular, rather than the plural. However, we are not convinced by this argument either, given that the

6. In addition to its reliance upon the language of the consent judgment, Duke Energy contends that it has an equivalent right of ingress and egress implied in law. *See City of Statesville v. Bowles*, 6 N.C. App. 124, 130, 169 S.E.2d 467, 471 (1969) (stating that "[n]ecessarily included [in a sewer easement] would be the right to go on the property whenever necessary to inspect, repair or replace the sewer line"). However, we need not reach this issue given our holding with respect to the construction of the consent judgment.

7. Although the specific language upon which Plaintiffs focus is somewhat awkward, we are still persuaded that, in context, the reference to the interest "described in the petition" is the "easement over and upon" Ms. Freeman's land and that the reference to "the right of ingress" is not modified by "described in the petition." In the event that we were to accept the reading advocated by Plaintiffs, we would have effectively eliminated any separate meaning for the reference to a "right of ingress," an action which would violate the relevant canons of construction.

language of the consent judgment uses "easement" and "right of way" in a context that clearly does not include Nantahala's right of ingress and egress. Finally, Plaintiffs point to the absence of a specific delineation of the location of the secondary easement as an additional ground for rejecting the trial court's construction of the consent judgment. However, since the language of the consent judgment clearly provides a right of ingress and egress for the purpose of accessing the property on which the transmission line is located and since that right cannot be meaningfully exercised through a single or limited number of previously-delineated points of ingress, we find this argument unpersuasive as well. Thus, we conclude that the trial court correctly concluded that Defendant owned a secondary easement under the consent judgment in addition to a primary easement.[8]

2. Ambiguity

[2] Secondly, Plaintiffs contend that the consent judgment is ambiguous and that the trial court erred by concluding that no genuine issue of material fact requiring the intervention of a jury existed concerning the extent to which the consent judgment created a secondary easement allowing Duke Energy to cross portions of Ms. Freeman's property other than the strip occupied by the transmission line. Once again, we disagree.

The extent to which a consent judgment is ambiguous is a question of law. *Malcolm*, 178 N.C. App. at 65, 630 S.E.2d at 695 (quoting *Bicket v. McLean Securities, Inc.*, 124 N.C. App. 548, 553, 478 S.E.2d 518, 521 (1996)). An ambiguity exists in the event that the relevant contractual language is fairly and reasonably susceptible to multiple constructions. *Id.* (quoting *Glover v. First Union National Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993)). According to Plaintiffs, the fact that the language of the consent judgment uses the words a "right of way" and an "easement" to refer to the rights granted to Nantahala and the fact that the consent judgment is couched in the singular suggests that the consent judgment only created a single easement. In addition, Plaintiffs argue that the phrase "together with" is equivalent to the word "include," so that the rights

8. Although Plaintiffs place considerable reliance upon the holding in *Malcolm*, 178 N.C. App. at 62, 630 S.E.2d at 693, we read that decision to address the extent to which the owner of the servient estate was entitled to engage in certain activities rather than the extent of the utility's right of ingress. Thus, aside from the general principles of law enunciated in the Court's opinion in *Malcolm*, we do not believe that our decision in that case has any significant bearing on the result which should be reached here.

of ingress and egress granted in the consent judgment are included within the easement on which the transmission line has been constructed. As a result, Plaintiffs contend that, because they are able to derive a reasonable alternative construction of the consent judgment derived from the language of that instrument, "the contract language is fairly and reasonably susceptible to multiple constructions." *Id.* We do not find Plaintiff's argument persuasive.

" 'Whenever a court is called upon to interpret a contract[,] its primary purpose is to ascertain the intention of the parties at the moment of its execution.' " *Gilmore v. Garner*, 157 N.C. App. 664, 666, 580 S.E.2d 15, 18 (2003) (quoting *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973)).

> Intention or meaning in a contract may be manifested or conveyed either expressly or impliedly, and it is fundamental that that which is plainly or necessarily implied in the language of a contract is as much a part of it as that which is expressed.

Gilmore at 667, 580 S.E.2d at 18 (quoting *Lane* at 410-11, 200 S.E.2d at 625).

> According to the consent judgment, Nantahala was
>
> adjudged to be the owner of an easement over and upon the lands of the respondents *together with the rights of ingress and egress described in the petition*, and which easement is more particularly described as follows . . . .

All parties agree that the language of the consent judgment clearly and unambiguously granted Nantahala an easement authorizing it to build and maintain electric transmission lines on the strip of land "more particularly described" at a later point in the document. However, given that the contractual language refers to a separate right of ingress and egress, we have concluded that the consent judgment creates both a primary easement in which the transmission line could be constructed and operated and a secondary right of access to the primary easement. In other words, for the reasons set forth above, we believe that the language of the consent judgment unambiguously refers to both an express primary easement encumbering the described strip of land and a secondary easement granting a right of ingress and egress to the property subject to the primary easement. As we have already noted, the fact that the consent judgment uses "easement" and "right of way" in the singular does not cast any doubt on this conclusion since the references to the "ease-

ment" or "right of way" upon which Plaintiffs rely in advancing this argument clearly refer exclusively to the primary easement. Moreover, taken in context, we believe that the expression "together with" as used in the consent judgment clearly means "in addition to" rather than "including." *See Williams v. Best*, 195 N.C. 324, 326, 142 S.E.2d 2, 3 (1928) (stating that "[t]he personal property is bequeathed 'together with' the rents and use of the real estate–i.e., along with, or in union or combination with the latter," so that "[t]he expression is copulative connecting the two gifts"). Thus, because the consent judgment clearly and unambiguously granted two separate and distinct easements, one primary and one secondary, to Nantahala and because we do not find Plaintiffs' attempts to establish the existence of an ambiguity in the relevant contractual language persuasive, we conclude that the trial court correctly determined that the consent judgment was without ambiguity.

3. Failure to Define the Scope of the Right of Ingress

[3] Thirdly, Plaintiffs contend that, because the consent judgment did not expressly define the location at which Duke Energy's right of ingress and egress should be exercised, any secondary easement created by the consent judgment is patently ambiguous, thereby rendering the secondary easement void. *King v. King*, 146 N.C. App. 442, 445, 552 S.E.2d 262, 264-65 (2001) (stating that, "[i]f the description of an easement is 'in a state of absolute uncertainty, and refer[s] to nothing extrinsic by which it might possibly be identified with certainty,' the agreement is patently ambiguous and thereby unenforceable") (quoting *Lane v. Coe*, 262 N.C. 8, 13, 136 S.E.2d 269, 273 (1964)). We disagree.

As we have previously discussed, the consent judgment expressly stated that the primary easement was intended to allow Nantahala to work within and to construct, maintain, or repair power lines on the property encumbered by the primary easement. However, as we have also previously noted, "[t]he mere right-of-way for an electric transmission line would be of little value without the right to maintain and protect the line," *Weyerhaeuser Co.* at 720-21, 127 S.E.2d at 542, making the inclusion of language granting a separate right of access to the primary easement necessary and appropriate. The right of ingress and egress expressly mentioned in the consent judgment granted Nantahala access to the transmission line in order to "maintain and protect" it. As we read the language of the consent judgment, Ms. Freeman and Ms. Jordan clearly and unambiguously intended to

allow Nantahala to cross their property in order to reach the strip of land encumbered by the primary easement. Had either of them intended to limit the point at which Nantahala could enter and exit their property for the purposes specified in the consent judgment to one or more designated locations, they had the opportunity to delineate those locations in that document. Given the manner in which transmission lines must be maintained and operated, it would have been difficult, if not impossible, to clearly and precisely define the location or locations at which Nantahala would have been entitled to exercise its right of ingress and egress. Instead, in light of the fact that a problem can develop with a transmission line at any number of locations, it would be much more consistent with the purpose of the secondary easement to leave the exact points at which the right of ingress and egress could be exercised undefined. As a result, we conclude that the fact that Ms. Freeman and Ms. Jordan elected not to specify the location or locations at which Nantahala could exercise its right of ingress and egress for the purpose of repairing and maintaining the transmission line demonstrates that they authorized Nantahala to cross their property at any point outside of the strip of land encumbered by the primary easement as reasonably needed to effectuate the purposes set out in the consent judgment, so that the language of the consent judgment does not contain a patent ambiguity sufficient to render the relevant provision of the consent judgment unenforceable. Thus, the trial court correctly concluded that the consent judgment authorized Duke Energy to cross Plaintiffs' property outside of the strip of land described in the primary easement in order to effectuate the purposes sought to be achieved by the consent judgment.

4. Failure to Join Necessary Parties

[4] Finally, Plaintiffs argue that the trial court erred by denying Plaintiffs' reconsideration motion, which was predicated on a contention that the trial court erred by failing to require Defendant to join all necessary and proper parties to this action in accordance with N.C. Gen. Stat. § 1A-1, Rule 19. We are unable to agree with Plaintiffs' contention.

N.C. Gen. Stat. § 1A-1, Rule 19(a) provides that:

> Subject to the provisions of [N.C. Gen. Stat. § 1A-1,] Rule 23, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should have been joined as plaintiff cannot be obtained he may be made a defend-

> ant, the reason therefor being stated in the complaint; provided, however, in all cases of joint contracts, a claim may be asserted against all or any number of the persons making such contracts.

" 'The term "necessary parties" embraces all persons who have or claim material interests in the subject matter of a controversy, which interests will be directly affected by an adjudication of the controversy.' " *Durham County v. Graham*, 191 N.C. App. 600, 603, 663 S.E.2d 467, 469 (2008) (quoting *Wall v. Sneed*, 13 N.C. App. 719, 724, 187 S.E.2d 454, 457 (1972) (emphasis added) (citation omitted in the original). According to well-established North Carolina law, "[n]ecessary parties *must* be joined in an action. Proper parties *may* be joined. Whether proper parties will be ordered joined rests within the sound discretion of the trial court." *Booker v. Everhart*, 294 N.C. 146, 156, 240 S.E.2d 360, 365 (1978) (emphasis added) (citing *Strickland v. Hughes*, 273 N.C. 481, 160 S.E.2d 313 (1968)).

In light of the definition of a "necessary party" set out above, we conclude that the owners of other tracts that were part of Ms. Freeman's property in 1942 were not necessary parties required to be joined in this case. The decision reached by the trial court merely addresses the extent to which Duke Energy has a right to cross Plaintiffs' property and makes no attempt to determine the extent to which other persons who owned a portion of the tract that Ms. Freeman owned at the time the consent judgment was entered into are subject to the same primary and secondary easements as Plaintiffs. In the event that a controversy arises between Duke Energy and the owners of other portions of Ms. Freeman's property, both parties will be entitled to litigate that dispute at that time. As a result, since N.C. Gen. Stat. § 1A-1, Rule 19(a), only requires the joinder of necessary parties and because the other persons owning interests in Ms. Freeman's property are not directly affected by the trial court's decision, we hold that the trial court did not commit reversible error by denying Plaintiffs' motion for reconsideration, or by not requiring Defendant to join all proper parties to the action.

III. Conclusion

Thus, for the reasons set forth above, we conclude that all of Plaintiffs' challenges to the trial court's decision to grant partial summary judgment in favor of Defendants lack merit. For that reason, we affirm the trial court's order.

AFFIRMED.

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

STATE OF NORTH CAROLINA v. BENZION BIBER

No. COA09-331

(Filed 7 September 2010)

Search and Seizure— motion to suppress—white powder found in bathroom light fixture in motel room

The trial court erred in a felony possession of cocaine case by denying defendant's motion to suppress the white powder recovered from a bathroom light fixture in a motel room. The trial court failed to make any findings of fact or conclusions of law concerning defendant's intent and capability to maintain control and dominion over the white powder.

Judge STEELMAN dissenting.

Appeal by Defendant from judgment entered 3 October 2008 by Judge Zoro J. Guice, Jr. in Superior Court, Buncombe County. Heard in the Court of Appeals 16 September 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert T. Hargett, for the State.

Betsy J. Wolfenden for Defendant on brief.

Appellate Defender Staples Hughes substituted, after briefing, as counsel of record for Defendant.

McGEE, Judge.

Benzion Biber (Defendant) was indicted for possession of four grams of crack cocaine on 3 March 2008 based on evidence obtained pursuant to Defendant's arrest on 9 September 2007. Defendant moved to suppress the cocaine on 26 September 2008, arguing it was obtained in violation of Defendant's Fourth Amendment rights. The trial court heard Defendant's motion to suppress on 3 October 2008[1]

1. The transcript of the 3 October 2008 hearing incorrectly states that the hearing was held on 29 August 2006.

and entered an order denying defendant's motion on 14 November 2008. Defendant then entered a plea of guilty to possession of a schedule II substance, preserving his right to appeal the denial of his motion to suppress. Defendant was sentenced to a suspended sentence of six to eight months, and was placed on twenty-four months supervised probation. Defendant appeals.

The State presented the following evidence at the 3 October 2008 hearing on Defendant's motion to suppress. Cheryl Harvin (Harvin), General Manager of a Motel 6 in Buncombe County, testified she received two complaints on 9 September 2007 from one of her guests, Sharon Hensley (Hensley), who had rented a room ("Room 312" or "the room") with an unidentified friend the previous evening. Both times Hensley complained that there were people in her room using drugs, and that she did not want them there. She did not identify who was in her room, or who was using drugs. Hensley first spoke to Harvin in the office of the Motel 6. Subsequently, Hensley called Harvin from an unknown location, but not from Room 312. Harvin called the Asheville Police Department, and two officers, Alan Presnell (Officer Presnell) and Michelle Spinda (Officer Spinda), were dispatched to the Motel 6. Harvin accompanied the officers to Room 312, and Harvin knocked on the door.

Officer Presnell testified that he and Officer Spinda remained out of view as the door opened, and he heard Harvin speak with a male who was inside the room. Harvin told the male "you are not supposed to be here," and then Officer Presnell "stepped around the corner of the doorway . . . and [he] encountered [Defendant] standing at the door." Officer Presnell told Defendant why they were there, and Defendant stepped back to let the officers into the room, but the officers remained in the doorway. Officer Presnell testified that when he "asked whose room is this, [Defendant] said, 'It's my room.' That led me to believe that he was the official renter of the room when, in fact, now I know he wasn't."

Officer Presnell then saw that two females, later identified as Tammy Meadows (Meadows) and Candice Moose (Moose), were also in the room. Officer Presnell observed that there were two beds in Room 312, one closer to the entrance door and one closer to the bathroom towards the rear of the room. When Officer Presnell entered the room, Meadows, who had been sitting on the bed closest to the bathroom, "got up from the bed and I would say ran to the bathroom [and] went in and closed the door." Knowing that there had been a report of drug activity in Room 312, Officer Presnell testified that the action

of Meadows "was consistent with what we know to be the activities of someone who is either trying to destroy or hide evidence or trying [to] elude the police[.]" Officer Spinda saw Meadows grab what Officer Spinda identified as a crack pipe before Meadows ran into the bathroom.

The officers then entered Room 312. They observed drug paraphernalia consistent with crack cocaine use on the bed closest to the bathroom, which was the bed on which Meadows had just been sitting. Officer Presnell asked Defendant to step back while Officer Spinda went to the bathroom door, knocked on the door, and asked Meadows to come out. Officer Spinda heard the toilet flush. Officer Presnell described his job at that point as maintaining the situation in the room by keeping control of Defendant and Moose while Officer Spinda dealt with the situation in the bathroom. Officer Presnell was making sure neither Defendant nor Moose made any threatening movements or attempted to hide or destroy any potential evidence. Defendant was walking back and forth between one of the beds and the dresser in the room. Officer Presnell asked Defendant several times to remain still. Officer Presnell described Defendant as attempting to reach under pillows and open the dresser drawers. During this time, Officer Spinda collected the drug paraphernalia from the bed, and continued her attempts to gain access to the bathroom. After about a minute, Meadows opened the bathroom door and came out. Officer Spinda described Meadows as "nervous and jittery."

Officer Spinda then entered the bathroom to conduct a search because she was concerned that Meadows may have been attempting to hide or destroy evidence. Officer Spinda noticed razor blades in the toilet bowl. At this point, Defendant, Meadows, and Moose were all seated on the beds. Officer Presnell questioned Meadows, asking her why she had run into the bathroom, and if there had been any illegal activity taking place. Officer Spinda returned from the bathroom holding a small cardboard box. Officer Presnell looked inside the box and saw more drug paraphernalia. Officer Spinda asked if the box belonged to the two women or Defendant. All three denied owning the box. Meadows, however, admitted she owned some of the paraphernalia in the box. Officer Spinda located more paraphernalia after searching the women's purses. Officer Spinda returned to the bathroom and located a plastic bag containing white powder inside a light fixture. No field test was conducted on the substance by the officers at that time. Defendant, Meadows, and Moose all denied knowing anything about the white substance.

During the search, Officer Spinda pulled back the covers on the bed upon which Defendant was seated, and Defendant jumped up in a manner that Officer Presnell found potentially threatening to Officer Spinda. Officer Presnell then drew his weapon and placed Defendant in handcuffs. There was a duffel bag containing men's clothing near the entrance to the room. Defendant stated the duffel bag belonged to him.

The officers arrested Defendant, Meadows, and Moose. Meadows and Moose were arrested for possession of paraphernalia and possession of a controlled substance. It is unclear if either Meadows or Moose was arrested for trespassing. Officer Presnell testified that Defendant was not arrested for possession of paraphernalia because Defendant "didn't have any paraphernalia about his person even though he was in the room, the paraphernalia was more consistent with the females. [Meadows] . . . was in the bathroom seconds before the paraphernalia was found in the bathroom."

Defendant was arrested for "constructive possession of what we believed to be powder cocaine." Officer Presnell transported Defendant to the detention center. At the time, Officer Presnell did not know whether Defendant's presence in Room 312 had been lawful or not. When they reached the detention center, Officer Presnell informed Defendant that if he had any contraband on him, he should let Officer Presnell know before they entered the detention facility. Defendant then asked Officer Presnell to hold out his hands and Defendant dropped two rocks, later determined to be four grams of crack cocaine, into Officer Presnell's hands. Lab tests subsequently conducted on the white powder obtained from the light fixture in the bathroom of Room 312 determined that it was not a controlled substance.

Defendant contends that the trial court erred in denying Defendant's motion to suppress. We agree.

"In reviewing a trial judge's ruling on a suppression motion, we determine only whether the trial court's findings of fact are supported by competent evidence, and whether these findings of fact support the [trial] court's conclusions of law." *State v. Pulliam*, 139 N.C. App. 437, 439-40, 533 S.E.2d 280, 282 (2000) (citation omitted).

In this case, after the denial of Defendant's motion to suppress, Defendant pled guilty to the charge of felony possession of cocaine. Because prior to arrest, no suspected controlled substance was actually found on Defendant's person, or in any of his personal belongings, the

State based its possession charge against Defendant upon the theory that Defendant constructively possessed the white powder recovered from the bathroom light fixture in Room 312.

"A defendant constructively possesses contraband when he or she has 'the intent and capability to maintain control and dominion over' it. The defendant may have the power to control either alone or jointly with others." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citation omitted). Absent exclusive control over the area in which the suspected controlled substance was found, "constructive possession of the [suspected] contraband materials may not be inferred without other incriminating circumstances." *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984); *see also State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001); *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989). A " 'conviction must be based upon [a defendant's] *knowing* possession of the [suspected controlled substance].' A State cannot obtain a conviction based on drugs being 'surreptitiously introduced . . . into a defendant's residence.' " *Rashidi*, 172 N.C. App. at 635-36, 617 S.E.2d at 74 (citations omitted). For example, "[t]he State must show more than [that a] package was addressed to defendant and contained [a controlled substance], since such proof does not necessarily establish defendant's knowledge of the contents of the package and his intent to exercise control over the [contents]. *State v. Weems*, 31 N.C. App. 569, 571, 230 S.E.2d 193, 194 (1976) ('Necessarily, power and intent to control the contraband material can exist only when one is aware of its presence.')." *Rashidi*, 172 N.C. App. at 636, 617 S.E.2d at 74.

> Receipt of a package, without more, is analogous to a person being in proximity to drugs on premises over which he does not have exclusive control. When a person does not have exclusive possession of the place where narcotics are found, "the State must show other incriminating circumstances before constructive possession may be inferred." *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989) (citation omitted); *see State v. Balsom*, 17 N.C. App. 655, 659, 195 S.E.2d 125, 128 (1973) ("Mere proximity to persons or locations with drugs about them is usually insufficient, in the absence of other incriminating circumstances, to convict for possession.").

Id.

In the present case, the trial court failed to make any findings of fact or conclusions of law concerning Defendant's "intent and capa-

bility to maintain control and dominion over" the white powder found in the bathroom light fixture. As intent and capability to maintain control and dominion are elements of constructive possession, the trial court's findings of fact and conclusions of law fail to support its order denying Defendant's motion to suppress. *Miller*, 363 N.C. at 99, 678 S.E.2d at 594. We reverse the trial court's order for this reason. *Id.* at 98-99, 678 S.E.2d at 594. However, we will consider whether competent evidence presented at the suppression hearing could support Defendant's charge for constructive possession before we decide whether it is necessary to remand to the trial court for additional findings and conclusions.

> Our cases addressing constructive possession have tended to turn on the specific facts presented. *See*, e.g., *Butler*, 356 N.C. at143-44, 147-48, 567 S.E.2d at 138-39, 141 (finding constructive possession when the defendant acted suspiciously upon alighting from a bus; hurried to a taxicab and yelled "let's go" three times; fidgeted and ducked down in the taxicab once in the back seat, then exited the taxicab at the instruction of police officers and walked back to the bus terminal without being told to do so, drawing officers away from the taxicab; and drugs were recovered from under the driver's seat of the taxicab approximately ten minutes later when the cab returned from giving another customer a ride); *Matias*, 354 N.C. at 550-52, 556 S.E.2d at 270-71 (finding constructive possession when officers, after smelling marijuana emanating from a passing automobile occupied by the defendant and three others, recovered marijuana and cocaine stuffed between the seat pad and back pad where the defendant had been seated, and an officer testified the defendant was the only occupant who could have placed the package there); *State v. Brown*, 310 N.C. 563, 569-70, 313 S.E.2d 585, 588-89 (1984) (finding sufficient other incriminating circumstances when cocaine and other drug packaging paraphernalia were found on a table beside which the defendant was standing when the officers entered the apartment, the defendant had been observed at the apartment multiple times, possessed a key to the apartment, and had over $1,700 in cash in his pockets); *State v. Baxter*, 285 N.C. 735, 736-38, 208 S.E.2d 696, 697-98 (1974) (finding constructive possession when the defendant was absent from the apartment when police arrived but a search of the bedroom that the defendant and his wife occupied yielded men's clothing and marijuana in a dresser drawer, with additional marijuana found in the pocket of

> a man's coat in the bedroom closet); *State v. Allen*, 279 N.C. 406, 408, 412, 183 S.E.2d 680, 682, 684-85 (1971) (finding constructive possession when, even though the defendant was absent from the apartment at the time of a search, heroin was found in the bedroom and kitchen; the defendant's identification and other personal papers were in the bedroom, public utilities for the premises were listed in the defendant's name; and a witness testified that the defendant had provided heroin to him for resale). These and other cases demonstrate that two factors frequently considered are the defendant's proximity to the contraband and indicia of the defendant's control over the place where the contraband is found.

Id. at 99-100, 678 S.E.2d at 594-95 (internal citations omitted).

> [I]n *State v. Neal*, 109 N.C. App. 684, 687-88, 428 S.E.2d 287, 290 (1993), this Court found sufficient incriminating circumstances to survive a motion to dismiss when defendant had been in a bathroom where another person was flushing drugs down the toilet, but fled from the bathroom as the police arrived. *See also State v. Frazier*, 142 N.C. App. 361, 367, 542 S.E.2d 682, 687 (2001) (finding sufficient incriminating circumstances to survive a motion to dismiss when defendant was observed lunging into a bathroom and placing his hands in the ceiling where drugs were later located)[.]

State v. Turner, 168 N.C. App. 152, 156-57, 607 S.E.2d 19, 23 (2005).

The trial court in the present case ruled as a matter of law that Defendant lacked standing to challenge the search of the room, a finding that necessarily ruled Defendant was not an overnight guest in the room.[2] *Stoner v. California*, 376 U.S. 483, 489, 11 L. Ed. 2d 856, 860-61 (1964); *United States v. Kitchens*, 114 F.3d 29, 32 (4th Cir. W. Va. 1997). The trial court concluded:

> [D]efendant was not a registered guest at the motel and did not rent the room at the motel, . . . the only evidence to connect [D]efendant to the motel room is his statement that it was his room and that the bag containing the male clothes was his. There is no way to know or determine whether [D]efendant had been in the room fifteen minutes or twenty-four hours. That the only claim which [Defendant] had to standing for the motel room is his

2. The trial court's analysis properly should have been directed to whether Defendant had a legitimate expectation of privacy in Room 312 pursuant to the Fourth Amendment, not whether Defendant had standing to contest the search. *Minn. v. Carter*, 525 U.S. 83, 87-88, 142 L. Ed. 2d 373, 379 (1998).

> statement that the room was his and his claiming of the male clothing. That question of standing for [Defendant] to complain, with respect to the search of the motel room, is not supported by all of the evidence presented during the course of this hearing. And the [c]ourt will conclude . . . that the evidence failed to prove or indicate that [Defendant] had any standing to complain of the search conducted by [the officers].

Because the trial court concluded that "the evidence failed to prove or indicate" Defendant had "standing" to challenge the search of the room, this conclusion also necessarily means that the trial court concluded Defendant was not the "friend" Hensley indicated she would be sharing the room with. Had Defendant been the "friend" with whom Hensley indicated she would be sharing the room when she checked in, then Defendant would have had "standing" to challenge the search. *Stoner*, 376 U.S. at 489, 11 L. Ed. 2d at 860-61; *Kitchens*, 114 F.3d at 32. If Defendant had a legitimate expectation of privacy in the room, he would have had "standing" to contest the search. *Rakas v. Illinois*, 439 U.S. 128, 142-43, 58 L. Ed. 2d 387, 400-01 (1978). Further, all the evidence clearly shows that Hensley did not want Defendant, Meadows, and Moose in her room, as she twice contacted management in order to have them removed. They were clearly not invited guests at the time the officers conducted their search. Thus, not only was Defendant's control over the room not exclusive, it was minimal.

In *State v. Moore*, 162 N.C. App. 268, 592 S.E.2d 562 (2004) our Court found the relevant facts were as follows:

> [T]he officers talked briefly with [the defendant] at the residence's door, Defendant attempted to shut the door. The deputies grabbed [the defendant] and arrested him for resisting arrest. Thereafter, the deputies searched the residence. In plain view, the deputies found a brown paper envelope containing crack cocaine sitting on top of some insulation in an area where the paneling had been removed from the wall.
>
> The deputies also found two other individuals in the residence. Upon searching [the defendant's] person, the deputies located $18.00 in his front pocket and $309 in his billfold. Deputy Springs testified he had seen [the defendant] at [the residence] on several previous occasions.

Id. at 270, 592 S.E.2d at 564-65. The *Moore* Court held that it was error for the trial court to have instructed the jury on constructive possession of the cocaine found in the residence, stating:

> The State also indicates . . . $327.00 of U.S. currency on [the defendant's] person, and the African-American female's testimony that she was there to see her cousin, D.D., whom Deputy Springs indicated was [the defendant's] street name, constituted incriminating circumstances from which one could infer constructive possession. . . . Upon answering the door, the officers asked to talk with [the defendant] about narcotics activity. [the defendant] indicated he did not want to talk to police and tried to close the door. The officers then prevented [the defendant] from closing the door, grabbed him and threw him on the ground and arrested him. When [the defendant] attempted to close the door, he was not under arrest, was not the subject of an arrest warrant and was under no obligation to talk to police. Indeed, the trial court dismissed Defendant's resist, obstruct and delay charge. Moreover, there is no evidence Defendant struggled with the officers before the officers handcuffed him as the State contends in its brief. Finally, $327.00 in U.S. currency, without more, is not a significant amount of money from which one can infer constructive possession of drugs. As there was insufficient evidence of incriminating circumstances, we conclude the trial court erred in instructing the jury on constructive possession.

Id. at 276, 592 S.E.2d at 566-67.

In *Weems*, 31 N.C. App. at 571, 230 S.E.2d at 194-95, our Court found the following facts were supported by substantial evidence:

> [The police] saw three men get into the automobile and drive away. They followed and shortly thereafter stopped the car. Defendant was found to be a passenger sitting in the right front seat. The driver was the registered owner of the car. The third man was riding in the back seat. Packets of heroin were found hidden in three different locations in the car, two of which were in the front seat area and one in the back seat area. Defendant was in close proximity to the heroin hidden in the front seat area. There was no evidence defendant owned or controlled the car. There was no evidence he had been in the car at any time other than during the short period which elapsed between the time the officers saw the three men get in the car and the time they

> stopped and searched it. There was no evidence of any circumstances indicating that defendant knew of the presence of the drugs hidden in the car.

Id. at 571, 230 S.E.2d at 194-95. The *Weems* Court held:

> Viewing the evidence in the light most favorable to the State, and giving the State the benefit of every legitimate inference which may be reasonably drawn from the evidence, we find no evidence of any circumstance connecting the defendant to the drugs in any manner whatsoever other than the showing of his mere presence for a brief period in the car as a passenger. In our opinion, this was not enough. Defendant's motion for nonsuit should have been allowed.

Id. at 571-72, 230 S.E.2d at 195. In this case, because the trial court concluded that Defendant was not a person with any legitimate authority to control the room, and further concluded that there was no way of determining how long Defendant had been in the room prior to the arrival of the officers, we hold there was not competent evidence that Defendant intended to, and had the capability to, maintain control and dominion over the place where the suspected controlled substance was found, or over the suspected controlled substance itself. *Id.; Moore*, 162 N.C. App. at 276, 592 S.E.2d 566-67.

Furthermore, as we have determined there are no findings of fact or conclusions of law covering the elements of constructive possession, there are naturally no findings or conclusions concerning Defendant's "proximity to the contraband." The trial court simply concluded as a matter of law that none of Defendant's constitutional rights had been violated by his arrest for constructive possession. "It is recognized that 'mere proximity to persons or locations with drugs about them is usually insufficient, in the absence of other incriminating circumstances, to convict for possession.' " *State v. Balsom*, 17 N.C. App. 655, 659, 195 S.E.2d 125, 128 (1973).

In *Miller*, a divided panel of our Supreme Court held that the evidence, when viewed in the light most favorable to the State, was sufficient for a charge of constructive possession to be submitted to the jury. The evidence upon which our Supreme Court based its holding was as follows:

> police found defendant in a bedroom of the home where two of his children lived with their mother. When first seen, defendant

> was sitting on the same end of the bed where cocaine was recovered. Once defendant slid to the floor, he was within reach of the package of cocaine recovered from the floor behind the bedroom door. Defendant's birth certificate and state-issued identification card were found on top of a television stand in that bedroom. The only other individual in the room was not near any of the cocaine. Even though defendant did not have exclusive possession of the premises, these incriminating circumstances permit a reasonable inference that defendant had the intent and capability to exercise control and dominion over cocaine in that room.

Miller, 363 N.C. at 100, 678 S.E.2d at 595.

We first note that even absent the trial court's conclusion of law that Defendant had no "standing" to challenge the officers' search of Room 312, the facts in this case fall far short of the facts present in *Miller*. Further, the State's evidence in this case clearly shows that the officers never saw Defendant enter the bathroom, and no evidence was presented that Defendant had ever entered the bathroom. The evidence shows that Meadows ran into the bathroom, and for more than one minute refused to come out in response to Officer Spinda's demands. While in the bathroom, Meadows conducted activity consistent with the destruction or hiding of contraband.

Our review of other appellate opinions from our Courts in which a defendant did not have clear dominion and control over the premises shows no decision upholding a finding of intent to exercise control and dominion over a suspected controlled substance when there was no evidence that the defendant was ever in an area where he had the capability to secrete the suspected contraband in the location in which it was found. In *Miller*, the defendant slid off of a bed in which contraband was located, and more contraband was found in close proximity to where the defendant was found lying on the floor. In the cases cited in *Miller* that did not involve locations over which the defendant had clear dominion and control, the contraband was located either in immediate proximity to the defendant, or in places where competent evidence showed the defendant had recently been. *Id.* at 99-100, 678 S.E.2d at 594-95. In those cases where the contraband was not located in close proximity to the defendant, the defendant's dominion and control over the location was evident, and there were other circumstances to support constructive possession. *See*, *e.g.*, *Baxter*, 285 N.C. at 736-38, 208 S.E.2d at 697-98 "(finding constructive possession when the defendant was absent from the apart-

ment when police arrived but a search of the bedroom that the defendant and his wife occupied yielded men's clothing and marijuana in a dresser drawer, with additional marijuana found in the pocket of a man's coat in the bedroom closet)[.]" *Miller*, 363 N.C. at 100, 678 S.E.2d at 595; *see also* cases cited above. There was "no evidence that [Defendant was] under the influence of or [a user of] of narcotics." *Balsom*, 17 N.C. App. at 659, 195 S.E.2d at 128. The trial court's relevant findings of fact concerning Defendant's actions in the room were limited to the following: that Defendant "stated to [Officer] Presnell that the motel room was his room[;]" that Defendant "continued or insisted on continuing to walk around the room[,]" following which Officer "Presnell told [Defendant] to have a seat on the bed[;]" "[t]hat after [Defendant] took a seat on the bed pursuant to the officers' instructions, that [Defendant] stood up real fast on one occasion and the officers drew their guns[;]" and that "a bag was located in the motel room which [Defendant] said was his bag. That inside the bag was male clothes which [Defendant] also said were his clothes." The relevance of the trial court's findings that Defendant stated the room was his, and that Defendant stated the duffel bag containing male clothes was his, is seriously undermined by the trial court's conclusion that Defendant lacked "standing" to contest the search, and the conclusion that there was no way to know whether Defendant had been in the room "fifteen minutes or twenty-four hours."

We decline to expand the holding in *Miller* to allow someone to be convicted of constructive possession when competent evidence supports neither dominion and control over the location in which the contraband was located, nor that the suspect was ever in close proximity to the recovered contraband (or suspected contraband). *See State v. Harvey*, 281 N.C. 1, 12-13, 187 S.E.2d 706, 714 (1972); *State v. McNeil*, 165 N.C. App. 777, 781, 600 S.E.2d 31, 34 (2004). Were we to expand the holding in *Miller* to cover these facts, we would in effect be affirming convictions for constructive possession based upon a defendant's "mere proximity to persons or locations with drugs about them[.]" *Balsom*, 17 N.C. App. at 659, 195 S.E.2d at 128.

We hold that there was not competent evidence presented in this case to support the trial court's findings of fact nor its conclusion that Defendant had the requisite intent and capability to maintain control and dominion over the suspected controlled substance. *Id.* at 99, 678 S.E.2d at 594. There was no competent evidence of any circumstances indicating that Defendant knew of the presence of the

suspected controlled substance located in the bathroom light fixture. *See Hamilton*, 145 N.C. App. at 158, 549 S.E.2d at 237; *(see also State v. Savaria*, 2005 N.C. App. LEXIS 1237 (N.C. Ct. App. July 5, 2005)). "[W]e find no evidence of any circumstance connecting the defendant to the drugs in any manner whatsoever other than the showing of his mere presence for a brief period in" the room. *Weems*, 31 N.C. App. at 571, 230 S.E.2d at 195. We hold that the trial court erred in denying Defendant's motion to suppress.

New trial.

Judge JACKSON concurs.

Judge STEELMAN dissents with a separate opinion.

STEELMAN, Judge, dissenting.

I must respectfully dissent from the majority opinion.

The defendant was convicted of the possession of two rocks of crack cocaine that he surrendered to police, not the counterfeit controlled substance that was found in the bathroom light fixture of the motel room.

On appeal, defendant brings forward only two assignments of error as follows:

> 6. The trial court's conclusion of law in its denial of defendant's motion to suppress, that . . . on the ground that it was erroneous in law, and, therefore, the trial court's conclusion violated the defendant's rights under North Carolina law, Article I, §§ 19, 20, 23 and 35 of the North Carolina Constitution, and the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.
>
> 8. The trial court erred by denying defendant's motion to suppress on the ground that the decision was not supported by sufficient conclusions of law, was erroneous in law, and, therefore, the trial court's decision violated the defendant's rights under North Carolina law, Article I, §§ 19, 20, 23 and 35 of the North Carolina Constitution, and the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Neither of these assignments of error attack any of the trial court's findings of fact, and they are therefore binding on appeal. *State v.*

Carrouthers, — N.C. App. —, —, 683 S.E.2d 781, 784 (2009). Since assignment of error 6 fails to specify which conclusion of law it seeks to attack, it is deficient. *State v. Roache*, 358 N.C. 243, 288, 595 S.E.2d 381, 411 (2004); N.C.R. App. P. 10(c)(1) (2009). There is no assignment of error that the conclusions of law are not supported by the findings of fact. The remaining assignments of error are not argued and are deemed abandoned. N.C.R. App. P. 28(b)(6) (2009). Thus the analysis is limited to assignment of error 8, which is a general attack on the sufficiency of the conclusions of law to support the decision.

Defendant's motion to suppress raised two issues; (1) that the police officers violated his constitutional rights by searching the motel room without consent and without a search warrant; and (2) that there was no probable cause to arrest defendant. The trial court's order addresses in detail the first issue, but fails to make any findings of fact or conclusions of law as to whether there was probable cause to arrest the defendant.

It is not the role of the appellate courts to rule upon issues not previously decided by the trial court. *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001). I would remand this matter to the trial court for entry of an order containing findings of fact and conclusions of law concerning whether there was probable cause to arrest the defendant.

I would affirm the trial court's order denying the motion to suppress as to the search of the motel room.

TOTAL RENAL CARE OF NORTH CAROLINA, LLC D/B/A TRC-LELAND, PETITIONER V. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, RESPONDENT, AND BIO-MEDICAL APPLICATIONS OF NORTH CAROLINA, INC., D/B/A FRESENIUS MEDICAL CARE OF BRUNSWICK COUNTY, RESPONDENT-INTERVENOR

No. COA09-879

(Filed 7 September 2010)

1. Appeal and Error— preservation of issues—failure to make specific argument

Although petitioner generally contended that the Department of Health and Human Services's (DHHS) final agency decision

failed to apply the correct legal standards, the Court of Appeals (COA) did not address this argument. Petitioner did not specify how any of the alleged general failures to apply the correct legal standards changed the outcome of the case. Further, the COA addressed DHHS's application of standards of review in regard to each substantive issue argued by petitioner.

2. Hospitals and Other Medical Facilities— approval of certificate of need application—dialysis facility

The Department of Health and Human Services (DHHS) did not err by approving respondent intervenor's certificate of need (CON) application for a new dialysis facility. Petitioner failed to cite any law suggesting that patient letters should be given greater weight during the CON process. DHHS complied with the public hearing requirement under N.C.G.S. § 131E-185(a1)(2). Further, DHHS properly concluded that respondent intervenor reasonably determined travel distances and dialysis patient growth, that the Anson County case was markedly different from the present one, and that respondent intervenor's application was in compliance with Criterion 3 and the Performance Standards Rule.

3. Hospitals and Other Medical Facilities— rejection of certificate of need application—dialysis facility

The Department of Health and Human Services did not err by finding that petitioner's certificate of need application did not conform with Criterion 3 or 14 of N.C.G.S. § 131E-183(a) or with 10A N.C. Admin. Code 14C.2202(b)(2). Furthermore, findings of fact 116 and 141 were not inconsistent.

4. Hospitals and Other Medical Facilities— certificate of need application—dialysis facility—comparative review argument rejected

Although petitioner contended the Department of Health and Human Services erred by engaging in a comparative review of the pertinent certificate of need applications, this argument was deemed meritless based on the prior conclusions that respondent intervenor conformed to Criterion 3, and petitioner failed to comply with Criterion 3 and 14 and the Transplantation Standard Rule.

Appeal by petitioner from Final Agency Decision entered on or about 19 March 2009 by the North Carolina Department of Health and Human Services. Heard in the Court of Appeals 13 January 2010.

Poyner Spruill LLP, by William R. Shenton, for petitioner-appellant.

Attorney General Roy A. Cooper, III, by Scott Stroud, for respondent-appellee.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Lee M. Whitman, and Tobias S. Hampson, for respondent-intervenor-appellee.

STROUD, Judge.

Total Renal Care of North Carolina, LLC d/b/a TRC-Leland appealed the final agency decision affirming the decision of the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section to approve the application of Bio-Medical Applications of North Carolina, Inc. d/b/a Fresenius Medical Care of Brunswick County for a new dialysis facility. For the following reasons, we affirm.

I. Background

On 28 March 2008, Total Renal Care of North Carolina, LLC d/b/a TRC-Leland ("TRC") filed a petition for a contested case hearing regarding the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section's ("the CON Section") decisions denying "TRC's application to develop and operate a new ten-station dialysis facility in the town of Leland in Brunswick County" and approving Bio-Medical Applications of North Carolina, Inc. d/b/a Fresenius Medical Care of Brunswick County's ("BMA") application "to develop and operate a new dialysis facility in the town of Supply, also in Brunswick County[.]" Both applications were submitted after a need was recognized "for 13 additional dialysis stations in Brunswick County, North Carolina." TRC requested that both decisions be reversed and that it be awarded a certificate of need ("CON") for a new dialysis facility in Leland. On or about 17 April 2008, BMA filed a motion to intervene in the case. On 1 May 2008, BMA's motion was granted.

On or about 23 December 2008, Joe L. Webster, administrative law judge, recommended that BMA and TRC be granted "a new review of the applications utilizing reviewers not involved in the initial review, and in the alternative, reverse the CON Section's decision to grant BMA's application for a certificate of need and to affirm the CON Section's decision to deny TRC's applications for a certificate of

need." On or about 5 March 2009, TRC submitted its exceptions to the recommended decision and a proposed final agency decision. Also on or about 5 March 2009, the CON Section and BMA submitted their exceptions to the recommended decision and their proposed final agency decision. On or about 19 March 2009, the North Carolina Department of Health and Human Services Division of Health Service Regulation ("DHHS") affirmed the CON Section's decision to award BMA a CON. TRC appealed.

II. Standard of Review

The standard of review of an administrative agency's final decision is dictated by the substantive nature of each assignment of error.

Where the appellant asserts an error of law in the final agency decision, this Court conducts de novo review. When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency.

Fact-intensive issues, such as sufficiency of the evidence or allegations that a decision is arbitrary or capricious, are reviewed under the whole record test.

A court applying the whole record test may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter de novo. Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidenceto justify the agency's decision.

Substantial evidence means relevant evidence a reasonable mind might accept as adequate to support a conclusion. However, the whole record test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence.

In *Britthaven and Total Renal Care*, this Court applied a standard of deference first described by the United States Supreme Court in *Skidmore v. Swift & Company*, 323 U.S. 134, 89 L.Ed. 124 (1944), regarding agency interpretations of enabling statutes.

> Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. The weight of such an interpretation in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.
>
> In *Total Renal Care*, this Court added: If appropriate, some deference to the Agency's interpretation is warranted when we are operating under the traditional standards of review.

Good Hope Health Sys., L.L.C. v. N.C. Dep't. of Health and Human Servs., 189 N.C. App. 534, 543-44, 659 S.E.2d 456, 462-63 (citations, quotation marks, ellipses, brackets, and headings omitted), *aff'd per curium*, 362 N.C. 504, 666 S.E.2d 749 (2008).

III. Legal Standards

[1] TRC first contends that "the final agency decision failed to apply the correct legal standards." (Original in all caps). TRC argues DHHS cited the wrong standard for reviewing a recommended decision, "mischaracterized the standard for finding harmless error[,]" and misstated "principles applicable to reviewing applicants for conformity with review criteria and determining whether an applicant may receive a certificate of need." In its first argument, TRC does not specify how any of the alleged general failures "to apply the correct legal standards" changed the outcome of the case in any way, and therefore we will not address this argument further. *See Responsible Citizens v. City of Asheville*, 308 N.C. 255, 271, 302 S.E.2d 204, 214 (1983) ("The burden is on the appellant not only to show error, but to show *prejudicial* error, *i.e.*, that a different result would have likely ensued had the error not occurred." (emphasis in original) (citations omitted)). However, we will address DHHS's application of standards of review in regard to each substantive issue argued by TRC.

IV. BMA Application

[2] N.C. Gen. Stat. § 131E-183 sets forth the criteria for issuing a CON. *See* N.C. Gen. Stat. § 131E-183 (2007). N.C. Gen. Stat. § 131E-183(a) provides that "[t]he Department shall review all applications utilizing the criteria outlined in this subsection and shall determine that an application is either consistent with or not in conflict with these

criteria before a certificate of need for the proposed project shall be issued." N.C. Gen. Stat. § 131E- 183(a). N.C. Gen. Stat. § 131E-183(a)(3) ("Criterion 3") provides that

> [t]he 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). Furthermore, "[a]n applicant proposing to establish a new End Stage Renal Disease facility shall document the need for at least 10 stations based on utilization of 3.2 patients per station per week as of the end of the first operating year of the facility[,]" 10A N.C. Admin. Code 14C.2203(a) (2008); this rule is under the "Performance Standards[.]" "[T]here is no specific methodology that must be used in determining patient origin, under CON regulations, patient origin must be projected and all assumptions, including the specific methodology by which patient origin is projected, must be clearly stated." *Retirement Villages, Inc. v. N.C. Dept. of Human Res.*, 124 N.C. App. 495, 500, 477 S.E.2d 697, 700 (1996) (citation, quotation marks, and brackets omitted).

TRC argues that DHHS erroneously determined that BMA complied with Criterion 3 and the Performance Standards Rule because "*[t]he record shows that the CON Section simply did not consider whether BMA's fundamental assumption*—that all Brunswick County patients who had been going to a facility outside the county would choose to dialyze at its Supply facility—*was reasonable*." (Emphasis added.) TRC contends that

> [t]he crux of this appeal involves the CON Section's failure to consider pertinent information contained in the BMA and TRC Applications, presented in written comments and at the public hearing, and gathered by the CON Section Project Analyst herself. That information was directly pertinent to the fundamental assumption in BMA's Application. The Final Agency Decision upholds the CON Section's erroneous determinations.

Thus, TRC asserts that letters in support of its application, information presented at the public hearing, and information regarding travel distances reveal the flaw in "BMA's fundamental assumption—that all

Brunswick County patients who had been going to a facility outside the county would choose to dialyze at its Supply facility[.]" TRC further contends that the CON Section departed from its normal standards in reviewing TRC and BMA's competing applications, thus leading to DHHS's erroneous conclusion.

A. Letters

TRC claims that "there were 35 letters of support in the TRC Application but only six letters of support in the BMA Application." In the final agency decision DHHS found as fact that

> TRC's application was accompanied by a significant number of letters of support. Patient letters of support are not as relevant in a county need review because the patients typically know only one of the providers. . . . It would thus not be appropriate for the CON Section to have given great weight to these letters in determining whether BMA's need methodology was reasonable. . . . If patient support was the only deciding factor, there would be no need for publication of county need in an SDR or review of CON applications.

TRC fails to cite any law suggesting that patient letters should be "given great weight" during the CON process. Furthermore, TRC concedes that there were also letters in support of BMA's application.

As long as both applications are reasonable and supported by substantial evidence, this Court will not overturn the decision of DHHS through the use of contrary evidence. *See Craven Reg'l Med. Auth. v. N.C. Dep't. of Health and Human Servs.*, 176 N.C. App. 46, 59, 625 S.E.2d 837, 845 (2006) ("There were reasons to support both applications and deference must be given to the agency's decision where it chooses between two reasonable alternatives. It would be improper for this Court to substitute its judgment for the Agency's decision where there is substantial evidence in the record to support its findings. This argument is without merit." (citation omitted); *see also Good Hope Health Sys., L.L.C.*, 189 N.C. App. at 544, 659 S.E.2d at 462 ("Substantial evidence means relevant evidence a reasonable mind might accept as adequate to support a conclusion." (citations and quotation marks omitted)). Thus, we cannot substitute our judgment for that of DHHS in its consideration of the letters submitted on behalf of TRC or BMA.

B. Public Hearing

TRC also argues that

> [w]hile the CON Section held a public hearing as required, neither the Project Analyst nor the supervisor assigned to this review attended the hearing, listened to, or reviewed a transcript of, the oral comments presented at the hearing by patients and family members before the decision on the applications.

However, Ms. Tanya Rupp, the project analyst who reviewed the TRC and BMA applications, testified that after she reviewed the applications she "read through the public hearing materials." These materials included a sign-in sheet which indicated in whose favor each individual spoke and "written summaries of the comments made at the public hearing[.]" Thus, there was substantial evidence that Ms. Rupp was aware of the comments at the public hearing and that she considered the public hearing in her decision. *See Good Hope Health Sys., L.L.C.* at 544, 659 S.E.2d at 462. As long as the public hearing is in compliance with the applicable statutes and regulations, we cannot impose a requirement that the project analyst be personally present for the entire public hearing.

Furthermore, though the CON Section was required to conduct a public hearing, *see* N.C. Gen. Stat. § 131E-185(a1)(2) (2007), TRC has failed to direct our attention to any law regarding what specifically must be done with the information gathered at the public hearing. While a failure to consider information from the public hearing at all would render N.C. Gen. Stat. § 131E-185(a1)(2) meaningless, we also do not read the statute to require the stringent application that TRC advocates. The CON Section conducted the hearing in accordance with N.C. Gen. Stat. § 131E-185(a1)(2); the CON Section employees who attended noted individuals who attended the meeting and their comments; and the public comments were summarized and reviewed by the project analyst. We conclude the CON Section did enough to comply with N.C. Gen. Stat. § 131E-185(a1)(2).

C. Travel Distances and Dialysis Patient Population Growth

TRC also argues that Ms. Rupp "gathered information on travel distances between the available and proposed dialysis facilities[,]" but failed to use this information properly, along with other information that "demonstrated an increase in the Leland dialysis patient population and a decrease in the Supply dialysis patient population." TRC contends that Ms. Rupp knew that

> [t]he distance between the proposed site of the TRC-Leland Facility and the TRC-Wilmington Facility was 8.81 miles or 14 minutes of travel time. . . .
>
> The distance between Supply, where BMA proposed its facility and the Leland area was 23.65 miles or 33 minutes of travel time. . . .
>
> The distance between the existing TRC-Shallotte Facility and Supply was 7.86 miles or 11 minutes of travel time. . . .

Defendant contends "[t]his data established that the TRC-Wilmington facility was much closer to northern Brunswick County than the site of the BMA Supply facility[,]" thus "for patients leaving northern Brunswick County to get treatment at TRC's Wilmington facility, that facility still would be closer[.]"

However, TRC itself is making a fundamental assumption, which is that patients will automatically choose the closest facility, no matter the county. TRC ignores other relevant information presented before the CON Section and DHHS regarding the heavy traffic in Wilmington, the lack of public transportation options across county lines, and the Wave county van system that provides transportation for qualified dialysis patients within Brunswick County. As DHHS had substantial evidence before it as to why a patient might choose dialysis in his or her own county rather than to travel to Wilmington in New Hanover County, we again will not find error based upon conflicting evidence. *See Good Hope Health Sys., L.L.C.* at 544, 659 S.E.2d at 462.

TRC also contends that "[t]he data showed that BMA had proposed a facility in a zip code with a shrinking population of dialysis patients who would need hemodialysis treatments, and that the Leland zip code, where TRC had proposed to locate its facility, was experiencing significant patient growth." However, TRC failed to challenge the findings of fact which state that BMA based its projected patient population on "the Five Year Annual Change Rate published within the July 2007" Semiannual Dialysis Report by DHHS. "The Five Year Annual Change Rate represents the average annual growth rate over a five (5) year period so as to capture the dynamics of the population and account for all upswings and downturns in the population." TRC, on the other hand, based its projected patient population "on the Brunswick County growth rate over a six (6) month period, the Shallotte facility growth rate over an eight (8) month period and over a five (5) year period, and the North Carolina growth rate for all patients in the state over a five (5) year period."

Based on this information, we conclude DHHS did not err in determining that it was reasonable for BMA to base its projected population growth on five years' worth of data, rather than relying upon six month's worth of data which allegedly indicated a decrease. *See id.*

D. Prior Practice

TRC also argues that

> [t]he CON Section's approach in this review directly conflicts with its analysis of a similar situation [regarding Anson County. In the Anson County application,] the . . . Project Analyst concluded that one applicant had overstated the number of patients who would transfer to its Anson County facility by relying on the unreasonable assumption that a number of patients who lived in Anson County but were choosing to dialyze at a facility in Union County would transfer to the proposed Anson County facility. On that basis, the Project Analyst concluded that the applicant failed to conform to Review Criterion 3 or to meet the Performance Standard Rule. . . . In the instant case, BMA likewise overstated its projected patient population, but the Project Analyst failed to analyze and reject this overstatement, and this oversight was not addressed in the Final Agency Decision.

DHHS found that the Anson County case was "substantively and materially different" from this case. DHHS ultimately concluded that the Anson County case was "not determinative of the ultimate decision reached in this case." We agree from our review that the facts of the Anson County case are markedly different from the present one.

With regard to Anson County, BMA included in its patient population 14 patients who lived in Anson County but stated "they wanted to go to the [proposed] Marshville facility [in Union County]." The Marshville facility was eventually approved and BMA's Anson County facility was not, in part because BMA's patient origin methodology did not take into account the 14 patients who wanted to dialyze in the Marshville facility. The Anson County situation is entirely different from the situation here; TRC has not identified specific patients who want to use its facility which were also included in BMA's calculation of its projected patient population. DHHS's finding of fact that the two cases are distinguishable on this point is supported by the record.

E. Criterion 3 and Performance Standards Rule

As to Criterion 3 and the Performance Standards Rule, TRC only contests BMA's assumption that Brunswick County patients would want to receive dialysis in Brunswick County. TRC does not challenge any other portion of compliance with Criterion 3 or the Performance Standard Rule. Therefore, as we have concluded that DHHS could properly decide, based upon the substantial evidence before it, that it was reasonable for BMA to assume that Brunswick County patients would want to receive dialysis in Brunswick County, we also conclude that DHHS properly concluded that BMA's application was in compliance with Criterion 3 and the Performance Standards Rule, as the "fundamental assumption" was the only challenge TRC brought as to these two requirements. These arguments are overruled.

V. TRC Application

[3] TRC argues that DHHS erred in finding its application non-conforming to Criterion 3, N.C. Gen. Stat. § 131E-183(a)(14), in findings of fact 116 and 141, and 10A N.C. Admin. Code 14C.2202(b)(2). We disagree.

A. Criterion 3

TRC directs our attention to DHHS's determination that TRC did not did not comply with Criterion 3.

Again, Criterion 3 provides,

> [t]he 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).

As to Criterion 3, DHHS concluded that TRC's application did not conform due to TRC's methodology in projecting patient population. In its application, TRC projected that 29 of its existing patients would transfer to the new facility due to proximity to their homes and because they could continue seeing their current doctors. However, TRC projected it would open its facility with 31 patients. TRC did not explain where the two other patients came from, as it had specifically

identified only 29. Furthermore, in predicting its annual growth rate, TRC began its calculations from January 1, 2007. However, TRC did not submit its application until September of 2007 and did not project opening the facility until 2009. Therefore, we agree with DHHS's determination that TRC's methodology did not conform with Criterion 3 as TRC's population projections were "unreasonable and unsupported by the evidence."

B. Criterion 14

TRC next contends that DHHS erred in determining it did not comply with N.C. Gen. Stat. § 131E-183(a)(14) ("Criterion 14") which provides that "[t]he applicant shall demonstrate that the proposed health services accommodate the clinical needs of health professional training programs in the area, as applicable." N.C. Gen. Stat. § 131E-183(a)(14). TRC argues that the CON Section and DHHS should have taken note of a letter it submitted regarding "the President of Brunswick Community College indicating the College's appreciation of its long-standing relationship with TRC and the use of the Shallotte facility as training site for its nursing students." Assuming *arguendo*, as TRC argues, that the CON Section should have even considered this letter which was part of an entirely separate application not at issue, the letter still in no way establishes TRC conformed with Criterion 14. While TRC may have allowed Brunswick Community College use of its Shallotte facility, it cites to no evidence which showed it would allow the Brunswick Community College to use its Leland facility. As this is the only evidence TRC directs us to that it conformed with Criterion 14, DHHS properly concluded that TRC did not conform.

C. Findings of Fact 116 and 141

TRC next directs our attention to findings of fact 116 and 141 which provide:

> 116. The TRC application was nonconforming to Criterion 3.
>
> 141. . . . If TRC's application had been found comparatively superior to BMA's application, the CON Section would have conditionally approved TRC's application and disapproved BMA's application.

TRC argues that these two findings are inconsistent. However, we find this argument meritless as finding of fact 141 is clearly conditioned by the word "[i]f." Certainly, *if* TRC's application were found to be comparatively superior to BMA's application, it would have

been appropriate for it to have been conditionally approved. However, TRC's application was not found to be comparatively superior; BMA's was. This argument is meritless.

D. Transplantation Standard Rule

TRC also argues that the CON Section erred in determining TRC had not complied with 10A N.C. Admin. Code 14C.2202(b)(2) ("Transplantation Standard Rule"), while concluding BMA had conformed. The Transplantation Standard Rule requires that

> a letter of intent to sign a written agreement or a written agreement with a transplantation center describing the relationship with the dialysis facility and the specific services that the transplantation center will provide to patients of the dialysis facility.

10A N.C. Admin. Code 14C.2202(b)(2) (2008). While TRC alleges DHHS erred in concluding BMA had conformed with the Transplantation Standard Rule, the final agency decision provides a list of TRC's issues, which does not include this contention. Furthermore, TRC did not challenge this list by claiming it had further issues. Therefore, we will not review this issue regarding BMA. However, TRC has assigned error to the finding that it did not comply with the Transplantation Standard Rule, and we will review this contention.

TRC directs our attention to "a letter from Duke University Medical Center and an unsigned agreement between TRC-Leland and Carolinas Medical Center pertaining to provisions of transplant services." The letter from Duke University Medical Center was from Stephen R. Smith, M.D., an Associate Professor of Medicine in the Division of Nephrology at Duke University Medical Center. The letter stated that "Dr. McCabe and [sic] will continue to provide transplant services to the new unit DaVita Leland." Furthermore, although the record contains a document noted as a "Transplant Agreement[,]" the only signature on this agreement is on behalf of Davita Dialysis of Leland and the signature space on behalf of Carolinas Medical Center is blank. These two documents are neither "a letter of intent to sign a written agreement or a written agreement with a transplantation center[.]" While Dr. Smith indicated he and a colleague will provide services at TRC's new facility, he in no way indicated that Duke University's transplantation center will be doing the same. Furthermore, while TRC does have a written document purporting to be an agreement with Carolinas Medical Center, this document is not an agreement until

actually signed by an authorized representative of Carolinas Medical Center. We therefore conclude that DHHS did not err in concluding TRC did not conform with the Transplantation Standard Rule.

VI. Comparative Review

[4] Lastly, TRC contends DHHS should not have engaged in a comparative review of the applications, and even if it did, it should have found TRC's to be the superior application. TRC's contention that there should not have been a comparative review is based upon the argument that BMA did not conform to Criterion 3. However, we have already concluded that DHHS did not err in concluding BMA conformed to Criterion 3, and therefore this argument is meritless. TRC also points to various other errors in DHHS's consideration, but we have already concluded that DHHS did not err as to its determinations regarding TRC's previous contentions of BMA's application and that TRC failed to comply with Criterion 3 and 14 and the Transplantation Standard Rule; these findings alone establish that TRC's application could not have been superior to BMA's application. This argument is also meritless.

VII. Conclusion

We conclude that DHHS properly allowed BMA's application and disapproved TRC's application. We affirm.

AFFIRMED.

Judges BRYANT and ELMORE concur.

HARCO NATIONAL INSURANCE COMPANY PLAINTIFF v. GRANT THORNTON LLP, DEFENDANT

No. COA09-996

(Filed 7 September 2010)

1. Appeal and Error— interlocutory orders and appeals— choice of law determination—writ of certiorari granted

Although defendant's appeal from the Business Court's choice of law determination was from an interlocutory order, the Court of Appeals granted defendant's petition for writ of certiorari to consider the merits of defendant's appeal, given the com-

plexities of the case and the importance of determining the choice of law to resolve the issues involved.

2. Conflicts of Law— choice of law test—Audit State test—lex loci test

The Business Court erred in a negligence and negligent misrepresentation case by determining the choice of law on the basis of its self-created Audit State test. The nature of the cause of action, not the occupation of the defendant, controls the determination of the applicable choice of law test. The Business Court was required to apply the *lex loc*i test to plaintiff's tort claims under the prior holdings of our Supreme Court and the doctrine of *stare decisis*.

3. Appeal and Error— judgment entered under misapprehension of law—lex loci test

Although normally a judgment is vacated and remanded for further proceedings when the order or judgment appealed from was entered under a misapprehension of the applicable law, the Court of Appeals concluded it was appropriate to determine if the Business Court correctly concluded that Pennsylvania law would apply under the *lex loci* test. The Business Court's order indicated that under any test, it believed that Pennsylvania law would apply.

4. Civil Procedure— motion for summary judgment under Illinois law—lex loci test

The Business Court did not err by denying defendant's motion for summary judgment under Illinois law. Illinois law did not govern the case under the *lex loci* test.

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

Additional assignments of error not addressed by defendant in its brief were deemed abandoned under N.C. R. App. P. 28(b)(6).

Appeal by defendant from order entered 20 April 2009 by Judge Ben F. Tennille in Wake County Superior Court. Heard in the Court of Appeals 10 March 2010.

Ragsdale Liggett PLLC, by Mary Hulett, Ashley Huffstetler Campbell, and Amie C. Sivon, for plaintiff-appellee.

Yates, McLamb & Weyher, LLP, by Barbara B. Weyher and Thomas C. Younger, III; and Cohen & Grigsby, P.C., by Kerrin M. Kowach and Richard R. Nelson, II, pro hac vice, for defendant-appellant.

CALABRIA, Judge.

Grant Thornton LLP ("defendant") appeals an order (1) resolving Harco National Insurance Company's ("plaintiff") Motion for Choice of Law Determination; and (2) denying defendant's motion for summary judgment. We affirm in part and reverse in part.

I. Background

Plaintiff is an Illinois corporation which provides property and casualty insurance and reinsurance. In October 2002, plaintiff began negotiations to enter into a Program Administrator Agreement ("PAA") with Capital Bonding Corporation ("Capital Bonding"), a Pennsylvania corporation.[1] Under the proposed terms of the PAA, Capital Bonding would be appointed as plaintiff's agent to sell bail and immigration bonds in plaintiff's name in a number of states, including North Carolina. In exchange, Capital Bonding agreed to pay plaintiff a portion of the premiums generated by Capital Bonding's bond sales.

During the course of negotiations, two of plaintiff's executives visited Capital Bonding at their office in Pennsylvania. At plaintiff's request, Capital Bonding provided these executives with financial information that included Capital Bonding's balance sheet for the year 2000 and financial statements for the year 2001. Both items indicated that they had been audited by defendant, a Pennsylvania company. These audits were performed by defendant in Pennsylvania. The audit opinions were also delivered to Capital Bonding in Pennsylvania. Plaintiff claims that it relied upon these audit opinions to make its decision to enter into the PAA.

The PAA was executed on 1 January 2003. It provided that Capital Bonding would make payments to the courts when bonds issued in plaintiff's name were forfeited because bonded individuals failed to appear in court. However, plaintiff, as an insurance company,

1. Capital Bonding, which is now defunct, is not a party to this lawsuit.

remained ultimately liable to make these payments if Capital Bonding failed to do so. From 2003 to 2004, Capital Bonding issued, in plaintiff's name, hundreds of millions of dollars worth of bonds in thirty-eight states.

In 2004, Capital Bonding ceased making payments on forfeited bonds. As a result, plaintiff was required to pay all forfeited bonds that were still outstanding. On 13 January 2004, the North Carolina Department of Insurance seized more than $900,000 from plaintiff's North Carolina trust account located at Wachovia Bank in North Carolina in order to satisfy outstanding bond obligations. Ultimately, plaintiff paid more than $15,000,000 for forfeited bonds that had been issued by Capital Bonding in North Carolina. These payments, along with the payments due in thirty-seven other states, came from a variety of sources, and were primarily funded from plaintiff's corporate bank account in Illinois. However, none of these payments were made to any entity located in Illinois.

On 23 February 2005, plaintiff initiated an action against defendant in Wake County Superior Court, asserting claims for negligence and negligent misrepresentation. On 14 March 2006, the case was designated a complex business matter and assigned to the North Carolina Business Court ("the Business Court"). On 5 December 2008, plaintiff filed a Motion for Choice of Law Determination, arguing that North Carolina law should control the instant case. On 9 December 2008, defendant filed a response to plaintiff's motion and a motion for summary judgment, arguing that Illinois law should control and that defendant would be entitled to summary judgment under Illinois law. On 20 April 2009, the Business Court issued an Order and Opinion resolving the parties' respective motions. Under a choice of law test devised by the Business Court, referred to as the "Audit State test," the Business Court determined that Pennsylvania law applied. As a result, defendant's motion for summary judgment under Illinois law was denied. The Business Court's order noted that if Illinois law, rather than Pennsylvania law, had applied to the instant case, defendant would be entitled to summary judgment. From this order, defendant appeals.

II. Interlocutory Appeal

[1] As an initial matter, we note that the Business Court's order is interlocutory and generally would not be subject to immediate appellate review. "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. Dep't 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 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 Business Court's order is only permitted if the order affects a substantial right.

The question of whether a choice of law determination affects a substantial right has not been previously addressed by our Courts. However, in *United Virginia Bank v. Air-Lift Assoc.*, this Court, without conducting a substantial right analysis, issued a writ of certiorari to hear an interlocutory appeal that primarily involved a choice of law determination. 79 N.C. App. 315, 319, 339 S.E.2d 90, 92 (1986). Furthermore, in *Stetser v. TAP Pharm. Prods., Inc.*, this Court, after determining that no substantial right was affected,[2] issued a writ of certiorari to review an interlocutory order that also involved a choice of law determination. 165 N.C. App. 1, 12, 598 S.E.2d 570, 579 (2004).

"The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when . . . no right of appeal from an interlocutory order exists[.]" N.C.R. App. P. 21(a)(1) (2008). In the instant case, defendant filed, in the alternative, a petition for a writ of certiorari. Without considering whether defendant's appeal affects a substantial right, we determine that, as in *United Virginia Bank* and *Stetser*, granting this petition would be appropriate. Given the complexities of the instant case and the importance of determining the choice of law to resolve the issues involved, "the administration of justice will best be served by granting defendant['s] petition." *Reid v. Cole*, 187 N.C. App. 261, 264, 652 S.E.2d 718, 720 (2007). Defendant's petition for writ of certiorari is granted, and we consider the merits of defendant's appeal.

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2. The appellants in *Stetser* did not argue that the choice of law determination affected a substantial right.

III. Choice of Law

[2] The parties both argue that the Business Court erred by determining the choice of law on the basis of the "Audit State test." We agree.

The Business Court's order initially discussed the differing standards of accountant liability in three jurisdictions: Illinois, North Carolina, and Pennsylvania. Then, in order to determine which of the three states' law applied to the instant case, the Business Court examined the nature of accountant liability and its interplay with tort and warranty claims. The Business Court noted that our Courts have applied different conflict of law rules for tort and warranty claims.

Our Supreme Court has made clear that lex loci delicti ("lex loci") is the appropriate choice of law test to apply to tort claims.

> Our traditional conflict of laws rule is that matters affecting the substantial rights of the parties are determined by lex loci, the law of the situs of the claim, and remedial or procedural rights are determined by lex fori, the law of the forum. For actions sounding in tort, the state where the injury occurred is considered the situs of the claim. Thus, under North Carolina law, when the injury giving rise to a negligence or strict liability claim occurs in another state, the law of that state governs resolution of the substantive issues in the controversy.

Boudreau v. Baughman, 322 N.C. 331, 335, 368 S.E.2d 849, 853-54 (1988) (internal citations omitted). Our Courts have "consistently adhered to the lex loci rule in tort actions." *Id.*

However, our Supreme Court has also made clear that lex loci does not apply to warranty claims, because "actions for breach of implied warranty are now governed by the Uniform Commercial Code, adopted in North Carolina in 1965 as chapter 25 of the General Statutes." *Id.* at 336, 368 S.E.2d at 854. Instead, the choice of law that applies to warranty claims is determined by the most significant relationship test, "which requires the forum to determine which state has the most significant relationship to the case." *Id.* at 338, 368 S.E.2d at 855.

The Business Court determined that third party claims against an accountant should be specially categorized, because "[a]lthough the third party claims are generally couched in tort terms of negligence or negligent misrepresentation, they are strongly analogous to contract

breach of warranty claims." As a result, the Business Court created a new choice of law test, to be applied only in auditor liability cases: "The law of the state where an audit is performed, delivered, and disseminated (the "Audit State") should control the scope of liability to third parties not in privity with an accountant." The Business Court referred to this test in its order as the "Audit State test."

The Business Court's Audit State test seems to be the only such test of its kind. Our research has not revealed a single case in any jurisdiction that purports to utilize such a test for the purpose of determining the choice of law in an auditor liability case. As the Business Court's order acknowledges, claims for negligence and negligent misrepresentation are claims sounding in tort. It is the nature of the cause of action, not the occupation of a defendant, that controls the determination of the applicable choice of law test. While the Business Court expressed concern that "[u]sing the law of the state where the injury occurred is problematic[,]" it was required to apply the lex loci test to plaintiff's tort claims pursuant to the prior holdings of our Supreme Court and the doctrine of stare decisis.

> It is, then, an established rule to abide by former precedents, *stare decisis*, where the same points come up again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because, the law in that case being solemnly declared and determined what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or swerve from according to his private sentiments; he being sworn to determine, not according to his private judgment, but according to the known laws and customs of the land—not delegated to pronounce a new law, but to maintain and expound the old one—*jus dicere et non jus dare.*

McGill v. Town of Lumberton, 218 N.C. 586, 591, 11 S.E.2d 873, 876 (1940) (internal quotations and citations omitted). Thus, we determine that the Business Court erred by resolving plaintiff's choice of law motion by ignoring the precedent of our Supreme Court in *Boudreau* and utilizing instead its self-created Audit State test.

IV. Application of Lex Loci

[3] Normally, "[w]hen the order or judgment appealed from was entered under a misapprehension of the applicable law, the judgment, including the findings of fact and conclusions of law on which the

judgment was based, will be vacated and the case remanded for further proceedings." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 469, 597 S.E.2d 674, 693 (2004) (internal quotations and citation omitted). However, in the instant case, the Business Court's order also indicated that, under any test, including the lex loci test, it believed that Pennsylvania law would apply. The Business Court's order concluded that "[t]his Court believes that whether a 'significant relationship' or a 'place of injury' test is applied, Pennsylvania law should apply in this case." Therefore, it is appropriate for this Court to determine if the Business Court correctly concluded that Pennsylvania law would apply under the lex loci test.

A. Standard of Review

A trial court's application of North Carolina's conflict of law rules is a legal conclusion, which this Court reviews *de novo*. *Stetser*, 165 N.C. App. at 14, 598 S.E.2d at 579. "[F]or the causes of action that are normally considered to be torts . . . the law of the state where the plaintiff was injured controls the outcome of the claim." *Id.* at 14-15, 598 S.E.2d at 580. The plaintiff's injury is considered to be sustained in the state "where the last act occurred giving rise to [the] injury." *United Virginia Bank*, 79 N.C. App. at 321, 339 S.E.2d at 94. Thus, in order to determine which state's law applies to plaintiff's tort claims in the instant case, we must determine the state where plaintiff was injured.

B. The Business Court's Analysis

The Business Court determined that plaintiff suffered its harm in Pennsylvania based upon the following analysis:

> In the circumstances of this case, the place of injury can be approached in many different ways. It is undisputed that the audit was performed, delivered, and disseminated in Pennsylvania. The work was done by Pennsylvania auditors for a Pennsylvania company. If the audit done for CBC was defective, the negligent act giving rise to all claims was the delivery of the audit to CBC. The heart of Harco's claim is that it was induced into entering into the fronting agreement with CBC by the allegedly defective audit. It is certainly arguable and entirely plausible that the injury occurred when the "fronting" agreement was entered into, not when Harco honored its obligations under the bonds. Harco was injured when it entered into the contract that required it to pay on bonds in the future. The money it paid out on the bonds was the

> result of its entering into the Pennsylvania law governed contract. The final payments were made through CBC even though it was not CBC's money that was lost. Harco officials went to Pennsylvania to do their due diligence. They got the allegedly defective information there, and that allegedly caused them to enter into the "fronting" agreement.

In reaching this conclusion, the Business Court misapplied the lex loci test.

> In jurisdictions which apply the rule of lex loci delicti, an issue may arise as to whether the law of the state where an allegedly wrongful act or omission took place or that of the state where the injury or other harm was sustained should apply. In such a case, the place of the tort generally is considered to be the state where the injury or harm was sustained or suffered, and as a general rule, a victim should recover under the system in place where the injury occurred. That is, the situs of the tort ordinarily is the state where the last event necessary to make the actor liable or the last event required to constitute the tort takes place, and the substantive law of such state applies.

16 Am. Jur. 2d *Conflict of Laws* § 109 (2009); *see also Jefferson-Pilot Life Ins. Co. v. Spencer*, 336 N.C. 49, 56, 442 S.E.2d 316, 320 (1994) ("[A]n action for negligent misrepresentation . . . does not accrue before the misrepresentation is discovered, neither does it accrue until the misrepresentation has caused claimant harm.").

The Business Court incorrectly applied the lex loci test when it focused its injury analysis on where the alleged negligent misrepresentations took place. Since plaintiff had not yet sustained any injury, it had no cause of action when defendant provided the allegedly defective audit to Capital Bonding. Additionally, plaintiff had not sustained any injury when it entered into the "fronting" agreement with Capital Bonding on the basis of that audit. Since the Business Court failed to examine where plaintiff's loss was actually sustained and focused instead on where the alleged negligent misrepresentations were made, we hold that the Business Court erred by determining that because defendant's alleged negligent misrepresentations took place in Pennsylvania, Pennsylvania law would apply under the lex loci test.

C. Determination of the Place of Harm

Our Courts have not previously applied the lex loci test to either negligence or negligent misrepresentation claims in the context of a business transaction. However, this Court has previously applied the lex loci test to determine the place where a business suffered its injury in actions for unfair or deceptive trade practices.

In *Lloyd v. Carnation Co.*, this Court held that the plaintiff, a North Carolina bull semen distributor, suffered injury in Virginia (and thus Virginia law applied) when the defendants deprived plaintiff of exclusive distribution in Virginia. 61 N.C. App. 381, 387-88, 301 S.E.2d 414, 418 (1983). In *United Virginia Bank*, this Court held that Virginia law applied to a counterclaim where the defendants alleged that the plaintiff committed an unfair trade practice by representing to the defendants that they had a buyer who would pay $150,000 for an airplane and the plane was instead sold in Virginia for the sum of $55,000. 79 N.C. App. at 321, 339 S.E.2d at 94. These cases indicate that, at a minimum, it is necessary for a North Carolina court, applying the lex loci test, to make some attempt to determine the state in which the injured party actually suffered its harm.

Without acknowledging either *Lloyd* or *United Virginia Bank*, defendant encourages this Court to consider the question of where plaintiff suffered its injury in its broadest sense, by arguing that plaintiff suffered injury at its principal place of business, located in Illinois, because plaintiff felt the economic impact of its damages there. Plaintiff cites a string of cases, including several North Carolina federal cases, that provide persuasive authority for this proposition. *See*, *e.g.*, *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42, 49 n.11 (4th Cir. 1983) ("[I]njuries sustained by ITCO, a North Carolina corporation with its principal place of business in North Carolina, were sustained in the state of North Carolina."); *Rhone-Poulenc Agro S.A. v. Monsanto Co.*, 73 F. Supp. 2d 554, 555 (M.D.N.C. 1999) ("Other federal courts that have examined the application of the lex loci delicti rule to fraud claims consistently have concluded that the state where the injury occurred in a fraud claim is the state in which the plaintiff suffered the economic impact[,]" i.e. its principal place of business.); *Madison River Mgmt. Co. v. Business Mgmt. Software Corp.*, 387 F. Supp. 2d 521, 532 (M.D.N.C. 2005) ("[I]t is clear that Colorado law governs . . . because Defendant suffered any injury as a result of alleged misrepresentations in Colorado, its principal place of business.").

However, none of the cases cited by defendant attempt to reconcile this apparent bright line "place of business" rule with the choice of law analyses conducted by this Court in *Lloyd* and *United Virginia Bank*. *United Virginia Bank* is not cited by any of the cases relied upon by defendant,[3] and only one case, *ITCO Corp.*, mentions *Lloyd*. 722 F.2d at 49 n.11. But even *ITCO Corp.* only mentions *Lloyd* for the proposition that the "law of the state where the injuries are sustained should govern" an unfair and deceptive trade practices claim; it does not rely on *Lloyd* to determine where the plaintiff actually suffered its injuries. *Id.* Moreover, two additional North Carolina federal cases make clear that there is not a universal consensus regarding defendant's proposed bright line rule. In *Santana, Inc. v. Levi Strauss & Co.*, the Court held that California law would apply under the lex loci test where the injury alleged by the plaintiff, a Missouri corporation with an office in North Carolina, was invoice deductions made by the defendant in California as a result of a dispute over the quality of fabric supplied by the defendant. 674 F.2d 269, 273 (4th Cir. 1982). Furthermore, in *United Dominion Indus. v. Overhead Door Corp.*, the Court specifically rejected "a bright line rule that in all cases an injury is sustained where corporate headquarters are located." 762 F. Supp. 126, 130 (W.D.N.C. 1991). Instead, the Court, relying heavily on *United Virginia Bank*, applied Texas law to a dispute over an asset purchase when the defendant conveyed the assets and the North Carolina plaintiff delivered its money for the assets in Texas. *Id.*

We find the reasoning in *United Dominion Indus.* persuasive and join that Court in rejecting defendant's proposed bright line rule. The location of a plaintiff's residence or place of business may be useful for determining the place of a plaintiff's injury in those rare cases where, even after a rigorous analysis, the place of injury is difficult or impossible to discern. However, as the examples of *Lloyd* and *United Virginia Bank* indicate, a significant number of cases exist where a plaintiff has clearly suffered its pecuniary loss in a particular state, irrespective of that plaintiff's residence or principal place of business. In those cases, the lex loci test requires application of the law of the state where the plaintiff has actually suffered harm. Therefore, it must be determined whether the record in the instant case sufficiently indicates the state where plaintiff suffered the injury that gave rise to its claims.

3. *ITCO Corp.* was decided prior to this Court's decision in *United Virginia Bank*.

Defendant argues that, if plaintiff was injured in a state other than Illinois, then plaintiff first suffered an injury when it paid "licensing fees issued to states other than North Carolina" prior to 13 January 2004, since those fees were part of plaintiff's claimed damages. Defendant additionally contends that the record makes it impossible to determine where plaintiff first paid these licensing fees. However, although plaintiff initially paid these fees on behalf of Capital Bonding, nothing in the record indicates that it submitted these fees to Capital Bonding for reimbursement before plaintiff's funds were seized by the North Carolina Department of Insurance. Plaintiff could not have suffered an injury and thus, could not have had any cognizable causes of action until after it had unsuccessfully requested the repayment of these fees. *See Pierson v. Buyher*, 330 N.C. 182, 186, 409 S.E.2d 903, 906 (1991) (Holding that a cause of action does not accrue on the mere possibility of an injury).

Instead, plaintiff's causes of action accrued when the North Carolina Department of Insurance seized plaintiff's funds that were held in a North Carolina trust account by a North Carolina bank on 13 January 2004. At that time, plaintiff involuntarily parted with tangible property located in North Carolina, constituting the injury necessary to create causes of action against defendant for negligence and negligent misrepresentation. While both the Business Court's order and defendant's brief seem to characterize the seizure of plaintiff's trust account funds as plaintiff's funds being *received* in North Carolina, it is the location of the funds in North Carolina at the time of the seizure and not the location where the funds were received that is dispositive. Plaintiff's funds were clearly located in North Carolina at the time they were seized and, as a result, we hold that plaintiff suffered the injury necessary to give rise to its negligence and negligent misrepresentation claims in North Carolina. Therefore, North Carolina law governs plaintiff's claims under the lex loci test.

V. Summary Judgment

[4] Defendant argues that the trial court erred by denying its motion for summary judgment under Illinois law. Since Illinois law does not govern the instant case under the lex loci test, the Business Court correctly denied defendant's motion. This assignment of error is overruled.

VI. Conclusion

[5] The record on appeal includes additional assignments of error not addressed by defendant in its brief to this Court. Pursuant to N.C.R. App. P. 28(b)(6) (2008), we deem these assignments of error abandoned and need not address them.

The Business Court improperly ignored the precedent of our Supreme Court when it created the Audit State test to determine that Pennsylvania law governs the instant case, and we reverse that portion of the Business Court's order. Under a proper application of the lex loci test, North Carolina law governs the instant case, because plaintiff suffered the harm necessary to give rise to its causes of action when the North Carolina Department of Insurance seized plaintiff's funds located in its North Carolina bank account. This disposition makes it unnecessary to address plaintiff's cross-assignment of error that there is no conflict between the laws of Pennsylvania and North Carolina.

Since North Carolina law governs the instant case, the Business Court's denial of defendant's motion for summary judgment under Illinois law is affirmed. This disposition makes it unnecessary to address plaintiff's cross-assignments of error regarding the Business Court's interpretation of Illinois law.

Affirmed in part and reversed in part.

Judges HUNTER, Robert C. and STEELMAN concur.

STATE OF NORTH CAROLINA v. KENNETH THOMAS FORTE

No. COA09-1591

(Filed 7 September 2010)

1. Fiduciary Relationship— exploitation of elder adult—sufficiency of evidence—elder adult—caretaker

The trial court did not err by failing to dismiss all three charges of exploitation of an elder adult based on alleged insufficient evidence of an elder adult and a caretaker. There was sufficient evidence showing that the victim, who was older than 60 and needed extensive assistance from others, was an elder adult and that defendant had assumed the responsibility for the care of the victim.

2. Witnesses— competency—elderly witness

The trial court did not abuse its discretion in an exploitation of an elder adult case by allowing the elderly victim to testify on behalf of the State. The trial court's findings and personal observation led it to determine that the victim was competent to testify as a witness. The witness's testimony demonstrated his ability to distinguish between the truth and a lie. Further, it is not unusual for an elderly individual to have some difficulty in responding coherently to all of the questions asked during *voir dire*.

Appeal by Defendant from judgment entered 16 June 2009 by Judge Joseph Crosswhite in Richmond County Superior Court. Heard in the Court of Appeals 9 June 2010.

Attorney General Roy Cooper, by Assistant Attorney General M. Lynne Weaver, for the State.

Smith, James, Rowlett & Cohen, L.L.P., by Seth R. Cohen, for Defendant.

STEPHENS, Judge.

I. Procedural History

On 2 February 2009, Defendant Kenneth Thomas Forte was indicted on three counts of exploitation of an elder adult for offenses allegedly committed against Ernest Lindsey between 20 December 2003 and 1 June 2006.[1] The case was tried before a jury during the 8 June 2009 criminal session of Richmond County Superior Court. On 16 June 2009, the jury returned verdicts finding Defendant guilty on all charges. The trial court sentenced Defendant to 60 months probation and ordered him to pay $35,000 in restitution. Defendant gave oral notice of appeal in open court.

II. Evidence

The evidence presented at trial tended to show the following: Defendant, a woodworker, moved to Richmond County, North Carolina, in 1995 to care for his aging parents. Defendant's father

1. Two counts were in violation of N.C. Gen. Stat. § 14-32.3 (2003) and one count was in violation of N.C. Gen. Stat. § 14-112.2 (2005). Effective 1 December 2005, N.C. Gen. Stat. § 14.32.3 was repealed and replaced by N.C. Gen. Stat. § 14-112.2. The statutes are substantially similar except that N.C. Gen. Stat. § 14.32.3 required that the offender be a "caretaker" while N.C. Gen. Stat. § 14-112.2 requires that the offender be one who "stands in a position of trust and confidence with an elder adult" or "has a business relationship with an elder adult."

introduced Defendant to Lindsey in 1998 when Lindsey was either 88 or 98 years old.[2] At that time, Lindsey hired Defendant to renovate a beauty shop located on Lindsey's property. During the renovation, Defendant drove Lindsey to Charlotte, North Carolina, to buy items for the beauty shop. After he completed work on the beauty shop, Defendant continued to perform renovations, installations, and various other maintenance projects on Lindsey's home and property, including putting new siding and shingles on Lindsey's home, putting a gate in Lindsey's fence, and installing a handrail in Lindsey's home.

During the time the offenses were allegedly committed, Lindsey lived alone in his home. Lindsey's youngest sister, Laura Cromer, lived next door. Ms. Cromer cooked and brought meals to Lindsey on a daily basis. Shane Martin, a family friend, helped Lindsey maintain his truck and drove Lindsey to get groceries until Mr. Martin died in 2004. Thereafter, Defendant assisted Lindsey with grocery shopping.

Lindsey had not driven since 2000, and Defendant drove Lindsey wherever Lindsey needed or wanted to go including various grocery stores, the Alcoholic Beverage Control (ABC) package store, a pawn shop, and the courthouse to file his will. Defendant also took Lindsey to purchase dentures and a headstone. Moreover, Defendant performed a pedicure on Lindsey on at least one occasion.

The State introduced 92 checks totaling $45,412.26 written from Lindsey to Defendant between 30 December 2003 and 1 June 2006. Checks written from Lindsey to Defendant between April 2002 and December 2003 were also admitted. According to Defendant, some of the checks were to reimburse Defendant for purchases Defendant made for Lindsey, including items purchased and used to maintain Lindsey's home and yard. Defendant also testified that Lindsey gave him a series of checks written for $1,800 each and also one check written for $1,400 for Defendant to cash and give the money to Lindsey so Lindsey could purchase another vehicle. Defendant further indicated that he cashed other checks written from Lindsey to him and then gave the cash to Lindsey because Lindsey did not have a bank account in Ellerbe, where he lived.

Defendant testified that he did not balance Lindsey's checkbook or see Lindsey's bank statements, although he assisted Lindsey in paying utility bills beginning in 2002. According to Defendant,

2. Delores Bordeaux, Lindsey's daughter, testified that Lindsey's official birth records show that he was born in 1910, but family members believed he may have been born 10 years earlier in 1900, based on accounts from Lindsey and other family members.

Lindsey wrote the numeric amounts on checks and signed the checks while Defendant filled in the text portion and mailed them.

Ms. Bordeaux moved to St. Louis, Missouri in 1972 but visited her father in North Carolina at least twice a year. Ms. Bordeaux testified that she thought her father was capable of managing his own affairs between 20 December 2003 and 1 June 2006, but that before Defendant became involved in her father's life, Hattie Fairley cashed checks for her father "for a number of years" because there was no local branch of his bank, Ms. Cromer provided care and assistance for her father, Mr. Martin drove her father to go grocery shopping, and the Meals on Wheels program brought her father meals.

Ms. Bordeaux became aware that Defendant was assisting Lindsey in paying bills because she shared a joint checking account with Lindsey. Ms. Bordeaux indicated that in 2004, she noticed that large amounts of money were unaccounted for in their joint checking account, and she discovered checks signed by her father written to Defendant for cash in large amounts. Ms. Bordeaux testified that she questioned Defendant several times regarding the checks written on Lindsey's account. She stated that her father seemed confused about what was happening. Thereafter, Ms. Bordeaux and her husband requested that Defendant send copies of all of Lindsey's bills to Ms. Bordeaux. Defendant indicated that he would do so, but never did. Ms. Bordeaux then requested that Defendant give Lindsey's bills to Ms. Cromer. Defendant did not comply with this request either. Ms. Bordeaux testified that she and her husband asked Defendant not to write any checks over $500 for cash, and Ms. Bordeaux began writing checks for cash to herself to limit the amount of money that Defendant could withdraw from Lindsey's account. Ms. Bordeaux testified that when Defendant was not responsive to her requests, she and her husband sent a certified letter to Defendant and a copy to Lindsey, dated 24 April 2006, requesting that Defendant refrain from any further involvement in Lindsey's finances and that Defendant not receive any check from Lindsey made payable to him in an amount greater than $500.

In June of 2006, after Defendant had been unresponsive to her repeated requests to refrain from involvement in Lindsey's finances, Ms. Bordeaux and her husband went to the Richmond County Sheriff's office with copies of checks written by Lindsey to Defendant and expressed concern over the checks. Detective Wendell Sessoms spoke with the Bordeauxs, took the checks, and went to Lindsey's

home to ask Lindsey about his checking account. Thereafter, Detective Sessoms contacted Defendant who agreed to speak with him at the Sheriff's Department. Detective Sessoms questioned Defendant regarding Lindsey's checking account and his relationship with Lindsey and arrested him shortly thereafter.

Ms. Bordeaux testified that she did not realize her father needed live-in care until after the charges were brought against Defendant in 2006 and that Lindsey appeared much thinner and frailer by 2006. Ms. Bordeaux believed that her father understood what he was doing "to an extent" and was "fairly" mentally alert in 2006, although he could not coherently explain to her the relationship he had with Defendant. She noticed that his faculties gradually declined beginning in 2006. In 2007, Lindsey signed a power of attorney naming Ms. Bordeaux as his attorney-in-fact. In that same year, Doris Lindsey, Ms. Bordeaux's cousin, moved in with Lindsey to take care of him full-time. At the time of trial, Lindsey had other hired caregivers who assisted with his personal care each day.

III. Discussion

A. Motion to Dismiss

[1] By his first and second arguments, Defendant contends that the trial court erred by failing to dismiss all three charges of exploitation of an elder adult for insufficient evidence of the charges. We disagree.

In evaluating a motion to dismiss for insufficiency of the evidence, the task of a reviewing court is to

> examine the evidence adduced at trial in the light most favorable to the State to determine if there is substantial evidence of every essential element of the crime. Evidence is 'substantial' if a reasonable person would consider it sufficient to support the conclusion that the essential element exists.

State v. McKinnon, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). The question is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* Evidence sufficient to "carry a case to the jury" must be more than a "mere scintilla" and must generally be "any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction[.]" *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (quotation marks and citations

omitted). The court does not weigh the evidence and any discrepancies or contradictions in the evidence are to be resolved by the jury.

Id. at 67, 296 S.E.2d at 652.

A person is guilty of exploitation of an elder adult under N.C. Gen. Stat. § 14-32.3[3] if

> that person is a caretaker of a[n] . . . elder adult who is residing in a domestic setting, and knowingly, willfully and with the intent to permanently deprive the owner of property or money (i) makes a false representation, (ii) abuses a position of trust of fiduciary duty, or (iii) coerces, commands, or threatens, and, as a result of the act, the . . . elder adult gives or loses possession and control of property or money.

N.C. Gen. Stat. § 14-32.3(c). Under N.C. Gen. Stat. § 14-112.2,[4]

> [i]t is unlawful for a person: (i) who stands in a position of trust and confidence with an elder adult . . ., or (ii) who has a business relationship with an elder adult . . . to knowingly, by deception or intimidation, obtain or use, or endeavor to obtain or use, an elder adult's . . . funds, assets, or property with the intent to temporarily or permanently deprive the elder adult . . . of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elder adult . . . .

N.C. Gen. Stat. § 14-112.2(b).

1. Elder Adult

Defendant first argues that the State did not produce substantial evidence that Ernest Lindsey was an "elder adult."

Under both the repealed and the current statutes, an "elder adult" is defined as "[a] person 60 years of age or older who is not able to provide for the social, medical, psychiatric, psychological, financial, or legal services necessary to safeguard the person's rights and resources

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3. Defendant was charged with two counts of exploitation of an elder adult under this repealed version of the statute, which applied to offenses committed between 1 December 1995 and 30 November 2005, for Defendant's actions which occurred between 30 December 2003 through 30 November 2005.

4. Defendant was charged with one count of exploitation of an elder adult under the present version of the statute, which applies to offenses committed on or after 1 December 2005, for Defendant's actions which occurred between 1 December 2005 and 6 May 2006.

and to maintain the person's physical and mental well-being." N.C. Gen. Stat. § 14-112.2(a)(2); N.C. Gen. Stat. § 14-32.3(d)(4).

On this issue, the State presented evidence that tended to show the following: Lindsey was either 99 or 109 at the time of trial and had not driven a vehicle since 2000. Ms. Cromer lived next door to Lindsey and assisted him with paying his bills, brought him meals, and bought him groceries. The Meals on Wheels Program delivered a mid-day meal to Lindsey on a daily basis. Mr. Martin assisted Lindsey by driving him places, maintaining his vehicles, and grocery shopping for him. Before Defendant's arrival, Lindsey's friend cashed checks for him.

Defendant similarly cashed checks for Lindsey and, beginning in 2002, assisted Lindsey with paying bills by filling out checks that Lindsey then signed. Defendant also indicated that Lindsey wrote checks to him which he cashed and then gave the cash to Lindsey. Defendant drove Lindsey wherever he needed or wanted to go, including various grocery stores, the ABC store, the pawn shop, and Wal-Mart. Defendant also helped Lindsey with personal hygiene and made doctor and dentist appointments for him.

This evidence tends to show that Lindsey was older than 60 and needed extensive assistance from others to "safeguard [his] rights and resources and to maintain [his] physical and mental well-being." N.C. Gen. Stat. § 14-112.2(a)(2); N.C. Gen. Stat. § 14-32.3(d)(4).

Defendant argues further, however, that Ms. Bordeaux's testimony that her father was capable of managing his own affairs demonstrated that Lindsey was not an elder adult within the meaning of the statute. We reiterate the well-established principle that neither the trial court nor this Court may weigh the evidence. *Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 652. While Ms. Bordeaux's testimony may be some evidence tending to show that Lindsey was able to provide for his own well-being, when all the evidence presented at trial is viewed in the light most favorable to the State, as it must be on a motion to dismiss for insufficient evidence, *McKinnon*, 306 N.C. at 298, 293 S.E.2d at 125, we conclude there was sufficient evidence from which a jury could find that Lindsey was an "elder adult." Accordingly, the trial court did not err in denying Defendant's motion to dismiss. Defendant's argument is overruled.

2. Caretaker

Next, Defendant argues there was insufficient evidence that Defendant was a "caretaker" of Lindsey.

A "caretaker" is defined as "[a] person . . . who has assumed the responsibility for the care of a[n] elder adult voluntarily or by contract." N.C. Gen. Stat. § 14-32.3(d)(1).

On this issue, the State presented evidence that tended to show the following: Ms. Bordeaux testified that Defendant performed odd jobs for Lindsey, ran errands for Lindsey, drove Lindsey to different places, wrote checks for Lindsey, visited with Lindsey, and cut Lindsey's toenails on at least one occasion. Ms. Cromer testified that although she did not witness Defendant provide any personal care for Lindsey, Lindsey and Defendant had a close relationship and Defendant was around Lindsey's home with increasing frequency.

Defendant testified that he took Lindsey numerous places to buy groceries, alcohol, and other supplies and necessities. Defendant also took Lindsey to purchase a headstone and dentures. Defendant purchased items for Lindsey and completed renovations and other home projects on Lindsey's property. Defendant also took Lindsey to file his will and made doctor and dentist appointments for him. Moreover, Defendant was intricately involved in helping Lindsey manage his financial affairs by cashing checks for Lindsey and assisting Lindsey with paying bills.

Defendant argues that these "limited activities" are not sufficient to transform the "friendly relationship" between him and Lindsey into that of caretaker and charge. We disagree. We conclude the evidence was sufficient to allow the jury to find that Defendant had "assumed the responsibility for the care" of Lindsey. N.C. Gen. Stat. § 14-32.3(d)(1). Accordingly, as the State offered sufficient evidence that Defendant was a "caretaker" of Lindsay, the trial court did not err in denying Defendant's motion to dismiss. Defendant's argument is overruled.

B. Witness Competency

[2] Finally, Defendant contends that the trial court erred by allowing Lindsey to testify on behalf of the State. Specifically, Defendant contends that Lindsey was incapable of expressing himself concerning the matter at issue so as to be understood, and that his presence before the jury was so prejudicial as to deny Defendant a fair trial. We disagree.

Generally, every person is competent to be a witness unless disqualified by the Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 601(a) (2009). However,

> [a] person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth.

N.C. Gen. Stat. § 8C-1, Rule 601(b) (2009). "This subdivision (b) establishes a minimum standard for competency of a witness . . . ." *State v. DeLeonardo*, 315 N.C. 762, 766, 340 S.E.2d 350, 354 (1986). "The issue of the competency of a witness to testify rests in the sound discretion of the trial court based upon its observation of the witness." *State v. Rael*, 321 N.C. 528, 532, 364 S.E.2d 125, 128 (1988). "Absent a showing that a trial court's ruling as to competency could not have been the result of a reasoned decision, it will not be disturbed on appeal." *Id.*

In this case, after observing Lindsey testify on *voir dire*, the trial court found as follows:

> In rendering this decision, I have reviewed the *Davis* case. My understanding is Rule 601(b) says it does not ask how bright, how young or how old a witness is. Instead, the question is does the witness have the capacity to understand the difference between telling the truth and lying.
>
> In the Court's discretion, I do find that [Lindsey is] capable of telling the difference between the truth and a lie.
>
> Further, in the Court's discretion, under this standard, I find that he does have the capacity to testify for the State in this matter.

Thus, based on its findings and personal observation of Lindsey, the trial court determined that Lindsey was competent to testify as a witness in this case. Although the trial court did not make a specific finding as to whether Lindsey was capable of expressing himself so as to be understood concerning the matters about which he was to testify, the findings made by the trial court and its conclusion that he was competent clearly establish that the trial court exercised its discretion in declaring Lindsey competent as a witness. *See State v. Eason*, 328 N.C. 409, 427, 402 S.E.2d 809, 818 (1991) ("Although the trial court did not make a specific finding as to whether the child was capable of expressing herself concerning the matters as to which she

was to testify, the findings made by the trial court and its conclusion that she was competent clearly establish that the trial court exercised its discretion in declaring her competent as a witness."). "As it is clear that the trial court exercised its discretion in declaring [Lindsey] competent, its determination in this regard must be left undisturbed on appeal, absent a showing that the trial court's ruling as to the competency of the witness could not have been the result of a reasoned decision." *Id.* (citing *State v. Spaugh*, 321 N.C. 550, 364 S.E.2d 368 (1988); *Rael*, 321 N.C. 528, 364 S.E.2d 125; *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987)).

"Rule 601(b) does not ask how bright, how young, or how old a witness is." *State v. Davis*, 106 N.C. App. 596, 605, 418 S.E.2d 263, 269 (1992). In determining the competency of a young child or a developmentally delayed individual to testify, this Court has stated that "[i]t matters not that some of the witness's answers during *voir dire* are ambiguous or vague or that they are unable to answer some of the questions which are put to them" as such performance is not unusual when the witness is a young child or a developmentally delayed individual. *State v. Oliver*, 85 N.C. App. 1, 8, 354 S.E.2d 527, 532 (1987) (citing *State v. Gordon*, 316 N.C. 497, 503, 342 S.E.2d 509, 512 (1986)).

In *Oliver*, the prosecuting witness, a developmentally delayed 16 or 17 year old girl, was unable to testify how long it had been since August of that year, was unable to answer with specificity where she lived in her town or how long she had lived there, and did not answer several questions at all. However, this Court concluded that

> the record show[ed] there was sufficient evidence for the trial court to determine she was competent to testify [as] . . . [s]he was able to tell the court where she went to school, name her teachers, tell how old she was, when her birthday was, and what month it was during the trial. [Furthermore, s]he said she knew it was bad to tell a lie and was able also to say whether a statement told her was a lie or the truth.

Oliver, 85 N.C. App. at 8-9, 354 S.E.2d at 532.

In *Gordon*, the prosecuting witness was a six or seven year old girl. Although the Court acknowledged "that some of the witness' answers during the *voir dire* were ambiguous and vague [and that] she was completely unable to answer some of the questions which were put to her[,]" *Gordon*, 316 N.C. at 503, 342 S.E.2d at 512, this Court found no abuse of discretion in the trial court's allowing the

witness to testify as "[t]he record indicate[d] that the witness was clearly able to differentiate between a true statement and one which was false. Furthermore, she showed a general knowledge of the difference between right and wrong." *Id.* at 502-03, 342 S.E.2d at 512.

During the *voir dire* hearing in this case, Lindsey correctly testified to his full name, his birth date, and where he lived. He was able to correctly identify his sister, his son-in-law, Defendant, and his own signature. Lindsey testified that he understood that he was at the courthouse, that a trial was taking place, and that he understood his duty to tell the truth. Lindsey's testimony further demonstrated his ability to tell the truth from a lie.

Defendant argues that Lindsey's testimony shows he was "clearly befuddled" and that at first he "wasn't even sure he knew [Defendant]." Lindsey's testimony further revealed that Lindsey did not know if he had a checking account, if Defendant had helped him purchase a truck, or if Defendant had clipped his toenails. Defendant notes that "[t]he main thing Mr. Lindsey seemed to remember about [Defendant] was his 'beautiful mustache.' "

However, while some of Lindsey's answers during the *voir dire* were ambiguous and vague, and he was unable to answer some of the questions which were put to him, it would not be unusual for an elderly individual to have some difficulty in responding coherently to all of the questions asked during *voir dire*. As in *Oliver* and *Gordon*, Lindsey did, at certain points in his testimony, show an understanding of the difference between truth and falsehood and of the importance of telling the truth. This testimony supports the implicit finding of the trial judge—who was present and able to observe Lindsey's demeanor firsthand—that the witness was competent. We are therefore unable to say that the trial judge abused his discretion in finding Lindsey competent to testify at trial. This assignment of error is overruled.

For the reasons set forth above, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges STEELMAN and HUNTER, JR. concur.

PERRY DANIEL CASKEY, PLAINTIFF-APPELLEE v. AMY JOHNSON CASKEY, DEFENDANT-APPELLANT

No. COA09-1191

(Filed 7 September 2010)

Child Custody and Support— calculation of gross monthly income—employer's payments—Social Security and Medicare taxes—medical insurance premiums—life and disability insurance premiums—retirement and 401(K) plans

The trial court erred in its calculation of defendant wife's gross monthly income for child support purposes. Only income to which a parent has immediate access and can choose to access without incurring a penalty can be considered for child support purposes. Thus, the trial court erred in including as income defendant's employer's payments toward her Social Security and Medicare (FICA) taxes, medical insurance premiums, life and disability insurance premiums, and her employer's contributions to her retirement and 401(k) plans. The case was remanded for a recalculation of the amount of plaintiff's child support obligation.

Appeal by Defendant from order entered 20 March 2009 by Judge N. Hunt Gwyn in District Court, Union County. Heard in the Court of Appeals 23 March 2010.

Stepp Lehnhardt Law Group, P.C., by Donna B. Stepp, for Plaintiff-Appellee.

Weaver, Bennett & Bland, P.A., by Rebecca K. Watts, for Defendant-Appellant.

McGEE, Judge.

Plaintiff and Defendant were married on 18 December 1993. Three children were born of the marriage between Plaintiff and Defendant. Plaintiff and Defendant separated on 10 February 2006. Plaintiff filed a complaint for child custody, child support, equitable distribution, and attorney's fees on 13 July 2006. Defendant answered on 5 October 2007, and included counterclaims for inequitable distribution in her favor, child custody, sequestration of the marital residence for the use and benefit of the children, child support, and attorney's fees. Plaintiff and Defendant resolved all issues except child support. The trial court held a hearing on 4 March 2009 to consider the issue of child support. The trial court entered an order on 20 March 2009,

in which it ordered Plaintiff to pay Defendant monthly child support in the amount of $234.00. Defendant appeals from the 20 March 2009 order of the trial court. Additional relevant facts will be discussed in the body of the opinion.

Gross Monthly Income

In Defendant's first argument, she contends the trial court erred in calculating her gross monthly income for child support purposes. We agree. Defendant specifically argues the trial court should not have included as income her employer's payments toward Defendant's Social Security and Medicare (FICA) taxes, Defendant's medical insurance premiums, Defendant's life and disability insurance premiums, and her employer's contributions to Defendant's retirement and 401(k) plans.

A trial court's determination concerning child support payment

> is reviewable, but it will not be disturbed in the absence of a clear abuse of discretion. In fixing the amount of . . . child support which the husband is required to pay the wife the court must consider not only the needs of the . . . children but the estate and earnings of both the husband and wife. It is a question of fairness and justice to all parties.

Beall v. Beall, 290 N.C. 669, 673-74, 228 S.E.2d 407, 410 (1976) (citations omitted) (emphasis added).

The trial court found the following relevant facts in its order:

> 7. . . . Plaintiff is currently employed by the City of Monroe as a police officer, and has an average gross monthly income of $4,353.00.
>
> 8. . . . Defendant's W2 states that. . . Defendant's gross yearly income is approximately $50,000.
>
> 9. However, . . . Defendant filed an Employer Wage Affidavit which states that . . . Defendant receives a dollar for dollar credit for additional benefits, which are treated as income, thereby making her gross yearly compensatory income $74,428.89.
>
> 10. . . . Defendant contends that the employer wage affidavit includes payment for taxes which are attributed to the employer and should not be included in her gross income.

Based upon its findings of fact and conclusions of law, the trial court calculated Plaintiff's child support obligation to be $234.00 per month.

Defendant was employed by the Town of Matthews (the Town) as a police officer. Defendant's employer wage affidavit (the affidavit) listed her salary as $54,965.56. Chief of Police Rob Hunter testified that the $54,965.56 figure represented what Defendant, an hourly employee, would have earned had Defendant worked her full "assigned work schedule" for the year. Chief Hunter further testified that, because Defendant suffered from multiple sclerosis, Defendant was unable to work all the hours provided for in her assigned work schedule and, therefore, could not have received the full $54,965.56 figure indicated in the affidavit. The affidavit further showed that the Town annually paid the following on behalf of Defendant: $4,204.87 in FICA tax obligations, $7,565.22 in medical insurance premiums, $171.49 in life and accidental death and dismemberment insurance premiums, $4,023.48 in retirement plan contributions, $2,748.28 in 401(k) plan contributions, and $750.00 in longevity pay. The trial court included all of the above listed payments made by the Town as income for the purposes of calculating Defendant's gross annual income.

> The amount of a parent's child support obligation is determined by application of The North Carolina Child Support Guidelines (Guidelines). G.S. § 50-13.4(c)[.] A trial court may deviate from the Guidelines when it finds, by the greater weight of the evidence, application of the Guidelines: (1) would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support; or (2) would be otherwise unjust or inappropriate. G.S. § 50-13.4(c)[.]

Barham v. Barham, 127 N.C. App. 20, 24, 487 S.E.2d 774, 777 (1997) (internal citations omitted). The Guidelines define gross income as "income before deductions for federal or state income taxes, Social Security or Medicare taxes, health insurance premiums, retirement contributions, or other amounts withheld from income." N.C. Child Support Guidelines, 2009 Ann. R. (N.C.) 42. The Guidelines further state:

> **(1) Gross Income.** "Income" means a parent's actual gross income from any source, including but not limited to income from employment or self-employment (salaries, wages, commissions, bonuses, dividends, severance pay, etc.), . . . retirement or pensions, interests, trusts, annuities, capital gains, social security benefits, workers compensation benefits, unemployment insur-

> ance benefits, disability pay and insurance benefits, gifts, prizes and alimony or maintenance received from persons other than the parties to the instant action. When income is received on an irregular, non-recurring, or one-time basis, the court may average or pro-rate the income over a specified period of time or require an obligor to pay as child support a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support.

Id. at 43.

> **(4) Income Verification.** Child support calculations under the guidelines are based on the parents' current incomes at the time the order is entered. Income statements of the parents should be verified through documentation of both current and past income. Suitable documentation of current earnings (at least one full month) includes pay stubs, employer statements, or business receipts and expenses, if self-employed. Documentation of current income must be supplemented with copies of the most recent tax return to provide verification of earnings over a longer period.

Id. Our Court recently held in *Head v. Mosier*, ___ N.C. App. ___, 677 S.E.2d 191 (2009):

> When determining a parent's child support obligation under the Guidelines, a court must determine each parent's gross income. 2006 Guidelines. A parent's child support obligation should be based on the parent's " 'actual income *at the time the order is made*.' " Next, the court must determine allowable deductions from a parent's gross income to get his or her adjusted gross income. 2006 Guidelines. A parent's presumptive child support obligation is based primarily on his or her adjusted gross income.

I*d.* at ___, 677 S.E.2d at 197 (internal citations omitted) (emphasis in original).

Defendant argues that the trial court erred in its calculation because it should have only included Defendant's salary and longevity pay as income for the purposes of determining Plaintiff's child support obligation. Defendant contends that the trial court also erred in including the payments the Town made toward Defendant's Social Security, Medicare, life and accidental death and dismemberment insurance, retirement, and 401(k) accounts when calculating Defendant's income.

The Guidelines do not specifically address payments an employer makes on behalf of an employee and the effect, if any, said payments might have on the employee's adjusted gross income for the purposes of child support. A review of our state's case law reveals no clear answers to this question. We, therefore, review relevant legal principles from our appellate courts, as well as opinions from other jurisdictions, for guidance.

Retirement and Insurance Contributions

The Arizona Court of Appeals addressed these issues in *Hetherington v. Hetherington*, 202 P.3d 481 (2008), *review denied*, —— P.3d ——, 2009 Ariz. LEXIS 146 (2009). In *Hetherington*, the mother argued that the trial court had erred in failing to include the contributions made by the father's employer for the father's employment benefits. *Id.* at 486. In *Hetherington*, "gross income" for child support purposes is defined as including

> "income from any source, and may include, but is not limited to, income from salaries, wages, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits (subject to Section 26), worker's compensation benefits, unemployment insurance benefits, disability insurance benefits, recurring gifts, prizes, and spousal maintenance. Cash value shall be assigned to in-kind or other non-cash benefits[.]"

Id. (quoting Section 5(A) of the Arizona Child Support Guidelines). The Arizona Court of Appeals conducted the following analysis concerning the effect employer contributions might have on the calculation of a parent's child support obligations, highlighting whether employment benefits reduced the living expenses of the parent. This analysis begins by focusing on decisions involving employment-related expenses, and employer contributions to a parent's insurance premiums.

> Although the question whether to include employee benefits such as employer-paid health-insurance premiums and employer contributions to retirement accounts as income to the employee parent is one of first impression in Arizona, courts in other jurisdictions have considered similar issues, and most courts agree that the employment benefits that a parent receives that *reduce his living expenses* should be included as income to that parent for the purpose of determining the amount of child support. *See Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503, 514-15

(2004) (holding that benefits such as housing expenses, utilities, homeowners' insurance, other costs of home maintenance, groceries and furnishings were properly included as income to an employee parent, citing similar holdings in *Mascaro v. Mascaro*, 569 Pa. 255, 803 A.2d 1186, 1194 (2002); *Clark v. Clark*, 172 Vt. 351, 779 A.2d 42, 48-49 (2001), and *Morgan v. Ackerman*, 964 S.W.2d 865 (Mo. App. 1998)). *See also In re Marriage of Schulze*, 60 Cal. App. 4th 519, 70 Cal. Rptr.2d 488, 494-95 (1997) (holding that the use of a company car and employer-subsidized housing justified imputing the rental value of the car and the rent subsidy to the employee); *Mobley v. Mobley*, 309 S.C. 134, 420 S.E.2d 506, 509-510 (S.C. Ct. App. 1992) (holding that the car, housing and utility allowances paid by an employer were properly included in the employee parent's income). Also, the courts in some jurisdictions have held that it is appropriate to include employer-provided health-insurance coverage as income to the employee parent because it saves the parent that expense. *See Bellinger v. Bellinger*, 46 A.D.3d 1200, 847 N.Y.S.2d 783, 785 (App. Div. 2007) (holding that the trial court correctly included in the employee parent's income his "before-tax health insurance deductions" that were a "fringe benefit" provided by his employer); *Lawrence v. Delkamp*, 1998 ND 178, 584 N.W.2d 515, 518 (1998) (holding that it was not error to include as income of the employee parent the amounts that the employer paid for health-, life- an disability-insurance premiums); *Farr v. Cloninger*, 937 S.W.2d 760, 764 (Mo. Ct. App. 1997); *Chiovaro v. Tilton-Chiovaro*, 805 P.2d 575, 578, 247 Mont. 185 (1991) (holding that employer-provided health insurance is a benefit that an employee parent would have to provide and that it should, therefore, be included as income). *Cf. Widman v. Widman*, 619 So.2d 632, 634 (La. App. 1993) (holding that "gross income" does not include the insurance *premiums* paid by an employer but only the insurance *benefits*). The Alabama court held that whether to include employer-paid health-insurance *premiums* as income to the employee parent depended on whether the parent had the ability to choose between accepting additional wages in lieu of the benefit. *See Jones v. Jones*, 920 So.2d 563, 564-65 (Ala. Civ. App. 2005). When the "parent would be paid the same wages regardless of whether the parent decided to accept or to decline employer-paid health-insurance coverage . . . that is, where a parent has no power to redirect payments for such coverage[,]" the benefit should not be included as income. *Id.* (italics omitted)

Id. at 487.

The Arizona Court of Appeals also analyzed the effect of employer contributions to retirement accounts.

> Cases involving employer contributions to a retirement plan are not as uniform. The Missouri court held that employer contributions to an employee parent's retirement account were not income because "there was no discernable way in which these contributions would be of any assistance to Father in satisfying any child support payments." *Farr*, 937 S.W.2d at 764. The court noted that the employee parent did not have the option to receive cash in lieu of the contribution, and it concluded that this benefit therefore "provided no positive impact on [the parent's] immediate ability to pay child support." *Id.* The Colorado court similarly held that undistributed employer contributions to employee parents' pension plans did not constitute income for determining child support because the employers determined the amount of their contributions "and the employees did not have the option of directly receiving the amounts as wages." *In re Marriage of Mugge*, 66 P.3d 207, 211 (Colo. Ct. App. 2003) (citing *Campbell v. Campbell*, 635 So. 2d 44, 46 (Fla. Dist. Ct. App. 1994); *Ballard v. Davis*, 259 A.D.2d 881, 686 N.Y.S.2d 225, 229 n.3 (1999); and *Jordan v. Brackin*, 992 P.2d 1096, 1100 (Wyo. 1999)). The courts that have included employer contributions to retirement plans as income have not provided any particular rationale for including this particular benefit. *See Cozier v. Cozier*, 819 So. 2d 834, 836 (Fla. Dist. Ct. App. 2002) (holding that the trial court properly included as income to the employee parent the benefits of medical and term life insurance, a company car and the employer's contributions to an individual retirement account but that the court was required to place a dollar value on each benefit); *Lawrence*, 584 N.W.2d at 518-19 (holding that the definition of income included the employer's contributions to the employee parent's pension fund); *De Masi v. De Masi*, 530 A.2d 871, 879, 366 Pa. Super. 19 (1987) (holding that it was not error to include in the employee parent's income the amounts that the corporation paid for the parent's life-, health- and disability-insurance premiums and its contributions to the pension plan).

Id. at 487-88.

The Arizona Court of Appeals focused on the decisions of courts across the country seeking an "equitable outcome." The Court deter-

mined that a central consideration in the analysis should be whether the amount of employment benefits received was significant and served to reduce a parent's living expenses in such a manner as to affect the amount of child support that parent was capable of paying.

> Despite varying approaches, "courts throughout the nation have been unwavering in their attempt to reach an equitable outcome when it comes to determining a party's income for child support," *Gangwish*, 678 N.W.2d at 515, and we attempt to do the same. Thus, in interpreting the Guidelines, we seek to determine the intent of the Arizona Supreme Court based on the language and the overall purpose of the Guidelines. *Mead*, 198 Ariz. at 221 P8, 8 P.3d at 409.
>
> One purpose of the Guidelines as expressed in Section 1(A) is "[t]o establish a standard of support for children consistent with the reasonable needs of children and the ability of parents to pay." The receipt of employment benefits that "are significant and reduce personal living expenses" affects a parent's ability to pay child support and should be considered as income to that parent. *See* Guidelines § 5(D). For example, a parent may incur a different expense for health and/or life insurance if his employer did not pay for (a portion of) the premium. However, worker's compensation insurance is not an ordinary living expense for which a parent would otherwise have to pay. These are issues for the family court to resolve in the first instance.
>
> Neither is the impact on parental income of an employer's contribution to a retirement plan and to retirement long-term disability clear. For example, in this case, there was no evidence regarding whether Husband had an option to receive additional salary in lieu of his employer's ASRS contributions or whether he could determine the amount contributed. Similarly, there was no evidence regarding the retirement long-term disability benefit, and it is unknown whether this would be an ordinary living expense that Husband would otherwise incur. These also are issues for the family court to resolve in the first instance.
>
> One court has noted that the inclusion as income of employment benefits may obligate a parent to pay child support based on income that he does not really have available to spend. *See In re Marriage of Schlafly*, 149 Cal. App. 4th 747, 57 Cal. Rptr. 3d 274, 281 (2007). This is a valid concern that may be considered by the family court in determining the appropriate amount of child sup-

> port in any case. Indeed, Section 20(A) of the Guidelines allows the court to deviate from the Guidelines amount when the application of the Guidelines would be inappropriate or unjust in the individual case, when the deviation is not contrary to the child(ren)'s best interests, and when the court makes written findings stating why it deviated and what the child-support obligation would have been with and without the deviation. Thus, in a case in which benefits artificially inflate a parent's income, the court may consider a deviation from the Guidelines.

Id. at 488-89. We agree with the approach adopted by the Arizona Court of Appeals which focuses on "income" to which a parent has immediate access, and "income" that a parent can choose to access without incurring a penalty. If employment benefits received by a parent reduced the living expenses that parent would have otherwise incurred, those benefits should be included as income to that parent for the purpose of determining the amount of child support. *Id.* at 487.

The Indiana Court of Appeals has also addressed the issue of employer contributions to a parent's retirement plans. In considering the ramifications of allowing *all* contributions to a retirement account to be counted as income, the Indiana Court of Appeals cautioned that allowing all such contributions to be counted as income "would require each and every retirement contribution to be included in the [child support] calculation, regardless of how the account works. The child support calculation would be based upon funds accessible, if at all, only upon paying a significant penalty." *Saalfrank v. Saalfrank*, 899 N.E.2d 671, 679-80 (Ind. Ct. App. 2008). The Indiana Court of Appeals then held:

> Thus, we conclude that, in determining whether to exclude retirement contributions, in whole or in part, for purposes of calculating a child support obligation, the trial court should consider:
>
> (1) a parent's control of whether or in what amount a retirement contribution is made;
>
> (2) the parents' established course of conduct in retirement plan ning (prior to and after the dissolution);
>
> (3) the amount of the contribution (from nominal to a large amount that could suggest the inappropriate sheltering of income);
>
> (4) whether and to what extent there are incentives for the contribution;

(5) whether the contribution qualifies for favorable tax treatment; [and,]

. . . .

(7) any other relevant evidence.

Here, the human resources director of Father's employer sent to Mother a three-page letter detailing the terms of Father's employment. He described the Money Purchase Savings Plan ("MPSP") as follows: "Employees are automatically enrolled in the Money Purchase Savings Plan on their one (1) year anniversary, and the company contributes 6% of employee earnings, and does not require any employee contribution." The MPSP was mandatory, functioned automatically, upon a date certain, in a pre-determined and reasonable amount, and was generally applicable to the company's employees. Therefore, Mother did not establish error in the trial court's [decision not to treat] Father's contributions to the MPSP [as income for child support purposes].

Id. at 680 (citation omitted). We find the reasoning of the Indiana Court of Appeals compelling, and hold that the list of considerations cited above should be part of North Carolina courts' calculus when making determinations concerning a parent's income for child support purposes. We find this approach best complies with our Supreme Court's mandate that: "In fixing the amount of . . . child support . . . the court must consider not only the needs of the . . . children but the estate and earnings of both the husband and wife. It is a question of fairness and justice to *all parties*." *Beall*, 290 N.C. at 673-74, 228 S.E.2d at 410 (citations omitted) (emphasis added).

We also find the above analysis relevant when considering employer contributions to a parent's insurance premiums. We hold that contributions made by an employer to an employee's retirement accounts, including any 401(k) accounts, and insurance premiums, may not be included as income for the purposes of the employee's child support obligations unless the trial court, after making the relevant findings, determines that the employer's contributions immediately support the employee in a way that is akin to income. We place particular relevance on a determination concerning whether the employee *may* receive an immediate benefit from the employer's contributions, such that the employee's *present* ability to pay child support is thereby enhanced. *See Head*, ___ N.C. App. at ___, 677 S.E.2d at 197 ("A parent's child support obligation should be based on the

parent's ' "actual income *at the time the order is made.*" ' ") (citation omitted). For example, if the employee could elect to receive cash instead of retirement or life insurance contributions from the employer, those employer contributions might properly be considered as income for child support purposes.

Upon review of the record, we find that a new hearing is required and we reverse and remand to the trial court for consideration of the factors discussed above. The trial court shall make the appropriate findings of fact and conclusions of law in support of its determination of these issues. Plaintiff and Defendant may present additional relevant evidence, in order for the trial court to make informed findings on these issues.

Social Security and Medicare

It is clear from the Guidelines that benefit payments made to a parent from Social Security or Medicare are properly considered income for the purpose of calculating the parent's gross income for child support. The Guidelines do not, however, give specific guidance concerning whether payments made by an employer toward an employee's expected Social Security and Medicare benefits can be considered income.

First, in accord with the analyses we have adopted above, we hold that Social Security and Medicare taxes employers are required to make on behalf of an employee may not be considered income as applied to a parent's child support obligations. We make this holding because these payments by an employer provide a parent no immediate access to any additional funds from which they could contribute to child support. Second, the Guidelines state:

> **(4) Income Verification.** Child support calculations under the guidelines are based on the parents' current incomes at the time the order is entered. Income statements of the parents should be verified through documentation of both current and past income. Suitable documentation of current earnings (at least one full month) includes pay stubs, employer statements, or business receipts and expenses, if self-employed. Documentation of current income must be supplemented with copies of the most recent tax return to provide verification of earnings over a longer period. . . .

N.C. Child Support Guidelines, 2009 Ann. R. (N.C.) 43.

Neither an employee's pay stubs, nor an employee's tax returns, treat the employer's mandatory contributions to an employee's future Social Security or Medicare benefits as current income. The Guide lines state that pay stubs and tax returns constitute appropriate documentation of an employee's earnings, or income, for the purposes of calculating child support obligations. Therefore, we hold that, pursuant to the language of the Guidelines, neither employer payments made toward an employee's future Social Security benefits, nor employer payments made toward an employee's future Medicare benefits, may be considered as income for the purpose of determining child support obligations. Inclusion of these employer contributions in the case before us constituted an abuse of discretion. We therefore vacate that portion of the trial court's order that included payments by the Town toward Defendant's future FICA benefits in the trial court's calculation of the amount of Plaintiff's child support obligation. We remand to the trial court for re-calculation of the amount of Plaintiff's child support obligation in light of this holding.

Reversed and remanded in part, vacated and remanded in part.

Judges CALABRIA and GEER concur.

STATE OF NORTH CAROLINA v. RONELL MICHAEL BETTIS, DEFENDANT

No. COA09-1345

(Filed 7 September 2010)

1. Evidence— exclusion—another suspect on bicycle—failure to make offer of proof

The trial court did not abuse its discretion in a possession of a firearm by a felon and robbery with a firearm case by excluding evidence of another suspect on a bicycle. Defendant failed to make an offer of proof, and the significance of the information regarding a person on a bicycle was not obvious from the record.

2. Criminal Law— instruction—flight—circumstantial evidence of identity

The trial court did not err in a possession of a firearm by a felon and robbery with a firearm case by overruling defendant's instruction on flight. Defendant failed to point to any case law providing that circumstantial evidence of defendant's identity as the individual fleeing from a car wreck could not be used to establish flight.

3. Firearms and Other Weapons— possession of firearm by felon—robbery with firearm—motion to dismiss—sufficiency of evidence—dangerous weapon

The trial court did not err by denying defendant's motion to dismiss the charges of possession of a firearm by a felon and robbery with a firearm even though defendant contended there was insufficient evidence that a dangerous weapon was in fact used or that the robber was in fact defendant. Where there is evidence that a defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon and nothing to the contrary appears in evidence, the presumption that the victim's life was endangered or threatened is mandatory. The State need not have affirmatively demonstrated that the gun recovered from defendant's car was operable, and there was sufficient circumstantial evidence that defendant committed the robbery.

4. Robbery— failure to instruct on lesser-included charge—common law robbery

The trial court did not err or commit plain error by failing to instruct the jury on common law robbery. The State did not need to establish that the gun was operable since no contrary evidence was presented. Further, there was substantial evidence of the elements of robbery with a dangerous weapon, and thus, an instruction on the lesser included offense of common law robbery was not required.

Appeal by defendant from judgments entered on or about 23 April 2009 by Judge Howard E. Manning, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 25 March 2010.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Daniel D. Addison, for the State.

Daniel F. Read, for defendant-appellant.

STROUD, Judge.

A jury found defendant guilty of possession of a firearm by a felon and robbery with a firearm. On appeal, defendant argues the trial court erred in excluding evidence of another suspect, instructing the jury on flight, denying defendant's motions to dismiss, and failing to instruct the jury on common law robbery. For the following reasons, we find no error.

I. Background

The State's evidence tended to show that at approximately 3:00 a.m. on 30 March 2008 Mr. Odunaya Eisayo was working at a Circle K store. Mr. Eisayo was assisting a customer when he heard someone ("the suspect") say, "Open the register and give me the money, quick." The suspect was wearing a black mask and holding a gun. The suspect hit Mr. Eisayo with the gun. Mr. Eisayo gave the suspect all of the cash from the cash register. Mr. Eisayo described the suspect as approximately five feet, five inches tall, wearing a mask and a dark jacket.

Mr. Robert Finch was at the Circle K to get gas when he "saw a gentleman in a black mask had the clerk by the neck with one hand. In the other hand, he was hitting the clerk in the head with a gun." Mr. Finch saw the suspect run out of the building and jump into a light-colored sedan.

Officer Adams of the Raleigh Police Department was responding to a call about the robbery at the Circle K when he saw a vehicle that matched the description of the suspect's vehicle. Officer Adams made a U-turn to follow the suspect vehicle and the vehicle began speeding approximately 55 to 65 miles per hour above the speed limit. The suspect vehicle then ran a stop sign, drove through a yard, and hit a fence. The suspect jumped out of the vehicle. Officer Adams saw a "black male, approximately five foot, seven inches tall, medium complexion, wearing black pants, a black wave cap/hair cap, and a dark-colored jacket."

Agent Timothy Anguish of the City County Bureau of Identification was called to the scene of the car wreck. The vehicle the suspect ran

from was a Plymouth Acclaim with license plate XRE-8148. Inside the vehicle, Agent Anguish found, *inter alia*, a black mask and a gun. Officer Miller of the Raleigh Police Department learned that the wrecked vehicle belonged to defendant.

Also on 30 March 2008, Officer Inman of the Raleigh Police Department responded to a 911 call from defendant reporting his car stolen. Defendant told Officer Inman he had left his car at his apartment with the key in the glove box. Officer Inman informed defendant that his car had been found and asked him to come to the police station.

Detective Bryan Hall of the Raleigh Police Department was informed that defendant had reported to 911 that his car was stolen. Detective Hall began discussing the robbery at the Circle K with defendant, to which defendant responded, "Okay. My car was not stolen, but I don't know anything about any robbery." Detective Hall read defendant his Miranda rights, and defendant agreed to waive them. Defendant denied committing the robbery, but also stated, "Just take me over to county. If you're going to charge me, just send me over there. I'll get ten years for the robbery and another seven for the weapon. That's it. Just send me over there. I'm better off there."

On or about 19 May 2008, defendant was indicted for possession of a firearm by a convicted felon, providing a false report to a law enforcement officer, and robbery with a dangerous weapon. On or about 18 August 2008, a superceding indictment was filed charging defendant with possession of a firearm by a convicted felon. After a jury trial, defendant was convicted of possession of a firearm by a felon and robbery with a firearm. Defendant had a prior record level of IV and was sentenced to 20 to 24 months imprisonment on the possession of a firearm by a felon conviction and 112 to 144 months on the robbery with a dangerous weapon conviction. Defendant appeals.

II. Suspect on a Bicycle

[1] Defendant first contends that "the trial court erred in excluding evidence that there was a second suspect on a bicycle and same was highly relevant in light of the fact that the actual robber was not tracked from the scene." (Original in all caps). "[T]he proper standard of review for reviewing a trial court's decision to admit or exclude evidence is abuse of discretion." *State v. Early*, 194 N.C. App. 594, 599, 670 S.E.2d 594, 599 (2009) (citation omitted). "Our Supreme Court has often stated that the test to be used when evaluating an abuse of discretion issue is whether a decision is manifestly unsup-

ported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Leggett v. AAA Cooper Transp., Inc.*, ___ N.C. App. ___, ___, 678 S.E.2d 757, 761 (2009) (citation, quotation marks, ellipses, and brackets omitted).

During Officer Hourigan's testimony, on cross-examination, the following dialogue took place:

> Q. . . . . But did you help search for the suspect on a bicycle that was reported by a witness?
>
> A. No. I did not.
>
> Q. Okay. Were you aware that there was a concerned citizen——
>
> MS. JANSSEN [State's attorney]: Objection.
>
> THE COURT: Sustained.
>
> Q. Did anyone talk to you about a person on a bicycle, any police officer?
>
> A. I don't recall anyone talking to me about someone on a bicycle.

Also in the trial, during Detective Hall's cross-examination the following was stated:

> Q. Did you receive any information about another suspect on a bicycle in a fact sheet?
>
> A. I reviewed that information after completing everything in this particular case, what's called a case jacket. I do remember reading information about a person on a bicycle, yes.
>
> Q. And that person matched the description of the robber——
>
> MS. JANSSEN: Objection.
>
> THE COURT: Sustained.
>
> Q. Well, did you, yourself, talk with anybody else besides Mr. Bettis as a suspect?
>
> A. No, sir.

Lastly, during Detective Goodall's testimony defendant's attorney asked, "And were you aware that they were also searching for a person on a bicycle that matched the description of the robber?" Detective Goodall responded, "I heard nothing about a bicycle." The State did not object.

Our Supreme Court has determined a party must make an offer of proof, unless the record reveals the significance of the excluded evidence, to have appellate review of the exclusion of evidence. *See State v. Jacobs*, 363 N.C. 815, 818, 689 S.E.2d 859, 861 (2010).

> In order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record. We also held that the essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred.

Jacobs at 818, 689 S.E.2d at 861 (citation, quotation marks, and brackets omitted). In *Jacobs*, the trial court excluded

> certain evidence of the victim's character during Hampton's[, the victim's friend's,] testimony. Hampton testified that the victim originally placed in Hampton's car the nine-millimeter handgun that Hampton used to return fire at defendant. However, when defense counsel sought to elicit from Hampton additional testimony about how often the victim carried such weapons, the nature of the victim's reputation in the community, and the felony or felonies of which the victim had previously been convicted, the trial court sustained the State's objections.
>
> . . . .
>
> Hampton was permitted to testify that he knew the victim was a convicted felon. When asked how he knew that, Hampton responded, "Hearsay," adding that the victim had not told him about any prior convictions. Defense counsel then asked which of the victim's convictions were known to Hampton, and although the trial court sustained the State's objection, Hampton nonetheless responded, "I don't know exactly."

Id. at 818-19, 689 S.E.2d at 861-62. The Supreme Court determined that

> [n]o offer of proof was made regarding any details Hampton knew about the victim's criminal history, nor is the significance of any purported knowledge or lack of knowledge of these convictions on the part of Hampton, defendant's companion at the time of the shooting, obvious from the record. Accordingly, the exclusion of this evidence has not been preserved for appellate review.

Id. at 819, 689 S.E.2d at 862.

Here, when the State objected and the trial court sustained the objections, defendant failed to make any offer of proof, voir dire the witnesses, offer any further evidence or even raise the bicycle issues again. It appears from Detective Hall's testimony that the substantive information which would be necessary to make the offer was proof was part of the information Detective Hall reviewed "after completing everything in this particular case, what's called a case jacket." However, defendant did not make the offer of proof, and the significance of the information regarding a "person on a bicycle" is not obvious from the record. Defendant does not direct us to a single place in the three-hundred-fifty-eight page transcript, other than the portions noted above, where anyone a side from defendant's attorney mentions a suspect on a bicycle. "Accordingly, the exclusion of this evidence has not been preserved for appellate review." *Id.* This argument is overruled.

III. Jury Instruction on Flight

[2] Defendant next argues that "the trial court erred in overruling defendant's objection to the instruction on flight, as there was no evidence that the person who fled was in fact defendant." (Original in all caps.) Defendant contends that "the evidence was only circumstantial that Mr. Bettis was at the scene of the robbery or that he was in the car" and that "the jury should not have been allowed to consider evidence of flight as evidence of guilt" given that the only evidence was circumstantial. Thus, defendant is not arguing that there was not evidence of the flight of the suspect fleeing the scene of the car wreck, but rather that there was only circumstancial evidence that defendant was the suspect who was fleeing the scene.

> On appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Bass v. Johnson, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002) (citations, quotation marks, and ellipses omitted). "[J]ury instructions relating to the issue of flight are proper as long as there is some

evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged." *State v. Allen*, 346 N.C. 731, 741, 488 S.E.2d 188, 193 (1997) (citations and quotation marks omitted).

Defendant fails to direct us to any case law providing that circumstantial evidence of the defendant's identity cannot be used to establish flight. "The law makes no distinction between the weight to be given to either direct or circumstantial evidence." *State v. Nunez*, —— N.C. App. ——, ——, 693 S.E.2d 223, 226 (2010) (citation omitted). Here, the evidence included a description of a masked man robbing a store and escaping in a light-colored sedan; an officer seeing a vehicle that matched such description and when he went to follow the vehicle, defendant's vehicle, it sped up; a high speed chase with defendant's vehicle in close proximity and time to the robbery; defendant's abandoned car, matching the eyewitness description of the suspect's car, which contained a mask and a gun; and defendant's initial report that his car was stolen, followed by his admission that it was not stolen. Accordingly, we conclude there was sufficient evidence, be it circumstantial or not, that defendant was the individual fleeing from the car wreck in order for the trial court to properly give a jury instruction on flight. The jury instructions "are proper . . . as there is some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged." *Allen* at 741, 488 S.E.2d at 193. Defendant's argument is overruled.

IV. Motions to Dismiss

[3] Defendant next argues that "the trial court erred by denying defendant's motions to dismiss, as the believable evidence was insufficient to submit the case to the jury, in particular the lack of evidence that a dangerous weapon was in fact used or that the robber was in fact this defendant." (Original in all caps.)

> The standard of review for a trial court's denial of a motion to dismiss for insufficient evidence is well-settled:
>
> Evidence is sufficient to sustain a conviction when, viewed in the light most favorable to the State and giving the State every reasonable inference therefrom, there is substantial evidence to support a jury finding of each essential element of the offense charged, and of defendant's being the perpetrator of such offense.

> Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility. Evidence is not substantial if it 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, and the motion to dismiss should be allowed even though the suspicion so aroused by the evidence is strong. This Court reviews the denial of a motion to dismiss for insufficient evidence de novo.
>
> If substantial evidence, whether direct, circumstantial, or both, supports a finding that the offense charged has been committed and that the defendant committed it, the motion to dismiss should be denied and the case goes to the jury.

State v. Wilkerson, — N.C. App. —, —, 675 S.E.2d 678, 680 (2009) (citation and quotation marks omitted).

"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. Cole*, — N.C. App. —, —, 681 S.E.2d 423, 427 (citation and quotation marks omitted), *disc. review denied*, 363 N.C. 658, 686 S.E.2d 678, *disc. review denied*, 363 N.C. 658, 686 S.E.2d 679 (2009).

A. Operability of Weapon

As to his motions to dismiss, defendant first argues that the State failed to prove the "firearm or other dangerous weapon" was operable. *Id.* Defendant argues "it is . . . well settled that in a case where robbery with a dangerous weapon is charged and the weapon is found and submitted into evidence, it is an essential element in proving that the victim's life was actually endangered that the weapon be shown to be operable[;]" defendant cites to *State v. Joyner*, 312 N.C. 779, 324 S.E.2d 841 (1985). However, *State v. Joyner* provides that

> [w]hen a person commits a robbery by the use or threatened use of an implement which appears to be a firearm or other dangerous weapon, the law presumes, in the absence of any evidence to the contrary, that the instrument is what his conduct repre-

> sents it to be–an implement endangering or threatening the life of the person being robbed. *Thus, where there is evidence that a defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon and nothing to the contrary appears in evidence, the presumption that the victim's life was endangered or threatened is mandatory.*

312 N.C. 779, 782, 324 S.E.2d 841, 844 (1985) (emphasis added) (citation omitted).

Here, there was no "evidence to the contrary" that indicated the gun recovered from defendant's car was not operable. *Id.* Therefore, "where there is evidence that a defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon and nothing to the contrary appears in evidence, the presumption that the victim's life was endangered or threatened is mandatory." *Id.* Thus, in this situation, the State need not affirmatively demonstrate that the gun recovered from defendant's car was operable.

B. Defendant as the Perpetrator

Defendant also argues that all evidence that he committed the robbery was circumstantial. Again, "[t]he law makes no distinction between the weight to be given to either direct or circumstantial evidence." *Nunez* at —, 693 S.E.2d at 226. Here, the State's evidence showed that an individual in a mask with a gun hit Mr. Eisayo with a gun and forced Mr. Eisayo to give him money; the individual then ran to a light-colored sedan; a light-colored sedan, registered to defendant, was seen in the area of the crime close in time to when the crime was reported; when an officer followed defendant's vehicle it sped up and eventually crashed; an individual was seen fleeing from defendant's vehicle; and a mask and gun were left in defendant's vehicle. We find this to be substantial evidence that defendant committed the crime of robbery with a dangerous weapon. *See Cole* at —, 681 S.E.2d at 427; *Wilkerson* at —, 675 S.E.2d at 680. These arguments are overruled.

V. Jury Instruction on Common Law Robbery

[4] Lastly, defendant argues that "the trial court committed plain error by failing to instruct on common law robbery as there was no evidence that the weapon was indeed dangerous and therefore the jury should have been allowed to consider a verdict of guilty of common law robbery." (Original in all caps.) Here, defendant argues that because the State did not establish that the gun was operable, the

trial court should have instructed the jury on common law robbery and not simply robbery with a dangerous weapon.

"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) (citation and quotation marks omitted). However, we need not even consider plain error as we have already concluded that the State did not need to establish that the gun was operable because no contrary evidence was presented. *See Joyner* at 782, 324 S.E.2d at 844. As there was substantial evidence of the elements for robbery with a dangerous weapon, the trial court did not need to instruct the jury on the lesser-included offense of common law robbery. *See State v. Johnson*, 337 N.C. 212, 221, 446 S.E.2d 92, 97-98 (1994) ("Where the uncontradicted evidence is positive and unequivocal as to each and every element of armed robbery, and there is no evidence supporting defendant's guilt of a lesser offense, the trial court does not err in failing to instruct the jury on the lesser included offense of common law robbery. In the present case uncontradicted evidence showed that both Mr. and Mrs. Ross were threatened with a deadly weapon; hence, we conclude the trial court did not err in failing to instruct on common-law robbery." (citation and brackets omitted)). This argument is overruled.

VI. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges ELMORE and JACKSON concur.

CANDACE HEDGES, EMPLOYEE, PLAINTIFF-APPELLEE v. WAKE COUNTY PUBLIC SCHOOL SYSTEM, EMPLOYER, SELF-INSURED, KEY RISK MANAGEMENT SERVICES, SERVICING AGENT, DEFENDANTS-APPELLANTS

No. COA09-1305

(Filed 7 September 2010)

1. Workers' Compensation— injury by accident—unexplained fall

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's fall at work was a compensable injury by accident under N.C.G.S. § 97-2(6) and (2). There need not have been evidence of any unusual or untoward condition or occurrence causing the fall which produced the injury. The fall itself is the unusual unforeseen occurrence which was the accident. Further, where the fall was unexplained and the Commission made no finding that any force or condition independent of the employment caused the fall, then there was an inference that the fall arose out of the employment.

2. Workers' Compensation— attorney fees—unknown cause of fall not an unreasonable claim

The Industrial Commission did not abuse its discretion in a workers' compensation case by awarding attorney fees to plaintiff under N.C.G.S. § 97-88.1 even though defendants contended the claim was unreasonable. The only argument defendants made before the Commission was that the claim should be denied because plaintiff did not know the cause of her fall, and this argument has previously been rejected.

Appeal by Defendants from opinion and award entered 10 July 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 February 2010.

Hardison & Cochran P.L.L.C., by Benjamin T. Cochran, for Plaintiff-Appellee.

Teague, Campbell, Dennis & Gorham, LLP, by Dayle A. Flammia and Heather T. Baker, for Defendants-Appellants.

McGEE, Judge.

Candace Hedges (Plaintiff) was injured at work on 1 June 2007 when she walked into a workroom at Reedy Creek Elementary School to make copies of payroll materials. Plaintiff stumbled and fell as she entered the workroom. In a recorded statement to a representative of Key Risk Management Services (Defendant-Insurer), Plaintiff stated that: "As I walked into the workroom, stumbled, the floor was clear. There was nothing there to impede . . . my walking in or anything. I just stumbled." The Commission found that Plaintiff, carrying paperwork in her left arm, was unable to catch or steady herself, and fell to the floor. Plaintiff landed with her full weight on her right arm. Plaintiff experienced pain in her right arm and notified her supervisor of her injury. Plaintiff sought medical care at an urgent care center that day. At the urgent care center, Plaintiff received an xray of her arm, along with a sling and pain medication. She had a follow-up visit four days later and the urgent care center recommended that she see an orthopaedic.

Dr. Hadley Calloway (Dr. Calloway) of Raleigh Orthopaedic examined Plaintiff on 10 July 2007. An MRI revealed that Plaintiff had a massive rotator cuff tear with proximal retraction. Dr. Calloway noted that Plaintiff reported experiencing no right shoulder problems prior to her 1 June 2007 injury. Defendant-Insurer informed Plaintiff on 13 July 2007 that her claim had been denied. Dr. Calloway performed an arthroscopic repair of a complete rotator cuff tear in Plaintiff's right shoulder, an arthroscopic subacromial decompression of her right shoulder, and a mini-open distal clavicle excision on 9 August 2007. Plaintiff returned to part-time work for the Wake County Public School System (Defendant-Employer) on 1 November 2007, and to full-time work on 28 January 2008, with restrictions on lifting and overhead use of her right arm. On 4 March 2008, Dr. Calloway assigned a twenty percent permanent partial disability rating for Plaintiff's right arm.

A hearing was conducted on 6 May 2008 before Deputy Commissioner Kim Ledford. In an opinion and award filed 8 December 2008, the deputy commissioner concluded that Plaintiff had sustained a compensable injury by accident arising out of and in the course of her employment with Defendant-Employer. Defendants appealed the 8 December 2008 opinion and award to the Commission. In an opinion and award filed 10 July 2009, the Commission affirmed the deputy commissioner's 8 December 2008 opinion and award. Defendants appeal.

I.

[1] Defendants argue on appeal that: (1) Plaintiff's fall was not a compensable injury by accident as defined by N.C. Gen. Stat. § 97-2(6) and (2) the Commission erred in awarding attorney's fees to Plaintiff pursuant to N.C. Gen. Stat. § 97-88.1. We conclude that the Commission's findings of fact and conclusions of law regarding the compensability of Plaintiff's claim were supported by competent evidence and the applicable law. In addition, we affirm the Commission's decision to award attorney's fees to Plaintiff under N.C. Gen. Stat. § 97-88.1.

"It is well established in North Carolina that the Workers' Compensation Act should be liberally construed and that ' "[w]here any reasonable relationship to employment exists, or employment is a contributory cause, the court is justified in upholding the award as 'arising out of employment.' " ' " *Hollin v. Johnston Cty. Council on Aging*, 181 N.C. App. 77, 84, 639 S.E.2d 88, 93 (2007) (quoting *Kiger v. Bahnson Service Co.*, 260 N.C. 760, 762, 133 S.E.2d 702, 704 (1963)). Furthermore, " '[a]n opinion and award of the Industrial Commission will only be disturbed upon the basis of a patent legal error.' " *Billings v. General Parts, Inc.*, 187 N.C. App. 580, 585, 654 S.E.2d 254, 258 (2007) (quoting *Roberts v. Burlington Indus., Inc.*, 321 N.C. 350, 354, 364 S.E.2d 417, 420 (1988)). Lastly, "[t]he evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation omitted).

"For an injury to be compensable under the Worker's Compensation Act, the claimant must prove three elements: (1) that the injury was caused by an accident; (2) that the injury was sustained in the course of the employment; and (3) that the injury arose out of the employment." *Hollar v. Furniture Co., Inc.*, 48 N.C. App. 489, 490, 269 S.E.2d 667, 669 (1980).

First, there is no dispute that Plaintiff's injury was sustained in the course of her employment. Plaintiff was on the premises of Defendant-Employer where the duties of her employment required her to be, the accident occurred during working hours, and Plaintiff was engaged in the performance of her duties or in activities incidental thereto. *See, e.g., Taylor v. Twin City Club*, 260 N.C. 435, 437-38, 132 S.E.2d 865, 867 (1963).

Second, in this case, there was an "accident." "An accident is 'an unlooked for and untoward event which is not expected or designed by the person who suffers the injury.' " *Ferreyra v. Cumberland Cty.*, 175 N.C. App. 581, 583-84, 623 S.E.2d 825, 827 (2006) (quoting *Adams v. Burlington Industries*, 61 N.C. App. 258, 260, 300 S.E.2d 455, 456 (1983)). "[I]t is not essential that there be evidence of any unusual or untoward condition or occurrence causing a fall which produces injury. The fall itself is the unusual, unforeseen occurrence which is the accident. A fall is usually regarded as an accident." *Taylor*, 260 N.C. at 437, 132 S.E.2d at 867 (internal citations omitted). Despite Defendants' arguments to the contrary, an injury that is the result of a fall, which itself stems from an event that results from both the employee's normal work routine and normal conditions, may still constitute an "accident." *See Robbins v. Hosiery Mills*, 220 N.C. 246, 247, 17 S.E.2d 20, 20-21 (1941) (finding the fall, the result of reaching for work material on an elevated rack, constituted an "accident").

Third, Plaintiff must prove that her injury arose out of the course of her employment with Defendant-Employer. " 'Arising out of' employment relates to the origin or cause of the accident." Taylor, 260 N.C. at 438, 132 S.E.2d at 867 (citing *Lockey v. Cohen, Goldman & Co.*, 213 N.C. 356, 196 S.E. 342 (1938)). "The question of whether an injury 'arises out of employment' is a mixed question of law and fact and our review is limited to whether 'the findings and conclusions are supported by competent evidence.' " *Mills v. City of New Bern*, 122 N.C. App. 283, 284, 468 S.E.2d 587, 589 (1996) (citation omitted). "Where any reasonable relationship to the employment exists, or employment is a contributory cause, the court is justified in upholding the award as 'arising out of employment.' " *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E.2d 476, 479 (1960) (citations omitted).

Although the Commission makes no clear finding that Plaintiff's injury was the result of an unexplained fall, the Commission did find that

> [P]laintiff's accident and injury arose out of and in the course of her employment because when she stumbled and fell she was at work; she was performing duties related to her employment which directly benefitted [D]efendant-[E]mployer; and she was unable to steady and catch herself when she began to fall as she had her left arm loaded with work-related papers to be copied, causing her to land on her right arm and shoulder with her full weight.

The Commission identified the reason why the outcome of the fall could not be mitigated, corrected, or prevented, but it did not find the origin or cause of the fall. Also, based on the record, the origin or cause of the fall is apparently unknown or undisclosed; therefore, we apply case law unique to unexplained fall cases. When a fall is unexplained, and the Commission has made no finding that any force or condition independent of the employment caused the fall, then an inference arises that the fall arose out of the employment. *Slizewski v. Seafood, Inc.*, 46 N.C. App. 228, 232, 264 S.E.2d 810, 813 (1980).

We note that the decisions of our appellate courts have clearly stated that causation is still a requirement when evaluating the "arising out of" employment prong of unexplained fall workers' compensation cases: " 'Arising out of' employment relates to the origin or cause of the accident." *Taylor*, 260 N.C. at 438, 132 S.E.2d at 867 (citation omitted). In *Taylor*, our Supreme Court further affirmed that claimants in workers' compensation cases involving unexplained falls still bear the burden of proving causation, but found the following sufficient to meet that burden:

> It has been suggested that this result in unexplained-fall cases relieves claimants of the burden of proving causation. We do not agree. The facts found by the Commission in the instant case permit the inference that the fall had its origin in the employment. There is no finding that any force or condition independent of the employment caused or contributed to the accident. The facts found indicate that, at the time of the accident, the employee was within his orbit of duty on the business premises of the employer, he was engaged in the duties of his employment or some activity incident thereto, he was exposed to the risks inherent in his work environment and related to his employment, and the only active force involved was the employee's exertions in the performance of his duties.

Id. at 440, 132 S.E.2d at 869.

Our Supreme Court also held in *Robbins*, 220 N.C. at 248, 17 S.E.2d at 21, that

> [t]he logic of these decisions is this: where the employee, while about his work, suffers an injury in the ordinary course of the employment, the cause of which is unexplained but which is a natural and probable result of a risk thereof, and the Commission finds from all the attendant facts and circumstances that the

> injury arose out of the employment, an award will be sustained. If, however, the cause is known and is independent of, unrelated to, and apart from the employment—the result of a hazard to which others are equally exposed—compensation will not be allowed. Herein lies the distinction which is bottomed upon the rule of liberal construction.

In our Court's most recent determination of an unexplained fall case, *Hodges v. Equity Grp.*, 164 N.C. App. 339, 596 S.E.2d 31 (2004), an employee who fell while walking at work testified that "he did not stumble or trip, there were no obstructions in his way, and he did not believe he slipped." *Id.* at 343, 596 S.E.2d at 35. Yet, our Court held in *Hodges* that, as in *Slizewski*, an inference was permitted that the fall had its origin in the employee's employment. *Id.* at 344-45, 596 S.E.2d at 35. Our Court stated in *Hodges* that, "[e]ven though [the] Plaintiff [could] not explain what caused him to fall, as stated in *Slizewski*, an inference that the fall had its origin in employment [was] permitted . . . because 'the only active force involved was the employee's exertions in the performance of his duties.' " *Id.* at 344, 596 S.E.2d at 35 (quoting *Slizewski*, 46 N.C. App. at 232-33, 264 S.E.2d at 813).

The case before us is factually materially indistinguishable from *Hodges* and we affirm the Commission's award of compensation to Plaintiff.

II.

[2] Defendants next argue that the Commission erred in awarding attorney's fees to Plaintiff pursuant to N.C. Gen. Stat. § 97-88.1. Pursuant to this statute, "[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 (2009).

Whether an award of attorney's fees is appropriate requires the application of a two-part analysis:

> "First, [w]hether the [party] had a reasonable ground to bring a hearing is reviewable by this Court *de novo*. For a reviewing court to determine whether a defendant had reasonable ground to bring a hearing, it must consider the evidence introduced at the hearing. The determination of reasonable grounds is not whether the party

prevails in its claim, but whether the claim is based on reason rather than stubborn, unfounded litigiousness."

Clayton v. Mini Data Forms, Inc., — N.C. App. —, —, 681 S.E.2d 544, 553 (2009) (quoting *Meares v. Dana Corp.*, 193 N.C. App. 86, 93, 666 S.E.2d 819, 825 (2008), *disc. review denied*, 363 N.C. 129, 673 S.E.2d 359 (2009)). Only if "this Court agrees that the party lacked reasonable grounds, [do] we review the Commission's decision whether to award attorneys' fees and the amount awarded for abuse of discretion." *Clayton*, — N.C. App. at —, 681 S.E.2d at 553.

Because we above found the facts of this case to be so similar to those in *Hodges*, we affirmed the award of compensation to Plaintiff. Our decision is based on the fact that, in *Hodges*, our Court upheld an award to an employee who testified that he fell while at work, but could not give any explanation as to what caused the fall. *Hodges*, 164 N.C. App. at 343-44, 596 S.E.2d at 34-35. Relying on *Hodges*, we have held that, in the present case, the Commission did not err in finding that Plaintiff's fall arose out of her employment.

Defendant-Insurer, through its Senior Claims Representative David Byrd, denied Plaintiff's workers' compensation claim for the following stated reasons: "[Plaintiff's] injury did not arise out of and in the course and scope of [her] employment. [Plaintiff's] condition [was] not the result of a risk or hazard peculiar to [Plaintiff's] employment and any other defenses that become known to the employer/carrier."

This matter was heard before the deputy commissioner on 6 May 2008. Plaintiff was the only witness to testify. The entirety of Defendants' cross-examination of Plaintiff consisted of a little over one page of the transcript, including the following exchange between Defendants' counsel and Plaintiff. "Q. [Y]ou stumbled and the floor was clear. Is that still your testimony? A. It is. . . . Q. And . . . there was nothing there to impede your . . . walking in or anything, you said? A. There was nothing there. . . . I just stumbled. Defendants appealed the deputy commissioner's opinion and award to the Commission for the following stated reasons: "[P]laintiff merely stumbled and fell with no nexus to her employment, and not due to any risk incident to her employment," and "[t]he award is contrary to law as [P]laintiff failed to meet her burden of showing that her fall was a compensable event."

Defendants made no argument before the Commission, nor presented any evidence suggesting, that Plaintiff's testimony that she did

not know why she fell was not credible. *See Hodges*, 164 N.C. App. at 346, 596 S.E.2d 31, 36 (citation omitted). Defendants made no argument before the Commission that Plaintiff's fall was in any manner related to an idiopathic condition or some other external force not attributable to Plaintiff's regular work routine. *See Hodges*, 164 N.C. App. at 348, 596 S.E.2d at 38. Defendants made no argument before the Commission that the facts in the present case were somehow distinguishable from the facts in *Hodges*. Defendants made no argument before the Commission that any of their constitutional rights had been violated by the award. *State v. Highsmith*, 173 N.C. App. 600, 604, 619 S.E.2d 586, 590 (2005). Defendants made no argument before the Commission that *Hodges* was wrongly decided and that Defendants wished to preserve a good faith argument for appeal that *Hodges* should be overruled by our Supreme Court. *See* N.C.R. App. P. 34(a)(1).

The only argument Defendants made before the Commission was that, because Plaintiff did not know the reason for the fall leading to the injury Plaintiff sustained while performing her work duties, there could be no causal connection between Plaintiff's fall and her employment—i.e. that Plaintiff's injury did not arise out of her employment. We have found no relevant facts in this case to distinguish it from *Hodges*. *Hodges* was controlling precedent at the time Defendants decided to deny Plaintiff's workers' compensation claim and request a hearing. Because the only argument Defendants made before the Commission was that Plaintiff's claim should be denied because Plaintiff did not know the cause of her fall, an argument that our Court rejected in *Hodges*, we hold that Defendants' denial of Plaintiff's claim and their decision to pursue this action was unreasonable. *Clayton*, ___ N.C. App. at ___, 681 S.E.2d at 553. We further hold that the Commission did not abuse its discretion in awarding attorney's fees to the Plaintiff.

Affirmed.

Judge GEER and ERVIN concur.

NATIONWIDE MUTUAL INSURANCE COMPANY, PLAINTIFF v. DONALD BURGDOFF, INDIVIDUALLY AND CYNTHIA BURGDOFF, INDIVIDUALLY AND DONALD BURGDOFF AND CYNTHIA BURGDOFF, AS CO-EXECUTORS OF THE ESTATE OF PATRICIA ELEANOR BURGDOFF, DECEASED, DEFENDANTS

No. COA09-1117

(Filed 7 September 2010)

Insurance— automobile—underinsured motorists coverage—opportunity to select or reject coverage—question of fact

Whether defendants were given the opportunity to reject or select different underinsured motorists coverage limits was a factual determination for the jury, and the trial court erred by granting summary judgment for plaintiff Nationwide in a declaratory judgment action to determine the amount of underinsured motorists coverage coverage available to defendants.

Appeal by defendants from order entered 14 May 2009 by Judge John L. Holshouser, Jr., in Rowan County Superior Court. Heard in the Court of Appeals 11 February 2010.

Robinson Elliott & Smith, by William C. Robinson and Katherine A. Tenfelde, for plaintiff-appellee.

Brooke & Brooke, by Thomas M. Brooke, for defendant-appellants.

Twiggs, Beskind, Strickland & Rabenau, P.A., by Jerome P. Trehy, Jr., on behalf of North Carolina Advocates for Justice, amicus curiae.

CALABRIA, Judge.

Donald ("Mr. Burgdoff") and Cynthia ("Mrs. Burgdoff") Burgdoff, both individually and as co-executors of the Estate of Patricia Eleanor Burgdoff (collectively "defendants"), appeal an order granting summary judgment to Nationwide Mutual Insurance Company ("plaintiff"). We reverse and remand.

In 1995, defendants moved to North Carolina from the state of New York. In October 1995, Mrs. Burgdoff met with plaintiff's licensed insurance agent Susan Bare ("Ms. Bare"), in order to obtain automobile insurance. Mrs. Burgdoff and Ms. Bare discussed the types of coverages available. On the basis of these discussions, Mrs. Burgdoff completed an "Automobile Insurance Application," which requested, *inter alia*, bodily injury insurance coverage for uninsured and underinsured motorists ("UM/UIM"), in the maximum amount of $100,000

per person and $300,000 per accident ("100/300"). On 4 October 1995, Mrs. Burgdoff signed a "Personal Auto Closing Statement" ("the closing statement"). However, Mrs. Burgdoff did not execute a North Carolina Rate Bureau UM/UIM Selection/Rejection Form ("selection/rejection form") when she signed the closing statement. Defendants were then issued an automobile insurance policy by plaintiff, effective 4 October 1995 ("the Burgdoff policy"). The Burgdoff policy, with its corresponding coverage limits, has been repeatedly renewed by defendants and was still in effect at the time of the filing of this action.

On 8 December 2006, defendants' eight-year-old daughter, Patricia Eleanor Burgdoff ("Patricia"), was killed in an automobile accident. As a result of the accident, defendants filed a wrongful death action against Ross Edward Neese ("Neese") in Rowan County Superior Court. At the time of the accident, Neese had a liability insurance policy in effect with North Carolina Farm Bureau Insurance Group ("the Neese policy"). The Neese policy contained a personal liability limit of $100,000 per person.

Because defendants sought damages from Neese in excess of the $100,000 personal liability limit contained in the Neese policy, they notified plaintiff of their intention to seek recovery under the UIM provision of the Burgdoff policy. Defendants then served copies of their wrongful death action on plaintiff as an unnamed defendant.

On 24 September 2009, plaintiff filed a "Complaint for Declaratory Judgment" under Rule 57 of the North Carolina Rules of Civil Procedure in Rowan County Superior Court. Plaintiff sought a determination of the amount of UIM coverage available to defendants under the Burgdoff policy. Plaintiff and defendants each filed motions for summary judgment. After a hearing on 14 May 2009, the trial court granted summary judgment to plaintiff and issued a Declaration of Judgment that defendants were entitled to UM/UIM coverage in the amount of 100/300. Defendants appeal.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009).

> The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.

. . .

> Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial.

Edwards v. GE Lighting Sys., Inc., — N.C. App. —, —, 685 S.E.2d 146, 148 (2009) (citation omitted). "On appeal, an order granting summary judgment is reviewed de novo." *Stutts v. Travelers Indem. Co.*, — N.C. App. —, —, 682 S.E.2d 769, 771 (2009).

In North Carolina, UIM coverage is governed by N.C. Gen. Stat. § 20-279.21(b)(4). When defendants first purchased the Burgdoff policy in October 1995, this statute read, in relevant part:

> The coverage required under this subdivision shall not be applicable where any insured named in the policy rejects the coverage. An insured named in the policy may select different coverage limits as provided in this subdivision. *If the named insured does not reject underinsured motorist coverage and does not select different coverage limits, the amount of underinsured motorist coverage shall be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy.* Once the option to reject underinsured motorist coverage or to select different coverage limits is offered by the insurer, the insurer is not required to offer the option in any renewal, reinstatement, substitute, amended, altered, modified, transfer, or replacement policy unless a named insured makes a written request to exercise a different option. The selection or rejection of underinsured motorist coverage by a named insured or the failure to select or reject is valid and binding on all insureds and vehicles under the policy.
>
> Rejection of or selection of different coverage limits for underinsured motorist coverage for policies under the jurisdiction of the North Carolina Rate Bureau *shall be made in writing by the named insured on a form promulgated by the Bureau and approved by the Commissioner of Insurance.*

N.C. Gen. Stat. § 20-279.21(b)(4) (1995) (emphasis added). The disposition of the instant case is entirely dependent upon a determination of the effect of a failure to provide an insured with a valid North Carolina Rate Bureau UM/UIM selection/rejection form, as required by this statute. The parties agree that no form had been either pre-

sented to defendants or executed at the time of Patricia's death and, as a result, plaintiff was in violation of the statute when it failed to provide defendants with the form.

The parties each present a single case that they respectively believe should control the analysis of this issue. Plaintiff argues that the instant case is controlled by the holding of our Supreme Court in *State Farm Mut. Auto. Ins. Co. v. Fortin*, 350 N.C. 264, 513 S.E.2d 782 (1999). In *Fortin*, the insured initially rejected UIM coverage. N.C. Gen. Stat. § 20-279.21(b)(4) was subsequently amended to require an insurance company to offer its insured, on a selection/rejection form promulgated by the North Carolina Rate Bureau, a fresh choice to reject UIM coverage or select different coverage limits the first time a policy was renewed after the amendment. *Id.* at 270-71, 513 S.E.2d at 785. However, the renewal forms the insurance company provided to the insured simply incorporated the previous rejection and did not offer the insured a fresh choice of UIM coverage. As a result, our Supreme Court held that there was an invalid rejection of UIM coverage. *Id.* at 271, 513 S.E.2d at 785. "[B]ecause there was neither a valid rejection of UIM coverage nor a selection of different UIM coverage limits," the amount of the insured's UIM coverage was determined to be "equal to the highest limits of bodily injury liability coverage for any one vehicle" insured under their policy, as required by N.C. Gen. Stat. § 20-279.21(b)(4). *Id.* at 271, 513 S.E.2d at 786. Plaintiff contends that the facts in the instant case also support a finding of an invalid rejection of UIM limits.

Defendants, in contrast, argue that the instant case case should be controlled by this Court's holding in *Williams v. Nationwide Mut. Ins. Co.*, 174 N.C. App. 601, 621 S.E.2d 644 (2005). In *Williams*, the parties stipulated that the insurance company had never offered the insured the opportunity to either reject UIM coverage or select different UIM coverage limits. *Id.* at 603, 621 S.E.2d at 645-46. This Court held that when an insurance company totally failed to allow their insured to choose their policy benefits as required by N.C. Gen. Stat. § 20-279.21(b)(4), the UIM coverage limits established in that statute did not apply. *Id.* at 605-06, 621 S.E.2d at 647. Instead, taking into account the remedial nature of the automobile insurance statutes, this Court determined that the policy provided UIM coverage with limits of $1,000,000 per person and $1,000,000 per accident, the maximum amount permitted by our statutes. *Id.* at 606, 621 S.E.2d at 647. Defendants argue that plaintiff's failure to provide defendants with the selection/rejection form constitutes a *per se* total failure to pro-

vide an opportunity to reject UIM coverage or select different UIM policy limits, bringing this case under the *Williams* holding.

The *Williams* Court specifically and repeatedly referred to the insurance company's "total failure" to provide "the opportunity to select or reject the UIM policy limits," in order to justify its determination that the insurance policy at issue was not governed by the statutory limits of N.C. Gen. Stat. § 20-279.21(b)(4). *Id.* at 604-06, 621 S.E.2d at 646-47. This was because "[t]he statute clearly establishes that the insured must be given the initial opportunity to reject or select different policy limits." *Id.* at 605, 621 S.E.2d at 647. There is nothing in *Williams* that would support expanding its holding beyond situations where an insured was never given the opportunity to reject or select different coverage limits.

The *per se* rule suggested by defendants, that the *Williams* analysis must apply whenever an insurer does not produce a valid selection/rejection form, cannot be reconciled with our Supreme Court's holding in *Fortin*. The facts in *Fortin* clearly indicate that the insured, upon renewal, was not provided with the proper North Carolina Rate Bureau selection/rejection form, but this failure of the insurance company to provide the form did not result in an increase in UIM coverage beyond the statutory limits of N.C. Gen. Stat. § 20-279.21(b)(4). Along these same lines, the deciding factor for the *Williams* Court was not that the insured was not provided with the proper selection/rejection form; instead, the Court emphasized that the insured was not provided with *any* opportunity at all to even consider UIM coverage. As explained by the *Williams* Court:

> The statutory limitations for UIM coverage established in N.C.G.S. § 20-279.21(b)(4) take effect if the named insured does not reject UIM coverage or does not select UIM coverage limits different than the bodily injury liability coverage contained in the policy. N.C.G.S. § 20-279.21(b)(4) (2001). Here, however, the insured *was not given the opportunity to reject or select different coverage limits*.

Id. at 605, 621 S.E.2d at 647 (emphasis added). Therefore, the relevant inquiry in determining whether *Williams* applies is whether defendants were given the *opportunity* to reject or select different UIM coverage limits.

Whether or not defendants were provided the opportunity to reject or select different UIM coverage limits is a factual determina-

tion that is generally best resolved by a jury. The record in the instant case reveals a genuine issue of material fact as to whether plaintiff provided defendants with the opportunity to reject or select different UIM coverage limits and, therefore, summary judgment was inappropriate.

Plaintiff provided an affidavit by Ms. Bare, in which she stated she had verbally provided Mrs. Burgdoff the opportunity to reject or select different UIM coverage limits: "I specifically explained to Ms. Burgdoff that she had the opportunity to buy liability coverage and UM/UIM insurance in an amount up to $1,000,000. Ms. Burgdoff selected coverage in the amount of 100/300 for both liability and combined UM/UIM." Mrs. Burgdoff testified about this meeting at her deposition, as follows:

> Q: Do you recall whether, during the course of your conversation whether there were any changes made or whether you made any changes based on any options or whether you wanted to increase any particular coverages or decrease any coverages?
>
> A: No. *I haven't talked to them about anything like that.*
>
> Q: You didn't go into that much detail, as you recall?
>
> A: No.

(Emphasis added). In addition, defendants each indicated in their answers to plaintiff's interrogatories that they were not informed that they could select an amount of UIM coverage that was different from the amount of liability coverage.

This conflicting evidence creates a genuine issue of material fact as to whether defendants were given the opportunity to reject or select different UIM coverage limits when they purchased their insurance policy from plaintiff. As a result, the trial court's order granting summary judgment to plaintiff must be reversed and this case must be remanded for a jury trial on this issue.

If the jury determines that plaintiff provided defendants with an opportunity to reject or select different UIM coverage limits, then the trial court shall issue a judgment that defendants' UIM coverage limits under the Burgdoff policy were 100/300, pursuant to N.C. Gen. Stat. § 20-279.21 (b)(4). If, however, the jury determines that there was a total failure on the part of plaintiff to provide defendants the opportunity to reject or select different UIM coverage limits, the trial court shall issue a judgment, pursuant to *Williams*, that defendants' UIM coverage limits under the Burgdoff policy were $1,000,000.

Reversed and remanded.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA v. THOMAS WAYNE LIVENGOOD

No. COA09-1414

(Filed 7 September 2010)

1. Evidence— cross-examination—objection to expert testimony—failure to give desired answer

The trial court did not abuse its discretion in a first-degree statutory sexual offense case by overruling defendant's objection to an expert witness's answer to a question asked by defense counsel during cross-examination. The fact that the witness did not give defense counsel the desired answer did not constitute a basis for defendant's objection.

2. Constitutional Law— effective assistance of counsel—failure to show prejudice

Defendant did not receive ineffective assistance of counsel in a first-degree statutory sexual offense case based on his trial counsel's failure to object to portions of a witness's testimony, asking certain questions of that same witness, and failing to object to the trial court's denial of the jury's request for a transcript of trial testimony. Defendant extracted small snippets of testimony taken out of context, the trial court denied the jury's request for a transcript in its discretion, and defendant failed to show any prejudice arising from defense counsel's actions.

Appeal by defendant from judgment entered 11 June 2009 by Judge Richard L. Doughton in Rowan County Superior Court. Heard in the Court of Appeals 24 March 2010.

Attorney General Roy Cooper, by Assistant Attorney General Lauren M. Clemmons, for the State.

Kevin P. Bradley, for defendant-appellant.

STEELMAN, Judge.

The trial court did not err in overruling defendant's objection to a witness' answer to a question asked by defense counsel during cross-examination. Defendant can show no prejudice resulting from his trial counsel's failure to object to questions asked by the State, to certain questions asked by defense counsel, and the failure of defense counsel to object to the trial court's discretionary ruling that denied the jury's request for a transcript of certain testimony during its deliberations.

I. Factual and Procedural Background

Defendant was indicted for three counts of incest with a stepchild, three counts of first degree statutory rape of a child less than 13 years of age, and two counts of first degree statutory sexual offense with a child less than 13 years of age. Each of these charges was based upon defendant's conduct with D, his stepdaughter. At the conclusion of the State's evidence, the trial court dismissed two counts of incest, two counts of first degree statutory rape, and one count of first degree statutory sexual offense. The jury found the defendant guilty of one count of first degree statutory sexual offense. As to the remaining two charges, the jury was deadlocked, and the trial court declared a mistrial. Defendant was sentenced to a minimum of 336 months and a maximum of 413 months from the presumptive range of sentences. Defendant appeals.

II. Overruling Objection Claim

[1] In his first argument, defendant argues the trial court erred in overruling his objection to the answer of Dr. Russo to a question asked by defense counsel during cross-examination. We disagree.

A. Standard of Review

On appeal, we review the trial court's evidentiary rulings for abuse of discretion. *State v. Cook*, 193 N.C. App. 179, 181, 666 S.E.2d 795, 797 (2008). An abuse of discretion is a ruling "so arbitrary that it could not have been the result of a reasoned decision." *Id.* (quoting *State v. Hagans*, 177 N.C. App. 17, 23, 628 S.E.2d 776, 781 (2006)).

B. Dr. Russo's Testimony

Dr. Kathleen Russo testified at trial as an expert witness for the State in the field of pediatric medicine specializing in the diagnosis and treatment of child sex abuse. On direct examination, Dr. Russo testified that she interviewed D. The physical examination of D revealed no signs of trauma to D's hymen. On cross-examination, Dr. Russo opined, without objection, that her physical findings could be

consistent with rape or with no rape. Upon recross-examination, defense counsel attempted to get Dr. Russo to agree with the portion of the above-recited testimony that was favorable to defendant:

> [Defense counsel]: And the medical aspects of this case physically are that there are no showings of any rape; correct?
>
> A: There's no physical findings which do not rule out her disclosure, sir.
>
> [Defense counsel]: I'm going to object to that final statement, Your Honor.
>
> [Trial Court]: Overruled.

Defendant argues that Dr. Russo's answer constituted an impermissible comment on the credibility of D, in violation of this Court's holding in *State v. Horton*, —— N.C. App. ——, 682 S.E.2d 754, 757 (2009). We hold that the trial court did not abuse its discretion in overruling defendant's objection. Dr. Russo's response was consistent with her prior testimony that her physical findings were consistent with rape or no rape, and was not a comment on D's credibility. The fact that the witness did not give defendant's counsel the answer desired, emphasizing the portion of her testimony that was favorable to defendant, did not constitute a basis for defendant's objection.

This argument is without merit.

III. Ineffective Assistance of Counsel Claim

[2] In his second argument, defendant contends that the performance of his trial attorney was so deficient as to violate the guarantee of effective assistance of counsel contained in the Sixth Amendment of the United States Constitution and in Article I, Section 23 of the North Carolina Constitution. Defendant argues that his trial counsel was ineffective in (1) failing to object to portions of Dr. Russo's testimony which defendant contends were a comment on D's credibility; (2) asking certain questions of Dr. Russo; and (3) failing to object to the trial court's denial of the jury's request for the trial testimony of D and Dr. Russo. We disagree.

A. Standard of Review

A defendant claiming ineffective assistance of counsel must demonstrate, based on the totality of the circumstances: (a) his trial counsel made such errors that he was not functioning as the counsel guaranteed in the United States and North Carolina Constitutions;

and (b) the deficient performance prejudiced the defense so that defendant did not receive a fair trial. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985); *State v. Miller*, 64 N.C. App. 390, 390-91, 307 S.E.2d 439, 439 (1983), *cert. denied*, 311 N.C. 308, 317 S.E.2d 906 (1984); *see also Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). Defendant's burden is heavy: appellate courts are highly deferential to the choices counsel makes at trial because the tactics of effective lawyers vary widely. *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694.

B. Analysis

1. Testimony of Dr. Russo

Defendant has extracted small snippets of Dr. Russo's testimony out of context and strung them together to argue that Dr. Russo was making comments on D's truthfulness. Defendant contends that trial counsel was ineffective in: (a) failing to object to Dr. Russo's testimony that D was "very cooperative" during her interview with Dr. Russo; (b) failing to object to Dr. Russo's professional "diagnosis . . . that [D] suffered a traumatic episode and . . . needed mental health counseling to help her understand what happened to her;" (c) failing to object to Dr. Russo's statement that "[D] gave [Dr. Russo] no reason to think" that D transferred her sexual abuse allegations onto defendant; and (d) asking Dr. Russo to affirm her statement that, according to D's statements at her interview with Dr. Russo, D "was the victim . . . of sexual abuse." Defendant contends that this testimony had the effect of an expert witness vouching for the credibility of D, which is not permitted under *State v. Horton*, 200 N.C. App. 74, 77-78, 682 S.E.2d 754, 757 (2009).

a. "[D] was very cooperative"

This statement was made as part of Dr. Russo's direct testimony, where she described the procedures used at the commencement of her interview of D, a young child. The statement described D's attitude in the interview; that she was not reticent. In the context of this portion of Dr. Russo's testimony, it was not a comment on D's truthfulness. This evidence was relevant, properly admitted, and would have withstood an objection by defendant's counsel. Defendant can show no prejudice arising from this action by his trial counsel.

b. "[D] suffered a traumatic episode"

On cross-examination, defense counsel asked Dr. Russo whether she had written any prescriptions for D following the examination. Dr. Russo stated that she made a psychological referral. On redirect, the prosecutor confirmed this testimony, and asked Dr. Russo about her diagnosis upon which the referral was based. Dr. Russo responded that D had suffered a traumatic episode and needed mental health counseling. Dr. Russo did not state the source of the traumatic episode or make any comment on D's truthfulness. This evidence was relevant, properly admitted, and would have withstood an objection by defendant's counsel. Defendant can show no prejudice arising from this action by his trial counsel.

c. No reason to think sexual abuse transferred to defendant

Defense counsel examined Dr. Russo concerning D's fear of her grandmother's boyfriend, and whether her fear of that person was transferred to defendant by D. Dr. Russo stated that she did not believe so. Defense counsel then asked Dr. Russo the basis of that belief. Dr. Russo stated: "She gave me no reason to think that in my interview." This testimony was not a comment on D's truthfulness, but simply a statement that there was nothing in the interview that would have given credence to defendant's transference theory. We cannot say that the raising of the transference theory, and its rejection by Dr. Russo, was prejudicial to defendant.

d. "[D] was the victim of sexual abuse" based on "what [D] said"

Defendant next points to the following exchange that took place during defense counsel's recross-examination of Dr. Russo:

> Q: When you say you believe that [D] was the victim, I think, of sexual abuse—is that what you said?
>
> A: Yes, it is, sir.
>
> Q: You're just saying what she said; right?
>
> A: Correct.

The import of this exchange was not that Dr. Russo was giving her own opinion that D was the victim of sexual abuse, but that she was merely reiterating what D told her. We cannot say that the above exchange was prejudicial to defendant.

2. Jury's Transcript Request

The decision by a trial court to not provide trial testimony to the jury will be upheld absent an abuse of discretion. *State v. Green*, 77 N.C. App. 429, 431-32, 335 S.E.2d 176, 178 (1985). We review this issue to determine whether the trial court exercised its discretion in declining to provide the jury with the trial testimony of D and Dr. Russo.

In *Green*, this Court held that the trial court did not abuse its discretion where it denied the jury's request for trial testimony and defendant did not object, because the trial judge recognized the decision to have a transcript prepared was discretionary. *Id*. In the case at hand, Judge Doughton denied the jury's request for a transcript without an objection from defense counsel, ruling that "*in my discretion* . . . I'm going to tell [the jury] that it's their duty to recall and remember the testimony that was presented." (emphasis added).

We hold that the trial court did not err in denying the jury's request for a transcript because Judge Doughton denied the request in his discretion. Because Judge Doughton properly denied the jury's request for the testimony, defendant was not prejudiced by the failure of trial counsel to object to the trial court's decision.

Absent a showing of prejudice, defendant's ineffective assistance of counsel claims fail, and we reject defendant's second argument.

NO ERROR.

Judges BRYANT and BEASLEY concur.

STATE OF NORTH CAROLINA v. KENDRA RUTH VAN PELT, DEFENDANT

No. COA09-1361

(Filed 7 September 2010)

1. Stalking— motion to dismiss—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss a misdemeanor stalking charge where (viewed in the light most favorable to the State) there was substantial evidence that defendant harassed the victim and that the victim was in reasonable fear for the safety of himself and his family.

2. Stalking— harassing telephone calls—calls to doctor's office

The trial court properly denied defendant's motion to dismiss a charge of making harassing telephone calls to a doctor where the warrant listed only telephone calls to his office. It was not necessary for the State to show that defendant actually had a conversation with the doctor.

Appeal by defendant from judgment entered on or about 30 April 2009 by Judge R. Allan Baddour, Jr. in Durham County, Superior Court. Heard in the Court of Appeals 11 March 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General David W. Boone, for the State.

Mercedes O. Chut, for defendant-appellant.

STROUD, Judge.

Defendant appealed from her convictions of misdemeanor stalking and harassing phone calls. Defendant argues that the trial court should have granted her motions to dismiss because the State presented insufficient evidence of the crimes charged. As we conclude there was sufficient evidence of the crimes charged, we find no error.

I. Background

The State's evidence tended to show that in 2001, Dr. Phillip Shadduck had a medical appointment with defendant. After Dr. Shadduck's 2001 appointment with defendant, he had no contact with her until January of 2006 when "a plant was delivered to [Dr. Shadduck's] office with a sticky note that had [defendant's] name and phone number on it[.]" In February of 2006, defendant brought Dr. Shadduck a poem to his office and inquired about his children. In March of 2006, defendant began repeatedly paging Dr. Shadduck at work.

In April of 2006, defendant called Dr. Shadduck at home at night "just want[ing] to talk[.]" Dr. Shadduck informed defendant it was inappropriate for her to call him for personal reasons at home and the conversation ended. A few minutes after the conversation ended, defendant called Dr. Shadduck's home again. Dr. Shadduck's wife, Debra Shadduck, answered the phone, and defendant told her,

> Your husband doesn't love you. Do you think your husband would love you? He is having an affair with me. He has an apart-

> ment in Raleigh. I'm not the only wom[a]n. There is another woman. Do you really think he loves? Do you think he loves you? Now tell me, do you think he loves you?

Dr. Shadduck then called an acquaintance who was a police officer because

> [i]t seemed to [him] that this had been going on for about nine weeks with a pattern of escalation. It was not getting better. The level of intrusion had gone up from just dropping off gifts, to unscheduled office visits, to calls at the offices, to pages after-hours at night, and then finally a phone call after-hours at home at night.

Dr. Shadduck became concerned for the safety of his children so he and his wife spoke with teachers and counselors at the school and had the school remove his children from the school website. Dr. Shadduck also took out a restraining order on defendant. In the fall or summer of 2006, Dr. Shadduck was informed by the medical board that defendant had filed a complaint against him.

On 28-30 April 2009, a jury trial was held. The jury found defendant guilty of misdemeanor stalking and harassing phone calls. Defendant received a suspended sentence for 30 months of supervised probation. Defendant appeals.

II. Motion to Dismiss

Defendant argues the trial court erred in failing to dismiss the charges of misdemeanor stalking and harassing phone calls due to the insufficiency of the evidence.

A. Standard of Review

> The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence.

State v. Johnson, ___ N.C. App. ___, ___, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted).

B. Misdemeanor Stalking

[1] At the time of defendant's offenses N.C. Gen. Stat. § 14- 277.3[1] read,

> (a) Offense.—A person commits the offense of stalking if the person willfully on more than one occasion follows or is in the presence of, or otherwise harasses, another person without legal purpose and with the intent to do any of the following:
>
> (1) *Place that person in reasonable fear either for the person's safety or the safety of the person's immediate family or close personal associates.*
>
> (2) Cause that person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment, and that in fact causes that person substantial emotional distress.
>
> . . . .
>
> (c) Definition.—For the purposes of this section, the term "harasses" or "harassment" means knowing conduct, including written or printed communication or transmission, telephone or cellular or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions, directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.

N.C. Gen. Stat. § 14-277.3(a), (c) (2005) (emphasis added).

Defendant argues that the State's evidence shows communications to persons other than Dr. Shadduck on all but one occasion, but that only Dr. Shadduck was "alleged as a victim[.]" However, all of the communications were directed to Dr. Shadduck. In addition, the communications both to Dr. Shadduck and directed to Dr. Shadduck through his office personnel and his wife caused Dr. Shadduck to be "in reasonable fear . . . for [his own] safety [and] the safety of [his] . . . immediate family[.]" N.C. Gen. Stat. § 14-277.3(a).

Here, viewing the evidence in the light most favorable to the State, *Johnson* at —, 693 S.E.2d at 148, the evidence showed that

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1. N.C. Gen. Stat. § 14-277.3 has since been repealed. *See* N.C. Gen. Stat. § 14-277.3 (2009).

defendant harassed Dr. Shadduck by written communications, pager, and phone and that these communications served "no legitimate purpose." N.C. Gen. Stat. § 14-277.3(c). The communications were directed to a specific person, Dr. Shadduck; even the communications which were made to Dr. Shadduck's office staff were directed to Dr. Shadduck, as defendant asked that her messages be conveyed to Dr. Shadduck and she was seeking to see him. The evidence also showed that the harassment did in fact terrorize Dr. Shadduck as it placed him in a "high degree of fear, a state of intense fright or apprehension." *State v. Surrett*, 109 N.C. App. 344, 349, 427 S.E.2d 124, 127 (1993) ('Terrorize' is defined as more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension. (citation and quotation marks omitted)). Dr. Shadduck's fear is evidenced by his own testimony, his actions in having his staff make sure the office doors were locked and ensuring the outside lights were working along with encouraging them to walk in "twos" to their cars, his wife's testimony of his demeanor during and after his phone call with defendant, his late night phone call to a police officer on the best course of action to take, his action in taking out a restraining order, and his visit to his children's school to speak with their teachers and counselors and to have them removed from the school's website. The State's evidence tended to show that Dr. Shadduck's fears regarding his own safety as well as that of his family were reasonable given defendant's odd behavior which exhibited "a pattern of escalation." Viewed in the light most favorable to the State, *Johnson* at ——, 693 S.E.2d at 148, the State presented substantial evidence that defendant harassed Dr. Shadduck and that he was in reasonable fear for the safety of himself and his family. We conclude the trial court did not err in denying defendant's motion to dismiss. This argument is overruled.

C. Harassing Phone Call

[2] N.C. Gen. Stat. § 14-196(a)(3) provides that "[i]t shall be unlawful for any person . . . [t]o telephone another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number[.]" N.C. Gen. Stat. § 14-196(a)(3) (2005). Defendant argues that the warrant for her arrest for harassing phone calls notes only her telephone calls to Regional Surgical Associates and not any other calls, particularly the calls to Dr. Shadduck's home. However, even considering only the phone calls made to Regional Surgical Associates, we conclude that the evidence shows that defendant

called Dr. Shadduck at Regional Surgical Associates "for the purpose of annoying and harassing" Dr. Shadduck as the warrant provides. It was not necessary for the State to show that defendant actually had a conversation with Dr. Shadduck when she called his office repeatedly, as N.C. Gen. Stat. § 14-196(a)(3) requires only evidence that defendant made telephone calls to Dr. Shadduck's office "repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number[.]" *Id.* The evidence viewed in the light most favorable to the State, *see Johnson* at —— 693 S.E.2d at 148, demonstrated that defendant repeatedly called Dr. Shadduck's office for the purpose of annoying and harassing him. Accordingly, the trial court properly denied defendant's motion to dismiss. This argument is overruled.

III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges ELMORE and JACKSON.

DAVID W. PETERSON, AND JUDITH S. PETERSON, PLAINTIFFS v. POLK- SULLIVAN, LLC, DEFENDANT

No. COA09-1251

(Filed 7 September 2010)

Deeds— description—clear plat description controlling

Summary judgment was properly granted for defendant in a land dispute where the trial court properly determined that a clearly referenced plat controlled this case. The general clause in a deed is allowed to control or is given significance only when the specific description is ambiguous or insufficient, or the reference is to a fuller and more accurate description.

Appeal by plaintiffs from order entered 29 June 2009 by Judge Shannon R. Joseph in Superior Court, Chatham County. Heard in the Court of Appeals 25 February 2010.

Northen Blue, LLP, by David M. Rooks, for plaintiffs-appellants.

Pendergrass Law Firm, PLLC, by James K. Pendergrass, Jr., for defendant-appellee.

STROUD, Judge.

Plaintiffs David and Judith Peterson sued defendant Polk-Sullivan, LLC regarding a land dispute. Summary judgment was granted in favor of Polk-Sullivan and the Petersons appealed. As we conclude that the trial court properly granted summary judgment in Polk-Sullivan's favor, we affirm.

I. Background

On or about 5 August 2008, the Petersons filed a complaint alleging that they are "owners in fee simple and are in possession of that certain tract or parcel of land in Chatham County, North Carolina (the 'Property')" and that defendant Polk-Sullivan "claims an estate or interest in the Property adverse to the Plaintiffs and that the alleged claim of Defendant is based upon a mistake in the deed to Defendant[.]" The Petersons requested, *inter alia*, "the Court remove the cloud of Defendant's adverse claim to Plaintiffs' Property from Plaintiffs' title and that Plaintiffs be declared the owner in fee simple of the Property, free and clear of any claims of Defendant pursuant to N.C. Gen. Stat. § 41-40." On 21 October 2008, Polk-Sullivan filed an answer to the Petersons' complaint denying most of the allegations and claiming the affirmative defenses of estoppel by plat, estoppel by deed, and superior title. Polk-Sullivan requested, *inter alia*, the trial court dismiss the Petersons' complaint.

On or about 1 May 2009, the Petersons filed a motion for summary judgment. On or about 15 June 2009, Polk-Sullivan filed a motion for summary judgment. On 29 June 2009, the trial court denied the Petersons' motion for summary judgment and granted Polk-Sullivan's motion for summary judgment. The Petersons appeal.

II. Summary Judgment

As stated in the trial court order,

> [t]he parties stipulated at the outset of the hearing that the legal issue to be decided by the Court in connection with both Motions was the legal effect of the following legal description in Plaintiff Peterson's back chain of title:

> BEING all of Lots 1, 2, 3, & 4, inclusive, PACES MILL SETTLEMENT, as per plat entitled "Survey of Paces Mill Settlement, Chatham County, Hadley Township", dated December 4, 1989, revised December 11, 1989, surveyed by Larry W. Poole & Associates P.A., Registered Land Surveyors, and recorded in Plat Slide 90-13, Chatham County Registry to which plat reference is hereby made for a more particular description of same, and being the same property as conveyed to grantors by Deed recorded in Book 505, Page 22, Chatham County Registry (hereinafter the ["]Pace Mills Legal Description").

Thus, the legal description the trial court was to consider contained reference to the 4 December 1989 survey, recorded at "Plat Slide 90-13" ("plat description") and to the "Deed recorded in Book 505, Page 22, Chatham County Registry [('deed description').]".

The Petersons argue that

> the trial court erred by failing to consider and give proper weight to all of the language contained in the conveyance of the Pace Mill Tract as it is described in Plaintiffs' chain of title in the deed from West Place to Pace Mill in Deed Book 552, Page 545 of the Chatham County Registry.
>
> . . . .
>
> Here, the deed to Pace Mill from West Place includes both a plat reference and a statement that the deed is intended to convey the same property that West Place acquired from their predecessor in title. The Trial Court erred by relying only on the plat reference and ignoring back deed reference.

Our Court has previously stated that

> [s]ummary judgment, by definition, is always based on two underlying questions of law: (1) whether there is a genuine issue of material fact and (2) whether the moving party is entitled to judgment. On appeal, review of summary judgment is necessarily limited to whether the trial court's conclusions as to these questions of law were correct ones.
>
> As the applicable standard of review is de novo, an appellate court must carefully examine the entire record in reviewing a grant of summary judgment, in order to assess the correctness of the trial court's determination of the two questions of law automatically raised by summary judgment[.]

Woods v. Mangum, — N.C. App. —, —, 682 S.E.2d 435, 441 (2009) (citations, quotation marks, and brackets omitted), *aff'd per curiam*, 363 N.C. 827, 689 S.E.2d 858 (2010).

While the Petersons argue that we should consider the deed description and the parties' intentions, the North Carolina Supreme Court has plainly stated that the plat referenced in the deed is controlling:

> [i]t seems to have been established by numerous decisions of this Court that where lots are sold by reference to a recorded plat, the effect of reference to the plat is to incorporate it in the deed as a part of the description of the land conveyed. . . . a map or plat, referred to in a deed, becomes a part of the deed as if it were written therein. Where a deed contains two descriptions, one by metes and bounds and the other by lot and block according to a certain plat or map, the controlling description is the lot according to the plan, rather than the one by metes and bounds.

Kelly v. King, 225 N.C. 709, 716, 36 S.E.2d 220, 224 (1945) (emphasis added) (citations and quotation marks omitted); *see Lewis v. Furr*, 228 N.C. 89, 92-93, 44 S.E.2d 604, 606 (1947) ("The specific description in a deed, when definite and clear, is not to be enlarged by a reference to the source of title, such as 'being the same property conveyed in deed', etc., because when connected with the specific description, it can only be considered as an identification of the land described in the boundary[] or as a further means of locating the property[.] It is only when the specific description is ambiguous, or insufficient, or the reference is to a fuller and more accurate description, that the general clause is allowed to control or is given significance in determining the boundaries." (citations and quotation marks omitted)).

The Petersons cite to *U.S. v. Kubalak*, 365 F. Supp. 2d 677 (W.D.N.C. 2005), *Sugg v. Greenville*, 169 N.C. 606, 86 S.E. 695 (1915), and *Gudger v. White*, 141 N.C. 507, 54 S.E. 386 (1906) in support of their argument that the trial court should have considered the deed description and/or the parties' intentions, instead of relying upon the plat description; however, none of the cases referenced by the Petersons provide that the trial court should refer to a deed description or allow the parties' intentions to control over a clearly referenced plat description. The trial court therefore correctly determined that the plat controls and properly set the boundary line at "N 83 Degrees 43 Minutes 32 Seconds West 1411.29 feet." This argument is overruled.

III. Conclusion

Because the trial court properly relied upon the plat reference to which the parties stipulated, we affirm the judgment of the trial court.

AFFIRMED.

Judges ELMORE and JACKSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 SEPTEMBER 2010)

AGAPION v. CITY OF GREENSBORO No. 09-1664	Guilford (08CVS9012)	Affirmed
BOATWRIGHT DISTRIB. v. NORTH STATE No. 09-1077	Wake (07CVS7889)	No Error
CRAFT DEV. v. CNTY. OF CABARRUS No. 09-1610	Cabarrus (08CVS1951)	Affirmed
DRAUGHON v. CITY OF CLINTON No. 09-1330	Indus. Comm. (749775)	Dismissed
HAAS v. N.C. DEP'T OF CRIME CONTROL No. 09-1367	Wake (08CVS7523)	Reversed and Remanded
HARCO NAT'L INS. CO. v. THORNTON No. 09-906	Wake (05CVS2500)	Dismissed
HUNTER v. CITIBANK CARDS No. 09-1407	Indus. Comm. (787369)	Dismissed
IN RE D.S. No. 08-1078-2	Robeson (02JB168)	Reversed and remanded for entry of order of dismissal
IN RE E.G.K. No. 10-396	Wake (08JT248)	Affirmed
IN RE J.D.R. No. 09-1340	Buncombe (08JB441)	Affirmed
IN RE J.M. No. 10-272	Harnett (06J178)	Affirmed
IN RE S.R.H., G.E.H., I.G.H. No. 10-448	Union (07JT40-42)	Affirmed
JACKSON v. PENTON No. 09-1351	Moore (99CVD1242)	Affirmed in part; reversed and remanded in part

JI v. CITY OF RALEIGH No. 09-1026	Wake (08CVS4564)	Affirmed
KINTZ v. AMERLINK, LTD. No. 09-1584	Nash (08CVS2633)	Affirmed
LANVALE PROPERTIES v. CNTY. OF CABARRUS No. 09-1621	Cabarrus (08CVS1244)	Affirmed
MAGARO v. MAGARO No. 10-96	Pasquotank (06CVD23)	Because we reverse on these grounds, we do not address defendant's other assignments of error
MARDAN IV v. CNTY. OF CABARRUS No. 09-1611	Cabarrus (08CVS1950)	Affirmed
MCMAHON & ASSOCS. v. FUTURE SERENITY, INC. No. 09-1580	Iredell (07CVS2322)	Vacated in part, dismissed in part, affirmed in part
MULL v. MULL No. 09-1233	Buncombe (04CVD5107)	Reversed and Remanded
PETERS v. NORWALK FURN. No. 09-1135	Burke (08CVS1773)	Affirmed
REKECHINSKY v. GRIFFITHS No. 09-1128	Wake (08CVS5168)	Reversed and Remanded
SANDER v. SANDER No. 09-912	Henderson (09CVD593)	Dismissed
SOUTHERN SEEDING SERV. v. MARTIN No. 10-180	Durham (09CVD4437)	Affirmed in part and dismissed in part
SPEIGHTS v. FORBES No. 09-1554	Durham (09CVS2016)	Affirmed
STATE v. ALI No. 09-867	Wake (07CRS31073)	No Error
STATE v. BALDWIN No. 10-208	Hoke (09CRS50048-51) (09CRS265)	No Error

STATE v. BEST No. 10-62	Sampson (06CRS3715-17)	Dismissed in part; vacated in part
STATE v. BLACKBURN No. 09-1133	Catawba (08CRS10003)	No error; remanded for correction of a clerical error
STATE v. BOWENS No. 09-1485	Mecklenburg (08CR238168)	Affirmed
STATE v. BROWN No. 10-15	Mecklenburg (08CRS71595) (08CRS204997-99)	No Error
STATE v. CHAMBERS No. 09-1430	Forsyth (08CRS37918) (08CRS58735)	No Error
STATE v. COMPTON No. 09-1336	Gaston (07CRS68093)	No Error
STATE v. CORNWELL No. 10-158	Cabarrus (08CRS11260) (08CRS53931)	No Error
STATE v. DARDEN No. 10-63	Sampson (08CRS52885-86)	No prejudicial error; remanded for correction of a clerical error
STATE v. ELDER No. 10-117	Mecklenburg (09CRS212789-790)	No Error
STATE v. GREENE No. 09-1327	Cabarrus (06CRS50169-71)	No prejudicial error
STATE v. HAMMONDS No. 10-237	Mecklenburg (09CRS60268) (09CRS57257)	Affirmed
STATE v. HARRIS No. 10-144	Mecklenburg (08CRS241972) (08CRS241885)	Dismissed
STATE v. HAWKINS No. 10-154	Craven (08CRS53782)	Affirmed
STATE v. HILL No. 10-124	Rutherford (07CR53857)	Vacated

STATE v. JUSTICE No. 10-92	Durham (04CRS49709)	Vacated
STATE v. LEWIS No. 10-280	Nash (08CRS57966-67) (09CRS50763-64)	Affirmed
STATE v. LYONS No. 09-1667	Pitt (08CRS60526)	No Error
STATE v. MARLER No. 09-1573	Haywood (07CRS3974) (07CRS3977) 07CRS3971-72) (07CRS54963)	No Error
STATE v. MCLAUGHLIN No. 09-1418	Moore (06CRS54553) (06CRS54575)	No Error
STATE v. MCLEOD No. 10-248	Moore (08CRS6589) (08CRS54496) (08CRS54495)	Dismissed
STATE v. MOTT No. 10-226	Nash (08CRS50795) (08CRS54034) (08CRS50783)	Reversed and Remanded
STATE v. OWENS No. 09-1146	Brunswick (04CRS4211) (04CRS4209)	Remanded
STATE v. PARKS No. 10-209	Cabarrus (07CRS2152)	No Error
STATE v. PEGUES No. 10-329	Davie (08CRS51083) (08CRS1472)	No Error
STATE v. ROBINSON No. 10-182	Rowan (04CRS54741)	Dismissed
STATE v. ROOK No. 10-54	Durham (08CRS1086) (07CRS56213)	Dismissed
STATE v. SLOAN No. 10-75	Mecklenburg (07CRS258537-38)	Dismissed

STATE v. SMITH No. 09-467-2	Mecklenburg (08CRS39546) (08CRS39547) (08CRS39545)	Affirmed
STATE v. SPELLMAN No. 09-1636	Johnston (07CRS56337)	No Error
STATE v. STARLING No. 09-1703	Robeson (07CRS53733)	No Error
STATE v. THIAM No. 09-1506	Pitt (08CRS56493-94)	New trial
STATE v. WARMACK No. 10-181	Mecklenburg (08CRS201162)	Affirmed
STATE v. WASHINGTON No. 10-130	Hoke (06CRS53014)	Affirmed
STATE v. WESTROM No. 10-22	Durham (08CRS47172)	No Error
STATE v. WHITNEY No. 10-254	Onslow (09CRS52382)	Affirmed
STATE v. WILLIAMS No. 09-1596	Guilford (06CRS24690) (06CRS86416) (08CRS110130-31)	No Error
STATE v. WILLIAMSON No. 10-334	Rockingham (09CRS411) (09CRS410)	Affirmed and remanded in part for correction of the judgments revoking probation
STATE v. WINGATE No. 09-1597	Buncombe (08CRS58024)	No Error
STATE v. ZUNIGA No. 10-72	Guilford (08CRS82360-62)	No error in 08CRS82360 and 82361. Remanded for determination and correction of clerical error in 08CRS82362
STEPHENSON v. LANGDON No. 09-1494	Johnston (08CVS2451)	Affirmed

STRICKLAND v. STRICKLAND No. 09-1103	Wilson (06E506)	Affirmed
THE N.C. STATE BAR v. SOSSOMON No. 09-1269	NC State Bar (07DHC9)	Affirmed

APPENDIXES

AMENDMENTS TO THE RULES FOR COURT-ORDERED ARBITRATION

AMENDMENTS TO THE RULES IMPLEMENTING MEDIATION IN MATTERS BEFORE THE CLERK OF SUPERIOR COURT

AMENDMENTS TO THE RULES IMPLEMENTING MEDIATION IN MATTERS PENDING IN DISTRICT CRIMINAL COURT

AMENDMENTS TO THE RULES IMPLEMENTING PRELITIGATION FARM NUISANCE MEDIATION PROGRAM

AMENDMENTS TO THE RULES IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

AMENDMENTS TO THE RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT ACTIONS

AMENDMENTS TO THE RULES OF THE NORTH CAROLINA SUPREME COURT FOR THE DISPUTE RESOLUTION COMMISSION

AMENDMENTS TO THE STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

AMENDMENTS TO THE RULES FOR COURT-ORDERED ARBITRATION

Adopted August 28, 1986. Effective January 1, 1987, with amendments received effective through January 1, 2005, Renumbered, reorganized and amended by order of the Supreme Court adopted on October 6, 2011 and effective January 1, 2012.

Rule 1. Definitions.

(a) *"Court"* as used in these rules means:

(1) The chief district court judge or the delegate of such judge; or

(2) Any assigned judge exercising the court's jurisdiction and authority in an action.

(b) *"Living Human Being"* for purposes of these Rules is defined as a natural person, not to include any legally created person(s), as identified in N.C.G.S. §12-3(6).

Administrative History: Authority—Order of the North Carolina Supreme Court, August 28, 1986, pilot rules adopted; pilot rule amended effective March 4, 1987; permanent rule adopted, by order of the North Carolina Supreme Court, September 14, 1989; Arb. Rule 1(a), formerly Arb. Rule 8(f), amended March 8, 1990, and amended December 19, 2002 and renumbered as Arb. Rule 1(a), effective _____, 2011; New Arb. Rule 1(b) adopted _____, 2011, effective immediately as to all cases filed on or after _____, 2012.

Rule 2. Actions Subject To Arbitration.

(a) *By Order of the Court.*

(1) All civil actions filed in the district court division are subject to court-ordered arbitration under these rules in accordance with the authority set forth in N.C.G.S. §7A-37.1(c), except actions:

(i) Which are assigned to a magistrate, provided that appeals from judgments of magistrates are subject to

court-ordered arbitration under these rules except appeals from summary ejectment actions and actions in which the sole claim is an action on an account;

(ii) In which class certification is sought;

(iii) In which a request has been made for a preliminary injunction or a temporary restraining order including claims filed under N.C.G.S. Chapter 50C;

(iv) Involving family law matters including claims filed under N.C.G.S. chapters 50, 50A, 50B, 51, 52, 52B and 52C;

(v) Involving title to real estate;

(vi) Which are special proceedings; or

(vii) In which the sole claim is an action on an account.

(2) *Requests for jury trial.* Cases otherwise eligible for arbitration shall be arbitrated regardless of whether a party made a request for a jury trial.

(3) *Identification of Actions for Arbitration.* The clerk shall identify actions eligible for arbitration upon the filing of the complaint or docketing of an appeal from a magistrate's judgment, in accordance with Arb. Rule 2(a)(1) and notify the court that the case has been identified for arbitration.

(4) *Notice to Parties.* The court shall serve notice upon the parties or their counsel as soon as practicable after the filing of the last required responsive pleading or the expiration of time for the last required responsive pleading or the docketing of an appeal from a magistrate's judgment.

(5) *Arbitration by Agreement.* The parties in any other civil action pending in the district court division may, upon joint written motion, request to submit the action to arbitration under these rules. The court may approve the motion if it finds that arbitration under these rules is appropriate. The consent of the parties shall not be presumed, but shall be stated by the parties expressly in writing.

(b) *Exemption and Withdrawal From Arbitration.* The court may exempt or withdraw any action from arbitration on its own motion, or on the motion of a party, made not less than 10 days before the arbitration hearing and a showing that:

(1) the action is excepted from arbitration under Arb. Rule 2(a)(1) or

(2) there is a compelling reason to do so.

Administrative History: Authority—Order of the North Carolina Supreme Court, August 28, 1986, pilot rules adopted; pilot rule amended effective March 4, 1987; permanent rule adopted, by order of the North Carolina Supreme Court, September 14, 1989; Arb. Rule 2(a)(1)and Arb. Rule 2(a)(2), formerly Arb. Rule 1(a) were amended March 8, 1990 and December 19, 2002 and renumbered _____, 2011; (d) was amended March 8, 1990 and December 19, 2002; Arb. Rule 2(a)(3), formerly Arb. Rule 8(a), was amended March 8, 1990 and December 19, 2002, and renumbered as Arb. Rule 2(a)(3), _____, 2011.

COMMENT

The purpose of these rules is to create an efficient, economical alternative to traditional litigation for prompt resolution of disputes in district court. The rules provide for court-ordered arbitration of district court actions because district court actions are typically suitable for consideration in the manner provided in these rules.

An arbitrator may award damages in any amount which a party is entitled to recover. These rules do not affect the jurisdiction or functions of the magistrates where they have been assigned such jurisdiction.

In a case involving multiple defendants when there is an appeal from a magistrate's judgment, and one or more defendants have been dismissed, an appeal by a remaining defendant does not operate to rejoin the dismissed defendant(s) in the action absent properly filed pleadings in accordance with N.C.R.Civ.P. 13.

"Family law matters" in Arb.Rule 2(a)(1)(iv) includes all family law cases such as divorce, guardianship, adoptions, juvenile matters, child support, custody, and visitation. "Summary ejectments", referred to in Arb.Rule 2(a)(1)(i) and "special proceedings", referred to in Arb.Rule 2(a)(1)(vi), are actions so designated by the North Carolina General Statutes.

Arb. Rule 2(a)(3) contemplates that the clerk or designee shall determine whether an action is eligible for arbitration after reviewing the pleadings. The rule further contemplates that the clerk or designee will look beyond the cover sheet and filing codes to make this determination. The purpose of these rules is to be inclusive of the cases eligible for arbitration.

"An action on an account" as referenced and excluded in Arb. Rule 2(a)(1)(i) and 2(a)(1)(vii) includes all cases involving an

account wherein the account holder is authorized to complete multiple transactions. These actions should only include accounts in which the account holder has the ability to make more than one purchase during different periods. This exemption should not include cases wherein there was one transaction, even if multiple payments are included in the agreement. The accrual of interest does not constitute multiple transactions. Action on an account, as excluded by Arb. Rule 2(a)(1)(i) and Arb. Rule 2(a)(1)(vii), does not include the exclusion of monies owed claims. Cases in which attorneys' fees are requested are not "actions in which the sole claim is an action on an account" and are therefore not excluded under Arb. Rule 2(a)(1)(vii).

No case should be excluded from the mandatory arbitration process pursuant to Arb.Rule 2(a)(1)(vii) for the action on account exception unless the original petition is accompanied by a verified itemized statement which evidences multiple transactions. All other cases shall be treated as a claim for monies owed and should be arbitrated. The court or their designee shall review any petition alleging it is an action on an account and verify that the verified itemized statement is attached. If there is no such attachment, the matter shall be deemed a petition for monies owed and the matter shall be noticed for arbitration. N.C.G.S. §8-45.

Rule 3. Eligibility of Arbitrators.

(a) *Qualification Requirements for Arbitrators*. The chief district court judge shall receive and approve applications for persons to be appointed as arbitrators. Arbitrators so approved shall serve at the pleasure of the appointing court. A person seeking to be added to the list of eligible arbitrators shall:

(1) Be a member in good standing of the North Carolina State Bar;

(2) Have been licensed to practice law for five years;

(3) Shall have been admitted in North Carolina for at least the last two years of the five-year period. Admission outside North Carolina may be considered for the balance of the five-year period, so long as the arbitrator was admitted as a duly licensed member of the bar of a state(s) or a territory(ies) of the United States or the District of Columbia;

(4) Shall complete the arbitrator training course prescribed by the Administrative Office of the Courts or their training designee;

(5) Shall observe at least one arbitration conducted by an arbitrator already on the list of approved arbitrators as provided for herein; and

(6) Have a valid email address.

(b) *Application Process*. The person seeking eligibility as an arbitrator shall submit:

(1) a completed application on an approved form provided by the Administrative Office of the Courts; and

(2) documented proof of the qualifications as set forth in Arb. Rule 3(a) shall be attached to the application form and submitted to the chief district court judge or designee in each judicial district in which the applicant intends to serve as an arbitrator.

(c) *Oath of Office*. Arbitrators shall take an oath or affirmation similar to that prescribed in N.C.G.S. §11-11, on a form promulgated by the Administrative Office of the Courts, before conducting any hearings. Said oath shall be administered by the chief district court judge or designee. A copy of the oath shall be filed by the applicant with the clerk in each county in which they serve.

(d) *Arbitrator Ethics; Disqualification*. Arbitrators shall comply with the Canons of Ethics for Arbitrators promulgated by the Supreme Court of North Carolina. Arbitrators shall be disqualified and must recuse themselves in accordance with the Canons.

(e) *Conflict*. An arbitrator shall be prohibited from participating, serving or being involved in any capacity, in any case wherein they previously served as an arbitrator. An arbitrator shall also be prohibited from participating in other cases, in any capacity, wherein the parties and/or issues arise from a case over which the arbitrator presided.

(f) *Complaints*. All complaints against an arbitrator shall be filed with the chief district court judge or designee for the county in which the arbitration giving rise to the complaint was conducted using a form promulgated by the Administrative Office of the Courts.

Administrative History: Authority—Order of the North Carolina Supreme Court, August 28, 1986; New Arb. Rule 3 adopted _____, 2011 (a) is former Arb. Rule 2(b) and was adopted September 14, 1989, amended March 8, 1990, amended August 1, 1995, amended December 19, 2005 and amended and renumbered _____, 2011. (c) is former Arb. Rule 2(d) and was adopted September 14, 1989 and was amended and renumbered _____, 2011; (d) is former Arb. Rule 2(e)

and was adopted September 14, 1989, amended December 19, 2002 and renumbered _____, 2011.

Rule 4. Assignment of Arbitrator.

(a) *Appointment.* The court shall appoint an arbitrator in the following manner:

(1) The court shall rotate through the list for their district, set forth in subsection Arb. Rule 3(a), of available qualified arbitrators and appoint the next eligible arbitrator from the list and notify the parties of the arbitrator selected.

(2) Appointments shall be made without regard to race, gender, religious affiliation or political affiliation. The chief district court judge shall retain the discretion to depart in a specific case from a strict rotation when, in the judge's discretion, there is good cause shown.

(b) *Fees and Expenses.* Arbitrators shall be paid the maximum allowable fee as set forth in N.C.G.S. §7A-37.1(c1) after an award is filed with the court. The arbitrator shall make application with the court on the proper NCAOC form within thirty (30) days of the filing of the award. An arbitrator may be paid a reasonable fee not exceeding the maximum allowable fee for work on a case not resulting in a hearing upon the arbitrator's written application to and approval by the chief district court judge. This fee shall be shared by the parties as set forth by these rules.

(c) *Replacement of Arbitrator.* Any party may move the chief district court judge of the district where the action is pending for an order removing the arbitrator from that case so long as the motion is file more than 7 days before the scheduled arbitration hearing. For good cause, such an order shall be entered. If an arbitrator is removed, recused, unable or unwilling to serve, a replacement shall be appointed by the court from the list of arbitrators in accordance with Arb. Rule 4(a).

Administrative History Pilot Rule Adopted: August 28, 1986; Pilot Rule Amended: March 4, 1987; Permanent Rule Adopted: September 14, 1989; (a) was amended March 8, 1990, December 19, 2002 and _____, 2011; former (b) was amended on March 8, 1990, August 1, 1995, December 19, 2002 and was renumbered and reorganized as Arb. Rule 3(a), _____, 2011; former (c) was amended March 8, 1991, December 19, 2002, January 1, 2005 and amended and renumbered as Arb. Rule 4(d), _____, 2011; former (d) was renumbered as Arb. Rule 3(c), _____, 2011; former (e) was adopted September 14, 1989, amended December 19, 2002 and amended and renumbered as Arb,.

Rule 3(d), _____, 2011; former (f) was adopted September 14, 2989, amended December 19, 2002 and amended and renumbered as Arb. Rule 4(d), _____, 2011.

COMMENT

The court shall regularly use all arbitrators on the court's list as established in Arb. Rule 4(a). In counties or districts where arbitrators are assigned for multiple cases in a day, the court shall rotate through the list and appoint the next available arbitrator on the list for each day, rather than appointing a different arbitrator for each case. Under Arb. Rule 4(a)(2), consideration should be given to distance of travel and availability of arbitrators.

In accordance with Arb. Rule 4(b), filing of the award is the final act at which payment should be requested, closing the matter for the arbitrator. The arbitrator should make the award when the hearing is concluded. Hearings must be brief and expedited so that an arbitrator can hear at least three per day. See Arb.Rule 6(q).

Payments authorized by Arb. Rule 4(b) are made subject to court approval to ensure conservation and judicial monitoring of the use of funds available for the program. Arbitrators shall not be paid a fee for continued hearings.

An agreement by all parties to remove an arbitrator may constitute good cause under Arb Rule 4(c).

Rule 5. Fees And Costs.

(a) *Arbitration Costs.* The arbitrator may include, in an award, court costs accruing through the arbitration proceedings in favor of the prevailing party. Costs may not include the arbitrator fee or any portion of said fee, which shall be equally divided between the parties in accordance with these rules.

(b) *Arbitrator Fee.* The arbitrator's fee shall be equally divided among all parties to that action pursuant to Arb. Rule 5(c). No party shall be required to be responsible for any more than their pro rata share of the arbitrator's fee.

(c) *Payment of Arbitrator's Fee.*

(1) *By Non Indigent Parties.* Each party not found by the clerk to be indigent shall pay, into the clerk of court, an equal share of the arbitrator fee prior to the arbitration hearing. Failure to pay the fee shall not be a ground for continuance of the arbitration. The clerk, to whom the fee is paid, shall document each party that pays or is found to be indigent in

the file on the proper form promulgated by the Administrative Office of the Court. This form shall be placed in the file.

(2) *By Indigent or Partially Indigent Parties.*

(i) *Partially Indigent Persons.* If, in the opinion of the clerk or court, an indigent person is financially able to pay a portion, but not all, of their pro rata share of the arbitrator's fee, the court shall require the partially indigent person to pay such portion prior to the arbitration. Failure to pay the fee shall not be a ground for continuance of the arbitration. The clerk, to whom the fee is paid, shall document each party that pays the proper amount or is found to be indigent in the file on the proper form promulgated by the Administrative Office of the Courts. This form shall be placed in the file. The clerk shall apply the criteria enumerated in N.C.G.S. §1-110(a).

(ii) *Fully Indigent Persons.* Upon a finding that the party is indigent, that party shall not be required to pay their portion of the arbitration fee prior to the arbitration.

(3) *Liens.* In all cases, wherein any portion of a party's pro rata share of the arbitrator's fee is not paid in full, the court shall direct that a judgment be entered in the office of the clerk of superior court for the unpaid portion of that party's pro rata share of the arbitrator's fee, which shall constitute a lien as prescribed by the general law of the State applicable to judgments. Any reimbursement to the State as provided in this rule or any funds collected by reason of such judgment shall be deposited in the State treasury and credited against the judgment. A district court judge shall direct entry of judgment for actions or proceedings filed in district court or for those matters appealed from a magistrate's award.

(4) *Judgment for Fee.* The order or judgment shall become effective and the judgment shall be docketed and indexed pursuant to N.C.G.S. § 1-233 et seq., in the amount of the partially indigent or indigent party's share of the arbitrator's fee. Each judgment docketed against a person shall include the social security number, if any, of the judgment debtor.

Administrative History Pilot Rules: Adopted: August 28, 1996; Pilot Rules Amended March 4, 1987; (a) is former Arb. Rule 7(a) and was adopted September 14, 1989, was amended and renumbered _____, 2011; (b) and (c) were adopted _____, 2011; (d) is former Arb. Rule 7(b) and was adopted September 14, 1989, amended December 19, 2002 and renumbered _____, 2011.

COMMENT

When determining each party's equal share of the fee in accordance with Arb. Rule 5(b), take the total arbitrator fee and divide it by the total number of parties in the action. If one party has been granted relief to sue as an indigent, include that party in the number by which the fee is divided to calculate other parties' equal share. Multiple plaintiffs and defendants shall be counted individually and not as one party. These fees are non-refundable.

For purposes of Arb Rule 5, a person shall apply for indigency before the clerk if requesting indigent status as it relates to the arbitration fee by completing and submitting AOC–G-106 or similar form if this form is modified and/or replaced by the Administrative Office of the Courts.

For purposes of Arb. Rule 5, if a party that is not a living human being, as defined by Arb. Rule 1, is listed as a party and a living human being, who is an owner, share holder or has any other ownership interest in that non-human being party is also listed as a party, then each shall be counted as an individual party.

Rule 6. Arbitration Hearings.

(a) *Hearing Scheduled by the Court.* Arbitration hearings shall be scheduled by the court and held in a courtroom, if available, or in any other public room suitable for conducting judicial proceedings and shall be open to the public.

(1) *Scheduling.* The court shall schedule hearings with notice to the parties to begin within 60 days after:

(i) the docketing of an appeal from a magistrate's judgment,

(ii) the filing of the last responsive pleading, or

(iii) the expiration of the time allowed for the filing of such pleading.

(b*) Date of Hearing Advanced by Agreement.* A hearing may be held earlier than the date set by the court, by agreement of the parties with court approval.

(c) *Hearings Rescheduled; Continuance; Cancellation.* A hearing may be scheduled, rescheduled, or continued to a date after the time allowed by this rule only by the court before whom the case is pending, and may be upon a written motion filed at least 24 hours prior to the scheduled arbitration hearing, and a showing of a strong

and compelling reason to do so. In the event a consent judgment or dismissal is not filed with the clerk and notice provided to the court more than 24 hours prior to the scheduled arbitration hearing, all parties shall be liable for the arbitrator fee in accordance with Arb. Rule 5. Any settlement reached prior to the scheduled arbitration hearing must be reported by the parties to the court official administering the arbitration. The parties must file dismissals or consent judgments prior to the scheduled hearing to close the case without a hearing. If the dismissals or consent judgments are not filed before the scheduled hearing, the parties should appear at the hearing to have their agreement entered as the award of the arbitrator.

(d) *Prehearing Exchange of Information*. At least 10 days before the date set for the hearing, the parties shall exchange:

(1) Lists of witnesses they expect to testify;

(2) Copies of documents or exhibits they expect to offer in evidence; and

(3) A brief statement of the issues and their contentions.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing. Failure to comply with Arb. Rule 6(n) may be cause for sanctions under Arb. Rule 6(o). Each party shall bring to the hearing and provide to the arbitrator a copy of these materials. These materials shall not be filed with the court or included in the case file.

(e) *Exchanged Documents Considered Authenticated*. Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian, or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(f) *Copies of Exhibits Admissible*. Copies of exchanged documents or exhibits are admissible in arbitration hearings.

(g) *Witnesses*. Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(h) *Subpoenas*. N.C.R.Civ.P. 45 shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(i) *Authority of Arbitrator to Govern Hearings*. Arbitrators shall have the authority of a trial judge to govern the conduct of hearings, except the arbitrator may not issue contempt orders, issue sanctions or dismiss the action. The arbitrator shall refer all contempt matters and dispositive matters to the court.

(j) *Law of Evidence Used as Guide*. The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(k) *No Ex Parte Communications With Arbitrator*. No ex parte communications between parties or their counsel and arbitrators are permitted.

(l) *Failure to Appear; Defaults; Rehearing*. If a party who has been notified of the date, time and place of the hearing fails to appear, or fails to appear with counsel for cases in which counsel is mandated by law, without good cause therefor, the hearing shall proceed and an award may be made by the arbitrator against the absent party upon the evidence offered by the parties present, but not by default or dismissal for failure to appear. If a party is in default for any other reason but no judgment has been entered upon the default pursuant to N.C.R.Civ.P. 55(b) before the hearing, the arbitrator may hear evidence and may issue an award against the party in default. The court may order a rehearing of any case in which an award was made against a party who failed to obtain a continuance of a hearing and failed to appear for reasons beyond the party's control. Such motion for rehearing shall be filed with the court within the time allowed for demanding trial de novo stated in Arb. Rule 9(a).

(m) *No Record of Hearing Made*. No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(n) *Parties Must Be Present at Hearings; Representation*. All parties shall be present at hearings in person or through counsel. Parties may appear pro se as permitted by law.

(o) *Sanctions*. Any party failing to attend an arbitration proceeding in person or through counsel shall be subject to those sanctions available to the court in N.C.R.Civ.P. 11, 37(b)(2)(A)- 37(b)(2)(D) and

N.C.G.S. § 6-21.5 on the motion of a party, report of the arbitrator, or by the court on its own motion.

(p) *Proceedings in Forma Pauperis*. The right to proceed in forma pauperis is not affected by these rules.

(q) *Limits of Hearings*. Arbitration hearings shall be limited to one hour unless the arbitrator determines at the hearing that more time is necessary to ensure fairness and justice to the parties.

(1) A written application for a substantial enlargement of time for a hearing must be filed with the court and the arbitrator if the arbitrator has been assigned, and must be served on opposing parties at the earliest practicable time, and no later than the date for prehearing exchange of information under Arb. Rule 6(d). The court will rule on these applications after consulting the arbitrator if an arbitrator has been assigned.

(2) An arbitrator is not required to receive repetitive or cumulative evidence.

(r) *Hearing Concluded*. The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments the arbitrator permits have been completed. In exceptional cases, the arbitrator has discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing has been concluded.

(s) *Motions*. Designation of an action for arbitration does not affect a party's right to file any motion with the court.

(1) The court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in the award. Parties shall state their contentions regarding pending motions referred to the arbitrator in the exchange of information required by Arb. Rule 6(d).

(2) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the court so orders.

(t) *Binding Hearing*. All parties to an action may agree that any award by the arbitrator be binding. Such agreement shall be in writing on a form promulgated by the Administrative Office of the Courts and shall be executed by all parties. The consent shall be filed with the clerk's office in the county in which the action is pending. Parties consenting to a binding hearing may not request a trial de novo after the arbitration award is issued. Once all parties agree to binding arbi-

tration, no party may dismiss an appeal from a magistrate's award or dismiss the action in full except by consent. The clerk or court shall enter judgment on the award at the time the award is filed if the action has not been dismissed by consent.

Administrative History Pilot Rule Adopted August 28, 1986. Pilot Rule Amended March 4, 1987. Permanent Rule Adopted September 14, 1989. This is former Arb. Rule 3 renumbered _____, 2011. (b), (j), (o), and (q) were amended March 8, 1990; (a), (b), (g), (j), (l), (n), (o), (p) and (q) were amended December 19, 2002; (r) was adopted _____, 2011and applies to all cases filed on or after _____, 2011.

COMMENT

The 60 days in Arb. Rule 6(a)(1) will allow for discovery, trial preparation, pretrial motions, disposition and calendaring. A motion to continue a hearing will be heard by a judge mindful of this goal. Continuances may be granted when a party or counsel is entitled to such under law, e.g. N.C.R.Civ.P. 40(b); rule of court, e.g. N.C.Prac.R. 3; or customary practice.

Under Arb. Rule 6(c), both parties are responsible for notifying the court personnel responsible for scheduling arbitration hearings that a consent judgment or dismissal has been filed. The notice required under Arb. Rule 6(c) should be filed with the court personnel responsible for scheduling the arbitration hearings. Failure to do so will result in assessment of the arbitrator fee. The "court official administering the arbitration" is the arbitration coordinator, judicial assistant or other staff member managing the arbitration program, as may vary from county to county.

Arb. Rule 6(d)(3) contemplates that the arbitrator shall return all evidence submitted when the hearing is concluded and the award has been made. Original documents and exhibits should not be marked in any way to identify them with the arbitration to avoid possible prejudice in any future trial.

For purposes of Arb. Rule 6(g), the arbitrator shall have such authority to administer oaths if such authorization is consistent with the laws of North Carolina.

As articulated in Arb Rule 6(i), the arbitrator is to rule upon the evidence presented at the hearing, or lack thereof. Thus an arbitrator may enter a $0 award or an award for the defendant if the evidence presented at the hearing does not support an award for the plaintiff.

Arb. Rule 6(n) requires that all parties be present in person or through counsel. The presence of the parties or their counsel is necessary for presentation of the case to the arbitrator. Rule 6(n) does

not require that a party or any representative of a party have authority to make binding decisions on the party's behalf in the matters in controversy, beyond those reasonably necessary to present evidence, make arguments and adequately represent the party during the arbitration. Specifically, a representative is not required to have the authority to make binding settlement decisions.

Arb. Rule 6(n) sets forth that parties may appear pro se, as permitted by law. In accordance with applicable state law, only parties that are natural persons may appear pro se at arbitrations. Any business, corporation, limited liability corporation, unincorporated association or other professional parties, including but not limited to, businesses considered to be a separate legal entity shall be represented by counsel in accordance with the North Carolina General Statutes. See Case Notes Below.

The rules do not establish a separate standard for pro se representation in court-ordered arbitrations. Instead, pro se representation in court-ordered arbitrations is governed by applicable principles of North Carolina law in that area. See Arb. Rule 6(n). Conformance of practice in court-ordered arbitrations with the applicable law is ensured by providing that pro se representation be "as permitted by law."

The purpose of Arb. Rule 6(q) is to ensure that hearings are limited and expedited. Failure to limit and expedite the hearings defeats the purpose of these rules. In this connection, note the option in Arb. Rule 6(d) for use of prehearing stipulations and/or sworn or unsworn statements to meet time limits.

Under Arb. Rule 6(r), the declaration that the hearing is concluded by the arbitrator formally marks the end of the hearing. Note Arb. Rule 7(a), which requires the arbitrator to file the award within three days after the hearing is concluded or post-hearing briefs are received. The usual practice should be a statement of the award at the close of the hearing, without submission of briefs. In the unusual case where an arbitrator is willing to receive post-hearing briefs, the arbitrator should specify the points to be addressed promptly and succinctly. Time limits in these rules are governed by N.C.R. Civ. P. 6 and N.C.G.S. §§103-4, 103-5.

Under Arb. Rule 6(s)(1), the court will rule on prehearing motions which dispose of all or part of the case on the pleadings, or which relate to procedural management of the case.

No party shall be deemed to have consented to binding arbitration unless it is documented on the proper form, which is executed after the filing date of the action. No executed contract, lien, lease or

other legal document, other than the proper form designating the arbitration as binding, shall be used to make an arbitration binding upon either party.

Case Notes—For note discussing representation of parties who are not living human beings, see Lexis-Nexis v Travishan Corp., 155 N.C. App. 205, 573 S.E.2d 547 (2002).

Rule 7. The Award.

(a) *Filing the Award.* The award shall be in writing, signed by the arbitrator and filed with the clerk within three days after the hearing is concluded or the receipt of post-hearing briefs, whichever is later. The arbitrator shall file a complete award indicating any award, the rate of any applicable interest and any accrued interest.

(b) *Findings; Conclusions; Opinions.* No findings of fact and conclusions of law or opinions supporting an award are required.

(c) *Scope of Award.* The award must resolve all issues raised by the pleadings, may be in any amount supported by the evidence, shall include interest as provided by law, and may include attorney's fees as allowed by law.

(d) *Copies of Award to Parties.* The arbitrator shall deliver a copy of the award to all of the parties or their counsel at the conclusion of the hearing or the clerk shall serve, in accordance with the N.C.R.Civ.P. 5, the award within three (3) days after filing. A record shall be made by the arbitrator or the court of the date and manner of service.

Administrative History Pilot Rules Adopted August 28, 1986; Pilot Rules Amended: March 4, 1987; Permanent Rule Adopted September 14, 1989; This is former Arb. Rule 4, renumbered _____, 2011. (a), (c) and (d) were adopted _____, 2011; (a) and (d) were amended _____, 2011.

COMMENT

Ordinarily, the arbitrator should issue the award at the conclusion of the hearing. See Arb. Rule 7(a). If the arbitrator wants post-hearing briefs, the arbitrator must receive them within three days, consider them, and file the award within three days thereafter. See Arb. Rule 6(r) and its Comment. If the arbitrator deems it appropriate, the arbitrator may explain orally the basis of the award.

If an award is incomplete or unclear, the clerk should request clarification from the arbitrator and the arbitrator should amend the award to make the award, including any interest, evident. In the event

this occurs after the award was announced to the parties, the court should serve the amended order on all parties in accordance with Arb. Rule 7(d). The service of an amended order shall cause the period for demanding a trial de novo to restart in accordance with Arb. Rule 8.

Rule 8. The Court's Judgment.

(a) *Termination of Action Before Judgment.* Dismissals or a consent judgment may be filed at any time before entry of judgment on an award.

(b) *Judgment Entered on Award.* If the case is not terminated by dismissal or consent judgment and no party files a demand for trial de novo within 30 days after the award is served, the clerk or the court shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be served on all parties or their counsel by mail in accordance with N.C.R.Civ.P. 5(b).

(c) *Judgment upon dismissal or withdrawal of a demand for trial de novo.* If the case is noticed for trial de novo and all parties consent to withdraw the demand for the trial de novo in accordance with Rule 9(a)(3), the clerk or court shall immediately enter judgment on the award. A copy of the judgment shall be served on all parties or their counsel by the clerk in accordance with N.C.R.Civ.P. 5. A certificate of service shall be executed by the clerk and shall be filed.

Administrative History Pilot Rule Adopted August 28, 1986. Pilot Rule Amended March 4, 1987. Permanent Rule Adopted September 14, 1989. This is former Arb. Rule 6, renumbered _____, 2011. (a) was amended December 19, 2002; (b) was amended March 8, 1990 and December 19, 2002; (c) was adopted _____, 2011 and applies to all cases filed on or after _____, 2011.

COMMENT

No appeal lies from an arbitration award to the appellate courts of this State. The remedy available to a party aggrieved by the award is to demand a trial de novo in the district court. In the absence of such a demand within the 30 day period set forth in Arb. Rule 8(b), the clerk or the court will enter judgment on the award.

Rule 9. Trial De Novo.

(a) *Trial De Novo as of Right.*

(1) Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's

award may have a trial de novo as of right upon filing a written demand for trial de novo with the court, and service of the demand on all parties, on form promulgated by the Administrative Office of the Courts within 30 days after the arbitrator's award has been served on all parties, or within 10 days after an adverse determination of an Arb. Rule 6(l) motion to rehear. Demand for jury trial pursuant to N.C.R.Civ.P. 38(b) does not preserve the right to a trial de novo. A demand by any party for a trial de novo in accordance with this section is sufficient to preserve the right of all other parties to a trial de novo. Any trial de novo pursuant to this section shall include all claims in the action. No rulings by the arbitrator shall be binding on the court at a trial de novo.

(2) Upon the demand of a trial de novo by any party pursuant to these Rules, that demand shall be deemed to have preserved the rights of all parties and all issues in the case for trial de novo. No party shall lose a right to a trial de novo of any eligible issue as a result of the failure of the party initially demanding the trial de novo to proceed for any reason. In the event the party initiating the trial de novo fails to proceed for any reason, any other party may request that the trial de novo be calendared for all issues.

(3) The court shall, upon any party demanding a trial de novo of any issue, calendar all parties and issues before the court for a de novo trial. All issues and parties shall remain as pending matters and shall be calendared by the court in a timely manner for the trial de novo hearing unless and until such time as all parties agree to dismiss the demand for a trial de novo. Any such agreement shall be recorded on a form promulgated by the Administrative Office of the Courts, executed by all parties and filed with the clerk in the county in which the action is pending prior to the trial de novo.

(b) *Trial De Novo Fee.*

(1) The first party filing a demand for trial de novo in cases wherein the initiating party has not properly moved the court for indigent relief and relief from payment of the trial de novo fee, in accordance with Arb. Rule 9(b)(2)(ii), shall pay a filing fee at the time the written demand for trial de novo is filed with the clerk, equivalent to the arbitrator's compensation, as set forth in Arb. Rule 4(b), which shall be held by the clerk until the case is terminated. The fee shall be returned to the

demanding party only upon written order of the trial judge finding that the position of the demanding party has been improved over the arbitrator's award. Otherwise, the filing fee shall be deposited into the Judicial Department's General Fund at the expiration of thirty days from the final judgment from a court of competent jurisdiction or the expiration of the time for filing any available appeals, whichever is later. No party may make application for the return of this fee after the expiration of thirty days from the final judgment.

(2) If a party properly moves the court by proper motion which includes that party's social security number for indigent status and requests relief from the payment of the trial de novo fee prior to the trial de novo hearing, that party shall not be required to pay the trial de novo fee at the time of demanding the trial de novo. Said motion shall be heard subsequent to the completion of the trial de novo. In a ruling upon such motions, the judge shall apply the criteria enumerated in N.C.G.S. §1-110(a), but shall take into consideration the outcome of the trial de novo and the previous arbitration and whether a judgment was rendered in the indigent's favor. A judge may find that the party was indigent at the time of arbitration, but not indigent at the time of the trial de novo and make a ruling on the fees due accordingly. The court shall enter an order granting, in part or in full, or denying the party's request and:

(i) If the party is denied indigent relief, that party shall pay the trial de novo fee within ten (10) days of a final judgment from a court of competent jurisdiction or the expiration of time for all available appeals, whichever is later. In the event the party fails to pay the trial de novo fee as directed by the court, the clerk shall follow the procedure set forth in this rule for entry of judgment in the amount of the trial de novo fee as if the person had been found indigent.

(ii) If the party is granted indigent relief for any portion of the trial de novo fee, the court shall direct that a judgment be entered in the clerk's office in the county in which the action is pending for the unpaid portion of that party's pro rata share of the trial de novo fee, which shall constitute a lien as prescribed by the general law of the State applicable to judgments. The order or judgment shall become effective and the judgment shall be docketed and indexed pursuant to N.C. Gen. Stat. §1-233 et

seq., in the amount of the partially indigent or indigent party's share of the trial de novo fee. Each judgment docketed against a person shall include the social security number, if any, of the judgment debtor.

(c) *No Reference to Arbitration in Presence of Jury.* A trial de novo shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the court's approval.

(d) *No Evidence of Arbitration Admissible.* No evidence that there have been arbitration proceedings or of statements made and conduct occurring in arbitration proceedings may be admitted in a trial de novo, or in any subsequent proceeding involving any of the issues in or parties to the arbitration, without the consent of all parties to the arbitration and the court's approval.

(e) *Arbitrator Not to Be Called as Witness.* An arbitrator may not be deposed or called as a witness to testify concerning anything said or done in an arbitration proceeding in a trial de novo or any subsequent civil or administrative proceeding involving any of the issues in or parties to the arbitration. The arbitrator's notes are privileged and not subject to discovery.

(f) *Judicial Immunity.* The arbitrator shall have judicial immunity to the same extent as a trial judge with respect to the arbitrator's actions in the arbitration proceeding.

(g) *Exclusion of Issues.* All parties to an action may consent to limit the issues to be considered by the court in a trial de novo. Any such consent shall be in writing and executed by all parties or their respective counsel, filed with the clerk and submitted to the court at the trial de novo. The consent document shall set forth the issues upon which agreement has been reached and all issues remaining for consideration by the court.

Administrative History Pilot Rule Adopted August 28, 1986; Pilot Rule Amended March 4, 1987; Permanent Rule Adopted September 14, 1989; This is former Arb. Rule 5 and was renumbered _____, 2011; (a)(1) was formerly Arb. Rule 5(a), was amended March 8, 1990, December 19, 2002 and was amended and renumbered _____, 2011; Arb. Rule (a)(2) and Arb. Rule(a)(3) were adopted _____, 2011 and apply to all cases filed on or after _____, 2011; (b)(1)was amended March 8, 1990, December 19, 2002 and was amended and renumbered _____, 2011; Arb. Rule (b)(2) was adopted _____, 2011and applies to all cases filed on or after _____, 2011; (e) and (f) were amended March 8, 1990; (c)(d) were amended December

19, 2002; (g) was adopted _____, 2011 and applies to all cases filed on or after _____, 2011

COMMENT

Arb. Rule 9(a)(2) and 9(a)(3) clarify that each party is not required to notice their respective issues for a trial de novo. Once a trial de novo has been demanded, it shall be heard unless all parties consent otherwise in writing.

Under Arb. Rule 9(b)(1), if a party prevails but does not improve their position at the trial novo hearing, that party shall not be eligible for reimbursement of the trial de novo filing fee.

Arb. Rule 9(c) does not preclude cross-examination of a witness in a later proceeding concerning prior inconsistent statements during arbitration proceedings, if done in such a manner as not to violate the intent of Arb. Rules 9(c) and 9(d).

In a case involving multiple defendants and where one or more defendants have been dismissed, a demand for trial de novo by a remaining defendant does not operate to rejoin the dismissed defendant in the action absent properly filed pleadings in accordance with N.C.R.Civ.P. 13.

In the event a party has previously requested a trial by jury, the trial de novo shall be a jury trial. See also the Comment to Arb. Rule 8 regarding demand for trial de novo.

Final judgment of a court of competent jurisdiction as referenced in Arb. Rule 9(b)(1) shall mean the final judgment once all parties have availed themselves of all possible appellate processes and no avenues of appeal remain, either because the appeal has been heard and judgment has been rendered, the court has declined to consider the appeal or the time for properly filing all appeals has expired.

For purposes of Arb. Rule 9(b)(2), a person shall apply for indigency relief before the district court judge by completing and submitting AOC–G-106 or similar form if this form is modified and/or replaced by the Administrative Office of the Courts.

For purposes of Arb. Rule 9, if a party that is not a living human being, as defined by Arb. Rule 1, is listed as a party and a living human being, who is an owner, share holder or has any other ownership interest in that non-human being party is also listed as a party, then each shall be counted as an individual party.

Rule 10. Administration.

(a) *Forms.* Forms for use in these arbitration proceedings must be approved by the Administrative Office of the Courts.

(b) *Delegation of Nonjudicial Functions*. To conserve judicial resources and facilitate the effectiveness of these rules, the court may delegate nonjudicial, administrative duties and functions to supporting court personnel and authorize them to require compliance with these rules.

(c) *Local Rules*. The chief district court judge may publish local rules, not inconsistent with the Rules and N.C.G.S. 7A-37.1, implementing arbitration.

Administrative History: Authority—Order of the North Carolina Supreme Court, August 28, 1986, pilot rule adopted; pilot rule amended effective March 4, 1987; permanent rule adopted, by order of the North Carolina Supreme Court, September 14, 1989; Arb. Rule 8(a), renumbered as Arb. Rule 2(3), effective _____, 2011, was amended March 8, 1990 and December 19, 2002; Arb. Rule 8(b), renumbered as Arb. Rule 8(b)(1) and former Arb. Rule 8(b)(2), effective _____, 2011, was amended March 8, 1990 and December 19, 2002; Arb. Rule (d) was amended March 8, 1990 and (f), renumbered as Arb. Rule 1(b), effective _____, 2011, was amended March 8, 1990 and December 19, 2002; Amended December 19, 2002—(c) and (e); Effective _____, 2011, former (a), (b), (c) were renumbered, reorganized and amended; Effective _____, 2011, Arb. Rule 10(d) was reorganized as Arb. Rule 10(a) and Arb. Rule 10(e) was reorganized as Arb. Rule 10(b).

Rule 11. Application Of Rules.

These Rules shall apply to cases filed on or after the effective date of these rules and to pending cases submitted by agreement of the parties under Arb. Rule 2(b) or referred to arbitration by order of the court in those districts designated for court-ordered arbitration in accordance with N.C.G.S. §7A-37.1.

Administrative History: Authority—Order of the North Carolina Supreme Court, August 28, 1986, pilot rules adopted; pilot rule amended effective March 4, 1987; permanent rule adopted, by order of the North Carolina Supreme Court, September 14, 1989; Amended March 8, 1990; Amended December 19, 2002; Amended _____, 2011, effective immediately to all cases filed on or before _____, 2011.

COMMENT

A common set of rules has been adopted. These rules may be amended only by the Supreme Court of North Carolina. The enabling legislation, N.C.G.S. §7A-37.1, vests rule-making authority in the Supreme Court, and this includes amendments.

Editor's note.—As to the applicability of the Rules for Court-Ordered Arbitration, see the order of the Supreme Court preceding these rules.

In the Supreme Court of North Carolina
Order Adopting Amendments to the Rules for Court-Ordered Arbitration in North Carolina

WHEREAS, section 7A-37.1 of the North Carolina General Statutes authorizes the use of court-ordered, non-binding arbitration in our courts as an alternative procedure to traditional civil litigation, and

WHEREAS, N.C.G.S. section 7A-38.1(b) enables this Court to implement section 7A-38.1 by adopting rules and amendments to rules concerning said court-ordered arbitrations,

NOW, THEREFORE, pursuant to N.C.G.S. section 7A-38.1(c), the Rules for Court-Ordered Arbitration in North Carolina are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of January, 2012.

Adopted by the Court in conference the 6th day of October, 2011. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules for Court-Ordered Arbitration in North Carolina amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

s/Timmons-Goodson
For the Court

AMENDMENTS TO THE RULES IMPLEMENTING MEDIATION IN MATTERS BEFORE THE CLERK OF SUPERIOR COURT

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RULE 1. INITIATING MEDIATION IN MATTERS BEFORE THE CLERK

A. PURPOSE OF MANDATORY MEDIATION. These Rules are promulgated pursuant to N.C.G.S. § 7A-38.3B to implement mediation in certain cases within the clerk's jurisdiction. The procedures set out here are designed to focus the parties' attention on settlement and resolution rather than on preparation for contested hearings and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in other settlement efforts voluntarily either prior to or after the filing of a matter with the clerk.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES. In furtherance of this purpose, counsel, upon being retained to represent a party to a matter before the clerk, shall discuss the means available to the parties through mediation and other settlement procedures to resolve their disputes without resort to a contested hearing. Counsel shall also discuss with each other what settlement procedure and which neutral third party would best suit their clients and the matter in controversy.

C. INITIATING THE MEDIATION BY ORDER OF THE CLERK.

(1) Order by The Clerk of Superior Court. The clerk of superior court of any county may, by written order, require all persons and entities identified in Rule 4 to attend a mediation in any matter in which the clerk has original or exclusive jurisdiction, except those matters under N.C.G.S. Chapters 45 and 48 and those matters in which the jurisdiction of the clerk is ancillary.

(2) Content of Order. The order shall be on a North Carolina Administrative Office of the Courts (NCAOC) form and shall:

(a) require that a mediation be held in the case;

(b) establish deadlines for the selection of a mediator and completion of the mediation;

(c) state the names of the persons and entities who shall attend the mediation;

(d) state clearly that the persons ordered to attend have the right to select their own mediator as provided by Rule 2;

(~~3~~e) state the rate of compensation of the court appointed mediator in the event that those persons do not exercise their right to select a mediator pursuant to Rule 2; and

(f) state that those persons shall be required to pay the mediator's fee in shares determined by the clerk.

(3) Motion for Court Ordered Mediation. In matters not ordered to mediation, any party, interested persons or fiduciary may file a written motion with the clerk requesting that mediation be ordered. Such motion shall state the reasons why the order should be allowed and shall be served in ac-cordance with Rule 5 of the North Carolina Rules of Civil Procedure (N.C.R.Civ.P.) on non-moving parties, interested persons and fiduciaries designated by the clerk or identified by the petitioner in the pleadings. Objections to the motion may be filed in writing within five days after the date of the service of the motion. Thereafter, the clerk shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(4) Informational Brochure. The clerk shall serve a brochure prepared by the Dispute Resolution Commission (Commission) explaining the mediation process and the operations of the Commission along with the order required by Rule 1.C.(1) and 1.C.(3).

(5) Motion to Dispense With Mediation. A named party, interested person or fiduciary may move the clerk of superior court to dispense with a mediation ordered by the clerk. Such motion shall state the reasons the relief is sought and shall be served on all persons ordered to attend and the mediator. For good cause shown, the clerk may grant the motion.

(6) Dismissal of Petition For the Adjudication of Incompetence. The petitioner shall not voluntarily dismiss a petition for adjudication of incompetence after mediation is ordered.

RULE 2. DESIGNATION OF MEDIATOR

A. DESIGNATION OF CERTIFIED MEDIATOR BY AGREEMENT OF PARTIES. The parties may designate a mediator certified by the Commission by agreement within a period of time as set out in the clerk's order. However, the parties may only designate mediators certified for estate and guardianship matters pursuant to these Rules for estate or guardianship matters.

The petitioner shall file with the clerk a Designation of Mediator within the period set out in the clerk's order; however, any party may file the designation. The party filing the designation shall serve a copy on all parties and the mediator designated to conduct the mediation. Such designation shall state the name, address and telephone number of the mediator designated; state the rate of compensation of the mediator; state that the mediator and persons ordered to attend have agreed upon the designation and rate of compensation; and state under what rules the mediator is certified. The notice shall be on a NCAOC form.

B. APPOINTMENT OF MEDIATOR BY THE CLERK. In the event a Designation of Mediator is not filed with the clerk within the time for filing stated in the clerk's order, the clerk shall appoint a mediator certified by the Commission. The clerk shall appoint only those mediators certified pursuant to these Rules for estate and guardianship matters to those matters. The clerk may appoint any certified mediator who has

expressed a desire to be appointed to mediate all other matters within the jurisdiction of the clerk.

Except for good cause, mediators shall be appointed by the clerk by rotation from a list of those certified mediators who wish to be appointed for matters within the clerk's jurisdiction, without regard to occupation, race, gender, religion, national origin, disability or whether they are an attorney.

C. MEDIATOR INFORMATION DIRECTORY. The Commission shall maintain for the consideration of the clerks of superior court and those designating mediators for matters within the clerk's jurisdiction, a directory of certified mediators who request appointments in those matters and a directory of those mediators who are certified pursuant to these Rules. Said directory shall be maintained on the Commission's website at www.ncdrc.org.

D. DISQUALIFICATION OF MEDIATOR. Any person ordered to attend a mediation pursuant to these Rules may move the clerk of superior court of the county in which the matter is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be designated or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATION

A. WHERE MEDIATION IS TO BE HELD. The mediation may be held in any location to which all the persons ordered to attend and the mediator agree. In the absence of such an agreement, the mediation shall be held in the courthouse or other public or community building in the county where the matter is pending. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the time and location of the mediation to all persons ordered to attend.

B. WHEN MEDIATION IS TO BE HELD. The clerk's order issued pursuant to Rule 1.C.(3) shall state a deadline for completion of the mediation. The mediator shall set a date and time for the mediation pursuant to Rule 6.B.(5) and shall conduct the mediation before that date unless the date is extended by the clerk.

C. ~~REQUEST TO EXTEND DEADLINE FOR COMPLETION~~ EXTENDING DEADLINE FOR COMPLETION. The clerk

may extend the deadline for completion of the mediation upon the clerk's own motion, upon stipulation of the parties or upon suggestion of the mediator. ~~The mediator or any person ordered to attend the mediation may request the Clerk of Superior Court to extend the deadline for completion of the mediation. Such request shall state the reasons the extension is sought and shall be delivered to all persons ordered to attend and the mediator. The Clerk may grant the request without hearing by setting a new deadline for the completion of the mediation, which date may be set at any time prior to the hearing. Notice of the Clerk's decision shall be delivered to all persons ordered to attend and the mediator by the person who sought the extension and shall be filed with the Court.~~

D. RECESSES. The mediator may recess the mediation at any time and may set times for reconvening which are prior to the deadline for completion. If the time for reconvening is set before the mediation is recessed, no further notification is required for persons present at the mediation.

E. THE MEDIATION IS NOT TO DELAY OTHER PROCEEDINGS. The mediation shall not be cause for the delay of other proceedings in the matter, including the completion of discovery, the filing or hearing of motions or the hearing of the matter, except by order of the clerk of superior court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATIONS

A. ATTENDANCE.

(1) Persons ordered by the clerk to attend a mediation conducted pursuant to these Rules shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.B or an impasse has been declared. Any such person may have the attendance requirement excused or modified, including the allowance of that person's participation by telephone or teleconference:

(a) By agreement of all persons ordered to attend and the mediator; or

(b) By order of the clerk of superior court, upon motion of a person ordered to attend and notice of the motion to all other persons ordered to attend and the mediator.

(2) Any person ordered to attend a mediation conducted pursuant to these Rules that is not a natural person or a governmental entity shall be represented at the mediation by an officer, employee or agent who is not such person's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the matter.

(3) Any person ordered to attend a mediation conducted pursuant to these Rules that is a governmental entity shall be represented at the mediation by an employee or agent who is not such entity's outside counsel and who has authority to decide on behalf of such entity whether and on what terms to settle the matter; provided, however, if under law proposed settlement terms can be approved only by a governing board, the employee or agent shall have authority to negotiate on behalf of the governing board.

(4) An attorney ordered to attend a mediation pursuant to these Rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.

(5) Other persons may participate in the mediation at the discretion of the mediator.

(6) Persons ordered to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for mediation sessions before the completion deadline and shall keep the mediator informed as to such problems as may arise before an anticipated session is scheduled by the mediator.

B. FINALIZING AGREEMENT.

(1) If an agreement is reached at the mediation, in matters that, as a matter of law, may be resolved by the parties by agreement, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. The parties shall designate a person who will file a consent judgment or one or more voluntary dismissals with the clerk and that person shall sign the mediator's report. If agreement is reached in such matters prior to the mediation or during a recess, the parties shall inform the mediator and the clerk that the matter has been settled and, within 10 calendar days of the agreement being reached, file a consent judgment or voluntary dismissal(s).

(2) In all other matters, including guardianship and estate matters, if an agreement is reached upon some or all of the

issues at mediation, the persons ordered to attend shall reduce its terms to writing and sign it along with their counsel, if any. Such agreements are not binding upon the clerk but they may be offered into evidence at the hearing of the matter and may be considered by the clerk for a just and fair resolution of the matter. Evidence of statements made and conduct occurring in a mediation where an agreement is reached is admissible pursuant to N.C.G.S. § 7A-38.3B(g)(3).

All written agreements reached in such matters shall include the following language in a prominent place in the document:

"This agreement is not binding on the clerk but will be presented to the clerk as an aid to reaching a just resolution of the matter."

C. PAYMENT OF MEDIATOR'S FEE. The persons ordered to attend the mediation shall pay the mediator's fee as provided by Rule 7.

D. NO RECORDING. There shall be no stenographic, audio or video recording of the mediation process by any participant. This prohibition precludes recording either surreptitiously or with the agreement of the parties.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATION OR PAY MEDIATOR'S FEE

Any person ordered to attend a mediation pursuant to these Rules who fails without good cause to attend or to pay a portion of the mediator's fee in compliance with N.C.G.S. § 7A-38.3B and the Rules promulgated by the Supreme Court of North Carolina (Supreme Court) to implement that section, shall be subject to contempt powers of the clerk and the clerk may impose monetary sanctions. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, mediator fees, expenses and loss of earnings incurred by persons attending the mediation.

A person seeking sanctions against another person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all persons ordered to attend. The clerk may initiate sanction proceedings upon his/her own motion by the entry of a show cause order. If the clerk imposes sanctions, the clerk shall do so, after notice and a hearing, in a written order making findings of fact and conclusions of law. An order imposing sanctions is reviewable by the superior court in accordance with N.C.G.S. § 1-301.2 and N.C.G.S. § 1-301.3, as applicable, and thereafter by the appellate courts in accordance with N.C.G.S. § 7A-38.1(g).

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) Control of the Mediation. The mediator shall at all times be in control of the mediation and the procedures to be followed. However, the mediator's conduct shall be governed by Standards of Professional Conduct for Mediators (Standards) promulgated by the Supreme Court which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) Private Consultation. The mediator may communicate privately with an participant or counsel prior to, during and after the mediation. The fact that private communications have occurred with a participant before the conference shall be disclosed to all other participants at the beginning of the mediation.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) The costs of the mediation and the circumstances in which participants will not be taxed with the costs of mediation;

(c) That the mediation is not a trial, the mediator is not a judge, and the parties retain their right to a hearing if they do not reach settlement;

(d) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(e) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(f) The inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.3B;

(g) The duties and responsibilities of the mediator and the participants; and

(h) That any agreement reached will be reached by mutual consent and reported to the clerk as provided by rule.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediation should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

(4) Reporting Results of Mediation.

(a) The mediator shall report to the court on a NCAOC form within five days of completion of the mediation whether or not the mediation resulted in a settlement or impasse. If settlement occurred prior to or during a recess of a mediation, the mediator shall file the report of settlement within five days of learning of the settlement and, in addition to the other information required, report who informed the mediator of the settlement.

(b) The mediator's report shall identify those persons attending the mediation, the time spent in and fees charged for mediation, and the names and contact information for those persons designated by the parties to file such consent judgment or dismissal(s) with the clerk as required by Rule 4.B. Mediators shall provide statistical data for evaluation of the mediation program as required from time to time by the Commission or the NCAOC. Mediators shall not be required to send agreements reached in mediation to the clerk, except in estate and guardianship matters and other matters which may be resolved only by order of the clerk.

(c) Mediators who fail to report as required pursuant to this Rule shall be subject to the contempt power of the court and sanctions.

(5) Scheduling and Holding the Mediation. It is the duty of the mediator to schedule the mediation and conduct it prior to the mediation completion deadline set out in the clerk's order. The mediator shall make an effort to schedule the mediation at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the mediation. Deadlines for completion of the mediation shall be strictly ob-

served by the mediator unless said time limit is changed by a written order of the clerk of superior court.

~~**(6) Distribution of mediator evaluation form.** At the mediation, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per person with additional copies distributed upon request. The evaluation is intended for purposes of self improvement and the mediator shall review returned evaluation forms.~~

RULE 7. COMPENSATION OF THE MEDIATOR

A. BY AGREEMENT. When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. BY ORDER OF THE CLERK. When the mediator is appointed by the clerk, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $150 that is due upon appointment.

C. PAYMENT OF COMPENSATION. In matters within the clerk's jurisdiction that, as a matter of law, may be resolved by the parties by agreement the mediator's fee shall be paid in equal shares by the parties unless otherwise agreed to by the parties. Payment shall be due upon completion of the mediation.

In all other matters before the clerk, including guardianship and estate matters, the mediator's fee shall be paid in shares as determined by the clerk. A share of a mediator's fee may only be assessed against the estate of a decedent, a trust or a guardianship or against a fiduciary or interested person upon the entry of a written order making specific written findings of fact justifying the taxing of costs.

D. CHANGE OF APPOINTED MEDIATOR. Parties who fail to select a certified mediator within the time set out in the clerk's order and then desire a substitution after the clerk has appointed a certified mediator, shall obtain the approval of the clerk for the substitution. The clerk may approve the substitution only upon proof of payment to the clerk's original appointee the $150 one time, per case administrative fee, any other amount due and owing for mediation services pursuant to Rule 7.B and any postponement fee due and owing pur-

suant to Rule 7.F, unless the clerk determines that payment of the fees would be unnecessary or inequitable.

E. INDIGENT CASES. No person ordered to attend a mediation found to be indigent by the clerk for the purposes of these Rules shall be required to pay a share of the mediator's fee. Any person ordered by the clerk of superior court to attend may move the clerk for a finding of indigence and to be relieved of that person's obligation to pay a share of the mediator's fee. The motion shall be heard subsequent to the completion of the mediation or if the parties do not settle their matter, subsequent to its conclusion. In ruling upon such motions, the clerk shall apply the criteria enumerated in N.C.G.S. § 1-110(a), but shall take into consideration the outcome of the matter and whether a decision was rendered in the movant's favor. The clerk shall enter an order granting or denying the person's request. Any mediator conducting a mediation pursuant to these Rules shall waive the payment of fees from persons found by the court to be indigent.

F. POSTPONEMENTS.

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with mediation once the mediator has scheduled a date for a session of the mediation. After mediation has been scheduled for a specific date, a person ordered to attend may not unilaterally postpone the mediation.

(2) A mediation session may be postponed by the mediator for good cause beyond the control of the movant only after notice by the movant to all persons of the reasons for the postponement and a finding of good cause by the mediator. A postponement fee shall not be charged in such circumstance.

(3) Without a finding of good cause, a mediator may also postpone a scheduled mediation session with the consent of all parties. A fee of $150 shall be paid to the mediator if the postponement is allowed or if the request is within two business days of the scheduled date the fee shall be $300. The person responsible for it shall pay the postponement fee. If it is not possible to determine who is responsible, the clerk shall assess responsibility. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B. A mediator shall not charge a postponement fee when the mediator is responsible for the postponement.

(4) If all persons ordered to attend select the mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services or any postponement fee) or willful failure of a party contending indigent status to promptly move the clerk of superior court for a finding of indigency, shall constitute contempt of court and may result, following notice and a hearing, in the imposition of any and all lawful sanctions by the superior court pursuant to N.C.G.S. § 5A.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Commission may receive and approve applications for certification of persons to be appointed as clerk of court mediators.

A. For appointment by the clerk as mediator in all cases within the clerk's jurisdiction except guardianship and estate matters, a person shall be certified by the Commission for either the superior or district court mediation programs;

B. For appointment by the clerk as mediator in guardianship and estate matters within the clerk's jurisdiction, a person shall be certified as a mediator by the Commission for either the superior or district court programs and complete a course, at least 10 hours in length, approved by the Commission pursuant to Rule 9 concerning estate and guardianship matters within the clerk's jurisdiction;

C. Submit proof of qualifications set out in this section on a form provided by the Commission;

D. Pay all administrative fees established by the NCAOC upon the recommendation of the Commission; and

E. Agree to accept, as payment in full of a party's share of the mediator's fee, the fee ordered by the clerk pursuant to Rule 7.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the above qualifications or has not faithfully observed these Rules or those of any county in which he or she

has served as a mediator or the Standards. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators seeking certification pursuant to these Rules for estate and guardianship matters within the jurisdiction of the clerk of superior court shall consist of a minimum of 10 hours instruction. The curriculum of such programs shall include:

(1) Factors distinguishing estate and guardianship mediation from other types of mediations;

(2) The aging process and societal attitudes toward the elderly, mentally ill and disabled;

(3) Ensuring full participation of respondents and identifying interested persons and nonparty participants;

(4) Medical concerns of the elderly, mentally ill and disabled;

(5) Financial and accounting concerns in the administration of estates and of the elderly, mentally ill and disabled;

(6) Family dynamics relative to the elderly, mentally ill and disabled and to the families of deceased persons;

(7) Assessing physical and mental capacity;

(8) Availability of community resources for the elderly, mentally ill and disabled;

(9) Principles of guardianship law and procedure;

(10) Principles of estate law and procedure;

(11) Statute, rules and forms applicable to mediation conducted under these Rules; and

(12) Ethical and conduct issues in mediations conducted under these Rules.

The Commission may adopt Guidelines for trainers amplifying the above topics and set out minimum time frames and materials that trainers shall allocate to each topic. Any such Guidelines shall be available at the Commission's office and posted on its website.

B. A training program must be certified by the Commission before attendance at such program may be used for compliance with Rule 8.B. Certification need not be given in advance of attendance. Training programs attended prior to the promulgation of these Rules or attended in other states may be approved by the Commission if they are in substantial compliance with the standards set forth in this Rule.

C. To complete certification, a training program shall pay all administrative fees established by the NCAOC in consultation with the Commission.

RULE 10. PROCEDURAL DETAILS

The clerk of superior court shall make all those orders just and necessary to safeguard the interests of all persons and may supplement all necessary procedural details not inconsistent with these Rules.

RULE 11. DEFINITIONS

A. The term, clerk of superior court, as used throughout these Rules, shall refer both to said clerk or assistant clerk.

B. The phrase, NCAOC forms, shall refer to forms prepared by, printed and distributed by the NCAOC to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the NCAOC. Proposals for the creation or modification of such forms may be initiated by the Commission.

RULE 12. TIME LIMITS

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the N.C.R.Civ.P.

In the Supreme Court of North Carolina Order Adopting Amendments to the Rules Implementing Mediation in Matters Before the Clerk of Superior Court

WHEREAS, section 7A-38.3B of the North Carolina General Statutes codifies a statewide system of mediations to facilitate the resolution of matters pending before Clerks of Superior Court, and

WHEREAS, N.C.G.S. § 7A-38.3B(b) enables this Court to implement section 7A-38.3B by adopting rules and amendments to rules concerning said mediation.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.3B(b), the Rules Implementing Mediation In Matters Before The Clerk of Superior Court are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of January, 2012.

Adopted by the Court in conference the 6th day of October, 2011. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules Implementing Mediation In Matters Before The Clerk Of Superior Court amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES IMPLEMENTING MEDIATION IN MATTERS PENDING IN DISTRICT CRIMINAL COURT

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RULE 1. INITIATING VOLUNTARY MEDIATION IN DISTRICT CRIMINAL COURT

A. PURPOSE OF MEDIATION. Pursuant to N.C.G.S. § 7A-38.3D, these Rules are promulgated to implement programs for voluntary mediation of certain cases within the jurisdiction of the district criminal courts. These procedures are intended to assist private parties, with the help of a neutral mediator, in discussing and resolving their disputes and in conserving judicial resources. The chief district court judge, the district attorney and the community mediation center shall determine whether to establish a program in a district court judicial district. Because participation in this program and in the mediation process is voluntary, no defendant, complaining witness or any other person who declines to participate in mediation or whose case cannot be settled in mediation, shall face any adverse consequences as a result of his/her failure to participate or reach an agreement and the case shall simply be returned to court. Consistent with N.C.G.S. § 7A-38.3D(j) a party's participation or failure to participate in mediation is to be held confidential and not revealed to the court or the district attorney.

B. DEFINITIONS.

(1) Court. The term "court" as used throughout these rules, shall refer both to a criminal district court judge or his/her designee, including a district attorney or designee or personnel affiliated with a community mediation center.

(2) Mediation Process. The term "mediation process" as used throughout these rules, shall encompass intake, screening and mediation through impasse or until the case is dismissed.

(3) District Attorney. The term "district attorney" as used throughout these rules, shall refer to the district attorney, assistant district attorneys and any staff or designee of the district attorney.

C. INITIATING THE MEDIATION.

(1) Suggestion by the Court. In districts that establish a program, the court may encourage private parties to attend mediation in certain cases or categories of cases. In determining whether to encourage mediation in a case or category of cases, the judge or designee may consider among other factors:

(a) whether the parties are willing to participate;

(b) whether continuing prosecution is in the best interest of the parties or of any non-parties impacted by the dispute;

(c) whether the private parties involved in the dispute have an expectation of a continuing relationship and there are issues underlying their dispute that have not been addressed and which may create later conflict or require court involvement;

(d) whether cross-warrants have been filed in the case; and

(e) whether the case might otherwise be subject to voluntary dismissal.

(2) Multiple Charges. Multiple charges pending in the same court against a single defendant or pending against multiple defendants and involving the same complainant or complainants may be consolidated for purposes of holding a single mediation in the matter. Charges pending in multiple courts may be consolidated for purposes of mediation with the consent of those courts.

(3) Timing of Suggestion. The court shall encourage parties to attend and participate in mediation as soon as practicable. Since there is no possibility of incarceration resulting from any agreement reached in mediation, the

judge is not required to provide a court-appointed attorney to a defendant prior to his/her mediation.

(4) Notice to Parties. The court shall provide to parties who have agreed to attend mediation notice of the following, either orally or in writing, on a North Carolina Administrative Office of the Courts (NCAOC) approved form: (1) the deadline for completion of the mediation process, (2) the name of the mediator who will mediate the dispute or the name of the community mediation center who will provide the mediator and (3) that the defendant may be required to pay the dismissal fee set forth in Rule 5.B.(2). In lieu of providing this information orally or in writing, the court may refer the complaining witness and defendant to a community mediation center whose staff shall advise the parties of the above information.

(5) Motion for Mediation. Any complainant or defendant may file an oral or written request with the court to have a mediation conducted in his or her dispute and the court shall determine whether the dispute is appropriate for referral. If in writing, the motion may be on a NCAOC form.

(6) Screening. A mediator as defined by Rule 7 below or a community mediation center to which the parties are referred for mediation shall advise the court, if it is determined upon screening of the case or parties, that the matter is not appropriate for mediation.

RULE 2. PROGRAM ADMINISTRATION

Pursuant to N.C.G.S. § 7A-38.3D(c), a community mediation center may assist a judicial district in administering and operating its mediation program for district court criminal matters. The court may delegate to a center responsibility for the scheduling of cases and the center may provide volunteer and/or staff mediators to conduct the mediations. The center shall also maintain files in such mediations; record caseload statistics and other information as required by the court, the Dispute Resolution Commission (Commission) or the (NCAOC), including tracking the number of cases referred to mediation and the outcome of those mediations; and, in accordance with N.C.G.S. § 7A-38.7 and N.C.G.S. § 7A-38.3D(m), oversee the dismissal process for cases resolved in mediation.

RULE 3. APPOINTMENT OF MEDIATOR

A. AUTHORITY TO APPOINT. When the parties have agreed to attend mediation, the court shall appoint a community mediation center mediator by name or shall designate a center to appoint a mediator to conduct the mediation. The mediator appointed shall be qualified pursuant to Rule 8 of these rules.

B. DISQUALIFICATION OF MEDIATOR. For good cause shown, a complainant or defendant may move the court to disqualify the mediator appointed to conduct their mediation. If the mediator is disqualified, the court or designee shall appoint a new one to conduct the mediation. Nothing in this provision shall preclude a mediator from disqualifying him or herself.

RULE 4. THE MEDIATION

A. SCHEDULING MEDIATION. The mediator appointed to conduct the mediation or the community mediation center to which the matter has been referred by the court for appointment of a mediator, shall be responsible for any scheduling that must be done prior to the mediation, any reporting required by these rules or local rules and the maintenance of any files pertaining to the mediation.

B. WHERE MEDIATION IS TO BE HELD. Mediation shall be held in the courthouse or if suitable space is available, in the offices of a community mediation center or at any other place as agreed upon between the mediator and parties.

C. ~~REQUEST TO EXTEND DEADLINE FOR COMPLETION OF MEDATION~~ EXTENDING DEADLINE FOR COMPLETION. The court may extend the deadline for completion of the mediation process upon it's own motion or upon suggestion of community mediation center staff. ~~A mediator or Community Mediation Center staff may for good cause, request that the court extend the deadline for completion of the mediation process set pursuant to Rule 1.C.(4) above.~~

D. RECESSES. The mediator may recess the mediation at any time and may set times for reconvening. If the time for reconvening is set before the mediation is recessed, no further notification is required for persons present at the mediation. In recessing a matter, the mediator shall take into account whether the parties wish to continue mediating and whether they are making progress toward resolving their dispute.

E. NO RECORDING. There shall be no stenographic, audio or video recording of the mediation process by any participant. This prohibition precludes recording either surreptitiously or with the agreement of the parties.

RULE 5. DUTIES OF THE PARTIES

A. ATTENDANCE.

(1) Complainant(s) and defendant(s) who agree to attend mediation will physically attend the proceeding until an agreement is reached or the mediator has declared an impasse.

(2) The following may attend and participate in mediation:

(a) Parents or guardians of a minor party. Parent(s) or guardian(s) of a minor complainant or defendant who have been encouraged by the court to attend. However, a court shall encourage attendance by a parent or guardian only in consultation with the mediator and a mediator may later excuse the participation of a parent or guardian if the mediator determines his/her presence is not helpful to the process.

(b) Attorneys. Attorneys representing parties may physically attend and participate in mediation. Alternatively, lawyers may participate indirectly by advising clients before, during and after mediation sessions, including monitoring compliance with any agreements reached.

(c) Others. In the mediator's discretion, others whose presence and participation is deemed helpful to resolving the dispute or to addressing any issues underlying it, may be permitted to attend and participate unless and until the mediator determines their presence is no longer helpful. Mediators may exclude anyone wishing to attend and participate, but whose presence and participation the mediator deems would likely be disruptive or counterproductive.

(3) Exceptions to Physical Attendance. A party or other person may be excused from physically attending the mediation and allowed to participate by telephone or through any attorney:

(a) by agreement of the complainant(s) and defendant(s) and the mediator, or

(b) by order of the court.

(4) Scheduling. The complainant(s) and defendant(s) and any parent, guardian or attorney who will be attending the mediation will:

(a) Make a good faith effort to cooperate with the mediator or community mediation center to schedule the mediation at time that is convenient for all participants;

(b) Promptly notify the mediator or community mediation center to which the case has been referred of any significant scheduling concerns which may impact that person's ability to be present for mediation; and

(c) Notify the mediator or the center about any other concerns that may impact a party or person's ability to attend and participate meaningfully, *e.g.*, the need for wheelchair access or for a deaf or foreign language interpreter.

B. FINALIZING AGREEMENT.

(1) Written Agreement. If an agreement is reached at the mediation, the complainant and defendant are to insure that the terms are reduced to writing and signed. Agreements that are not reduced to writing and signed will not be deemed enforceable. If no agreement is reached in mediation, an impasse will be declared and the matter will be referred back to the court or its designee.

(2) Dismissal Fee. To be dismissed by the district attorney, the defendant, unless the parties agree to some other apportionment, shall pay a dismissal fee as set by N.C.G.S. § 7A-38.7 and N.C.G.S. § 7A-38.3D(m) to the clerk of superior court in the county where the case was filed and supply proof of payment to the community mediation center administering the program for the judicial district. Payment is to be made in accordance with the terms of the parties' agreement. The center shall, thereafter, provide the district attorney with a dismissal form, which may be an approved NCAOC form. In his or her discretion, a judge or his/her designee may waive

the dismissal fee pursuant to N.C.G.S. § 7A-38.3D(m) when the defendant is indigent, unemployed, a full-time college or high school student, is a recipient of public assistance or for any other appropriate reason. The mediator shall advise the parties where and how to pay the fee.

RULE 6. AUTHORITY AND DUTIES OF THE MEDIATOR

A. AUTHORITY OF THE MEDIATOR.

(1) Control of Mediation. The mediator shall at all times be in control of the mediation process and the procedures to be followed.

(2) Private Consultation. The mediator may communicate privately with any participant or counsel prior to and during the mediation. The fact that previous communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) Inclusion and Exclusion of Participants at Mediation. In the mediator's discretion, he or she may encourage or allow persons other than the parties or their attorneys, to attend and participate in mediation, provided that the mediator has determined the presence of such persons to be helpful to resolving the dispute or to addressing issues underlying it. Mediators may also exclude persons other that the parties and their attorneys whose presence the mediator deems would likely be or which has, in fact, been counter-productive.

(4) Scheduling the Mediation. The mediator or community mediation center staff involved in scheduling shall make a good faith effort to schedule the mediation at a time that is convenient for the parties and any parent(s), guardian(s) or attorney(s) who will be attending. In the absence of agreement, the mediator or community mediation center staff shall select the date for the mediation and notify those who will be participating. Parties are to cooperate with the mediator in scheduling the mediation, including providing the information required by Rule 5.A.(4).

B. DUTIES OF THE MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) That the mediation is not a trial and the mediator is not a judge, attorney or therapist;

(c) That the mediator is present only to assist the parties in eaching their own agreement;

(d) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(e) Whether and under what conditions communications with the mediator will be held in confidence during the mediation;

(f) The inadmissibility of conduct and statements as provided in N.C.G.S. § 7A-38.3D(i);

(g) The duties and responsibilities of the mediator and the participants;

(h) That any agreement reached will be by mutual consent;

(i) That if the parties are unable to agree and the mediator declares an impasse, that the parties and the case will return to court; and

(j) That if an agreement is reached in mediation and the parties agree to request a dismissal of the charges pending in the case, the defendant, unless the parties agree to some other apportionment, shall pay a dismissal fee in accordance with N.C.G.S. § 7A-38.7 and N.C.G.S. § 7A-38.3D(m), unless a judge in his or her discretion has waived the fee for good cause. Payment of the dismissal fee shall be made to the clerk of superior court in the county where the case was filed and the community mediation center must provide the district attorney with a dismissal form and proof that the defendant has paid the dispute resolution fee before the charges can be dismissed.

(2) Disclosure. Consistent with the Standards of Professional Conduct for Mediators (Standards), the mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. Consistent with the Standards, it is the duty of the mediator to determine in a timely manner

that an impasse exists and that the mediation should conclude. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

~~**(4) Distributing Informational Brochure.** The mediator shall distribute to the parties a copy of an informational brochure explaining the mediation process and advising them where they may file a complaint if they are unhappy with their mediator's conduct. The Dispute Resolution Commission shall develop, print, and distribute the informational brochure to participating community mediation centers and each center may add an insert to the brochure which more fully explains the operations of that center's program.~~

~~**(5)**~~ **(4) Reporting Results of Mediation.** The mediator or community mediation center shall report the outcome of mediation to the court or its designee in writing on a NCAOC approved form by the date the case is next calendared. If the criminal court charges are on the court docket the same day as the mediation, the mediator shall inform the attending district attorney of the outcome of the mediation before close of court on that date unless alternative arrangements are approved by the district attorney.

(5) Scheduling and Holding the Mediation. It is the duty of the mediator and community mediation center staff to schedule the mediation and conduct it prior to any deadline set by the court or its designee. Deadlines shall be strictly observed by the mediator and center staff unless the deadline is extended orally or in writing by a judge or his/her designee.

~~**(6) Distribution of mediator evaluation form.** At the mediation, the mediator shall distribute a mediator evaluation form provided by the Dispute Resolution Commission to the parties, one copy per party with additional copies available on request. The mediator shall deliver any completed evaluation forms to the Community Mediation Center with which he or she is affiliated~~.

RULE 7. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Commission may receive and approve applications for certification of persons to be appointed as district criminal court mediators. For certification, an applicant shall:

A. At the time of application, be affiliated with a community mediation center established pursuant to N.C.G.S. § 7A-38.5 as either a volunteer or staff mediator and have received the center's endorsement that he or she possesses the training, experience and skills necessary to conduct district court criminal mediations.

B. Have the following training and experience:

(1) Have both:

(a) Attended at least 24 hours of training in a district criminal court mediation training program certified by the Commission, and

(b) Have a four-year degree from an accredited college or university or have four years of post high school education through an accredited college, university or junior college or four years of full-time work experience, or any combination thereof; or have two years experience as a staff or volunteer mediator at a community mediation center, or

(2) Be a mediated settlement conference or family financial settlement mediator certified by the Commission or be an Advanced Practitioner Member of the Association for Conflict Resolution.

C. Observations and Mediation Experience:

(1) Observe at least two court-referred criminal district court mediations conducted by a mediator certified pursuant to these rules or for a one-year period following the initial adoption of these rules, observe any mediator who is affiliated with a community mediation center established pursuant to N.C.G.S. § 7A-38.5 and who has mediated at least 10 criminal district court cases.

(2) Co-mediate or mediate at least three court-referred district criminal court mediations under the observation of staff affiliated with a community mediation center whose criminal district court mediation training program has been certified by the Commission pursuant to Rule 9 of these Rules.

D. Demonstrate familiarity with the statutes, rules and practice governing district criminal court mediations in North Carolina.

E. Be of good moral character, submit to a criminal background check within one year prior to applying for certification under these Rules and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court of North Carolina (Supreme Court). Applicants for certification and recertification and all certified district criminal court mediators shall report to the Commission any pending criminal matters or any criminal convictions, disbarments or other disciplinary complaints and actions or any judicial sanctions as soon as the applicant or mediator has notice of them.

F. Commit to serving the district court as a mediator under the direct supervision of a community mediation center authorized under N.C.G.S. § 7A-38.5 for a period of at least two years.

G. Comply with the requirements of the Commission for continuing mediator education or training.

H. Submit proof of qualifications set out in this Section on a form provided by the Commission.

Community mediation centers participating in the program shall assist the Commission in implementing the certification process established by this Rule by:

(1) Documenting Sections A-F for the mediator and Commission;

(2) Reviewing its documentation with the mediator in a face-to-face meeting scheduled no less than 30 days from the mediator's request to apply for certification;

(3) Making a written recommendation on the applicant's certification to the Commission; and

(4) Forwarding the documentation for Sections A-F and its recommendation to the Commission along with the mediator's completed certification application form.

~~Through December 31, 2008, an applicant may be certified pursuant to these rules without compliance with Rules 7 B,C,D,E,F,G or H above provided that he or she is certified by and affiliated with a Community Mediation Center established pursuant to G.A. 7A-38.5 at the time of his/her application and is endorsed by the Center as possessing the training, experience and skills necessary to conduct district criminal~~

~~court mediations. However, such certification shall be for the period of one year only and it is expected that during the course of that year that the mediator will work toward complying with all the requirements established by Rule 7.~~

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the above qualifications or has not faithfully observed these Rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule. Certification renewal shall be required every two years.

A community mediation center may withdraw it's affiliation with a mediator certified pursuant to these Rules. Such disaffiliation does not revoke said mediator's certification. A mediator's certification is portable and a mediator may agree to be affiliated with a different center. However to mediate under this program in the district criminal court, a mediator must be affiliated with the community mediation center providing services in that court. A mediator may be affiliated with more than one center and provide services in the county served by those centers.

RULE 8. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators seeking certification as district criminal court mediators shall consist of a minimum of 24 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of district court criminal mediation;

(3) Agreement writing;

(4) Communication and information gathering;

(5) Standards of conduct for mediators including, but not limited to the Standards adopted by the Supreme Court;

(6) Statutes, rules, forms and practice governing mediations in North Carolina's district criminal courts;

(7) Demonstrations of district criminal court mediations;

(8) Simulations of district criminal court mediations, involving student participation as mediator, victim, offender and attorneys which shall be supervised, observed and evaluated by program faculty;

(9) Courtroom protocol;

(10) Domestic violence awareness; and

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing district court mediations in North Carolina.

B. A training program must be certified by the Commission before attendance at such program may be deemed as satisfying Rule 8. Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Commission if they are in substantial compliance with the standards set forth in this Rule.

C. Renewal of certification shall be required every two years.

RULE 9. LOCAL RULE MAKING

The chief district court judge of any district conducting mediations under these Rules is authorized to publish local rules, not inconsistent with these Rules and N.C.G.S. § 7A-38.3D, implementing mediation in that district.

In the Supreme Court of North Carolina
Order Adopting Amendments To The Rules Implementing Mediation In Matters Pending In District Criminal Court

WHEREAS, section 7A-38.3D of the North Carolina General Statutes codifies a statewide system of court-ordered mediations to be implemented in participating district court judicial districts in order to facilitate the resolution of criminal matter within the jurisdiction of those districts, and

WHEREAS, N.C.G.S. § 7A-38.3D(d) enables this Court to implement section 7A-38.1 by adopting rules and amendments to rules concerning said mediations,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.3D(d), the Rules Implementing Mediations In Matters Pending In District Criminal Court are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of January, 2012.

Adopted by the Court in conference the 6th day of October, 2011. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules of the North Carolina Supreme Court Implementing Mediations In Matters Pending In District Criminal Court amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

s/Timmons-Goodson, J.

For the Court

AMENDMENTS TO THE RULES IMPLEMENTING PRELITIGATION FARM NUISANCE MEDIATION PROGRAM

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RULE 1. SUBMISSION OF DISPUTE TO PRELITIGATION FARM NUISANCE MEDIATION

A. Mediation shall be initiated by the filing of a Request for Prelitigation Mediation of Farm Nuisance Dispute (Request) (Form AOC-CV-820) with the clerk of superior court in a county in which the action may be brought. The Request shall be on a form prescribed by the North Carolina Administrative Office of the Courts (NCAOC) ~~and be available through the clerk of superior court~~ and posted on the NCAOC's website at www.nccourts.org. The party filing the Request shall mail a copy of the Request by certified U.S. mail, return receipt requested, to each party to the dispute.

B. The clerk of superior court shall accept the Request and shall file it in a miscellaneous file under the name of the requesting party.

RULE 2. EXEMPTION FROM N.C.G.S. § 7A-38.1

A dispute mediated pursuant to N.C.G.S. § 7A-38.3, shall be exempt from an order referring the dispute to a mediated settlement conference entered pursuant to N.C.G.S. § 7A-38.1.

RULE 3. SELECTION OF MEDIATOR

A. PERIOD FOR SELECTION. The parties to the dispute shall have 21 days from the date of the filing of the Request to select a mediator to conduct their mediation and to file Notice of Selection of Certified Mediator by Agreement.

B. SELECTION OF CERTIFIED MEDIATOR BY AGREEMENT. The clerk shall provide each party to the dispute with a list of certified superior court mediators ~~who have expressed a willingness to mediate farm nuisance disputes~~ serving ~~in~~ the judicial district encompassing the county in which the Request was filed. If the parties are able to agree on a mediator from that list to conduct their mediation, the party who filed the Request shall notify the clerk by filing with the clerk a Notice of Selection of Certified Mediator by Agreement (Notice) (Form AOC-CV-821). Such Notice shall state the name, address and telephone number of the certified mediator selected; state the rate of compensation to be paid the mediator; and state that the mediator and the parties to the dispute have agreed on the selection and the rate of compensation. The Notice shall be on a form prepared and distributed by the NCAOC and available ~~through the clerk in the county in which the Request was filed~~ on the court's website.

~~C. Nomination of Non-Certified Mediator by Agreement. The parties may by agreement select a mediator who is not certified and whose name does not appear on the list of certified mediators available through the clerk but who, in the opinion of the parties, is otherwise qualified by training or experience to mediate the dispute. If the parties agree on a non-certified mediator, the party who filed the Request shall file with the clerk a Nomination of Non-Certified Mediator. Such Nomination shall state the name, address, and telephone number of the non-certified mediator selected; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and the parties to the dispute have agreed upon the selection and rate of compensation.~~

~~The senior resident superior court judge shall rule on the said nomination without a hearing, shall approve or disapprove the parties' nomination and shall notify the parties of his or her decision. The nomination and the court's approval or disapproval shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the clerk of superior court in the county where the Request was filed.~~

~~D~~ C. **COURT APPOINTMENT OF MEDIATOR.** If the parties to the dispute cannot agree on selection of a certified superior court mediator, the party who filed the Request shall file with the clerk a Motion for Court Appointment of Mediator

(Motion) and the senior resident superior court judge shall appoint ~~the~~ a certified superior court mediator. The Motion shall be filed with the clerk within 21 days of the date of the filing of the Request. The Motion shall be on a form prepared and distributed by the NCAOC (Form AOC-CV-821). The Motion shall state whether any party prefers a certified attorney mediator, and if so, the senior resident superior court judge shall appoint a certified attorney mediator. The Motion may state that all parties prefer a certified non-attorney mediator, and if so, the senior resident judge shall appoint a certified non-attorney mediator ~~if one is on the list~~. If no preference is expressed, the senior resident superior court judge may appoint any certified superior court ~~attorney~~ mediator ~~or a certified non-attorney mediator~~.

~~E~~ D. **MEDIATOR INFORMATION DIRECTORY.** To assist parties in learning more about the qualifications and experience of certified mediators, the Dispute Resolution Commission (Commission) shall post a list of certified superior court mediators on its website at www.ncdrc.org accompanied by contact, availability and biographical information, including information identifying mediators who wish to mediate farm nuisance matters. ~~the clerk of superior court in the county in which the Request was filed shall make available to the disputing parties a central directory of information on all certified mediators who wish to mediate cases in that county, including those who wish to mediate prelitigation farm nuisance disputes. The Dispute Resolution Commission shall be responsible for distributing and updating the directory.~~

RULE 4. THE PRELITIGATION FARM MEDIATION

A. **WHEN MEDIATION IS TO BE COMPLETED.** The mediation shall be completed within 60 days of the Notice ~~of Selection of Certified Mediator by Agreement~~ or the date of the order appointing a mediator to conduct the mediation.

B. ~~**EXTENTIONS**~~ **EXTENDING DEADLINE FOR COMPLETION.** The senior resident superior court judge may extend the deadline for completion of the mediation upon the judge's own motion, upon stipulation of the parties or upon suggestion of the mediator. ~~A party may file a motion with the clerk seeking to extend the 60 day period set forth in subpart A above. Such request shall state the reasons the extension is sought and explain why the mediation cannot be completed within 60 days of the mediator's appointment. The senior resident superior court judge may grant the motion by entering a~~

~~written order establishing a new date for completion of the mediation~~.

C. WHERE THE ~~CONFERENCE~~ MEDIATION IS TO BE HELD. Unless all parties and the mediator agree otherwise, the mediation shall be held in the courthouse or other public or community building in the county where the Request was filed. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the date, time and location of the mediation to all parties named in the Request or their attorneys.

D. RECESSES. The mediator may recess the mediation at any time and may set a time for reconvening, except that such time shall fall within a 30 day period from the date of the order appointing the mediator. No further notification is required for persons present at the recessed mediation session.

E. DUTIES OF THE PARTIES, ATTORNEYS, AND OTHER PARTICIPANTS. Rule 4 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

F. SANCATIONS FOR FAILURE TO ATTEND. Rule 5 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

RULE 5. AUTHORITY AND DUTIES OF THE MEDIATOR

A. AUTHORITY OF MEDIATOR.

(1) Control of Mediation. The mediator shall at all times be in control of the mediation and the procedures to be followed.

(2) Private Consultation. The mediator may communicate privately with any participant ~~or counsel~~ prior to and during the mediation. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) Scheduling the ~~Conference~~ Mediation. The mediator shall make a good faith effort to schedule the ~~conference~~ mediation at a time that is convenient for the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the ~~conference~~ mediation.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of mediation;

(d) The fact that the mediation is not a trial, the mediator is not a judge and that the parties may pursue their dispute in court if mediation is not successful and they so choose;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the ~~conference~~ mediation;

(g) The inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(l);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator to determine timely that an impasse exists and that the mediation should end.

(4) Scheduling and Holding the ~~Conference~~ Mediation. It is the duty of the mediator to schedule the mediation and to conduct it within the time frame established by Rule 4 above. Rule 4 shall be strictly observed by the mediator unless an extension has been granted in writing by the senior resident superior court judge.

(5) No Recording. There shall be no stenographic, audio or video recording of the mediation process by any partici-

pant. This prohibition precludes recording either surreptitiously or with the agreement of the parties.

RULE 6. COMPENSATION OF THE MEDIATOR

A. BY AGREEMENT. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator, except that no administrative fees or fees for services shall be assessed any party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

B. BY COURT ORDER. When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of ~~$125.00~~ $150 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of ~~$125.00~~ $150, except that no administrative fees or fees for services shall be assessed any party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

C. INDIGENT CASES. No party found to be indigent by the court for the purposes of these Rules shall be required to pay a mediator fee. Any mediator conducting a ~~settlement conference~~ mediation pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigency and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the ~~conference~~ mediation or, if the parties do not settle their cases, subsequent to the trial of the action. In ruling upon such motions, the judge shall apply the criteria enumerated in N.C.G.S. § 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

D. POSTPONEMENT FEE. As used herein, the term "postponement" shall mean reschedule or not proceed with a ~~settlement conference~~ mediation once a date for the ~~settlement conference~~ mediation has been agreed upon and scheduled by the parties and the mediator. After a ~~settlement conference~~ mediation has been scheduled for a specific date, a party may not unilaterally postpone the ~~conference~~ mediation. A ~~conference~~ mediation may be postponed only after notice to all parties of the reason for the postponement, payment of a post-

ponement fee to the mediator and consent of the mediator and the opposing attorney. If a mediation is postponed within seven business days of the scheduled date, the fee shall be ~~$125~~ $150. If the ~~settlement conference~~ mediation is postponed within three business days of the scheduled date, the fee shall be ~~$250~~ $300. Postponement fees shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 6.B.

E. PAYMENT OF COMPENSATION OF PARTIEIS. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the mediation.

F. SANCATIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the senior resident superior court judge for a finding of indigency, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of monetary ~~any and all lawful~~ sanctions by a resident or presiding superior court judge.

COMMENTS TO RULE 6

Comment to Rule 6.B.

Court-appointed mediators may not be compensated for travel time, mileage or any other out-of-pocket expenses ~~associated with a court ordered mediation~~.

Comment to Rule 6.D.

Though Rule 6.D. provides that mediators "shall" assess the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a postponement are beyond the control of the parties, for example, an illness, serious accident, unexpected and unavoidable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, the mediator, may, in his or her discretion, waive the postponement fee.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite ~~litigation~~ settlement. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

Comment to Rule 6.E.

If a party is found by a senior resident superior court judge to have failed to attend a ~~mediated settlement conference~~ mediation without good cause, then the court may require that party to pay the mediator's fee and related expenses.

Comment to Rule 6.F.

If the ~~Mediated Settlement Conference~~ Prelitigation Farm Nuisance Mediation Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. ~~MSC~~ Rule 6.~~E~~F is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 6.B (hourly fee and administrative fee) and 6.D postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 6 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 7. WAIVER OF MEDIATION

All parties to a farm nuisance dispute may waive mediation by informing the mediator of their waiver in writing. The Waiver of Prelitigation Mediation in Farm Nuisance Dispute (Waiver) shall be on a form prescribed by the ~~Administrative Office of the Courts~~ NCAOC (Form AOC-CV-822). ~~and available through the clerk~~. The party who requested mediation shall file the ~~w~~Waiver with the clerk and mail a copy to the mediator and all parties named in the Request.

RULE 8. MEDIATOR'S CERTIFICATION THAT MEDIATION CONCLUDED

A. CONTENTS OF CERTIFICATION. Following the conclusion of mediation or the receipt of a Waiver ~~of mediation~~ signed by all parties to the farm nuisance dispute, the media-

tor shall prepare a Mediator's Certification in Prelitigation Farm Nuisance Dispute (Certification) on a form prescribed by the NCAOC (Form AOC-CV-823). If a mediation was held, the Certification shall state the date on which the mediation was concluded and report the general results. If a mediation was not held, the Certification shall state why the mediation was not held and identify any parties named in the Request who failed, without good cause, to attend or participate in mediation or shall state that all parties waived mediation in writing pursuant to Rule 7 above.

B. DEADLINE FOR FILING MEDIATOR'S CERTIFICATION. The mediator shall file the completed Certification with the clerk within seven days of the completion of the mediation, the failure of the mediation to be held or the receipt of a signed waiver of mediation. The mediator shall serve a copy of the Certification on each of the parties named in the Request.

~~**RULE 9. CERTIFICATION AND DECERTIFICATION OF MEDIATORS OF PRELITIGATION FARM NUISANCE DISPUTES.**~~

~~Mediators certified to conduct prelitigation mediation of farm disputes shall be subject to all rules and regulations regarding certification, conduct, discipline and decertification applicable to mediators serving the Mediated Settlement Conferences Program and any such additional rules and regulations as adopted by the Dispute Resolution Commission and applicable to mediators of farm nuisance disputes~~.

RULE ~~10~~ 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

The Commission may specify a curriculum for a farm mediation training program and may set qualifications for trainers.

In the Supreme Court of North Carolina
Order Adopting Amendments to the Rules Implementing Prelitigation Farm Nuisance Mediation Program

WHEREAS, section 7A-38.3 of the North Carolina General Statutes codifies a establishes a statewide program to provide for prelitigation mediation of farm nuisance disputes prior to bringing of civil actions involving such disputes, and

WHEREAS, N.C.G.S. § 7A-38.3(e) enables this Court to implement section 7A-38.3 by adopting rules and amendments to rules concerning said mediated settlement conferences,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.3(e), the Rules Implementing the Prelitigation Farm Nuisance Mediated Program are adopted to read as the following pages. These amended Rules shall be effective on the 1st day of January, 2012.

Adopted by the Court in conference the 6th day of October 2011. The Appellate Division Reporter promulgate by publication as soon as practicable the portions of the the Rules Implementing the Prelitigation Farm Nuisance Program amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

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RULE 1. INITIATING SETTLEMENT PROCEDURES

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to N.C.G.S. § 7A-38.4A, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the court pursuant to these Rules.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent any party to a district court case involving family financial issues, including equitable distribution, child support, alimony, post-separation support action or claims arising out of contracts between the parties under N.C.G.S.

§§ 50-20(d), 52-10, 52-10.1 or 52B shall advise his or her client regarding the settlement procedures approved by these Rules and, at or prior to the scheduling conference mandated by N.C.G.S. § 50-21(d), shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. ORDERING SETTLEMENT PROCEDURES.

(1) Equitable Distribution Scheduling Conference. At the scheduling conference mandated by N.C.G.S. § 50-21(d) in all equitable distribution actions in all judicial districts, or at such earlier time as specified by local rule, the court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to these Rules, unless excused by the court pursuant to Rule 1.C.(6) or by the court or mediator pursuant to Rule 4.A.(2). The court shall dispense with the requirement to attend a mediated settlement conference or other settlement procedure only for good cause shown.

(2) Scope of Settlement Proceedings. All other financial issues existing between the parties when the equitable distribution settlement proceeding is ordered, or at any time thereafter, may be discussed, negotiated or decided at the proceeding. In those districts where a child custody and visitation mediation program has been established pursuant to N.C.G.S. § 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules only in those cases in which the parties and the mediator have agreed to include them and in which the parties have been exempted from, or have fulfilled the program requirements. In those districts where a child custody and visitation mediation program has not been established pursuant to N.C.G.S. § 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules with the agreement of all parties and the mediator.

(3) Authorizing Settlement Procedures Other Than Mediated Settlement Conference. The parties and their attorneys are in the best position to know which settlement procedure is appropriate for their case.

Therefore, the court shall order the use of a settlement procedure authorized by Rules 10-12 herein or by local rules of the district court in the county or district where the action is pending if the parties have agreed upon the procedure to be used, the neutral to be employed and the compensation of the neutral. If the parties have not agreed on all three items, then the court shall order the parties and their counsel to attend a mediated settlement conference conducted pursuant to these Rules.

The motion for an order to use a settlement procedure other than a mediated settlement conference shall be submitted a North Carolina Administrative Office of the Courts (NCAOC) form at the scheduling conference and shall state:

(a) the settlement procedure chosen by the parties;

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral; and

(d) that all parties consent to the motion.

(4) Content of Order. The court's order shall (1) require the mediated settlement conference or other settlement proceeding be held in the case; (2) establish a deadline for the completion of the conference or proceeding; and (3) state that the parties shall be required to pay the neutral's fee at the conclusion of the settlement conference or proceeding unless otherwise ordered by the court. Where the settlement proceeding ordered is a judicial settlement conference, the parties shall not be required to pay for the neutral.

The order shall be contained in the court's scheduling order, or if no scheduling order is entered, shall be on a NCAOC form. Any scheduling order entered at the completion of a scheduling conference held pursuant to local rule may be signed by the parties or their attorneys in lieu of submitting the forms referred to hereinafter relating to the selection of a mediator.

(5) Court-Ordered Settlement Procedures in Other Family Financial Cases. Any party to an action involving family financial issues not previously ordered to a

mediated settlement conference may move the court to order the parties to participate in a settlement procedure. Such motion shall be made in writing, state the reasons why the order should be allowed and be served on the non-moving party. Any objection to the motion or any request for hearing shall be filed in writing with the court within 10 days after the date of the service of the motion. Thereafter, the judge shall rule upon the motion and notify the parties or their attorneys of the ruling. If the court orders a settlement proceeding, then the proceeding shall be a mediated settlement conference conducted pursuant to these Rules. Other settlement procedures may be ordered if the circumstances outlined in subsection (3) above have been met.

(6) Motion to Dispense With Settlement Procedures. A party may move the court to dispense with the mediated settlement conference or other settlement procedure ordered by the judge. Such motion ~~shall be in writing and~~ shall state the reasons the relief is sought. For good cause shown, the court may grant the motion. Such good cause may include, but not be limited to, the fact that the parties have participated in a settlement procedure such as non-binding arbitration or early neutral evaluation prior to the court's order to participate in a mediated settlement conference or have elected to resolve their case through arbitration under the Family Law Arbitration Act (N.C.G.S. § 50-41 *et seq.*) or that one of the parties has alleged domestic violence. ~~The Court may also dispense with the mediated settlement conference for good cause upon its own motion or by local rule.~~

COMMENT TO RULE 1

Comment to Rule 1.C.(6).

If a party is unable to pay the costs of the conference or lives a great distance from the conference site, the court may want to consider Rules 4 or 7 prior to dispensing with mediation for good cause. Rule 4 provides a way for a party to attend electronically and Rule 7 provides a way for parties to attend and obtain relief from the obligation to pay the mediator's fee.

RULE 2. DESIGNATION OF MEDIATOR

A. DESIGNATION OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY AGREEMENT OF THE PARTIES. The parties may designate a certified family financial mediator

certified pursuant to these Rules by agreement by filing with the court a Designation of Mediator by Agreement at the scheduling conference. Such designation shall: state the name, address and telephone number of the mediator designated; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the designation and rate of compensation; and state that the mediator is certified pursuant to these Rules.

In the event the parties wish to designate a mediator who is not certified pursuant to these Rules, the parties may nominate said person by filing a Nomination of Non-Certified Family Financial Mediator with the court at the scheduling conference. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the nomination and rate of compensation, if any. The court shall approve said nomination if, in the court's opinion, the nominee is qualified to serve as mediator and the parties and the nominee have agreed upon the rate of compensation.

Designations of mediators and nominations of mediators shall be made on a NCAOC form. A copy of each such form submitted to the court and a copy of the court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

B. APPOINTMENT OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY THE COURT. If the parties cannot agree upon the designation of a mediator, they shall so notify the court and request that the court appoint a mediator. The motion shall be filed at the scheduling conference and shall state that the attorneys for the parties have had a full and frank discussion concerning the designation of a mediator and have been unable to agree on a mediator. The motion shall be on a form approved by the NCAOC.

Upon receipt of a motion to appoint a mediator, or failure of the parties to file a Designation of Mediator by Agreement with the court, the court shall appoint a family financial mediator, certified pursuant to these Rules, who has expressed a willingness to mediate actions within the court's district.

In making such appointments, the court shall rotate through the list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation or whether the mediator is a licensed attorney. ~~Certified mediators who do not reside in the judicial district, or a county contiguous to the judicial district, shall be included in the list of mediators available for appointment only if, on an annual basis, they inform the Judge in writing that they agree to mediate cases to which they are assigned.~~ The district court judges shall retain discretion to depart in a specific case from a strict rotation when, in the judge's discretion, there is good cause to do so.

Certified mediators who do not reside in the judicial district or a county contiguous to the judicial district, shall be included in the list of mediators available for appointment only if, on an annual basis as determined by the Dispute Resolution Commission (Commission), they request the court in each judicial district in which they wish to be appointed, to be put on their appointment list. Said letters shall be addressed to each court, but be mailed to the offices of the Commission. The Commission shall coordinate the compilation and distribution of appointment lists for each judicial district.

The Commission shall furnish to the district court judges of each judicial district a list of those certified family financial mediators requesting appointments in that district. That list shall contain the mediators' names, addresses and telephone numbers and shall be provided ~~both in writing and~~ electronically through the Commission's website at www.ncdrc.org. The Commission shall promptly notify the district court judges of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

C. MEDIATOR INFORMATION. To assist the parties in designating a mediator, the Commission shall assemble, maintain and post on its website ~~at www.ncdrc.org~~ a list of certified family financial mediators. The list shall supply contact information for mediators and identify court districts that they are available to serve. Where a mediator has supplied it to the Commission, the list shall also provide biographical information, including information about an individual mediator's education, professional experience and mediation training and experience.

D. DISQUALIFICATION OF MEDIATOR. Any party may move a court of the district where the action is pending for an

order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. WHERE CONFERENCE IS TO BE HELD. The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree to a location, the mediator shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date. The mediator is authorized to assist the parties in establishing a discovery schedule and completing discovery.

The court's order issued pursuant to Rule 1.C.(1) shall state a deadline for completion of the conference which shall be not more than 150 days after issuance of the court's order, unless extended by the court. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. ~~REQUEST TO EXTEND DEADLINE FOR COMPLETION~~ EXTENDING DEADLINE FOR COMPLETION. The district court judge may extend the deadline for completion of the mediated settlement conference upon the judge's own motion, upon stipulation of the parties or upon suggestion of the mediator. ~~A party, or the mediator, may move the Court to extend the deadline for completion of the conference. Such motion shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the motion, said party shall promptly communicate its objection to the Court.~~

~~The Court may grant the request by entering a written order setting a new deadline for completion of the conference, which date may be set at any time prior to trial. Said order shall be delivered to all parties and the mediator by the person who sought the extension.~~

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set during the conference, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions or the trial of the case, except by order of the court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(b) Attorneys. At least one counsel of record for each party whose counsel has appeared in the action.

(2) Any person required to attend a mediated settlement conference shall physically attend until such time as an agreement has been reached or the mediator, after conferring with the parties and their counsel, if any, declares an impasse. No mediator shall prolong a conference unduly.

Any such person may have the attendance requirement excused or modified, including allowing a person to participate by phone, by agreement of both parties and the mediator or by order of the court. Ordinarily, attorneys for the parties may be excused from attending only after they have appeared at the first session.

(3) Scheduling. Participants required to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for conference sessions before the completion deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been scheduled by the mediator, and a scheduling conflict with another court proceeding thereafter arises, participants shall promptly attempt to

resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina on June 20, 1985.

B. FINALIZING AGREEMENT.

(1) If an agreement is reached at the conference, the parties shall reduce to writing the essential terms of the agreement.

(a) If the parties conclude the conference with a written document containing all the terms of their agreement, signed by all parties and formally acknowledged as required by N.C.G.S. § 50-20(d) for property distribution, the mediator shall report to the court that the matter has been settled and include in the report the name ~~and signature~~ of the person responsible for filing closing documents with the court.

(b) If the parties are able to reach an agreement at the conference, but are unable to have it written or have it signed and acknowledged as required by N.C.G.S. § 50-20(d) for property distribution agreements, then the parties shall summarize their understanding in written form and shall use it as a memorandum and guide to writing such agreements and orders as may be required to give legal effect to its terms. In that event, the mediator shall facilitate the writing of the summary memorandum and shall either:

(i) report to the court that the matter has been settled and include in the report the name ~~and signature~~ of the person responsible for filing closing documents with the court; or, in the mediator's discretion,

(ii) declare a recess of the conference. If a recess is declared, the mediator may schedule another session of the conference if the mediator determines that it would assist the parties in finalizing a settlement.

(2) If the agreement is reached at the conference, ~~the person(s) responsible for filing closing documents with the~~

~~Court shall sign the mediator's report to the Court.~~ ~~T~~the parties shall file their consent judgment or voluntary dismissal with the court within 30 days or before expiration of the mediation deadline, whichever is longer.

(3) If an agreement is reached prior to the conference or finalized while the conference is in recess, the parties shall notify the mediator and file the consent judgment or voluntary dismissal(s) with the court within 30 days or before the expiration of the mediation deadline, whichever is longer. The mediator shall report to the court that the matter has been settled and who reported the settlement.

(4) No settlement agreement resolving issues reached at the proceeding conducted under this section or during its recesses shall be enforceable unless it has been reduced to writing, signed by the parties and acknowledged as required by N.C.G.S. § 50-20(d).

C. OF MEDIATOR'S FEE. The parties shall pay the mediator's fee as provided by Rule 7.

D. NO RECORDING. There shall be no stenographic, audio or video recording of the mediation process by any participant. This prohibition precludes recording either surreptitiously or with the agreement of the parties.

COMMENT TO RULE 4.

Comment to Rule 4.B.

N.C.G.S. § 7A-38.4A(j) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which agreement on all issues has been reached should be disposed of as expeditiously as possible. This rule is intended to assure that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep confidential the terms of their settlement, they may timely file with the court closing documents which do not contain confidential terms, *i.e.*, voluntary dismissal(s) or a consent judgment resolving all claims. Mediators will not be required by local rules to submit agreements to the court.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES OR PAY MEDIATOR'S FEE

Any person required to attend a mediated settlement conference or to pay a portion of the mediator's fee in compliance with N.C.G.S. § 7A-38.4A and the rules promulgated by the Supreme Court of North Carolina (Supreme Court) to implement that section who fails to attend or to pay without good cause, shall be subject to the contempt powers of the court and monetary sanctions imposed by a judge. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order.

If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. (~~See also Rule 7.F. and the Comment to Rule 7.F.~~)

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by Standards of Professional Conduct for Mediators (Standards) promulgated by the Supreme Court which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) Private Consultation. The mediator may communicate privately with any participant during the conference. However, there shall be no *ex parte* communication before or outside the conference between the mediator and any counsel or party on any matter touching the proceeding, except with regard to scheduling matters. Nothing in this rule prevents the mediator from engaging in *ex parte* communications, with the consent of the parties, for the purpose of assisting settlement negotiations.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.4A(j);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) Reporting Results of ~~Conference~~ Mediation.

(a) The mediator shall report to the court ~~on an A.O.C. form within 10 days of the conference whether or not an agreement was reached by the parties.~~ the results of the mediated settlement conference and any settlement reached by the parties prior to or

during a recess of the conference. Mediators shall also report the results of mediations held in other district court family financial cases in which a mediated settlement conference was not ordered by the court. ~~The mediator's~~ Said report shall ~~include~~ be filed on a NCAOC form within 10 days of the conclusion of the conference or of being notified of the settlement and shall include the names of those persons attending the mediated settlement conference if a conference was held. If partial agreements are reached at the conference, the report shall state what issues remain for trial. ~~The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.~~ Local rules shall not require the mediator to send a copy of the parties' agreement to the court.

(b) If an agreement upon all issues was reached, the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal(s)~~, when it shall be filed with the Court,~~ and the name, address and telephone number of the person(s) designated by the parties to file such consent judgment or dismissal(s) with the court as required by Rule 4.B.2. The mediator shall advise the parties that consistent with Rule 4.B.2 above, their consent judgment or voluntary dismissal is to be filed with the court within 30 days or before expiration of the mediation deadline, whichever is longer, and the mediator's report shall indicate that the parties have been so advised. ~~If an agreement upon all issues is reached at the conference, the mediator shall have the person(s) designated sign the mediator's report acknowledging acceptance of the duty to timely file the closing documents with the Court.~~

~~Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the Court and sanctions.~~

(c) The Commission or the NCAOC may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.

(d) Mediators who fail to report as required by this rule shall be subject to sanctions by the court. Such

sanctions shall include, but not be limited to, fines or other monetary penalties, decertification as a mediator and any other sanctions available through the power of contempt. The court shall notify the Commission of any action taken against a mediator pursuant to this section.

(5) Scheduling and Holding the Conference. The mediator shall schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless changed by written order of the court.

A mediator selected by agreement of the parties shall not delay scheduling or holding the conference because one or more of the parties has not paid an advance fee deposit required by that agreement.

~~**(6) Informational Brochure.** Before the conference, the mediator shall distribute to the parties or their attorneys a brochure prepared by the Dispute Resolution Commission explaining the mediated settlement conference process and the operations of the Commission.~~

~~**(7) Evaluation Forms.** At the mediated settlement conference, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per party with additional copies distributed upon request. The evaluation is intended for purpose of self improvement and the mediator shall review returned evaluation forms.~~

RULE 7. COMPENSATION OF THE MEDIATOR AND SANCTIONS

A. BY AGREEMENT. When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator. The terms of the parties' agreement with the mediator notwithstanding, Section E below shall apply to issues involving the compensation of the mediator. Sections D and F below shall apply unless the parties' agreement provides otherwise.

B. BY COURT ORDER. When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of $150, which accrues upon appointment.

C. CHANGE OF APPOINTED MEDIATOR. Pursuant to Rule 2.A, the parties may select a certified mediator or nominate a non-certified mediator to conduct their mediated settlement conference. Parties who fail to select a mediator and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. The court may approve the substitution only upon proof of payment to the court's original appointee the $150 one time, per case administrative fee and any other amount due and owing for mediation services pursuant to Rule 7.B and any postponement fee due and owing pursuant to Rule 7.F.

D. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fees shall be paid in equal shares by the named parties. Payment shall be due and payable upon completion of the conference.

E. INABILITY TO PAY. No party found by the court to be unable to pay a full share of a mediator's fee shall be required to pay a full share. Any party required to pay a share of a mediator fee pursuant to Rules 7.B and C may move the court to pay according to the court's determination of that party's ability to pay.

In ruling on such motions, the judge may consider the income and assets of the movant and the outcome of the action. The court shall enter an order granting or denying the party's motion. In so ordering, the court may require that one or more shares be paid out of the marital estate.

Any mediator conducting a settlement conference pursuant to these rules shall accept as payment in full of a party's share of the mediator's fee that portion paid by or on behalf of the party pursuant to an order of the court issued pursuant to this rule.

F. POSTPONEMENTS AND FEES.

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for a session of the settlement conference

has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A conference session may be postponed by the mediator for good cause only after notice by the movant to all parties of the reasons for the postponement and a finding of good cause by the mediator. Good cause shall mean that the reason for the postponement involves a situation over which the party seeking the postponement has no control, including but not limited to, a party or attorney's illness, a death in a party or attorney's family, a sudden and unexpected demand by a judge that a party or attorney for a party appear in court for a purpose not inconsistent with the Guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts or inclement weather such that travel is prohibitive. Where good cause is found, a mediator shall not assess a postponement fee.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause provided that the mediator was notified of the settlement immediately after it was reached and the mediator received notice of the settlement at least 14 calendar days prior to the date scheduled for mediation.

(4) Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of $150 shall be paid to the mediator if the postponement is allowed, except that if the request for postponement is made within seven calendar days of the scheduled date for mediation, the fee shall be $300. The postponement fee shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

(5) If all parties select the certified mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

~~**G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE.**~~
~~Willful failure of a party to make timely payment of that~~

~~party's share of the mediator's fee (whether the one time, per case administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status or the inability to pay his or her full share of the fee to promptly move the Court for a determination of indigency or the inability to pay a full share, shall constitute contempt of Court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by the Court.~~

COMMENTS TO RULE 7

Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage or any other out-of-pocket expenses associated with a court-ordered mediation.

Comment to Rule 7.D.

If a party is found by the court to have failed to attend a family financial settlement conference without good cause, then the court may require that party to pay the mediator's fee and related expenses.

Comment to Rule 7.F.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

~~**DRC Comment to Rule 7.G.**~~

~~If the Family Financial Settlement Program is to be successful, it is essential that mediators, both party-selected and Court-appointed, be compensated for their services. FFS Rule 7.G. is intended to give the Court express authority to enforce payment of fees owned both Court-appointed and party-selected mediators. In instances where the mediator is party-selected, the Court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.F (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.~~

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Commission may receive and approve applications for certification of persons to be appointed as family financial mediators. For certification, a person must have complied with the requirements in each of the following sections.

A. Training and Experience. ~~Each applicant for certification under this provision shall have completed the North Carolina Bar Association's two-day basic family law CLE course or equivalent course work in North Carolina law relating to separation and divorce, alimony and post-separation support, equitable distribution, child custody and support and domestic violence and in addition, shall:~~ Each applicant for certification must demonstrate that she/he has a basic understanding of North Carolina family law. Applicants should be able to demonstrate that they have completed at least 12 hours of education in basic family law (a) by attending workshops and programs on topics such as separation and divorce, alimony and post-separation support, equitable distribution, child custody and support and domestic violence; (b) by engaging in independent study such as viewing or listening to video or audio programs on those family law topics; or (c) by demonstrating equivalent experience, including demonstrating that his or her work experience satisfies one of the categories set forth in the Commission's Policy on Interpreting and Implementing the First Unnumbered Paragraph of FFS Rule 8.A., *e.g.*, that the applicant is an experienced family law judge, board certified family lawyer and, in addition, shall:

(1) Be an Advanced Practitioner member of the Association for Conflict Resolution (ACR) and have earned an undergraduate degree from an accredited four-year college or university, or

(2) Have completed a 40-hour family and divorce mediation training approved by the Commission pursuant to Rule 9, or, if already a certified superior court mediator, have completed the16-hour family mediation supplemental course pursuant to Rule 9, and have additional experience as follows:

(a) as a licensed attorney and/or judge of the General Court of Justice of the State of North Carolina or other state for at least five years; or

(b) as a licensed physician certified in psychiatry pursuant to N.C.G.S. § 90-9 *et seq.*, for at least five years; or

(c) as a person licensed to practice psychology in North Carolina pursuant to N.C.G.S. § 90-270.1 *et seq.*, for at least five years; or

(d) as a licensed marriage and family therapist pursuant to N.C.G.S. § 90-270.45 *et seq.*, for at least five years; or

(e) as a licensed clinical social worker pursuant to N.C.G.S. § 90B-7 *et seq.*, for at least five years; or

(f) as a licensed professional counselor pursuant to N.C.G.S. § 90-329 *et seq.*, for at least five years; or

(g) as a certified public accountant certified in North Carolina for at least five years.

B. If not licensed to practice law in one of the United States, have completed a six-hour training on North Carolina legal terminology, court structure and civil procedure provided by a trainer certified by the Commission. Attorneys licensed to practice law in states other than North Carolina shall complete this requirement through a course of self-study as directed by the Commission's executive secretary.

C. Be a member in good standing of the state bar of one of the United States or have provided to the Commission three letters of reference as to the applicant's good character and experience as required by Rule 8.A.

D. Have observed as a neutral observer with the permission of the parties two mediations involving custody or family financial issues conducted by a mediator who is certified pursuant to these rules, or who is an Advanced Practitioner Member of the ACR or who is a NCAOC mediator, and, if the applicant is not an attorney licensed to practice law in one of the United States, have observed three additional court ordered mediations in cases that are pending in state or federal courts in North Carolina having rules for mandatory mediation similar to these.

E. Demonstrate familiarity with the statutes, rules and standards of practice and conduct governing mediated settlement conferences conducted pursuant to these Rules.

F. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. An applicant for certification shall disclose on his/her application(s) any of the following: any pending criminal matters or any criminal convictions; any disbarments or other revocations or suspensions of any professional license or certification, including suspension or revocation of any license, certification, registration or qualification to serve as a mediator in another state or country for any reason other than to pay a renewal fee. In addition, an applicant for certification shall disclose on his/her application(s) any of the following which occurred within 10 years of the date the application(s) is filed with the Commission: any pending disciplinary complaint(s) filed with, or any private or public sanction(s) imposed by a professional licensing or regulatory body, including any body regulating mediator conduct; any judicial sanction(s); any civil judgment(s); any tax lien(s); or any bankruptcy filing(s). Once certified, a mediator shall report to the Commission within 30 days of receiving notice any subsequent criminal conviction(s); any disbarment(s) or revocation(s) of a professional license, other disciplinary complaints filed with, or actions taken by, a professional licensing or regulatory body; any judicial sanction(s); any tax lien(s); any civil judgment(s) or any filing(s) for bankruptcy.

G. Submit proof of qualifications set out in this section on a form provided by the Commission.

H. Pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

I. Agree to accept as payment in full of a party's share of the mediator's fee, the fee ~~as~~ ordered by the court pursuant to Rule 7.

J. Comply with the requirements of the Commission for continuing mediator education or training. (These requirements may include advanced divorce mediation training, attendance at conferences or seminars relating to mediation skills or process and consultation with other family and divorce mediators about cases actually mediated. Mediators seeking recertification beyond one year from the date of initial certification may also be required to demonstrate that they have completed eight hours of family law training, including tax issues relevant to divorce and property distribution and eight hours of training in family dynamics, child development and interper-

sonal relations at any time prior to that recertification.) Mediators shall report on a Commission approved form.

Certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule. No application for recertification shall be denied on the grounds that the mediator's training and experience does not meet the training and experience required under Rules which were promulgated after the date of his/her original certification.

K. No mediator who held a professional license and relied upon that license to qualify for certification under subsection 8.A.2 above shall be decertified or denied recertification because that mediator's license lapses, is relinquished or becomes inactive; provided, however, that this subsection shall not apply to any mediator whose professional license is revoked, suspended, lapsed, relinquished or becomes inactive due to disciplinary action or the threat of same, from his/her licensing authority. Any mediator whose professional license is revoked, suspended, lapsed, relinquished or becomes inactive shall report such matter to the Commission.

If a mediator's professional license lapses, is relinquished or becomes inactive, s/he shall be required to complete all otherwise voluntary continuing mediator education requirements as adopted by the Commission as part of its annual certification renewal process and to report completion of those hours to the Commission's office annually.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators certified pursuant to Rule 8.A.2.(c) shall consist of a minimum of 40 hours of instruction. The curriculum of such programs shall include the subjects in each of the following sections:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques typical of family and divorce mediation;

(3) Communication and information gathering skills;

(4) Standards of conduct for mediators including, but not limited to the Standards adopted by the Supreme Court;

(5) Statutes, rules and practice governing mediated settlement conferences conducted pursuant to these Rules;

(6) Demonstrations of mediated settlement conferences with and without attorneys involved;

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty;

(8) An overview of North Carolina law as it applies to custody and visitation of children, equitable distribution, alimony, child support and post separation support;

(9) An overview of family dynamics, the effect of divorce on children and adults~~,~~ and child development;

(10) Protocols for the screening of cases for issues of domestic violence and substance abuse; and

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing family financial settlement procedures in North Carolina.

B. Certified training programs for mediators certified pursuant to Rule 8.A.2.(d) shall consist of a minimum of 16 hours of instruction. The curriculum of such programs shall include the subjects listed in Rule 9.A. There shall be at least two simulations as specified in subsection (7).

C. A training program must be certified by the Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these Rules or attended in other states or approved by the ACR with requirements equivalent to those in effect for the Academy of Family Mediators immediately prior to its merger with other organizations to become the ACR may be approved by the Commission if they are in substantial compliance with the Standards set forth in this rule. The Commission may require attendees of an ACR approved program to demonstrate com-

pliance with the requirements of Rules 9.A.(5) and 9.A.(8) either in the ACR approved training or in some other acceptable course.

D. To complete certification, a training program shall pay all administrative fees established by the NCAOC in consultation with the Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES.

A. Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the court may order the use of those procedures listed in Rule 10.B unless the court finds: that the parties did not agree upon the procedure to be utilized, the neutral to conduct it or the neutral's compensation; or that the procedure selected is not appropriate for the case or the parties. Judicial settlement conferences may be ordered only if permitted by local rule.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES.

In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) Neutral Evaluation (Rule 11), in which a neutral offers an advisory evaluation of the case following summary presentations by each party.

(2) Judicial Settlement Conference (Rule 12), in which a district court judge assists the parties in reaching their own settlement, if allowed by local rules.

(3) Other Settlement Procedures described and authorized by local rule pursuant to Rule 13.

The parties may agree to use arbitration under the Family Law Arbitration Act (N.C.G.S. § 50-41 *et seq*.) which shall constitute good cause for the court to dispense with settlement procedures authorized by these rules (Rule 1.C.6).

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) When Proceeding is Conducted. The neutral shall schedule the conference and conduct it no later than 150 days from the issuance of the court's order or no later

than the deadline for completion set out in the court's order, unless extended by the court. The neutral shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the neutral shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the court.

(2) Extensions of Time. A party or a neutral may request the court to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. The court may grant the extension and enter an order setting a new deadline for completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(3) Where Procedure is Conducted. Settlement proceedings shall be held in any location agreeable to the parties. If the parties cannot agree to a location, the neutral shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

(4) No Delay of Other Proceedings. Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions or the trial of the case, except by order of the court.

(5) Inadmissibility of Settlement Proceedings. Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

(a) In proceedings for sanctions under this section;

(b) In proceedings to enforce or rescind a settlement of the action;

(c) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or

(d) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this subsection, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this section or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties and in all other respects complies with the requirements of Chapter 50 of the North Carolina General Statutes. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, other neutral or neutral observer present at a settlement proceeding under this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(6) No Record Made. There shall be no stenographic or other record made of any proceedings under these Rules.

(7) Ex Parte Communication Prohibited. Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(8) Duties of the Parties.

(a) Attendance. All parties and attorneys shall attend other settlement procedures authorized by Rule 10 and ordered by the court.

(b) Finalizing Agreement.

(i) If agreement is reached on all issues at the neutral evaluation, judicial settlement conference or other settlement procedure, the essential terms of the agreement shall be reduced to writing as a summary memorandum unless the parties have reduced their agreement to writing, signed it and in all other respects have complied with the requirements of Chapter 50 of the North Carolina General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to its terms. Within 30 days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the court by such persons as the parties or the court shall designate.

(ii) If an agreement is reached upon all issues prior to the neutral evaluation, judicial settlement conference or other settlement procedure or finalized while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel, shall comply in all respects with the requirements of Chapter 50 of the North Carolina General Statutes and shall file a consent judgment or voluntary dismissals(s) disposing of all issues with the court within 30 days, or before the expiration of the deadline for completion of the proceeding, whichever is longer.

(iii) When a case is settled upon all issues, all attorneys of record must notify the court within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s) *and when.*

(c) Payment of Neutral's Fee. The parties shall pay the neutral's fee as provided by Rule 10.C.(12), except that no payment shall be required or paid for a judicial settlement conference.

(9) Sanctions for Failure to Attend Other Settlement Procedure or Pay Neutral's Fee. Any person required to attend a settlement procedure or pay a neutral's fee in com-

pliance with N.C.G.S. § 7A-38.4A and the rules promulgated by the Supreme Court to implement that section who, fails to attend or to pay the fee without good cause, shall be subject to the contempt powers of the court and monetary sanctions imposed by the court. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, neutral fees, expenses and loss of earnings incurred by persons attending the procedure. A party to the action, or the court on its own motion, seeking sanctions against a party or attorney, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

(10) Selection of Neutrals in Other Settlement Procedures.

Selection By Agreement. The parties may select any person whom they believe can assist them with the settlement of their case to serve as a neutral in any settlement procedure authorized by these rules, except for judicial settlement conferences.

Notice of such selection shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures at the scheduling conference or the court appearance when settlement procedures are considered by the court. The notice shall be on a NCAOC form as set out in Rule 2 herein. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

If the parties are unable to select a neutral by agreement, then the court shall deny the motion for authorization to use another settlement procedure and the court shall order the parties to attend a mediated settlement conference.

(11) Disqualification of Neutrals. Any party may move a court of the district in which an action is pending for an order disqualifying the neutral; and, for good cause, such order shall be entered. Cause shall exist, but is not limited to circumstances where, the selected neutral has violated any standard of conduct of the State Bar or any standard

of conduct for neutrals that may be adopted by the Supreme Court.

(12) Compensation of Neutrals. A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding and making and reporting the award shall be compensable time. The parties shall not compensate a settlement judge.

(13) Authority and Duties of Neutrals.

(a) Authority of Neutrals.

(i) Control of Proceeding. The neutral shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the Proceeding. The neutral shall make a good faith effort to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral. In the absence of agreement, the neutral shall select the date and time for the proceeding. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the court.

(b) Duties of Neutrals.

(i) The neutral shall define and describe the following at the beginning of the proceeding:

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The admissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(1) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral and the participants.

(ii) Disclosure. The neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(iii) Reporting Results of the Proceeding. The neutral evaluator, settlement judge or other neutral shall report the result of the proceeding to the court in writing within 10 days in accordance with the provisions of Rules 11 and 12 herein on a NCAOC form. The NCAOC, in consultation with the Commission, may require the neutral to provide statistical data for evaluation of other settlement procedures.

(iv) Scheduling and Holding the Proceeding. It is the duty of the neutral to schedule the proceeding and conduct it prior to the completion deadline set out in the court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral unless said time limit is changed by a written order of the court.

RULE 11. RULES FOR NEUTRAL EVALUATION

A. NATURE OF NEUTRAL EVALUATION. Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of the merits of the case, settlement value and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case, after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. PRE-CONFERENCE SUBMISSIONS. No later than 20 days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the

evaluator and to the other parties pursuant to this paragraph shall not be filed with the court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than 10 days prior to the date established for the neutral evaluation conference to begin, any party may, but is not required to, send additional written information to the evaluator responding to the submission of an opposing party. The response furnished to the evaluator shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator, if he or she deems it necessary, may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) Evaluator's Opening Statement. At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the parties.

(2) Oral Report to Parties by Evaluator. In addition to the written report to the court required under these rules, at the conclusion of the neutral evaluation conference, the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of the merits of the case, estimated settlement value and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case

and the reasons therefore. The evaluator shall not reduce his or her oral report to writing and shall not inform the court thereof.

(3) Report of Evaluator to Court. Within 10 days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the court using a NCAOC form, stating when and where the conference was held, the names of those persons who attended the conference and the names of any party or attorney known to the evaluator to have been absent from the neutral evaluation without permission. The report shall also inform the court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the evaluation conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state the name of the person(s) designated to file the consent judgment or voluntary dismissals with the court. Local rules shall not require the evaluator to send a copy of any agreement reached by the parties to the court.

H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS. If all parties at the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions. If the parties do not reach a settlement during such discussions, however, the evaluator shall complete the neutral evaluation conference and make his or her written report to the court as if such settlement discussions had not occurred. If the parties reach agreement at the conference, they shall reduce their agreement to writing as required by Rule 10.C.(8)(b).

RULE 12. JUDICIAL SETTLEMENT CONFERENCE

A. SETTLEMENT JUDGE. A judicial settlement conference shall be conducted by a district court judge who shall be selected by the district court judge. Unless specifically approved by the district court judge, the district court judge who presides over the judicial settlement conference shall not be assigned to try the action if it proceeds to trial.

B. CONDUCTING THE CONFERENCE. The form and manner of conducting the conference shall be in the discretion of the settlement judge. The settlement judge may not impose a settlement on the parties but will assist the parties in reaching a resolution of all claims.

C. CONFIDENTIAL NATURE OF THE CONFERENCE. Judicial settlement conferences shall be conducted in private. No stenographic or other record may be made of the conference. Persons other than the parties and their counsel may attend only with the consent of all parties. The settlement judge will not communicate with anyone the communications made during the conference, except that the judge may report that a settlement was reached and, with the parties' consent, the terms of that settlement.

D. REPORT OF JUDGE. Within 10 days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the court using a NCAOC form, stating when and where the conference was held, the names of those persons who attended the conference and the names of any party or attorney known to the settlement judge to have been absent from the settlement conference without permission. The report shall also inform the court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the settlement conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state the name of the person(s) designated to file the consent judgment or voluntary dismissals with the court. Local rules shall not require the settlement judge to send a copy of any agreement reached by the parties to the court

RULE 13. LOCAL RULE MAKING

The chief district court judge of any district conducting settlement procedures under these Rules is authorized to publish local rules, not inconsistent with these Rules and N.C.G.S. § 7A-38.4, implementing settlement procedures in that district.

RULE 14. DEFINITIONS

A. The word, court, shall mean a judge of the district court in the district in which an action is pending who has administrative responsibility for the action as an assigned or presiding judge, or said judge's designee, such as a clerk, trial court administrator, case management assistant, judicial assistant and trial court coordinator.

B. The phrase, NCAOC forms, shall refer to forms prepared by, printed and distributed by the NCAOC to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the NCAOC. Proposals for the creation or modification of such forms may be initiated by the Commission.

C. The term, family financial case, shall refer to any civil action in district court in which a claim for equitable distribution, child support, alimony or post separation support is made or in which there are claims arising out of contracts between the parties under N.C.G.S. §§ 50-20(d), 52-10, 52-10.1 or 52B.

RULE 15. TIME LIMITS.

Any time limit provided for by these rules may be waived or extended for good cause shown. Time shall be counted pursuant to the North Carolina Rules of Civil Procedure.

In The Supreme Court of North Carolina
Order Adopting Amendments to the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases

WHEREAS, section 7A-38.4A of the North Carolina General Statutes codifies a statewide system of court-ordered mediated settlement conferences to be implemented in district court judicial districts in order to facilitate the resolution of equitable distribution and other family financial matters within the jurisdiction of those districts, and

WHEREAS, N.C.G.S. § 7A-38.4A(o) provides for this Court to implement section 7A-38.4A by adopting rules and amendments to rules concerning said mediated settlement conferences,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.4A(o), Rules Implementing Settlement Procedures in Equitable Distribution and other Family Financial Cases are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of January, 2012.

Adopted by the Court in conference the 6th day of October, 2011. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT ACTIONS

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RULE 1. INITIATING SETTLEMENT EVENTS

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES. Pursuant to N.C.G.S. § 7A-38.1, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the court pursuant to these Rules.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES. In furtherance of this purpose, counsel, upon being retained to represent any party to a superior court case, shall advise his or her client(s) regarding the settlement procedures approved by these Rules and shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. INITIATING THE MEDIATED SETTLEMENT CONFERENCE IN EACH ACTION BY COURT ORDER.

(1) Order by Senior Resident Superior Court Judge. The senior resident superior court judge of any judicial district shall, by written order, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in all civil actions except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his/her order upon motion of a party pursuant to Rule 1.C.(6) only for good cause shown.

(2) Motion to Authorize the Use of Other Settlement Procedures. The parties may move the senior resident superior court judge to authorize the use of some other settlement procedure allowed by these rules or by local rule in lieu of a mediated settlement conference, as provided in N.C.G.S. § 7A-38.1(i). Such motion shall be filed within 21 days of the order requiring a mediated settlement conference on a North Carolina Administrative Office of the Courts (NCAOC) form, and shall include:

(a) the type of other settlement procedure requested;

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral;

(d) that the neutral and opposing counsel have agreed upon the selection and compensation of the neutral selected; and

(e) that all parties consent to the motion.

If the parties are unable to agree to each of the above, then the senior resident superior court judge shall deny the motion and the parties shall attend the mediated settlement conference as originally ordered by the court. Otherwise, the court may order the use of any agreed upon settlement procedures authorized by Rules 10-12~~.~~3 herein or by local rules of the superior court in the county or district where the action is pending.

(3) Timing of the Order. The senior resident superior court judge shall issue the order requiring a mediated

settlement conference as soon as practicable after the time for the filing of answers has expired. Rules 1.C.(4) and 3.B herein shall govern the content of the order and the date of completion of the conference.

(4) Content of Order. The court's order shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on a NCAOC form.

(5) Motion for Court Ordered Mediated Settlement Conference. In cases not ordered to mediated settlement conference, any party may file a written motion with the senior resident superior court judge requesting that such conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing with the senior resident superior court judge within 10 days after the date of the service of the motion. Thereafter, the judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(6) Motion to Dispense with Mediated Settlement Conference. A party may move the senior resident superior court judge to dispense with the mediated settlement conference ordered by the judge. Such motion shall state the reasons the relief is sought. For good cause shown, the senior resident superior court judge may grant the motion.

Such good cause may include, but not be limited to, the fact that the parties have participated in a settlement procedure such as non-binding arbitration or early neutral evaluation prior to the court's order to participate in a mediated settlement conference or have elected to resolve their case through arbitration.

D. INITIATING THE MEDIATED SETTLEMENT CONFERENCE BY LOCAL RULE.

(1) Order by Local Rule. In judicial districts in which a system of scheduling orders or scheduling conferences is utilized to aid in the administration of civil cases, the senior resident superior court judge of said districts shall, by local rule, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in all civil actions except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his/her order upon motion of a party pursuant to Rule 1.D.(6) only for good cause shown.

(2) Scheduling Orders or Notices. In judicial districts in which scheduling orders or notices are utilized to manage civil cases and for all cases ordered to mediated settlement conference by local rule, said order or notice shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to ~~select~~ designate their own mediator and the deadline by which that ~~selection~~ designation should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to ~~select~~ designate a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(3) Scheduling Conferences. In judicial districts in which scheduling conferences are utilized to manage civil cases and for cases ordered to mediated settlement conferences by local rule, the notice for said scheduling conference shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to ~~select~~ designate their own mediator and the deadline by which that ~~selection~~ designation should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to ~~select~~ designate a mediator; and (5) state that the parties shall be required

to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(4) Application of Rule 1.C. The provisions of Rules 1.C.(2), (5) and (6) shall apply to Rule 1.D except for the time limitations set out therein.

(5) Deadline for Completion. The provisions of Rule 3.B determining the deadline for completion of the mediated settlement conference shall not apply to mediated settlement conferences conducted pursuant to Rule 1.D. The deadline for completion shall be set by the senior resident superior court judge or designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline shall be well in advance of the trial date.

(6) Selection of Mediator. The parties may ~~select and nominate~~ designate or the senior resident superior court judge may appoint, mediators pursuant to the provisions of Rule 2, except that the time limits for ~~selection, nomination,~~ designation and appointment shall be set by local rule. All other provisions of Rule 2 shall apply to mediated settlement conferences conducted pursuant to Rule 1.D.

(7) Use of Other Settlement Procedures. The parties may utilize other settlement procedures pursuant to the provisions of Rule 1.C.(2) and Rule 10. However, the time limits and method of moving the court for approval to utilize another settlement procedure set out in those rules shall not apply and shall be governed by local rule.

COMMENT TO RULE 1

Comment to Rule 1.C.(6).

If a party is unable to pay the costs of the conference or lives a great distance from the conference site, the court may want to consider Rules 4 or 7 prior to dispensing with mediation for good cause. Rule 4 provides a way for a party to attend electronically and Rule 7 provides a way for parties to attend and obtain relief from the obligation to pay the mediator's fee.

RULE 2. DESIGNATION OF MEDIATOR

A. DESIGNATION OF CERTIFIED MEDIATOR BY AGREEMENT OF PARTIES. The parties may designate a mediator certified pursuant to these Rules by agreement within 21 days

of the court's order. The plaintiff's attorney shall file with the court a Designation of Mediator by Agreement within 21 days of the court's order, however, any party may file the designation. The party filing the designation shall serve a copy on all parties and the mediator designated to conduct the settlement conference. Such designation shall state the name, address and telephone number of the mediator designated; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the designation and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on a NCAOC form.

B. APPROVAL OF PARTY NOMINEE ELIMINATED. As of January 1, 2006, the former Rule 2.B rule allowing the approval of a non-certified mediator is rescinded. Beginning on that date, the court shall appoint mediators certified by the Dispute Resolution Commission (Commission), pursuant to Rule 2.C which follows.

C. APPOINTMENT OF MEDIATOR BY THE COURT. If the parties cannot agree upon the designation of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the senior resident superior court appoint a mediator. The motion must be filed within 21 days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the designation of a mediator and have been unable to agree. The motion shall be on a form approved by the NCAOC.

Upon receipt of a motion to appoint a mediator, or failure of the parties to file a Designation of Mediator <u>by Agreement</u> with the court within 21 days of the court's order, the senior resident superior court judge shall appoint a mediator, certified pursuant to these Rules, who has expressed a willingness to mediate actions within the judge's district.

In making such appointments, the senior resident superior court judge shall rotate through the list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation or whether the mediator is a licensed attorney. ~~Certified mediators who do not reside in the judicial district, or a county contiguous to the judicial district, shall be included in the list of mediators available for appointment only if, on an annual basis, they inform the Judge in writing that they agree to mediate cases to which~~

~~they are assigned~~. The senior resident superior court judge shall retain discretion to depart in a specific case from a strict rotation when, in the judge's discretion, there is good cause to do so.

Certified mediators who do not reside in the judicial district or a county contiguous to the judicial district, shall be included in the list of mediators available for appointment only if, on an annual basis as determined by the Commission, they request each senior resident superior court judge in whose district they wish to be appointed to be put on the appointment list. Said letters shall be addressed to such senior resident superior court judges, but be mailed to the offices of the Commission. The Commission shall coordinate the compilation and distribution of appointment lists for each judicial district.

The Commission shall furnish to the senior resident superior court judge of each judicial district a list of those certified superior court mediators requesting appointments in that district. Said list shall contain the mediators' names, addresses and telephone numbers and shall be provided ~~both in writing and~~ electronically through the Commission's website at www.ncdrc.org. The Commission shall promptly notify the senior resident superior court judge of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

D. MEDIATOR INFORMATION DIRECTORY. To assist the parties in designating a mediator, the Commission shall assemble, maintain and post on its website at ~~www.ncdrc.org~~ a list of certified superior court mediators. The list shall supply contact information for mediators and identify court districts that they are available to serve. Where a mediator has supplied it to the Commission, the list shall also provide biographical information including information about an individual mediator's education, professional experience and mediation training and experience.

E. DISQUALIFICATION OF MEDIATOR. Any party may move the senior resident superior court judge of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be designated or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. WHERE CONFERENCE IS TO BE HELD. Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the courthouse or other public or community building in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The court's order issued pursuant to Rule 1.C.(1) shall state a deadline for completion for the conference which shall be not less than 120 days nor more than 180 days after issuance of the court's order. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. ~~REQUEST TO EXTEND DEADLINE FOR COMPLETION~~ EXTENDING DEADLINE FOR COMPLETION. The senior resident superior court judge may extend the deadline for completion of the mediated settlement conference upon the judge's own motion, upon stipulation of the parties or upon suggestion of the mediator. ~~A party, or the mediator, may request the Senior Resident Superior Court Judge to extend the deadline for completion of the conference. Such request shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the office of the Senior Resident Superior Court Judge.~~

~~The Senior Resident Superior Court Judge may grant the request by setting a new deadline for the completion of the conference, which date may be set at any time prior to trial. Notice of the Judge's action shall be served immediately on all parties and the mediator by the person who sought the extension and shall be filed with the Court~~.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions or the trial of the case, except by order of the senior resident superior court judge.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(i) All individual parties;

(ii) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action or who has been authorized to negotiate on behalf of such party and can promptly communicate during the conference with persons who have decision-making authority to settle the action; provided, however, if a specific procedure is required by law (*e.g.*, a statutory pre-audit certificate) or the party's governing documents (*e.g.*, articles of incorporation, bylaws, partnership agreement, articles of organization or operating agreement) to approve the terms of the settlement, then the representative shall have the authority to negotiate and make recommendations to the applicable approval authority in accordance with that procedure;

(iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under

law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

(b) Insurance Company Representatives. A representative of each liability insurance carrier, uninsured motorist insurance carrier and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each such carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(c) Attorneys. At least one counsel of record for each party or other participant, whose counsel has appeared in the action.

(2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(a) By agreement of all parties and persons required to attend and the mediator; or

(b) By order of the senior resident superior court judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

(3) Scheduling. Participants required to attend shall promptly notify the mediator after ~~selection~~ designation or appointment of any significant problems they may have with dates for conference sessions before the completion deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been scheduled by the mediator,

and a scheduling conflict with another court proceeding thereafter arises, participants shall promptly attempt to resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina on June 20, 1985.

B. NOTIFYING LIEN HOLDERS. Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify said lien holder or claimant of the date, time and location of the mediated settlement conference and shall request said lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

C. FINALIZING AGREEMENT.

(1) If an agreement is reached at the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically recorded. If an agreement is upon all issues, a consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

(2) If the agreement is upon all issues at the conference, ~~the person(s) responsible for filing closing documents with the Court shall also sign the mediator's report to the Court~~. ~~T~~the parties shall give a copy of their signed agreement, consent judgment or voluntary dismissal(s) to the mediator and all parties at the conference and shall file a consent judgment or voluntary dismissal(s) with the court within 30 days or within 90 days if the state or a political subdivision thereof is a party to the action, or before expiration of the mediation deadline, whichever is longer. In all cases, consent judgments or voluntary dismissals shall be filed prior to the scheduled trial.

(3) If an agreement is reached upon all issues prior to the conference or finalized while the conference is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all issues with the court within 30 days or within 90 days if the

state or a political subdivision thereof is a party to the action or before expiration of the mediation deadline, whichever is longer.

(4) When a case is settled upon all issues, all attorneys of record must notify the senior resident judge within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal(s), *and when.*

D. PAYMENT OF MEDIATOR'S FEE. The parties shall pay the mediator's fee as provided by Rule 7.

E. RELATED CASES. Upon application by any party or person, the senior resident superior court judge may order that an attorney of record or a party in a pending superior court case or a representative of an insurance carrier that may be liable for all or any part of a claim pending in superior court shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered pursuant to this rule. Any such attorney, party or carrier representative that properly attends a mediation conference pursuant to this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issues concerning an order entered pursuant to this rule shall be determined by the senior resident superior court judge who entered the order.

F. NO RECORDING. There shall be no stenographic, audio or video recording of the mediation process by any participant. This prohibition precludes recording either surreptitiously or with the agreement of the parties.

COMMENTS TO RULE 4

Comment to Rule 4.C.

N.C.G.S. § 7A-38.1(1) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which agreement upon all issues has been reached should be disposed of as expeditiously as possible. This rule is intended to assure that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process

and the mediator's duty of confidentiality. If the parties wish to keep confidential the terms of their settlement, they may timely file with the court closing documents which do not contain confidential terms, *i.e.*, voluntary dismissal(s) or a consent judgment resolving all claims. Mediators will not be required by local rules to submit agreements to the court.

Comment to Rule 4.E.

Rule 4.E was adopted to clarify a senior resident superior court judge's authority in those situations where there may be a case related to a superior court case pending in a different forum. For example, it is common for there to be claims asserted against a third-party tortfeasor in a superior court case at the same time that there are related workers' compensation claims being asserted in an Industrial Commission case. Because of the related nature of such claims, the parties in the Industrial Commission case may need an attorney of record, party or insurance carrier representative in the superior court case to attend the Industrial Commission mediation conference in order to resolve the pending claims in that case. Rule 4.E specifically authorizes a senior resident superior court judge to order such attendance provided that all parties in the related Industrial Commission case consent and the persons ordered to attend receive reasonable notice. The Industrial Commission's Rules for Mediated Settlement and Neutral Evaluation Conferences contain a similar provision that provides that persons involved in an Industrial Commission case may be ordered to attend a mediation conference in a related superior court case.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCE OR PAY MEDIATOR'S FEE

Any person required to attend a mediated settlement conference or to pay a portion of the mediator's fee in compliance with N.C.G.S. § 7A-38.1 and the rules promulgated by the Supreme Court of North Carolina (Supreme Court) to implement that section who fails to attend or to pay without good cause, shall be subject to the contempt powers of the court and monetary sanctions imposed by a resident or presiding superior court judge. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. The court may initiate

sanction proceedings upon its own motion by the entry of a show cause order.

If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. (~~See also Rule 7.G. and the Comment to Rule 7.G.~~)

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by Standards of Professional Conduct for Mediators (Standards) promulgated by the Supreme Court which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) Private Consultation. The mediator may communicate privately with any participant ~~or counsel~~ prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

~~**(3) Scheduling the conference.** The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.~~

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1;

(h) The duties and responsibilities of the mediator and the participants; and

(i) That any agreement reached will be reached by mutual consent.

(2) Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) Declaring impasse. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) Reporting Results of ~~conference~~ Mediation.

(a) The mediator shall report to the court the results of the mediated settlement conference and any settlement reached by the parties prior to or during a recess of the conference. Mediators shall also report the results of mediations held in other superior court civil cases in which a mediated settlement conference was not ordered by the court. Said report shall be filed on a NCAOC form within 10 days of the conclusion of the conference or of being notified of the settlement and shall include the names of those persons attending the mediated settlement conference if a conference was held. ~~whether or not an agreement was reached by the parties. The mediator's report shall include the names of those persons attending the mediated settlement conference. The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement~~

~~conference program~~. Local rules shall not require the mediator to send a copy of the parties' agreement to the court.

(b) If an agreement upon all issues is reached at, prior to or during a recess of the conference, the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal(s)~~, when it shall be filed with the Court,~~ and the name, address and telephone number of the person(s) designated by the parties to file such consent judgment or dismissal(s) with the court. ~~as required by Rule 4.C.(1).~~ The mediator shall advise the parties that Rule 4.C requires them to file their consent judgment or voluntary dismissal with the court within 30 days or within 90 days if the state or a political subdivision thereof is a party to the action, or before expiration of the mediation deadline, whichever is longer. The mediator shall indicate on the report that the parties have been so advised. ~~If an agreement upon all issues is reached at the conference, the mediator shall have the person(s) designated sign the mediator's report acknowledging acceptance of the duty to timely file the closing documents with the court.~~

~~Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the court and sanctions.~~

(c) The Commission or the NCAOC may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.

(d) Mediators who fail to report as required by this rule shall be subject to sanctions by the senior resident superior courtjudge. Such sanctions shall include, but not be limited to, fines or other monetary penalties, decertification as a mediator and any other sanction available through the power of contempt. The senior resident superior court judge shall notify the Commission of any action taken against a mediator pursuant to this section.

(5) Scheduling and Holding the Conference. It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. The mediator shall make an

effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the senior resident superior court judge.

A mediator selected by agreement of the parties shall not delay scheduling or holding a conference because one of more of the parties has not paid an advance fee deposit required by that agreement.

~~**(6) Distribution of mediator evaluation form.** At the mediated settlement conference, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per party with additional copies distributed upon request. The evaluation is intended for purposes of self improvement and the mediator shall review returned evaluation forms.~~

RULE 7. COMPENSATION OF THE MEDIATOR AND SANCTIONS

A. BY AGREEMENT. When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator. The terms of the parties' agreement with the mediator notwithstanding, Section D below shall apply to issues involving the compensation of the mediator. Sections E and F below shall apply unless the parties' agreement provides otherwise.

B. BY COURT ORDER. When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of $150 that is due upon appointment.

C. CHANGE OF APPOINTED MEDIATOR. Pursuant to Rule 2.A, the parties may select a certified mediator to conduct their mediated settlement conference. Parties who fail to select a certified mediator and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. The court may approve the substitution only upon proof of payment to the court's original appointee the $150 one time, per case administrative fee, any other amount due and owing for mediation services pursuant

to Rule 7.B and any postponement fee due and owing pursuant to Rule 7.E.

D. INDIGENT CASES. No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subsequent to the trial of the action. In ruling upon such motions, the judge shall apply the criteria enumerated in N.C.G.S. § 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

E. POSTPONEMENTS AND FEES.

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for a session of the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A conference session may be postponed by the mediator for good cause only after notice by the movant to all parties of the reasons for the postponement and a finding of good cause by the mediator. Good cause shall mean that the reason for the postponement involves a situation over which the party seeking the postponement has no control, including but not limited to, a party or attorney's illness, a death in a party or attorney's family, a sudden and unexpected demand by a judge that a party or attorney for a party appear in court for a purpose not inconsistent with the Guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts or inclement weather such that travel is prohibitive. Where good cause is found, a mediator shall not assess a postponement fee.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause provided that the media-

tor was notified of the settlement immediately after it was reached and the mediator received notice of the settlement at least 14 calendar days prior to the date scheduled for mediation.

(4) Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of $150 shall be paid to the mediator if the postponement is allowed, except that if the request for postponement is made within seven calendar days of the scheduled date for mediation, the fee shall be $300. The postponement fee shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

(5) If all parties select the certified mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

F. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the named parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the conference.

~~**G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE.** Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Senior Resident Superior Court Judge for a finding of indigency, shall constitute contempt of Court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by a Resident or Presiding Superior Court Judge.~~

COMMENTS TO RULE 7

Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage or any other out-of-pocket expenses associated with a court-ordered mediation.

It is not unusual for two or more related cases to be mediated collectively. A mediator shall use his or her business judgment in assessing the one time, per case administrative fee when two or more cases are mediated together and set his/her fee according to the amount of time s/he spent in an effort to schedule the matter for mediation. The mediator may charge a flat fee of $150 if scheduling was relatively easy or multiples of that amount if more effort was required.

Comment to Rule 7.E.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

Comment to Rule 7.F.

If a party is found by a senior resident superior court judge to have failed to attend a mediated settlement conference without good cause, then the court may require that party to pay the mediator's fee and related expenses.

~~**DRC Comment to Rule 7.G.**~~

~~If the Mediated Settlement Conference Program is to be successful, it is essential that mediators, both party selected and Court appointed, be compensated for their services. MSC Rule 7.G. is intended to give the Court express authority to enforce payment of fees owed both Court appointed and party selected mediators. In instances where the mediator is party selected, the Court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.E. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.~~

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Commission may receive and approve applications for certification of persons to be appointed as superior court mediators. For certification, a person shall:

A. Have completed a minimum of 40 hours in a trial court mediation training program certified by the Commission, or have completed a 16-hour supplemental trial court mediation training certified by the Commission after having been certified by the Commission as a family financial mediator;

B. Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she:

(a) is either:

(i) a member in good standing of the North Carolina State Bar (State Bar), pursuant to Title 27, N.C. Administrative Code, The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000, or

(ii) a member similarly in good standing of the bar of another state and a graduate of a law school recognized as accredited by the North Carolina Board of Law Examiners; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides to the Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney; and

(b) has at least five years of experience after date of licensure as a judge, practicing attorney, law professor and/or mediator or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8.B.(1) or Rule 8.B.(2).

(2) A non-attorney may be certified if he or she has completed the following:

(a) a six-hour training on North Carolina court organization, legal terminology, civil court procedure, the attorney-client privilege, the unauthorized practice of law and common legal issues arising in superior court cases, provided by a trainer certified by the Commission;

(b) provide to the Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's experience claimed in Rule 8.B.(2)(c);

(c) one of the following; (i) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Commission; and after completing the 20-hour training, mediating at least 30 disputes, over the course of at least three years, or equivalent experience, and possess a four-year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to January 1, 2005, and have four years of professional, management or administrative experience in a professional, business or governmental entity; or (ii) 10 years of professional, management or administrative experience in a professional, business or governmental entity and possess a four-year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to January 1, 2005.

(d) Observe three mediated settlement conferences meeting the requirements of Rule 8.C conducted by at least two different certified mediators, in addition to those required by Rule 8.C.

C. Observe two mediated settlement conferences conducted by a certified superior court mediator;

(1) at least one of which must be court ordered by a superior court, and

(2) the other may be a mediated settlement conference conducted under rules and procedures substantially similar to those set out herein in cases pending in the North Carolina Court of Appeals, North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, the North Carolina Superior Court or the United States District Courts for North Carolina.

D. Demonstrate familiarity with the statute, rules and practice governing mediated settlement conferences in North Carolina;

E. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. An applicant for certification shall disclose on his/her application(s) any of the following: any pending criminal matters or any criminal convictions; any disbarments or other revocations or suspensions of any professional license or certification, including suspension or revocation of any license, certification, registration or qualification to serve as a mediator in another state or country for any reason other than to pay a renewal fee. In addition, an applicant for certification shall disclose on his/her application(s) any of the following which occurred within ten years of the date the application(s) is filed with the Commission: any pending disciplinary complaint(s) filed with, or any private or public sanctions(s) imposed by, a professional licensing or regulatory body, including any body regulating mediator conduct; any judicial sanction(s); any civil judgment(s); any tax lien(s); or any bankruptcy filing(s). Once certified, a mediator shall report to the Commission within 30 days of receiving notice any subsequent criminal conviction(s); any disbarment(s) or revocation(s) of a professional license(s), other disciplinary complaint(s) filed with or actions taken by, a professional licensing or regulatory body; any judicial sanction(s); any tax lien(s); any civil judgment(s) or any filing(s) for bankruptcy.

F. Submit proof of qualifications set out in this section on a form provided by the Commission;

G. Pay all administrative fees established by the NCAOC upon the recommendation of the Commission;

H. Agree to accept as payment in full of a party's share of the mediator's fee, the fee ordered by the court pursuant to Rule 7; ~~and~~,

(I) Comply with the requirements of the Commission for continuing mediator education or training. (These requirements may include completion of training or self-study designed to improve a mediator's communication, negotiation, facilitation or mediation skills; completion of observations; service as a mentor to a less experienced mediator; being mentored by a more experienced mediator; or serving as a trainer. Mediators shall report on a Commission approved form.); and

J. No mediator who held a professional license and relied upon that license to quality for certification under subsections B.(1) or B.(2) above shall be decertified or denied recertification because that mediator's license lapses, is relinquished or becomes inactive; provided, however, that this subsection shall not apply to any mediator whose professional license is revoked, suspended, lapsed, relinquished or becomes inactive due to disciplinary action or the threat of same, from his/her licensing authority. Any mediator whose professional license is revoked, suspended, lapsed or relinquished or becomes inactive shall report such matter to the Commission.

If a mediator's professional license lapses, is relinquished or becomes inactive, s/he shall be required to complete all otherwise voluntary continuing mediator education requirements adopted by the Commission as part of its annual certification renewal process and to report completion of those hours to the Commission's office annually.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators seeking only certification as superior court mediators shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of trial court mediation;

(3) Communication and information gathering skills;

(4) Standards of conduct for mediators including, but not limited to the Standards adopted by the Supreme Court;

(5) Statutes, rules and practice governing mediated settlement conferences in North Carolina;

(6) Demonstrations of mediated settlement conferences;

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(8) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

B. Certified training programs for mediators who are already certified as family financial mediators shall consist of a minimum of sixteen hours. The curriculum of such programs shall include the subjects in Rule 9.A and discussion of the mediation and culture of insured claims. There shall be at least two simulations as specified in subsection (7).

C. A training program must be certified by the Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these Rules or attended in other states may be approved by the Commission if they are in substantial compliance with the standards set forth in this Rule.

D. To complete certification, a training program shall pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES. Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the senior resident superior court judge may order the use of the procedure requested under these rules or under local rules unless the court finds that the parties did not agree upon all of the relevant details of the procedure, (including items a-e in Rule 1.C.(2)); or that for good cause, the selected procedure is not appropriate for the case or the parties.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES. In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) Neutral Evaluation (Rule 11). Neutral evaluation in which a neutral offers an advisory evaluation of the case following summary presentations by each party;

(2) Arbitration (Rule 12). Non-binding arbitration, in which a neutral renders an advisory decision following summary presentations of the case by the parties and binding arbitration, in which a neutral renders a binding decision following presentations by the parties; and

(3) Summary Trials (Jury or Non-Jury) (Rule 13). Non-binding summary trials, in which a privately procured jury or presiding officer renders an advisory verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer; and binding summary trials, in which a privately procured jury or presiding officer renders a binding verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer.

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) When Proceeding is Conducted. Other settlement procedures ordered by the court pursuant to these rules

shall be conducted no later than the date of completion set out in the court's original mediated settlement conference order unless extended by the senior resident superior court judge.

(2) Authority and Duties of Neutrals.

(a) Authority of neutrals.

(i) Control of proceeding. The neutral evaluator, arbitrator or presiding officer shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the proceeding. The neutral evaluator, arbitrator or presiding officer shall attempt to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral(s). In the absence of agreement, such neutral shall select the date for the proceeding.

(b) Duties of neutrals.

(i) The neutral evaluator, arbitrator or presiding officer shall define and describe the following at the beginning of the proceeding.

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(l) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral(s) and the participants.

(ii) Disclosure. Each neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(iii) Reporting results of the proceeding. The neutral evaluator, arbitrator or presiding officer shall report the result of the proceeding to

the court on a NCAOC form. The NCAOC may require the neutral to provide statistical data for evaluation of other settlement procedures on forms provided by it.

(iv) Scheduling and holding the proceeding. It is the duty of the neutral evaluator, arbitrator or presiding officer to schedule the proceeding and conduct it prior to the completion deadline set out in the court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral evaluator, arbitrator or presiding officer unless said time limit is changed by a written order of the senior resident superior court judge.

(3) Extensions of Time. A party or a neutral may request the senior resident superior court judge to extend the deadline for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. If the court grants the motion for an extension, this order shall set a new deadline for the completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(4) Where Procedure is Conducted. The neutral evaluator, arbitrator or presiding officer shall be responsible for reserving a place agreed to by the parties, setting a time, and making other arrangements for the proceeding and for giving timely notice to all attorneys and unrepresented parties in writing of the time and location of the proceeding.

(5) No Delay of Other Proceedings. Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions or the trial of the case, except by order of the senior resident superior court judge.

(6) Inadmissibility of Settlement Proceedings. Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral or a neutral observer present at the settlement proceeding, shall not be sub-

ject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

(a) In proceedings for sanctions under this section;

(b) In proceedings to enforce or rescind a settlement of the action;

(c) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or

(d) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this section, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediated settlement conference or other settlement proceeding. No mediator, other neutral or neutral observer present at a settlement proceeding shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals and proceedings to enforce laws concerning juvenile or elder abuse.

(7) No Record Made. There shall be no record made of any proceedings under these Rules unless the parties have stipulated to binding arbitration or binding summary trial in which case any party after giving adequate notice to opposing parties may record the proceeding.

(8) Ex Parte Communication Prohibited. Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(9) Duties of the Parties.

(a) Attendance. All persons required to attend a mediated settlement conference pursuant to Rule 4 shall attend any other settlement procedure which is non-binding in nature, authorized by these rules and ordered by the court except those persons to whom the parties agree and the senior resident superior court judge excuses. Those persons required to attend other settlement procedures which are binding in nature, authorized by these rules and ordered by the court shall be those persons to whom the parties agree.

Notice of such agreement shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the order requiring a mediated settlement conference. The notice shall be on a NCAOC form.

(b) Finalizing agreement.

(i) If an agreement is reached on all issues at the neutral evaluation, arbitration or summary trial, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate within 14 days of the conclusion of the proceeding or before the expiration of the deadline for its completion, whichever is longer. The person(s) responsible for filing closing documents with the court shall also sign the report to the court. The parties shall give a copy of their signed agreement, consent judgment or voluntary dismissal(s) to the neutral evaluator, arbitrator or presiding officer and all parties at the proceeding.

(ii) If an agreement is reached upon all issues prior to the evaluation, arbitration or summary trial or while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all issues with the court within 14 days or before the expiration of the deadline for completion of the proceeding whichever is longer.

(iii) When a case is settled upon all issues, all attorneys of record must notify the senior resident judge within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s), *and when*.

(c) Payment of neutral's fee. The parties shall pay the neutral's fee as provided by Rule 10.C.(l2).

(10) Selection of Neutrals in Other Settlement Procedures. The parties may select any individual to serve as a neutral in any settlement procedure authorized by these rules. For arbitration, the parties may select either a single arbitrator or a panel of arbitrators. Notice of such selection shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the order requiring a mediated settlement conference.

The notice shall be on a NCAOC form. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

(11) Disqualification. Any party may move a resident or presiding superior court judge of the district in which an action is pending for an order disqualifying the neutral; and for good cause, such order shall be entered. Cause shall exist if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) Compensation of the Neutral. A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparing for the neutral evaluation, conducting the proceeding and making and reporting the award shall be compensable time.

Unless otherwise ordered by the court or agreed to by the parties, the neutral's fees shall be paid in equal shares by the parties. For purposes of this section, multiple parties shall be considered one party when they are represented by the same counsel. The presiding officer and jurors in a summary jury trial are neutrals within the meaning of these Rules and shall be compensated by the parties.

(13) Sanctions for Failure to Attend Other Settlement Procedure or Pay Neutral's Fee. Any person required to attend a settlement procedure or to pay a neutral's fee in compliance with N.C.G.S. § 7A-38.1 and the rules promulgated by the Supreme Court to implement that section, who fails to attend or to pay the fee without good cause, shall be subject to the contempt powers of the court and monetary sanctions imposed by a resident or presiding superior court judge. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, neutral fees, expenses and loss of earnings incurred by persons attending the procedure. A party seeking sanctions against a person or a resident or presiding judge upon his/her own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

RULE 11. RULES FOR NEUTRAL EVALUATION

A. NATURE OF NEUTRAL EVALUATION. Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing candid assessment of liability, settlement value and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also

responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. PRE-CONFERENCE SUBMISSIONS. No later than 20 days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, shall not be more than five pages in length and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than 10 days prior to the date established for the neutral evaluation conference to begin any party may, but is not required to, send additional written information not exceeding three pages in length to the evaluator, responding to the submission of an opposing party. The response shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) Evaluator's Opening Statement. At the beginning of the conference the evaluator shall define and describe

the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the parties.

(2) Oral Report to Parties by Evaluator. In addition to the written report to the court required under these rules at the conclusion of the neutral evaluation conference, the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of liability, estimated settlement value and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefore. The evaluator shall not reduce his or her oral report to writing and shall not inform the court thereof.

(3) Report of Evaluator to Court. Within 10 days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the court using a NCAOC form. The evaluator's report shall inform the court when and where the evaluation was held, the names of those who attended and the names of any party, attorney or insurance company representative known to the evaluator to have been absent from the neutral evaluation without permission. The report shall also inform the court whether or not an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the evaluator to send a copy of any agreement reached by the parties to the court.

H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS. If all parties to the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions.

RULE 12. RULES FOR ARBITRATION

In this form of settlement procedure the parties select an arbitrator who shall hear the case and enter an advisory decision. The arbitrator's decision is made to facilitate the parties' negotiation of a settlement and is non-binding, unless neither party timely requests a trial *de novo*, in which case the decision is entered by the senior resident superior court judge as a judgment, or the parties agree that the decision shall be binding.

A. ARBITRATORS.

(1) Arbitrator's Canon of Ethics. Arbitrators shall comply with the Canons of Ethics for Arbitrators promulgated by the Supreme Court of North Carolina (Canons). Arbitrators shall be disqualified and must recuse themselves in accordance with the Canons.

B. EXCHANGE OF INFORMATION.

(1) Pre-hearing Exchange of Information. At least 10 days before the date set for the arbitration hearing the parties shall exchange in writing:

(a) Lists of witnesses they expect to testify;

(b) Copies of documents or exhibits they expect to offer into evidence; and

(c) A brief statement of the issues and contentions of the parties.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing. Each party shall bring to the hearing and provide to the arbitrator a copy of these materials. These materials shall not be filed with the court or included in the case file.

(2) Exchanged Documents Considered Authenticated. Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(3) Copies of Exhibits Admissible. Copies of exchanged documents or exhibits are admissible in arbitration hearings, in lieu of the originals.

C. ARBITRATION HEARINGS.

(1) Witnesses. Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(2) Subpoenas. Rule 45 of the North Carolina Rules of Civil Procedure (N.C.R.Civ.P.) shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these Rules.

(3) Motions. Designation of an action for arbitration does not affect a party's right to file any motion with the court.

(a) The court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in the award. Parties shall state their contentions regarding pending motions referred to the arbitrator in the exchange of information required by Rule 12.B.(1).

(b) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the court so orders.

(4) Law of Evidence Used as Guide. The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(5) Authority of Arbitrator to Govern Hearings. Arbitrators shall have the authority of a trial judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all matters involving contempt to the senior resident superior court judge.

(6) Conduct of Hearing. The arbitrator and the parties shall review the list of witnesses, exhibits and written

statements concerning issues previously exchanged by the parties pursuant to Rule 12.B.(1), above. The order of the hearing shall generally follow the order at trial with regard to opening statements and closing arguments of counsel, direct and cross-examination of witnesses and presentation of exhibits. However, in the arbitrator's discretion the order may be varied.

(7) No Record of Hearing Made. No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(8) Parties must be Present at Hearings; Representation. Subject to the provisions of Rule 10.C.(9), all parties shall be present at hearings in person or through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator. All parties may be represented by counsel. Parties may appear *pro se* as permitted by law.

(9) Hearing Concluded. The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments the arbitrator permits have been completed. In exceptional cases, the arbitrator has discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing has been concluded.

D. THE AWARD.

(1) Filing the Award. The arbitrator shall file a written award signed by the arbitrator and filed with the clerk of superior court in the county where the action is pending, with a copy to the senior resident superior court judge within 20 days after the hearing is concluded or the receipt of post-hearing briefs whichever is later. The award shall inform the court of the absence of any party, attorney or insurance company representative known to the arbitrator to have been absent from the arbitration without permission. An award form, which shall be a NCAOC form, shall be used by the arbitrator as the report to the court and may be used to record its award. The report shall also inform the court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with

the court. Local rules shall not require the arbitrator to send a copy of any agreement reached by the parties to the court.

(2) Findings; Conclusions; Opinions. No findings of fact and conclusions of law or opinions supporting an award are required.

(3) Scope of Award. The award must resolve all issues raised by the pleadings, may be in any amount supported by the evidence, shall include interest as provided by law, and may include attorney's fees as allowed by law.

(4) Costs. The arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party.

(5) Copies of Award to Parties. The arbitrator shall deliver a copy of the award to all of the parties or their counsel at the conclusion of the hearing or the arbitrator shall serve the award after filing. A record shall be made by the arbitrator of the date and manner of service.

E. TRIAL DE NOVO.

(1) Trial *De Novo* as of Right. Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial *de novo* as of right upon filing a written demand for trial *de novo* with the court, and service of the demand on all parties, on a NCAOC form within 30 days after the arbitrator's award has been served. Demand for jury trial pursuant to N.C.R.Civ.P. 38(b) does not preserve the right to a trial *de novo*. A demand by any party for a trial *de novo* in accordance with this section is sufficient to preserve the right of all other parties to a trial *de novo*. Any trial *de novo* pursuant to this section shall include all claims in the action.

(2) No Reference to Arbitration in Presence of Jury. A trial *de novo* shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the court's approval.

F. JUDGMENT ON THE ARBITRATION DECISION.

(1) Termination of Action Before Judgment. Dismissals or a consent judgment may be filed at any time before entry of judgment on an award.

(2) Judgment Entered on Award. If the case is not terminated by dismissal or consent judgment and no party files a demand for trial *de novo* within 30 days after the award is served, the senior resident superior court judge shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be served on all parties or their counsel.

G. AGREEMENT FOR BINDING ARBITRATION.

(1) Written Agreement. The arbitrator's decision may be binding upon the parties if all parties agree in writing. Such agreement may be made at any time after the order for arbitration and prior to the filing of the arbitrator's decision. The written agreement shall be executed by the parties and their counsel and shall be filed with the clerk of superior court and the senior resident superior court judge prior to the filing of the arbitrator's decision.

(2) Entry of Judgment on a Binding Decision. The arbitrator shall file the decision with the clerk of superior court and it shall become a judgment in the same manner as set out in N.C.G.S. § 1-567.1 ff.

H. MODIFICATION PROCEDURE.

Subject to approval of the arbitrator, the parties may agree to modify the procedures required by these rules for court ordered arbitration.

MSC RULE 13. RULES FOR SUMMARY TRIALS

In a summary bench trial, evidence is presented in a summary fashion to a presiding officer, who shall render a verdict. In a summary jury trial, evidence is presented in summary fashion to a privately procured jury, which shall render a verdict. The goal of summary trials is to obtain an accurate prediction of the ultimate verdict of a full civil trial as an aid to the parties and their settlement efforts.

Rule 23 of the General Rules of Practice also provide for summary jury trials. While parties may request of the court permission to utilize that process, it may not be substituted in lieu of mediated settlement conferences or other procedures outlined in these rules.

(A) PRE-SUMMARY TRIAL CONFERENCE.

Prior to the summary trial, counsel for the parties shall attend a conference with the presiding officer selected by the parties pursuant to Rule 10.C.(10). That presiding officer shall issue an order which shall:

(1) onfirm the completion of discovery or set a date for the completion;

(2) Order that all statements made by counsel in the summary trial shall be founded on admissible evidence, either documented by deposition or other discovery previously filed and served or by affidavits of the witnesses;

(3) Schedule all outstanding motions for hearing;

(4) Set dates by which the parties exchange:

(a) A list of parties' respective issues and contentions for trial;

(b) A preview of the party's presentation, including notations as to the document (*e.g.* deposition, affidavit, letter, contract) which supports that evidentiary statement;

(c) All documents or other evidence upon which each party will rely in making its presentation; and

(d) All exhibits to be presented at the summary trial.

(5) Set the date by which the parties shall enter a stipulation, subject to the presiding officer's approval, detailing the time allowable for jury selection, opening statements, the presentation of evidence and closing arguments (total time is usually limited to one day);

(6) Establish a procedure by which private, paid jurors will be located and assembled by the parties if a summary jury trial is to be held and set the date by which the parties shall submit agreed upon jury instructions, jury selection questionnaire, and the number of potential jurors to be questioned and seated;

(7) Set a date for the summary jury trial; and

(8) Address such other matters as are necessary to place the matter in a posture for summary trial.

B. PRESIDING OFFICER TO ISSUE ORDER IF PARTIES UNABLE TO AGREE. If the parties are unable to agree upon the dates and procedures set out in Section A of this Rule, the presiding officer shall issue an order which addresses all matters necessary to place the case in a posture for summary trial.

C. STIPULATION TO A BINDING SUMMARY TRIAL. At any time prior to the rendering of the verdict, the parties may stipulate that the summary trial be binding and the verdict become a final judgment. The parties may also make a binding high/low agreement, wherein a verdict below a stipulated floor or above a stipulated ceiling would be rejected in favor of the floor or ceiling.

D. EVIDENTIARY MOTIONS. Counsel shall exchange and file motion *in limine* and other evidentiary matters, which shall be heard prior to the trial. Counsel shall agree prior to the hearing of said motions as to whether the presiding officer's rulings will be binding in all subsequent hearings or non-binding and limited to the summary trial.

E. JURY SELECTION. In the case of a summary jury trial, potential jurors shall be selected in accordance with the procedure set out in the pre-summary trial order. These jurors shall complete a questionnaire previously stipulated to by the parties. Eighteen jurors or such lesser number as the parties agree shall submit to questioning by the presiding officer and each party for such time as is allowed pursuant to the Summary Trial Pre-trial Order. Each party shall then have three peremptory challenges, to be taken alternately, beginning with the plaintiff. Following the exercise of all peremptory challenges, the first 12 seated jurors, or such lesser number as the parties may agree, shall constitute the panel.

After the jury is seated, the presiding officer in his/her discretion, may describe the issues and procedures to be used in presenting the summary jury trial. The jury shall not be informed of the non-binding nature of the proceeding, so as not to diminish the seriousness with which they consider the matter and in the event the parties later stipulate to a binding proceeding.

F. PRESENTATION OF EVIDENCE AND ARGUMENTS OF COUNSEL. Each party may make a brief opening statement, following which each side shall present its case within the time limits set in the Summary Trial Pre-trial Order. Each party may reserve a portion of its time for rebuttal or surrebuttal evidence. Although closing arguments are generally omitted, subject to the presiding officer's discretion and the parties' agreement, each party may be allowed to make closing arguments within the time limits previously established.

Evidence shall be presented in summary fashion by the attorneys for each party without live testimony. Where the credibility of a witness is important, the witness may testify in person or by video deposition. All statements of counsel shall be founded on evidence that would be admissible at trial and documented by prior discovery.

Affidavits offered into evidence shall be served upon opposing parties far enough in advance of the proceeding to allow time for affiants to be deposed. Counsel may read portions of the deposition to the jury. Photographs, exhibits, documentary evidence and accurate summaries of evidence through charts, diagrams, evidence notebooks or other visual means are encouraged, but shall be stipulated by both parties or approved by the presiding officer.

G. JURY CHARGE. In a summary jury trial, following the presentation of evidence by both parties, the presiding officer shall give a brief charge to the jury, relying on predetermined jury instructions and such additional instructions as the presiding officer deems appropriate.

H. DELIBERATION AND VERDICT. In a summary jury trial, the presiding officer shall inform the jurors that they should attempt to return a unanimous verdict. The jury shall be given a verdict form stipulated to by the parties or approved by the presiding officer. The form may include specific interrogatories, a general liability inquiry and/or an inquiry as to damages. If, after diligent efforts and a reasonable time, the jury is unable to reach a unanimous verdict, the presiding officer may recall the jurors and encourage them to reach a verdict quickly and/or inform them that they may return separate verdicts, for which purpose the presiding officer may distribute separate forms.

In a summary bench trial, at the close of the presentation of evidence and arguments of counsel and after allowing time for

settlement discussions and consideration of the evidence by the presiding officer, the presiding officer shall render a decision. Upon a party's request, the presiding officer may allow three business days for the filing of post-hearing briefs. If the presiding officer takes the matter under advisement or allows post-hearing briefs, the decision shall be rendered no later than 10 days after the close of the hearing or filing of briefs whichever is longer.

I. JURY QUESTIONNING. In a summary jury trial the presiding officer may allow a brief conference with the jurors in open court after a verdict has been returned, in order to determine the basis of the jury's verdict. However, if such a conference is used, it should be limited to general impressions. The presiding officer should not allow counsel to ask detailed questions of jurors to prevent altering the summary trial from a settlement technique to a form of pre-trial rehearsal. Jurors shall not be required to submit to counsels' questioning and shall be informed of the option to depart.

J. SETTLEMENT DISCUSSIONS. Upon the retirement of the jury in summary jury trials or the presiding officer in summary bench trials, the parties and/or their counsel shall meet for settlement discussions. Following the verdict or decision, the parties and/or their counsel shall meet to explore further settlement possibilities. The parties may request that the presiding officer remain available to provide such input or guidance as the presiding officer deems appropriate.

K. MODIFICATION OF PROCEDURE. Subject to approval of the presiding officer, the parties may agree to modify the procedures set forth in these Rules for summary trial.

L. REPORT OF PRESIDING OFFICER. The presiding officer shall file a written report no later than 10 days after the verdict. The report shall be signed by the presiding officer and filed with the clerk of the superior court in the county where the action is pending, with a copy to the senior resident court judge. The presiding officer's report shall inform the court of the absence of any party, attorney or insurance company representative known to the presiding officer to have been absent from the summary jury or summary bench trial without permission. The report may be used to record the verdict. The report shall also inform the court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local

rules shall not require the presiding officer to send a copy of any agreement reached by the parties.

RULE 14. LOCAL RULE MAKING

The senior resident superior court judge of any district conducting mediated settlement conferences under these Rules is authorized to publish local rules, not inconsistent with these Rules and N.C.G.S. § 7A-38.1, implementing mediated settlement conferences in that district.

RULE 15. DEFINITIONS

A. The term, senior resident superior court judge, as used throughout these rules, shall refer both to said judge or said judge's designee.

B. The phrase, NCAOC forms, shall refer to forms prepared by, printed and distributed by the NCAOC to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the NCAOC. Proposals for the creation or modification of such forms may be initiated by the Commission.

RULE 16. TIME LIMITS

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the N.C.R.Civ.P.

In the Supreme Court of North Carolina
Order Adopting Amendments To The Rules Implementing Statewide Mediated Settlement Conferences And Other Settlement Procedures
In Superior Court Civil Actions

WHEREAS, section 7A-38.1 of the North Carolina General Statutes codifies a statewide system of court-ordered mediated settlement conferences to be implemented in superior court judicial districts in order to facilitate the resolution of civil actions within the jurisdiction of those districts, and

WHEREAS, N.C.G.S. § 7A-38.1(c) enables this Court to implement section 7A-38.1 by adopting rules and amendments to rules concerning said mediated settlement conferences.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.1(c), the Rules Implementing Statewide Mediated Settlement Conferences and Other

Settlement Procedures in Superior Court Civil Actions are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of January, 2012.

Adopted by the Court in conference the 6th day of October, 2011. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules of the North Carolina Supreme Court Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE RULES OF THE NORTH CAROLINA SUPREME COURT FOR THE DISPUTE RESOLUTION COMMISSION

TABLE OF CONTENTS

I. OFFICERS OF THE COMMISSION.

A. Officers. The Dispute Resolution Commission (Commission) shall establish the offices of chair and vice chair.

B. Appointment; Elections.

(1) The chair shall be appointed for a two-year term and shall serve at the pleasure of the Chief Justice of the Supreme Court of North Carolina (Supreme Court).

(2) The vice chair shall be elected by vote of the full Commission for a two-year term and shall serve in the absence of the chair.

C. Committees.

(**1**) The chair may appoint such standing and *ad hoc* committees as are needed and designate Commission members to serve as committee chairs.

(2) The chair may, with approval of the full Commission, appoint ex-officio members to serve on either standing or *ad hoc* committees. Ex-officio members may vote upon issues before committees but not upon issues before the Commission.

II. COMMISSION OFFICE; STAFF.

A. Office. The chair, in consultation with the director of the North Carolina Administrative Office of the Courts (NCAOC), is authorized to establish and maintain an office for the conduct of Commission business.

B. Staff. The chair, in consultation with the director of the NCAOC, is authorized to appoint an executive secretary and to: (1) fix his or her terms of employment, salary, and benefits; (2) determine the scope of his or her authority and duties and (3) delegate to the executive secretary the authority to employ necessary secretarial and staff assistants, with the approval of the director of the NCAOC.

III. COMMISSION MEMBERSHIP.

A. Vacancies. Upon the death, resignation or permanent incapacitation of a member of the Commission, the chair shall notify the appointing authority and request that the vacancy created by the death, resignation or permanent incapacitation be filled. The appointment of a successor shall be for the former member's unexpired term.

B. Disqualifications. If, for any reason, a Commission member becomes disqualified to serve, that member's appointing authority shall be notified and requested to take appropriate action. If a member resigns or is removed, the appointment of a successor shall be for the former member's unexpired term.

C. Conflicts of Interest and Recusals. All members and ex-officio members of the Commission must:

(1) Disclose any present or prior interest or involvement in any matter pending before the Commission or its committees for decision upon which the member or ex-officio member is entitled to vote;

(2) Recuse himself or herself from voting on any such matter if his or her impartiality might reasonably be questioned; and

(3) Continue to inform themselves and to make disclosures of subsequent facts and circumstances requiring recusal.

D. Compensation. Pursuant to N.C.G.S. § 138-5, ex-officio members of the Commission shall receive no compensa-

tion for their services but may be reimbursed for their out-of-pocket expenses necessarily incurred on behalf of the Commission and for their mileage, subsistence and other travel expenses at the per diem rate established by statutes and regulations applicable to state boards and commissions.

IV. MEETINGS OF THE COMMISSION.

A. Meeting Schedule. The Commission shall meet at least twice each year pursuant to a schedule set by the Commission and in special sessions at the call of the chair or other officer acting for the chair.

B. Quorum. A majority of Commission members shall constitute a quorum. Decisions shall be made by a majority of the members present and voting except that decisions to dismiss complaints or impose sanctions pursuant to Rule VIII of these Rules or to deny certification or certification renewal or to revoke certification pursuant to Rule IX of these Rules shall require an affirmative vote consistent with those Rules.

C. Public Meetings. All meetings of the Commission for the general conduct of business and minutes of such meetings shall be open and available to the public except that meetings, portions of meetings or hearings conducted pursuant to Rules VIII and IX of these Rules may be closed to the public in accordance with those Rules.

D. Matters Requiring Immediate Action. If, in the opinion of the chair, any matter requires a decision or other action before the next regular meeting of the Commission and does not warrant the call of a special meeting, it may be considered and a vote or other action taken by correspondence, telephone, facsimile~~,~~ or other practicable method; provided, all formal Commission decisions taken are reported to the executive secretary and included in the minutes of Commission proceedings.

V. COMMISSION'S BUDGET.

The Commission, in consultation with the director of the NCAOC, shall prepare an annual budget. The budget and supporting financial information shall be public records.

VI. POWERS AND DUTIES OF THE COMMISSION.

The Commission shall have the authority to undertake activities to expand public awareness of dispute resolution procedures, to foster

growth of dispute resolution services in this state and to ensure the availability of high quality mediation training programs and the competence of mediators. Specifically, the Commission is authorized and directed to do the following:

A. Review and approve or disapprove applications of (1) persons seeking to have training programs certified; (2) persons seeking certification as qualified to provide mediation training; (3) attorneys and non-attorneys seeking certification as qualified to conduct mediated settlement conferences and mediations; and (4) persons or organizations seeking reinstatement following a prior suspension or decertification.

B. Review applications as against criteria for certification set forth in rules adopted by the Supreme Court for mediated settlement conference/mediation programs operating under the Commission's jurisdiction and as against such other requirements of the Commission which amplify and clarify those rules. The Commission may adopt application forms and require their completion for approval.

C. Compile and maintain lists of certified trainers and training programs along with the names of contact persons, addresses and telephone numbers and make those lists available on-line or upon request.

D. Institute periodic review of training programs and trainer qualifications and re-certify trainers and training programs that continue to meet criteria for certification. Trainers and training programs that are not re-certified, shall be removed from the lists of certified trainers and certified training programs.

E. Compile, keep current, and make available on-line lists of certified mediators, which specify the judicial districts in which each mediator wishes to practice.

F. Prepare, keep current and make available on-line biographical information submitted to the Commission by certified mediators in order to make such information accessible to court staff, lawyers, and the wider public.

G. Make reasonable efforts on a continuing basis to ensure that the judiciary; clerks of court; court administration personnel; attorneys; and to the extent feasible, parties to mediation; are aware of the Commission and its office and the Commission's duty to receive and hear com-

plaints against mediators and mediation trainers and training programs.

VII. MEDIATOR CONDUCT.

The conduct of all mediators, mediation trainers and managers of mediation training programs must conform to the Standards of Professional Conduct for Mediators (Standards) adopted by the Supreme Court and enforceable by the Commission and the standards of any professional organization of which such person is a member that are not in conflict nor inconsistent with the Standards. A certified mediator shall inform the Commission of any criminal convictions, disbarments or other revocations or suspensions of a professional license, complaints filed against the mediator or disciplinary actions imposed upon the mediator by any professional organization, judicial sanctions, civil judgments, tax liens or filings for bankruptcy. Failure to do so is a violation of these Rules. Violations of the Standards or other professional standards or any conduct otherwise discovered reflecting a lack of moral character or fitness to conduct mediations or which discredits the Commission, the courts or the mediation process may subject a mediator to disciplinary proceedings by the Commission.

VIII. INVESTIGATION AND REVIEW OF MATTERS OF ETHICAL CONDUCT, CHARACTER, AND FITNESS TO PRACTICE; CONDUCT OF HEARINGS; SANCTIONS.

A. Establishment of the Committee on Standards, Discipline, and Advisory Opinions. The chair of the Commission shall appoint a standing Committee on Standards, Discipline, and Advisory Opinions (SDAO Committee) to review the matters set forth in Section B. below. Members of the Committee shall recuse themselves from deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest. The Commission's executive secretary shall serve as staff to the SDAO Committee.

B. Matters to Be Considered by SDAO Committee. The SDAO Committee shall review and consider the following matters:

(1) Matters relating to the moral character of an applicant for mediator certification or certification renewal or of a certified mediator and appeals of staff decisions to deny an application for mediator

certification or certification renewal on the basis of the applicant's character;

(2) Matters relating to the moral character of any trainer or manager affiliated with a certified mediator trainining program or one that is an applicant for certification or certification renewal and appeals of staff decisions to deny an application for mediator training program certification or certification renewal on the basis of the character of any trainer or manager affiliated with the program;

(3) Complaints by a member of the Commission, its staff, a judge, court staff or any member of the public regarding the character, conduct or fitness to practice of a mediator or a trainer or manager affiliated with a certified mediator training program or that allege a violation of the program rules or the Standards; and

(4) The drafting of advisory opinions pursuant to the Commission's Advisory Opinion Policy.

C. Initial Staff Review and Determination.

(1) Review and Referral Of Matters Relating to Moral Character. The executive secretary shall review information relating to the moral character of applicants for mediator or mediator training program certification or certification renewal, mediators and mediator training program managers and administrators (applicants) including matters which applicants are required to report under program rules.

The executive secretary may contact applicants to discuss matters reported and conduct background checks on applicants. Any third party with knowledge of the above matters or any other information relating to the moral character of an applicant may notify the Commission. Commission staff shall seek to verify any such third party reports and may disregard those that cannot be verified. Commission staff may contact any agency where complaints about an applicant have been filed or any agency or judge that has imposed discipline.

All such reported matters or any other information gathered by Commission staff and bearing on moral

character shall be forwarded directly to the SDAO Committee for its review, except those matters expressly exempted from review by the Guidelines for Reviewing Pending Grievances/Complaints, Disciplinary Actions Taken and Convictions (Guidelines). Matters that are exempted by the *Guidelines* may be processed by Commission staff and will not act as a bar to certification or certification renewal.

The executive secretary or the SDAO Committee may elect to take any matter relating to an applicant's moral character, including matters reported by third parties or revealed by background check, and process it as a complaint pursuant to Rule VIII.C.3.below. The executive secretary may consult with the chair prior to making such election.

(2) Executive Secretary Review of Oral or Written Complaints. The executive secretary shall review oral and written complaints made to the Commission regarding the conduct, character or fitness to practice of a mediator or a trainer or manager affiliated with a certified mediator training program (respondent), except that the executive secretary shall not act on anonymous complaints unless staff can independently verify the allegations made.

(a) Oral complaints. If after reviewing an oral complaint, the executive secretary determines it is necessary to contact third party witnesses about the matter or to refer it to the SDAO Committee, the executive secretary shall first make a summary of the complaint and forward it to the complaining party who shall be asked to sign the summary along with a release and to return it to the Commission's office, except that complaints initiated by a member of the Commission, SDAO Committee or Commission staff or by judges, other court officials~~,~~ or court staff need not be in writing and, upon request, the identity of the complaining party may be withheld from the respondent. The executive secretary shall not contact any third parties in the course of investigating a matter until such

time as ~~the~~ a signed summary and release have been returned to the Commission.

(b) Written complaints. Commission staff shall acknowledge all written complaints within ~~twenty (20)~~ 30 days of receipt. Written complaints may be made by letter or email or filed on the Commission's approved complaint form. If a complaint is not made on the approved form, Commission staff shall require the complaining party to sign a release before contacting any third parties in the course of an investigation.

(c) If a complaining party refuses to sign a complaint summary prepared by the executive secretary or to sign a release or otherwise seeks to withdraw a complaint after filing it with the Commission, the executive secretary or a SDAO Committee member may pursue the complaint. In determining whether to pursue a complaint independently, the executive secretary or a SDAO Committee member shall consider why the complaining party is unwilling to pursue the matter further, whether the complaining party is willing to testify if a hearing is necessary, whether the complaining party has specifically asked to withdraw the complaint, the seriousness of the allegations made in the complaint, whether the circumstances complained of may be independently verified without the complaining party's participation and whether there have been previous complaints filed regarding the respondent's conduct.

(d) If the executive secretary asks a respondent to respond in writing to a complaint, the respondent shall be provided with a copy of the complaint and any supporting evidence provided by the complaining party. The respondent shall have 30 days from the date of the executive secretary's letter transmitting the complaint to respond. Upon request, the respondent may be afforded 10 additional days to respond to the complaint.

~~d~~ **(e)** There shall be no statute of limitations on the filing of complaints.

(3) Initial Determination on Oral and Written Complaints.

After reviewing a Rule VIII.B.3. complaint and any additional information gathered, including information supplied by the respondent and any witnesses contacted, the executive secretary shall determine whether to:

(a) Recommend Dismissal. The executive secretary shall make a recommendation to dismiss a complaint if s/he concludes that the complaint does not warrant further action. Such recommendation shall be made to the chair of the SDAO Committee. If after giving the complaint due consideration, the SDAO chair disagrees with the executive secretary's ~~, the complaint shall be dismissed with notification to the complaining party, the respondent, and any witnesses contacted~~ recommendation to dismiss, s/he may direct staff to refer the matter for conciliation or to the full SDAO Committee for review. ~~The Executive Secretary shall note for the file why a determination was made to dismiss the complaint.~~ If the chair agrees with the executive secretary, the complaint shall be dismissed with notification to the complaining party, the respondent and any witnesses contacted. The executive secretary shall note for the file why a determination was made to dismiss the complaint. Dismissed complaints shall remain on file with the Commission for at least five years and the SDAO Committee may take such complaints into consideration if additional complaints are later made against the same respondent.

The complaining party shall have 30 days from the date of ~~notification to appeal the Chair's determination~~ the letter sent by certified U.S. mail, return receipt requested, notifying him or her that the complaint has been dismissed to appeal the determination to the full SDAO Committee. ~~on Standards,~~

~~Discipline, and Advisory Opinions. If after giving the complaint due consideration, the Chair disagrees with the Executive Secretary's recommendation to dismiss, s/he may direct staff to refer the matter for conciliation or to the full Committee for review.~~

(b) Refer to Conciliation. If the executive secretary determines that the complaint appears to be largely the result of a misunderstanding between the respondent and complainant or raises a best practices concern(s) or technical or relatively minor rule violation(s) resulting in minimal harm to the complainant, the matter may be referred for conciliation after speaking with the parties and concluding that they are willing to discuss the matter and explore the complainant's concerns. Once a matter is referred for conciliation, the executive secretary may serve as a resource to the parties, but shall not act as their mediator. Prior to or at the time a matter is referred for conciliation, Commission staff shall provide written information to the complainant explaining the conciliation process and advising him/her that the complaint will be deemed to be resolved and the file closed if the complainant does not notify the Commission within 90 days of the referral that conciliation either failed to occur or did not resolve the matter. If either the complaining party or the respondent refuses conciliation or the complaining party notifies Commission staff that conciliation failed, the executive secretary may refer the matter to the SDAO Committee for review or to the SDAO chair with a recommendation for dismissal.

(c) Refer to SDAO Committee. Following initial investigation, including contacting the respondent and any witnesses, if necessary, the executive secretary shall refer all Rule VIII.B.3. matters to the full SDAO Committee when such matters raise concerns about possible significant program rule or Standards violations or raise a significant question about a respondent's character, conduct or fitness to practice. No matter shall be referred to the SDAO Committee

until the respondent has been forwarded a copy of the complaint and a copy of these Rules and allowed a 30 day period in which to respond. Upon request, the respondent may be afforded 10 additional days to respond.

The respondent's response to the complaint and the responses of any witnesses or others contacted during the investigation shall not be forwarded to the complainant, except as provided for in N.C.G.S. § 7A-38.2(h) and there shall be no opportunity for rebuttal. The response shall be included in the materials forwarded to the SDAO Committee. ~~In addition, i~~If any witnesses were contacted, any written responses or any notes from conversations with those witnesses shall also be included in the materials forwarded to the SDAO Committee.

(4) Confidentiality. Commission staff will create and maintain files for all matters considered pursuant to Rule VIII.B. Those files shall contain information submitted by or about applicants and respondents including any notes taken by the executive secretary or Commission staff relative to reports regarding moral character of applicants or complaints about mediators, trainers or managers. All information in those files shall remain confidential until such time as the SDAO Committee completes its preliminary investigation and finds probable cause following deliberation pursuant to Rule VIII.D.2.

The executive secretary shall reveal the names of respondents to the SDAO Committee and the SDAO Committee shall keep the names of respondents and other identifying information confidential except as provided for in N.C.G.S. § 7A-38.2(h).

D. SDAO Committee Review and Determination on Matters Referred by Staff.

(1) SDAO Committee Review of Applicant Moral Character Issues and Complaints.

The SDAO Committee shall review all matters brought before it by the executive secretary pursuant to the provisions of Rule VIII.B. above and may contact any other persons or entities for additional information. The chair or his/her designee

may issue subpoenas for the attendance of witnesses and for the production of books, papers or other documentary evidence deemed necessary or material to the SDAO Committee's investigation and review of the matter.

(2) SDAO Committee Deliberation.

The SDAO Committee shall deliberate to determine whether probable cause exists to believe that an applicant or respondent's conduct:

(a) is a violation of the Standards of Professional Conduct for Mediators or any other standards of professional conduct that are not in conflict with nor inconsistent with the Standards and to which the mediator, trainer or manager is subject;

(b) is a violation of Supreme Court program rules or any other program rules for mediated settlement conference/mediation programs;

(c) **i**s inconsistent with good moral character (Mediated Settlement Conference Program Rule 8.E., Family Financial Settlement Conference Rule 8.F. and District Criminal Court Rule 7.E.);

(d) reflects a lack of fitness to conduct mediated settlement conferences/mediations or to serve as a trainer or training program manager (Rule VII above); and/or

(e) discredits the Commission, the courts or the mediation process (Rule VII above).

(3) SDAO Committee Determination.

Following deliberation, the SDAO Committee shall determine whether to dismiss a matter, ~~or to~~ make a referral or ~~to~~ impose sanctions.

(a) **To Dismiss.** If a majority of SDAO Committee members reviewing an issue of moral character or a complaint finds no probable cause, the SDAO Committee shall dismiss the matter and instruct the executive secretary:

(i) to certify or recertify the applicant, if an application is pending, or to notify the

mediator, trainer or manager by certified U.S. mail, return receipt requested, that no further action will be taken in the matter; or

(ii) to notify the complaining party and the respondent by certified U.S. mail, return receipt requested, that no further action will be taken and that the matter is dismissed. The complaining party shall have no right of appeal from the SDAO Committee's decision to dismiss the complaint. All witnesses contacted shall also be notified that the complaint has been dismissed.

(b) To Refer. If a majority of SDAO Committee members determines that:

(i) any violation of the program rules or Standards that occurred was technical or relatively minor in nature, caused minimal harm to a complainant~~t~~, and did not discredit the program, courts~~,~~ or Commission, the SDAO Committee may:

(1) dismiss the complaint with a letter to the respondent citing the violation and advising him or her to avoid such conduct in the future, or

(2) refer the respondent to one or more members of the SDA Committee to discuss the matter and explore ways that the respondent may avoid similar complaints in the future.

(ii) the applicant or respondent's conduct has raised best practices or professionalism concerns, the SDAO Committee may:

(1) direct staff to dismiss the complaint with a letter to the respondent advising him/her of the SDAO Committee's concerns and providing guidance, or

(2) direct the respondent to meet with one or more members of the SDAO Committee who will informally dis-

cuss the SDAO Committee's concerns and provide counsel, or

(3) refer the respondent to the Chief Justice's Commission on Professionalism for counseling and guidance; or

(iii) the applicant or respondent's conduct raises significant concerns about his/her mental stability, mental health, lack of mental acuity or possible dementia, or concerns about possible alcohol or substance abuse, the SDAO Committee may, in lieu of or in addition to imposing sanctions, refer the applicant or respondent to the North Carolina State Bar's Lawyer Assistance Program (LAP) for evaluation or, if the applicant or respondent is not a lawyer, to a physician or other licensed mental health professional or to a substance abuse counselor or organization.

Neither letters nor referrals are viewed as sanctions under Rule VIII.E.10. below. Rather, both are intended as opportunities to address concerns and to help applicants or respondents perform more effectively as mediators. There may, however, be instances that are more serious in nature where the SDAO Committee may both make a referral and impose sanctions under Rule VIII. E.10.

In the event that an applicant or respondent is referred to one or more members of the SDAO Committee for counsel, to LAP or some other professional or entity and fails to cooperate regarding the referral; refuses to sign releases or to provide any resulting evaluations to the SDAO Committee; or any resulting discussions or evaluation(s) suggest that the applicant or respondent is notcurrently capable of serving as a mediator, trainer or manager, the SDAO Committee reserves the right to make further determinations in the matter, including decertification. During a

referral under (iii) above, the SDAO Committee may require the applicant or respondent to cease practicing as a mediator, trainer or manager during the referral period and until such time as the SDAO Committee has authorized his/her return to active practice. The SDAO Committee may condition a certification or renewal of recertification on the applicant's successful completion of the referral process.

Any costs associated with a referral, *e.g.*, costs of evaluation or treatment, shall be borne entirely by the applicant or respondent.

(c) To Propose Sanctions. If a majority of SDAO Committee members find probable cause pursuant to Rule VIII.D.2. above, the SDAO Committee shall propose sanctions on the applicant or respondent, except as provided for in Rule VIII.D.3.(b)(i).

Within the 30 day period set forth in Rule VIII.D.~~3.(d)~~ 4. below, an applicant or respondent may contact the SDAO Committee and object to any referral made or sanction imposed on the applicant or respondent, including objecting to any public posting of a sanction, and seek to negotiate some other outcome with the SDAO Committee. The SDAO Committee shall have the authority to engage in such negotiations with the applicant or respondent. During the negotiation period, the respondent may request an extension of the time in which to request an appeal under Rule VIII.~~E~~. D.4. below. The executive secretary, in consultation with the SDAO Committee chair, may extend the appeal period up to an additional 30 days in order to allow more time to complete negotiations.

(4) Right of Appeal. If a referral is made or sanctions are imposed, the applicant or respondent shall have 30 days from the date of the letter sent by U.S. certified mail, return receipt requested, transmitting the SDAO Committee's findings and action to appeal.

Notification of appeal must be made to the Commission's office in writing. If no appeal is received within 30 days, the complainant, applicant or respondent shall be deemed to have accepted the SDAO Committee's findings and proposed sanctions.

E. Appeal to the Commission.

(1) The Commission Shall Meet to Consider Appeals. An appeal of the SDAO Committee's determination pursuant to Rule VIII.~~E.~~ D.4. above shall be heard by the members of the Commission, except that all members of the SDAO Committee who participated in issuing the determination on appeal shall be recused and shall not participate in the Commission's deliberations. No matter shall be heard and decided by less than three Commission members. Members of the Commission shall recuse themselves when they cannot act impartially. Any challenges raised by the appealing party or any other party questioning the neutrality of a member shall be decided by the Commission's chair.

(2) Conduct of the Hearing.

(a) At least 30 days prior to the hearing before the Commission, Commission staff shall forward to all parties, special counsel to the Commission and members of the Commission who will hear the matter, copies of all documents considered by the SDAO Committee and summaries of witness interviews and/or character recommendations.

(b) Hearings conducted by the Commission pursuant to this rule shall be *de novo*.

(c) Applicants, complainants, respondents and any witnesses or others identified as having relevant information about the matter may appear at the hearing with or without counsel.

(d) All hearings will be open to the public except that for good cause shown the presiding officer may exclude from the hearing room all persons except the parties, counsel and those engaged in the hearing. No hearing will be closed to the public over the objection of an applicant or respondent.

(e) In the event that the applicant, complainant~~,~~ or respondent fails to appear without good cause, the Commission shall proceed to hear from those parties and witnesses who are present and make a determination based on the evidence presented at the proceeding.

(f) Proceedings before the Commission shall be conducted informally, but with decorum.

(g) The Commission, through its counsel, and the applicant or respondent may present evidence in the form of sworn testimony and/or written documents. The Commission, through its counsel, and the applicant or respondent may cross-examine any witness called to testify by the other. Commission members may question any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The Commission shall consider all evidence presented and give it appropriate weight and effect.

(h) The Commission's chair or designee shall serve as the presiding officer. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and speedy investigation and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers or other documentary evidence.

(3) Date of Hearing. An appeal of any sanction proposed by the SDAO Committee shall be heard by the Commission within ~~ninety (90)~~ 120 days of the date ~~the sanction is proposed~~ the notice of appeal is filed with the Commission.

(4) Notice of Hearing. The Commission's office shall serve on all parties by certified U.S. mail, return receipt requested, notice of the date, time and place of the hearing no later than 60 days prior to the hearing.

(5) ***Ex Parte* Communications.** No person shall have any *ex parte* communication with members of the Commission concerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to Commission staff.

(6) **Attendance.** All parties, including applicants, complainants and respondents, shall attend in person. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or to allow witnesses to testify by telephone or through video conference with such limitations and conditions as are just and reasonable. If an attorney or witness appears by telephone or video conference, the Commission's staff must be notified at least 20 days prior to the proceeding. At least five days prior to the proceeding, the Commission's staff must be provided with contact information for those who will participate by telephone or video conference.

(7) **Witnesses.** The presiding officer shall exercise discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office and to all other parties at least 10 days prior to the hearing, the names of all witnesses who will be called to testify.

(8) **Transcript.** The Commission shall retain a court reporter to keep a record of the proceeding. Any party who wishes to obtain a transcript of the record may do so at his/her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of tapes alone, non-certified transcripts therefrom, or a record made by a court reporter retained by a party are not part of the official record.

(9) **Commission Decision.** After the hearing, a majority of the Commission members hearing the appeal may: (i) find that there is not clear and convincing evidence to support the imposition of sanctions and, therefore, dismiss the complaint or direct the Commission staff to certify or recertify the mediator

or mediator training program, or (ii) find that there is clear and convincing evidence that grounds exist to impose sanctions and impose sanctions. The Commission may impose the same or different sanctions than imposed by the SDAO Committee. The Commission shall set forth its findings, conclusions and sanctions, or other action, in writing and serve its decision on the parties within 60 days of the date of the hearing.

(10) Sanctions. The sanctions that may be proposed by the SDAO Committee or imposed by the Commission include, but are not limited to, the following:

(a) Private, written admonishment;

(b) Public, written admonishment;

(c) Completion of additional training;

(d) Restriction on types of cases to be mediated in the future;

(e) Reimbursement of fees paid to the mediator or training program;

(f) Suspension for a specified term;

(g) Probation for a specified term;

(h) Certification or renewal of certification upon conditions;

(i) Denial of certification or certification renewal;

(j) Decertification;

(k) Prohibition on participation as a trainer or manager of a certified mediator training program either indefinitely or for a period of time; and

(l) Any other sanction deemed appropriate by the Commission.

(11) Publication of SDAO Committee/Commission Decisions.

(a) Names of respondents who have been reprimanded privately or applicants who have never been certified and have been denied certification shall not be published in the Commission's newsletter ~~and~~ nor on its web site.

(b) Names of respondents or applicants who are sanctioned under any other provision of Section ~~B~~E.10. above and who have been denied reinstatement under Section ~~B~~E.13. below shall be published in the Commission's newsletter and on its web site along with a short summary of the facts involved and the discipline imposed. For good cause shown, the Commission may waive this requirement.

(c) Chief district court judges and/or senior resident superior court judges in judicial districts in which a mediator serves**,** the NC State Bar and any other professional licensing/certification bodies to which a mediator is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any sanction imposed upon a mediator except those named in Subsection a. above.

(d) If the Commission imposes sanctions as a result of a complaint filed by a third party, the Commission's office shall, on request, release copies of the complaint, response, counter response and Commission/Committee decision.

(12) Appeal. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions imposing sanctions or denying applications for mediator or mediator training program certification**.** An order imposing sanctions or denying applications for mediator or mediator training program certification shall be reviewable upon appeal ~~where~~ and the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed in the Superior Court in Wake County within 30 days of the date of the Commission's decision.

(13) Reinstatement. An applicant, mediator, trainer~~,~~ or manager who has been sanctioned under this rule may be reinstated as a certified mediator or as an active trainer or manager pursuant to Section ~~B~~E.13.~~g~~h. below. Except as otherwise provided by

the SDAO Committee or Commission, no application for reinstatement may be tendered within two years of the date of the sanction or denial.

(a) A petition for reinstatement shall be made in writing, verified by the petitioner~~,~~ and filed with the Commission's office.

(b) The petition for reinstatement shall contain:

(i) the name and address of the petitioner;

(ii) the offense or misconduct upon which the suspension or decertification or the bar to training or program management was based; and

(iii) a concise statement of facts claimed to justify reinstatement as a certified mediator or a trainer or program manager.

(c) The petition for reinstatement may also contain a request for a hearing on the matter to consider any additional evidence which the petitioner wishes to put forth, including any third party testimony regarding his or her character, competency or fitness to practice as a mediator, trainer or manager.

(d) The Commission's staff shall refer the petition to the Commission for review.

(e) If the petitioner does not request a hearing, the Commission shall review the petition and shall make a decision within 60 days of the filing of the petition. That decision shall be final. If the petitioner requests a hearing, it shall be held within ~~ninety (90)~~ 120 days of the filing of the petition. The Commission shall conduct the hearing consistent with Section ~~B~~E. above. At the hearing, the petitioner may:

(i) appear personally and be heard;

(ii) be represented by counsel;

(iii) call and examine witnesses;

(iv) offer exhibits; and

(v) cross-examine witnesses.

(f) At the hearing, the Commission may call witnesses, offer exhibits~~,~~ and examine the petitioner and witnesses.

(g) The burden of proof shall be upon the petitioner to establish by clear and convincing evidence:

(i) that the petitioner has rehabilitated his/her character; addressed and resolved any conditions which led to his/her suspension or decertification; completed additional training in mediation theory and practice to ensure his/her competency as a mediator, trainer or manager; and/or taken steps to address and resolve any other matter(s) which led to the petitioner's suspension, decertification or prohibition from serving as a trainer or manager; and

(ii) the petitioner's certification will not be detrimental to the Mediated Settlement Conference, Family Financial Settlement, Clerk Mediation ~~or~~ District Criminal Court Mediation Program, or other program rules, or to the Commission, ~~the~~ courts or ~~the~~ public ~~interest;~~ and

(iii) that the petitioner has completed any paperwork required for reinstatement and paid any required reinstatement and/or certification fees.

(h) If the petitioner is found to have rehabilitated him or herself and is fit to serve as a mediator, trainer or manager, the Commission shall reinstate the petitioner as a certified mediator or as an active trainer or manager. However, if the suspension or decertification or the bar to training or management has continued for more than two years, the reinstatement may be conditioned upon the completion of addi-

tional training and observations as needed to refresh skills and awareness of program rules and requirements.

(i) The Commission shall set forth its decision to reinstate a petitioner or to deny reinstatement in writing, making findings of fact and conclusions of law, and serve the decision on the petitioner by U.S. certified mail, return receipt requested, within 30 days of the date of the hearing.

(j) If a petition for reinstatement is denied, the petitioner may not apply again pursuant to this section until two years have lapsed from the date the denial was issued.

(k) The General Court of Justice, Superior Court Division in Wake County, shall have jurisdiction over appeals of Commission decisions to deny reinstatement. An order denying reinstatement shall be reviewable upon appeal, ~~where~~ and the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed in the Superior Court in Wake County within 30 days of the date of the Commission's decision.

RULE IX. INVESTIGATION AND REVIEW OF APPLICATIONS FOR CERTIFICATION DENIED OR REVOKED FOR REASONS OTHER THAN THOSE PERTAINING TO ETHICS AND CONDUCT.

A. Establishment of the Standing Committee on Certification of Mediators and Mediator Training Programs.

(1) Establishment of Certification Committee. The chair of the Commission shall appoint a standing Committee on Certification of Mediators and Mediator Training Programs (Certification Committee) to review the matters set forth in Section 2 below. Members of the Certification Committee shall recuse themselves from deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest.

(2) Matters to Be Considered by Certification Committee. The Certification Committee shall review and consider the following matters:

(a) Appeals of staff decisions to deny an application filed by a person seeking mediator certification or recertification or by a mediator training program seeking certification or recertification, because of deficiencies that do not relate to conduct or ethics. The latter deficiencies shall be considered pursuant to Rule VIII.

(b) Complaints which are filed by a member of the Commission, its staff, or any member of the public about a certified mediator or certified mediator training program or an applicant for certification or certification renewal; except that, complaints relating to applicant, mediator, trainer or manager conduct or ethics shall be considered only pursuant to Rule VIII.

(3) The Investigation of Qualifications.

(a) Information obtained during the process of certification or renewal. Commission staff shall review all pending applications for certification and recertification to determine whether the applicant meets the non-ethics related qualifications set out in program rules adopted by the Supreme Court for mediated settlement conference/mediation programs under the jurisdiction of the Commission and any guidelines or other policies adopted by the Commission amplifying those rules. Commission staff may contact those reporting to request additional information and may consider any other information acquired during the investigation process that bears on the applicant's eligibility for certification or certification renewal.

(b) Complaints about mediator or mediator training program qualifications filed with the Commission. The staff of the Commission shall forward written complaints about the qualifications of a certified mediator or certified mediator training program or any trainer or manager affiliated with such program (affected person/program) that do not pertain to ethics or conduct filed by any

member of the general public, the Commission, or its staff to the Certification Committee for investigation. Copies of such complaints shall be forwarded by certified U.S. mail, return receipt requested, to the affected person.

However, in instances where Commission staff believes a complaint to be wholly without merit, the executive secretary shall refer the matter to the Certification Committee's chair rather than to the Certification Committee as set forth above. If after giving the complaint due consideration, the chair also believes that the complaint is wholly without merit, the complaint shall be dismissed with notification to the complaining party. The complaining party shall have 30 days from the date of notification to appeal the chair's determination to the full Certification Committee. The appeal shall be in writing and directed to the Commission's office.

(c) Investigation by the Certification Committee. The Certification Committee shall investigate all matters brought before it by staff pursuant to the provisions of Sections a. or b**.** The chair or designee may issue subpoenas for the attendance of witnesses and for the production of books, papers or other documentary evidence deemed necessary or material to any such investigation. The chair or designee may contact the following persons and entities for information concerning such application or complaint:

(i) all references, employers, colleges and other individuals and entities cited in applications for mediator certification, including any and all other professional licensing or certification bodies to which the applicant is subject;

(ii) all proposed trainers cited in training program applications and in the case of applications for certification renewal, participants who have completed the training program; and

(iii) all parties bringing complaints about a mediator or a mediator training program's qualifi-

cations for certification or certification renewal and any other person or entity with information about the subject of the complaint.

All information in Commission files pertaining to the initial certification of a mediator or mediation training program or to renewals of such certifications shall be confidential.

(d) Probable Cause Determination. The Certification Committee shall deliberate to determine whether probable cause exists to believe that the affected person/program or the applicant:

(i) does not meet the qualifications for mediator certification set out in program rules adopted by the Supreme Court for mediated settlement conference/mediation programs under the jurisdiction of the Commission or guidelines and other policies adopted bythe Commission that amplify those rules; or

(ii) does not meet the qualifications for mediator training program certification as set out in program rules adopted by the Supreme Court for mediated settlement conference/mediation programs under the jurisdiction of the Commission or guidelines and other policies adopted by the Commission that amplify those rules.

If probable cause is found, that the application for certification or re-certification should be denied or the affected person/program's certification should be revoked.

4. Authority of Certification Committee to Deny Certification or Certification Renewal or to Revoke Certification.

(a) If a majority of Certification Committee members reviewing a matter finds no probable cause pursuant to Section A.3.d. above, Commission staff shall certify or recertify the affected person/program or applicant. If the investigation were initiated by the filing of a written complaint, the Certification Committee shall dismiss the complaint and notify the complaining party and the affected person/program or appli-

cant in writing by certified U.S. mail, return receipt requested, that the complaint has been dismissed and that the affected person/program or applicant will be certified or re-certified. There shall be no right of appeal from the Certification Committee's decision to dismiss a complaint or to certify or re-certify an affected person/program or applicant.

(b) If a majority of Certification Committee members reviewing a matter finds probable cause pursuant to Section A.3.d. above, the Certification Committee shall deny certification or re-certification or revoke certification. The Certification Committee's findings, conclusions, and denial shall be in writing and forwarded to the affected person/program or applicant by certified U.S. mail, return receipt requested.

(c) If the Certification Committee denies certification or re-certification or revokes certification, the affected person/program or applicant may appeal the denial or revocation to the Commission within 30 days from the date of the letter transmitting the Certification Committee's findings, conclusions and denial. Notification of appeal must be in writing and directed to the Commission's office. If no appeal is filed within 30 days, the affected person/program or applicant shall be deemed to have accepted the Certification Committee's findings and denial or revocation.

B. Appeal of the Denial to the Commission.

(1) The Commission Shall Meet. An appeal of a denial or revocation by the Certfication Committee pursuant to Section A.3.d. above shall be heard by the members of the Commission, except that all members of the Certification Committee who participated in issuing the determination that is on appeal shall recuse themselves from participating. No matter shall be heard and decided by less than three Commission members. Members of the Commission shall recuse themselves when they cannot act impartially. Any challenges raised by the appealing party or any other party questioning the neutrality of a member shall be decided by the Commission's chair.

(2) Conduct of the Hearing.

(a) At least 30 days prior to the hearing before the Commission, Commission staff shall forward

to all parties; special counsel to the Commission, if appointed; and members of the Commission who will hear the matter, copies of all documents considered by the Committee and summaries of witness interviews and/or character recommendations.

(b) Hearings conducted by the Commission will be a *de novo* review of the Certification Committee's decision.

(c) The Commission's chair or his/her designee shall serve as the presiding officer. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and speedy investigation and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers or other documentary evidence.

(d) Special counsel supplied either by the North Carolina Attorney General at the request of the Commission or employed by the Commission may present the evidence in support of the denial or revocation of certification. Commission members may question any witnesses called to testify at the hearing.

(e) The Commission, through its counsel, and the applicant or affected person/program may present evidence in the form of sworn testimony and/or written documents. The Commission, through its counsel, and the applicant or affected person/program, may cross-examine any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The Commission shall consider all evidence presented and give it appropriate weight and effect.

(f) All hearings shall be conducted in private, unless the applicant or affected person/program requests a public hearing.

(g) In the event that the complainant, affected person/program, or applicant fails to appear without

good cause, the Commission shall proceed to hear from those parties and witnesses who are present and make a determination based on the evidence presented at the proceeding.

(h) Proceedings before the Commission shall be conducted informally but with decorum.

(3) Date of Hearing. An appeal of any denial by the Certification Committee shall be heard by the Commission within ~~ninety (90)~~ 120 days of the date of the letter transmitting the Certification Committee's findings, conclusions and denial or revocation.

(4) Notice of Hearing. The Commission's office shall serve on all parties by certified U.S. mail, return receipt requested, notice of the date, time, and place of the hearing no later than 60 days prior to the hearing.

(5) *Ex Parte* Communications. No person shall have any *ex parte* communication with members of the Commission concerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to Commission staff.

(6) Attendance. All parties, including complaining parties and applicants, or their representatives in the case of a training program, shall attend in person. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or to allow witnesses to testify by telephone or through video conference with such limitations and conditions as are just and reasonable. If an attorney or witness appears by telephone or video conference, the Commission's staff must be notified at least 20 days prior to the proceeding. At least five days prior to the proceeding, the Commission's staff must be provided with contact information for those who will participate by telephone or video conference.

(7) Witnesses. The presiding officer shall exercise his/her discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office at least 10 days prior to the hearing the names of all witness who will testify for them.

(8) Transcript. The Commission shall retain a court reporter to keep a record of the proceeding. Any party who wishes to obtain a transcript of the record may do so at his or her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of tapes alone, non-certified transcripts therefrom, or a record made by a court reporter retained by a party are not part of the official record.

(9) Commission Decision. After the hearing, a majority of the Commission members hearing the appeal may: (i) find that there is not clear and convincing evidence to support the denial or revocation and, therefore dismiss the complaint or direct the Commission staff to certify or recertify the mediator or mediator training program; or (ii) find that there is clear and convincing evidence to affirm the committee's findings and denial or revocation. The Commission shall set forth its findings, conclusions and denial in writing and serve it on the parties within 60 days of the date of the hearing.

(10) Publication of Committee/Commission Decisions.

(a) Names of applicants for mediator certification or names of mediator training programs that are denied certification or recertification or who have had their certification revoked pursuant to this rule shall not be published in the Commission's newsletter or on its web site and the fact of that denial or revocation shall not be generally publicized.

(b) Chief district court judges and/or senior resident superior court judges in districts which the mediator serves, the NC State Bar and any other professional licensing/certification bodies to which the mediator is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any denial or revocation of certification.

(11) Appeals. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions denying an applica-

tion or revoking a certification**.** An order denying or revoking certification pursuant to this rule shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within 30 days of the date of the Commission's decision.

(12) Reinstatement of Certification. A mediator or training program whose certification renewal has been denied or whose certification has been revoked under this rule may be re-certified or reinstated as a certified mediator or mediation training program pursuant to Section B.12.g. below. An application for reinstatement may be tendered at any time the applicant believes that he/she/it is qualified to be reinstated.

(a) A petition for reinstatement shall be made in writing, verified by the petitioner and filed with the Commission's office.

(b) The petition for reinstatement shall contain:

(i) the name and address of the petitioner;

(ii) the qualification upon which the denial or revocation was based; and

(iii) a concise statement of facts claimed to justify certification or recertification as a certified mediator or mediator training program.

(c) The petition for reinstatement or certification may also contain a request for a hearing on the matter to consider any additional evidence that the petitioner wishes to put forth.

(d) The Commission's staff shall refer the petition to the Commission for review.

(e) If the petitioner does not request a hearing, the Commission shall reviewthe petition and shall make a decision within 60 days of the filing of the petition. That decision shall be final. If the petitioner requests a hearing, it shall be held within 90 days of the filing of the petition. The Commission shall conduct the hearing consistent with Section B. above. At the hearing, the petitioner may:

(i) appear personally and be heard;

(ii) be represented by counsel;

(iii) call and examine witnesses;

(iv) offer exhibits; and

(v) cross-examine witnesses.

(f) At the hearing, the Commission may call witnesses, offer exhibits and examine the petitioner and witnesses.

(g) The burden of proof shall be upon the petitioner to establish by clear and convincing evidence:

(i) that the petitioner has satisfied the qualifications that led to the denial or revocation; and

(ii) that the petitioner has completed any paperwork required for reinstatement and paid any required reinstatement and/or certification fees.

(h) If the petitioner is found to have met the qualifications and is entitled to be certified as a mediator or mediator training program, the Commission shall so certify.

(i) If a petition for reinstatement is denied, the petitioner may apply again pursuant to this section at any time after the qualifications are met.

(j) The Commission shall set forth its decision to certify a mediator or mediator training program or to deny certification in writing, making findings of fact and conclusions of law, and serve the decision on the petitioner by certified U.S. mail, return receipt requested, within 60 days of the date of the hearing.

(k) The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions to deny reinstatement. An order denying reinstatement shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of review shall be filed with

the Superior Court in Wake County within 30 days of the date of the Commission's decision.

X. INTERNAL OPERATING PROCEDURES.

The Commission may adopt and publish internal operating procedures and policies for the conduct of Commission business.

B. The Commission's procedures and policies may be changed as needed on the basis of experience.

In the Supreme Court of North Carolina
Order Adopting Amendments to the Rules of the North Carolina Supreme Court for the Dispute Resolution Commission

WHEREAS, section 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission to provide for the certification and qualification of mediators, other neutrals, and mediation and other neutral training programs, the regulation of mediators, other neutrals, and trainers and managers affiliated with certified or qualified programs, and

WHEREAS, N.C.G.S. § 7A-38.2(a) provides for this Court to implement section 7A-38.2 by adopting rules,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(a), the Supreme Court's Rules for the Dispute Resolution Commission are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of January, 2012.

Adopted by the Court in conference the 6th day of October, 2011. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Supreme Court's Rules for the Dispute Resolution Commission amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

s/Timmons-Goodson, J.
For the Court

AMENDMENTS TO THE STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

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PREAMBLE

These Standards of Professional Conduct for Mediators (Standards) shall apply to all mediators who are certified by the North Carolina Dispute Resolution Commission (Commission) or who are not certified, but are conducting court-ordered mediations in the context of a program or process that is governed by statutes, as amended from time to time, which provide for the Commission to regulate the conduct of mediators participating in the program or process. Provided, however, that if there is a specific statutory provision that conflicts with these Standards, then the statute shall control.

These Standards are intended to instill and promote public confidence in the mediation process and to provide minimum standards for mediator conduct. As with other forms of dispute resolution, mediation must be built upon public understanding and confidence. Persons serving as mediators are responsible to the parties, the public and the courts to conduct themselves in a manner that will merit that confidence. (See Rule VII of the Rules of the North Carolina Supreme Court for the Dispute Resolution Commission.)

It is the mediator's role to facilitate communication and understanding among the parties and to assist them in reaching an agreement. The mediator should aid the parties in identifying and discussing issues and in exploring options for settlement. The mediator should not, however, render a decision on the issues in dispute. In mediation, the ultimate decision whether and on what terms to resolve the dispute belongs to the parties and the parties alone.

I. Competency: A mediator shall maintain professional competency in mediation skills and, where the mediator lacks the skills necessary for a particular case, shall decline to serve or withdraw from serving.

A. A mediator's most important qualification is the mediator's competence in procedural aspects of facilitating the resolution of disputes rather than the mediator's familiarity with technical knowledge relating to the subject of the dispute. Therefore, a mediator shall obtain necessary skills and substantive training appropriate to the mediator's areas of practice and upgrade those skills on an ongoing basis.

B. If a mediator determines that a lack of technical knowledge impairs or is likely to impair the mediator's effectiveness, the mediator shall notify the parties and withdraw if requested by any party.

C. Beyond disclosure under the preceding paragraph, a mediator is obligated to exercise his/her judgment as to whether his/her skills or expertise are sufficient to the demands of the case and, if they are not, to decline from serving or to withdraw.

II. Impartiality: A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute.

A. Impartiality means absence of prejudice or bias in word and action. In addition, it means a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.

B. As early as practical and no later than the beginning of the first session, the mediator shall make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's impartiality.

C. The mediator shall decline to serve or shall withdraw from serving if:

(1) a party objects to his/her serving on grounds of lack of impartiality, and after discussion, the party continues to object; or

(2) the mediator determines he/she cannot serve impartially.

III. Confidentiality: A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.

A. A mediator shall not disclose, directly or indirectly, to any non-participant, any information communicated to the mediator by a participant within the mediation process. A mediator's tendering a copy of an agreement reached in mediation pursuant to a statute that mandates such a tender shall not be considered to be a violation of this paragraph.

B. A mediator shall not disclose, directly or indirectly, to any participant, information communicated to the mediator in confidence by any other participant in the mediation process, unless that participant gives permission to do so. A mediator may encourage a participant to permit disclosure, but absent such permission, the mediator shall not disclose.

C. The confidentiality provisions set forth in A. and B. above notwithstanding, a mediator ~~has discretion to~~ may report otherwise confidential conduct or statements made in preparation for, during or as a follow-up to mediation ~~to a participant, non-participant, law enforcement personnel, or other officials or to give an affidavit, or to testify about such conduct or statements in the following circumstances~~ in the circumstances set forth in sections (1) and (2) below:

(1) A statute requires or permits a mediator to testify or to give an affidavit or to tender a copy of any agreement reached in mediation to the official designated by the statute.

If, pursuant to Family Financial Settlement (FFS) and Mediated Settlement Conference (MSC) Rule 5, a mediator has been subpoenaed by a party to testify about who attended or failed to attend a mediated settlement conference/mediation, the mediator shall limit his/her testimony to providing the names of those who were physically present or who attended by electronic means.

If, pursuant to FFS and MSC Rule 5, a mediator has been subpoenaed by a party to testify about a party's failure to pay the mediator's fee, the mediator's testimony shall be limited to information about the amount of the fee and who had or had not paid it and shall not include statements made by any participant about the merits of the case.

(2) ~~Where public safety is an issue~~: To a participant, non-participant, law enforcement personnel or other persons

affected by the harm intended where public safety is an issue, in the following circumstances:

(i) a party or other participant in ~~to~~ the mediation has communicated to the mediator a threat of serious bodily harm or death to be inflicted on any person, and the mediator has reason to believe the party has the intent and ability to act on the threat; or

(ii) a party or other participant in ~~to~~ the mediation has communicated to the mediator a threat of significant damage to real or personal property and the mediator has reason to believe the party has the intent and ability to act on the threat; or

(iii) a party's or other participant's conduct during the mediation results in direct bodily injury or death to a person.

If the mediator is a North Carolina lawyer and a lawyer made the statements or committed the conduct reportable under subsection C.(2) above, then the mediator shall report the statements or conduct to the North Carolina State Bar (State Bar) or the court having jurisdiction over the matter in accordance with North Carolina State Bar Rule of Professional Conduct 8.3(e).

D. Nothing in this Standard prohibits the use of information obtained in a mediation for instructional purposes or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable.

E. Nothing in this Standard shall prohibit a mediator from revealing communications or conduct occurring prior to, during or after a mediation in the event that a party to or a participant in a mediation has filed a complaint regarding the mediator's professional conduct, moral character or fitness to practice as a mediator and the mediator reveals the communication or conduct for the purpose of defending him/herself against the complaint. In making any such disclosures, the mediator should make every effort to protect the confidentiality of non-complaining parties to or participants in the mediation and avoid disclosing the specific circumstances of the parties' controversy. The mediator may consult with non-complaining parties or witnesses to consider their input regarding disclosures.

IV. Consent: A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator and the party's options within the process.

A. A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require.

B. A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nevertheless, a mediator shall encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

C. If a party appears to have difficulty comprehending the process, issues or settlement options or difficulty participating in a mediation, the mediator shall explore the circumstances and potential accommodations, modifications or adjustments that would facilitate the party's capacity to comprehend, participate and exercise self-determination. If the mediator then determines that the party cannot meaningfully participate in the mediation, the mediator shall recess or discontinue the mediation. Before discontinuing the mediation, the mediator shall consider the context and circumstance of the mediation, including subject matter of the dispute, availability of support persons for the party and whether the party is represented by counsel.

D. In appropriate circumstances, a mediator shall inform the parties of the importance of seeking legal, financial, tax or other professional advice before, during or after the mediation process.

V. Self Determination: A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.

A. A mediator is obligated to leave to the parties full responsibility for deciding whether and on what terms to resolve their dispute. He/She may assist them in making informed and thoughtful decisions, but shall not impose his/her judgment or opinions for those of the parties concerning any aspect of the mediation.

B. A mediator may raise questions for the participants to consider regarding their perceptions of the dispute as well as the acceptability of proposed options for settlement and their impact on

third parties. Furthermore, a mediator may suggest for consideration options for settlement in addition to those conceived of by the parties themselves.

C. A mediator shall not impose his/her opinion about the merits of the dispute or about the acceptability of any proposed option for settlement. A mediator should resist giving his/her opinions about the dispute and options for settlement even when he/she is requested to do so by a party or attorney. Instead, a mediator should help that party utilize his/her own resources to evaluate the dispute and the options for settlement.

This section prohibits imposing one's opinions, advice and/or counsel upon a party or attorney. It does not prohibit the mediator's expression of an opinion as a last resort to a party or attorney who requests it and the mediator has already helped that party utilize his/her own resources to evaluate the dispute and options.

D. Subject to Standard IV.D above, if a party to a mediation declines to consult an independent counsel or expert after the mediator has raised this option, the mediator shall permit the mediation to go forward according to the parties' wishes.

E. If, in the mediator's judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, inequality of bargaining power or ability, unfairness resulting from non-disclosure or fraud by a participant or other circumstance likely to lead to a grossly unjust result, the mediator shall inform the parties of the mediator's concern. Consistent with the confidentiality required in Standard III, the mediator may discuss with the parties the source of the concern. The mediator may choose to discontinue the mediation in such circumstances but shall not violate the obligation of confidentiality.

VI. Separation of Mediation from Legal and Other Professional Advice: A mediator shall limit himself or herself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.

A mediator may provide information that the mediator is qualified by training or experience to provide only if the mediator can do so consistent with these Standards. Mediators may respond to a party's request for an opinion on the merits of the case or suitability of settlement proposals only in accordance with Section V.C above.

OFFICIAL COMMENT

Although mediators shall not provide legal or other professional advice, mediators may respond to a party's request for an opinion on the merits of the case or the suitability of settlement proposals only in accordance with Section V.C above, and mediators may provide information that they are qualified by training or experience to provide only if it can be done consistent with these Standards.

VII. Conflicts of Interest: A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.

A. The mediator shall place the interests of the parties above the interests of any court or agency which has referred the case, if such interests are in conflict.

B. Where a party is represented or advised by a professional advocate or counselor, the mediator shall place the interests of the party over his/her own interest in maintaining cordial relations with the professional, if such interests are in conflict.

C. A mediator who is a lawyer, therapist or other professional and the mediator's professional partners or co-shareholders shall not advise, counsel or represent any of the parties in future matters concerning the subject of the dispute, an action closely related to the dispute or an out growth of the dispute when the mediator or his/her staff has engaged in substantive conversations with any party to the dispute. Substantive conversations are those that go beyond discussion of the general issues in dispute, the identity of parties or participants and scheduling or administrative issues. Any disclosure that a party might expect the mediator to hold confidential pursuant to Standard III is a substantive conversation.

A mediator who is a lawyer, therapist or other professional may not mediate the dispute when the mediator or the mediator's professional partners or co-shareholders has advised, counseled or represented any of the parties in any matter concerning the subject of the dispute, an action closely related to the dispute, a preceding issue in the dispute or an out growth of the dispute.

D. A mediator shall not charge a contingent fee or a fee based on the outcome of the mediation.

E. A mediator shall not use information obtained or relationships formed during a mediation for personal gain or advantage.

F. A mediator shall not knowingly contract for mediation services which cannot be delivered or completed as directed by a court or in a timely manner.

G. A mediator shall not prolong a mediation for the purpose of charging a higher fee.

H. A mediator shall not give or receive any commission, rebate or other monetary or non-monetary form of consideration from a party or representative of a party in return for referral or expectation of referral of clients for mediation services.

VIII. Protecting the Integrity of the Mediation Process. A mediator shall encourage mutual respect between the parties and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

A. A mediator shall make reasonable efforts to ensure a balanced discussion and to prevent manipulation or intimidation by either party and to ensure that each party understands and respects the concerns and position of the other even if they cannot agree.

B. If a mediator believes that the statements or actions of ~~a~~ any participant, ~~including those of the mediator~~, including those of a lawyer who the mediator believes is engaging in or has engaged in professional misconduct, jeopardize ~~conducting a mediation consist with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from, or terminating the mediation.~~ or will jeopardize the integrity of the mediation process, the mediator shall attempt to persuade the participant to cease his/her behavior and take remedial action. If the mediator is unsuccessful in this effort, s/he shall take appropriate steps including, but not limited to, postponing, withdrawing from or terminating the mediation. If a lawyer's statements or conduct are reportable under Standard III.C.(2), the mediator shall report the lawyer to the State Bar or the court having jurisdiction over the matter in accordance with North Carolina State Bar Rule of Professional Conduct 8.3.

In the Supreme Court of North Carolina
Order Adopting Amendments to the Standards of Professional Conduct for Mediators

WHEREAS, section 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission under the Judicial Department and charges it with the administration of mediator certification and regulation of mediator conduct and decertification, and

WHEREAS, N.C.G.S. § 7A-38.2(a) provides for this Court to adopt standards for the conduct of mediators and of mediator training programs participating in the proceedings conducted pursuant to N.C.G.S. § 7A-38.1, 7A-38.3, 7A-38.4A, 7A-38.3B, and 7A-38.3C.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(a), the Standards of Professional Conduct for Mediators are hereby amended to read as in the following pages. These amended Standards shall be effective on the 1st of January, 2012.

Adopted by the Court in conference the 6th day of October, 2011. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Standards of Professional Conduct for Mediators amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

s/Timmons-Goodson, J.
For the Court

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

court's entry of judgment and default judgment as to only one of three defendants. The order affected a substantial right under N.C.G.S. § 7A-27(d) based upon the possibility of inconsistent verdicts upon the same facts. **Regions Bank v. Baxley Commercial Props., LLC, 293.**

Judgment entered under misapprehension of law—lex loci test—Although normally a judgment is vacated and remanded for further proceedings when the order or judgment appealed from was entered under a misapprehension of the applicable law, the Court of Appeals concluded it was appropriate to determine if the Business Court correctly concluded that Pennsylvania law would apply under the *lex loci* test. The Business Court's order indicated that under any test, it believed that Pennsylvania law would apply. **Harco Nat'l Ins. Co. v. Grant Thornton LLP, 687.**

Notice of appeal—not in record—appeal dismissed—not treated as petition for writ of certiorari—Defendant's appeal from the trial court's order requiring him to enroll in lifetime satellite-based monitoring was dismissed where the record contained no written notice of appeal. The Court of Appeals declined to treat defendant's purported appeal as a petition for writ of *certiorari* as defendant's brief did not contain the requisite documentation. **State v. Inman, 324.**

Notice of appeal—sufficiently clear—Although defendant's notice of appeal could have been worded more artfully, it was sufficiently clear to notice appeal from both a judgment at which defendant was neither present nor represented by counsel and a subsequent order denying defendant's motion for a new trial. **Brown v. Ellis, 93.**

Oral notice of appeal insufficient—satellite-based monitoring hearing—certiorari—Defendant at the time of his satellite-based monitoring hearing did not have any indication that his oral notice of appeal was improper; however in the interest of justice and to expedite the decision in the public interest, the Court of Appeals granted defendant's request to consider his brief as a petition for writ of *certiorari* and addressed the merits of his appeal. **State v. Clayton, 300.**

Oral notice of appeal insufficient—satellite-based monitoring hearing—civil in nature—Defendant's oral notice of appeal from an order imposing satellite-based monitoring (SBM) upon him was insufficient to confer jurisdiction on the Court of Appeals as SBM hearings and proceedings are civil regulatory proceedings. The Court treated defendant's brief as a petition for *certiorari* and granted said petition to address the merits of defendant's appeal. **State v. Oxendine, 205.**

Preservation of issues—additional issues not addressed—mootness—The Court of Appeals declined to address additional issues raised by plaintiff since it concluded the trial court's interlocutory order was not subject to immediate review. Further, the issue of whether the trial court should have allowed plaintiff to depose witnesses during the pendency of *Harbour Point I* was moot. **Harbour Point Homeowners' Ass'n Inc. v. DJF Enters., Inc., 152.**

Preservation of issues—defendant's right to counsel at trial—no objection required—The Court of Appeals had jurisdiction to hear defendant's argument that the trial court erred in finding that defendant had forfeited his right to counsel at trial and was required to represent himself. Defendant was not

APPEAL AND ERROR—Continued

CRIMINAL LAW—Continued

WORKERS' COMPENSATION—Continued

Injury by accident—fall on ice—outside defendant's premises—The Industrial Commission did not err by failing to find that plaintiff's fall on ice was not an injury by accident in the course of her employment where the fall occurred close to defendant's doorway but in a parking lot over which defendant had no control. **Cardwell v. Jenkins Cleaners, Inc., 228.**

Injury by accident—unexplained fall—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's fall at work was a compensable injury by accident under N.C.G.S. § 97-2(6) and (2). There need not have been evidence of any unusual or untoward condition or occurrence causing the fall which produced the injury. The fall itself is the unusual unforeseen occurrence which was the accident. Further, where the fall was unexplained and the Commission made no finding that any force or condition independent of the employment caused the fall, then there was an inference that the fall arose out of the employment. **Hedges v. Wake Cnty. Pub. Sch. Sys., 732.**

Job duties—unlocking door—fall in parking lot—The Industrial Commission did not err in a workers' compensation case by failing to find that unlocking the back door was part of plaintiff's job where the Commission found that defendant had not reached the back door when the injury occurred. **Cardwell v. Jenkins Cleaners, Inc., 228.**

Slip and fall—findings—location of fall—Competent evidence supported the Industrial Commission's findings in a workers' compensation case that plaintiff was in a parking lot not controlled by defendant when she fell. **Cardwell v. Jenkins Cleaners, Inc., 228.**

Stipulation—scope of review by Industrial Commission—The Industrial Commission did not err in a workers' compensation case by determining that the parties had stipulated that the sole issue was whether plaintiff's injury occurred on defendant's premises. The Commission resolved both of the factual issues raised by the employee and did not improperly limit the scope of its review. **Cardwell v. Jenkins Cleaners, Inc., 228.**

Suitable employment—within restrictions—competent evidence—Competent evidence in the record supported the Industrial Commission's finding of fact in a workers' compensation case that between the time plaintiff was terminated from his employment with defendant and the time plaintiff reached maximum medical improvement, plaintiff was unable to find suitable employment within the restrictions related to his injury. **McLaughlin v. Staffing Solutions, 137.**

Total disability compensation—failure to obtain other employment—due to injury-related work restrictions—The Industrial Commission did not erroneously conclude that plaintiff was eligible for continuing temporary total disability compensation under the test established in *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228. The Commission's conclusion that plaintiff's failure to obtain other employment was due to his injury-related work restrictions was supported by the Commission's findings of fact. Moreover, contrary to defendant's contention, the *Seagraves* test is not applicable only when plaintiff's injury played a role in his termination. **McLaughlin v. Staffing Solutions, 137.**

ZONING

Judicial review—de novo standard—The superior court correctly identified *de novo* review as the standard of review for a municipal zoning decision. **Land v. Village of Wesley Chapel, 123.**

Shooting range—grandfathered—improvements—not a material alteration— The trial court correctly concluded that there had been no material alteration of property that was grandfathered under a zoning ordinance where a shooting range on the property was rotated, a new and larger backstop was built, and other changes were made in response to nearby residential development. The Village did not include the value of the land in its calculation of the percentage threshold for determining "material alteration" under the ordinance. **Land v. Village of Wesley Chapel, 123.**

Shooting range—grandfathered—not clearly covered by ordinance—The trial court correctly concluded that petitioner's property was grandfathered under a land use ordinance and that petitioner was not required to obtain a special use permit for his personal shooting range, absent a clear land use ordinance regulating shooting ranges. **Land v. Village of Wesley Chapel, 123.**