NORTH CAROLINA COURT OF APPEALS REPORTS

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. DAVID FRANKLIN HURT

No. COA09-442

(Filed 16 November 2010)

1. **Constitutional Law— Confrontation Clause—non-capital sentencing—jury determination required to increase sentence**

   The Confrontation Clause of the Sixth Amendment applies to all sentencing proceedings, both capital and non-capital, where a jury determines a fact that would increase the defendant's sentence beyond the statutory maximum. *State v. Sings*, 182 N.C. App. 162, involved defendant's stipulation to aggravating factors and was limited to its facts.

2. **Constitutional Law— forensic analysts—summaries of reports of others**

   The Confrontation Clause was violated where two SBI forensic analysts merely summarized the results of absent analysts.

Appeal by Defendant from judgment entered 4 April 2008 by Judge Thomas D. Haigwood in Caldwell County Superior Court. Heard in the Court of Appeals 1 October 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert C. Montgomery and Assistant Attorney General Daniel P. O'Brien, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Barbara S. Blackman, for Defendant.

BEASLEY, Judge.

David Franklin Hurt (Defendant) appeals from judgment imposing a sentence in the aggravated range for second-degree murder. Specifically, Defendant challenges the sentencing jury's finding that, as an aggravating factor, the offense to which he had pled guilty was especially heinous, atrocious, or cruel. For the reasons stated below, we hold Defendant is entitled to a new trial.

In 1999, Defendant was indicted for the first-degree murder of Howard Nelson Cook and the first-degree burglary and common law robbery perpetrated in the course thereof. Cook's nephew, William Parlier, was also charged with Cook's murder. Parlier pled guilty to first-degree murder and received a sentence of life in prison. After Parlier reneged on his promise to testify against Defendant, the State agreed to negotiate a plea with Defendant, and on 26 August 2002, Defendant pled guilty to second-degree murder in exchange for dismissal of the remaining charges. The trial judge sentenced Defendant to the maximum aggravated range of 276 to 341 months' imprisonment. Defendant appealed, and a divided panel held that the trial court erred in treating "its finding that [D]efendant joined with one other person" as an aggravating factor. *State v. Hurt*, 163 N.C. App. 429, 435, 594 S.E.2d 51, 55 (2004), *rev'd*, 359 N.C. 840, 616 S.E.2d 910 (2005), *and rev'd in part and aff'd in part as modified*, 361 N.C. 325, 643 S.E.2d 915 (2007). This Court vacated Defendant's sentence, and remanded for resentencing. *See id.* at 434-35, 594 S.E.2d at 55-56 (reasoning that N.C. Gen. Stat. § 15A-1340.16(d)(2) provides for an aggravated sentence when " '[t]he defendant joined with *more than one* other person in committing the offense' " and remanding for a new sentencing hearing because the trial judge imposed a sentence beyond the presumptive term on the basis of an erroneous finding in aggravation). On the State's direct appeal, our Supreme Court reversed this Court's holding as to the aggravating factor issue because "accomplishment of a robbery and murder by uniting with one other individual" is a proper *nonstatutory* factor under N.C. Gen. Stat. § 15A-1340.16(d)(20). *Hurt*, 359 N.C. 840, 844, 616 S.E.2d 910, 913 (2005), *vacated in part on other grounds*, 361 N.C. 325, 643 S.E.2d 915 (2007). Addressing Defendant's motion for appropriate relief, however, the Court remanded for resentencing on different grounds in accordance with *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), because his sentence exceeded the statutory maximum but the upward durational departure from the presumptive sentence was based solely on judicially found facts. *Hurt*, 359 N.C. at 845-46, 616 S.E.2d at 913-14. Issuance of the mandate was stayed, *Hurt*, 359 N.C. 846, 620 S.E.2d 528, and upon reconsideration, our Supreme

Court vacated its earlier opinion in part and remanded the case with instructions to remand to the trial court for a new sentencing hearing, *see Hurt*, 361 N.C. at 332, 643 S.E.2d at 919 (vacating the portion that remanded due to structural error and, instead, remanding "because the trial court's *Blakely* error was not harmless beyond a reasonable doubt," but leaving its aggravating factor analysis undisturbed).

During resentencing, a jury trial on aggravating factors was held at the 31 March 2008 Session of Superior Court in Caldwell County. At the outset of the trial, the court informed the jury panel that Defendant had previously entered a plea of guilty to the second-degree murder of Cook and that the State was now contending the existence of the aggravating factor that the offense pleaded to was especially heinous, atrocious, or cruel (HAC).[1]

On 26 February 1999, police found Cook dead in his home. Cook had sustained blunt force trauma and multiple stab wounds. Earlier that morning, Nancy and Jody Hannah were awakened when a man drove a white van into their backyard and got it stuck. Paula Calloway testified that Defendant and Parlier had previously come to her house in a white van. When she and Defendant awoke to Parlier leaving in the van, they went looking for it and found it stuck in a yard. Defendant freed the van, drove it back to Calloway's house, and fell asleep. Shortly thereafter, Calloway saw police lights and observed officers picking up Parlier in the road. Deputies Jason Beebee and Joel Fish with the Catawba County Sheriff's Office were responding to a call about a possible drunk driver and the van stuck in a yard when they saw an "extremely intoxicated" Parlier walking up the road and then falling into a ditch. Parlier had on his person four one-dollar bills, two of which had "reddish, brown stains on them." During their encounter with Parlier, the officers observed a white van in Calloway's driveway, which prompted them to return to her residence later that morning. Fish found Defendant in Calloway's bed and noticed that the white pants he was wearing had "darkening red spots" and a "brown stain" on them. Evidence collected from Calloway's bedroom included a pair of Defendant's boots and a sweatshirt lying near Defendant that Fish described as having "large reddish, brown stains on it." Another set of officers, also based on information gathered during the encounter with Parlier, went to

1. Although the State's notice to Defendant listed several non-statutory aggravating factors it intended to try before the resentencing jury, including Defendant's joining with one other person in the robbery and murder of Cook without being charged with committing conspiracy for the offenses, the State elected to proceed only on the HAC aggravator under N.C. Gen. Stat. § 15A-1340.16(d)(7).

check on Cook. Officer David Bates arrived at Cook's residence around 4:00 a.m. and found Cook laying on the floor in a large amount of blood. Paramedics and EMS personnel testified to the gross amount of blood at the scene and gaping wounds on Cook's body.

Special Agent Susie Barker, expert forensic biologist and serologist with the State Bureau of Investigation (SBI), testified that her section received a series of physical items in this case. The evidence was assigned to Special Agent Todd, who tested the items for the presence of blood and other bodily fluids and prepared a lab report detailing his results. Barker testified, over objection, that Todd had identified blood on Defendant's sweatshirt and boots and on a cigarette butt found outside Cook's front door. David Freeman, a special agent in the DNA unit of the SBI, then testified that former SBI Special Agent D.J. Spittle performed DNA testing on several items received from the serologist division. Over Defendant's objection, Freeman testified to the results of Spittle's analysis, including his conclusion that DNA found on Defendant's sweatshirt and boots matched Cook's DNA profile. Freeman also testified that the saliva-end of the cigarette found at the crime scene matched Defendant's DNA.

Dr. Patrick Lantz, a forensic pathologist and the Forsyth County Medical Examiner, testified in regards to Cook's autopsy report, completed by former forensic pathologist Dr. David Winston. Lantz testified, over objection by defense counsel, that Cook's "final autopsy diagnosis included sharp force injuries or stab wounds of the head and the neck, the thorax, the abdomen, the back, some blunt trauma to the head, neck[,] chest, abdomen, and some incised wounds." He continued that "[a]ccording to Dr. Winston's report he listed twelve major stab wounds involving the neck, the chest, the abdomen, and the back." Over objection, Lantz recited Winston's findings as to each of the stab wounds and testified to his opinion as a pathologist that six of the major stab wounds noted in the autopsy hit vital organs and could have been fatal in and of themselves. Lantz indicated that "[t]he stab wounds would have caused bleeding inside and outside of [Cook's] body" and would have been painful. However, because the stab wounds did not hit a major blood vessel or "any vital organs that would have caused immediate loss of consciousness," Lantz testified that it might have taken five to ten minutes before Cook went unconscious due to the blood loss. An additional five to ten minutes could have transpired after Cook lost consciousness before the time he died.

At the conclusion of the State's evidence, Defendant made a motion to dismiss the jury's consideration of the aggravating factor

that this offense was especially heinous, atrocious, or cruel. The trial court denied this motion, and Defendant did not present any evidence at this stage. The jury found, beyond a reasonable doubt, the existence of the aggravating factor that the offense was especially heinous, atrocious, or cruel.

During the mitigation phase, Defendant offered a "mitigation report" that had been compiled for his 2002 plea bargain proceedings, but the trial court sustained the State's hearsay objection and refused to admit the notebook. The defense first called Parlier, who admitted to currently being in custody for a conviction on his plea to first-degree murder but denied killing Cook and said it was Defendant who had done so. Defense counsel then attempted to impeach Parlier's testimony by asking about an affidavit he had previously signed. The affidavit stated that on the night of 25 February 1999, Parlier told Defendant that he needed a ride to Cook's house to borrow twenty dollars from his uncle; that Defendant waited outside in his van while Parlier went inside; that it was Parlier who stabbed Cook and thereafter directed Defendant to drive to the Rhodhiss Dam to dispose of evidence. Parlier, however, testified that the affidavit was false and, on cross-examination, explained that Defendant paid him forty dollars to copy and sign the affidavit. Defendant testified at the mitigation phase, and his recitation of the facts mirrored those that appeared in Parlier's affidavit, with additional details. Evidence was also heard from an inmate Parlier had approached for help in preparing his testimony for this case and from Defendant's aunt and uncle. The State then presented victim impact evidence.

Defense counsel requested a mitigated range sentence because Defendant played a minor role and read a portion of the 2002 plea hearing transcript wherein the prosecutor opined "Parlier [was] the actual killer." Despite defense counsel's argument that the State showed only that Defendant brought Parlier to Cook's house, was at the front door, and helped dispose of evidence, the trial court rejected the proposal that Defendant was a passive participant and declined to find any non-statutory mitigating factors. The trial court found that the HAC factor outweighed the factors in mitigation and that an aggravated sentence was thus justified. The trial court imposed a sentence in the maximum aggravated range, 276 to 341 months, from which Defendant appeals.

Defendant raises five arguments on appeal, specifically that the trial court erred in (1) denying his motion to dismiss due to the State's failure to establish that the offense was heinous, atrocious, or cruel;

(2) granting the State's motion to quash a subpoena for the appearance of Assistant District Attorney Jason Parker, as it deprived Defendant of the opportunity to elicit the State's "judicial admissions" made during guilty plea proceedings; (3) "permitting SBI Agent Freeman to testify that he is able to state whether a person committed the charged crime based upon whether a DNA match is made"; (4) refusing to admit Defendant's "mitigation report" on hearsay grounds at the mitigation phase; and (5) admitting hearsay evidence regarding blood tests, DNA analyses, and autopsy findings performed by non-testifying witnesses in the absence of a showing by the State that the non-testifying witnesses were unavailable, thereby depriving Defendant of confrontation and cross-examination rights. Because we conclude that the admission of certain forensic evidence violated Defendant's constitutional rights and was not harmless, we hold the trial court committed reversible error—rendering our review of Defendant's remaining contentions unnecessary—and address only his final argument.

I.

[1] Whether a defendant has a right to confront witnesses against him at sentencing trials conducted pursuant to *Blakely* is an issue of first impression in our courts. Defendant contends that United States Supreme Court decisions *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), and, by extension, *Melendez-Diaz v. Massachusetts*, 557 U.S. –––, 174 L. Ed. 2d 314 (2009), should apply at all sentencing proceedings, whether capital or non-capital, that are held before a jury. For the reasons discussed herein, we agree that the Confrontation Clause of the Sixth Amendment applies to all sentencing proceedings where a jury makes the determination of a fact or facts that, if found, increase the defendant's sentence beyond the statutory maximum. Thus, because the trial court's admission of testimonial hearsay evidence during the aggravation phase of Defendant's sentencing proceedings violated the Confrontation Clauses of the federal and state constitutions and the constitutional errors were not harmless beyond a reasonable doubt, we remand this case for a new sentencing hearing.

A.

Whether a defendant's constitutional right to confrontation has been violated is a question of law which we review *de novo*. *See State v. Thorne*, 173 N.C. App. 393, 396, 618 S.E.2d 790, 793 (2005) ("It is well-settled that *de novo* review is ordinarily appropriate in cases where constitutional rights are implicated."). Generally, we interpret

the Confrontation Clause of the North Carolina Constitution identically to its federal counterpart; thus, our analysis under each tends to be uniform, and, although Defendant's brief cites both provisions, we consider the federal version only in addressing his arguments. *See State v. Sings*, 182 N.C. App. 162, 164 n.2, 641 S.E.2d 370, 371 n.2 (2007) (noting the "general rule" that our courts construe the two confrontation clauses—Article I, § 23, and the Sixth Amendment of the state and federal constitutions, respectively—"as having no significant differences"); *see also infra* note 2.

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The United States Supreme Court, however, has never explicitly ruled whether the Confrontation Clause applies at sentencing. *See, e.g.*, *United States v. Higgs*, 353 F.3d 281, 324 (4th Cir. 2003) ("It is far from clear that the Confrontation Clause applies to a capital sentencing proceeding."); *United States v. Kikumura*, 918 F.2d 1084, 1103 n.19 (3d Cir. 1990) (expressing "hope . . . that the Supreme Court in the near future will decide whether confrontation clause principles are applicable at sentencing hearings"); *United States v. Gray*, 362 F. Supp. 2d 714, 725 (S.D. W. Va. 2005) ("The Supreme Court . . . has never decided whether sentencings are 'criminal prosecutions' for Sixth Amendment purposes."). Despite the lack of any clear directive from the Supreme Court, the prevailing view among federal circuit courts and several state courts is that the constitutional right to confrontation does not apply at sentencing. *See, e.g.*, *United States v. Paull*, 551 F.3d 516, 527 (6th Cir. 2009) ("While recent developments in sentencing and Confrontation Clause jurisprudence 'may be a broad signal of the future, there is nothing specific in *Blakely*, *Booker* or *Crawford* that would cause this Court to reverse its long-settled rule of law that [the] Confrontation Clause permits the admission of testimonial hearsay evidence at sentencing proceedings,' and so we will 'continue to observe [our] precedent that testimonial hearsay does not affect a defendant's right to confrontation at sentencing.' "); *Rodgers v. State*, 948 So. 2d 655, 674-75 (Fla. 2006) (Cantero, J., concurring) (collecting recent federal appellate cases denying Confrontation Clause rights at sentencing); Michael S. Pardo, *Confrontation Clause Implications of Constitutional Sentencing Options*, 18 Fed. Sent'g Rep. 230, 230 (2006) ("Although the Supreme Court has not answered definitively whether a confrontation right ever applies at sentencing, several federal circuits have concluded that it does not.").

Still, the issue is far from settled. *See* Wayne R. LaFave et al., *Criminal Procedure* § 26.4(f), at 768 (3d ed. 2007) ("[A]lthough the federal courts of appeals unanimously declined to recognize a federal defendant's right to confrontation under either the Sixth Amendment or the Due Process Clause in the guidelines setting, several of these decisions have been divided . . . ."). Where the judiciary has grappled with the issue in both the capital and non-capital context, the scholastic writing has focused in large part on the extension of confrontation rights to capital sentencing. *See generally*, *e.g.*, Penny J. White, *"He Said," "She Said," and Issues of Life and Death: The Right to Confrontation at Capital Sentencing Proceedings*, 19 Regent U. L. Rev. 387 (2007). And while one court observed that "*Crawford v. Washington* . . . has breathed new life into the debate," *Gray*, 362 F. Supp. 2d at 725, the Supreme Court of North Carolina had already applied the right of confrontation to the sentencing phase of capital trials prior to *Crawford*. *See State v. Nobles*, 357 N.C. 433, 441, 584 S.E.2d 765, 771 (2003) ("[O]nce the state decides to present the testimony of a witness to a capital sentencing jury, the Confrontation Clause requires the state to undertake good-faith efforts to secure the 'better evidence' of live testimony before resorting to the 'weaker substitute' of former testimony."); *State v. Holmes*, 355 N.C. 719, 733, 565 S.E.2d 154, 165 (2002) ("While the Rules of Evidence do not apply to a capital sentencing proceeding, the constitutional right to confront witnesses does apply."). Thus, our courts have already resolved, without noting any controversy regarding the issue, the question of the Confrontation Clause's applicability at capital sentencing, with which many courts have struggled prior to *Crawford*, *see*, *e.g.*, *Proffitt v. Wainwright*, 685 F.2d 1227, 1254 (11th Cir. 1982) (holding "the right to cross-examine adverse witnesses applies to capital sentencing hearings"); *Rodriguez v. State*, 753 So. 2d 29, 43 (Fla. 2000) (stating the "uncontroverted proposition that the Sixth Amendment right of confrontation applies to all three phases of the capital trial"), or in light of *Crawford*, *see*, *e.g.*, *United States v. Mills*, 446 F. Supp. 2d 1115, 1135 (C.D. Cal. 2006) (holding the protections of *Crawford* "apply to any proof of any aggravating factor during the penalty phase of a capital proceeding").

Crawford did, however, cast doubt on our jurisprudence in this area where our reasoning was based on the interconnection between confrontation rights and the rules of evidence. After the landmark ruling in *Crawford*, which is further detailed below, our Supreme Court applied the Confrontation Clause and the standard outlined by *Crawford* to capital sentencing testimony in *State v. Bell*, 359 N.C. 1,

34-36, 603 S.E.2d 93, 115-16 (2004). This Court recently declined to extend *Bell's* ruling to a non-capital sentencing hearing in *State v. Sings*, upon which the State now relies. *See Sings*, 182 N.C. App. at 165, 641 S.E.2d at 372 (noting that *Bell's* language requiring compliance with *Crawford* when the State presents testimonial evidence "to a *capital sentencing jury*" suggests the ruling is "intended to apply only to *capital* sentencing hearings"). The State contends that *Sings* is dispositive of the issue that *Crawford* does not apply in the non-capital sentencing context and forecloses Defendant's argument. However, where the sentencing in *Sings* was based on the defendant's stipulation to three aggravating factors and not pursuant to a *Blakely* hearing, *see id.* at 163, 641 S.E.2d at 371, our holding there cannot be read to encompass the facts of this case, where the factor potentially augmenting Defendant's sentence was determined by a jury. Because such stipulations dispensed with the necessity of impaneling a sentencing jury to find aggravating factors, we agree with Defendant that *Sings* "does not bear on the resolution of this issue." Rather, we hold today that *Crawford* does indeed apply to evidence offered to prove sentencing facts in the *Blakely* context, and the rationale therefor mirrors the justification for securing the right to confrontation in the capital sentencing context. An overview of the evolution in Confrontation Clause jurisprudence and its interplay with the United States Supreme Court's sentencing decisions will illuminate the bases for our conclusion. *See generally*, Nigel Hugh Holder, Comment, *Confrontation at Sentencing: The Logical Connection Between* Crawford *and* Blakely, 49 How. L.J. 179 (2005) (arguing that because of the changes *Crawford* and *Blakely* made to the landscape of the Sixth Amendment, the Confrontation Clause should apply at sentencing and therefore bar the use of testimonial hearsay during sentencing proceedings).

In overruling *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597 (1980), *Crawford* extricated the constitutional mandate of the right to confrontation from the rules of evidence by "reunit[ing] Confrontation Clause protection with the historical motivation for the clause." *Gray*, 362 F. Supp. 2d at 725; *see also Crawford*, 541 U.S. at 60, 158 L. Ed. 2d at 198 (discrediting the rationale of *Roberts* for its failure to be "faithful to the original meaning of the Confrontation Clause" and criticizing its departure from historical principles). Where the *Roberts* test conditioned admissibility of out-of-court statements on: (1) unavailability of the declarant and (2) reliability based on either a "firmly rooted hearsay exception" or, if none qualified, "particularized guarantees of trustworthiness," *Roberts*, 448 U.S. at 66, 65 L. Ed.

2d at 608, *Crawford* dispensed with the vague "reliability" criterion in favor of applying the Confrontation Clause to only a subset of hearsay statements: those which are "testimonial," *see generally Crawford*, 541 U.S. 36, 158 L. Ed. 2d 177. The new rule provided that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69, 158 L. Ed. 2d at 203.

The Court's sentencing decisions have evolved from *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), a non-capital case holding "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455; to *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556 (2002), holding aggravating circumstances in capital cases function as elements and must be found by jurors, not judges; and, most recently to *Blakely*, 542 U.S. 296, 159 L. Ed. 2d 403, and *United States v. Booker*, 543 U.S. 220, 160 L. Ed. 2d 621 (2005), extending *Apprendi's* rule to sentencing guidelines that supply fixed ranges, within the statutory maximum, based on additional findings of fact and explaining that the relevant statutory maximum is the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant. "All these cases stand for the proposition that any additional findings that increase a defendant's sentence beyond what state or federal law authorizes based solely on the jury's verdict are, in effect, 'elements' that must be submitted to a jury and proven beyond a reasonable doubt." Pardo, *supra*, at 231.

The North Carolina courts have addressed the scope of confrontation at sentencing but have not elaborated thereon in detail since *Blakely*. In *State v. Phillips*, 325 N.C. 222, 381 S.E.2d 325 (1989), our Supreme Court relied on *Williams v. New York*, 337 U.S. 241, 93 L. Ed. 1337 (1949), for the proposition that "[t]he use of hearsay evidence at sentencing hearings does not violate the Constitution of the United States." *Phillips*, 325 N.C. at 224, 381 S.E.2d at 326. In *Williams*, the United States Supreme Court addressed a capital defendant's due process challenge to an out-of-court presentence investigation report and concluded that due process did not limit the information available to sentencing judges, who were afforded broad discretionary power to fashion individualized sentences. *See Williams*, 337 U.S. at 242-45, 93 L. Ed. at 1339-41. Based on the emerging philosophy of the time—a rehabilitative model of punishment,

individualizing sentences under an indeterminate scheme—the Court noted that the wide latitude of discretion given judges "made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial," *id.* at 247, 93 L. Ed. at 1342, and recognized that most of the information relied upon by judges at sentencing "would be unavailable if . . . restricted to that given in open court by witnesses subject to cross-examination," *id.* at 250, 93 L. Ed. at 1343. Notwithstanding the retained validity of *Williams*, "some writers have argued that the combination of *Crawford* and *Blakely v. Washington*, which gave defendant a right to jury trial on facts that must be proved to enhance a sentence, should extend the right of confrontation to sentencing trials." 30A Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 6371.2, at 84 (Supp. 2010) (footnotes omitted); *see also* LaFave et al., *supra*, § 26.4(f), at 767-68 ("Nevertheless, whether a defendant has a right to confrontation at sentencing has proved to be a controversial question in modern sentencing systems that, unlike the discretionary sentencing examined in *Williams*, clearly tie the severity of a sentence to particular findings of fact[,]" and " '[t]o rely on a decision made in a different world 40 years ago as the measure of due process, is to ignore the realities of the present system.' ").

One such scholar, noting that *Williams* by no means settled the "confrontation question," emphasizes the critical mistake of the courts' reliance on their pre-*Booker* or pre-*Blakely* cases and argues that such precedent "fails to seriously engage the text of the Sixth Amendment" and "is based on an erroneous understanding of the Confrontation Clause . . . [and] on now-rejected sentencing policy." Benjamin C. McMurray, *Challenging Untested Facts at Sentencing: The Applicability of* Crawford *at Sentencing After* Booker, 37 McGeorge L. Rev. 589, 605 (2006). As an example of the courts' misplaced dependence on *Williams*, he criticizes the 10th Circuit's analysis in *United States v. Beaulieu*, 893 F.2d 1177 (10th Cir. 1990):

> There the court stated, "[t]he Supreme Court has made clear that the constitutional requirements mandated in a criminal trial as to confrontation and cross-examination do not apply at non-capital sentencing proceedings." Reading this statement, we would expect the cited authorities to point us to some Supreme Court exposition of the significance of the Sixth Amendment, but as noted above, the Supreme Court has never addressed this issue. The cited authority is simply another Tenth Circuit case, which in

> turn relied on *Williams* for the proposition that "[i]t seems clear from these decisions that the requirements mandated in a criminal trial as to confrontation and cross-examination are not applicable at sentencing proceedings. The right to confrontation is basically a trial right." But *Williams* said nothing about the Confrontation Clause. By reading earlier authorities as if they had resolved this constitutional issue, the pre-*Booker* courts have perpetuated the critical failure. Because no court has grappled with the meaning of the Sixth Amendment, circuit courts should welcome the opportunity to resolve this issue in the wake of *Crawford* and *Booker*.

Id. at 607-08 (footnotes omitted). Another scholar has noted that the refusal to extend the Confrontation Clause to sentencing based on *Williams* rests on two flawed assumptions: "First, trial and sentencing are different procedures that raise fundamentally different types of evidentiary demands and requirements. And second, the confrontation right is just a constitutionally required hearsay rule and thus no different from other evidence rules, which typically do not apply at sentencing." Pardo, *supra*, at 230 (footnote omitted). Professor Pardo continues: "The Court's recent sentencing decisions, from *Apprendi* to *Booker*, have vitiated the first assumption, and *Crawford* has explicitly rejected the second." *Id.* Where *Apprendi* eradicated the import of labels that attempt to distinguish " 'elements,' " required to be proven to a jury beyond a reasonable doubt, from " 'sentencing factors,' " and emphasized that "the relevant inquiry is one not of form, but of [the] effect" of the factual finding on punishment, *Apprendi*, 530 U.S. at 494, 147 L. Ed. 2d at 457, *Blakely* and *Booker* extended the reasonable doubt requirement to sentencing guidelines that impose fixed ranges within the statutory maximum. As such, the combination of *Apprendi* with *Booker* and *Blakely* has eroded any notion of a clear line separating trial from sentencing and distinguishing the procedural rights that must be afforded defendants at each phase. In *Crawford*, the Court rebuffed the notion that protection of the Confrontation Clause of the Sixth Amendment was intended to be left "to the vagaries of the rules of evidence," thus rejecting the antiquated premise that the Confrontation Clause is just a constitutional ban on hearsay, inextricably tied to evidentiary rules. *Crawford*, 541 U.S. at 61, 158 L. Ed. 2d at 199; *see also United States v. Fields*, 483 F.3d 313, 365 (5th Cir. 2007) (Benavides, J., dissenting) ("The Confrontation Clause and the rules of evidence offer entirely separate protections. Conforming to evidentiary rules regarding hearsay will not

satisfy the Confrontation Clause[;] . . . if a hearsay statement is not testimonial, the Confrontation Clause offers no protection.").

While some courts have clung steadfastly to *Williams* in post-*Crawford* cases, our Supreme Court has not demanded continued adherence to its tenets where the proceedings are so different in nature. In fact, no North Carolina appellate court has cited to *Williams* after *Crawford*. Thus, we are not bound to apply *Williams* to a context as distinct as *Blakely* sentencing hearings. Furthermore, many courts declining to extend confrontation rights to non-capital sentencing have overlooked the United States Supreme Court's decision in *Specht v. Patterson*, 386 U.S. 605, 18 L. Ed. 2d 326 (1967), another due process case that extended confrontation rights to the enhancement stage of sentencing for a sex offense. Where a state statute provided that, upon conviction, a sex offender was subject to an additional sentence if the judge found that the defendant constituted a threat of bodily harm or was a habitual offender and mentally ill, *Specht*, 386 U.S. at 607, 18 L. Ed. 2d at 329, the Court held that because the statute required "the making of a new charge leading to criminal punishment," the defendant must "have an opportunity to . . . be confronted with witnesses against him, [and] have the right to cross-examine," *id.* at 610, 18 L. Ed. 2d at 330. One court summarized the Supreme Court's ruling in *Specht*

> that the Constitution extends certain trial rights—including the right to confrontation—to *some* proceedings where a factfinder finds facts that necessarily subject a criminal defendant to additional liability. Although *Specht* did not explicitly mention the Sixth Amendment, the Court held that "[d]ue process . . . requires that [the defendant] be present with counsel, have an opportunity to be heard, *be confronted with witnesses against him*, *have the right to cross-examine*, and to offer evidence of his own." Therefore, once the activity of a sentencer stops being an exercise of discretion and becomes constitutionally significant factfinding, the right to confrontation attaches.

Mills, 446 F. Supp. at 1125 (internal citation omitted). Importantly, *Specht* involved the non-capital sentencing context and explicitly distinguished itself from *Williams* because the sentence imposed upon conviction was not within the judge's discretion but, rather, further findings were necessary for any enhancement thereof. *See id.* at 608, 18 L. Ed. 2d at 329 (noting the Court's continued adherence to *Williams* but "declin[ing] the invitation to extend it to this *radically different situation*" (emphasis added)).

Moreover, a large percentage of the cases that have declined to apply the Confrontation Clause to non-capital sentencing proceedings post-*Blakely* (or, more relevantly, post-*Booker*) were reported from federal jurisdictions. *See*, *e.g.*, *Paull*, 551 F.3d at 527-28 (holding testimonial hearsay does not affect defendant's right to confrontation at sentencing but doing so under advisory guidelines system where *Blakely* and *Booker* did not require factual findings that increase sentence to be found by a jury beyond a reasonable doubt); *United States v. Bustamante*, 454 F.3d 1200, 1202-03 (10th Cir. 2006) (deeming the Confrontation Clause inapplicable at non-capital sentencing but *Booker* was not triggered because of advisory guidelines); *United States v. Cantellano*, 430 F.3d 1142 (11th Cir. 2005) (holding *Crawford* inapplicable at non-capital sentencing because the " 'right to confrontation is a *trial* right,' " but neither *Blakely* nor *Booker* applied and sentence was enhanced based on judicially found fact of prior conviction); *Mills*, 446 F. Supp. 2d at 1124 (noting the 9th Circuit's "holding that the hearsay-limiting rights afforded by the Confrontation Clause do not apply to *non-capital sentencing*, where the judge, *not the jury*," makes the aggravating factor sentencing determination (second emphasis added)). In these cases, "[a]rguments that sentencings under the [federal] Guidelines closely simulate trials so as to require the same procedural protections have been significantly undermined by the *Booker* remedy that makes [those] Guidelines advisory." *Gray*, 362 F. Supp. 2d at 725.

Thus, a review of the caselaw negating that *Crawford* plays a role in sentencing proceedings after *Blakely* and *Booker* is a bit misleading because this view is held largely by *Booker* sentencing regimes, where the question becomes more difficult because the judge is not bound by the guideline calculation. *See id.* ("Under the advisory [Guideline] system, the factual findings that [judges] make at sentencing no longer mandate a defendant's punishment with mathematical precision. In the absence of such mandatory, fact-driven penalty determinations, arguments for constitutional procedural protections at sentencing are weakened."). Our Supreme Court, however, has held that, under the North Carolina sentencing system, any factor that authorizes an upward durational departure from the statutory maximum must be found pursuant to *Blakely*. *See State v. Blackwell*, 361 N.C. 41, 45, 638 S.E.2d 452, 455 (2006) ("[A]fter *Blakely*, trial judges may not enhance criminal sentences beyond the statutory maximum absent a jury finding of the alleged aggravating factors beyond a reasonable doubt."). Where sentencing facts are thus nec-

essary in our state system to enable a judge to impose a sentence that exceeds the presumptive range for the convicted offense, such facts are the functional equivalent of elements of the underlying crime pursuant to *Apprendi* and *Blakely* under the federal constitution.[2] For, if aggravating factors warrant treatment as elements for due process purposes—in that a defendant is entitled to have a jury find them beyond a reasonable doubt before being eligible for an aggravated sentence—the logical corollary is that the same Confrontation Clause protections that are guaranteed at the guilt-innocence phase of trial also apply to evidence presented at a sentencing hearing to prove these factors. One state court has expressly agreed, and the facts are analogous to the instant case.

In *State v. Rodriguez*, 754 N.W.2d 672 (Minn. 2008), the Supreme Court of Minnesota held "that the right of confrontation applies in jury sentencing trials" because "if the Sixth Amendment right to a jury trial applies in jury sentencing trials, then the right of cross-examination, which is a core component of the jury trial right, applies in jury sentencing trials." *Rodriguez*, 754 N.W.2d at 681. The Minnesota court reasoned that the United States Supreme Court "turned to the historical understanding of the Sixth Amendment" in both *Apprendi* and *Blakely*, just as it did in *Crawford*, where the Court "quot[ed] Blackstone's observation that the open examination of witnesses . . . is much more conducive to the clearing up of truth." *Id.* at 679-80 (internal quotation marks and citations omitted).

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2. To the extent that aggravating factors are not considered elements of a crime for purposes of Article I, § 23, of our state constitution, which grants "person[s] charged with crime . . . the right . . . to confront the accusers and witnesses with other testimony," N.C. Const. art. I, § 23, our reversal of this case is based on Defendant's federal Confrontation Clause rights, and a § 23 analysis would not change our conclusion. *Compare Blackwell*, 361 N.C. at 51-52, 638 S.E.2d at 459-60 (stating "aggravating factors are not, and have never been, elements of a 'crime' for purposes of Article I, Section 24 analysis"—requiring a unanimous jury verdict for any criminal conviction—and "declin[ing] to superimpose *Blakely's* definition of aggravator upon the well recognized definition of 'crime' under [§] 24"), *with Apprendi*, 530 U.S. at 494 n.19, 147 L. Ed. 2d at 457 n.19 (indicating that regardless of the term used, whether labeled "sentencing factor," "aggravating factor," or "sentence enhancement," if it "describe[s] an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict."), *and State v. Allen*, 359 N.C. 425, 460, 615 S.E.2d 256, 280 (2005) (Martin, J., concurring in part and dissenting in part) ("[T]he instant case deals with the failure to submit an *aggravating factor*, as opposed to an *essential element*, for jury determination. But this distinction provides no viable basis for distinguishing *Neder* [*v. United States*, 527 U.S. 1, 144 L. Ed. 2d 35 (1999)], as the *Blakely* line of cases firmly establishes the principle that aggravating factors are the 'functional equivalent' of essential elements of the crime for purposes of the Sixth Amendment right to jury trial."), *withdrawn*, 360 N.C. 569, 635 S.E.2d 899 (2006).

Rodriguez also connected the Court's emphasis in *Apprendi* and *Blakely* on "the right to have a jury find the truth of every accusation beyond a reasonable doubt" to its emphasis in *Crawford* "that the Confrontation Clause requires that the reliability of testimonial statements be assessed by testing in the crucible of cross-examination." *Id.* at 680 (internal quotation marks omitted). Therefore, the Minnesota court rationalized that

> [t]he admission at a jury sentencing trial of testimonial statements of a witness who did not testify and who has not previously been subject to cross-examination surely constitutes the "use of *ex parte* examinations as evidence against the accused," which is "the principal evil at which the Confrontation Clause was directed."

Id. (quoting *Crawford*, 541 U.S. at 50, 158 L. Ed. 2d at 192). While it does not appear that another case emulating *Rodriguez* has been reported, several courts have expressed their approval of a rationale similar to that employed by the Minnesota court. *See Gray*, 362 F. Supp. 2d at 725 (proposing that "the truth-seeking function of the Confrontation Clause deserves attention at sentencing" because "[t]he adversarial system provides the best method of establishing the reliability of testimonial evidence and the appropriate weight to assign to such evidence," and, therefore, "strongly encourag[ing] the use of witness testimony and cross-examination to resolve factual disputes at sentencing, notwithstanding [the court's] finding that *Crawford* does not apply at sentencing under the post-*Booker* sentencing regime."); *In re M.P.*, 220 S.W.3d 99, 108 (Tex. App. 2007) (concluding that, "at a minimum," a criminal defendant should have confrontation rights at sentencing: "(1) in cases in which the State seeks imposition of a sentence on the basis of findings beyond those 'reflected in the jury verdict or admitted by the defendant'; and (2) whenever the State calls a witness to testify at punishment"); *see also* LaFave et al., *supra*, § 26.4(f), at 769 ("[S]entencing factors that qualify as elements, for which the defendant has a right to a jury determination and proof beyond a reasonable doubt, should be established by evidence that would meet the confrontation requirements for admission at trial."). We believe *Rodriguez* and the authorities sharing its rationale represent the better-reasoned view.

While we have never held that the right of confrontation applies to the sentencing phase of non-capital trials, no North Carolina case has addressed the similarities between the penalty phase of a capital case and jury sentencing hearing in a non-capital case under *Blakely*.

Both require the State to prove an element to a jury beyond a reasonable doubt, and without a finding of an aggravating factor by the trier of fact, the presumptive sentence is the maximum sentence that can be imposed for the crime. Where confrontation rights apply in one context, they should apply equally to the other. Our caselaw supports this conclusion by comparing sentencing proceedings to jury trials on several occasions, suggesting that any factual issue required to trigger a certain sentence is a "trial issue," whether arising during the guilt or sentencing phase of trial. *See*, *e.g.*, *State v. Pinch*, 306 N.C. 1, 22, 292 S.E.2d 203, 221 (1982) (equating capital sentencing to a trial proceeding by noting that, "[a]s a general matter, the truthfulness of any aspect of any witness's testimony may be attacked on cross-examination" and explaining that "[t]his basic rule applies to all trial proceedings, including both the guilt and sentencing phases in capital cases"), *abrogated in part on other grounds by State v. Wilson*, 322 N.C. 117, 145, 367 S.E.2d 589, 605 (1988), *and overruled in part on other grounds by State v. Benson*, 323 N.C. 318, 326, 372 S.E.2d 517, 521 (1988), *and State v. Robinson*, 336 N.C. 78, 110, 443 S.E.2d 306, 321 (1994). Notably, our Supreme Court in *State v. Lopez*, 363 N.C. 535, 681 S.E.2d 271 (2009), a non-capital case conducted pursuant to *Blakely*, discussed the rules of procedure and evidence meant to assure the evidence a *sentencing* jury hears and considers is reliable by referring to N.C. Gen. Stat. § 7A-97, which deals with jury trials. *See Lopez*, 363 N.C. at 540-41, 681 S.E.2d at 275 (discussing the propriety of closing arguments made during a jury sentencing trial on aggravating factors with reference to "[t]he rules of procedure and evidence [which] are meant to assure that the evidence a jury hears and considers is reliable"); *see also id.* at 544, 681 S.E.2d at 277 (Brady, J., concurring in the result only) ("The jury was charged with answering one question: Did the evidence presented support the finding of the aggravating factor? This is purely a factual question, and *much like in the guilt-innocence phase of the trial*, the jury is asked to evaluate whether the State presented sufficient evidence to prove its case." (emphasis added)). Our Supreme Court has also stated in another non-capital case, long before *Crawford* and *Blakely*, albeit without further discussion, that "[a]lthough G.S. 15A-1334(b) makes inapplicable 'formal rules of evidence' at the sentencing hearing, the statute does require that defendant be given an opportunity to *confront and cross-examine witnesses against him* and to present witnesses and arguments in his own behalf." *State v. Williams*, 295 N.C. 655, 670, 249 S.E.2d 709, 720 (1978) (emphasis added), *superceded by statute on other grounds*.

While it has been said that "death is different," we perceive the importance of safeguarding the accuracy and propriety of jury fact-finding in sentencing clearly as pertaining to both the capital and non-capital context. *See United States v. Brown*, 441 F.3d 1330, 1361 n.12 (11th Cir. 2006) (distinguishing the inapplicability of *Crawford* in the context of non-capital sentencing from the court's previous holding "that the constitutional right to cross-examine witnesses applies to capital sentencing hearings" on the basis that "death is different"). *But see Fields*, 483 F.3d at 367 (Benavides, J., dissenting) ("I agree that the Confrontation Clause typically will not apply at noncapital sentencing, *so long as* the sentencing facts apply to an indeterminate scheme and a judge has broad discretion in imposing the sentence. Only to that extent is *Williams's* application plain. But the Supreme Court recently recognized [in *Apprendi*] that even noncapital sentencing is not always so different from trial proceedings, and if the sentencing facts 'increase the prescribed range of penalties to which a criminal defendant is exposed' such that the sentencing fact is the 'equivalent of an element of a greater offense than the one covered by the jury's guilty verdict,' then the Confrontation Clause should apply and *Williams* does not control even in the noncapital context." (emphasis added)); *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002) (citing *Specht* for the proposition that "the Confrontation Clause applies during those portions of a sentencing proceeding that can lead to an increase in the maximum lawful punishment"). For, it appears that, in a system such as ours where confrontation rights are already embedded in the capital sentencing scheme, the better approach compares the nature of those proceedings (along with the guilt-innocent phase), rather than the nature of the punishment, as *Apprendi*, a non-capital case, intimates:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached.

Apprendi, 530 U.S. at 484, 147 L. Ed. 2d at 451. Without minimizing the unrivaled severity of capital punishment, we simply acknowledge that in both capital and non-capital jury sentencing, the defendant endures another "mini-trial," which has often been bifurcated or even trifurcated from the trial on the substantive offense, to discover

whether he will lose more liberty than otherwise allowable under the applicable statute. *See* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967, 1967, 1973 (2005) ("[d]rawing on the history of unified trials in the era of the Framers," who "knew nothing of a 'guilt' phase and a 'penalty' phase," and noting that the Sixth Amendment hails from a time where guilt and sentencing "were determined simultaneously by a single jury verdict in a trial with full adversarial rights," in support of his argument that the later-evolved practice of bifurcating trial from sentencing, cannot be viewed as an indication "that the 'trial rights' of the Sixth Amendment were conceived with such a separation in mind"). Thus, we believe that in determining the availability of constitutional *procedural* protections in specific contexts, the proper focus is on the essential characteristics of the *procedure* at issue and not on the incommensurate punitive measures different defendants may face at those otherwise similar stages. Accordingly, we distinguish the procedural aspects of *Sings*, where sentencing proceeded after the defendant *stipulated* to the aggravating factors at issue, and limit our holding there to the facts of that case. *See Sings*, 182 N.C. App. at 163, 641 S.E.2d at 371. Where, however, the sentencing fact to be proved is covered by *Blakely*, such that it must be found beyond a reasonable doubt before a judge may impose a sentence above that allowed by the presumptive range, *Crawford* applies.

Our holding is consistent with the syllogism illustrated by Professor Pardo: (1) additional findings that are required to increase a defendant's sentence are "elements," and, as such, "despite their labels and when they occur," these "issues at 'sentencing' function as as-yet-undecided 'trial' issues"; (2) the Confrontation Clause applies to trial issues; and (3) "the confrontation right should apply to sentencing issues that function as 'elements' or trial issues" just like those adjudicated at trial Pardo, *supra*, at 231.[3]

B.

[2] Having determined that the Confrontation Clause applies during non-capital jury sentencing trials, we must determine if Defendant's rights thereunder were violated and, if so, whether such error was

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3. We note that our holding has no effect on the established inapplicability of other evidence rules at sentencing, nor do we hold or suggest that they should apply. Our evidence rules are matters of legislative discretion; thus, "it is not inconsistent to conclude that the Confrontation Clause should apply at sentencing because it is a constitutionally mandated requirement, while other evidence rules (such as those involving hearsay, character, and impeachment) may not apply." Pardo, *supra*, at 231.

harmless. We conclude that *Melendez-Diaz*, an extension of *Crawford* in Confrontation Clause jurisprudence, prohibited the introduction of the results of the non-testifying forensic analysts, and the trial court's error in allowing the substitute witnesses to testify was not harmless.[4]

"The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009) (citing *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203). Our analysis of whether Defendant's confrontation rights were violated consists of a three-part inquiry implemented pursuant to *Crawford*, and we must determine: "(1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant." *State v. Clark*, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217 (2004). While *Crawford* did not explicitly define "testimonial" evidence, leaving the lower courts to shape the term's parameters, *see Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' "), the United States Supreme Court did provide various examples of the types of statements that are testimonial in nature, including:

> *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 51-52, 158 L. Ed. 2d at 193 (internal quotation marks, citations, and alteration omitted).

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4. While *Melendez-Diaz* was decided over one year after Defendant's resentencing trial was finalized, the Supreme Court's reasoning is applicable to the instant case. *See United States v. Johnson*, 457 U.S. 537, 549, 73 L. Ed. 2d 202, 213 (1982) ("[W]hen a decision of [the Supreme] Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way.").

Further illustrating the Sixth Amendment's prohibition against the prosecution's attempt "to prove its case via *ex parte* out-of-court affidavits," the United States Supreme Court recently applied the *Crawford* holding to documents or reports that the government seeks to enter into evidence that are "testimonial" in nature. *Melendez-Diaz*, 557 U.S. at —, 174 L. Ed. 2d at 332. In *Melendez-Diaz*, the Court addressed the admissibility of a sworn "certificate of analysis," displaying the results of forensic testing, as evidence that a seized substance was illegal contraband. *Id.* at —, 174 L. Ed. 2d at 320. Reasoning that "[t]he 'certificates' are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination,' " the Court had no doubt that these documents "fall within the 'core class of testimonial statements' " described in *Crawford*. *Id.* at —, 174 L. Ed. 2d at 321. As such, "the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment." *Id.* at —, 174 L. Ed. 2d at 322. "Thus, when the State seeks to introduce forensic analyses, '[a]bsent a showing that the analysts [are] unavailable to testify at trial *and* that [defendant] had a prior opportunity to cross-examine them' such evidence is inadmissible under *Crawford*." *Locklear*, 363 N.C. at 452, 681 S.E.2d at 305 (quoting *Melendez-Diaz*, 557 U.S. at —, 174 L. Ed. 2d at 322). Stated alternatively, if it is not shown that an analyst is unavailable to testify at trial *and* that there was a prior opportunity for cross-examination available to the accused, *Melendez-Diaz* entitles the criminal defendant "to be confronted with the analysts at trial." *Melendez-Diaz*, 557 U.S. at —, 174 L. Ed. 2d at 322 (internal quotation marks omitted).

The North Carolina Courts "have applied the reasoning of *Melendez-Diaz* to other types of witnesses and testimony" in a series of opinions based on that decision. *State v. Craven*, — N.C. App. —, —, 696 S.E.2d 750, 752 (2010). In *Locklear*, our Supreme Court extended the *Melendez-Diaz* holding from its focus on the admissibility of documents themselves as an offer of forensic proof to likewise govern testimony of experts who essentially rely on such documents as the basis for their opinions. *See Locklear*, 363 N.C. at 452, 681 S.E.2d at 304-05 (applying *Melendez-Diaz* to proscribe in-court expert testimony as to the opinions rendered by other experts, where the State's witnesses merely recited the contents and findings contained within "testimonial" reports prepared by the non-testifying forensic examiners). There, it was error for the trial court to admit "evidence of forensic analyses performed by a forensic pathologist

and a forensic dentist who did not testify" because "[t]he State failed to show that either witness was unavailable to testify or that defendant had been given a prior opportunity to cross-examine them." *Id.* at 452, 681 S.E.2d at 305. However, "[w]ell-settled North Carolina case law allows an expert to testify to his or her own conclusions based on the testing of others in the field." *State v. Mobley*, 200 N.C. App. —–, —–, 684 S.E.2d 508, 511 (2009), *disc. review denied*, 363 N.C. 809, 692 S.E.2d 393 (2010); *see also State v. Hough*, —– N.C. App. —–, —–, 690 S.E.2d 285, 291 (2010) (declining to find *Melendez-Diaz* abrogates the cases "that relied on *Crawford* and were decided prior to *Melendez-Diaz* . . . where the analyst who testified asserted his or her own expert opinion"). Thus, when an "underlying report, which would be testimonial on its own, is used as a basis for the opinion of an expert who independently reviewed and confirmed the results," it is "not offered for the proof of the matter asserted" and does not implicate the Confrontation Clause. *Mobley*, 200 N.C. App. at —–, 684 S.E.2d at 512.

In *Mobley*, we distinguished the expert testimony at issue from the facts of *Locklear*. Where the medical examiner in *Locklear* "did not testify to his own expert opinion based upon the tests performed by other experts, nor did he testify to any review of the conclusions of the underlying reports or of any independent comparison performed," the testifying expert in *Mobley* "testified not just to the results of other experts' tests, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts' tests, and her own expert opinion based on a comparison of the original data." *Id.* at —–, 684 S.E.2d at 511. As such, the challenged testimony did not implicate the Confrontation Clause, and accordingly no violation of *Crawford* or *Melendez-Diaz* occurred. *See id.* at —–, 684 S.E.2d at 512. In *Hough*, this Court approved the admission of expert testimony as to the identity of controlled substances delivered by a witness who did not conduct or witness the underlying testing performed by a non-testifying forensic chemist. *See Hough*, —– N.C. App. at —–, 690 S.E.2d at 290-92 (holding that while the report at issue "formed the basis" of the expert's opinion, it "was not offered for the proof of the matter asserted and was not prima facie evidence that the substances recovered from the crime scene were, in fact, marijuana and cocaine"). The witness had described in great detail that which her "peer review" entailed, sufficiently showing that "her expert opinion was based on an independent review and confirmation of test results," but we emphasized,

notably, that "[i]t is not our position that every 'peer review' will suffice to establish that the testifying expert is testifying to his or her expert opinion." *Id.* at ––, 690 S.E.2d at 291.

Here, the prejudicial testimony from testifying experts summarizing another non-testifying expert's reports consisted of the serologist and DNA evidence offered by SBI Agents Barker and Freeman respectively.[5] Both lab reports were clearly testimonial under the tenets of *Melendez-Diaz*. *See Locklear*, 363 N.C. at 452, 681 S.E.2d at 305 ("The [Supreme] Court specifically referenced autopsy examinations as one such kind of forensic analyses [that qualify as testimonial statements]."); *Mobley*, 200 N.C. App. at ––, 684 S.E.2d at 511 ("Although the Court in *Melendez-Diaz* addressed only drug testing, the Court's analysis easily implicates DNA testing as well."). Still, the admissibility of Barker and Freeman's testimony will not be governed by the *Melendez-Diaz* if the reports upon which they relied merely provided a basis for their *independent* expert opinions but were offered neither as proof of the matter asserted nor *prima facie* evidence that the items linking Defendant to the crime contained blood or saliva that matched his DNA profile. We conclude, however, that the reports in the instant case were not limited to this permissible function. As discussed below, the testimony elicited from Barker and Freeman intended to reveal their level of participation in the forensic testing at issue or their independent familiarity with the results thereof falls short of that held to be sufficient in *Mobley* and *Hough*. Rather, the facts here more closely mirror those of *State v. Galindo*, –– N.C. App. ––, 683 S.E.2d 785 (2009). In *Galindo*, even though the expert chemist explained the lab's chain of custody protocol, which had been followed, and testified that the analytical procedures "exceeded industry standards" and were "relied upon by experts in the field of forensic chemistry," it was clear that his identification of certain

5. While the United States Supreme Court included autopsy examinations in its list of forensic analyses controlled by *Melendez-Diaz* and our courts have explicitly deemed autopsy reports to constitute testimonial evidence thereunder, *see Locklear*, 363 N.C. at 452, 681 S.E.2d at 305 (citing *Melendez-Diaz*, 557 U.S. at –– n.5, 174 L. Ed. 2d at 326 n.5), we do not discuss Lantz's testimony to the non-testifying pathologist's autopsy findings at great length. For, even if Lantz's recitation of stab wounds visually observed by Dr. Winston and listed in the latter's report are considered a type of testimonial forensic evidence contemplated by *Melendez-Diaz*, his description of Cook's stab wounds was not prejudicial. Several responding officers and EMS personnel also testified to the wounds they personally observed, and several photographs of the victim's body were published to the jury for inspection. Moreover, Lantz's opinion testimony regarding the impact of the various wounds and the time it would have taken for Cook to lose consciousness was clearly based, not on the report at all, but on his own independent experience as a pathologist.

chemical substances was "based 'solely' on the lab report" prepared by another non-testifying analyst. *Id.* at ––, 683 S.E.2d at 787.

Neither expert in the case *sub judice* testified to having taken part in conducting any of the testing of the substance, nor did either perform any independent analysis. Special Agent Barker testified that the items sent to the serologist division were assigned to Special Agent Todd, who is no longer employed with the SBI. While Barker approved of the techniques and procedures employed by Todd, her testimony demonstrates that her familiarity with this case was limited to her role as "technical reviewer" of Todd's report. Barker stated that "[i]t's required for any report before it goes out that it have a peer review by someone who is certified in that area" and that she "actually did the peer review on this case." She found the procedures used by Todd to be in accordance with standard methods and concurred with his analyses and results, but there is absolutely no indication that Barker conducted any independent testing designed to confirm the conclusions of the non-testifying expert, made any comparison of the original data in formulating her opinion, or ever even inspected any item of physical evidence prior to testifying in this case. In fact, Barker's recognition of the evidence tested by Todd seems to have been limited to her ability to identify Todd's initials on each envelope containing the particular item and not on any personal examination thereof or confirmation of the results relating thereto. As the State presented each exhibit, Barker recited which tests Todd had performed thereon and what the results of those tests were. Only after eliciting testimony as to Todd's results did the State revisit each exhibit and ask Barker, based on her review of the tests and analyses performed, to provide her opinion as a forensic biologist of what bodily fluids each exhibit contained. Thus, Barker's initial testimony as to the results was clearly a mere recitation of the findings contained in Todd's lab report. Only later did Barker purport to offer her expert opinions, which conformed entirely to that which Todd's report indicated, without explanation of any review or confirmation she performed on any particular item. Barker's general testimony at the outset of her examination that she concurred with Todd's results is not sufficient to show that the opinions she offered were indeed her own.

Special Agent Freeman with the DNA unit likewise testified as the technical reviewer of non-testifying declarant Agent Spittle's work. While Freeman indicated that he was "very familiar with the testing that was used" because he "helped validate the system," his dealings with this particular case were limited to "the specific report

that [Spittle] generated and all the subsequent notes." Freeman also identified the State's exhibits solely through recognition of Todd and Spittle's initials. The only further explanation of Freeman's involvement with this case referenced his "review of the notes and the fact that [he was] the person that basically did the peer review." After identifying each exhibit, Freeman reported the results of the DNA testing performed thereon by Spittle and then offered his "opinion[s] as to the [DNA results] that [he] just testified to." This putative opinion testimony, however, mirrored the findings of Spittle's underlying report exactly. On cross-examination, Freeman further indicated that he had conducted no independent research to confirm the contents of the underlying report, when defense counsel asked, "Now, you tested other items as part of your analysis, DNA analysis, is that correct?" Freeman clarified that "[o]ther items were tested by Special Agent Spittle" and continued to testify specifically to *Spittle's* conclusions and what "[h]is results indicate." The State elicited no testimony that Freeman's "opinion as to [Spittle's] results," finding various DNA matches between Defendant and the evidence tested, was based on anything other than the witness's reading of the lab report.

The mere peer review of the retired agents' methods and conclusions does not suffice in this case, for the transcript reveals that these experts were merely summarizing the results of the absent analysts. Neither Barker nor Freeman provided any insight as to the nature or details of their peer review, and it is clear from their testimony that they took no part in conducting any testing or independent analyses of the evidence at issue. Accordingly, Barker and Freeman were not using the reports of another expert as the basis for their own independent expert opinions but, rather, were "merely reporting the results of other experts." *Mobley*, ––– N.C. App. at –––, 684 S.E.2d at 511. As such, the reports were clearly being utilized by the testifying experts as a vehicle through which they impermissibly offered the statements of other expert analysts for the truth of the matter asserted, implicating the Confrontation Clause.

This case is akin to *Locklear* because the challenged evidence—Barker and Freeman's testimony based solely on the lab reports of non-testifying analysts—was testimonial in nature and therefore was subject to the requirements of *Crawford* and *Melendez-Diaz*. Accordingly, it was constitutional error for the trial court to admit the serology and DNA reports as well as Barker and Freeman's testimony as to the contents thereof because there was no showing by the State regarding any prior opportunity for cross-examination by Defendant.

Crawford and *Melendez-Diaz* thus entitle Defendant to be confronted with the analysts at trial. Moreover, testimony that the original SBI analysts had retired does not suffice to establish that the State made "good-faith efforts" to procure their presence as witnesses at trial, *Nobles*, 357 N.C. at 441, 584 S.E.2d at 771, and does not constitute a showing of unavailability. Barker and Freeman should not have been allowed to testify to the presence of blood on the several items of evidence submitted to the SBI or to the follow-up DNA test results implicating Defendant because these opinions were based exclusively on the tests that Agents Todd and Spittle claimed to have performed and their unconfirmed observations. Furthermore, these errors were certainly not harmless. Where it was proper for the jury "to consider . . . [D]efendant's actual role in the offense as opposed to his legal liability for the acts of others," *State v. Benbow*, 309 N.C. 538, 546, 308 S.E.2d 647, 652 (1983), evidence of his participation and involvement in the crime was submitted only in the form of this forensic evidence that was improperly admitted under the Confrontation Clause. Accordingly, Defendant is awarded a new sentencing trial.

New trial.

Judges STEPHENS and HUNTER, Jr. concur.

STATE OF NORTH CAROLINA v. CHARLA DEAN DAVIS

No. COA09-1537

(Filed 16 November 2010)

1. Evidence— expert testimony—blood alcohol concentration —odor analysis not sufficiently reliable method

The trial court erred by allowing the State's expert witness to give his opinion of defendant's blood alcohol concentration (BAC) at the time of the accident. The witness's odor analysis was not a sufficiently reliable method of proof, and there was a reasonable possibility that a different result would have been reached at trial absent this testimony for the charges of driving while impaired, reckless driving, second-degree murder, and assault with a deadly weapon inflicting serious injury. However, the error was not prejudicial to defendant on the charges of driving while license revoked (DWLR) and felony hit

and run. DWLR was remanded for resentencing because it was consolidated with the reckless driving charge.

2. Motor Vehicles— driving while impaired—reckless driving—second-degree murder—assault with deadly weapon inflicting serious injury—motion to dismiss—sufficiency of evidence—blood alcohol concentration—impairment

The trial court did not err by denying defendant's motion to dismiss several of the charges against her including second-degree murder, assault with a deadly weapon inflicting serious injury, driving while impaired, and reckless driving. The State was required to prove either defendant's blood alcohol concentration (BAC) at a relevant time after driving or that defendant was impaired. The State expert's testimony that defendant's BAC was 0.18 was sufficient to survive a motion to dismiss these charges. However, as the admission of the witness's odor test testimony was prejudicial, defendant was granted a new trial.

3. Evidence— prior crimes or bad acts—DWI convictions—temporal remoteness

The trial court committed prejudicial error by admitting defendant's 1989 and 1990 convictions for driving while impaired (DWI). In light of the sixteen-year gap between her older convictions and her more recent one, defendant's eighteen and nineteen-year-old convictions, combined with her sole conviction for DWI occurring in 2006, did not constitute part of a clear and consistent pattern of criminality.

4. Homicide— second-degree murder—instruction—intent

The trial court did not err or commit plain error by its instruction to the jury concerning the definition of intent in regard to the charge of second-degree murder. The trial court gave the pattern jury instruction three times, followed the third instruction with the definition of the word "intent" applied within the context of the instruction, repeated the instruction on malice, and then explained the meaning of "intent."

5. Sentencing— aggravating factors—knowingly created great risk of death to more than one person with hazardous device or weapon

The trial court did not err by submitting the aggravating factor to the jury that defendant knowingly created a great risk of

death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person even though defendant was already charged with assault with a deadly weapon inflicting serious injury (AWDWISI). AWDWISI only required that a defendant use a deadly weapon and did not require the proof necessary for the aggravating factor.

Appeal by Defendant from judgments entered 11 June 2009 by Judge Richard D. Boner in Superior Court, Gaston County. Heard in the Court of Appeals 28 April 2010.

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

James N. Freeman, Jr. for Defendant-Appellant.

McGEE, Judge.

Charla Dean Davis (Defendant) was convicted of reckless driving, driving while license revoked, second-degree murder, two counts of felony hit and run, two counts of assault with a deadly weapon inflicting serious injury, and driving while impaired. Defendant appeals.

The evidence at trial tended to show that, at approximately 9:30 p.m. on 7 August 2008, Betty Adams (Ms. Adams) and six of her friends left Gastonia for Charlotte in a Ford Expedition (the Expedition). Ms. Adams' cousin, Kevin Adams (the driver), was driving the Expedition. As the driver drove east across the Catawba River Bridge (the bridge) on Wilkinson Boulevard, he suffered an aneurysm, his head "leaned over towards" Ms. Adams, and he became unable to drive the Expedition. Ms. Adams was in the front passenger seat, and she was able to use the brakes to stop the Expedition. Lawanna Pearson (Ms. Pearson) was seated behind Ms. Adams, and she grabbed the steering wheel. Ms. Adams and Ms. Pearson were thereby able to stop the Expedition in the middle of the bridge.

A tractor-trailer driven by Ronnie Eudy (Mr. Eudy) stopped behind the Expedition. Mr. Eudy got out of his tractor-trailer, approached the Expedition, and spoke with Ms. Adams. Ms. Adams told Mr. Eudy that the driver had suffered a stroke and Mr. Eudy offered his assistance. Ms. Adams, Ms. Pearson, and another passenger in the Expedition, Jerry Leach (Mr. Leach), continued speaking with Mr. Eudy while standing next to the driver's door of the Expedition. During their conversation, a "grey truck came speeding"

across the bridge in one of the westbound lanes. The grey truck struck Mr. Eudy, Ms. Adams, Ms. Pearson, and Mr. Leach. Ms. Adams, Ms. Pearson, and Mr. Leach each suffered injuries but survived; however, as a result of his injuries, Mr. Eudy died upon arrival at Carolinas Medical Center. The grey truck continued on after the accident, leaving the scene.

Richard Tashiro (Mr. Tashiro) testified he was driving his red pickup truck in one of the westbound lanes of the bridge. Mr. Tashiro said that he "saw two vehicles . . . approaching [him] and at the time [he] didn't know that they weren't moving. [He] could tell that it was probably a car and a truck[.]" Mr. Tashiro further testified that "as [he] got closer, [he] noticed a vehicle stopped in [his] lane on the right. . . . So [he] hit [his] brakes to stop and when [he] did [his] truck pulled to the right and hit the bridge and spun back around and [he] was facing back towards Charlotte[.]"

Belmont Police Sergeant Jason Davis (Sergeant Davis) investigated the accident scene and recovered pieces from a silver Saturn Vue (the Saturn). Sergeant Davis testified that a Saturn Vue was a "small SUV type vehicle." Sergeant Davis went to a nearby convenience store and spoke with the clerk on duty. The clerk informed Sergeant Davis that her co-worker, Bryant Burrell (Mr. Burrell), had received a phone call in which the caller told Mr. Burrell that the caller had hit someone with the caller's vehicle and intended to take the vehicle to Mr. Burrell's house. Sergeant Davis obtained Mr. Burrell's address in Mount Holly and accompanied officers of the Mount Holly Police Department to recover the vehicle.

The police officers found the Saturn at Mr. Burrell's house, with damage consistent with the accident on the bridge. The vehicle pieces recovered at the scene of the accident matched pieces missing from the Saturn. Mr. Burrell was home when Sergeant Davis and the officers arrived, and he told them that Defendant had called him while he was at work and said she was driving the Saturn. Mr. Burrell testified that Defendant also told him that "someone just crossed the yellow line and hit [her]." Mr. Burrell did not see Defendant that night, but he gave Belmont Police Sergeant Richard Spry (Sergeant Spry) Defendant's phone number and address. Sergeant Spry left voice messages on Defendant's phone and had Defendant's photograph published on the television during the next day's morning news. Mr. Burrell went with Sergeant Spry to Defendant's home address, but Defendant was not there.

Sergeant Spry first saw Defendant about 8:00 a.m. the following day, 8 August 2008. Defendant approached Sergeant Spry in the lobby of the Belmont Police Department and stated that she was aware the police were interested in speaking with her. Sergeant Spry described Defendant's clothing as being in disarray, "like it would have been if someone had slept in their clothes all night long." Sergeant Spry testified that he "could smell alcohol on [Defendant's] breath at that point."

Sergeant Spry then questioned Defendant, who stated she had been driving a silver Saturn Vue on the bridge the night of the accident and had hit something, but that she did not stop "because [she had] one more class. . . . A driving class." Sergeant Spry testified that he later learned the class Defendant was referring to was "an alcohol drinking class, assessment class" that Defendant was taking in order to "get her license back." In response to Sergeant Spry's further questioning, Defendant stated she went to the home of a friend, Laura Maynard (Ms. Maynard), and spent the night there. Defendant further stated that, after she arrived at Ms. Maynard's house, Ms. Maynard "gave [Defendant] some vodka." Sergeant Spry did not administer any blood or breath test to determine Defendant's blood alcohol on the morning of 8 August 2008. However, four days later, on 12 August 2008, Sergeant Spry asked Defendant to return to the Police Department and to undergo a blood test. The results of this blood test were negative for any drugs or alcohol.

Defendant was indicted and found guilty of the following: second-degree murder in the death of Mr. Eudy; two counts of assault with a deadly weapon inflicting serious injury (AWDWISI), for injury to Ms. Adams and to Mr. Leach; driving while impaired (DWI); felony hit and run in the death of Mr. Eudy; felony hit and run with personal injury to Ms. Adams; reckless driving; and driving while her driver's license was revoked (DWLR). The jury also found the following aggravating factor: "Defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person."

The trial court sentenced Defendant to 276 months to 341 months in prison for second-degree murder; a consolidated sentence of 42 months to 60 months in prison for AWDWISI, to run consecutively with Defendant's sentence for second-degree murder; a consolidated sentence of 10 months to 12 months for hit and run, to run consecutively with Defendant's sentence for AWDWISI; and a sentence of 120

days in prison for DWLR and reckless driving, to run concurrently with Defendant's sentence for second-degree murder. The trial court arrested judgment on Defendant's DWI conviction. Defendant appeals. Further facts will be discussed as necessary.

I. Blood Alcohol Concentration

A. Odor Analysis

[1] Defendant argues that the trial court committed reversible error in allowing the State's expert witness to give his opinion of Defendant's blood alcohol concentration (BAC) at the time of the accident. Defendant contends that the expert's opinion was not based on a sufficiently reliable method of proof. We agree.

At trial, the State offered the testimony of Paul L. Glover (Mr. Glover), a research scientist and branch head for the Forensic Test for Alcohol, a part of the North Carolina Department of Health and Human Services [DHHS]. Mr. Glover testified that, based on retrograde extrapolation, he was able to determine Defendant's BAC at the time of the accident. Mr. Glover explained that retrograde extrapolation allows an analyst to determine BAC at a designated time based on a reported alcohol concentration and the amount of time that elapsed between the time the sample was taken and time of the event in question. Our Supreme Court has explained retrograde extrapolation as

> a mathematical analysis in which a known blood alcohol test result is used to determine what an individual's blood alcohol level would have been at a specified earlier time. The analysis determines the prior blood alcohol level on the bases of (1) the time elapsed between the occurrence of the specified earlier event (*e.g.*, a vehicle crash) and the known blood test, and (2) the rate of elimination of alcohol from the subject's blood during the time between the event and the test.

State v. Cook, 362 N.C. 285, 288, 661 S.E.2d 874, 876 (2008). Our Courts have recognized retrograde extrapolation as a reliable method of proving BAC. *See State v. Davis*, 142 N.C. App. 81, 542 S.E.2d 236 (2001); *State v. Catoe*, 78 N.C. App. 167, 336 S.E.2d 691 (1985).

Defendant's challenge to Mr. Glover's testimony, however, focuses not on the retrograde extrapolation itself, but rather on the reported alcohol concentration upon which Mr. Glover based the extrapolation. When Defendant reported to the Belmont Police

Department on the morning of 8 August 2008, she was met by Sergeant Spry. Sergeant Spry did not perform any blood or breath tests on Defendant that morning. However, Sergeant Spry testified that he was able to smell alcohol on Defendant's breath that morning.

Mr. Glover based his retrograde extrapolation analysis on Sergeant Spry's report that Defendant's breath smelled of alcohol at 8:14 a.m. on 8 August 2008, more than ten hours after the accident. Mr. Glover testified during *voir dire* that the odor of alcohol did "not give [him] an absolute value with respect to the alcohol concentration, but it [did] show that alcohol was still in [Defendant's] system and [was] still being exhaled in her breath." Mr. Glover also testified during *voir dire* that the determination of BAC in this case was made under "the assumption that there was no alcohol consumption" by Defendant during the time between the accident and Defendant's meeting with Sergeant Spry. However, Mr. Glover opined that, based on "look[ing] at some papers, some texts, where the concentration of alcohol that is detectable by the human nose has been measured[,]" the lowest BAC that is detectable by odor alone is 0.02. Mr. Glover further testified that the literature he relied upon suggested a range of possible BAC levels, but that "[n]ot knowing the concentration, I used the lowest concentration that is detectable[.]" Over objection, Mr. Glover was permitted to testify that, in his opinion, at the time of the accident, Defendant had a BAC of 0.18.

Defendant contends that Mr. Glover's use of "odor analysis" as a baseline is an insufficient basis for the admission of his opinion. The test for the admissibility of expert testimony in North Carolina is set forth in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004). *Howerton* affirms a three-part inquiry for determining the admissibility of expert testimony: "(1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? . . . (2) Is the witness testifying at trial qualified as an expert in that area of testimony? . . . [and] (3) Is the expert's testimony relevant?" *Id.* at 458, 597 S.E.2d at 686 (citations omitted). A trial court ruling on the admissibility of expert testimony is given " 'wide latitude of discretion[,]' " and will not be overturned absent an abuse of discretion. *Id.* (citation omitted). "An abuse of discretion results when 'the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) (citation omitted).

At issue before us is whether Mr. Glover's odor analysis is a sufficiently reliable method of proof. In *Howerton*, the Supreme Court explained:

> Where . . . the trial court is without precedential guidance or faced with novel scientific theories, unestablished techniques, or compelling new perspectives on otherwise settled theories or techniques, a different approach is required. Here, the trial court should generally focus on the following nonexclusive "indices of reliability" to determine whether the expert's proffered scientific or technical method of proof is sufficiently reliable: "the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked 'to sacrifice its independence by accepting [the] scientific hypotheses on faith,' and independent research conducted by the expert."

Howerton, 358 N.C. at 460, 597 S.E.2d at 687 (citations omitted).

In *State v. Corriher*, 184 N.C. App. 168, 645 S.E.2d 413 (2007), the State relied on "retrograde extrapolation evidence . . . to explain that a blood sample exposed to heat over 12 days might register a lower blood alcohol concentration than it would have at the time it was drawn." *Id.* at 170, 645 S.E.2d at 415. The State's expert testified that he had previously performed a test on a sample of blood that was taken and then stored without refrigeration for seventy-eight days. *Id.* at 171, 645 S.E.2d at 415. Further, the expert testified that the study he performed was "conducted using accepted procedures and methodology and its results were published to the scientific community in newsletters and presented at scientific conferences." *Id.*

In the present case, Mr. Glover testified during *voir dire* that, though he had testified as an expert witness in North Carolina "[a]bout 230 to 240 times[,]" he had never before testified based solely on an odor analysis. Mr. Glover did mention one case in which he was involved that began with "people detect[ing] an odor[,]" but he said, "[u]ltimately [he] had a blood test on that one." Thus, the odor analysis at issue here is "[a] novel scientific theor[y], [an] unestablished technique[], or [a] compelling new perspective[] on otherwise settled theories or techniques" and must therefore be accompanied by sufficient indices of reliability. *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687 (citations omitted).

Mr. Glover testified during voir dire that "there are published values for the concentrations of alcohol that humans . . . can detect with their nose." During his direct examination, Mr. Glover testified that he

> looked at some papers, some texts, where the concentration of alcohol that is detectable by the human nose has been measured. We have a guide that deals with a lot of different chemicals and it will list the lowest value or lowest concentration that is detectable by the human nose. . . . I looked at that and found the lowest value that is detectable is 49 parts per million. If I convert that to a BAC for impaired driving type cases, that would be a .02.

However, Mr. Glover did not specify which texts provided him with this information, nor were such texts presented at trial. Likewise, there was no evidence that Mr. Glover had performed any independent verification of an odor analysis or "smell test" of this type, nor that he had ever submitted his methodology for peer review. Thus, the method of proof used by Mr. Glover in the case before us lacks the significant indices of reliability that we noted in *Corriher*.

Further, in N.C. Gen. Stat. § 20-139.1, the General Assembly has established a thorough set of "[p]rocedures governing chemical analyses[.]" N.C. Gen. Stat. § 20-139.1 (2009). N.C.G.S. § 20-139.1(a) provides that a chemical analysis of a person's BAC is admissible in implied-consent cases such as that at issue before us, and explicitly "does not limit the introduction of other competent evidence as to a person's alcohol concentration[.]" N.C.G.S. § 20-139.1(a). We note, however, that the rules governing the performance of a chemical analysis under N.C.G.S. § 20-139.1 are explicit in their requirements with respect to certain chemical analyses. For example, in order for the results of a breath analysis to be admissible, the analysis must be "performed in accordance with the rules of [DHHS]" as well as be performed by a person using an instrument for which a permit has been issued by DHHS. N.C.G.S. § 20-139.1(b)(1)-(2). Further, N.C.G.S. § 20-139.1(b2) provides that DHHS "shall perform preventative maintenance on breath-testing instruments used for chemical analysis." N.C.G.S. § 20-139.1(b2). Finally, N.C.G.S. § 20- 139.1(b3) requires "the testing of at least duplicate sequential breath samples." N.C.G.S. § 20-139.1(b3). "The results of the chemical analysis of all breath samples are admissible if the test results from any two consecutively collected breath samples do not differ from each other by an alcohol concentration greater than 0.02." *Id.* Chemical analyses of blood or urine samples are likewise regulated, requiring performance by an analyst possessing a DHHS permit "authorizing the chemical analyst to analyze blood or urine for alcohol or controlled substances, metabolites of a controlled substance, or any other impairing substance." N.C.G.S. § 20-139.1(c4).

The "odor analysis" performed in the case before us is lacking in any of the rigorous standards applied to chemical analyses of breath, blood and urine under N.C.G.S. § 20-139.1. Sergeant Spry reported that he smelled alcohol on Defendant's breath the day after the accident. Sergeant Spry made no attempt to test Defendant's BAC by breathalyzer or blood test. Mr. Glover's calculation of baseline BAC was based on "the odor of alcohol . . . detected on [Defendant's] breath" taken by Sergeant Spry at 8:00 a.m. on 8 August 2008, more than ten hours following the accident. There was no testimony showing how Sergeant Spry's alcohol-detecting abilities were even remotely comparable to those of a trained operator using well-maintained and certified equipment pursuant to a DHHS-issued permit. Based on the foregoing, we find that Mr. Glover's retrograde extrapolation was not supported by a reliable method of proof. In light of our review of accepted analysis methodologies, the odor analysis in the case before us was so unreliable that the trial court's decision was manifestly unsupported by reason. Therefore, the trial court abused its discretion in admitting this testimony.

B. Prejudice

Defendant contends she is entitled to a new trial as a result of the trial court's error in admitting Mr. Glover's odor analysis testimony. "The erroneous admission of evidence requires a new trial only when the error is prejudicial." *State v. Chavis*, 141 N.C. App. 553, 566, 540 S.E.2d 404, 414 (2000) (citations omitted). "To show prejudicial error, a defendant has the burden of showing that 'there was a reasonable possibility that a different result would have been reached at trial if such error had not occurred.' " *Id.* (citations omitted). We therefore determine whether " 'there was a reasonable possibility that a different result would have been reached at trial' " had the trial court not admitted Mr. Glover's testimony regarding Defendant's BAC. *Id.* (citations omitted).

Other than Mr. Glover's testimony, the State presented no evidence as to Defendant's BAC. The trial court's instructions to the jury regarding DWI and second-degree murder specifically required that the jury determine whether Defendant had a BAC greater than 0.08 at any relevant time after driving. Because the State offered no other evidence of Defendant's BAC at the relevant time, there is a " 'reasonable possibility that a different result would have been reached at trial' " had the trial court not admitted Mr. Glover's testimony. *Id.* (citations omitted).

C. Impairment

The State contends that evidence of impairment alone would support the convictions of second-degree murder and DWI. As the trial court's instructions were limited to BAC with respect to the charge of second-degree murder and for DWI, we disagree. However, the trial court's instruction on reckless driving required the jury to make the following determination:

> Second, that [Defendant] drove that vehicle while impaired and that in doing so she acted carelessly and heedlessly in willful or wanton disregard of the rights or safety of others.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant drove a vehicle upon a highway while impaired and that in so doing she acted carelessly or heedlessly in willful or wanton disregard of the rights or safety of others, then it would be your duty to return a verdict of guilty of reckless driving.

Thus, the jury was required to determine whether Defendant drove while impaired. The trial court instructed the jury that, to find Defendant guilty of AWDWISI, it must find as follows:

> First that the defendant assaulted Betty Adams by intentionally striking her with a motor vehicle. An assault is also sometimes referred to as a battery. An assault or battery is the intentional application of any force, directly or indirectly, to the person of another without his or her consent.
>
> Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom. Intent may be implied from culpable negligence if an injury is the direct result of intentional acts done under circumstances which show a reckless disregard for the safety of others and a willingness to inflict injury.
>
> The second thing the State must prove beyond a reasonable doubt is that the defendant used a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious bodily injury. A motor vehicle is a deadly weapon.

> And, third, the State must prove that the defendant inflicted serious injury upon Betty Adams. Serious injury is defined as such physical injury as causes great pain and suffering.

The record shows that the only evidence the State offered of culpable negligence was Defendant's alleged impairment. Thus, the instructions to the jury regarding reckless driving and AWDWISI allowed the jury to find Defendant guilty of those charges based on a finding that Defendant was impaired and the instructions did not limit the jury solely to consideration of whether Defendant's BAC was 0.08 or greater. We therefore address the State's argument regarding the sufficiency of the evidence of impairment.

The State argues that our Supreme Court's decision in *State v. Hewitt*, 263 N.C. 759, 140 S.E.2d 241 (1965), is controlling as to this issue. The State quotes the following rule as set forth in *Hewitt*: "The fact that a motorist has been drinking, when considered in connection with faulty driving such as following an irregular course on the highway or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show [impairment]." *Id.* at 764, 140 S.E.2d at 244. In *Hewitt*, the defendant had been driving a vehicle that collided with another vehicle, causing the death of the other driver. *Id.* at 760, 140 S.E.2d at 241. The defendant had consumed approximately one alcoholic drink each hour during the five hours preceding the accident, but testified that he was not under the influence of alcohol while he was driving. *Id.* at 764, 140 S.E.2d at 244. The evidence presented by the State concerning the cause of the accident was described by the Court as "simply conjecture, speculation and guesswork," and the sole description of the defendant's driving was the defendant's own assertion that he had been driving at, or just above, the posted speed limit before the accident. *Id.* at 762-64, 140 S.E.2d at 243-44. In *Hewitt*, the Court held that, while there was evidence that the defendant had been drinking, the evidence was insufficient to establish a *prima facie* showing of a violation of N.C.G.S. § 20-138 because "the requisite additional circumstances [indicative of faulty driving] [did] not appear." *Id.* at 764, 140 S.E.2d at 244.

In the case before us, the State presented the testimony of two bartenders who served Defendant on 7 August 2008. Over the period of time between 5:00 p.m. and 9:20 p.m., Defendant was served four Pabst Blue Ribbon beers and two liquor drinks containing Wild Turkey 101. Defendant did not drink at least half of one of the beers. Neither bartender testified that Defendant was impaired that evening.

Thus, although there was testimony that Defendant had consumed alcohol prior to driving, there was no testimony that she was impaired.

> The correct test . . . is not whether the party . . . had drunk or consumed a spoonful or a quart of intoxicating beverage, but whether a person is under the influence of an intoxicating liquor . . . by reason of his having drunk a sufficient quantity of an intoxicating beverage . . . to cause him to lose normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties.

State v. Ellis, 261 N.C. 606, 607, 135 S.E.2d 584, 585 (1964).

The evidence concerning the circumstances of the accident included the following: Ms. Pearson testified that she, Mr. Eudy, Ms. Adams and Mr. Leach, were standing on the bridge next to the Expedition trying to avoid being hit by oncoming traffic. Sergeant Spry testified that "there were people across the center line that [Defendant] hit[.]" The door to Mr. Eudy's tractor-trailer was open and extended into Defendant's lane. Mr. Burrell told Sergeant Davis that Defendant had told him after the accident that someone had crossed into her lane and hit her, and that she had driven off. There was no other testimony regarding the manner in which Defendant was driving. As in *Hewitt*, the facts before us establish that Defendant had been drinking, but not that she was impaired. Further, Sergeant Spry testified as follows on cross-examination:

> Q. When you spoke to [Defendant] the morning after this happened, she did not conceal or hide the fact that she was involved in some kind of wreck on the bridge, did she?
>
> A. No, sir, she did not.
>
> Q. She didn't indicate she knew exactly what happened, did she?
>
> A. No, sir.
>
> Q. She indicated to you that she thought something came across the center line and hit her?
>
> A. That is correct.
>
> Q. Based on your investigation of the wreck, would that not be consistent with what happened?
>
> A. Are you asking me did something hit her?

Q. Okay. I am asking was something across the center line that got hit?

A. There were people across the center line that she hit, yes, sir.

Q. And you saw the Expedition on the bridge that night, correct?

A. Yes, sir.

Q. You saw how it was parked right there at the front left tire literally covering the double yellow line on the bridge; is that correct?

A. That is correct, yes, sir. It is on the double yellow line.

Q. And the passenger door—or the driver's side door of the Expedition was open by all accounts; is that correct?

A. Yes, sir.

Q. So it would have been extending even further into the oncoming lane of traffic. Is that not correct, sir?

A. That is correct, yes, sir.

Q. This isn't a big bridge, is it?

A. It's quite a small bridge, actually.

Q. Not a lot of margin for error on this bridge. Is that fair to say?

A. That's correct.

Q. There [are] four lanes but they are all narrow?

A. Yes, sir.

We do not find that Sergeant Spry's testimony that Defendant collided with someone or something that was extending into her lane of travel is tantamount to evidence of "faulty driving such as following an irregular course on the highway or other conduct indicating an impairment of physical or mental faculties," as determined in *Hewitt*. *Hewitt*, 263 N.C. at 764, 140 S.E.2d at 244. Thus, except for the fact of the collision itself, the State presented no evidence that Defendant's driving was in any way irregular or faulty. On this evidence, as in *Hewitt*, we find no *prima facie* showing of a violation of N.C.G.S. § 20-138, or of Defendant's impairment.

Because there was no evidence of impairment, the State was limited to proving reckless driving and AWDWISI by showing Defendant's BAC. Thus, there is a " 'reasonable possibility that a dif-

ferent result would have been reached at trial' " had the trial court not admitted Mr. Glover's odor test testimony. *Chavis*, 141 N.C. App. at 566, 540 S.E.2d at 414 (citations omitted).

We next address the charges of DWLR and felony hit and run. To sustain a conviction of DWLR, the State must prove that a defendant was driving a motor vehicle on a "highway[] of the State" while his or her driver's license was revoked. N.C. Gen. Stat. § 20-28 (2009) ("any person whose drivers license has been revoked who drives any motor vehicle upon the highways of the State while the license is revoked is guilty of a Class 1 misdemeanor"). N.C. Gen. Stat. § 20-166 sets forth the requirements for a conviction of felony hit and run as follows:

> (a) The driver of any vehicle who knows or reasonably should know:
>
> > (1) That the vehicle which he or she is operating is involved in a crash; and
> >
> > (2) That the crash has resulted in serious bodily injury, as defined in G.S. 14-32.4, or death to any person;
>
> shall immediately stop his or her vehicle at the scene of the crash. The driver shall remain with the vehicle at the scene of the crash until a law-enforcement officer completes the investigation of the crash or authorizes the driver to leave and the vehicle to be removed, unless remaining at the scene places the driver or others at significant risk of injury.
>
> Prior to the completion of the investigation of the crash by a law enforcement officer, or the consent of the officer to leave, the driver may not facilitate, allow, or agree to the removal of the vehicle from the scene for any purpose other than to call for a law enforcement officer, to call for medical assistance or medical treatment as set forth in subsection (b) of this section, or to remove oneself or others from significant risk of injury. If the driver does leave for a reason permitted by this subsection, then the driver must return with the vehicle to the accident scene within a reasonable period of time, unless otherwise instructed by a law enforcement officer. A willful violation of this subsection shall be punished as a Class F felony.

N.C. Gen. Stat. § 20-166 (2009). Thus, the elements of proof of DWLR and felony hit and run do not require a showing of impairment of a defendant or a defendant's BAC for conviction. Therefore, there is

not a " 'reasonable possibility that a different result would have been reached at trial' " on those charges had the trial court not admitted Mr. Glover's odor test testimony. *Chavis*, 141 N.C. App. at 566, 540 S.E.2d at 414 (citations omitted).

Therefore, for the charges of DWI, reckless driving, second-degree murder, and AWDWISI, the trial court's error in allowing Mr. Glover's odor test testimony was prejudicial to Defendant and Defendant is entitled to a new trial on those charges. The error was not prejudicial to Defendant as to the charges of DWLR and felony hit and run.

II. Motion to Dismiss

[2] Defendant next argues that the trial court erred in denying her motion to dismiss several of the charges against her, because Mr. Glover's odor test testimony was inadmissible and the State presented no other evidence of Defendant's impairment. She contends the following charges should have been dismissed: second-degree murder; AWDWISI; DWI; and reckless driving. In light of our standard of review and our Court's holding in *State v. Morton*, 166 N.C. App. 477, 601 S.E.2d 873 (2004), we disagree.

A motion to dismiss criminal charges should be allowed only where the State has failed to show " 'substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of [the] defendant's being the perpetrator of the offense.' " *Id.* at 481, 601 S.E.2d at 876 (citation omitted). "All evidence actually admitted, whether competent or not, must be viewed in the light most favorable to the State, drawing every reasonable inference in favor of the State." *Id.* (citing *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) *and State v. Jones*, 342 N.C. 523, 540, 467 S.E.2d 12, 23 (1996)). "It is not a sufficient basis for granting a motion to dismiss that some of the evidence was erroneously admitted by the trial court." *Morton*, 166 N.C. App. at 481-82, 601 S.E.2d at 876.

In *Morton*, our Court reviewed a trial court's ruling on a defendant's motion to dismiss a charge of possession of stolen goods where the only evidence of the defendant's knowledge that the goods were stolen was improperly admitted by the trial court. *Id.* We described the defendant's argument thus:

> Defendant contends there was insufficient evidence presented of the knowledge element of the crime, as the only evidence produced by the State indicating that defendant knew the items were

> stolen came from [another suspect's] statements, read by [a] Detective . . . . Although such statements were improperly admitted by the trial court, they must be considered when reviewing the evidence on a motion to dismiss.

Id. at 482, 601 S.E.2d at 876. Our Court held that the trial court did not err in denying the defendant's motion despite the fact that the only evidence offered at trial as to an essential element of the charges should not have been admitted. In *Morton*, we reviewed the evidence actually presented at trial, including that which was inadmissible, and concluded that there was sufficient evidence to survive the motion to dismiss. *Id.* at 482, 601 S.E.2d 876-77. However, our Court held that the admission of the evidence was prejudicial error and granted a new trial. *Id.*, 601 S.E.2d at 877. Thus, for the purposes of determining whether a trial court has erred in ruling on a motion to dismiss, we put ourselves in the position of the trial court at the time of ruling on the motion, and do not take into consideration a later determination by our Court that certain evidence may have been admitted in error. Later determinations of admissibility are relevant, however, for a determination of whether a defendant was prejudiced.

In the present case, the State offered the inadmissible testimony of Mr. Glover regarding Defendant's BAC. Although the only evidence supporting a vital element of the charges challenged by Defendant's motion to dismiss was inadmissible, we must consider that evidence in our review of the trial court's denial of Defendant's motion. *See id.* As discussed above, in order to sustain convictions for DWI, second-degree murder, AWDWISI, and reckless driving, the State was required to prove either Defendant's BAC at a relevant time after driving, or that Defendant was impaired. Mr. Glover opined that Defendant's BAC was 0.18, which is sufficient evidence to survive a motion to dismiss as to these charges. Therefore, the trial court did not err in denying Defendant's motion to dismiss. However, as the admission of Mr. Glover's testimony was prejudicial, we must grant Defendant a new trial as set forth above.

III. Defendant's Prior DWI Convictions

[3] Defendant next argues that the trial court erred in admitting her prior driving record and judgments which showed prior convictions for DWI to show malice on the part of Defendant regarding second-degree murder. Though we have granted Defendant a new trial as to her second-degree murder charge, this issue is likely to arise in her new trial and we therefore address it. The State offered evidence at

trial of Defendant's four prior DWI convictions. Defendant specifically challenges the introduction of three of the prior DWI convictions from 1989 and 1990, which occurred more than seventeen years prior to the accident giving rise to the present case. Defendant contends that the admission of the three convictions from 1989 and 1990 was prejudicial error, in that the convictions were too temporally remote to be admissible under N.C. Gen. Stat. § 8C-1, Rule 404(b). We agree.

N.C.Gen. Stat. § 8C-1, Rule 404(b) provides in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2009). Our Courts have held that "evidence of prior convictions is admissible under Rule 404(b) to show the malice necessary to support a second-degree murder conviction." *State v. Rich*, 132 N.C. App. 440, 450, 512 S.E.2d 441, 448 (1999), *aff'd* 351 N.C. 386, 527 S.E.2d 299 (2000). However, "[t]he admissibility of evidence under this rule is guided by two further constraints-similarity and temporal proximity." *State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993).

Our Courts have recently addressed on several occasions the issue of temporal proximity with respect to the use of prior convictions to show malice. In *State v. Miller*, 142 N.C. App. 435, 440, 543 S.E.2d 201, 205 (2001), our Court rejected the defendant's argument that evidence of his convictions dating back sixteen years before the offense was too remote in time to be relevant. In *State v. Goodman*, 149 N.C. App. 57, 560 S.E.2d 196 (2002), *rev'd* 357 N.C. 43, 577 S.E.2d 619 (2003) (*per curiam*), our Court addressed the admission of a defendant's prior convictions occurring during the thirty-seven years before the date of the offense. In *Goodman*, our Court held that

> [a]lthough we agree that the entire driving record should not have been admitted due to concerns of temporal proximity, to the extent three convictions for driving while intoxicated occurred only one and two years outside of the permissible time-frame set forth in *Miller*, the jury must assess the weight and credibility to afford that evidence.

Id. at 70, 560 S.E.2d at 204. In a dissenting opinion later adopted *per curiam* by our Supreme Court, Judge Greene wrote that "[a]lthough defendant has six prior driving while impaired convictions dating back to 1962, only one of those occurred in the sixteen years prior to the crime at issue and none within the eight years prior to the crime at issue." *Goodman*, 149 N.C. App. at 73, 560 S.E.2d at 206, (J. Greene, dissenting). Judge Greene wrote that he would have held the admission of the prior convictions was error and that this error was "of a fundamental nature and, in [his] opinion, had a 'probable impact on the jury's finding of guilt' and thus constitute[d] plain error." *Id.* (citation omitted). Judge Greene further stated: "Accordingly, I would grant defendant a new trial." *Id.*

In *State v. Maready*, 362 N.C. 614, 669 S.E.2d 564 (2008), our Supreme Court "reject[ed] the notion" that *Goodman* established a "bright-line rule" which prohibits the introduction of any convictions predating the offense by sixteen years. *Id.* at 624, 669 S.E.2d at 570. The Supreme Court wrote:

> The relevance of a temporally remote traffic-related conviction to the question of malice does not depend solely upon the amount of time that has passed since the conviction took place. Rather, the extent of its probative value depends largely on intervening circumstances. In the instant case, in which defendant was convicted of DWI four times in the sixteen years preceding the events now at issue, his older convictions do not serve only "to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." Those convictions instead constitute part of a clear and consistent pattern of criminality that is highly probative of his mental state at the time of his actions at issue here.

Id. (citations omitted). The Court further wrote:

> Unlike the instant case, *State v. Goodman* was an exception to the general rule: a case in which the intervening circumstances between temporally distant convictions and the actions at issue militated strongly against admission of the remote convictions. Our holding in *Goodman* was based on the temporal remoteness of the defendant's prior convictions *combined with* the defendant's relatively clean driving record in the years leading up to the crime at issue in that case. It does not follow that admission of any conviction greater than sixteen years old automatically constitutes error, and hence we disavow any such reading of *Goodman*.

Id. at 624-25, 669 S.E.2d at 570-71 (emphasis in the original). The Supreme Court ultimately found no plain error in the trial court's admission of the defendant's prior convictions predating the offense by more than sixteen years. *Id.* at 624, 669 S.E.2d at 570. In finding no plain error in the admission of the prior convictions in *Maready*, the Court conducted the following analysis distinguishing the facts of *Maready* from those in *Goodman*:

> Defendant's driving record in the instant case stands in stark contrast to the record at issue in *Goodman*. Like the *Goodman* defenant, defendant here had six previous DWI convictions. However, whereas only one of the *Goodman* defendant's previous DWI convictions occurred within the sixteen years preceding the crime at issue in that case, . . . defendant in the case *sub judice* was convicted of DWI four times in the sixteen years leading up to the incident at issue. Moreover, while the most recent prior DWI conviction in *Goodman* occurred more than eight years before the crime at issue there, . . . defendant in this case was convicted of DWI less than six months before the incident giving rise to the current charges against him.

Id. at 623, 669 S.E.2d at 570 (citations omitted).

In the case before us, Defendant was convicted of DWI four times prior to the 2008 offense. Three of those convictions occurred in 1989 and 1990, eighteen and nineteen years prior to the 2008 offense. The most recent of Defendant's prior DWI convictions occurred in 2006, two years prior to the 2008 offense. Thus, there was a gap of sixteen years between three of Defendant's prior convictions and her 2006 conviction. Defendant's case is strikingly similar to that of *Goodman*, in which "only one of the . . . defendant's previous DWI convictions occurred within the sixteen years preceding the crime at issue in that case[.]" *Id.* Likewise, Defendant's case is for the same reason distinguishable from *Maready*, where the defendant "was convicted of DWI four times in the sixteen years leading up to the incident at issue." *Id.*

In light of the sixteen-year gap between her older convictions and her more recent conviction, we find that Defendant's eighteen and nineteen-year-old convictions, combined with her sole conviction for DWI occurring in 2006, do not "constitute part of a clear and consistent pattern of criminality." *Id.* at 624, 669 S.E.2d at 570. Therefore, the older convictions are not "highly probative of [Defendant's] mental state at the time of [her] actions at issue here." *Id.* We therefore

hold that the admission of evidence concerning Defendant's 1989 and 1990 convictions for DWI was error; however, the admission of Defendant's DWI conviction from 2006 was not error because it was within the general time frame set forth in *Miller*, and affirmed by *Goodman* and *Maready*.

Defendant argues that the error occurring in the case before us was prejudicial. As stated above, "[t]o show prejudicial error, a defendant has the burden of showing that 'there was a reasonable possibility that a different result would have been reached at trial if such error had not occurred.' " *Chavis*, 141 N.C. App. at 566, 540 S.E.2d at 414 (citations omitted). In light of Judge Greene's dissenting opinion in *Goodman*, as adopted by our Supreme Court, we hold that the admission of Defendant's 1989 and 1990 convictions for DWI was prejudicial error. *See Goodman*, 149 N.C. App. at 73, 560 S.E.2d at 206, (J. Greene, dissenting).

IV. Jury Instructions

[4] Defendant further argues that the trial court committed plain error in its instructions to the jury concerning the definition of intent. Because Defendant did not object to the instructions at trial, Defendant requests that we review for plain error.

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to the appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings[.]"

State v. Cummings, 346 N.C. 291, 314, 488 S.E.2d 550, 563-64 (1997) (alteration in the original, citations omitted).

During its deliberation, the jury requested that the trial court again instruct the jury on second-degree murder. The trial court gave the instruction again, including the following malice instruction:

> Malice is a necessary element that distinguishes second degree murder from manslaughter. Malice arises when an act which is inherently dangerous to human life is intentionally done so reck-

> lessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.

The jury later requested an instruction on "the definition of malice[.]" In response to that request, the trial court gave substantially the same instruction as above. The jury later sent a note to the trial court explaining that the jury was "having difficulty deciphering the definition of the word intent as it applies to malice[.]" The trial court made the following statement to counsel:

> [W]hat I intend—if, in fact, if they need a definition of the word intent, I will use the definition from Black's Law Dictionary which is this: "It is the exercise of intelligent will, the mind being fully aware of the nature and consequences of the act which is about to be done and with such knowledge and with full liberty and action willing and electing to do it."

After discussion with counsel, the trial court stated:

> I can take this somewhat convoluted definition, I think, and put it in plain English if that's what they are asking. It involves an exercise of will. A person intends an act when, aware of the nature and consequences of the act, that person chooses to do it. I think that is about as simple as I can make it.

The jury returned to the courtroom and the following exchange occurred:

> FOREMAN: We—on the charge of second degree murder, Judge, we just need clarification on the definition of malice and the word intent as the law states what it is so that we can be clear to understand how the evidence applies to those charges.
>
> THE COURT: Are you asking what the word intent means?
>
> FOREMAN: Yes, as the law defines it.
>
> THE COURT: Well, let me repeat the instruction and see if I can define intent for you. As I told you earlier, malice arises when an act which is inherently dangerous to human life is intentionally done so recklessly and wantonly as to manifest a mind utterly without regard to human life and social duty and deliberately bent on mischief.
>
> So the instructions refer to an act that is inherently dangerous to human life that is intentionally done. The word intent, as it is used in the context of this instruction, means as follows: Intent

involves an exercise of will. A person intends an act when aware of the nature and consequences of the act that person chooses to do it. An act is intentional when a person makes a conscious decision or choice to do the act. That's as simple as I can make it. Does that answer your question?

FOREMAN: We appreciate it.

Defendant, quoting N.C. Pattern Jury Instruction 206.32, contends that this instruction "impermissibly takes the focus of the malice instruction off the proof necessary to show that an inherently dangerous act was 'intentionally done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.' " Defendant cites no authority in support of this argument, but contends that "[t]his de-emphasis of all the elements necessary to prove malice in a second degree murder case was a fundamental error."

We first note, in fact, that the trial court three times gave the jury the same instruction quoted above by Defendant. The third time the trial court gave the instruction, it followed with an explanation of how the definition of the word "intent" applied within the context of the instruction. When the jury requested a definition of the word "intent" alone, the trial court first repeated the instruction on malice and then explained the meaning of "intent." Viewing the instructions in context, and as a whole, we find no error, much less plain error.

V. Aggravating Factor

[5] Defendant next argues that the trial court erred by submitting an aggravating factor to the jury. Specifically, Defendant argues that it was error to submit "aggravating factor number 8 to the jury as the conduct described in this aggravator was already the subject of the charges [Defendant] was tried and convicted on." Defendant assigns error to the aggravating factor that she "knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." Defendant contends that, because the use of "a deadly weapon was an element of both the charges of assault with a deadly weapon inflicting serious injury[,] [t]his factor was improperly used to aggravate [her] sentence." We disagree.

N.C. Gen. Stat. § 15A-1340.16(d) provides, in pertinent part, that "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation." N.C. Gen. Stat.

§ 15A-1340.16(d) (2009). Defendant challenges specifically the following portion of the trial court's instruction to the jury regarding AWDWISI: "that . . . Defendant used a deadly weapon. A deadly weapon is a weapon likely to cause death or serious injury. A motor vehicle is a deadly weapon." Defendant contends that the evidence necessary to prove this element was used to prove the above-quoted aggravating factor. We note that AWDWISI requires simply that a defendant use a deadly weapon. The aggravating factor in the case before us required the jury to find that Defendant "created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." Because, for AWDWISI, the State was not required to prove that Defendant used a weapon or device which would normally be hazardous to the lives of more than one person, we find no error. *See State v. Crisp*, 126 N.C. App. 30, 40, 483 S.E.2d 462, 468 (1997) ("this Court has previously addressed this issue and held that it was not error to also find an aggravating factor from the use of a weapon after a defendant has been convicted of assault"); *and State v. Platt*, 85 N.C. App. 220, 228, 354 S.E.2d 332, 336 (1987) ("[I]n order to prove its case, the State simply needed to show that defendant used a deadly weapon, and it did not need to show, as an essential part of its proof of the charged offenses, that defendant employed a weapon normally hazardous to the lives of more than one person. . . . Accordingly, we hold the court did not err in finding this factor.").

VI. Conclusion

The trial court erred by admitting evidence of Defendant's convictions for DWI from 1989 and 1990 to show malice. The trial court abused its discretion in admitting Mr. Glover's odor test testimony as to Defendant's BAC. These errors were prejudicial, and Defendant is entitled to a new trial as to those charges relying on Mr. Glover's testimony and Defendant's prior convictions as proof of the elements of the offenses. Because the trial court consolidated the charges of DWLR and reckless driving under the same file number for sentencing, and because we have granted a new trial on the reckless driving charge, we also remand for resentencing as to DWLR. *See State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987).

No error in part, remanded for resentencing in part, and new trial in part, as follows:

No Error in 08-CRS-061770 and 08-CRS-061771.

Remanded for resentencing in 08-CRS-061772 for the offense of DWLR.

New Trial in 08-CRS-014067, 08-CRS-014068, 08-CRS-014069, and 08-CRS-014070, and in 08-CRS-061772 for the offense of reckless driving.

Judges STROUD and BEASLEY concur.

JEFFREY BROOKS TEMPLETON AND ELIZABETH A. COLONNA BIRD; TRUSTEE OF THE ELIZABETH A. COLONNA BIRD REVOCABLE TRUST, DATED AUGUST 31, 2000, PLAINTIFFS V. TOWN OF BOONE, DEFENDANT

No. COA09-1332

(Filed 16 November 2010)

1. Zoning— standing to challenge ordinance amendment—motion to dismiss granted

A *de novo* review revealed that the trial court did not err in a zoning ordinance amendment case by granting defendant's motion to dismiss plaintiffs' complaint for lack of standing. Plaintiff Templeton did not have standing to bring a constitutional or statutory claim against defendant, and plaintiff Bird failed to allege facts sufficient to have standing to bring constitutional claims or a statutory claim against defendant to challenge the Steep Slope Ordinance. However, plaintiff Bird did have standing to bring a statutory challenge against the Viewshed Protection Ordinance.

1. Statutes of Limitation and Repose— zoning ordinance amendment—failure to give proper notice

The trial court did not err in a zoning ordinance amendment case by granting defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) based on expiration of the two-month statute of limitations under N.C.G.S. § 160A-364.1. Even if defendant failed to properly notify plaintiff under Chapter 160A, plaintiffs' complaint was filed more than two years following defendant's adoption of the ordinances.

Judge JACKSON concurring in part and dissenting in part.

Appeal by plaintiffs from order entered 10 June 2009 by Judge Joseph N. Crosswhite in Superior Court, Watauga County. Heard in the Court of Appeals 25 February 2010.

Clement Law Office by Charles E. Clement, for plaintiffs-appellants.

Cranfill Sumner & Hartzog LLP by Susan K. Burkhart, for defendant-appellee.

STROUD, Judge.

Jeffrey Brooks Templeton and Elizabeth A. Colonna Bird, trustee of the Elizabeth A. Colonna Bird Revocable Trust, (referred to collectively as "plaintiffs") appeal from a trial court's order in favor of the Town of Boone ("defendant") dismissing their complaint with prejudice "for failure to state a claim upon which relief can be granted[.]" For the following reasons, we affirm the trial court's dismissal of plaintiffs' claims.

I. Background

Plaintiffs' complaint alleged the following: On 21 April 2005, the Boone Town Council adopted a resolution to form a task force to "Study Issues Relating to Development of Steep Slopes and Multi-Family Housing" in order "to work with town staff to develop a recommended strategy relating to the future development of steep slopes and large multi-family housing projects." The task force prepared a recommended "zoning map and text amendments" to the town's Unified Development Ordinance. These recommendations resulted in a proposal for the Steep Slope Ordinance and the Viewshed Protection Ordinance amendments ("the subject zoning ordinance amendments"), which the Boone Town Council adopted on 2 October 2006.

Plaintiffs allege they are owners of real property "located in, and subject to, the zoning and extraterritorial zoning jurisdiction of the Town of Boone[,]" and are "directly and adversely affected" "by the zoning ordinances adopted by the Town of Boone." Plaintiff Bird was notified by letter from the Town of Boone that property owned by the Elizabeth A. Colonna Bird Revocable Trust was located within that area that would be affected by the proposed ordinance amendments. However, upon inspection of the Viewshed Protection Map, she deter-

mined that the trust property was not within the Viewshed area. Plaintiffs allege that without notice to plaintiff Bird or a change in the Viewshed Protection Map, the town improperly subjected the trust property to the Viewshed Protection Ordinance.

On 31 November 2006, plaintiff Templeton commenced this action against defendant by filing an "Application and Order extending time to file Complaint." On 21 December 2006, plaintiff Templeton and nine other plaintiffs, not including plaintiff Bird, filed a complaint in Superior Court, Watauga County against defendant alleging that the adoption of the subject ordinance amendments was a violation of plaintiffs' Constitutional substantive due process rights; a violation of plaintiffs' civil rights pursuant to 42 U.S.C. § 1983; an unlawful rezoning and limitation of the use of property; an inverse condemnation/unlawful taking; arbitrary and capricious; and an unlawful preemption of state building code. Plaintiffs sought a declaratory judgment and injunctive relief. This complaint was removed to the United States District Court for the Western District of North Carolina by defendants. Plaintiffs then amended their complaint and it was remanded to Superior Court, Watauga County; defendant filed a motion to dismiss; and on 8 October 2007, plaintiff Templeton and the other nine plaintiffs filed a "Notice of Voluntary Dismissal" without prejudice.

On 7 October 2008, plaintiffs Templeton and Bird filed the complaint which is the subject of this appeal in Superior Court, Watauga County. In plaintiffs' first two claims they request a declaratory judgment that the subject zoning ordinance amendments be declared "facially defective, vague and unenforceable[;]" because (1) the ordinances give "[u]nbridled, unqualified authority and discretion" to the Town's staff "in excess of the Town's legislative authority[;]" (2) the ordinances amount to a violation of plaintiffs' procedural due process rights as (a) the ordinances fail to give notice as to which properties are affected by them, and (b) the procedures used by defendant to enact the ordinances failed to give proper notice to plaintiffs in violation of town ordinances and state law; (3) the ordinances amount to a violation of plaintiffs' substantive due process rights as (a) they are vague and unenforceable, (b) arbitrary and capricious, (c) unreasonable, (d) overreaching, and (e) were enacted in bad faith; (4) the Viewshed Protection Ordinance amounts to an unconstitutional taking; and (5) the Steep Slope Ordinance unlawfully preempts state building codes. In plaintiffs' additional claims they allege that defendant's "unlawful adoption" of the subject zoning ordinance amendments "changed the zoning and use of Plaintiffs' land, and the lands

of all persons who own property in the Town of Boone or its ETJ area[,]" and the subject zoning ordinance amendments are a violation of plaintiffs' rights under Article I, § 19 of the North Carolina Constitution as they amount to a "deprivation of their rights and privileges as property owners[.]" On 18 May 2009, defendant filed a motion to dismiss plaintiffs' suit pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), Rule 12(b)(1), and Rule 12(c). On 10 June 2009, the trial court granted defendant's motion to dismiss "for failure to state a claim upon which relief can be granted[.]" Plaintiffs appealed.

On appeal plaintiffs bring forth substantive arguments as to the statute of limitations, substantive due process, procedural due process, statutory claims, and arguments addressing standing. As "[s]tanding is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction[,]" *Perdue v. Fuqua*, 195 N.C. App. 583, 585, 673 S.E.2d 145, 147 (2009), we first review plaintiffs' standing to bring this suit.

II. Standing

A. Standard of Review

[1] This Court has held that "[a] ruling on a motion to dismiss for want of standing is reviewed de novo." *Metcalf v. Black Dog Realty, LLC*, —— N.C. App. ——, ——, 684 S.E.2d 709, 714 (2009) (citation omitted). "In our de novo review of a motion to dismiss for lack of standing, we view the allegations as true and the supporting record in the light most favorable to the non-moving party." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008). The party invoking jurisdiction has the burden of establishing standing. *Neuse River Found. v. Smithfield Foods*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) (citation omitted), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). The elements of standing are:

> (1) 'injury in fact'—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;
>
> (2) the injury is fairly traceable to the challenged action of the defendant;
>
> (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Marriott v. Chatham County, 187 N.C. App. 491, 494, 654 S.E.2d 13, 16 (2007) (citation and quotation marks omitted). "If a party does not

have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Id.* at 496, 654 S.E.2d at 17 (citation and quotation marks omitted). "If a court finds at any stage of the proceedings that it lacks jurisdiction over the subject matter of a case, it must dismiss the case for want of jurisdiction." *State v. Linemann*, 135 N.C. App. 734, 739, 522 S.E.2d 781, 785 (1999) (citation omitted).

Plaintiffs first contend that "the trial court erred in granting defendants' motion to dismiss pursuant to Rule 12(b)(1) of the Rules of Civil Procedure on the grounds that plaintiffs pled sufficient facts demonstrating that they have standing and the trial court has subject-matter jurisdiction." However, it appears that the trial court based its order dismissing plaintiffs' claims on N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2005) ("Failure to state a claim upon which relief can be granted"), not N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) ("Lack of jurisdiction over the subject matter"). This Court has held that even if dismissal was for the wrong reason,

> a trial court's 'ruling must be upheld if it is correct upon any theory of law[,]' and thus it should 'not be set aside merely because the court gives a wrong or insufficient reason for [it].' *Manpower, Inc. v. Hedgecock*, 42 N.C. App. 515, 519, 257 S.E.2d 109, 113 (1979). *See also Sanitary District v. Lenoir*, 249 N.C. 96, 99, 105 S.E.2d 411, 413 (1958) (if correct result reached, judgment should not be disturbed even though court may not have assigned the correct reasons for the judgment entered); *Payne v. Buffalo Reinsurance Co.*, 69 N.C. App. 551, 555, 317 S.E.2d 408, 411 (1984) (it is common learning that a correct judgment must be upheld even if entered for the wrong reason).

Opsahl v. Pinehurst Inc., 81 N.C. App. 56, 63, 344 S.E.2d 68, 73, *cert. granted*, 318 N.C. 284, 347 S.E.2d 465 (1986), *disc. review improvidently allowed*, 319 N.C. 222, 353 S.E.2d 400 (1987). Therefore, we must determine whether the trial court's dismissal of plaintiffs' claims was "correct upon any theory of law[.]" *See id.* First, we address whether the trial court could have dismissed plaintiffs' complaint for lack of standing. Plaintiffs brought constitutional claims and statutory challenges to the subject zoning ordinance amendments. We will first address the issue of standing as to plaintiffs' constitutional claims.

B. Standing for Plaintiffs' Constitutional Challenges

Plaintiffs argue that they have standing to bring constitutional challenges to the subject zoning ordinance amendments as they have

sufficiently alleged an "imminent danger" from the application of those ordinances to their property interests. Defendant, citing *Grace Baptist Church v. Oxford*, 320 N.C. 439, 358 S.E.2d 372 (1987), contends that to challenge the constitutionality of a zoning ordinance, the plaintiff must allege evidence that he has sustained an injury or is in immediate danger of sustaining an injury as a result of enforcement of the subject ordinances. Defendant concludes that there is no allegation by plaintiffs of an immediate danger of sustaining an injury because "there is no factual allegation in the Complaint . . . indicating that the Town enforced or attempted to enforce the Ordinances against [plaintiff] Templeton."

In *Grace*, the plaintiff brought an action against the defendant-city alleging "that portions of the Oxford ordinance of 1970" that regulated the size of signs and required paved off-street parking "were unlawful in that they deprived appellant of due process of law and denied it equal protection of the law." *Id.* at 441-42, 358 S.E.2d at 374. On the defendant-city's motion to dismiss, the trial court declared that the ordinance requiring paved off-street parking was constitutional on its face and as applied. *Id.* at 442, 358 S.E.2d at 374. The plaintiff appealed, but "the Court of Appeals did not address the question of whether the challenged ordinance had been selectively enforced, inasmuch as it found that no enforcement action had been brought against appellant." *Id.* On appeal from this Court, to our Supreme Court, the plaintiff argued that the city ordinance was facially unconstitutional and "violated the equal protection clause of the fourteenth amendment because it was selectively enforced against the church." *Id.* at 443-44, 358 S.E.2d at 375. The Court held that the challenged ordinance was facially constitutional and found that the Court of Appeals erred in declining to address the question of whether the ordinance, as applied, was selectively enforced against the appellant. *Id.* at 443-44, 358 S.E.2d at 375. The Court held that "[i]n order to challenge the constitutionality of an ordinance, a litigant must produce evidence that he has sustained an injury or is in immediate danger of sustaining an injury as a result of enforcement of the challenged ordinance." *Id.* at 444, 358 S.E.2d at 375. (citing *Town of Atlantic Beach v. Young*, 307 N.C. 422, 298 S.E.2d 686, *appeal dismissed*, 462 U.S. 1101, 77 L. Ed. 2d 1328 (1983)). The Court, in applying this rule, held that the plaintiff's complaint, alleging that the defendant-city intended to require it to pave its parking lot, in itself did not confer standing. *Id.* However, the Court held that when combined with the defendant-city's answer, which asked the court to

order the church to immediately cease use of its property until "they are in compliance with the said Ordinance[,]" and the trial court's finding that the defendant-city, "at the commencement of this action and presently," intends to enforce the provision requiring paved parking lots, "the church was in immediate danger of sustaining injury" and thus "had standing to challenge the constitutionality of the ordinance." *Id.*

Here, plaintiffs brought several constitutional claims alleging that the subject zoning ordinance amendments amounted to violations of plaintiffs rights under procedural due process, substantive due process, an unconstitutional taking of property, and a violation of their rights "to use their land" pursuant to Article 1, Section 19 of the North Carolina Constitution." However, there is no allegation in plaintiffs' complaint indicating that defendant enforced or attempted to enforce the subject zoning ordinance amendments against either plaintiff Templeton or plaintiff Bird. Plaintiffs' complaint simply states that plaintiffs own or have an interest in property within an area of town that will be *affected* by the subject zoning ordinance amendments. Without an allegation that the subject zoning ordinance amendments will be or have been enforced against property owned by plaintiffs, plaintiffs have failed to demonstrate that they have "sustained an injury or [are] in immediate danger of sustaining an injury" from enforcement of the ordinance amendments against them. *See id.* at 444, 358 S.E.2d at 375. Therefore, plaintiffs failed to carry their burden to make sufficient allegations to establish standing to bring their constitutional claims against defendant. *Neuse River Found.*, 155 N.C. App. at 113, 574 S.E.2d at 51. Accordingly, we affirm the trial court's dismissal of plaintiffs' constitutional claims. *Linemann*, 135 N.C. App. at 739, 522 S.E.2d at 785.

C. Standing for Statutory Challenges

Plaintiffs, citing *Thrash Ltd. Partnership v. County of Buncombe*, 195 N.C. App. 678, 673 S.E.2d 706 (2009) ("*Thrash I*"), argue that they have standing to bring statutory challenges alleging that defendant failed to follow proper procedures as to how it enacted the subject zoning ordinance amendments. Defendant counters that plaintiff Templeton does not have standing to bring his statutory claims because he failed to allege sufficient facts to show that he owns property in an area affected by the subject zoning ordinance amendments.

We note that in *Thrash I* the disputed ordinance was a county-wide zoning ordinance and the location of the plaintiffs' property was not at issue as every property in the County was affected by the ordi-

nance. 195 N.C. App. at 680, 673 S.E.2d at 708. Here, unlike *Thrash I*, the subject zoning ordinance amendments are not county-wide amendments, but ordinance amendments that are applicable only to properties located within 100 feet from major traffic corridors within the county or that have a slope value of 30% or greater. In *Thrash Ltd. Partnership v. County of Buncombe*, 195 N.C. App. 727, 673 S.E.2d 689 (2009) ("*Thrash II*"), a related case involving the same parties as *Thrash I*, this Court addressed the issue of standing in the context of statutory procedural challenges to the defendant-county's property elevation restriction ordinance which was only applicable to those properties located more than 2500 feet above sea level.

In *Thrash II*, the plaintiff filed a declaratory judgment action alleging that the defendant-county did not follow the proper "prerequisite statutory requirements" when it adopted the "Multi-Family Dwelling Ordinance" which set "rules for properties located above 2500 feet above sea level," and "for properties located 3000 feet above sea level." *Id.* at 729, 673 S.E.2d at 691. The ordinance did not apply to properties located below 2500 feet above sea level. *Id.* On a summary judgment motion, the defendant-county argued that the plaintiffs did not have standing to challenge the ordinance. *Id.* The trial court held that the plaintiffs had standing but granted summary judgment in favor of the defendant-county. *Id.* Defendant-county cross-appealed the trial court's ruling on standing. *Id.* This Court held that

> landowners in the area of a county affected by a zoning ordinance are allowed to challenge the ordinance on the basis of procedural defects in the enactment of such ordinances. *See Frizzelle v. Harnett County*, 106 N.C. App. 234, 416 S.E.2d 421 (1992) (plaintiffs, as landowners in the area of the county affected by the zoning ordinance, were allowed to challenge the ordinance on the basis of inadequate notice); *Lee v. Simpson*, 44 N.C. App. 611, 261 S.E.2d 295 (1980) (plaintiffs, who were owners of property adjacent to property that was rezoned, succeeded in overturning the rezoning ordinance for lack of proper notice); *George v. Town of Edenton*, 294 N.C. 679, 680, 242 S.E.2d 877, 878 (1978) ("Plaintiffs, as residents of Chowan County within the jurisdiction of the zoning powers of defendants, challenge in their complaint the legality of both actions of the Town Council and ask the court to determine their validity."); *Blades v. City of Raleigh*, 280 N.C. 531, 544, 187 S.E.2d 35, 42 (1972) ("The plaintiffs, owners of property in the adjoining area affected by the ordinance, are parties in interest entitled to maintain the action.").

Id. at 730, 673 S.E.2d at 691-92. As the location of the plaintiffs' property was relevant, the Court held that

> '[a] party has standing to challenge a zoning ordinance in an action for declaratory judgment only when it 'has a specific personal and legal interest in the subject matter affected by the zoning ordinance and . . . is directly and adversely affected thereby." *Village Creek Prop. Owners Ass'n v. Town of Edenton*, 135 N.C. App. 482, 485, 520 S.E.2d 793, 795 (1999) (quotation omitted).

Id. at 731, 673 S.E.2d at 692. In applying this rule to determine if the plaintiffs had standing to bring their statutory challenges, the Court then analyzed whether plaintiffs were in an area "directly and adversely affected" by the "Multi-Family Dwelling Ordinance[:]"

> The Multi-Family Dwelling Ordinance contains regulations of land which are contingent upon the elevation and use of the land. Plaintiff's land is located at an elevation above 2500 feet above sea level, and is suitable for multi-family dwelling use. Therefore, plaintiff's use of its land was limited by the zoning regulations.
>
> We hold that plaintiff has standing to challenge the validity of the Multi-Family Dwelling Ordinance.

Id.

Here, plaintiffs make several statutory challenges to the procedures defendant used to enact the subject zoning ordinances. As to the Viewshed Protection Ordinance ("VPO"), plaintiffs in their first claim made the following allegations challenging defendant's procedure in enacting this amendment to the town's Unified Development Ordinance ("UDO"):

> i. Adoption of the VPO amounted to substantial amendments to the UDO. The notices that preceded the September 25, 2006 public hearing, which formed the basis for the said amendments were fatally defective.
>
> ii. The changes to the text of the VPO made after the September 14, 2006 public hearing were substantial enough to require new notice in accordance with the provisions of N.C.G.S. § 160A-364 and Town of Boone Ordinance § 21-380[c].
>
> iii. In violation of the provisions of Town of Boone Ordinance § 21-380[d], the changes made to the August 24, 2006 Viewshed Protection Map after the September 14, 2006 public hearing were not made available until the time of [the] public hearing on

September 25, 2006. The new map included properties not depicted on the August 24 map.

iv. In violation of Boone Ordinance § 21-379, the Town failed to provide to the public the analysis of the ordinances to determine compliance with the Comprehensive Plan . . . .

As to the Steep Slope Protection Ordinance ("SSPO"), plaintiffs made the following allegations challenging defendant's procedure in enacting this zoning ordinance amendment:

i. Adoption of the SSPO amounted to substantial amendments to the UDO. The notices that preceded the September 25, 2006 public hearing, which formed the basis for the said amendments were fatally defective.

ii. In violation of N.C.G.S. § 160A-364 and Town of Boone Ordinance § 21-380[c], the changes made to the texts of the SSPO after the public hearing were substantial enough to require new notice;

iii. The changes made in the Steep Slope text after the September 14, 2006 public hearing were not made available until the time of public hearing dated September 25, 2006;

iv. The Defendant failed to provide to the public the analysis of the ordinances to determine compliance with the Comprehensive Plan as required by Town of Boone Ordinance § 21-379.[1]

Here, contrary to the facts in *Thrash II*, we cannot determine from plaintiffs' complaint whether the Viewshed Protection Ordinance "directly and adversely affect[s]", the property owned by plaintiff Templeton. *See id.* The Viewshed Protection Ordinance is applicable only to properties located "more than 100 feet above the nearest major traffic corridor" and which can be seen from a major traffic corridor "during any season of the year . . . ." Even though plaintiffs' complaint alleges that plaintiff Templeton is the owner of real property "affected by the zoning ordinances adopted by the Town of Boone which are subject of this action and he is directly and adversely affected thereby[,]" the complaint makes no specific allegation that plaintiff Templeton's property is located within 100 feet of

1. We note that the procedural challenges in plaintiffs' claims one and two are also alleged violations of procedural due process. However, as we held that plaintiff did not properly allege facts sufficient to establish standing for their constitutional challenges to the subject zoning ordinance amendments, our focus is limited to reviewing only the statutory challenges in these claims.

a major traffic corridor or that any portion of his property could be seen from a major traffic corridor. Therefore, unlike *Thrash II*, plaintiffs' complaint does not make factual allegations which would support a finding that plaintiff Templeton's property is "directly and adversely affected[,]" *see id*, by the Viewshed Protection Ordinance. Accordingly, we hold that plaintiff Templeton has not made sufficient allegations to carry his burden of establishing standing to bring his statutory claims against the Viewshed Protection Ordinance adopted by defendant, *Neuse River Found.*, 155 N.C. App. at 113, 574 S.E.2d at 51, and those claims were properly dismissed by the trial court. *Linemann*, 135 N.C. App. at 739, 522 S.E.2d at 785.

As to plaintiff Bird, plaintiffs' complaint does allege that the Viewshed Protection Ordinance affects the trust property, as it alleges that "the Town subjected the trust property to the onerous regulations of the Viewshed Ordinance Map." Taking this allegation as true, *Mangum*, 362 N.C. at 644, 669 S.E.2d at 283, the trust property must be located within 100 feet of a major traffic corridor or a portion of the trust property can be seen from a major traffic corridor. Therefore, we hold that this allegation is sufficient to establish that the trust property is "directly and adversely affected" by the Viewshed Protection Ordinance, *see Thrash II*, 195 N.C. App. at 731, 673 S.E.2d at 692, and to give plaintiff Bird standing to bring her statutory claims against the Viewshed Protection Ordinance adopted by defendant.

The Steep Slope Ordinance is only applicable to properties with a slope value of 30% or greater. Plaintiffs' complaint makes no allegation that the slope value of the property owned by plaintiff Templeton or plaintiff Bird is 30% or greater and subject to this ordinance. Accordingly, plaintiffs failed to carry their burden to establish standing to bring a statutory claim against the Steep Slope Ordinance adopted by defendant, *Neuse River Found.*, 155 N.C. App. at 113, 574 S.E.2d at 51, and those claims were properly dismissed by the trial court. *Linemann*, 135 N.C. App. at 739, 522 S.E.2d at 785.

In addition to the above statutory procedural challenges, plaintiffs also alleged that the subject zoning ordinance amendments unlawfully preempt "regulation reserved by our legislature to the North Carolina State Building Code Council, in violation of NCGS §143-138(e)[,]" and established standards for the exercise of authority and discretion in excess of defendant's "legislative authority[.]" As there is an allegation that the trust property was "subjected to" the Viewshed Protection Ordinance, plaintiffs' complaint makes suffi-

cient allegations for plaintiff Bird to have standing to bring further statutory challenges to the Viewshed Protection Ordinance. *See Thrash II*, 195 N.C. App. at 731, 673 S.E.2d at 692. As stated above, plaintiffs' complaint does not give either plaintiff standing to make any further statutory challenges against the subject zoning ordinance amendments, and those claims were also properly dismissed by the trial court. *Linemann*, 785.

Plaintiffs in their complaint allege that defendant's "unlawful adoption" of the subject zoning ordinance amendments "changed the zoning and use of Plaintiffs' land, and the lands of all persons who own property in the Town of Boone or its ETJ area." This claim does not allege a particular statutory or constitutional reason that the defendant's adoption of the subject zoning ordinance amendments was "unlawful[.]" Adoption of zoning ordinances in accordance with the governing statutes is clearly not "unlawful[;]" N.C. Gen. Stat. § 160A-381 (2005)[2] permits a municipality to pass a zoning ordinance that changes the use of a landowner's property and N.C. Gen. Stat. § 160A-385 (2005)[3] allows a municipality to supplement or change those zoning ordinances. Therefore, plaintiffs' claim could be interpreted as alleging that the amendments were "unlawful[ly]" adopted in that defendant failed to follow proper statutory procedures, as already discussed above. Plaintiffs' claim could also be interpreted as alleging an unlawful limitation to the use of plaintiffs' property, which could be a constitutional claim. It is thus unclear whether this claim is a statutory or constitutional claim, as the subject zoning ordinance amendments could be "unlawful" because their adoption violated the statutory scheme governing zoning changes in Chapter 160A of our General Statutes, *see* N.C. Gen. Stat. §§ 160A-381 to 160A-392 (2005), or amounted to a violation of plaintiffs' rights under the North Carolina Constitution or the United States Constitution. In any event, plaintiffs failed to bring sufficient allegations to establish standing to bring their constitutional claims against defendant, and any constitutional allegations in plaintiffs' claim were properly dismissed. As to

2. N.C. Gen. Stat. § 160A-381(a) states that "[f]or the purpose of promoting health, safety, morals, or the general welfare of the community, any city may adopt zoning and development regulation ordinances. These ordinances may be adopted as part of the unified development ordinance or as a separate ordinance. A zoning ordinance may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land. . . ."

3. N.C. Gen. Stat. § 160A-385(a)(1) states that "[z]oning ordinances may from time to time be amended, supplemented, changed, modified or repealed. . . ."

any statutory claims that the subject zoning ordinance amendments or their adoption was "unlawful" in this claim, only plaintiff Bird would have standing to bring statutory claims against the Viewshed Protection Ordinance. Any other statutory claims in plaintiff's complaint were properly dismissed by the trial court. *Linemann*, 135 N.C. App. at 739, 522 S.E.2d at 785. Therefore, we conclude that plaintiff Templeton does not have standing to bring a constitutional or statutory claim against defendant; plaintiff Bird failed to allege facts sufficient to have standing to bring constitutional claims or a statutory claim against defendant to challenge the Steep Slope Ordinance. However, plaintiff Bird does have standing to bring a statutory challenge against the Viewshed Protection Ordinance including the enactment procedures defendant used, whether this zoning amendment is preempted by state law, whether it grants authority and discretion in excess of defendant's statutory authority, or if its amounts to "unlawful" zoning.

III. Statute of Limitations

[2] Plaintiffs contend next that "the trial court erred in granting defendant's motion to dismiss pursuant to Rule 12(b)(6)" as plaintiff Bird's claims are not barred by the applicable statute of limitations. Defendant counters that "[u]nder the clear language of the statute of limitations and case law, Bird's claims are barred by the two-month statute of limitations."

N.C. Gen. Stat. § 160A-364.1 (2005) states that "[a] cause of action as to the validity of any zoning ordinance, or amendment thereto, adopted under this Article or other applicable law shall accrue upon adoption of the ordinance, or amendment thereto, and shall be brought *within two months* as provided in G.S. 1-54.1." (emphasis added). Here, plaintiffs alleged that defendant adopted the subject zoning ordinance amendments on 2 October 2006. Plaintiffs' complaint, which included plaintiff Bird as a party, was filed on 7 October 2008, more than two years following defendant's adoption of these ordinances. Therefore, plaintiff Bird's statutory claims are barred by the applicable statute of limitations.

Plaintiffs cite *Thrash Ltd. Partnership v. County of Buncombe*, 195 N.C. App. 678, 673 S.E.2d 706 (2009) ("*Thrash I*"), *Beach Mt. Vacations, Inc. v. Fin., Inc.*, 167 N.C. App. 639, 605 S.E.2d 714 (2004), *Miller v. Talton*, 112 N.C. App. 484, 435 S.E.2d 793 (1993), *Frizzelle v. Harnett County*, 106 N.C. App. 234, 416 S.E.2d 421 (1992), *Sofran Corp. v. Greensboro*, 327 N.C. 125, 393 S.E.2d 767 (1990), *George v. Edenton*, 31 N.C. App. 648, 230 S.E.2d 695 (1976), *reversed in part by*,

294 N.C. 679, 242 S.E.2d 877 (1978), *Walker v. Elkin*, 254 N.C. 85, 118 S.E.2d 1 (1961) in support of their argument that the statute of limitations should not bar plaintiff Bird's claims because the Viewshed Map plaintiff Bird saw at the public hearing on 25 September 2006 showed that the trust property was not located in an area affected by the ordinance, but defendant subjected it to the ordinance later without notifying her and that is why she delayed in filing her action. Defendant, citing *Thompson v. Town of Warsaw*, 120 N.C. App. 471, 462 S.E.2d 691 (1995), argues that "it is well established that the statute of limitations bars all claims challenging the validity of an ordinance, even if the notice of hearing for such a zoning ordinance was invalid." (Emphasis omitted).

In *Thompson*, the plaintiffs argued that the statute of limitations for filing a complaint against a zoning ordinance was not applicable because the challenged zoning ordinance was amended by the defendant-town without complying with the statutory notice provisions. *Id.* at 473-74, 462 S.E.2d at 692. This Court noted that it had "previously held that even where an amendment is adopted inconsistent with the notice requirements of Chapter 160A, an action which attacks the validity of the amendment [but is] commenced more than [the statutory period] from the adoption of the amendment is barred." *Id.* at 473, 462 S.E.2d at 692 (citing *Pinehurst Area Realty, Inc. v. Village of Pinehurst*, 100 N.C. App. 77, 80, 394 S.E.2d 251, 253 (1990) (rejecting the plaintiff's argument that its challenge to a zoning ordinance was not barred by the statute of limitations because the defendant failed to properly notify plaintiff of impending zoning action in violation of N.C. Gen. Stat. § 160A-34), *disc. rev. denied*, 328 N.C. 92, 402 S.E.2d 417, *cert. denied*, 501 U.S. 1251, 115 L. Ed. 2d 1055 (1991)). Accordingly, we hold that even if defendant failed to properly notify plaintiffs pursuant to Chapter 160A, plaintiff Bird's claims are still barred by the applicable statute of limitations. *Thrash I* and the other cases cited by plaintiffs are not applicable as they do not address the effect of the statute of limitations on a zoning ordinance challenge. Plaintiff Bird's claims are barred by the applicable statute of limitations and were properly dismissed by the trial court.

IV. Conclusion

As plaintiffs' claims were properly dismissed by the trial court, we affirm the trial court's order.

AFFIRMED.

Judge ELMORE concurs.

Judge JACKSON concurs in part and dissents in part in a separate opinion.

JACKSON, Judge, concurring in part, dissenting in part.

Although I agree with the majority's ultimate holding—that the claims of neither plaintiff survive the municipality's motions to dismiss—I write separately to highlight a significant problem I see with its analysis as to the issue of standing. Specifically, I am concerned with the majority's assertion that plaintiffs do not have standing to pursue their constitutional claims because their complaint did not allege "that the subject zoning ordinance amendments will be or have been enforced against property owned by plaintiffs[.]" I think that a requirement that the ordinance be enforced before a property owner may challenge it could allow a municipality to evade statutorily-mandated procedural safeguards by waiting to enforce an ordinance until two months after its adoption, thereby immunizing itself pursuant to the statute of limitations.

Our case law with respect to North Carolina General Statutes, section 160A-364.1 is fairly clear. When a plaintiff challenges the validity of a zoning ordinance, which a municipality enacted pursuant to its legislative function,[4] he has two months within which to initiate an action for declaratory judgment. In *Pinehurst Area Realty, Inc. v. Village of Pinehurst*, we noted that our courts have construed this statute strictly. 100 N.C. App. 77, 80, 394 S.E.2d 251, 253 (1990), *disc. rev. denied*, 328 N.C. 92, 402 S.E.2d 417, *cert. denied*, 501 U.S. 1251, 115 L. Ed. 2d 1055 (1991). In that case, we also rejected the plaintiff's argument that section 160A-364.1 did not provide the relevant statute of limitations for constitutional claims:

> Plaintiff characterizes this action as "a cause of action for deprivation of constitutional rights" and states that the United States

4. The statute of limitations set forth in North Carolina General Statutes, section 160A-364.1 applies to a challenge to an ordinance's validity, which goes to a municipality's legislative authority to adopt, amend, and repeal zoning ordinances. *See* David W. Owens, Land Use Law in North Carolina 270–72 (2006); *see also Taylor v. City of Raleigh*, 290 N.C. 608, 618, 227 S.E.2d 576, 582 (1976) ("The General Assembly has delegated to 'the legislative body' of cities and incorporated towns the power to adopt zoning regulations and from time to time, to amend or repeal such regulations.") (citations omitted). In contrast, when a municipality makes a quasi-judicial decision, such as denying a variance from a zoning ordinance, the applicable statute of limitations is thirty days from the date of the decision. *See* Owens, *supra*, at 271–72; *see also* N.C. Gen. Stat. § 160A-388(e2) (2009).

> Supreme Court in *Wilson v. Garcia*, 471 U.S. 261, 85 L. Ed. 2d 254 (1985), has directed that such actions "be subject to the relevant state's personal injury statute of limitations" which in North Carolina is three years. The *Wilson* court was addressing federal civil rights actions under 42 U.S.C.S. § 1983 when it chose to apply the personal injury statute of limitations. We do not find *Wilson* controlling.

Id. After recounting the "important public policy considerations" such as "a strong need for finality with respect to zoning matters[,]" we explained that

> North Carolina courts have not held that violations of federal constitutional claims in zoning actions extend the usual [two-month[5]] statute of limitations. In *Sherrill v. Town of Wrightsville Beach*, 81 N.C. App. 369, 344 S.E.2d 357, *disc. rev. denied*, 318 N.C. 417, 349 S.E.2d 600 (1986), this Court held that plaintiff's claims for federal due process violations were barred by the nine-month statute of limitations. It is noteworthy that *Sherrill* was decided after *Wilson*, *supra.*

Id. at 80-81, 394 S.E.2d at 253. The *Pinehurst* Court then held that the "plaintiff's challenge to the 1985 zoning law based on alleged state and federal constitutional violations is barred by the [two]-month statute of limitations." *Id.* at 81, 394 S.E.2d at 253-54.

In *Capital Outdoor Advertising v. City of Raleigh*, our Supreme Court noted that this Court and the Fourth Circuit had dealt differently with which statute of limitations applied to facial constitutional challenges to zoning ordinances. 337 N.C. 150, 162, 446 S.E.2d 289, 297 (1994). Although that case did not require our Supreme Court to decide between the three-year time limit upheld by the Fourth Circuit and the nine-month—now two-month—limitation supported by the *Pinehurst* Court, it nonetheless suggested its agreement with the shorter time frame. *Id.* ("While our [two-month] statute of limitations contained in N.C.G.S. § 1-54.1 and N.C.G.S. § 160A-314.1 appears to treat the issue far more specifically than N.C.G.S. § 1-52(5) and while our North Carolina Court of Appeals decisions appear the better reasoned decisions on the issue, we need not resolve the matter in this case . . . ."). Accordingly, our case law appears to be well-settled that a plaintiff must raise facial

5. North Carolina General Statutes, section 160A-364.1 originally provided a nine-month statute of limitations for challenges to zoning ordinances. However, effective 1 October 1996, the General Assembly amended the statute to two months, the time limit applicable to the case *sub judice*. 1995 N.C. Sess. Laws 746 §§ 7, 8.

constitutional challenges to an ordinance within the two-month statute of limitations or else such claim is barred.

Our case law also is well-established as to standing. Our Supreme Court has held that one's status as a taxpayer or as a citizen of a certain municipality does not confer standing to challenge a zoning ordinance. *See Fox v. Board of Comm'rs*, 244 N.C. 497, 500, 94 S.E.2d 482, 485 (1956) ("[I]t was not alleged or shown that any plaintiff owns realty constituting farm land either subject to or exempt from the provisions of the ordinance. Indeed, it is not alleged or shown that any plaintiff owns any property of any kind presently restricted by the ordinance. Plaintiffs cannot present an abstract question and obtain an adjudication in the nature of an advisory opinion."). Rather, "[a] party has standing to challenge a zoning ordinance in an action for declaratory judgment only when it 'has a specific personal and legal interest in the subject matter affected by the zoning ordinance and . . . is directly and adversely affected thereby.' " *Village Creek Prop. Owners' Ass'n v. Town of Edenton*, 135 N.C. App. 482, 485, 520 S.E.2d 793, 795 (1999) (quoting *Taylor v. City of Raleigh*, 290 N.C. 608, 620, 227 S.E.2d 576, 583 (1976)).

In *Grace Baptist Church v. City of Oxford*, cited by the majority, our Supreme Court held that a plaintiff's failure to allege specific facts within its complaint to establish standing was rectified by the municipality's request for an injunction in its responsive pleading. 320 N.C. 439, 444, 358 S.E.2d 372, 375 (1987). Based upon that threatened enforcement, the plaintiff was "in immediate danger of sustaining an injury as a result of enforcement[.]" *Id.* The majority in the case *sub judice* takes that application of facts a step further by requiring enforcement, or threatened enforcement, in order for a plaintiff to assert a constitutional challenge to a zoning ordinance. Notably, however, the *Grace Baptist* Court analyzed the plaintiff's standing in that case *only* with respect to its as-applied constitutional claim. *Id.* When analyzing whether an ordinance had been selectively enforced against the plaintiff as compared with others in the municipality, a threshold question of enforcement clearly is necessary. I emphasize, though, that immediately prior to that determination, the *Grace Baptist* Court had reviewed the merits of the plaintiff's facial challenge to the ordinance without addressing issues of standing. *Id.* at 442-43, 358 S.E.2d at 374-75. Accordingly, I do not think that *Grace Baptist* supports the majority's assertion that plaintiffs do not have standing to pursue their constitutional claims because their com-

plaint did not allege "that the subject zoning ordinance amendments will be or have been enforced against property owned by plaintiffs[.]"

I think that the majority errs by considering the standing requirements for facial constitutional challenges in the same light as those required for as-applied constitutional claims. Requiring enforcement or threat of enforcement in order to mount an as-applied challenge to an ordinance or to challenge the quasi-judicial decision of a zoning board with respect to a requested variance ensures that only those citizens truly affected by a municipality's actions have standing to bring their claims. In contrast, a facial challenge to an ordinance's validity or, as the majority discusses, challenges to the procedures ensured by statute or local ordinance should not depend upon threatened enforcement. Facial challenges, therefore, are more similar to what the majority labels "statutory challenges" than to as-applied constitutional challenges.

Thrash Ltd. P'ship v. County of Buncombe (*Thrash II*), as cited by the majority, addressed this specific issue when it distinguished a case relied upon by the municipality:

> We find *Andrews* to be distinguishable. The plaintiff's challenge to the zoning ordinance in *Andrews* was based on arbitrariness, equal protection, or constitutionality as applied to the plaintiff's land. As the case necessarily involved a specific consideration of plaintiff's land, the plaintiff was required to show that she had an immediate risk of sustaining an injury in order to have standing. In the instant case, plaintiff is challenging the procedural enactment of the Multi-Family Dwelling Ordinance. Thus, plaintiff's declaratory judgment action is not an "as-applied" challenge, but rather is an attack on the validity of the zoning ordinance.

195 N.C. App. 727, 730-31, 673 S.E.2d 689, 692 (2009). The *Thrash II* Court further noted "that to require a plaintiff to demonstrate a direct injury in order to challenge a zoning regulation would allow counties to make zoning decisions without complying with the statutory requirements . . . ." *Id.* at 731, 673 S.E.2d at 692.

In *Messer v. Town of Chapel Hill*, this Court held that a plaintiff cannot challenge the validity of a zoning ordinance unless he first has requested a variance. 125 N.C. App. 57, 64-65, 479 S.E.2d 221, 225, *vacated as moot*, 346 N.C. 259, 485 S.E.2d 269 (1997). In a prescient dissent, Judge Greene acknowledged the potentially problematic interaction between our statute of limitations and a requirement of

enforcement for standing purposes. *Id.* at 65, 479 S.E.2d at 226 (Greene, J., dissenting). At the time he authored this dissent, the statute of limitations was nine months, *id.* (Greene, J., dissenting); Judge Greene's concerns may prove more relevant given the truncated two-month statute of limitations. According to Judge Greene,

> I do not agree that the complaint must be dismissed on the grounds that the claims are premature or "not ripe" for consideration. The plaintiffs challenge the ordinance on the grounds that it is an arbitrary and capricious act by the government and is therefore unconstitutional. In other words, the plaintiffs contend that *any* application of the ordinance is unconstitutional because their property rights were violated the very moment the government enacted the ordinance, without regard to how it may be applied. This constitutes a "facial challenge" as opposed to an "as applied challenge," *see Eide v. Sarasota County*, 908 F.2d 716, 724 n.14 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120, 112 L. Ed. 2d 1179, 111 S. Ct. 1073 (1991), and as such there is no requirement that the plaintiff, prior to filing the complaint, first seek a variance from the zoning requirement. *See id.*; *Pennell v. San Jose*, 485 U.S. 1, 11, 99 L. Ed. 2d 1, 14, 108 S. Ct. 849 (1988) (addressing facial challenge). Furthermore, because any action challenging the validity of the ordinance must be filed within nine months of its enactment, N.C.G.S. § 160A-364.1 (1994), requiring the plaintiffs to seek a final ruling on a variance request prior to filing this action would seriously jeopardize the right to file the action, as it is likely that a final decision would not be entered within nine months of the enactment of the ordinance. I would reverse the order of the trial court and remand.

Id. at 65, 479 S.E.2d at 225-26 (Greene, J., dissenting).

This precise problem presented itself in a pair of our unpublished cases. In *Nags Head Constr. & Dev., Inc. v. Town of Nags Head*, we held that the plaintiff had not established standing to challenge the validity of a zoning ordinance.

> In its complaint, plaintiff does not claim or allege that it would be subject to the challenged ordinance or is about to suffer any direct injury. Rather, plaintiff merely alleges that it has a legal interest in certain parcels of property located within the Town's jurisdiction. This general interest, common to all members of the public, is insufficient to establish standing. [*Wilkes v. North Carolina State Board of Alcoholic Control*, 44 N.C. App. 495,

> 496-97, 261 S.E.2d 205, 206-07 (1980)]. Furthermore, plaintiff does not claim or allege that it sought or was denied a permit or variance under the challenged ordinance.

2005 N.C. App. LEXIS 832, at *6 (unpublished). When the case came before us again, we held that the statute of limitations barred plaintiff's claim, leaving plaintiff with no method of redress.

> The zoning ordinance at issue in this appeal was adopted on 20 August 2003. Pursuant to G.S. § 160A-364.1, plaintiff had until two months thereafter to file a suit challenging the ordinance. Although plaintiff filed a complaint on 20 October 2003, that complaint was dismissed for lack of standing and this Court subsequently affirmed the dismissal. *See Nags Head Constr. & Dev., Inc. v. Town of Nags Head*, —– N.C. App. —–, —– S.E.2d —–, 2005 N.C. App. LEXIS 832 (2005) (unpublished) (trial court properly dismissed the complaint as plaintiff failed to show an existing case or controversy with the Town and that plaintiff would suffer direct injury because a permit was neither sought or denied).
>
> Plaintiff next filed the subject complaint challenging the zoning ordinance on 4 February 2004, more than five months after the expiration of the two month limitations period. On these facts, the trial court properly determined that the plaintiff had not sustained his burden of showing that the action was instituted within the prescribed period. Thus, the order granting defendant's Rule 12(b)(6) motion was proper.

Nags Head Constr. & Dev., Inc. v. Town of Nags Head, 2006 N.C. App. LEXIS 971, at *4-5 (unpublished).

Here, I agree with the majority that the two-month statute of limitations bars plaintiff Bird's claims. *See* N.C. Gen. Stat. § 160A-364.1 (2005). As cited by the majority, "this Court has previously held that even where an amendment is adopted inconsistent with the notice requirements of Chapter 160A, an action which attacks the validity of the amendment commenced more than [two] months from the adoption of the amendment is barred." *Thompson v. Town of Warsaw*, 120 N.C. App. 471, 473, 462 S.E.2d 691, 692 (1995) (citing *Pinehurst Area Realty*, 100 N.C. App. at 80, 394 S.E.2d at 253). Therefore, because plaintiff Bird did not bring her claims within the requisite two-month time frame, her complaint failed to state a claim upon which relief could be granted, as properly held by the trial court.

However, plaintiff Templeton's claims are not barred by the statute of limitations, because he brought his original suit within the allotted two-month period and voluntarily dismissed those claims pursuant to Rule 41 of our Rules of Civil Procedure. He then re-filed within the one-year time frame provided by that Rule. Thus, I must look at whether plaintiff Templeton has standing to pursue his claim. In accordance with *Thrash II*, plaintiff Templeton has not alleged specific facts that support his standing to challenge the ordinance. However, I emphasize that an allegation as to the slope value of his property and as to the distance between his property and a major traffic corridor would satisfy the requirements of standing with respect to both "statutory challenges" and a facial constitutional challenge. He need not allege that enforcement of the ordinance is imminent except as to his as-applied constitutional challenges. I also note that the majority's reasoning appears to be inconsistent with respect to its standing analysis. If plaintiff Bird's allegation that "the Town subjected the trust property to the onerous regulations of the Viewshed Ordinance and Map" necessitates the inference that such property "must be located within 100 feet of a major traffic corridor or a portion of the trust property can be seen from a major traffic corridor[,]" as asserted by the majority, then the allegations that plaintiff Bird's and plaintiff Templeton's properties are "directly and adversely affected" by the zoning ordinances would require the same inference. If we take the allegations as true, then both allegations are sufficient to establish standing. If we require specific factual allegations that support a finding of standing, as the *Thrash II* Court appeared to require, then neither party meets that threshold. As I would hold that all of plaintiff Bird's claims are barred by the statute of limitations, I do not address whether she established standing as to either of the ordinances.

ANITA M. HONEYCUTT, PLAINTIFF v. JOSEPH WHITNEY HONEYCUTT, DEFENDANT

No. COA09-1450

(Filed 16 November 2010)

1. Appeal and Error— record—settlement order not included —no prejudice—appeal not dismissed

The absence of an order settling the record on appeal in a domestic case was a technical violation which did not result in

dismissal of the appeal where the record otherwise contained that which should have been included and did not contain that which should have been excluded. Neither appellate review nor the adversarial process was impaired.

2. Appeal and Error— partial summary judgment—interlocutory—avoidance of piecemeal litigation

An order granting partial summary judgment on rescission of a separation agreement affected a substantial right and was not dismissed as interlocutory where plaintiff sought rescission of the agreement and equitable distribution. Dismissal of the appeal would have created piecemeal litigation.

3. Divorce— separation agreement—ratification

The trial court correctly granted summary judgment for defendant on a claim to rescind a separation agreement where there was no issue of fact that plaintiff ratified the agreement with full knowledge that the benefits she received were pursuant to the agreement and that her acceptance of benefits was not under duress or any other wrongdoing.

Judge HUNTER, JR., ROBERT N. concurring in part and dissenting in part.

Appeal by plaintiff from order entered on or about 1 April 2009 by Judge Jane V. Harper in District Court, Mecklenburg County. Heard in the Court of Appeals 14 April 2010.

James, McElroy & Diehl, P.A., by Amy E. Simpson, for plaintiff-appellant.

Casstevens, Hanner, Gunter, Riopel & Wofford, P.A., by Dorian H. Gunter, for defendant-appellee.

STROUD, Judge.

The trial court granted partial summary judgment in favor of defendant. Plaintiff appeals. Because we conclude that the trial court properly concluded that there was no genuine issue of material fact as to plaintiff's ratification of the parties' "SEPARATION AGREEMENT PROPERTY SETTLEMENT PARENTING AGREEMENT[,]" we affirm.

I. Background

On or about 26 June 2006, the parties entered into a "SEPARATION AGREEMENT PROPERTY SETTLEMENT PARENTING AGREEMENT" ("Agreement"). On 3 October 2008, plaintiff sued defendant requesting rescission of the agreement, equitable distribution, child support/attorney's fees or in the alternative specific performance of the Agreement seeking distribution of "80% of the value of all the assets which Defendant/Husband did not specifically disclose" and payment of plaintiff's attorney's fees, and absolute divorce. On or about 3 December 2008, defendant answered plaintiff's complaint and counterclaimed for child support, restoration of the status quo, and absolute divorce. Also on or about 3 December 2008, defendant filed a motion for summary judgment. On or about 1 April 2009, the trial court granted partial summary judgment in favor of defendant regarding plaintiff's claims for rescission of the Agreement and equitable distribution. Plaintiff appeals.

II. Referred Motions

[1] Before we consider the substance of plaintiff's appeal we must address three motions filed by the parties with this Court. On or about 14 December 2009, defendant filed a motion to dismiss plaintiff's appeal pursuant to North Carolina Appellate Procedure Rules 9, 11, 12, 25 and 37. Defendant alleges various issues regarding the settlement of the record on appeal. In substance, defendant's arguments are based upon the fact that the record does not contain an order officially settling the record on appeal. Both parties concede that the trial court held a hearing regarding settlement of the record and made rulings as to various documents which should be included in the record; however, plaintiff's counsel failed to have the written order regarding settlement of the record executed by the trial court. Plaintiff filed the record on appeal and both parties filed their briefs.

While we agree that there is a technical deficiency in the record on appeal due to the lack of the trial court's order as to settlement of the record, we do not deem dismissal to be an appropriate remedy in this situation. In *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, our Supreme Court set out the proper analysis for this Court to use when a party fails to comply with the Rules of Appellate Procedure in some respect which does not deprive this Court of jurisdiction:

> The final principal category of default involves a party's failure to comply with one or more of the nonjurisdictional requi-

> sites prescribed by the appellate rules. . . . [T]he appellate court faced with a default of this nature possesses discretion in fashioning a remedy to encourage better compliance with the rules.
>
> We stress that a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal.
>
> . . . .
>
> Based on the language of Rules 25 and 34, the appellate court may not consider sanctions of any sort when a party's noncompliance with nonjurisdictional requirements of the rules does not rise to the level of a substantial failure or gross violation. . . .
>
> In the event of substantial or gross violations of the nonjurisdictional provisions of the appellate rules, however, the party or lawyer responsible for such representational deficiencies opens the door to the appellate court's need to consider appropriate remedial measures. . . .
>
> . . . .
>
> In determining whether a party's noncompliance with the appellate rules rises to the level of a substantial failure or gross violation, the court may consider, among other factors, whether and to what extent the noncompliance impairs the court's task of review and whether and to what extent review on the merits would frustrate the adversarial process. The court may also consider the number of rules violated, although in certain instances noncompliance with a discrete requirement of the rules may constitute a default precluding substantive review.
>
> . . . .
>
> [W]hen a party fails to comply with one or more nonjurisdictional appellate rules, the court should first determine whether the noncompliance is substantial or gross under Rules 25 and 34. If it so concludes, it should then determine which, if any, sanction under Rule 34(b) should be imposed. Finally, if the court concludes that dismissal is the appropriate sanction, it may then consider whether the circumstances of the case justify invoking Rule 2 to reach the merits of the appeal.

362 N.C. 191, 198-201, 657 S.E.2d 361, 365-67 (2008) (citations and quotation marks omitted).

Here, we conclude that plaintiff's violations regarding the record on appeal were not substantial or gross violations because neither party claims that any evidence, document, or information which should be in the record on appeal is missing or that any item which should have been excluded was included. Under these circumstances, the violation does not "impair[] the court's task of review" as we have all the necessary documents in order to perform a complete review of the merits, and "review on the merits [does not] frustrate the adversarial process" as defendant has not suffered any prejudice or been impeded in arguing his own case due to the procedural defects. *Id.* at 200, 657 S.E.2d at 366-67. Accordingly, we deny defendant's motion to dismiss. Although we caution plaintiff's counsel in the future to ensure that all steps necessary for settlement of the record are completed and properly included in the record on appeal, pursuant to *Dogwood*, we do not impose any sanction against plaintiff. *Dogwood* at 199, 657 S.E.2d at 366 ("Based on the language of Rules 25 and 34, the appellate court may not consider sanctions of any sort when a party's noncompliance with nonjurisdictional requirements of the rules does not rise to the level of a 'substantial failure' or 'gross violation.' ")

In response to defendant's motion to dismiss, on or about 28 December 2009, plaintiff filed a motion to amend the record on appeal and a motion for an extension of time to have the order entered by the trial court added to settle the record on appeal. As we have already noted, we have the necessary documents in order to conduct a thorough review despite the technical violation of the Rules of Appellate Procedure, and as we have denied defendant's motion to dismiss, we also deny both of plaintiff's motions.

III. Interlocutory Appeal

[2] In its brief, defendant again argues that this Court should dismiss plaintiff's appeal, this time on the grounds that the appeal is interlocutory as there are still several claims pending in the trial court. However, we conclude that plaintiff has demonstrated that the trial court's order granting partial summary judgment affects a substantial right, and thus we disagree. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) ("[I]n two instances a party is permitted to appeal interlocutory orders. First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that

there is no just reason to delay the appeal. Second, a party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits. Under either of these two circumstances, it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those grounds." (citations, quotation marks, and ellipses omitted)).

In *Case v. Case*, the parties entered into a separation agreement. 73 N.C. App. 76, 77, 325 S.E.2d 661, 662, *disc. review denied*, 313 N.C. 597, 330 S.E.2d 606 (1985). The plaintiff wife filed a claim for absolute divorce, and the defendant husband raised various counterclaims, including equitable distribution. *Id.* at 77, 325 S.E.2d at 662-63. The plaintiff wife filed for partial summary judgment, and the trial court granted partial summary judgment in the plaintiff wife's favor by dismissing the defendant husband's claim for equitable distribution. *Id.* at 77, 325 S.E.2d at 663. This Court determined that the defendant husband's appeal should be heard, stating:

> The granting of the summary judgment motion is not appealable, unless the appeal is provided for elsewhere in the statute. Defendant may immediately appeal from this interlocutory order if it affects a substantial right. It has been held that an order which completely disposes of one of several issues in a lawsuit affects a substantial right. The trial court in granting summary judgment concluded that the separation agreement was valid and not revoked by the reconciliation of the parties. The separation agreement was a bar to the counterclaim for equitable distribution, thus there existed no genuine issue of material fact. The trial court's conclusion completely disposes of the issue of equitable distribution, thereby affecting a substantial right of the defendant rendering the appeal reviewable.

Id. at 78-79, 325 S.E.2d at 663 (citations omitted). Just as in *Case*, here the trial court's order for partial summary judgment "concluded that the separation agreement was valid" and "[t]he separation agreement was a bar to the counterclaim for equitable distribution[;]" the order has completely disposed of plaintiff's claim for equitable distribution and therefore affects a substantial right. *Id.*

A similar situation was presented in *Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E.2d 97 (1984). In *Buffington*, the parties entered into a separation agreement after which the plaintiff husband filed a

lawsuit "seeking a divorce and specific performance of the separation agreement[.]" *Id.* at 484, 317 S.E.2d at 97-98. The defendant wife filed a counterclaim alleging that the separation agreement was void and seeking equitable distribution. *Id.* at 484, 317 S.E.2d at 98. Both parties filed motions for summary judgment as to the enforceability of the separation agreement. *Id.* The trial court granted the plaintiff husband's motion, finding the agreement to be enforceable; the defendant wife appealed. *Id.* This Court addressed the interlocutory appeal as follows:

> Before determining whether the trial court's summary judgment orders were correct, we examine the procedural status of defendant's appeal. As a general rule, a party may properly appeal only from a final order, which disposes of all the issues as to all parties, or an interlocutory order affecting a substantial right of the appellant. The purpose of the substantial right doctrine is to prevent fragmentary or premature appeals, by permitting the trial division to have done with a case fully and finally before it is presented to the appellate division[.]
>
> In ruling on the parties' summary judgment motions, the trial judge noted that the record fails to establish any genuine issue of material fact that would support the legal conclusion that the separation agreement of the parties is not valid as to the division of the property of the parties. By its rulings, the trial court necessarily determined that the separation agreement was valid as a matter of law and that defendant's counterclaim for equitable distribution should therefore be denied. The only issues left remaining for trial were those relating to plaintiff's claim for specific performance of the separation agreement, or, alternatively, damages for breach. The trial court's orders did not constitute a final judgment as they did not dispose of all issues as to all the parties in the lawsuit. However, it has been held that an order which completely disposes of one of several issues in a suit affects a substantial right. The trial court's order also affects a substantial right of defendant by preventing adjudication of defendant's counterclaim and plaintiff's claims in a single lawsuit[.]

Id. at 485-86, 317 S.E.2d at 98 (citations, quotation marks, and ellipses omitted). Just as in *Buffington*, here the trial court's order completely disposed of plaintiff's equitable distribution claim and has the effect of "preventing adjudication of defendant's counterclaim and plaintiff's claims in a single lawsuit[.]" *Id.* at 486, 317 S.E.2d at 98.

The Agreement here provides for distribution of the parties' property; plaintiff seeks a different distribution of marital and divisible property by her claim for equitable distribution. Dismissal of plaintiff's appeal will create piecemeal litigation; if this appeal is dismissed, the trial court could proceed to distribute the property in accord with the Agreement. After the trial, this Court could determine that instead of distributing the property according to the Agreement, the trial court should have set aside the Agreement and instead ruled upon plaintiff's equitable distribution claim. Consideration of plaintiff's appeal at this point avoids the possibility of two trials with the same goal. In accord with *Case* and *Buffington*, we will consider the merits of this appeal. *See Buffington*, 69 N.C. App. 483, 317 S.E.2d 97; *Case*, 73 N.C. App. 76, 325 S.E.2d 661.

IV. Summary Judgment

We now turn to the issues plaintiff has argued on appeal. Plaintiff contends that the trial court erred in granting partial summary judgment in favor of defendant because there were genuine issues of material fact which precluded summary judgment.

A. Standard of Review

> In the consideration of a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial.

Metcalf v. Black Dog Realty, LLC, ––– N.C. App. –––, –––, 684 S.E.2d 709, 717 (2009) (citation omitted). This Court's "standard of review is *de novo*, and we view the evidence in the light most favorable to the non-movant." *Scott & Jones v. Carlton Ins. Agency Inc.*, ––– N.C. App. –––, –––, 677 S.E.2d 848, 850 (2009) (citation omitted). The standard of review for an order granting a motion for summary judgment

> requires a two-part analysis of whether, (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.

Von Viczay v. Thoms, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000) (citation and quotation marks omitted), *aff'd per curiam*, 353 N.C. 445, 545 S.E.2d 210 (2001).

B. Rescission

[3] Because this Court must review "the evidence in the light most favorable to" plaintiff, *Scott* at ––, 677 S.E.2d at 850, the following summary of the facts surrounding plaintiff's claims was drawn entirely from plaintiff's complaint and deposition testimony.[1] Plaintiff and defendant were married on or about 18 November 1995 and separated on or about 1 July 2006. In 2003, the parties "began to experience marital discord[,]" which at various points in time included extramarital affairs by both parties. Plaintiff alleged that defendant's infidelity "began prior to September 2003," while defendant discovered plaintiff's affair in May of 2006. Plaintiff alleged that she "apologized, begged, cried and pleaded" for forgiveness and that she wanted to remain married to defendant. However, defendant wanted to separate and he told plaintiff "that he would have an agreement drawn up that would be 'more than fair.' " Plaintiff "was an emotional mess[.]" Defendant told plaintiff that there may be hope of saving the marriage "if she would sign the agreement as it was presented."

On or about 14 June 2006, defendant presented a proposed agreement to plaintiff. On the day plaintiff received the proposed agreement, plaintiff read over the document "probably at least five or six" times. Within the next day or two, plaintiff contacted Ms. Sandra Dopf, a divorce counselor, to discuss the proposed agreement. Plaintiff "went back and forth on whether" to call an attorney, because she feared that doing so would "blow[] up any chance of salvaging [her] marriage." However, defendant was aware that plaintiff was going to see Ms. Dopf.

Plaintiff went to see Ms. Dopf alone on her first visit and took the proposed agreement to review. Plaintiff was not sure if the document was fair because she did not have "any kind of financial information at that point." Ms. Dopf read the proposed agreement, discussed "various terms" of the document with plaintiff, and answered plaintiff's questions, although "looking back on it[,]" plaintiff did not think that Ms. Dopf answered her questions correctly. Ms. Dopf suggested meeting with both parties to address the issues in mediation.

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1. We note that some allegations in plaintiff's affidavit, which was filed on or about 11 February 2009, could be construed as contradictory to her deposition testimony which was given on or about 27 July 2007. To the extent that plaintiff's affidavit contradicts her deposition testimony, we will disregard those allegations of the affidavit, as "[a] party is not permitted to file affidavits contradicting prior testimony for the purpose of creating an issue of fact." *Ahmadi v. Triangle Rent A Car, Inc.*, –– N.C. App. ––, ––, 691 S.E.2d 101, 103 (2010) (citation omitted).

Ms. Dopf later met with defendant alone, and then both parties met with her "maybe two more times[.]" The parties and Ms. Dopf discussed various issues regarding custody, visitation, child support, and other financial matters. Although defendant did not bring documents such as bank statements to the meeting with Ms. Dopf, he did bring an Excel spreadsheet of assets and liabilities. Neither plaintiff nor Ms. Dopf "push[ed]" defendant to bring additional financial documentation. Although plaintiff did not know the actual values of various items of property, plaintiff was aware that: the house was worth "probably" over $2,000,000.00; defendant had sold a company for "about $12 million" before taxes; defendant had used some of the funds from the sale of the company to purchase "two office buildings in Wilmington;" plaintiff and defendant were in the process of "building a new house on at [sic] Wrightsville Beach[;]" the parties had purchased a 350 acre farm in Statesville and were jointly obligated on the mortgage; defendant had bought various cars and an airplane; defendant had purchased boats, including paying cash for a "70-foot Hatteras luxury yacht[;]" and defendant had "bought 12 acres of land to develop into home sites," upon which plaintiff had cosigned on the note.

At the final meeting, Ms. Dopf "redid [the] whole document" because there was a problem with the email or download of the document from defendant's attorney. Ms. Dopf made revisions to the document; plaintiff read over the document, asked any questions she had, and understood the document. On or about 26 June 2006, the parties went to lunch together after meeting with Ms. Dopf and then went to Post Net where they signed the Agreement and had it notarized.

In plaintiff's complaint, plaintiff sought rescission of the agreement based upon false representations, nondisclosure, duress, undue influence, and substantive and procedural unconscionability of the Agreement. Plaintiff claims that the property distribution "in the Agreement is heavily in favor of Defendant" and that the child custody and support terms are also "unfavorable to Plaintiff/Wife such that Plaintiff/Wife would not have agreed to such terms had it not been for the pressure and undue influence of Defendant/Husband."

C. Ratification

Defendant argues that plaintiff's claim for rescission for any of the reasons alleged is barred by her ratification of the Agreement. Therefore, even if we were to assume *arguendo* that there are genuine issues of material fact as to some or all of plaintiff's claims for

rescission, defendant contends that plaintiff has ratified the Agreement by her acceptance of benefits under the Agreement. Thus, if defendant is entitled to summary judgment as to his affirmative defense of ratification, the trial court was correct in granting partial summary judgment for defendant.

Plaintiff concedes in her brief that after execution of the Agreement she received:

> 1) $500,000; and 2) possession of the house on Mary Ardery Circle which she had been residing in with her family during the marriage and prior to the date of separation; two automobiles (which she was driving prior to the date of separation); furniture and personal property in the home; and three investment accounts.
>
> . . . .
>
> [3)] $500,000[;] . . . [4)] 7,000 per month; . . . [5)] $916,000[; and] . . . [6)] $500 per month in child support.

(Footnote omitted.)

It is also worth noting that plaintiff admits in a memorandum to the trial court that she initially hired an attorney regarding the Agreement in early 2007 and brought her first lawsuit for rescission of the Agreement on 7 May 2007. The factual allegations of plaintiff's complaint in the first lawsuit are substantially the same as in this lawsuit. Plaintiff's deposition which was filed in this matter was taken during the first lawsuit. Plaintiff took a voluntary dismissal of the first lawsuit without prejudice on 19 June 2008 and hired new counsel in July 2008; plaintiff's new counsel filed the current lawsuit on 3 October 2008. Plaintiff accepted and has retained at least $1,421,000.00 of the payments and property under the Agreement *after* she had hired her first attorney and filed her first lawsuit against defendant.

In *Goodwin v. Webb*, our Supreme Court adopted Judge Greene's dissent and reversed the opinion of this Court. *Goodwin*, 357 N.C. 40, 577 S.E.2d 621 (2003). The dissent stated that

> [a] party ratifies an agreement by retroactively authorizing or otherwise approving it, either expressly or by implication. Thus, ratification can occur where a party accepts benefits and performs under an agreement. The act only constitutes ratification if it is done with full knowledge that the acceptance of benefits or the performance arises pursuant to the agreement and is done so without any duress.

Goodwin, 152 N.C. App. 650, 656-57, 568 S.E.2d 311, 315 (2002) (Greene, J., dissenting) (citations, quotation marks, ellipses, and brackets omitted), *rev'd per curiam*, 357 N.C. 40, 577 S.E.2d 621 (2003).

A review of *Goodwin's* facts shows that although the wrongs alleged by the plaintiff wife were substantially more egregious than those alleged by plaintiff here, *see Goodwin*, 152 N.C. App. 650, 568 S.E.2d 311, the Supreme Court found that her acceptance of benefits was controlling. *See Goodwin*, 357 N.C. 40, 577 S.E.2d 621. In *Goodwin*, the plaintiff wife sought to set aside a separation agreement based upon allegations that her husband had "procured [the agreement] by coercion, duress, threats of physical abuse, mental abuse, and undue influence[.]" *Goodwin*, 152 N.C. App. at 651, 568 S.E.2d at 312. The plaintiff wife forecast evidence that her husband[2] had told a friend "that he forced Plaintiff to sign the Agreement by threatening that if she didn't sign the papers he was going to beat the hell out of her." *Id.*, 152 N.C. App. at 652-53, 568 S.E.2d at 313 (quotation marks omitted). The plaintiff wife also testified in her deposition that the husband had "threatened [her] throughout their marriage, that he had frequently beaten her, and that during the weeks before she signed the Agreement, [the husband] told plaintiff if she did not sign the Agreement, he would beat the hell out of her." *Goodwin*, 152 N.C. App. at 653, 568 S.E.2d at 313 (quotation marks and brackets omitted). "[E]ven after signing the Agreement, and until the time of Goodwin's death, [the plaintiff wife] still feared that [the husband] would physically harm her or have someone physically harm her if she did not comply with the Agreement or did something to legally affect the Agreement." *Id.* (quotation marks, ellipses, and brackets omitted). The plaintiff wife also presented evidence from Dr. Sultan, who had "performed a clinical evaluation of" her which stated Dr. Sultan's opinion that "Plaintiff was convinced that she had no choice but to sign the Agreement or risk physical assault and abuse from [the husband]." *Id.* (quotation marks, ellipses, and brackets omitted). The plaintiff wife had endured

> physical and mental abuse . . . during her 25-year marriage [which] left her unable to contest the provisions of the Agreement even had been signed, as she was fearful of repercussions from [the husband] if she contested the Agreement, even

2. The husband in *Goodwin* died prior to inception of the case, so his executor was the defendant in the wife's lawsuit for rescission. *Goodwin*, 152 N.C. App. at 651, 568 S.E.2d at 311.

> during the time that he was sick and in the hospital and up until the time of his death.

Id. (quotation marks, ellipses, and brackets omitted). In addition, the plaintiff wife forecast evidence that she was most likely not intellectually capable of understanding the agreement because her IQ was in the low 70s. *Id.*, 152 N.C. App. at 654, 563 S.E.2d at 314. The plaintiff wife had left school after seventh grade and had "never had a personal bank account or a joint account during her marriage[.]" *Id.*, 152 N.C. App. at 655, 563 S.E.2d at 315. However, the evidence viewed in the light most favorable to the plaintiff wife also showed that she had received "$160,000.00, . . . various tracts of land, and [a] truck" under the agreement. *Id.*, 152 N.C. App. at 657, 563 S.E.2d at 316 (Greene, J., dissenting). The plaintiff wife accepted and used these funds and assets "with full knowledge they were benefits arising under the agreement." *Id.*

The facts here, viewed in the light most favorable to plaintiff, *see Scott* at —–, 677 S.E.2d at 850, clearly demonstrate that plaintiff became aware of the claimed unfairness of the Agreement shortly after its execution; this is evidenced by plaintiff's decision to file her first lawsuit for rescission of the Agreement. Although plaintiff argued before the trial court that her first attorney failed to conduct adequate discovery regarding defendant's assets, the fact remains that plaintiff had "full knowledge" that her "acceptance of benefits or the performance" occurred "pursuant to the agreement[.]" *Id.* Plaintiff has retained all benefits she has received under the Agreement and continued to accept payments under the Agreement until as late as June 2008.

Plaintiff argues that although she has retained the benefits she received under the Agreement, she did file a reply to defendant's counterclaim in which she stated that she "is prepared to disgorge herself of the benefits received under the Agreement if the Agreement is rescinded." Plaintiff contends that her statement that she was "prepared to disgorge" the benefits she received is sufficient. However, we find no authority that a statement that plaintiff is prepared to disgorge the benefits of the Agreement if it is rescinded is sufficient. To the contrary,

> [i]n order to rescind, however, the party injured must act promptly and within a reasonable time after the discovery of the fraud, or after he should have discovered it by due diligence, and he is not allowed to rescind in part and affirm in part; he must do one or the other. And as a general rule, a party is not allowed to

> rescind where he is not in a position to put the other in *statu quo* by restoring the consideration passed. Furthermore, if, after discovering the fraud, the injured party voluntarily does some act in recognition of the contract, his power to rescind is then at an end.

Bolich v. Ins. Co., 206 N.C. 144, 155-56, 173 S.E. 320, 326-27 (1934) (citation and quotation marks omitted). Instead of acting "promptly and within a reasonable time[,]" plaintiff continued to accept and retain benefits under the Agreement long after she became aware of the alleged improprieties related to the Agreement. *Id.* at 155, 173 S.E.2d at 326.

Plaintiff also argues that *Lumsden v. Lawing*, 117 N.C. App. 514, 451 S.E.2d 659 (1995) supports her argument that disgorgement of benefits is not always required as a precondition to a claim for rescission. In *Lumsden*, this Court stated that "[r]escission of a contract implies the entire abrogation of the contract from the beginning. Caselaw indicates that as a general rule, a party is not allowed to rescind where he is not in a position to put the other in *statu quo* by restoring the consideration passed." *Id.* at 518, 451 S.E.2d at 662 (citations, quotation marks, and brackets omitted). However, *Lumsden* involved "extraordinary circumstances" which made it impossible for the plaintiffs to reconvey the real property which was the subject of the action, as it had been foreclosed and sold to a third party. *Id.* at 515-20, 451 S.E.2d at 660-62. Because of these "extraordinary circumstances[,]" this Court further stated that "[t]he rule requiring return to status quo ante is a general rule, not an absolute rule. A preeminent authority on the law of contracts states that if complete restoration to status quo is impossible, the terms of a rescission remedy rest in the sound discretion of the courts." *Id.* at 519, 451 S.E.2d at 662 (citations omitted). *Lumsden* is inapposite to this case, as there is no showing or allegation of any impossibility for plaintiff to disgorge the benefits she has received under the Agreement. In fact, plaintiff acknowledges that disgorgement of the benefits is possible by her allegation that she is "prepared" to do so.

Plaintiff further argues that she should not have to return the benefits of the agreement to defendant as she is actually entitled to more than she has received, so she would be returning them to defendant only so that he would be required to give those benefits, and more, right back to her. However, plaintiff cites no authority for this argument, and we note that plaintiff's claim in this regard would have been true in *Goodwin* as well, but our Supreme Court still agreed

with Judge Greene in his determination that the plaintiff wife's retention of the assets she received under the agreement demonstrated her ratification of the agreement. *See Goodwin*, 357 N.C. 40, 577 S.E.2d 621. Because there is no genuine issue of fact that plaintiff ratified the Agreement with full knowledge that the benefits she was receiving were pursuant to the Agreement and that her acceptance of benefits was not under duress or any other wrongdoing, *see id.*, 152 N.C. App. at 656-57, 568 S.E.2d at 315 (Greene, J., dissenting), we affirm the trial court's order granting partial summary judgment in favor of defendant.

V. Conclusion

For the foregoing reasons, we affirm the trial court order granting partial summary judgment.

AFFIRMED.

Judge McGEE concurs.

Judge HUNTER, JR., Robert N. concurs in part and dissents in part in a separate opinion.

HUNTER, JR., Robert N., Judge, concurring in part and dissenting in part.

While I agree with my colleagues in regard to the resolution of defendant's motion to dismiss Anita Honeycutt's ("plaintiff") appeal for failure to properly settle the record on appeal, I dissent from that portion of the majority opinion regarding the resolution of defendant's motion to dismiss the appeal as interlocutory. Because I do not believe we should exercise jurisdiction over the questions raised by plaintiff, I express no opinion on the underlying merits of her claims for relief or the validity of the judgment below.

Plaintiff filed a complaint based on two alternative theories of relief. In her first theory, plaintiff seeks rescission of the separation agreement previously entered by the parties on grounds of unconscionability, and subsequent to rescission, an unequal distribution of the marital assets. Plaintiff also sought an absolute divorce, child support, and attorneys' fees. In the alternative, plaintiff pled a second theory of relief, in which she seeks specific performance of the separation agreement, providing her with an 80% distribution of any previously undisclosed assets, and attorneys' fees. The trial court's partial summary judgment order granted defendant's motion to deny plaintiff's claim for rescission of the separation agreement and for an equitable distribution. This ended any claim for relief on plaintiff's

first theory of relief until appeal. The trial court's order, however, denied defendant's other motions for summary judgment and left for trial plaintiff's claims for child support and attorneys' fees, and her alternative claim for specific performance of the separation agreement with regard to the identification of undisclosed assets. The trial court's partial summary judgment order also left available for future resolution a substantial claim regarding the distribution of marital property under the separation agreement, to wit, whether defendant had disclosed all of his assets at the time the separation agreement was agreed upon, and if not, how any such assets are to be distributed.

As a jurisdictional foundation for her appeal, plaintiff admits that this appeal is interlocutory. She nevertheless claims that the trial court's order granting partial summary judgment affects a substantial right: the right to avoid two trials and the possibility of being prejudiced by inconsistent verdicts. Specifically, plaintiff argues

> the dismissed claims and the remaining claims[] all deal in whole or in part with the identification, valuation and distribution of certain marital assets and liabilities. These assets could be identified, valued and distributed as part of the claim for specific performance. If [plaintiff] is successful on her appeal, and then successful on her claim to set aside the [separation] [a]greement, these same assets will be subject to redistribution by another judge and jury at a later date.

I disagree.

In domestic relations cases, when the trial court has upheld the validity of a separation agreement in a partial summary judgment order, this Court has reached differing conclusions as to whether a substantial right is affected. *Bromhal v. Stott*, 101 N.C. App. 428, 399 S.E.2d 340 (1991) (no substantial right where damages issue remained at trial); *Case v. Case*, 73 N.C. App. 76, 325 S.E.2d 661 (1985) (substantial right recognized even though claims for absolute divorce, child support, and child custody remained at trial); *Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E.2d 97 (1984) (substantial right recognized where issue of specific performance of the separation agreement or damages for breach remained at trial). These differing results are a consequence of the case-by-case assessment required for each interlocutory jurisdictional decision. Examining the law governing interlocutory appeals and the substantial right doctrine reveals that this *sui generis* procedure has resulted

in no clear holding from either this Court or the North Carolina Supreme Court on this specific question.

I disagree with the majority's reading of the facts of this case and the facts of *Case v. Case* and *Buffington v. Buffington*, which the majority cite as authority for this Court to assert jurisdiction. In *Case* and *Buffington*, the trial court's summary judgment order determined the final outcome of the distribution of all marital property; in neither case was further action by the trial court necessary with regard to the allocation of the parties' marital property. *Case*, 73 N.C. App. at 78, 325 S.E.2d at 663; *Buffington*, 69 N.C. App. at 485, 317 S.E.2d at 98. In this case, however, there are issues that remain to be determined regarding the application of the separation agreement, specifically plaintiff's claim that property exists that was undisclosed by defendant and requires distribution by the terms of the separation agreement. Because this claim remains outstanding, the partial summary judgment order is not final in any meaningful way because it does not decide all property issues between the parties.

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." *Cagle v. Teachy*, 111 N.C. App. 244, 247, 431 S.E.2d 801, 803 (1993). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990).

> An interlocutory order may be immediately appealed in only two circumstances: (1) when the trial court, pursuant to N.C.R. Civ. P. 54(b), enters a final judgment as to one or more but fewer than all of the claims or parties and certifies that there is no just reason to delay the appeal; or (2) when the order deprives the appellant of a substantial right that would be lost absent appellate review prior to a final determination on the merits.

High *Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, ––– N.C. App. –––, –––, 693 S.E.2d 361, 366 (2010), *disc. review denied*, ––– N.C. –––, ––– S.E.2d ––– (No. 262P10) (filed 26 August 2010). " '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)). No Rule 54(b) certification has been entered in this

case, and therefore, the "substantial right" exception is the only possible jurisdictional basis for review.

In this case, the trial court concluded that the separation agreement would control the distribution of the parties' marital property. The only potential remaining claim in which the trial court's decision could stand as a conflicting result is plaintiff's claim for specific performance of the separation agreement. Were we to dismiss this appeal as interlocutory, the suit would return to the trial court, and the parties could argue the merits of the specific performance claim.[3] If during the course of the litigation defendant was ordered to present a more complete list of assets per the terms of the separation agreement, and that list contained items not previously disclosed, then plaintiff may be entitled to a somewhat greater distribution of those assets under a sanctions clause in the agreement. In light of such a showing by plaintiff, the trial court could enter an order making findings and conclusions regarding the distribution of these undisclosed assets under the specific performance claim, and also come to a conclusion on the issues of the child support and attorneys' fees.

The majority's decision appears to be based upon the following logic: the trial court's order affects a substantial right because, if this Court does not address the present appeal, the parties await a final determination of all claims (i.e., the remaining claim for specific performance of the separation agreement), and if this Court were to subsequently reverse the trial court on the issue of rescission of the separation agreement, plaintiff would face the possibility of conflicting verdicts on the same facts. Based upon the majority's reasoning on the merits of the case, I think the premise that another panel of this Court would reach a conclusion different from that of the majority is unlikely. I also believe the majority's reasoning would apply to every appeal of an interlocutory order—effectively eliminating any meaningful distinction between those orders that affect a substantial right and those that do not. Examples of the difficulty in applying this rule to domestic relations cases abound and have been cited by appellees. *See Webb v. Webb*, 196 N.C. App. 770, 677 S.E.2d 462 (2009); *McIntyre v. McIntyre*, 175 N.C. App. 558, 623 S.E.2d 828 (2006); *Evans v. Evans*, 158 N.C. App. 533, 581 S.E.2d 464 (2003); *Embler*, 143 N.C. App. 162, 545 S.E.2d 259; *Stafford v. Stafford*, 133 N.C. App. 163, 515 S.E.2d 43, *aff'd per curiam*, 351 N.C. 94, 520 S.E.2d 785 (1999); *Rowe*

3. The central focus of these claims is what, if any, undisclosed assets the parties had at the time the separation agreement was signed.

v. Rowe, 131 N.C. App. 409, 507 S.E.2d 317 (1998); *Hunter v. Hunter*, 126 N.C. App. 705, 486 S.E.2d 244 (1997).

Moreover, the majority's decision will not obviate the need for the trial court to examine the claims for fraud, misrepresentation, or constructive fraud because of the "disputed" material facts regarding undisclosed assets. If the concealment is material, then the court below and this panel may have reached an unjust result on the claim for rescission. Even if the decision below is clear, little judicial economy will have been achieved by taking jurisdiction of this claim because the trial court and this Court will have to visit these facts and transactions twice.

Our law governing interlocutory appeals seeks to discourage piecemeal litigation. *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978) (stating interlocutory appeals are disfavored in order 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"). Because plaintiff can raise the issues in this appeal after a final disposition of this case, and little possibility of inconsistent verdicts exists, no substantial right has been affected by the trial court's order granting partial summary judgment. Accordingly, review of the order by this Court is not proper. I would dismiss the appeal as interlocutory.

LAWYERS TITLE INSURANCE CORPORATION, COMMONWEALTH LAND TITLE INSURANCE COMPANY, CLARK'S CREEK ASSOCIATES, L.L.C., AND BRANCH BANK AND TRUST COMPANY, PLAINTIFFS v. ZOGREO, LLC, FOREST AT SWIFT CREEK, LLC, C.C. MANGUM COMPANY, L.L.C., AND DONNIE HARRISON, IN HIS OFFICIAL CAPACITY AS SHERIFF OF WAKE COUNTY, DEFENDANTS[1]

No. COA09-1304

(Filed 16 November 2010)

1. Declaratory Judgments— security interests in real property—plaintiffs not bound by lien judgments

The trial court did not err in denying defendants' motion to dismiss and motion for judgment on the pleadings in a declara-

1. The order appealed from is captioned "LAWYERS TITLE INSURANCE CORPORATION *et al.*; Plaintiffs, v. ZOGREO, LLC *et al.*; Defendants." However, we elect to include the names of all the parties to the suit in the caption of this opinion.

tory judgment action concerning security interests in certain real property. As plaintiffs were not parties to defendant Bunn's or Mangum's actions to enforce their materialmen's liens, and therefore were not bound by the lien judgments, plaintiffs were free to bring subsequent actions to have the priority of their security interests determined.

2. Liens— security interests in real property—not impermissible collateral attack against lien judgments

Plaintiffs' civil action to determine security interests in certain real property did not represent an impermissible collateral attack against valid lien judgments held by defendants Bunn and Mangum because plaintiffs did not seek "nullification" of the Bunn and Mangum judgments, and plaintiffs might have been entitled to the relief requested without those judgments being declared void as between the parties to the lien enforcement actions.

3. Liens— security interests in real property—lien enforcement action—not determinative of date of first furnishing

Even if defendant Bunn's and Mangum's lien enforcement actions were "actions *in rem*," the resulting lien judgments did not establish the date of first furnishing upon which the Bunn and Mangum judgments were based as against plaintiffs.

4. Liens— security interests in real property—date of first furnishing—no issue of material fact

The trial court did not err in granting partial summary judgment in favor of plaintiffs in a declaratory judgment action concerning security interests in certain real property because no genuine issues of material fact existed with respect to Plaintiffs' claims for declaratory relief, including the date of first furnishing.

Appeal by Defendants[2] from judgment entered 8 June 2009 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 12 May 2010.

Moore & Van Allen PLLC, by David E. Fox and Michael J. Byrne, for Plaintiffs Lawyers Title Insurance Corporation, Commonwealth Land Title Insurance Company, and Branch Bank and Trust Company.

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2. Defendant Donnie Harrison, in his official capacity as Sheriff of Wake County, is not a party to this appeal.

No brief for Plaintiff Clark's Creek Associates, L.L.C.

Lewis & Roberts, PLLC, by James A. Roberts, III, Matthew C. Bouchard, and Brooke N. Albert, for Defendants Zogreo, LLC and Forest at Swift Creek, LLC.

Brent E. Wood and Nicholls & Crampton, P.A., by W. Sidney Aldridge, for Defendant C.C. Mangum Company, L.L.C.

Erwin and Eleazer, P.A., by L. Holmes Eleazer, Jr. and Fenton T. Erwin, Jr., for American Subcontractors Association of America, Amicus Curiae.

STEPHENS, Judge.

I. Pertinent Procedural History of Current Lawsuit

On 8 December 2008, in Wake County Superior Court, Lawyers Title Insurance Corporation ("Lawyers Title"), Commonwealth Land Title Insurance Company ("Commonwealth"), Clark's Creek Associates, L.L.C. ("Clark's Creek"), and Branch Bank and Trust Company ("BB&T") (collectively, "Plaintiffs"), filed a complaint for declaratory judgment and motions for a temporary restraining order, preliminary injunction, and permanent injunction against Zogreo, LLC ("Zogreo"), Forest at Swift Creek ("Forest"), and C.C. Mangum Company, L.L.C. ("Mangum") (collectively, "Defendants"), as well as Donnie Harrison in his official capacity as Sheriff of Wake County. Plaintiffs sought judgment declaring their security interests in property located in Garner, North Carolina ("Property") to have priority over materialmen's liens perfected by Bunn Construction Company, Inc. ("Bunn")[3] and Mangum, and sought to prevent the sale of the Property by execution sale.

On 19 December 2008, the trial court entered a temporary restraining order preventing Defendants and Sheriff Harrison from pursuing an execution sale of the Property. Plaintiffs filed an amended complaint on 6 January 2009. The parties served cross-motions for summary disposition on 18 March 2009. Specifically, Plaintiffs filed a motion for partial summary judgment; Zogreo and Forest filed a Rule 12(b)(6) motion to dismiss, and in the alternative, a Rule 56 motion for summary judgment; and Mangum filed motions for judgment on the pleadings and for summary judgment. While the parties' cross-motions were pending, Plaintiffs filed a motion to sup-

3. On 30 May 2008, Bunn assigned its judgment to Zogreo and Bunn is not a party to this appeal.

plement their motion for partial summary judgment to add an argument based on the doctrine of instantaneous seisin.

The parties' motions came on for hearing on 17 April 2009. On 8 June 2009, the trial court entered an Order and Partial Summary Judgment granting Plaintiffs' motion for partial summary judgment and denying Defendants' motions. The trial court concluded, *inter alia*, that "Defendants' liens and judgments are invalid as to these Plaintiffs[.]" The trial court did not consider the doctrine of instantaneous seisin in its ruling. The trial court's order further provides that "there is no just reason for delay" and that "this matter is Certified for Immediate Appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b)[.]"[4]

From the trial court's order, Defendants appeal. Plaintiffs cross-assign error to the trial court's implicit denial of their motion to add an argument based on the doctrine of instantaneous seisin.

II. Factual Background and Prior Litigation

The Property, the site of a residential development project referred to as Parkland Grove ("Project"), is divided into three tracts ("Tract 1," "Tract 2," and "Tract 3") and is encumbered by various security interests held by the parties. Specifically, the entire Property is subject to two claims of lien: one filed by Mangum on or about 5 October 2006, and one filed by Bunn on or about 18 December 2006. Additionally, portions of the Property are subject to deeds of trust: one held by BB&T recorded 22 February 2005 ("BB&T DOT"), and the other originally held by Cardinal State Bank ("Cardinal") recorded 29 April 2005 ("Cardinal DOT"). The Cardinal DOT was transferred to Clark's Creek. When BB&T and Cardinal obtained the deeds of trust, each obtained a lender's title insurance policy. Lawyer's Title issued a policy insuring BB&T and Commonwealth issued a policy insuring Cardinal. As Cardinal's assignee, Clark's Creek is insured under the Cardinal policy.

On 8 April 2004, Old Stage Partners, LLC ("Old Stage"), which owned Tract 1 at the time, entered into a contract with Bunn for clearing, grading, and erosion control services for $268,540. On 19

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4. When an appeal is from an order which disposes of some but not all claims against a party, "the trial court's determination that there is 'no just reason for delay' of appeal, while accorded deference, cannot bind the appellate courts[.]" *Anderson v. Atlantic Cas. Ins. Co.*, 134 N.C. App. 724, 726, 518 S.E.2d 786, 788 (1999) (internal citation omitted). However, we determine that a substantial right would be affected absent immediate appeal of the interlocutory order in this case and, thus, we will address the merits of the appeal.

April 2004, Old Stage entered into another contract with Bunn for sewer main, water main, storm drain, and roadway construction services. After performing some clearing and rough grading, Bunn ceased work on or around 16 June 2004 for non-payment. On 14 October 2004, Bunn filed a claim of lien on Tract 1 in the principal amount of $180,495.24 for "clearing and grading of property[.]" In this claim of lien, Bunn asserted that the date upon which labor or materials were first furnished to the Property ("date of first furnishing") was 5 April 2004 and the date upon which labor or materials were last furnished ("date of final furnishing") to the Property was 16 June 2004.

On 8 December 2004, Bunn filed suit against Old Stage to enforce the claim of lien. In its complaint, Bunn alleged that it had entered into " 'the Grading Contract' " with Old Stage under which Bunn was to perform "grading construction services" for a total price of $268,540. The complaint additionally alleged that Bunn had performed approximately $199,235 worth of grading and erosion services, that Bunn had ceased working on 16 June 2004, and that Old Stage owed Bunn the principal amount of $180,495.84 for labor and materials supplied to the Property.

On 12 January 2005, Old Stage entered into a third contract with Bunn for silt basin/erosion control services for $27,555. This contract was paid in full in cash when the contract was signed.

On 22 February 2005, Trinity Builders, LLC ("Trinity") purchased a controlling interest in Old Stage, and Old Stage conveyed Tract 1 to Trinity. Also on that date, BB&T loaned $975,000 to Trinity and Trinity executed a promissory note in favor of BB&T. BB&T recorded its deed of trust in Tract 1 as security for Trinity's promissory note, and Lawyer's Title issued a lender's policy insuring BB&T. A portion of the proceeds from the BB&T loan were used to pay the debt on which Bunn's claim of lien was based. As a result, Bunn cancelled its claim of lien on 28 February 2005 and dismissed with prejudice its action to enforce the lien on 10 March 2005.

On 25 April 2005, Bunn submitted a contract proposal to Trinity through Avery Bordeaux, who managed the Project for the various owners of the Property. The proposal was for sewer main, water main, storm drain, roadway, construction road, pump station, and force main construction services for $1,813,631. On 29 April 2005, Trinity borrowed $700,000 from Cardinal to purchase Tracts 2 and 3 from Nantex Corporation, thereby completing the aggregation of the tracts referred to in this case as the Property. As part of the transac-

tion, Trinity gave Cardinal a deed of trust on Tracts 2 and 3. Both the deed from Nantex to Trinity and the Cardinal DOT were recorded simultaneously on 29 April 2005.

On 25 May 2005, Avery Bordeaux, acting as Trinity's agent, signed Bunn's 25 April 2005 proposal. The contract, drafted by Bunn, states: "This proposal—contract replaces any others discussed or written in the past[.]"

On 16 September 2005, Mangum and Bunn entered into a written contract whereby Mangum would "furnish all materials and labor and perform all the work required for . . . Parkland Grove[.]" The total contract price was $1,086,545.80.

Bunn and Mangum ceased work on the Property on 29 September 2006 due to non-payment for their services. On 15 October 2006, Mangum filed a claim of lien on all three tracts. The claim of lien asserted a principal amount of $389,438.41, and listed a date of first furnishing of 15 May 2006 and a date of final furnishing of 22 September 2006. On 18 December 2006, Bunn filed a claim of lien on all three tracts. This claim of lien asserted a principal amount of $895,483.86, listed a date of first furnishing of 5 May 2004, and listed a date of final furnishing of 29 September 2006.

On 12 February 2007, Bunn filed suit against Trinity and Old Stage to enforce Bunn's claim of lien. In its complaint, Bunn alleged that "[i]n or about 2005," Bunn entered into a contract "to perform grading construction services." Bunn further alleged that it had "performed approximately $1,123,869.70 worth of grading and erosion services" and was "owed the principal amount of $895,483.86 for labor and materials supplied to the Property." On 2 January 2007, Mangum filed suit against Bunn and Trinity to enforce its claim of lien.

Bunn and Mangum filed motions for summary judgment, which were unopposed by Trinity. On 24 March 2008, the trial court, the Honorable Henry W. Hight, Jr. presiding, granted summary judgment in favor of Mangum ("Mangum Judgment"). The Mangum Judgment declares a lien on the Property, relates the lien back to 5 May 2004 by right of subrogation to Bunn's lien, and orders the sale of the Property to satisfy the judgment. On 29 April 2008, the trial court, the Honorable Orlando F. Hudson, Jr. presiding, granted summary judgment in favor of Bunn ("Bunn Judgment"). The Bunn Judgment declares a lien on the Property, relates the lien back to 5 May 2004, and orders the sale of the Property to satisfy the judgment. On 30 May 2008, Bunn assigned its judgment to Zogreo.

On 8 December 2008, Plaintiffs filed the action which is the subject of the present appeal.

III. Discussion

A. Issue One

[1] Defendants first argue that the trial court erred in denying Defendants' motion to dismiss and motion for judgment on the pleadings because Plaintiffs' civil action represents an impermissible collateral attack against two valid lien judgments. We disagree.

1. Standards of Review

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint. *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1979). "[A] complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff[s] [are] entitled to no relief under any state of facts which could be proved in support of the claim." *Id.* at 103, 176 S.E.2d at 166 (citation and quotation marks omitted; emphasis omitted). While the concept of notice pleading is liberal in nature, a complaint must nonetheless contain enough information to provide the substantive elements of a legally recognized claim or it may be dismissed under Rule 12(b)(6). *Stanback v. Stanback*, 297 N.C. 181, 204, 254 S.E.2d 611, 626 (1979). Moreover, if a complaint pleads facts which serve to defeat the claim, it should be dismissed. *Sutton*, 277 N.C. at 102, 176 S.E.2d at 166. "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

"Judgment on the pleadings . . . is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Groves v. Community Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001) (citations and quotation marks omitted). Any party may move for judgment on the pleadings "[a]fter the pleadings are closed but within such time as not to delay the trial[.]" N.C. Gen. Stat. § 1A-1, Rule 12(c) (2009). "[T]he trial court must view the facts and permissible inferences in the light most favorable to the nonmoving party." *Id.* "This Court reviews a trial court's grant of a motion for judgment on the pleadings *de novo*." *Carpenter v. Carpenter*, 189 N.C. App. 755, 757, 659 S.E.2d 762, 764 (2008).

2. Materialmen's Liens

Pursuant to Article 2 of North Carolina's mechanics', laborers', and materialmen's lien statute,

> [a]ny person who performs or furnishes labor or professional design or surveying services or furnishes materials or furnishes rental equipment pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a right to file a ["]claim of lien on real property["] on the real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished or equipment rented pursuant to the contract.

N.C. Gen. Stat. § 44A-8 (2009). The primary purpose of the lien statute is "to protect laborers and materialmen who expend their labor and materials upon the buildings of others." *Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc.*, 72 N.C. App. 224, 233-34, 324 S.E.2d 626, 632 (citation and quotation marks omotted), *disc. rev. denied*, 313 N.C. 597, 330 S.E.2d 606 (1985).

The lien created by N.C. Gen. Stat. § 44A-8 is inchoate until perfected by compliance with N.C. Gen. Stat. §§ 44A-11 and -12, and is lost if the steps required for its perfection are not taken in the manner and within the time prescribed by law. *Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd.*, 294 N.C. 661, 667, 242 S.E.2d 785, 789 (1978). To perfect a lien on real property, a contractor must file a claim of lien in the office of the clerk of the superior court of the county where the labor has been performed or the materials furnished at any time after the maturity of the obligation secured thereby, but not later than 120 days after the last furnishing of labor or materials at the site of the improvement. N.C. Gen. Stat. §§ 44A-11 and -12 (2009).

To enforce the claim of lien, the contractor must bring a lien enforcement action in the superior court within 180 days of the last furnishing of labor or materials at the site of the improvement. N.C. Gen. Stat. § 44A-13 (2009). When a lien is validly perfected, and is subsequently enforced by bringing an action within the statutory period set forth in N.C. Gen. Stat. § 44A-13, "the lien will be held to relate back [to] and become effective from the date of the first furnishing of labor or materials under the contract, and will be deemed perfected as of that time." *Frank H. Conner Co.*, 294 N.C. at 667, 242 S.E.2d at 789.

3. Lien Enforcement Action

A lien enforcement action "is designed to enforce the lien by the sale of whatever interest the person who caused the building to be erected or repaired had in the land improved by the labor or materials of the contractor at the time the lien attached." *Equitable Life Assurance Soc. v. Basnight*, 234 N.C. 347, 353, 67 S.E.2d 390, 395 (1951).

> [T]he action to enforce the lien is not created to determine the validity or the priority of the adverse claims of third persons in the premises subject to the lien. The contractor can obtain the complete relief sought, *i.e.*, the sale of the interest owned by the person who caused the improvement to be made at the time the lien attached, in his action against the landowner, without having the rights of adverse claimants ascertained and settled.

Id. Thus, "[o]nly the owner of the property subject to the materialmen's lien is required to be a party to an action to enforce the claim of lien." *Miller v. Lemon Tree Inn, Inc.*, 32 N.C. App. 524, 527, 233 S.E.2d 69, 72 (1977). Although "subsequent encumbrancers and other adverse claimants are *proper* parties to such action, for they have ascertainable interests in the subject matter of the controversy[,]" *Equitable Life Assurance Soc.*, 234 N.C. at 353, 67 S.E.2d at 395 (emphasis added), "subsequent encumbrancers and other adverse claimants are not *necessary* parties to an action to enforce a contractor's lien." *Id.* (emphasis added).

"[I]t is axiomatic that a judgment cannot be binding upon persons who were not party or privy to an action." *Miller*, 32 N.C. App. at 527, 233 S.E.2d at 72. Thus, subsequent encumbrancers and other adverse claimants who are not made proper parties to an action to enforce a lien are not bound by the lien judgment. *Equitable Life Assurance Soc.*, 234 N.C. at 353, 67 S.E.2d at 395 ("If a subsequent encumbrancer is not joined, he is not bound by the judgment in the action between the contractor and the owner . . . ."). Accordingly, an adverse claimant who has not been made a party to a lien enforcement action may bring a subsequent action to determine the priority of its interest in the property. *See Metropolitan Life Ins. Co. v. Rowell*, 115 N.C. App. 152, 444 S.E.2d 231 (1994) (beneficiary of a deed of trust brought an action challenging the priority of the supplier's lien that had been reduced to judgment); *Miller*, 32 N.C. App. 524, 233 S.E.2d 69 (plaintiff holder and beneficiary of deed of trust brought suit against lienor-judgment creditor to foreclose under a judicial sale and alleged plaintiff's deed of trust had priority over defendant's judgment lien in the proceeds from

the judicial sale); *Priddy v. Kernersville Lumber Co.*, 258 N.C. 653, 129 S.E.2d 256 (1963) (holder of deed of trust brought declaratory judgment action against lienor-judgment creditor to determine priority of liens after property offered for sale under execution).

In this case, Plaintiffs were not parties to Bunn's or Mangum's actions to enforce their materialmen's liens. Therefore, Plaintiffs were not bound by the lien judgments and were free to bring subsequent actions to have the priority of their security interests determined as against the lien judgments. *See Miller*, 32 N.C. App. at 527-28, 233 S.E.2d at 72 ("Plaintiffs were not parties to the action by defendant [] to enforce its materialmen's lien. Therefore, they were free to challenge the default judgment purporting to enforce [defendant's] lien in this action to foreclose their deed of trust in order to have the priority of the liens determined."). Accordingly, the trial court did not err in denying Defendants' motion to dismiss and motion for judgment on the pleadings.

4. Collateral Attack

[2] Defendants argue, however, that Plaintiffs' action "constitutes an impermissible collateral attack on the Bunn and Mangum Judgments" since Plaintiffs seek to nullify the judgments. We disagree.

"A collateral attack is one in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid." *Clayton v. N. C. State Bar*, 168 N.C. App. 717, 718, 608 S.E.2d 821, 822 (citation and quotation marks omitted), *cert. denied*, 359 N.C. 629, 615 S.E.2d 867 (2005). "A collateral attack on a judicial proceeding is 'an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it.' " *Reg'l Acceptance Corp. v. Old Republic Sur. Co.*, 156 N.C. App. 680, 682, 577 S.E.2d 391, 392 (2003) (citation omitted). Generally, "North Carolina does not allow collateral attacks on judgments." *Id.* However, "[a] judgment which is void, as opposed to being merely voidable or irregular, may be attacked at any time by anyone whose interests are adversely affected by it." *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 699, 239 S.E.2d 566, 572 (1977).

In this case, the priority of Plaintiffs' security interests in the Property can be ascertained with respect to Bunn's and Mangum's liens without declaring the Bunn and Mangum Judgments invalid. While the effective date of the Bunn and Mangum liens, as declared by the trial court, is invalid as to Plaintiffs in this action, the Bunn and

Mangum Judgments remain valid between the parties to the lien enforcement actions. Moreover, the declaratory judgment action brought by Plaintiffs is specifically established by law for the purpose of having the priority of the security interests of the parties determined. *See Rowell*, 115 N.C. App. 152, 444 S.E.2d 231 (1994) (beneficiary of a deed of trust brought an action challenging the priority of the supplier's lien that had been reduced to judgment).

Defendants nonetheless contend that because Plaintiffs "have failed to plead or prove that the Bunn and Mangum Judgments are void[,]" Plaintiffs' "attempt to destroy the Bunn and Mangum Judgments falls outside the scope of a permissible collateral attack." Defendants' argument is misguided.

Plaintiffs need not plead or prove that the Bunn and Mangum Judgments are void in order for the priority of Plaintiffs' security interests in the Property to be ascertained with respect to Bunn's and Mangum's liens. Thus, Plaintiffs' declaratory judgment action is not a collateral attack on the Judgments but, rather, is a permissible method of having the priority of the security interests of the parties determined while leaving the Judgments intact as between the parties to the lien enforcement actions.

Accordingly, as Plaintiffs do not seek "nullification" of the Bunn and Mangum Judgments, and Plaintiffs may be entitled to the relief requested without those Judgments being declared void as between the parties to the lien enforcement actions, Plaintiffs' action in this case does not constitute an impermissible collateral attack on the Bunn and Mangum Judgments. Defendants' argument is thus overruled.

5. Action in Rem

[3] Nonetheless, Defendants further argue that because Bunn's and Mangum's lien enforcement actions were "actions *in rem*," the resulting lien judgments established the validity of the liens, including the date of first furnishing, "as against the entire world." Again, we disagree.

Our Supreme Court has noted that a proceeding to enforce a mechanic's lien is *in rem*. *Vick v. Flournoy*, 147 N.C. 209, 212, 60 S.E. 978, 979 (1908); *Bernhardt v. Brown*, 118 N.C. 700, 706, 24 S.E. 527, 528 (1896).[5] A judgment *in rem* binds the world to any decision

5. Although we question whether a lien enforcement action is *in rem* or *quasi in rem*, we need not make such determination as the date of first furnishing stated in the lien judgments at issue is not binding on Plaintiffs regardless of whether such action is *in rem* or *quasi in rem*.

affecting the *res* involved in the litigation. *Cole v. Hughes*, 114 N.C. App. 424, 427, 442 S.E.2d 86, 88, *disc. review denied*, 336 N.C. 778, 447 S.E.2d 418 (1994). In this way, property rights may be determined with great certainty, allowing the owners of the property interests to use the property more efficiently, or to transfer their interests more easily. *Branca v. Security Ben. Life Ins. Co.*, 773 F.2d 1158, 1162 (11th Cir. Fla. 1985). A proceeding to enforce a mechanic's lien, and the resulting judgment, determines the contractor's lien on the property at issue and orders the sale of the property.

In this case, we do not adjudicate any property rights already determined in the lien enforcement actions or order the sale of the Property to satisfy a judgment, but consider the fact of the date of first furnishing upon which Bunn's and Mangum's claims of lien were based to determine the priority of Plaintiffs' security interests in the Property. "We see no reason why we should allow a judgment *in rem* to establish the facts on which that judgment is based in another suit, and we decline to do so." *Id.* at 1163 (footnote omitted). In *Becher v. Contoure Laboratories, Inc.*, 279 U.S. 388, 73 L. Ed. 752 (1929), a case concerning the validity of a patent, Justice Holmes enunciated this policy by writing for the United States Supreme Court that "[a] judgment *in rem* binds all the world, but the facts on which it necessarily proceeds are not established against all the world." *Id.* at 391, 73 L. Ed. at 754; *accord Cannon v. Cannon*, 223 N.C. 664, 671, 28 S.E.2d 240, 244 (1943).

Accordingly, even if Bunn's and Mangum's lien enforcement actions were "actions *in rem*," the resulting lien judgments did not establish the date of first furnishing upon which the Bunn and Mangum Judgments were based as against Plaintiffs. Defendants' argument is without merit.

B. Issue Two

[4] Defendants next argue that even if Plaintiffs' challenge to the Bunn and Mangum Judgments was permissible, the trial court erred in granting partial summary judgment in favor of Plaintiffs because genuine issues of material fact exist with respect to Plaintiffs' claims for declaratory relief. We disagree.

1. Standard of Review

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any mate-

rial 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). Summary judgment is designed to eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim of a party is exposed. *Hall v. Post*, 85 N.C. App. 610, 613, 355 S.E.2d 819, 822 (1987), *rev'd on other grounds*, 323 N.C. 259, 372 S.E.2d 711 (1988). "The party moving for summary judgment bears the burden of bringing forth a forecast of evidence which tends to establish that there is no triable issue of material fact." *Inland Constr. Co. v. Cameron Park II, Ltd., LLC*, 181 N.C. App. 573, 576, 640 S.E.2d 415, 418 (2007) (citation and quotation marks omitted).

> When a motion for summary judgment is made and supported as provided in [Rule 56(c)], an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (2009). "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).

2. Date of First Furnishing

Under N. C. Gen. Stat. § 44A-8,

> [a]ny person who performs or furnishes labor or professional design or surveying services or furnishes materials or furnishes rental equipment pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a right to file a ["]claim of lien on real property["] on the real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished or equipment rented pursuant to the contract.

N.C. Gen. Stat. § 44A-8. "[W]hen a lien is validly perfected, and is subsequently enforced by bringing an action within the statutory period set forth in [N.C. Gen. Stat. §] 44A-13(a), the lien will be held to relate back [to] and become effective from the date of the first furnishing of labor or materials under the contract, and will be deemed perfected as of that time." *Frank H. Conner Co.*, 294 N.C. at 667, 242 S.E.2d at 789; N.C. Gen. Stat. § 44A-10 (2009). Thus, "a contractor's lien for all

labor and materials furnished pursuant to a contract is deemed prior to any liens or encumbrances attaching to the property subsequent to the date of the contractor's first furnishing of labor or materials to the construction site." *Id.*

In this case, Bunn entered into a written contract with Old Stage on 8 April 2004 for clearing, grading, and erosion control services. On 19 April 2004, Bunn entered into another written contract with Old Stage for sewer main, water main, storm drain, and roadway construction services. Bunn performed clearing and rough grading, but ceased work on or around 16 June 2004 for non-payment. On 14 October 2004, Bunn filed a claim of lien in the principal amount of $180,495.24 for "clearing and grading of property[.]" In this claim of lien, Bunn asserted the date of first furnishing to be 5 April 2004.

On 8 December 2004, Bunn filed suit against Old Stage to enforce the claim of lien. Bunn alleged that it had entered into " 'the Grading Contract' " with Old Stage under which Bunn was to perform "grading construction services" for a total price of $268,540, and that Old Stage owed Bunn the principal amount of $180,495.84 for labor and materials supplied to the Property.

On 12 January 2005, Old Stage entered into a third contract with Bunn for silt basin/erosion control services for $27,555. Bunn was paid in full in cash when the contract was signed.

On 22 February 2005, Trinity purchased a controlling interest in Old Stage, and Old Stage conveyed Tract 1 to Trinity. Also on that date, BB&T loaned $975,000 to Trinity. A portion of the proceeds of the BB&T loan was used to pay the debt on which Bunn's 14 October 2004 claim of lien was based, and Bunn then cancelled its claim of lien and dismissed with prejudice its action to enforce the lien.

On 25 April 2005, Bunn submitted a contract proposal to Trinity. This proposal for sewer main, water main, storm drain, roadway, construction road, pump station, and force main construction services contained many of the line items from the 19 April 2004 contract, as well as additional items, for a total contract price of $1,813,631. At deposition, Chad D. Bunn, a Project Manager for Bunn, testified that Bunn was not obligated to do the work it had agreed to do under the first two contracts at the prices stated in those contracts "because [Old Stage] had a breach in their contract. They failed to pay us. So much time had lapsed that material prices had increased and we couldn't do it that cheap. Our prices had to go up." Thus, Bunn would

only agree to continue to work on the Project if Trinity signed the 25 April 2005 proposal reflecting the new prices.

On 25 May 2005, Avery Bordeaux signed Bunn's 25 April 2005 proposal. The contract, drafted by Bunn, states: "This proposal—contract replaces any others discussed or written in the past." Mr. Bunn testified that it was after 25 May 2005 "when [Bunn] came back [to the Project] for a second time[.]"

In an affidavit, Mr. Bunn stated that Bunn submitted invoices to Old Stage/Trinity for all work performed and that Defendants were supposed to pay the invoices upon receipt. Attached as exhibits to Mr. Bunn's affidavit were nine invoices, dated between 8 June 2006 and 27 October 2006 and totaling $1,123,869.70. The first attached invoice, dated 8 June 2006, was for $68,759.85. Mr. Bunn stated that when Trinity began falling behind on invoices, Bunn stopped working on the project on 29 September 2006.

These undisputed facts establish that Bunn was paid in full for its clearing and grading work under the 8 April 2004 contract and was also paid in full, in advance, for its silt basin/erosion control services under the 12 January 2005 contract. Moreover, after Bunn was paid under the 8 April 2004 and 12 January 2005 contracts, and after Old Stage was purchased by Trinity, Bunn submitted a contract proposal to Trinity on 25 April 2005 that, in Bunn's chosen terms, replaced any other contract discussed or written in the past. Trinity executed the contract on 25 May 2005 and Bunn performed the work that is the basis for its second claim of lien under this contract. There was no forecast of evidence that Bunn completed any work pursuant to any contract between 16 June 2004, when it ceased working for non-payment under the grading contract with Old Stage, and 25 May 2005, when it entered into the new contract with Trinity. Accordingly, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue that Bunn first furnished labor and materials under the 25 May 2005 contract on or after that date.

Defendants argue, however, that the dismissal of the Bunn lien enforcement action in 2005 should not have had any effect on Bunn's first date of performance in this case. We agree. Bunn's cancellation of its first claim of lien did not "re-set" Bunn's date of first furnishing for the purposes of this case. Instead, Bunn filed the first claim of lien, cancelled it after receiving payment for the amount asserted in the lien, and thereafter, entered into a *new* contract, under which it

commenced work. It was the commencement of work under a distinctly new contract that effectively "re-set" the date of first furnishing at issue here.[6]

Defendants argue that Mr. Bunn's statement in his affidavit that Bunn's "work on the Project was a part of one agreement and one contract[,]" and Mr. Bordeaux's statement in his affidavit that "Bunn and the owners of the Project had a single contract to provide services that was confirmed under the four proposals" create a genuine issue of material fact regarding the contractual arrangement between Bunn and the project owners. We disagree.

The proposals, drafted by Vick Bunn,[7] were identified as "contracts[.]" The last of the four contracts states that it "replaces any others discussed or written in the past." Bunn performed the work that is the subject of its second claim of lien under this fourth contract. Thus, the plain language of the contracts evidences four separate contracts with the final contract replacing all previous contracts. Moreover, Chad Bunn testified that he was not involved with the formation of any of the contracts entered into between Bunn and Old Stage or Trinity and that he only started to get involved in the "office side of the company . . . probably around 2005." There is no forecast of evidence that Chad Bunn had a basis of knowledge for his opinion that Bunn's work on the project was pursuant to one contract. Furthermore, Mr. Bordeaux testified at deposition that he did not write the above-referenced affidavit, had no memory of signing it, and stated,

> as I recall, is that this was a—would be a series of proposals that I would be receiving, that as we went from one phase of the project to another, I would receive. In other words, I didn't give him a contract for the overall—this was simply a contract for grading or a proposal for grading. The next proposal would have been another phase of the project.
>
> . . . .

6. Had Bunn continued working under one continuous contract, Bunn could have asserted the same date of first furnishing that it asserted in the first claim of lien. However, it could not have asserted the same obligation, *i.e.*, the debt for the work that was the basis for its first claim of lien. *Gaston Grading & Landscaping v. Young*, 116 N.C. App. 719, 721-22, 449 S.E.2d 475, 476-77 (1994).

7. Vick Bunn, Chad Bunn's father, was responsible for entering into the contracts with Old Stage and Trinity on behalf of Bunn and for invoicing. Vick Bunn died on 29 December 2006.

In other words, it would not have been one contract that covered everything in the project, is what I am saying.

. . . .

One master contract, we didn't never [sic] contemplate that.

Thus, Defendant's arguments that there was a material issue concerning the contractual arrangement between Bunn and the owners of the Property are without merit.

The BB&T DOT was recorded 22 February 2005. The Cardinal DOT, which was transferred to Clark's Creek, was recorded 29 April 2005. As these instruments were recorded before 25 May 2005, the BB&T DOT and the Cardinal DOT have priority over Bunn's and Mangum's liens as a matter of law. *Frank H. Conner Co.*, 294 N.C. at 667, 242 S.E.2d at 789. Accordingly, the trial court did not err in granting Plaintiffs summary judgment.

In light of our conclusions above, we need not reach Defendants' remaining argument that there was a genuine issue of material fact as to whether Old Stage and Trinity were "owners" of the Property on 5 May 2004 or Plaintiffs' cross-assignment of error that the trial court improperly denied their motion to add an argument based on the doctrine of instantaneous seisin.

The order of the trial court is

AFFIRMED.

Judges HUNTER and GEER concur.

NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY, PLAINTIFF v. JAIMIE MARTINSON, ADMINISTRATRIX OF THE ESTATE OF JOHN GILBERT MARTINSON, DEFENDANT

No. COA10-17

(Filed 16 November 2010)

Insurance— automobiles—uninsured motorist coverage—underinsured motorist coverage—notice of coverage available

The trial court did not err in granting plaintiff insurance company's motion for summary judgment and denying defendant's motion for summary judgment in a case involving uninsured

motorist (UM) and underinsured motorist (UIM) coverage. The mailing of the selection/rejection form by plaintiff established that there was not a total failure to inform defendant or decedent that up to $1,000,000.00 in UM/UIM coverage was available.

Appeal by defendant from order entered 26 August 2009 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 August 2010.

Robinson, Elliott & Smith, by Katherine A. Tenfelde and William C. Robinson, for plaintiff-appellee.

The Law Offices of Michael A. DeMayo, LLP, by Elizabeth G. Grimes and Michael A. DeMayo, for defendant-appellant.

Twiggs, Beskind, Strickland & Rabenau, P.A., by Jerome P. Trehy, Jr., for amicus curiae North Carolina Advocates for Justice.

HUNTER, Robert C., Judge.

Defendant Jaimie Martinson ("Mrs. Martinson"), as administratrix of the estate of John Gilbert Martinson ("Mr. Martinson"), appeals from the trial court's 26 August 2009 order denying her motion for summary judgment and granting plaintiff Nationwide Property and Insurance Company's ("Nationwide") motion for summary judgment. After careful review, we affirm the trial court's order.

Background

In 2006, Mr. and Mrs. Martinson moved to Charlotte, North Carolina so that Mr. Martinson could begin a new job. In March 2007, the couple purchased a home located in the Eastwood Homes Withrow Downs subdivision. At the time, Eastwood Homes had a relationship with the Doug Helms Agency (the "Helms Agency"), an independent Nationwide agency in Gastonia, North Carolina. Eastwood Homes agreed to refer buyers in their community to the Helms Agency to assist them with their home insurance needs. Mary Plybon ("Ms. Pylbon"), a representative of the Helms Agency, was trained by Nationwide and instructed to discuss all coverage needs with potential customers, including uninsured motorist ("UM") and underinsured motorist ("UIM") coverage.

In March 2007, Ms. Plybon first contacted Mr. Martinson by telephone and asked if he would be interested in general information regarding homeowners' insurance and other Nationwide services. Mr.

Martinson expressed interest in obtaining Nationwide insurance so Ms. Plybon mailed him several brochures to his home address. In July 2007, Ms. Plybon received information from Eastwood Homes that Mr. and Mrs. Martinson were expected to close on their new home soon. As a follow-up to their March conversation, Ms. Plybon called Mr. Martinson and asked if he was interested in receiving insurance quotes from Nationwide. Though Ms. Plybon does not remember all of the details of their conversation, the record shows that Ms. Plybon emailed Mr. Martinson the following quote on 17 July 2007, which was based on the same coverage the Martinsons had with Allstate at the time: (1) "Bodily Injury" coverage of "50/100" "Per Person/Occurrence"; (2) "Uninsured Motorists-Bodily Injury" coverage of "50/100" "Per Person/Occurrence"; (3) "Uninsured Motorists-Property Damage" coverage of "25000" "Per Occurrence"; and (4) "Underinsured Motorists-Bodily Injury" coverage of "50/100" "Per Occurrence[.]" The same day, Mr. Martinson emailed Ms. Plybon and asked for a quote on "100/300" UIM coverage. The next morning, Ms. Plybon emailed Mr. Martinson and informed him that she "adjusted the auto quote per [his] request . . . and increased the liability limits on the UM/UIM coverage to 100/300." Ms. Plybon requested that Mr. Martinson provide her with the VIN numbers for the automobiles that were to be covered under the policy as well as the Martinsons' driver's license numbers.

On 2 August 2007, having not received the requested information, Ms. Plybon contacted Mr. Martinson and asked that he forward the information to her and reminded him that his Allstate policy was scheduled to automatically renew on 22 August 2007. On 8 August 2007, Mr. Martinson called Ms. Plybon with the requested information and finalized the coverage he had selected, which included the 100/300 UM and UIM coverage. Ms. Plybon sent Mr. Martinson an email verifying his coverage selections. The parties do not dispute that Ms. Plybon never discussed with Mr. Martinson the fact that he could select up to $1,000,000.00 in UM/UIM coverage; however, Ms. Plybon stated in her deposition that had Mr. Martinson requested additional coverage beyond the 100/300 discussed, she would have been prepared to offer him a quote.

On 20 August 2007, Ms. Plybon spoke with Mr. Martinson again and processed his application for insurance per his request. Mr. Martinson paid the $465.00 premium for six months of coverage August 2007 through 22 February 2008. The declarations page provided in the record shows that Mr. Martinson is the "Named Insured" on the policy and Mrs. Martinson is listed as an "Insured Driver." Mrs.

Martinson never spoke with anyone at the Helms Agency prior to her husband's purchase of coverage. At that point, Mr. Martinson had purchased the six-month policy, but had not signed any documentation with Nationwide.

According to Ms. Plybon, Mr. Martinson requested that the application be mailed to his new home at 603 Wrayhill Drive. Ms. Plybon then requested that Melissa Melton ("Ms. Melton"), an operations manager at the Helms Agency, mail the application and the selection/rejection form promulgated by the North Carolina Rate Bureau to Mr. Martinson. Ms. Melton testified at her deposition that when she processes a payment for insurance coverage, the Nationwide computer automatically prints the insured's application and a selection/rejection form. Ms. Melton claimed that once Mr. Martinson's materials were printed, she checked to make sure that the application and selection/rejection form were in order before applying the proper postage and addressing the envelope to 603 Wrayhill Drive. Ms. Melton then emailed Ms. Plybon to inform her that she had prepared the Martinson materials as requested. A copy of the application and the selection/rejection form were retained in the Helms Agency's files.

Since the mail had already been picked up that day, Ms. Melton waited until the next day, 21 August 2007, to place the envelope in the Helms Agency's mailbox located in front of the office. According to Doug Helms, the envelope had a return address, but the envelope was never returned to the Helms Agency. Mr. Martinson never signed and returned the documents mailed to him, and, according to Ms. Melton, he never called the Helms Agency to say that he did not receive the envelope mailed on 21 August 2007. Mrs. Martinson claims that neither she nor her husband ever received that envelope.

On 11 September 2007, approximately three weeks after Mr. Martinson purchased the automobile policy from Nationwide, he was involved in a serious motor vehicle accident and was hospitalized. On 12 September 2007, Mrs. Martinson called Ms. Plybon to inform her that Mr. Martinson had been in an accident and may not survive. That same day, Angie Helms ("Mrs. Helms"), the wife of Doug Helms and part-time employee of the Helms Agency, called Mrs. Martinson to follow-up on the application that was mailed to Mr. Martinson, but never returned. In her deposition, Mrs. Helms claimed that she did not know that Mr. Martinson had been in an accident and her call was in accord with the Helms Agency's follow-up protocol. That same day,

Mrs. Helms mailed Mrs. Martinson another copy of the application and selection/rejection form.

When Mrs. Martinson received the materials mailed on 12 September 2007, she called Mrs. Helms to ask if she was authorized to sign the application and selection/rejection form. Mrs. Helms told her that since she was a named insured on the policy, she could sign the forms. Mrs. Martinson claimed in her affidavit that Mrs. Helms told her that if she did not sign the forms, her husband would not be covered for the accident; however, Mrs. Helms denied these allegations in her deposition.

Mr. Martinson died on 18 September 2007 due to the injuries he suffered in the 11 September 2007 car accident. Mrs. Martinson stated in her affidavit that representatives from the Helms Agency continued to call her and ask that she sign and return the application and selection/rejection form. On 26 September 2007, Mrs. Martinson spoke with Ms. Melton and asked that the signature pages of the application be emailed to her. At this time, Mrs. Martinson was represented by counsel in connection with her husband's accident; however, it is disputed as to whether Mrs. Martinson informed the Helms Agency of this fact. It is undisputed that Mrs. Martinson did not seek her attorney's advice regarding the forms sent to her by Nationwide. On 26 September 2007, Mrs. Martinson signed the application and selection/rejection form and returned it to the Helms Agency. Although the pre-printed signature lines on the documents call for the signature of John Martinson, Mrs. Martinson signed the forms with her own signature.

On 20 August 2008, Nationwide filed a complaint for declaratory judgment pursuant to Rule 57 of the North Carolina Rules of Civil Procedure. Nationwide requested that "the Court issue a Declaration of Judgment indicating that the total available underinsured motorist coverage is in the amount of $100,000/$300,000 . . . ." On or about 18 September 2008, Nationwide filed an amended complaint for declaratory judgment. On or about 18 November 2008, Mrs. Martinson, as administratrix of her husband's estate, filed an answer in which she requested that "the Court declare that Plaintiff's policy provides $1,000,000.00 in UIM coverage for Defendant's claims arising from the September 11, 2007 Accident[.]"

The parties filed cross-motions for summary judgment, and on 26 August 2009, the trial court, after hearing arguments from counsel, granted Nationwide's motion for summary judgment and denied that

of Mrs. Martinson. The trial court held that "Nationwide shall provide that amount of uninsured and underinsured motorist (UM/UIM) coverage to the Defendant . . . as shown on the automobile declarations page in the amount of $100,000.00 per person and $300,000.00 per accident . . . ." Mrs. Martinson timely appealed the trial court's order.

Standard of Review

" 'The standard of review on appeal [from] summary judgment is whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. The question is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is a genuine issue as to any material fact.' " *Woods v. Mangum*, ––– N.C. App. –––, –––, 682 S.E.2d 435, 438 (2009) (quoting *Sellers v. Morton*, 191 N.C. App. 75, 81, 661 S.E.2d 915, 920-21 (2008)), *aff'd per curiam*, 689 S.E.2d 858 (2010). "The burden is upon the moving party to show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *McGuire v. Draughon*, 170 N.C. App. 422, 424, 612 S.E.2d 428, 430 (2005) (citation omitted). "All facts asserted by the [nonmoving] party are taken as true and their inferences must be viewed in the light most favorable to that party." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal citations omitted). On appeal, this Court reviews an order granting summary judgment *de novo*. *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006). "Accordingly, we must examine the evidence herein to determine whether it reveals a genuine issue of material fact regarding the amount of UIM coverage provided in the policy; if not, the trial court properly granted plaintiff judgment as a matter of law." *Hendrickson v. Lee*, 119 N.C. App. 444, 448, 459 S.E.2d 275, 278 (1995).

Discussion

Mrs. Martinson argues that the trial court erred in granting Nationwide's motion for summary judgment and denying her motion for summary judgment. Mrs. Martinson's primary assertion is that Nationwide failed to notify her husband prior to his accident that $1,000,000.00 in UM/UIM coverage was available, and, because of this total failure to notify, her husband's estate is entitled to $1,000,000.00 in UIM coverage for the 11 September 2007 accident. Mrs. Martinson relies heavily on N.C. Gen. Stat. § 20-279.21(b)(3) (2007) of the Financial Responsibility Act (the "Act") and *Williams v. Nationwide Mutual Ins. Co.*, 174 N.C. App. 601, 621 S.E.2d 644 (2005).

"When examining cases to determine whether insurance coverage is provided by a particular automobile liability insurance policy, careful attention must be given to the type of coverage, *the relevant statutory provisions*, and the terms of the policy." *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 142, 400 S.E.2d 44, 47 (1991) (emphasis added). A survey of the applicable case law based on changing statutory mandates is essential to resolving the case *sub judice*. Prior to 1991, "an automobile liability insurance policy with bodily injury liability limits in excess of the statutory minimum was required to provide UIM coverage equal to the policy's bodily injury liability limits, absent an effective rejection." *State Farm Mutual Auto. Ins. Co. v. Fortin*, 350 N.C. 264, 267, 513 S.E.2d 782, 783 (1999); N.C. Gen. Stat. § 20-279.21(b)(4) (1989). Effective 5 November 1991, the General Assembly amended the Act to allow an insured to select UM and UIM coverage "in an amount not to be less than the financial responsibility amounts for bodily injury liability as set forth in G.S. 20-279.5 [$25,000 and $50,000] nor greater than one million dollars." N.C. Gen. Stat. § 20-279.21(b)(4) (1991).

> This amendment created a significant new choice for insureds regarding their options for UIM coverage. Instead of offering only two choices, rejection of UIM coverage or UIM coverage at the same limits as bodily injury liability coverage, the statute, as amended, permits insureds to select any UIM coverage limit from $25,000 to $1,000,000.

Fortin, 350 N.C. at 267, 513 S.E.2d at 783. The amendment also set forth:

> If the named insured rejects the coverage required under this subdivision, the insurer shall not be required to offer the coverage in any renewal, reinstatement, substitute, amended, altered, modified, transfer or replacement policy unless the named insured makes a written request for the coverage. Rejection of this coverage for policies issued after October 1, 1986, *shall be made in writing by the named insured on a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance.*

N.C. Gen. Stat. § 279.21(b)(4) (emphasis added).

As a matter of first impression, this Court addressed in *Maryland Casualty Co. v. Smith*, 117 N.C. App. 593, 597, 452 S.E.2d 318, 320 (1995) "whether the insured's rejection of underinsured motorists

coverage, prior to the statutory amendment and prior to the approval of the new form reflecting the substance of the statutory amendment, was still valid and effective with respect to an accident that occurred after the rejection form had been substantially revised and after the policy had been renewed." In *Smith*, the insured, Ralph Smith, signed a selection/rejection form on 29 September 1991 in which he rejected UM and UIM coverage on behalf of himself and the other members of his family listed on the policy. *Id.* at 595, 452 S.E.2d at 319. After passage of the 1991 amendment, Smith renewed the policy in March 1992, "but did not request that underinsured motorist coverage be added at that time." *Id.* On 2 May 1992, Joel Smith, Ralph Smith's son, was in an automobile accident. *Id.* The plaintiff insurance company claimed that the Smiths did not have UIM coverage because Ralph Smith did not add that coverage at renewal in 1992. *Id.* Smith argued before the trial court that his rejection of UIM was "ineffective" because the form he signed in September 1991 became "out-dated" after the 1991 amendment. *Id.* at 595-96, 452 S.E.2d at 319. The trial court agreed with Smith and this Court affirmed, holding that "Mr. Smith's rejection executed on 29 September 1991 was no longer valid and effective after the 1991 amendment and after the new selection/ rejection form was issued." *Id.* at 597, 452 S.E.2d at 320. The Court reasoned that the 1991 amendment allowed insureds to select up to $1,000,000.00 in UM/UIM coverage and that the selection/rejection form signed in September 1991 did not include that information. *Id.* at 598, 452 S.E.2d at 321. Accordingly, Ralph Smith was never adequately informed of the $1,000,000.00 coverage option. *Id.* The Court interpreted N.C. Gen. Stat. § 20- 279.21(b)(4) to mean that an insured must be given an opportunity to exercise his or her option to select or reject UM/UIM coverage by executing a proper selection/rejection form. *Id.* Once an up-to-date form is signed, the insurer is not required to obtain a new execution of the document at each renewal period. *Id.* This Court stated that the insurance company's inclusion of the updated form in the 1992 renewal package was "half-hearted at best" since it did not include any rate information and was "hardly calculated to provoke the insured's attention." *Id.* at 598, 452 S.E.2d at 321. The Court did not, however, state the amount of coverage the Smiths were entitled to receive.

This Court addressed a similar issue in *Metropolitan Property and Casualty Ins. Co. v. Caviness*, 124 N.C. App. 760, 478 S.E.2d 665 (1996). There, Caviness was involved in an automobile accident on 29 February 1992. *Id.* at 761, 478 S.E.2d at 666. "At no time prior to the

accident did Caviness execute a selection/rejection form thereby establishing the limit of her UIM coverage. On 16 March 1992, however, Caviness executed the requisite form and selected coverage of $100,000 per person and $300,000 per accident." *Id.* This Court determined that the "dispositive issue" was "whether, absent selection or rejection of UIM coverage by the insured, N.C. Gen. Stat. § 20-279.21(b)(4) mandates UIM coverage in an amount equal to the limit of liability coverage, or, alternatively, in the amount of one million dollars." *Id.* at 763, 478 S.E.2d at 667. We recognized that:

> As codified . . . the 1991 statute is inherently ambiguous regarding the amount of UIM coverage to accord an insured absent a selection or rejection of such coverage. Put simply, when, as here, an insured fails to select or reject UIM coverage, the 1991 statute provides no more than a range of possible coverage limits —not less than liability coverage but not more than one million dollars.

Id. The Court determined that because the Financial Responsibility Act is a remedial statute, it must be construed in the insured's favor. *Id.* at 763-64, 478 S.E.2d at 668. Consequently, the Court concluded that "absent completion of an approved selection or rejection form the insured is, as a matter of law, entitled to one million dollars in UIM coverage." *Id.* at 765, 478 S.E.2d at 668.

In *Fortin*, our Supreme Court faced an almost identical question of law as that presented in *Smith*. The insured, Toni Fortin, was injured in an automobile accident on 18 November 1994. *Fortin*, 350 N.C. at 266, 513 S.E.2d at 782. On 15 July 1991, Fortin had executed a selection/rejection form which stated: "I choose to reject Uninsured/Underinsured Motorists Coverage and select Uninsured Motorists Coverage at limits of [Bodily Injury] 100/300[.]" *Id.* at 266, 513 S.E.2d at 783. On 16 January 1992, Fortin's policy renewed and he was not given a fresh opportunity to reject or select UM/UIM coverage. *Id.* As this Court determined in *Smith*, the Supreme Court in *Fortin* held that Fortin's July 1991 rejection was no longer effective after the November 1991 amendment. *Id.* at 267, 513 S.E.2d at 783. Accordingly, "there was no valid rejection of UIM coverage in th[at] case." *Id.* In determining the amount of coverage owed to Fortin, the Supreme Court's remedy took into account the 1992 amendment to the statute. Effective 1 October 1992, N.C. Gen. Stat. § 20-279.21(b)(4) was amended and resolved the ambiguity described in *Caviness*. As revised, the statute states: "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." N.C. Gen. Stat. § 20-279.21(b)(4) (1992). The *Fortin* Court recognized that the 1992 amendment was in effect "on the date of the last renewal of the policy prior to and on the date of [Fortin's] accident[.]" 350 N.C. at 271, 513 S.E.2d at 786. The Court reasoned that, "[o]n each of these dates, the highest limit of bodily injury liability coverage for any one vehicle in the State Farm policy was $100,000 per person and $300,000 per accident. Therefore, because there was neither a valid rejection of UIM coverage nor a selection of different coverage limits, [Fortin's] UIM coverage is $100,000 per person and $300,000 per accident." *Id.*

Six years later, this Court decided *Williams*. There, a minor, Ashley Williams, was injured in an accident caused by the driver of the automobile, Jeremy Canady. *Williams*, 174 N.C. App. at 602, 621 S.E.2d at 645. On the date of the accident, 17 July 2001, the Canady's vehicle was insured by Nationwide with bodily injury coverage of $50,000.00 per person and $100,000.00 per accident. *Id.* The parties in the case stipulated to the following facts:

> The Canady policy was issued to Mr. and Mrs. Canady initially in 1984, and, except for periods of time when the policy was cancelled due to the Canadys' failure to pay the premium, it remained in effect through July 17, 2001, either through new, reinstated or renewal policies. The Canady policy was last renewed prior to the July 17, 2001 accident on June 12, 2001 for the policy period from June 12, 2001 to December 12, 2001. Neither Mr. Canady nor Mrs. Canady were offered by Nationwide or its authorized agent an opportunity to select or to reject UIM limits greater than their liability limits at any time prior to July 17, 2001. The option to select or reject UIM limits that are greater than the policy's liability limits was not available to insureds in North Carolina at any time prior to the effective date of the 1991 amendments to the UIM statute. Neither Mr. Canady nor Mrs. Canady signed a North Carolina Rate Bureau UM/UIM selection/rejection form for the Canady policy at any time prior to July 17, 2001.

Id. at 603, 621 S.E.2d at 645-46. This Court determined that, unlike in *Fortin*, there was a "total failure to provide the insured with an opportunity to select UIM coverage." *Id.* at 604, 621 S.E.2d at 647. The Court then acknowledged that N.C. Gen. Stat. § 20-279.21(b)(4) "does

not address the applicable default policy limits where the insured is not given the opportunity to select or reject the UIM policy limits[.]" *Id.* at 605, 621 S.E.2d at 647. Relying on *Caviness*, where the Court resolved the statute's ambiguous language in favor of the insured, the *Williams* Court held that the insured was entitled to $1,000,000.00 in UIM coverage. *Id.* The Court went on to state:

> A *total failure* on the part of the insurer to provide an opportunity to reject UIM coverage or select different UIM policy limits violates the requirement that these choices be made by the policy owner. Such a failure should not invoke the minimum UIM coverage limits established in N.C.G.S. § 20-279.21(b)(4) and shield the insurer from additional liability. So doing would violate the purpose of the statute to protect the insured and allow them to choose their policy benefits.

Id. at 605-06, 621 S.E.2d at 647 (emphasis added).

In examining the case law and the relevant statutory modifications, it is clear that an insured must be given the opportunity by the insurer to select or reject UIM and UM coverage. Since 1991, our legislature has required that a named insured sign a selection/rejection form promulgated by the North Carolina Rate Bureau indicating his or her selection or rejection of coverage. N.C. Gen. Stat. § 279.21(b)(4). Where the insurer attempts to notify the insured of the $1,000,000.00 maximum UM/UIM coverage, but there is neither a *valid* rejection of that coverage nor a selection of different coverage limits, an insured is entitled to the highest limit of bodily injury liability coverage on the insured's policy. *Id.*; *Fortin*, 350 N.C. at 271, 513 S.E.2d at 786. However, if there is a *total failure* by the insurer to notify the insured that he or she may purchase up to $1,000,000.00 in UM/UIM coverage, then the insured is entitled to $1,000,00.00 in coverage. *Williams*, 174 N.C. App. at 605-06, 621 S.E.2d at 647.

At the time of Mr. Martinson's accident, N.C. Gen. Stat. § 20- 279.21(b)(3) governed UM/UIM coverage and is substantively identical to the 1992 amended version in which the relevant provisions were found under subsection (b)(4). N.C. Gen. Stat. § 20-279.21(b)(3) (2007) reads in pertinent part:

> An insured named in the policy may select different coverage limits as provided in this subdivision. If the named insured in the policy does not reject uninsured motorist coverage and does not select different coverage limits, the amount of uninsured

> motorist coverage shall be equal to the highest limit of bodily injury and property damage liability coverage for any one vehicle in the policy. Once the option to reject the uninsured 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 the named insured makes a written request to exercise a different option. The selection or rejection of uninsured motorist coverage or the failure to select or reject by a named insured is valid and binding on all insureds and vehicles under the policy. Rejection of or selection of different coverage limits for uninsured motorist coverage for policies under the jurisdiction of the North Carolina Rate Bureau shall be made in writing by a named insured on a form promulgated by the Bureau and approved by the Commissioner of Insurance.

Mrs. Martinson relies on *Williams* and claims that there was a total failure by Nationwide to inform Mr. Martinson that UM/UIM coverage limits of up to $1,000,000.00 was available, and, therefore, Mr. Martinson had UIM coverage in the amount of $1,000,000.00 for the 11 July 2007 accident. We disagree.

The material facts in this case are undisputed. Nationwide claims that it mailed Mr. Martinson his application and selection rejection form on 21 August 2007 to the proper address. Mrs. Martinson claims that she never received that form, and, to the best of her knowledge, Mr. Martinson did not receive that form. The question, therefore, is whether the mailing of the selection/rejection form by Nationwide was sufficient to satisfy the standard of notice established by our case law upon interpretation of N.C. Gen. Stat. § 20-279.21(b)(3) even where the insured does not receive it prior to an accident in which he claims UIM coverage. We hold that it does and that there was not a *total failure* on the part of Nationwide to provide an opportunity for Mr. Martinson to reject UIM coverage or select different UIM policy limits. The mailing of the selection/rejection form to Mr. Martinson the day after he paid for the coverage prevents us from holding that a total failure to inform occurred. In *Williams*, the parties stipulated that there was no effort whatsoever on the part of the insurer to provide the insured a selection/rejection form. 174 N.C. App. at 603, 621 S.E.2d at 646. That is not the case here.

Though Mrs. Martinson claims that neither she nor her husband received the form, there is no evidence to contradict Nationwide's assertion that it was mailed on 22 August 2007.

> Moving [for summary judgment] involves giving a forecast of his own which is sufficient, if considered alone, to compel a verdict or finding in his favor on the claim or defense. In order to compel the opponent's forecast, the movant's forecast, considered alone, must be such as to establish his right to judgment as a matter of law."

Talbert v. Choplin, 40 N.C. App. 360, 363-64, 253 S.E.2d 37, 40 (1979). Nationwide has established through testimony of its employees, and through supporting electronic documentation, that the envelope containing the selection/rejection form was mailed on 22 August 2007. That envelope was never returned by the postal service and Mr. Martinson never called to say that he did not receive the forms. Mrs. Martinson claims that she and her husband were very tidy and that the mail that came into the house was always placed on a certain table so that she and Mr. Martinson could both see what had arrived. When asked how she knew that they never received the envelope, Mrs. Martinson responded: "Because I didn't see—because I don't ever remember receiving this." Mrs. Martinson's assertions pertain to her receipt of the envelope, not whether it was actually sent.

Mrs. Martinson argues in her brief to this Court that the mailbox rule, which creates a rebuttable presumption that an envelope sent via the postal service with proper postage was delivered to the intended party, *Sherrod v. Farmers' Mutual Fire Ins. Ass'n*, 139 N.C. 167, 51 S.E. 910 (1905), is not applicable in this case.[1] We decline to address the applicability of the mailbox rule since we hold that the mailing of the selection/rejection form by Nationwide establishes that there was not a total failure to inform Mr. Martinson that up to $1,000,000.00 in UM/UIM coverage was available.[2]

Our holding in this case is in line with this Court's recent decision in *Nationwide Mutual Ins. Co. v. Burgdoff*, —— N.C. App. ——, 698

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1. Nationwide makes some effort to rebut Mrs. Martinson's argument; however, Nationwide does not specifically argue that the mailbox rule is applicable.

2. Mrs. Martinson argues that for Nationwide to avail itself of the rebuttable presumption of the mailbox rule, it must demonstrate that it placed the envelope in the care and custody of the U.S. postal service. Mrs. Martinson argues that while there is no case on point, Rule 5(b) of the North Carolina Rules of Civil Procedure provides persuasive authority. N.C. Gen. Stat. § 1A-1, Rule 5(b) (2009) states: "Service by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed

S.E.2d 500 (2010). There, the Nationwide insurance agent, Ms. Bare, provided an affidavit in which she stated that she had *verbally* informed Mrs. Burgdoff that she could select UIM coverage in an amount up to $1,000,000.00. ––– N.C. App. at –––, 698 S.E.2d at 504. The Burgdoffs claimed that they were never informed of that option. *Id.* It was undisputed that a selection/rejection form was never mailed. *Id.* at –––, 698 S.E.2d at 502. The Burgdoffs relied on *Williams* and argued that Nationwide's "failure to provide [them] with [a] selection/rejection form constitute[d] a *per se* total failure to provide an opportunity to reject UIM coverage or select different UIM policy limits[.]" *Id.* at –––, 698 S.E.2d at 503. In analyzing *Williams*, this Court in *Burgdoff* stated: "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." *Id.* The Court further stated: "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." *Id.* The *Burgdoff* Court determined that there was a material issue of fact as to whether the Burgdoffs were *verbally* informed by Ms. Bare that they could purchase up to $1,000,000.00 in UIM coverage. *Id.* at –––, 698 S.E.2d at 503-04. Accordingly, the issue of whether there was a total failure was left to the jury. *Id.* Nevertheless, the Court's holding clearly establishes that verbally informing an insured of the UIM coverage limits is sufficient to distinguish the case from *Williams*.[3]

In the present case, Mr. Martinson was not verbally informed of the UIM coverage limits, but the selection/rejection form was mailed to him in a timely manner. There is no issue of material fact as to that point. As stated in *Williams*, and reiterated in *Burgdoff*, the critical determination is whether the insured was given some "opportunity to reject or select different coverage limits." *Id.*; *Williams*, 174 N.C. App. at 605, 621 S.E.2d at 647. Mr. Martinson was insured at the time of the accident for 100/300 UM/UIM coverage and we cannot say that

wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service." We note that this argument is unpersuasive. Rule 5(b) strictly governs service of a complaint upon a defendant and should not be used to require a business or an individual to take mail directly to the post office or place it in an official depository in order to take advantage of the mailbox rule.

3. The Court in *Burgdoff* did not create a requirement that an insured by verbally informed of UM/UIM coverage limits.

mailing a selection/rejection form by Nationwide that was never signed prior to the accident is a *total failure* on the part of Nationwide to inform the insured of available coverage that would require adherence to *Williams*. Consequently, we affirm the trial court's order.

Finally, there was an amicus brief filed in this case by the North Carolina Advocates of Justice ("NCAJ") in which the NCAJ requests that we establish a clear standard that would require an insurer to prove "actual notice" in circumstances such as the one at issue. We decline to address the merits of NCAJ's request; however, in the present case we clearly did not require a showing of actual notice. The mailing of the selection/rejection form was sufficient to preclude a holding that a total failure to notify occurred. Effective 1 February 2009, N.C. Gen. Stat. § 20-279.21(b)(3) was materially altered. For cases governed by the previous version of the statute, the existing case law is controlling.

Conclusion

Based on the foregoing analysis, we hold that the trial court did not err in denying Mrs. Martinson's motion for summary judgment and properly granted Nationwide's motion for summary judgment.

Affirmed.

Judges BRYANT and CALABRIA concur.

THOMAS JUNIOR JOHNSON, Plaintiff v. ESSIE BROWN JOHNSON, Defendant

No. COA10-276

(Filed 16 November 2010)

Appeal and Error— interlocutory order—no certification—no substantial right

Defendant wife's appeal in a divorce case was dismissed as being from an interlocutory order. The order was not properly certified under N.C.G.S. § 1A-1, Rule 54(b) and it did not affect a substantial right.

Appeal by Plaintiff from order dated 19 August 2009 by Judge Peter Mack in Carteret County District Court. Heard in the Court of Appeals 16 September 2010.

Lea, Rhine & Rosbrugh, PLLC, by James W. Lea, III and Lori W. Rosbrugh, and Dennis T. Worley, for Plaintiff.

Schulz Stephenson Law, by Bradley N. Schulz and Sundee Stephenson, for Defendant.

STEPHENS, Judge.

Plaintiff-husband initiated this action by filing a complaint for absolute divorce on 7 June 2005. In his complaint, Plaintiff alleged that he separated from Defendant-wife in June 1994. Plaintiff also alleged that the parties entered into a 10 November 2005 Separation Agreement and Property Settlement ("Agreement") "wherein the parties resolved all claims pursuant to N.C.G.S. § 50-20."

In her responsive pleading, dated 29 September 2005 and amended 23 October 2008, Defendant raised several affirmative defenses to Plaintiff's allegation of the Agreement and also brought forth counterclaims seeking divorce from bed and board, postseparation support, alimony, attorney fees, equitable distribution, and rescission "of separation agreement and real property deeds."

In February 2007, Defendant filed a motion for summary judgment on the issues of the validity of the Agreement and the date of separation; shortly thereafter, Plaintiff filed his own motion for summary judgment. Both motions were denied.

Between 7 October 2008 and 29 July 2009—which included a long break in the proceedings to allow Defendant to amend her pleadings—the court conducted a hearing on the Defendant's motion to set aside the Agreement and to establish the date of separation.

Following the hearing, the trial court entered its Order Setting Aside Separation Agreement and Establishing Date of Separation ("Order"). In the Order, the trial court set out the following conclusions of law, *inter alia*:

10. The plaintiff has moved for certification of this order pursuant to Rule 45(b) [sic], and over the objections of counsel for defendant, the court concludes that there are sufficient grounds that this order should be certified for immediate appeal.

11. Additionally, and again, over the objection of counsel for the defendant, plaintiff has asked that the court conclude that this order involves matters of substantial right, and the court concludes that it does.

The trial court thereupon ordered as follows:

1. That Defendant's Motion to Set Aside the Parties' Separation Agreement in its entirety is hereby GRANTED.

2. That the parties' date of separation is June 9, 2005.

3. This Order resolves the issue of the validity of the separation agreement and the issue of the date of separation of the parties.

4. This judgment is not interlocutory and the court finds that it effects [sic] a substantial right, because it effects [sic] a substantial amount of property, and plaintiff's motion for certification of the immediate appeal per rule 54(b) is allowed.

5. Plaintiff's claim for an absolute divorce and Defendant's claims for post separation support, alimony, attorney fees and equitable distribution survive this order.

Plaintiff gave his notice of appeal from the Order on 1 September 2009. In her brief, Defendant asks this Court to dismiss Plaintiff's appeal as interlocutory because the Order was not properly certified under N.C. Gen. Stat. §1A-1, Rule 54(b) and because the Order does not affect a substantial right of Plaintiff. We agree with Defendant's contention and accordingly dismiss Plaintiff's appeal as interlocutory.

In addressing the appealability of the Order, we first note that, regardless of the trial court's determination otherwise, the trial court's Order is, in fact, interlocutory.

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

Tridyn Indus., Inc. v. Am. Mut. Ins. Co., 296 N.C. 486, 488, 251 S.E.2d 443, 445 (1979) (ellipsis omitted) (quoting *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950)).

Based on the trial court's indication that several other claims by both parties survive the Order, there can be no doubt that the trial court's Order left the case for further action by the trial court "in order to settle and determine the entire controversy." *Id.* Thus, the Order is clearly interlocutory.

Immediate appeal from an interlocutory order such as this one may be pursued by either of two avenues.

> First, an interlocutory order can be immediately appealed 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. N.C.R. Civ. P. 54(b). Second, an interlocutory order can be immediately appealed under N.C. Gen. Stat. §§ 1-277(a)[] and 7A-27(d)(1)[] 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) (citation and internal quotation marks omitted), *disc. rev. denied*, 345 N.C. 340, 483 S.E.2d 161 (1997).

Because the trial court's Order seems to implicate both Rule 54(b) and the substantial right analysis, we address each separately to determine whether the Order may be appealed under either theory.

I. Rule 54(b)

N.C. Gen. Stat. §1A-1, Rule 54(b) provides that "[w]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, . . . the court may enter a final judgment as to one or more but fewer than all of the claims . . . only if there is no just reason for delay and it is so determined in the judgment." N.C. Gen. Stat. § 1A-1, Rule 54(b) (2009). "Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes." *Id.*

The trial judge ordered that the judgment "effects [sic] a substantial right, because it effects [sic] a substantial amount of property, and plaintiff's motion for certification of the immediate appeal per rule 54(b) is allowed." This order by the trial judge is an effective certification pursuant to Rule 54(b). *See Smock v. Brantley*, 76 N.C. App. 73, 74-75, 331 S.E.2d 714, 716 (1985) (holding that the trial court's order "that denial of an immediate appeal would affect a substantial right of plaintiffs" was "tantamount to a certification that there was no just reason for delay," and concluding that "the appeal has been

effectively certified and is therefore properly before [this court]"), *disc. rev. denied*, 315 N.C. 590, 341 S.E.2d 30 (1986).

Along with an effective certification, Rule 54(b) also requires that the judgment be final "as to one or more but fewer than all of the claims[.]" N.C. Gen. Stat. § 1A-1, Rule 54(b). Although the trial judge here stated that "[t]his judgment is not interlocutory"—presumably indicating that the judgment is final—a trial court cannot "by denominating [its] decree a 'final judgment' make it immediately appealable under Rule 54(b) if it is not such a judgment." *Tridyn Indus.*, 296 N.C. at 491, 251 S.E.2d at 447. Accordingly, appellate courts may review whether the judgment certified for appeal under Rule 54(b) is indeed a final, appealable judgment on a party's claim. *Id.* We conclude that, regardless of the trial court's finding and certification, the Order is not a final judgment on a claim for relief and is not appealable under Rule 54(b).

The threshold question on this issue is whether the trial court entered a final judgment as to a "claim for relief." The Order purports to be a final judgment on the issues of the date of separation and the validity of the Agreement. Because the issue of the date of separation is not a claim for relief, immediate appeal on that issue under Rule 54(b) is not available. Accordingly, we address only whether the trial court's determination of the validity of the Agreement is immediately appealable.

In his complaint, Plaintiff alleged that Defendant was not entitled to equitable distribution based on the Agreement. Plaintiff's allegation of the Agreement is properly characterized as a preemptive plea in bar—essentially, an anticipated response to Defendant's potential counterclaims for divorce, postseparation support, alimony, and equitable distribution. *See Garris v. Garris*, 92 N.C. App. 467, 468, 374 S.E.2d 638, 639 (1988) (holding that defendant's allegation that "a valid separation/property settlement agreement [] waived all of plaintiff's marital rights" is "properly characterized as a plea in bar to plaintiff's complaint"). In her amended answer, Defendant counterclaimed for postseparation support, alimony, and equitable distribution; Defendant also raised various defenses to Plaintiff's plea in bar in which Defendant asked the court to "set aside" the Agreement.

The Order granting Defendant's motion to set aside the Agreement is properly viewed as a judgment on Plaintiff's plea in bar. As such, the Order is not immediately appealable because an order disposing of a plea in bar is not a final judgment on a claim for relief

under Rule 54(b). *Garris*, 92 N.C. App. at 470, 374 S.E.2d at 640 ("Since the court's ruling only disposed of defendant's plea in bar, the ruling did not finally adjudicate any of plaintiff's claims. The ruling was thus not certifiable as a final appealable order under Rule 54(b).").

Although Defendant also set forth a counterclaim for rescission in her amended answer, the Order speaks the language of Defendant's defenses, which ask the court to set aside the Agreement, and does not mention at all Defendant's rescission claim. The Order purports to grant Defendant's "Motion to Set Aside the Parties' Separation Agreement" without making any ruling on the claim for rescission. Such a ruling, viewed as a judgment on Defendant's affirmative defenses, is not immediately appealable as it does not render final judgment on any *claim* put forth by either party. *See Yordy v. N.C. Farm Bureau Mut. Ins. Co.*, 149 N.C. App. 230, 231, 560 S.E.2d 384, 385 (2002) ("A defense raised by a defendant in answer to a plaintiff's complaint is not a 'claim' for purposes of Rule 54(b).").

Nevertheless, were this court to interpret the Order as rendering judgment on Defendant's rescission claim, we would again conclude that Rule 54(b) is not satisfied because the judgment on the rescission claim is not final as to that entire claim.

In her amended complaint, Defendant's sixth counterclaim seeks rescission of two sets of documents: "the separation agreement" and "any and all real property deeds executed . . . subsequent to the execution of the separation agreement[.]" The rescission counterclaim therefore contains two separate sub-claims.

However, the Order only sets aside the Agreement and does not set aside any subsequent property deeds. Presumably that portion of Defendant's rescission counterclaim is still viable. Therefore, the Order is not a final judgment on this entire claim. Rather, it is a final judgment on only a portion of the rescission claim. Such a judgment is not a final judgment as to a claim for relief under Rule 54(b) and is, thus, not immediately appealable.

The above discussion notwithstanding, because Defendant's prayer for relief included a request that the court set aside the Agreement, this Court could opt to treat Defendant's defenses seeking to set aside the Agreement as counterclaims. *See McCarley v. McCarley*, 289 N.C. 109, 113, 221 S.E.2d 490, 493 (1976) (holding that defendant's answer admitting allegations together with his prayer for absolute divorce "was, in effect, a counterclaim"); *see also* N.C. Gen.

Stat. § 1A-1, Rule 8(c) (2009) ("When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."). Even in that case, however, we must still conclude that Rule 54(b) is not satisfied.

Our Supreme Court has cautioned that in a case involving only two parties, "it is important in applying Rule 54(b) to distinguish the true multiple claim case from the case in which only a single claim based on a single factual occurrence is asserted but in which various kinds of remedies may be sought." *Tridyn Indus.*, 296 N.C. at 490, 251 S.E.2d at 447. Although there certainly are multiple claims in this case, we are not convinced that this case is a "true multiple claim case." In our view, this case is more analogous to a claim based on a single factual occurrence because Defendant's "claims" to set aside the Agreement and the other claims by the parties arise out of the same series of transactions: the signing of the Agreement, the alleged separation of the parties, and their ensuing marital conduct. *Accord Gardner v. Gardner*, 294 N.C. 172, 176, 240 S.E.2d 399, 403 (1978) (concluding that husband's divorce claim arises out of same transaction or occurrence as wife's abandonment claim).[1]

As stated in *Tridyn Indus.*, Rule 54(b) "should be seen as a companion to other rules of procedure which permit liberal joinder of claims and parties. See particularly [N.C. Gen. Stat. §] 1A-1, Rules 13, 14, 17-24." *Tridyn Indus.*, 296 N.C. at 490, 251 S.E.2d at 446. In response to the increased liberality of joinder rules, Rule 54(b) was promulgated to allow final decisions on some but less than all claims to be "treated as a judicial unit for purposes of appellate jurisdiction." *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 432, 100 L. Ed. 1297, 1304 (1956).[2] However, those claims that are inherently inseparable with other pending claims should not be immediately appealed under Rule 54(b). *See id.* at 436, 100 L. Ed. at 1306 (suggesting that a court may abuse its discretion in certifying an order under Rule 54(b) by certifying claims that are so inherently inseparable from, are so

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1. Although the result in *Gardner* was superceded by legislative amendment, *Gardner v. Gardner*, 48 N.C. App. 38, 42, 269 S.E.2d 630, 632-33 (1980), the analysis in *Gardner* is still persuasive at least.

2. "The North Carolina Rule 54(b) is substantially similar to its Federal counterpart, as that Rule was amended in 1961, and we have therefore appropriately considered Federal decisions and authorities for guidance and direction in the interpretation of our Rule." *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 165, 265 S.E.2d 240, 242-43, *review allowed and appeal dismissed*, 301 N.C. 92, —— S.E.2d —— (1980).

closely related with, or cannot be decided independently of the other claims pending with the trial court); *see also Ginett v. Computer Task Grp.*, 962 F.2d 1085, 1096 (2d Cir. 1992) (holding that "[o]nly those claims 'inherently inseparable' from or 'inextricably interrelated' to each other are inappropriate for rule 54(b) certification").

In this case, the trial court rendered a final judgment on Defendant's "claim" to set aside the Agreement. Although Defendant's "claim" to set aside the Agreement can be decided independently of the other claims, none of the other claims can be decided independently of Defendant's "claim" to set aside the Agreement: Plaintiff's claim for absolute divorce is subject to a year-long separation requirement, which Plaintiff argues is satisfied based on the separation date contained in the Agreement; Defendant's claim for divorce from bed and board depends on whether Plaintiff's conduct occurred during the marriage or during separation; Defendant's postseparation support claim depends on the separation date and the validity of the Agreement; and Defendant's equitable distribution and permanent alimony claims are fully dependent on the disposition of this "claim" and have been continued by the trial court.

Instead of being a separate judicial unit, the judgment on this "claim" is more properly characterized as a threshold determination of the validity of the remaining claims. As the trial court stated in the Order, "[t]his Order resolves the *issue* of the validity of the separation agreement and the *issue* of the date of separation of the parties." (Emphasis added). Although determination of these issues is important in the resolution of this case, Rule 54(b) does not provide for piecemeal appeal of every determination by the trial court that purports to resolve a major issue.

Because the Order does not fully and finally adjudicate a claim for relief separable from the remaining claims in the case, we conclude the Order is not immediately appealable under Rule 54(b).

II. Substantial rights

A trial court's interlocutory order may be immediately appealed if the decision deprives the appellant of a substantial right which would be lost absent immediate review. *Bartlett*, 124 N.C. App. at 524, 477 S.E.2d at 695; *see also* N.C. Gen. Stat. §§ 1-277(a), 7A-27(d) (2009). Notwithstanding the trial court's conclusion that the Order "effects [sic] a substantial right, because it effects [sic] a substantial amount of property," we conclude that the Order does not affect a substantial right such that the Order is not immediately appealable.

The Order setting aside the Agreement and allowing Defendant to proceed on her claims is analogous to the court's refusal to dismiss Defendant's claims for equitable distribution, postseparation support, and alimony despite Plaintiff's assertion of some affirmative defense. *See Garris*, 92 N.C. App. at 470, 374 S.E.2d at 640. Such a refusal would not affect a substantial right entitling Plaintiff to appeal the interlocutory ruling. *Id.*; *see also Johnson v. Pilot Life Ins. Co.*, 215 N.C. 120, 1 S.E.2d 381 (1939) (denial of motion to dismiss based on release and statute of limitations does not affect substantial right). "No substantial right of [Plaintiff] will be lost or prejudiced by delaying his appeal until the final judgment on [Defendant's remaining] claims." *Garris*, 92 N.C. App. at 470, 374 S.E.2d at 640.

As for the trial court's conclusion that the Order affects a substantial right because it affects a substantial amount of property, this Court has consistently held that interlocutory appeals challenging the financial repercussions of a separation or divorce do not affect a substantial right. *See, e.g.*, *Embler v. Embler*, 143 N.C. App. 162, 545 S.E.2d 259 (2001) (dismissing appeal because equitable distribution order that explicitly left open the related issue of alimony did not affect substantial right); *Stafford v. Stafford*, 133 N.C. App. 163, 515 S.E.2d 43, (holding that date of separation used by trial court in its entry of order granting absolute divorce did not affect substantial right), *aff'd per curiam*, 351 N.C. 94, 520 S.E.2d 785 (1999). Although the Order setting the date of the separation of the parties may have negative financial repercussions for Plaintiff, there is no evidence to indicate that a substantial right of Plaintiff will be irremediably adversely affected by delaying his appeal until the final judgment on the remaining claims in the matter.

Accordingly, we conclude that the Order does not affect a substantial right of Plaintiff and is not immediately appealable. Therefore, Plaintiff's appeal is

DISMISSED.

Judge ELMORE concurs.

Judge JACKSON concurs in separate opinion.

JACKSON, Judge, concurring by separate opinion.

Although I agree with the majority that plaintiff-husband's appeal should be dismissed, I write separately to emphasize that an appellant must argue in his brief that his appeal affects a substantial right in order to be entitled to appellate review of the matter. Because plaintiff-husband did not contend that his appeal affects a substantial right—but rather, solely relied upon the trial court's Rule 54(b) certification—I would not address whether or not a substantial right is affected by the trial court's order.

We previously have held that an appellant bears the burden of demonstrating that an appeal is properly before this Court. *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff'd*, 360 N.C. 53, 619 S.E.2d 502 (2005) (per curiam). When the appeal is based upon an interlocutory order, "the appellant must include in its statement of grounds for appellate review 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.' " *Id.* (quoting N.C. R. App. P. 28(b)(4)). "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[.]" *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). When the appellant fails to carry its burden, its appeal will be dismissed. *Id.*

In the case *sub judice*, plaintiff-husband's "Statement of the Grounds for Appellate Review" reads in its entirety,

> The Order appealed from is subject to immediate appellate review as it is a final judgment of fewer than all of the claims of the parties, pursuant to Rule 54 (b) of the North Carolina Rules of Civil Procedure, and further pursuant to the granting by the trial court of Plaintiff's motion for certification for immediate appeal in accordance with said Rule 54(b) on that basis that there is no just reason for delay.

Because plaintiff-husband did not carry his burden of demonstrating that his appeal of an interlocutory order affects a substantial right, I would not address whether the appeal does, in fact, affect such a right. Based upon the majority's analysis that plaintiff-husband's appeal also does not satisfy the requirements of Rule 54(b), I agree with the majority that his appeal is not properly before us, and therefore, should be dismissed.

IN RE: K.U.-S.G., D.L.L.G., AND P.T.D.G., MINOR CHILDREN

No. COA10-695

(Filed 16 November 2010)

Termination of Parental Rights— Uniform Child Custody Jurisdiction and Enforcement Act—modification of custody order—no subject matter jurisdiction

The trial court lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act to terminate respondent's parental rights. The order for termination modified an existing custody order entered by a Pennsylvania court and although the trial court satisfied the "home state" requirement, Pennsylvania had not lost continuing jurisdiction, Pennsylvania had not determined that North Carolina was a more convenient forum, and respondent continued to reside in Pennsylvania.

Appeal by respondent from order entered 4 March 2010 by Judge Sherry F. Alloway in Guilford County District Court. Heard in the Court of Appeals 18 October 2010.

E. Danielle Caldwell and Kathryn S. Lindley for petitioners-appellees.

Mary McCullers Reece for respondent-appellant mother.

HUNTER, Robert C., Judge.

Respondent-mother Sylvia G. appeals from the trial court's order terminating her parental rights with respect to her three children: P.T.D.G. ("Paul") (born June 2000), D.L.L.G. ("Dana") (born January 2002), and K.U.-S.G. ("Katie") (born December 2002).[1] We agree with respondent's threshold contention that the trial court lacked subject-matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") to terminate her parental rights, and, consequently, we vacate the court's order.

Facts

In 2002, Paul and Dana were living with respondent in Fayette County, Pennsylvania. On 1 November 2002, Fayette County Children

1. Pseudonyms are used throughout this opinion for the protection of the juveniles' privacy and ease of reading.

and Youth Services (FCCYS) filed a petition with the Court of Commons Pleas of Fayette County, alleging that Paul and Dana were neglected and dependant juveniles based on "lack of supervision issues." On 5 November 2002, the Pennsylvania court entered an order adjudicating Paul and Dana to be dependent juveniles and placed them in the "care, custody and supervision of [FCCYS] for foster home placement."

Shortly after Katie's birth in December 2002, FCCYS filed a juvenile petition alleging that she was a dependent juvenile. Respondent and her mother entered into a "safety plan" with FCCYS, agreeing to placement of Katie with her grandmother, with the condition that respondent not be allowed to have "unsupervised contact with [Katie]." Based on the safety plan, the Pennsylvania court entered an order on 13 December 2002, adjudicating Katie dependent and granting custody to Katie's grandmother, "until such time that [respondent] has satisfactorily completed her Family Service Plan . . . ." On 29 January 2002, however, FCCYS filed a petition for custody of Katie after it discovered that respondent and her mother "had not been abiding by the safety plan." That same day, the Pennsylvania court granted FCCYS temporary custody of Katie. After conducting a hearing on 24 February 2003, the Pennsylvania Court entered an order the next day continuing custody of Katie with FCCYS.

FCCYS subsequently placed all three children with respondent's great aunt and uncle, petitioners Curtis and Sara H., who are licensed foster parents in Pennsylvania. FCCYS worked with respondent on the family services plans established in the juvenile cases, but ultimately filed petitions on 11 May 2004 to terminate her parental rights with respect to all three juveniles. A hearing was held on 22 July 2004 regarding the petitions, but was continued pending completion of a "bonding assessment," and the goal for the juveniles remained reunification. At the second hearing on the termination petitions, held on 6 December 2004, FCCYS consented to giving respondent an additional six months to complete her service plan, and the hearing was rescheduled for June 2005.

On 31 May 2005, FCCYS filed a "Petition to Discharge" with respect to each juvenile, indicating that petitioners intended to move within the next month to North Carolina for work, but that FCCYS would be unable to permit the juveniles to move out of state while in the legal custody of FCCYS without obtaining "prior interstate approval," which could take several months to complete. FCCYS

requested that the court change the goal of the juveniles to "Placement with a Permanent Legal Custodian" and discharge the juveniles to the "permanent legal custody" of petitioners. Attached to the petitions were statements signed by respondent, the attorneys representing the juveniles, and petitioners, indicating that they all "join[ed] in and consent[ed] to the relief sought in the foregoing petition[s]." In orders entered 1 June 2005, the Pennsylvania court changed the juveniles' goal to placement with a permanent legal custodian and "discharged [the juveniles] to the custody of [petitioners]." The court also ordered that respondent continue to have supervised visitation with her children.

While petitioners and the juveniles moved to North Carolina, respondent remained in Pennsylvania. The juveniles lived in North Carolina until August 2006, when petitioners agreed that the juveniles should return to Pennsylvania to live with respondent. On 21 August 2006, petitioners and respondent entered a "Consent Order for Child Custody" in the District Court of Guilford County, North Carolina. In the order, the parties agreed that the North Carolina court had jurisdiction over the parties and the subject matter of the action and purported to "waive any further requirements of the Uniform Child Custody Jurisdiction and Enforcement Act." The consent order gave custody of the three children to respondent and "awarded visitation privileges" to petitioners.

The juveniles lived in Pennsylvania with respondent until April 2007, when respondent asked petitioners to take the juveniles back to North Carolina, stating that she would move to North Carolina in June 2007 after she finished nursing school. In June 2007, however, respondent was arrested in Pennsylvania on drug possession charges and remained in Pennsylvania pending resolution of the criminal charges. In January 2008, respondent signed a voluntary support order, agreeing to pay petitioners $105.00 a month in child support. Respondent also provided petitioners with a "notarized . . . paper" giving petitioners guardianship of her children. In October 2008, respondent was convicted of the drug charges and incarcerated in Pennsylvania, with a projected release date of 17 October 2010.

On 10 June 2009, petitioners filed petitions to terminate respondent's parental rights with respect to all three juveniles, alleging that respondent had failed to provide financial support for the juveniles as agreed in the voluntary support order, had abandoned the juveniles, and had not provided any emotional support for the juveniles.

Respondent filed a reply on 15 October 2009, generally denying the allegations regarding the existence of grounds to terminate her parental rights. After hearings were held on 8 January and 7 February 2010, the trial court entered an order on 4 March 2010, terminating respondent's parental rights with respect to Paul, Dana, and Katie. Respondent timely appealed to this Court.

Discussion

Respondent's threshold argument on appeal is that the trial court lacked subject-matter jurisdiction under the UCCJEA, N.C. Gen. Stat. §§ 50A-101 through -317 (2009), to terminate her parental rights. Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal. *Harper v. City of Asheville*, 160 N.C. App. 209, 213, 585 S.E.2d 240, 243 (2003). Subject-matter jurisdiction "involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130, *disc. review denied*, 354 N.C. 217, 554 S.E.2d 338 (2001). Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law. *In re Peoples*, 296 N.C. 109, 144, 250 S.E.2d 890, 910 (1978), *cert. denied sub nom. Peoples v. Judicial Standards Comm'n of N.C.*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). "When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened." *Hopkins v. Hopkins*, 8 N.C. App. 162, 169, 174 S.E.2d 103, 108 (1970). Thus the trial court's subject-matter jurisdiction may be challenged at any stage of the proceedings, even for the first time on appeal. *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006).

Our Juvenile Code grants district courts

> exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion.

N.C. Gen. Stat. § 7B-1101 (2009). Nevertheless, the jurisdictional requirements of the UCCJEA also must be satisfied for the district court to have authority to adjudicate termination actions. *In re N.R.M.*, 165 N.C. App. 294, 298, 598 S.E.2d 147, 149 (2004). As is the

case here, in order to terminate the parental rights of a non-resident parent, the court must "find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, without regard to G.S. 50A-204 . . . ." N.C. Gen. Stat. § 7B-1101; *see also In re E.X.J.*, 191 N.C. App. 34, 44, 662 S.E.2d 24, 30 (2008) (noting that, based on N.C. Gen. Stat. § 7B-1101, UCCJEA § 204's temporary emergency jurisdiction does not provide basis for terminating parental rights of non-resident), *aff'd per curiam*, 363 N.C. 9, 672 S.E.2d 19 (2009).

I. Jurisdiction under UCCJEA Section 201

The first provision of the UCCJEA, N.C. Gen. Stat. § 50A-201, "addresses the jurisdictional requirements for initial child-custody determinations." *In re J.W.S.*, 194 N.C. App. 439, 446, 669 S.E.2d 850, 854 (2008). The UCCJEA defines an "initial determination" as "the first child-custody determination concerning a particular child." N.C. Gen. Stat. § 50A-102(8). Here, the record establishes that the initial custody determinations with respect to all three juveniles were made by the Pennsylvania Court of Common Pleas in Fayette County. Consequently, the North Carolina court lacked jurisdiction under N.C. Gen. Stat. § 50A-201 to enter an order terminating respondent's parental rights. *See N.R.M.*, 165 N.C. App. at 298, 598 S.E.2d at 150 (holding trial court lacked jurisdiction under UCCJEA § 201 to enter termination order where initial "custody issues have already been addressed by an Arkansas court").

II. Jurisdiction under UCCJEA Section 203

The UCCJEA's remaining jurisdictional provision pertinent here, N.C. Gen. Stat. § 50A-203, "outlines the requirements for a North Carolina court to have jurisdiction to modify a child-custody determination." *N.R.M.*, 165 N.C. App. at 299, 598 S.E.2d at 150. "Modification" is defined as "a child-custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination." N.C. Gen. Stat. § 50A-102(11).

In this case, the Pennsylvania court entered orders on 1 June 2005 granting legal custody of the juveniles to petitioners and allowing respondent supervised visitation. Thus, at the time the North Carolina termination petitions were filed, there was an existing order from another state pertaining to the juveniles. Consequently, "any

change to th[ose] [Pennsylvania] order[s] qualif[y] as a modification under the UCCJEA." *N.R.M.*, 165 N.C. App. at 299, 598 S.E.2d at 150.

Under the UCCJEA, a North Carolina court may not modify a child-custody determination made by another state unless two requirements are satisfied: (1) the North Carolina court "has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2)"; and (2)(a) a court of the issuing state determines either that it "no longer has exclusive, continuing jurisdiction" under UCCJEA § 202 or that the North Carolina court would be a "more convenient forum" under UCCJEA § 207; or (b) a North Carolina court or a court of the issuing state "determines that the child, the child's parents, and any person acting as a parent do not presently reside in the [issuing] state." N.C. Gen. Stat. § 50A-203; *see also In re T.J.D.W.*, 182 N.C. App. 394, 396-97, 642 S.E.2d 471, 473 (explaining that only when UCCJEA § 203's "two conditions are fulfilled" may a North Carolina court modify another state's custody determination), *disc. review denied in part*, 361 N.C. 568, 651 S.E.2d 562, *aff'd per curiam in part*, 362 N.C. 84, 653 S.E.2d 143 (2007).

II.A Jurisdiction to Make Initial Custody Determination

N.C. Gen. Stat. § 50A-203's first requirement for modification is that the North Carolina court must have "jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2) . . . ." N.C. Gen. Stat. § 50A-203. N.C. Gen. Stat. § 50A-201(a)(1), in turn, provides for jurisdiction if North Carolina is the "home state of the child on the date of the commencement of the proceeding . . . ." N.C. Gen. Stat. § 50A-201(a)(1). A child's "home state" is defined as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C. Gen. Stat. § 50A-102(7).

Here, the record indicates that Paul, Dana, and Katie have been living with petitioners in North Carolina at least since April 2007 and that the termination petitions were filed in June 2009. Consequently, N.C. Gen. Stat. § 50A-201(a)(1)'s "home state" requirement is satisfied in this case. *See N.R.M.*, 165 N.C. App. at 299, 598 S.E.2d at 150 ("[T]he children had been living in New Hanover County since 1 August 2000, and the petition was filed 21 March 2002. Thus, the home state requirement was satisfied.").

II.B.1 Exclusive, Continuing Jurisdiction

The UCCJEA provides three options for satisfying its second requirement for jurisdiction to modify another state's custody determination. First, a North Carolina court may enter an order modifying another state's custody determination if a court of the issuing state concludes that it no longer has exclusive, continuing jurisdiction under the UCCJEA. The court of the issuing state loses "exclusive, continuing jurisdiction" under the UCCJEA if:

> (1) [it] determines that . . . the child, the child's parents, and any person acting as a parent [no longer] have a significant connection with th[at] State and that substantial evidence is no longer available in th[at] State concerning the child's care, protection, training, and personal relationships; or
>
> (2) [it] or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in th[e] [issuing] State.

N.C. Gen. Stat. § 50A-202(a). The official comment to N.C. Gen. Stat. § 50A-202(a)(1) "clarifies that 'the original decree State is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree State stating that it no longer has jurisdiction.' " *N.R.M.*, 165 N.C. App. at 300, 598 S.E.2d at 151 (quoting N.C. Gen. Stat. § 50A-202 official cmt.).

Here, although the North Carolina court stated that it had contacted "the Court of Common Pleas, Fayette County, Juvenile Division and determined that Fayette County no longer wished to retain jurisdiction," the record does not include an order from a Pennsylvania court indicating that Pennsylvania no longer has jurisdiction. Consequently, the Pennsylvania court did not lose jurisdiction under N.C. Gen. Stat. § 50A-202(a)(1). *See J.W.S.*, 194 N.C. App. at 448, 669 S.E.2d at 855-56 ("In the case before this Court, although the trial court found that 'the State of New York has not opted to exercise jurisdiction [,]' there is no order from the New York court in the record before us stating that New York no longer has jurisdiction. . . . Accordingly, the New York court did not lose jurisdiction under N.C. Gen. Stat. § 50A-202(a)(1)."). Respondent, moreover, was incarcerated in Pennsylvania when this termination action was initiated in North Carolina. Pennsylvania, therefore, did not lose jurisdiction based on N.C. Gen. Stat. § 50A-202(a)(2). *See N.R.M.*, 165 N.C. App. at

300, 598 S.E.2d at 151 ("[A]t the time of the petition, respondent resided in Arkansas[,] so Arkansas did not lose continuing jurisdiction based on N.C. Gen. Stat. § 50A-202(a)(2).").

II.B.2 More Convenient Forum Jurisdiction

Pursuant to UCCJEA § 203(1), Pennsylvania may relinquish jurisdiction to North Carolina if the Pennsylvania court determines that a North Carolina court would be a more convenient forum under UCCJEA § 207. *J.W.S.*, 194 N.C. App. at 448, 669 S.E.2d at 856. Again, however, nothing in the record suggests that a Pennsylvania court made such a determination. Consequently, "neither method of obtaining jurisdiction under N.C. Gen. Stat. § 50A-203(1) is satisfied." *J.W.S.*, 194 N.C. App. at 448, 669 S.E.2d at 856.

II.B.3 Jurisdiction under UCCJEA Section 203(2)

N.C. Gen. Stat. § 50A-203(2) "provides for jurisdiction if either the issuing state or the state attempting to modify the order determines that the child, the child's parents, and any person acting as a parent have left the issuing state." *J.W.S.*, 194 N.C. App. at 449, 669 S.E.2d at 856; *see also* N.C. Gen. Stat. § 50A-203 official cmt. (explaining that the "only exception" to general prohibition against "[t]he modification State . . . determin[ing] that the original decree State has lost its jurisdiction" is when "all parties have moved away from the original State"). The record in this case indicates that respondent, being incarcerated in state prison, continues to reside in Pennsylvania. Thus, despite petitioners' moving to North Carolina with the juveniles, jurisdiction under N.C. Gen. Stat. § 50A-203(2) is not established. *See N.R.M.*, 165 N.C. App. at 301, 598 S.E.2d at 151 ("Because respondent continued to live in Arkansas, subsection (2) [of UCCJEA § 203] was not satisfied even though petitioner and the children had left Arkansas and moved to North Carolina."). The trial court, therefore, lacked subject-matter jurisdiction under the UCCJEA to enter an order terminating respondent's parental rights. Accordingly, the trial court's order is vacated.

Vacated.

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

STATE OF NORTH CAROLINA v. NAKIA NICKERSON, Defendant

No. COA09-1511

(Filed 16 November 2010)

Possession of Stolen Property— lesser-included offense— unauthorized use of motor vehicle

Defendant's convictions for possession of stolen goods, obtaining habitual felon status, and driving while license revoked were reversed or remanded where defendant's request for an instruction on the lesser-included offense of unauthorized use of a motor vehicle was erroneously denied. All of the essential elements of unauthorized use of a motor vehicle are essential elements of possession of stolen goods and the evidence at trial contradicted two of the elements of possession of stolen goods. The State did not meet its burden of showing that the error was harmless.

Appeal by defendant from judgment entered on or about 8 July 2009 by Judge Orlando F. Hudson in Superior Court, Orange County. Heard in the Court of Appeals 14 April 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Ann W. Matthews, for the State.

Ryan McKaig, for defendant-appellant.

STROUD, Judge.

Defendant appeals his convictions for possession of stolen goods, obtaining habitual felon status, and driving while license revoked. Defendant contends the trial court erred in denying his request to instruct the jury on a lesser-included offense and denying his motion to dismiss the charge of possession of stolen goods. For the following reasons, we remand for a new trial as to defendant's convictions for possession of stolen goods and obtaining habitual felon status, and we remand for resentencing as to defendant's conviction for driving while license revoked.

I. Background

The State's evidence tended to show that on the evening of 19 November of 2008, Mr. Darrel Haller went to bed and when he woke up, his car, a 1997 gold Crysler Sebring with a black top, was gone.

Mr. Haller called the police. The police came to Mr. Haller's home where he informed them that the car had a gun in it. On 20 November 2008, Steve Lehew, a patrol sergeant with the Chapel Hill Police Department, was patrolling around Sykes and Whitaker Street when he "saw a Gold Crysler Sebring with a black top coming towards me on Nunn. And the stereo coming from the car was very loud. I could hear it from probably over 30 feet away. And that neighborhood, we have a lot of calls of noise complaints." Sergeant Lehew pulled behind the car and ran the license plate which "came back to a Chevy Lumina, so the license plate didn't match the type of vehicle they [sic] were on." Sergeant Lehew stopped the Sebring, which defendant was driving. Sergeant Lehew had defendant get out of the car and asked defendant if there were weapons in the car. Defendant responded, "[N]o; not my car; you can go ahead and search it." Sergeant Lehew found a gun in the car. Defendant told Sergeant Lehew "it wasn't his car. It was somebody's car, a friend. And the friend was too drunk—that he was in a condition that he couldn't walk. So he said he dropped his friend off at a place called Baldwin Park[.]" Defendant did not inform Sergeant Lehew of his friend's full name. Officer Curt Farrell, also of the Chapel Hill Police Department, was called "to cover" Sergeant Lehew. Officer Farrell went and checked Baldwin Park and Hargrave Center, a local park, but did not find defendant's friend.

On or about 5 January 2009, defendant was indicted for driving while license revoked, possession of stolen goods, and obtaining habitual felon status. On 7-8 July 2009, defendant was tried by a jury. Defendant was convicted on all charges. Defendant was determined to have a prior felony record level of IV and sentenced to 80 months to 105 months imprisonment for all of the convictions. Defendant appeals.

II. Lesser-Included Offense Jury Instruction

Defendant first contends that "the trial court erred in denying the defendant's request for a jury instruction on the lesser-included offense of unauthorized use of a motor vehicle where the evidence supported such an instruction." (Original in all caps.) Defendant argues that unauthorized use of a motor vehicle is a lesser-included offense of possession of stolen goods. In order to determine if the trial court should have instructed the jury on the "lesser-included offense" we must first determine if unauthorized use of a motor vehicle is in fact a lesser-included offense of possession of stolen goods.

Whether one crime is a lesser-included offense of another is a question of law. "We review questions of law de novo." *Staton v.*

Brame, 136 N.C. App. 170, 174, 523 S.E.2d 424, 427 (1999) (citation omitted).

> This Court has long held that the definitions accorded the crimes determine whether one offense is a lesser included offense of another crime. If the lesser crime has an essential element which is not completely covered by the greater offense, it is not a lesser-included offense. Our Supreme Court rejected the argument that an offense which was not ordinarily a lesser-included offense could become a lesser-included offense under specific factual circumstances.

State v. Hannah, 149 N.C. App. 713, 717, 563 S.E.2d 1, 4, *disc. review denied*, 355 N.C. 754, 566 S.E.2d 81 (2002) (citations, quotation marks, and brackets omitted); *see State v. Corbett*, 196 N.C. App. 508, 511, 675 S.E.2d 150, 152 ("The definitions accorded the crimes determine whether one offense is a lesser included offense of another crime. In other words, all of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense. The determination is made on a definitional, not a factual basis. *State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 378-79 (1982) (internal citations omitted), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993)."), *disc. review denied and appeal dismissed*, 363 N.C. 584, 682 S.E.2d 705 (2009).

"Felonious possession of stolen goods requires evidence of: (i) possession of personal property; (ii) valued at greater than $1,000; (iii) which has been stolen; (iv) the possessor knowing or having reasonable grounds to believe that the property is stolen; and (v) the possessor acts with a dishonest purpose." *State v. King*, 158 N.C. App. 60, 66, 580 S.E.2d 89, 94 (citing N.C. Gen. Stat. § 14-71.1), *disc. review denied and appeal dismissed*, 357 N.C. 509, 588 S.E.2d 376 (2003). The crime of "[u]nauthorized use of a motor-propelled conveyance" is defined in N.C. Gen. Stat. § 14-72.2(a): "[a] person is guilty of an offense under this section if, without the express or implied consent of the owner or person in lawful possession, he takes or operates an aircraft, motorboat, motor vehicle, or other motor-propelled conveyance of another." N.C. Gen. Stat. § 14-72.2(a) (2007). Thus, the elements of unauthorized use of a motor vehicle include (1) taking or operating, (2) a motor vehicle of another, (3) "without the express or implied consent of the owner or person in lawful possession[.]" *Id*

The first element of felonious possession of stolen goods is "possession of personal property;" *King* at 66, 580 S.E.2d at 94, the first element of unauthorized use of a motor vehicle requires the offender to take *or* operate the motor vehicle. *See* N.C. Gen. Stat. § 14-72.2(a). Possession has been defined as "[t]he fact of having or holding property in one's power; the exercise of dominion over property. . . . [or] [s]omething that a person owns or controls[.]" Black's Law Dictionary 1281 (9th ed. 2009). In order to operate a motor vehicle one must possess it, as operating a motor vehicle requires "having or holding [the motor vehicle] in one's power" and "control[ling]" the motor vehicle. *Id.* Thus, we conclude that operation of a motor vehicle is a form of possession, *see id.*, which is an element of possession of stolen goods. *See King* at 66, 580 S.E.2d at 94.

The second element of unauthorized use of a motor vehicle requires the taking or operation of a motor vehicle of another. *See* N.C. Gen. Stat. § 14-72.2(a). A motor vehicle of another is a type of personal property, which is an element of possession of stolen goods.[1] *See King* at 66, 580 S.E.2d at 94.

Lastly, unauthorized use of a motor vehicle requires taking or operating the motor vehicle "without the express or implied consent of the owner or person in lawful possession[.]" *See* N.C. Gen. Stat. § 14-72.2(a). Possession of stolen goods requires that the personal property be stolen. *See King* at 66, 580 S.E.2d at 94. Something which has been stolen has been taken "without the express or implied consent of the owner or person in lawful possession[.]" *See* N.C. Gen. Stat. § 14-72.2(a). We therefore conclude that unauthorized use of a motor vehicle is a lesser-included offense of possession of stolen goods, as all of the essential elements of unauthorized use of a motor vehicle are essential elements of possession of stolen goods. *See* N.C. Gen. Stat. § 14-72.2(a); *King* at 66, 580 S.E.2d at 94.

We now turn to the trial court's denial of defendant's request for a jury instruction on the lesser-included offense of unauthorized use of a motor vehicle.

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1. We note that the actual crime name pursuant to N.C. Gen. Stat. § 14-72.2 is "[u]nauthorized use of a motor-propelled conveyance[.]" *See* N.C. Gen. Stat. § 14-72.2. N.C. Gen. Stat. § 14-72.2(a) covers "aircraft, motorboat, motor vehicle, [and] other motor-propelled conveyance[.]" All of the instruments listed in N.C. Gen. Stat. § 14-72.2(a) are items of personal property, and thus any type of conveyance at issue pursuant to N.C. Gen. Stat. § 14-72.2(a) would be "completely covered by the greater crime," *Corbett* at 511, 675 S.E.2d at 152[,] of possession of stolen goods. *See King* at 66, 580 S.E.2d at 94.

> Due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. The jury's discretion is thus channelled so that it may convict a defendant of any crime fairly supported by the evidence.

State v. Arnold, 329 N.C. 128, 139, 404 S.E.2d 822, 829 (1991) (citation and brackets omitted). "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." N.C. Gen. Stat. § 15A-1443(b) (2007).

> Under North Carolina and federal law a lesser included offense instruction is required if the evidence would permit a jury rationally to find defendant guilty of the lesser offense and acquit him of the greater. The test is whether there is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense. Where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required.

State v. Millsaps, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (citations, quotation marks, and brackets omitted); *see also State v. Mangum*, 158 N.C. App. 187, 197, 580 S.E.2d 750, 757 ("Where the State presents evidence of every element of the offense, and there is no evidence to negate these elements other than the defendant's denial that he committed the offense, then no lesser-included offense need be submitted." (citation omitted)), *disc. review denied*, 357 N.C. 510, 588 S.E.2d 378 (2003). Here, the State's evidence established that defendant (1) possessed personal property (2) that was valued at more than $1,000 (3) and was stolen. *See King* at 66, 580 S.E.2d at 94. The remaining two elements of felonious possession of stolen goods are based upon the defendant's state of mind, whether defendant knew or had "reasonable grounds to believe that the property [wa]s stolen" and "act[ed] with a dishonest purpose." *Id.*; *see State v. Brown*, 85 N.C. App. 583, 586, 355 S.E.2d 225, 228 ("We agree with defendant that whether someone is acting with a dishonest purpose is a question of intent."), *disc. review denied*, 320 N.C. 172, 358 S.E.2d 57 (1987).

The evidence at trial showed that defendant told the police he was in the area for a funeral and that the car was not his, but belonged to his friend, whom he had left at a park because he was too drunk to drive. Furthermore, defendant's mother testified that defendant had gone to a funeral, and the police confirmed a funeral in the area. The evidence amounts to more than a mere denial by defendant that he knew the vehicle was stolen, but instead establishes contradictory evidence as to two of the elements of possession of stolen goods. *See King* at 66, 580 S.E.2d at 94; *Mangum* at 197, 580 S.E.2d at 757. Accordingly, the trial court should have instructed the jury on the lesser-included offense of unauthorized use of a motor vehicle. *See generally State v. Ross*, 46 N.C. App. 338, 339-40, 264 S.E.2d 742, 742-43 (1980) (determining the jury should have been instructed on unauthorized use of a motor vehicle as a lesser-included offense of larceny because "[t]here is no eyewitness testimony as to who took the Volkswagen car. Defendant is later found in the car by the officer. He had no consent to take or operate the car. Defendant's testimony tends to show he had no intent to steal the car. This evidence is sufficient to require the submission of the lesser included offense to the jury."). As the trial court erred in not instructing the jury on the lesser-included offense of unauthorized use of a motor vehicle, the burden is on the State to prove that the error was harmless. *See* N.C. Gen. Stat. § 15A-1443(b). The State argues only that the failure to provide the lesser-included offense instruction was not error, but as we have already concluded that it was error, the State has failed to meet its burden. Accordingly, we grant defendant a new trial as to the charges of possession of stolen goods and obtaining habitual felon status. As we are granting defendant a new trial we need not address his remaining issue on appeal.

III. Conclusion

Because the trial court erred in failing to instruct the jury on a lesser-included offense, we reverse the judgment as to the charges of possession of stolen goods and obtaining habitual felon status and remand for a new trial. Because defendant's conviction for driving while license revoked was not challenged on appeal but was consolidated with the other charges for sentencing, we also remand for resentencing on the driving while license revoked conviction.

NEW TRIAL.

Judges McGEE and HUNTER, JR., Robert N. concur.

STATE OF NORTH CAROLINA v. JEFFERY WAYNE SANDERS

No. COA10-233

(Filed 16 November 2010)

Conspiracy— assault with deadly weapon with intent to kill inflicting serious injury—motion to dismiss—sufficiency of evidence

A *de novo* review revealed the trial court did not err by failing to dismiss the charge of conspiracy to commit assault with a deadly weapon with intent to kill inflicting serious injury. The acts viewed collectively showed that the men formed an implied agreement, however impulsively, to assault the victim.

Appeal by defendant from judgment entered 1 October 2009 by Judge Phyllis M. Gorham in Carteret County Superior Court. Heard in the Court of Appeals 14 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Donald W. Laton, for the State.

Greene & Wilson, P.A., by Thomas Reston Wilson, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Jeffery Wayne Sanders ("defendant") appeals from a jury verdict finding him guilty of assault with a deadly weapon inflicting serious injury and of conspiracy to commit assault inflicting serious injury. Defendant argues that the trial court erred in failing to dismiss the charge of conspiracy for reason of insufficient evidence. We find no error.

I. Factual & Procedural History

On 10 December 2008, Jonathan Norman ("Norman") was celebrating his birthday with girlfriend Brittany Gibbs ("Gibbs") at the house of a mutual friend, Melissa Sanderlin ("Sanderlin"). During the celebration, Sanderlin received a phone call from Joseph Salter ("Salter"), suggesting that Salter and Norman settle their rivalry for Gibbs' affection with a fight. Norman agreed to the fight. Because Salter had several friends with him, Norman called upon defendant, Willard Sanders (defendant's father), and friend Jonathan Gillikin ("Gillikin") to join Norman in the fight. Shortly thereafter, the men

arrived in a truck driven by defendant, picked up Norman, and drove down the road to the home of Josh Lester ("Lester") where the fight was to occur. When they arrived at the Lester residence everyone "piled out" of the truck, began "hollering," and prepared to fight Salter. Lester's parents came out of the home and told everyone to leave the property; there would be no fight.

Norman, defendant, defendant's father, and Gillikin got into the cab and the bed of the truck and drove away with beers in hand, "raising Cain," and hollering. A neighbor, Mark Buffaloe, was outside of his home hanging Christmas decorations when he heard the commotion at the Lester residence. Mark Buffaloe called the police and was standing in his front yard with his son, Justin Buffaloe, as defendant's truck approached his yard. As the truck drove by, defendant's father, riding in the truck bed, yelled at Mark and Justin Buffaloe, "What the [expletive deleted] are you looking at?" Justin Buffaloe shouted back, "Why do you have to holler like you live in the ghetto?" Defendant then abruptly stopped the truck in front of the Buffaloes' home. Defendant's father jumped out, asked the Buffaloes if they "want[ed] a war," punched Justin Buffaloe in the mouth, and grabbed him by the throat. Mark Buffaloe attempted to intervene and stop any further attacks on his son by defendant's father. Testimony elicited at trial tended to show that, when Mark Buffaloe intervened to protect his son, defendant, Norman, and Gillikin jumped out of the truck to join the altercation and were heard to say, "we'll give you a war," and "let's go" or "let's go get them." There was conflicting testimony as to the sequence of punches thrown once these three men joined the fight. Several witnesses testified, however, that defendant broke away from the fight, walked back to the truck and retrieved a wooden dowel rod. Defendant was heard to say, "I'll finish him off with this" or "I'll finish it," and he then struck Mark Buffaloe several times on the head with the dowel rod until it broke. A few moments later, a deputy from the Carteret County Sheriff's Department arrived on the scene. Mark Buffaloe was taken to the hospital for treatment of his injuries which included a fractured skull, brain hemorrhage, and damage to his left eye.

On 11 December 2008, a warrant was issued for defendant's arrest. Two bills of indictment were returned by a Carteret County grand jury on 9 February 2009. The first indictment charged defendant with a single count of assault with a deadly weapon with intent to kill and inflicting serious injury on Mark Buffaloe. The second indictment charged defendant with a single count of felony conspiracy to

commit assault with a deadly weapon with intent to kill inflicting serious injury on Mark Buffaloe. Norman and Gillikin were charged for the same offenses and joined as codefendants for trial. Defendant's trial was held in Carteret County Superior Court during the 28 September 2009 Criminal Session. At the close of all the evidence, the trial court instructed the jury as agreed upon by the State and the defense during the charge conference. During deliberations, the jury requested further guidance on the definition of conspiracy, specifically asking: "When does a conspiracy stop and start? Does it transfer from one set of circumstances to a second?" Citing *State v. Christian*, 150 N.C. App. 77, 562 S.E.2d 568 (2002), the trial court, over defendant's objection, provided the following additional instruction to the jury:

> A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. In order to prove conspiracy, the State need not prove an express agreement. Evidence tending to show a mutual implied understanding will suffice. This evidence may be circumstantial or inferred from the defendant's behavior. The crime of conspiracy does not require an overt act for its completion. The agreement itself is the crime. Proof—proof of a conspiracy may also be, and generally is, established by a number of indefinite acts, each of which standing alone might have little weight, but taken collectively they point unerringly to the existence of conspiracy.

On 1 October 2009, the jury returned verdicts of guilty as to the lesser charges of assault with a deadly weapon inflicting serious injury and conspiracy to commit assault inflicting serious injury. The two charges were consolidated and the trial court imposed an active sentence of 24 to 38 months. Defendant timely entered notice of appeal.

II. Jurisdiction and Standard of Review

As defendant appeals from a final judgment, this Court has jurisdiction to hear the appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2009). We review 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). This Court, under a *de novo* standard of review, considers the matter anew and freely substitutes its own judgment for that of the trial court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008). A defendant's motion to dismiss should be denied if "there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defend-

ant's being the perpetrator of such offense." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). When ruling on a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, "making all reasonable inferences from the evidence in favor of the State." *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002). "The trial court in considering such motions is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *Id.*

III. Analysis

On appeal, defendant contends that the trial court erred by denying defendant's motions to dismiss the charge of conspiracy at the close of the State's evidence and at the close of all the evidence. Specifically, defendant alleges the State failed to present evidence of an agreement sufficient to support a conspiracy conviction as to the assault of Mark Buffaloe. According to defendant, the only conspiracy that existed, if any, was for the fight he, his friends, and his father intended to have with Joseph Salter, but which they abandoned. Defendant argues that the fight that actually occurred, wherein defendant, his friends, and his father assaulted Mark Buffaloe, was unplanned and not the result of a conspiracy. Defendant contends the jury improperly used his agreement to assault Joseph Salter to convict him of a conspiracy to assault Mark Buffaloe. We disagree.

The elements of felonious assault are satisfied when: (1) one person assaults another; (2) with a deadly weapon; (3) with the intent to kill; and (4) the assault results in serious injury to the victim. N.C. Gen. Stat. § 14-32(a) (2009). A criminal conspiracy is "an agreement, express or implied, between two or more persons, to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means." *State v. Gell*, 351 N.C. 192, 209, 524 S.E.2d 332, 343 (2000). Under the law of conspiracy, the agreement need not be express; " ' "[a] mutual, implied understanding is sufficient . . . ." ' " *State v. Lawrence*, 352 N.C. 1, 24-25, 530 S.E.2d 807, 822 (2000) (citations omitted). Direct proof of the charge is not essential and is rarely obtainable. *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933). A conspiracy

generally is "established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *Id.* Criminal conspiracy is complete upon "a meeting of the minds," *State v. Christopher*, 307 N.C. 645, 649, 300 S.E.2d 381, 383 (1983), when the parties to the conspiracy

> (1) give sufficient thought to the matter, however briefly or even impulsively, to be able mentally to appreciate or articulate the object of the conspiracy, the objective to be achieved or the act to be committed, and (2) whether informed by words or by gesture, understand that another person also achieves that conceptualization and agrees to cooperate in the achievement of that objective or the commission of the act.

15A C.J.S. *Conspiracy* § 114 (2002) (citing *Mitchell v. State*, 363 Md. 130, 767 A.2d 844 (2001)). "Ordinarily, the existence of a conspiracy is a jury question," and where reasonable minds could conclude that a meeting of the minds exists, the trial court does not err in denying a motion to dismiss for insufficiency of the evidence. *See State v. Larrimore*, 340 N.C. 119, 156, 456 S.E.2d 789, 809 (1995).

We find unpersuasive defendant's effort to imply the absence of a meeting of the minds by contrasting his well-orchestrated attempt to assault Joseph Salter with the abrupt nature of his assault of Mark Buffaloe. The spontaneity of the plan does not belie the conspiracy. Similarly, in the context of a unilateral contract, a meeting of the minds can exist when a party thereto accepts an offer by action not by words.

While we may agree with defendant the evidence tends to show that as the group left the Salters' residence these men had no intent to assault anyone else, concluding so does not preclude us from finding that a conspiracy arose after defendant arrived at the Buffaloes' residence. Defendant argues that the events leading up to the attack on Mark and Justin Buffaloe occurred in a matter of seconds and that there was no evidence of a common plan or purpose to support the charge of conspiracy. This argument is undermined by the testimony elicited at trial.

Several witnesses testified that defendant, defendant's father, Jonathan Norman, and Jonathan Gillikin set out to fight Joseph Salter and anyone who may have been with him. Ready for a fight, but told to leave the Salters' property, the group drove away, hollering and

creating a commotion as they approached the Buffaloes' home. Upon hearing Justin Buffaloe chastise the group for their rowdy behavior, defendant abruptly stopped the truck and defendant's father jumped out of the truck bed. Defendant's father charged toward Justin Buffaloe, and loudly asked if the Buffaloes "want[ed] a war." It was at that moment that defendant and his codefendants were heard to respond, "we'll give you a war," and "let's go" or "let's go get them." Defendant then exited the truck and joined the fight. Defendant briefly broke away from the fight, stated, "I'll finish him off," retrieved a wooden dowel rod from his truck and returned to strike Mark Buffaloe in the head.

We conclude these acts when viewed individually may not evidence a conspiracy; but when viewed collectively, evidence the men formed an implied agreement, however impulsively, to assault Mark Buffaloe. Thus, while defendant argues that the jury relied upon the wrong conspiracy—the Salter conspiracy—to convict him of a conspiracy to assault Mark Buffaloe, we believe it is defendant's reliance that is misplaced. The testimony was sufficient to permit the jury to conclude that defendant or one of his friends suggested they all join the fight and assault Mark Buffaloe. By his actions—exiting the truck and beating Mark Buffaloe—and by his words—"I'll finish him off"—the jury could conclude that defendant understood the objective of the conspiracy and agreed to it.

IV. Conclusion

We find there was substantial evidence before the trial court that defendant conspired to assault Mark Buffaloe with a deadly weapon with intent to kill inflicting serious injury. Accordingly, the trial court did not err in denying defendant's motions to dismiss.

No error.

Judges HUNTER, Robert C., and WALKER concur.

[208 N.C. App. 148 (2010)]

IN RE: THE MATTER OF ARDIES WILLIAMS, DECEASED

No. COA10-325

(Filed 16 November 2010)

Wills— intestate succession—legitimation—statutory requirements

The trial court did not err in affirming the clerk of court's order determining that neither petitioner was a legitimate heir to decedent's estate. Although the evidence tended to show that decedent informally acknowledged paternity of both petitioners, that acknowledgment did not fulfill the statutory requirements for legitimation under N.C.G.S. § 29-19(b)(1). Petitioners failed to show compliance with any of the four forms of legitimation necessary for illegitimate children to inherit from or through their putative fathers.

Appeal by petitioners from an order entered 2 November 2009 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 30 September 2010.

David Roy Blackwell, for petitioners-appellants.

Ellis & Winters LLP, by Matthew W. Sawchak and Chad T. Diamond, for respondent-appellee.

JACKSON, Judge.

Nancy Adams Watkins ("Watkins") and Brenda Adams Howard ("Howard") (collectively "petitioners") appeal the superior court's 2 November 2009 order affirming the 20 July 2009 order of the Clerk of Court that neither woman is a legitimate heir to the estate of Ardies Williams ("Williams"). For the reasons stated herein, we affirm.

On 24 May 2006, Williams died intestate. On 7 June 2006, Williams's wife, Audrey Williams ("Audrey"), applied for letters of administration and asserted that she was the only "person[] entitled to share in the decedent's estate." On 7 August 2006, Watkins, Howard, and Orlando Ardies Williams ("Orlando") filed "Objections to Filings By the Administrator[,]" contesting numerous statements made in Audrey's application, including her assertion that she alone was entitled to share in Williams's estate. The objections alleged, *inter alia*, that Williams was "survived by three children: Nancy Adams Watkins (daughter, age 55), . . . Brenda Adams Howard

(daughter, age 53), . . . and Orlando Ardies Williams (son, age 35) . . . . Each child of Ardies Williams visited him at his home prior to his death while Audrey Williams, the second wife of Ardies Williams, was present."

On 23 October 2006, a hearing was held before the Clerk of Court as to the issue of paternity or legitimacy for Watkins, Howard, and Orlando. Petitioners introduced as evidence a 17 November 1961 arrest warrant charging Williams with criminal non-support for Watkins and Howard. They also introduced eight receipts from the Domestic Relations Court for payments made to that court from Williams, which were payable to Portia Adams, petitioners' mother. In addition, petitioners produced a power-of-attorney signed by Williams that named Watkins as his attorney-in-fact and evidence of an insurance policy, also signed by Williams, that labeled Watkins as his daughter and named her as a beneficiary. Following the hearing, petitioners introduced an affidavit of former Superior Court Judge Robert L. Farmer ("Farmer"), who had been employed as solicitor of the Raleigh and Wake County Domestic Relations Court from 1 January 1963 until 2 June 1965. According to Farmer's affidavit, a finding that a defendant was the parent of the child at issue would have been necessary to a conviction for criminal non-support. Furthermore, Farmer asserted,

> To my knowledge, the Domestic Relations Court of Raleigh and Wake County would not accept the payments evidenced by the receipts noted above, unless a defendant was under a court order to pay such sums, including a judgment entered following a conviction for nonsupport of an illegitimate child in violation of G.S. 49-2.

The proceedings for Williams's estate were stayed on or about 3 November 2006, "pending discovery and submission of additional information on the question of paternity or legitimacy of the three alleged children of Ardies Williams[.]" On 20 July 2009, the Clerk of Court issued an order, finding and concluding, *inter alia*, that

> 1. The birth certificate for [Watkins] names Ardies Williams as her father, names Portia Adams as her mother and indicates that [Watkins] was born illegitimate.
>
> 2. The birth certificate for [Howard] omits the father's identity, names Portia Adams as her mother and indicates her mother was not married at the time of her birth[;] thus [Howard] was also born illegitimate.

3. There is no record of a marriage between Ardies Williams and Portia Adams which would legitimate [Watkins] and [Howard].

4. There are records from June 1956 and November 1961 regarding proceedings before the Domestic Relations Court for Wake County against Ardies Williams regarding his willful neglect and refusal to support and maintain his (2) minor illegitimate children, [Watkins] and [Howard]. These records include receipts for child support payments made by Ardies Williams to the Domestic Relations Court for the months March through August 1962. No other records from proceedings before the Domestic Relations Court regarding these persons have been produced by any party to this matter. There is no judicial decree in any of the records from the Domestic Relations Court that Ardies Williams is the father of [Watkins] and [Howard].

5. On or about April 8, 1992, Ardies Williams executed an Acknowledgment of Paternity on behalf of [Watkins] and [Howard]; said statement was made before a notary public[;] however, no party to this matter has produced evidence that this statement was filed during the lifetime of Ardies Williams with the clerk of superior court where he or either of his alleged daughters resided.

6. Based upon the records filed by the parties to this matter, the [c]ourt concludes that the paternity of Ardies Williams for [Watkins] and for [Howard] was not judicially determined by the Domestic Relations Court.

7. Based upon the records filed by the parties to the matter, the [c]ourt concludes that Ardies Williams did not legitimate [Watkins] or [Howard] during his lifetime.

8. This [c]ourt finds that neither [Watkins] [n]or [Howard] [is] entitled to inherit from the estate of Ardies Williams.

On 30 July 2009, petitioners appealed the Clerk's order to the superior court.[1] The superior court affirmed the order on 2 November 2009. Petitioners now appeal the 2 November 2009 order.

Petitioners' sole argument is that the superior court erred by failing to find that they are the daughters of Williams and, therefore, his lawful heirs. We disagree.

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1. The 20 July 2009 order from the Clerk of Court determined that Orlando was a legitimate son and heir of Williams, based upon the documented marriage between Williams and Orlando's mother. Therefore, Orlando did not appeal that order.

North Carolina General Statutes, section 1-301.3 governs "matters arising in the administration . . . of estates of decedents[.]" N.C. Gen. Stat. § 1-301.3(a) (2005). According to that section, the superior court reviews an order from the clerk to determine "(1) [w]hether the findings of fact are supported by the evidence[,] (2) [w]hether the conclusions of law are supported by the findings of facts[,] [and] (3) [w]hether the order or judgment is consistent with the conclusions of law and applicable law." N.C. Gen. Stat. § 1-301.3(d) (2005). Our review is the same as that of the superior court.[2] *In re Estate of Pate*, 119 N.C. App. 400, 403, 459 S.E.2d 1, 2-3 (citation omitted), *disc. rev. denied*, 341 N.C. 649, 462 S.E.2d 515 (1995).

We previously have held that

> [a]bsent a statute to the contrary, illegitimate children have no right to inherit from their putative fathers. There are several ways to legitimate children in North Carolina:
>
> 1) verified petition filed with the superior court by the putative father, 2) subsequent marriage of the parents, or 3) civil action to establish paternity. Illegitimate children may inherit from their putative fathers if they have been legitimated by one of the above or if paternity has been established in an action for criminal non-support.

Helms v. Young-Woodard, 104 N.C. App. 746, 749-50, 411 S.E.2d 184, 185 (1991) (internal citations omitted), *disc. rev. denied*, 331 N.C. 117, 414 S.E.2d 756 (1992). *See also* N.C. Gen. Stat. §§ 49-10 through -14 (2005).

North Carolina General Statutes, section 29-19(b) provides:

> For purposes of intestate succession, an illegitimate child shall be entitled to take by, through and from:
>
> > (1) Any person who has been *finally* adjudged to be the father of such child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16;

---

2. We note that petitioners did not include a standard of review in their brief to this Court, in violation of Rule 28(b)(4) of our Rules of Appellate Procedure. Similarly, petitioners' brief is single-spaced, also in violation of our Rules. *See* N.C.R. App. P. 28(j)(2)(A) (2009). Because these violations did not hamper our review of the matters before us, we do not issue sanctions against petitioners. Nonetheless, we caution future appellants to conform the format and substance of their briefs to our Rules.

> (2) Any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides.

N.C. Gen. Stat. § 29-19(b) (2005) (emphasis added). We note that, in 1977, the General Assembly substituted the phrase "finally adjudged" for "judicially determined" in subsection (b)(1) and that such language was effective to estates of decedents dying on or after 1 September 1977. 1977 N.C. Sess. Laws 757 § 3.

An illegitimate child's right to inherit from her putative father is established only via strict compliance with one of the statutory methods of legitimation. *See Hayes v. Dixon*, 83 N.C. App. 52, 54-55, 348 S.E.2d 609, 610 (1986), *disc. rev. denied*, 319 N.C. 224, 353 S.E.2d 402, *cert. denied*, 484 U.S. 824, 98 L. Ed. 2d 50 (1987). Furthermore, we have held that a putative father's acknowledgment of paternity before a notary public and execution of an "Affidavit Of Parentage For Child Born Out Of Wedlock" did not comply with the statutory provisions when such acknowledgment was never filed. *In re Estate of Morris*, 123 N.C. App. 264, 266-67, 472 S.E.2d 786, 787 (1996).

In the case *sub judice*, petitioners contend that "the arrest warrant charging Ardies Williams with the nonsupport of his illegitimate children [Watkins] and [Howard] and the subsequent receipts showing payments [through] the court to [petitioners' mother] indicate that paternity was judicially established as required by law." (Original in all caps). Of the four legitimation methods available in North Carolina—a verified petition filed with the court, the marriage of the mother and putative father, a civil action to establish paternity, or an action for criminal non-support—*see Helms*, *supra*, petitioners address only the fourth option in their brief. Although the evidence tends to show that Williams informally acknowledged paternity of both Watkins and Howard, that acknowledgment does not fulfill the statutory requirements for legitimation.

Petitioners, in an effort to prove that Watkins and Howard had been legitimated via an action for criminal non-support, presented three pieces of indirect evidence: (1) a 17 November 1961 arrest warrant for Williams, which alleged criminal non-support of the two minor children, Watkins and Howard; (2) eight receipts from the

Domestic Relations Court for payments Williams made to the court between March and August 1962, all of which were payable to petitioners' mother; and (3) Farmer's affidavit, which indicated that, to his knowledge, the Domestic Relations Court would not have accepted payments in the absence of a court order requiring those payments. From this, petitioners attempt to draw the inference that, in late 1961 or early 1962, Williams had been found guilty of criminal non-support of Watkins and Howard, which necessarily would have required a finding of Williams's paternity. Whether or not this inference is reasonable, our statutes mandate that paternity be *finally* adjudicated in order for an illegitimate child to inherit from or through her father. *See* N.C. Gen. Stat. § 29-19(b)(1). Considering that our legislature specifically changed the language of North Carolina General Statutes, section 29-19(b)(1) to require a *final* judgment, *see* 1997 N.C. Sess. Laws 757 § 3, it is clear that circumstantial evidence and inferences cannot satisfy the statutory mandate for legitimation.

Petitioners did not present the Clerk of Court with a judicial decree establishing Williams's paternity, and therefore, the Clerk did not err in finding that petitioners had failed to show compliance with any of the four forms of legitimation necessary for illegitimate children to inherit from or through their putative fathers. Accordingly, the lack of evidence demonstrating a final judgment as to Williams's paternity necessitated the Clerk of Court's conclusion that neither Watkins nor Howard can inherit from Williams's estate.

For the foregoing reasons, we affirm the superior court's order affirming the Clerk of Court's determination that neither Watkins nor Howard properly was legitimated by Williams.

Affirmed.

Judges ELMORE and THIGPEN concur.

[208 N.C. App. 154 (2010)]

IN THE MATTER OF: D.J.E.L.

No. COA10-685

(Filed 16 November 2010)

Termination of Parental Rights—grounds—lacked ability or willingness to establish safe home

The trial court did not abuse its discretion by terminating respondent mother's parental rights based on the best interests of the minor child. Clear and convincing evidence was presented to support the findings of fact under N.C.G.S. § 7B-1111(a)(9) that respondent lacked the ability or willingness to establish a safe home.

Appeal by respondent-mother from order entered on or about 8 April 2010 by Judge H. Thomas Jarrell, Jr. in District Court, Guilford County. Heard in the Court of Appeals on 18 October 2010.

Mercedes O. Chut, for Guilford County Department of Social Services, appellee.

Smith, James, Rowlett & Cohen, L.L.P., by Margaret Rowlett, for appellee guardian ad litem.

Richard Croutharmel, for respondent-mother.

STROUD, Judge.

Respondent-mother appeals from an order terminating her parental rights to Donnie.[1] For the following reasons, we affirm.

I. Background

On or about 16 April 2008, the trial court filed an order determining Donnie was a neglected and dependent juvenile. On or about 8 April 2010, the trial court terminated respondent-mother's parental rights based on the following findings of fact: When Donnie first came into the custody of the Guilford County Department of Social Services ("DSS") respondent-mother claimed that Donnie, then age six, "had tried [to] kill her with his spirit by causing a car in oncoming traffic to swerve into her lane" of travel. Respondent-mother also accused Donnie of "trying to poison her" and "speaking to her tele-

1. A pseudonym will be used to protect the identity of the child.

pathically[,] . . . calling her names via his mind to hers." Respondent-mother's accusations caused Donnie emotional problems. Respondent-mother had a history of violent relationships and previously had her parental rights terminated to another child. The trial court concluded that three grounds existed to terminate respondent-mother's parental rights: (1) neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (2) dependency pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), and (3) respondent-mother's "parental rights . . . with respect to another child have been terminated . . . and she lacks the ability or willingness to establish a safe home" pursuant to N.C. Gen. Stat. § 7B-1111(a)(9). The trial court also concluded that it was in the best interest of Donnie that respondent-mother's parental rights be terminated. The trial court accordingly ordered termination of respondent-mother's parental rights to Donnie. Respondent-mother appeals.

II. Standard of Review

> A termination of parental rights proceeding consists of two phases. In the adjudicatory stage, the petitioner has the burden of establishing by clear and convincing evidence that at least one of the statutory grounds listed in N.C. Gen. Stat. § 7B-1111 exists. We review whether the trial court's findings of fact are supported by clear and convincing evidence and whether the findings of fact support the conclusions of law.
>
> If the trial court determines that grounds for termination exist, it proceeds to the dispositional stage, and must consider whether terminating parental rights is in the best interests of the child. The court is required to issue an order terminating the parental rights unless it finds that the best interests of the child indicate that the family should not be dissolved. While there is no requirement at this dispositional stage for the court to make findings of fact upon the issuance of an order to terminate parental rights, such findings and conclusions must be made upon any determination that the best interests of the child require that rights not be terminated. We review the trial court's decision to terminate parental rights for abuse of discretion.

In re Anderson, 151 N.C. App. 94, 97-98, 564 S.E.2d 599, 602 (2002) (citation and quotation marks omitted).

III. N.C. Gen. Stat. § 7B-1111(a)(9)

Respondent-mother contends the trial court erred by concluding that any grounds existed for termination of her parental rights. Respondent-mother argues that her parental rights should not have been terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(9) which provides that "[t]he court may terminate the parental rights upon a finding [that] . . . [t]he parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction *and* the parent lacks the ability or willingness to establish a safe home." N.C. Gen. Stat. § 7B-1111(a)(9) (2009) (emphasis added).

"The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned." N.C.R. App. P. 28(a). Respondent-mother failed to challenge finding of fact 37 which provides that "[t]he mother's parental rights have been involuntarily terminated by a court of competent jurisdiction as to another child." Thus, the only issue before this Court is whether there was clear and convincing evidence presented to support the findings of fact upon which the trial court based its conclusion that respondent-mother "lacks the ability or willingness to establish a safe home." N.C. Gen. Stat. § 7B-1111(a)(9). The trial court made findings of fact regarding respondent-mother's history with domestic violence, and respondent-mother challenges these findings which include:

33. The mother has had a pattern of violent relationships ever since the child came into custody in spite of attending sessions designed to address issues of domestic violence.

34. The mother had a violent altercation with her step-father after the juvenile came into custody.

35. The mother also had a woman living with her who was violent and causing problems for some time before leaving the mother's residence.

Respondent-mother claims that findings of fact 33 through 35 are not supported by competent evidence. However, respondent-mother herself testified:

> Q. Okay. You also testified that you were having problems with D[onnie]'s father, C[arl?]
>
> A. Yes.

Q. Okay. Did you—did you file assault charges against him?

A. Yes, because he, um, tried to stab me with a knife at one incident.

Q. Did you take out a 50B against him?

A. Yeah. I took out—year, I took out a 50B.

. . . .

Q. . . . Did you go to domestic violence classes?

A. Yes. I went to Crossroad classes.

. . . .

Q. Now, regarding–regarding the domestic violence program that you attended and you've already talked about, did you have a, a woman living with you in the past couple years that was violent—had a violence problem?

A. Not but one.

Q. Was there a woman living in your home?

A. You mean–

Q. Have you had any female roommates since D[onnie] came into custody?

A. Yeah.

Q. And was there one that with whom violence was a problem that you had to finally get rid of because of that?

A. Yeah. Yeah. I had to get rid of her because she was tripping.

Q. Okay. And did you have any kind of violent altercation with your stepfather in the last couple of years?

A. Yeah. My stepdad and my mom's second husband, yeah.

Q. Okay. Did you have a 50B out of [sic] C[arl] back when D[onnie] was born?

A. Yes.

Q. And you returned—but you got back together with him after that?

A. Yes.

Furthermore, respondent-mother's therapist, Mr. Robert Goodman, testified that respondent-mother has "consistently been in domestic violence situations. She's been in situations where I—I call her judgment into question about who she has living with her. And my concern is really for D[onnie] that something—something really bad at some point would happen to D[onnie.]" Mr. Goodman was specifically asked, "So, do you think [respondent-mother] has the ability to establish a safe home for D[onnie]?" to which he responded, "I—I don't believe she does, no, not—not in my opinion." Also, Ms. Sandra Hurley, a foster care social worker with DSS, testified that she was not certain Donnie would be safe if respondent-mother was not on her medication and that respondent-mother "has a history of inviting people to stay in her home that often have problems and she has a history of getting into physical altercations with people in the home or relatives." We thus conclude that there was clear and convincing evidence to support the trial court's findings of fact 33 through 35 regarding domestic violence. We further conclude that findings of fact 33 through 35 and 37 support the trial court's conclusion of law that respondent-mother's parental rights could be terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(9). *See In re R.P.C.*, 185 N.C. App. 159, 647 S.E.2d 688 (2007) (unpublished). This argument is overruled.

Respondent has raised arguments as to the other grounds for termination of her parental rights found by the trial court; however, because only one of the grounds for termination under N.C. Gen. Stat. § 7B-1111 is needed to support the order for termination of parental rights, we need not consider any arguments related to other grounds found by the trial court. *See In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005) (citation omitted), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

IV. Best Interest

Respondent-mother also contends that the trial court abused its discretion in terminating her parental rights, particularly by inappropriately relying on the testimony of Donnie's therapist, Ms. Heather Mask. However, "it is th[e] judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984).

> (a) After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether

terminating the parent's rights is in the juvenile's best interest. In making this determination, the court shall consider the following:

(1) The age of the juvenile.

(2) The likelihood of adoption of the juvenile.

(3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration. N.C. Gen. Stat. § 7B-1110(a) (2009).

Here, the trial court found that Donnie was eight years old; adoption was very likely as he was living with a foster family that wanted to adopt him as soon as legally possible; termination of parental rights would accomplish the permanent plan of adoption; although Donnie had a bond with respondent-mother, he had indicated to his therapist that he did not wish to return to respondent-mother's custody; and Donnie had bonded with his current foster family, which had been meeting his needs and providing the love and support expected of a family. We conclude that the trial court did not abuse its discretion in determining it was in the best interest of Donnie that respondent-mother's parental rights be terminated. This argument is overruled.

V. Conclusion

We affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

Judges HUNTER, Robert C. and HUNTER, JR., Robert N. concur.

IN RE T.R.M.

[208 N.C. App. 160 (2010)]

IN THE MATTER OF: T.R.M.

No. COA10-728

(Filed 16 November 2010)

1. Termination of Parental Rights— failure to verify petition—no jurisdiction

The trial court's order terminating respondent mother's parental rights was vacated because the petition was not verified as required by N.C.G.S. § 7B-1104. Thus, the trial court never obtained jurisdiction over the action, and the termination order was void.

2. Child Abuse, Dependency, and Neglect— permanency planning order—cessation of reunification efforts—sufficiency of findings of fact

The trial court did not err in its permanency planning order by concluding that further reunification efforts between respondent mother and the minor child were not required on the grounds that it would be inconsistent with the minor child's health, safety, and need for a safe, permanent home within a reasonable period of time.

Appeal by respondent-mother from orders entered 12 June 2009 by Judge Jeanie R. Houston and 5 March 2010 by Judge David V. Byrd in District Court, Alleghany County. Heard in the Court of Appeals 18 October 2010.

James N. Freeman, Jr., for petitioner Alleghany County Department of Social Services.

Leslie C. Rawls, for appellant-mother.

Lucy Tatum Austin, for guardian ad litem.

STROUD, Judge.

Respondent-mother appeals from the trial court's permanency planning order and termination of parental rights order. For the following reasons, we affirm the permanency planning order and vacate the termination of parental rights order.

I. Background

On 12 February 2008, the Alleghany County Department of Social Services ("DSS") filed a juvenile petition alleging that Tom[1] was a neglected juvenile. On 13 February 2008, the trial court entered a non-secure custody order giving DSS custody of Tom. On 20 May 2008, the trial court entered an order adjudicating Tom neglected, based on the consent of respondent-mother and the father. On 12 June 2009, the trial court entered a permanency planning order which ceased reunification efforts with respondent-mother and changed the permanent plan for Tom to adoption. On 17 July 2009, DSS filed a petition for termination of respondent-mother's parental rights. On 5 March 2010, the trial court entered an order terminating respondent-mother's parental rights. Respondent-mother appeals from the permanency planning order and the termination of parental rights order.

II. Termination of Parental Rights Order

[1] Respondent-mother first contends that "[t]he trial court lacked subject matter jurisdiction over the termination proceedings because the unverified Petition did not comply with N.C. Gen. Stat. § 7B-1104[,]" which requires a petitioner to verify a petition to terminate parental rights. Because the petition was not verified, DSS and the guardian *ad litem* concede that the trial court lacked jurisdiction over the termination proceedings. Pursuant to N.C. Gen. Stat. § 7B-1104, "[t]he petition . . . pursuant to G.S. 7B-1102 [to terminate parental rights], shall be verified by the petitioner[.]" N.C. Gen. Stat. § 7B-1104 (2009). "[A] violation of the verification requirement of N.C.G.S. § 7B-1104 has been held to be a jurisdictional defect *per se*." *In re T.M.H.*, 186 N.C. App. 451, 454, 652 S.E.2d 1, 2, *disc. review denied*, 362 N.C. 87, 657 S.E.2d 31 (2007).

Here, DSS filed a petition to terminate respondent-mother's parental rights; however, the petition was not verified, as required by N.C. Gen. Stat. § 7B-1104. Therefore, the trial court never obtained jurisdiction over the termination action, and the trial court's termination of parental rights order is void; accordingly, we must vacate the trial court's order terminating parental rights. *See In re C.M.H.*, 187 N.C. App. 807, 809, 653 S.E.2d 929, 930 (2007). As we are vacating the order terminating parental rights we need not address respondent-mother's remaining challenges regarding this order.

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1. A pseudonym will be used to protect the identity of the child.

III. Permanency Planning Order

[2] Respondent-mother also appeals from the trial court's permanency planning order because it ceased reunification efforts. Pursuant to N.C. Gen. Stat. § 7B-507(b), the trial court may cease reunification efforts with a parent under specified circumstances:

> In any order placing a juvenile in the custody or placement responsibility of a county department of social services, . . . the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:
>
> (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]

N.C. Gen. Stat. § 7B-507(b)(1) (2009). A trial court may "order the cessation of reunification efforts when it finds facts based upon credible evidence presented at the hearing that support its conclusion of law to cease reunification efforts." *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003).

> This Court's review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law. If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal. The trial court's conclusions of law are reviewable *de novo* on appeal.

In re P.O., ––– N.C. App. –––, –––, 698 S.E.2d 525, 530 (2010) (citation and quotation marks omitted).

Here, the trial court made numerous findings of fact before relieving DSS of further reunification efforts and changing the permanent plan to adoption. The following findings support the trial court's determination that a return to respondent-mother's home was contrary to Tom's health, safety, and need for a permanent home:

> [T]om was born June 26, 2002 and is currently six and one-half years old. This Juvenile has experienced much trauma during his brief life highlighted by being a witness to numerous episodes of domestic abuse between his parents and being the victim of a sexual assault by his uncle in November of 2007. Even prior to the sexual abuse episode T[om] displayed bizarre behaviors at school

such as pulling up his teachers' shirts, pulling his pants down and fondling himself, and playing with his own urine. In December 2007 he appeared with bruises and complained of being beaten by his mother. In February 2008 he appeared with additional bruising and it became clear that he was not being protected from his sexual abuser. . . . Although the mother has been generally compliant and concerned about her son's welfare something in the relationship between the Juvenile and his mother produces the bizarre behaviors. . . . Immediately after each visit with his mother, T[om] is aggressive with other children to the point of hitting, choking and spitting; he almost always returns from visits with soiled underwear either from urine or feces; [h]e attempts to make himself vomit and is hard to control or direct in school including cursing and making statements that are nonsensical, almost hallucinatory. The foster mother . . . testified from an exhaustive daily journal that documented T[om]'s bizarre behaviors that occurred contemporaneously with visits with his mother. . . . Every time T[om] would make progress in his behavior another visit with his mother would set him back. The foster mother tried to help the biological mother by counseling with her about T[om]'s bathroom procedures, allowed her to return Tom home early from several visits when she could not handle him. . . . On October 2, 2008 he returned from a maternal visit with a swollen lip complaining that his mother had "flicked" him on the lip upon misbehaving. As a result of these behaviors and incidents visitations were ceased after October 2008. Since the termination of visits with his mother T[om]'s behavior has slowly, yet consistently and continuously improved to where he no longer wets or defecates himself, gets along well with his classmates and teachers, is succeeding in his school work, uses appropriate language and treats his foster family with love and respect. Overall, in the time since his mother's visits were ceased T[om] has made significant changes for the better. . . .

Prior to being in foster care from August 2007 until February 2008 T[om] had 12 absences and 15 tardies. Since being in foster care he has had four absences and one tardy. He does not like to miss school and is no longer fearful or scared about school. All teachers and school personnel corroborated the foster mother's testimony that T[om]'s bizarre behaviors coincided with maternal visits and that the cessation of these behaviors also coincided with the cessation of maternal visits. Melinda Bowers-Dalton noted

> that school authorities had offered T[om]'s mother therapy for his speech impediment and other developmental delays but that she had refused their help. As a result although he has made tremendous progress T[om] remains one to one and one half years behind his peers. In summary, although T[om]'s mother has gone through the motions of complying with the DSS service agreements including parenting classes, it is clear that she does not possess, nor can she learn to possess, the skills which those classes and other services are designed to teach, particularly regarding a child with the particular disabilities evidenced by T[om], and that reunification of T[om] with either of his parents is contrary to his best interest.

We conclude that the foregoing findings of fact support the trial court's conclusion that further reunification efforts were not required on the ground that reunification would be inconsistent with Tom's "health, safety, and need for a safe, permanent home within a reasonable period of time[.]" N.C. Gen. Stat. § 7B-507(b)(1).

Respondent-mother argues that the findings are not supported by competent evidence, particularly the findings which relate Tom's improvement to cessation of visits with respondent-mother. Respondent-mother's brief argues that "two factors suggest his behavior changes were not related to the visits. First, T[om]'s medication doses changed at the same time and his behavior gradually improved after the medication change. Secondly, T[om]'s behavior had changed in response to medication changes in the past[.]" However, the trial court considered all of the evidence before it, which includes evidence regarding Tom's medication and behavior changes; upon weighing all of the evidence the trial court found that Tom's behavioral changes were related to cessation of visits with respondent-mother. *See In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) ("[I]t is [the trial] judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom."). Our review of the transcript reveals that the findings of fact are supported by competent evidence in the form of testimony by Tom's foster mother, a social worker, two teachers, an occupational therapist, and a one-on-one classroom helper. Accordingly, we reject respondent-mother's argument and conclude that the trial court's findings of fact were supported by competent evidence.

IV. Conclusion

For the foregoing reasons, we vacate the order terminating respondent-mother's parental rights and affirm the permanency planning order.

VACATED IN PART; AFFIRMED IN PART.

Judges HUNTER, Robert C. and HUNTER, JR., Robert N., concur.

STATE OF NORTH CAROLINA ON BEHALF OF ANGELA R. BENFORD, PLAINTIFF v. LARRY D. BRYANT, DEFENDANT

No. COA10-433

(Filed 16 November 2010)

Child Custody and Support— Uniform Interstate Family Support Act—child support arrears—vested support payments

The trial court's order directing defendant to pay $2,966.00 in child support arrears under a Michigan judgment did not comply with the Uniform Interstate Family Support Act. As $4,860.00 in monthly support payments had accrued under the Michigan judgment and vested under Michigan law, the trial court was not free, consistent with full faith and credit, to find any other figure as defendant's debt under the Michigan judgment.

Appeal by plaintiff from order entered 30 November 2009 by Judge Jerry F. Waddell in Carteret County District Court. Heard in the Court of Appeals 27 October 2010.

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

No brief filed on behalf of defendant-appellee.

HUNTER, Robert C., Judge.

The State of North Carolina, on behalf of Angela R. Benford, appeals from the trial court's order directing defendant Larry D. Bryant to pay $2,916.00 in child support arrears. Because we agree with the State's contention that the trial court impermissibly modified

Mr. Bryant's child support obligation retroactively, we reverse the court's order and remand for further proceedings.

Facts

While living in Michigan, Ms. Benford (then Bryant) and Mr. Bryant separated in June 2004. The Michigan trial court entered a "Judgment of Divorce" on 4 January 2006 (the "Michigan judgment"), which, in addition to granting the parties a divorce, awarded custody of the couple's five children to Ms. Benford and ordered Mr. Bryant to pay child support in the amount of $486.00 per month. In an order entered 11 May 2007, the Michigan trial court awarded Mr. Bryant "parenting time" with his five children.

Although it is unclear when Ms. Benford and the children moved to North Carolina, she registered the Michigan judgment in Carteret County on 24 September 2007. After holding a hearing on 17 December 2007, the Carteret County District Court entered an order on 1 April 2008 confirming the registration of the Michigan judgment. The Carteret County Child Support Enforcement Agency moved to intervene in the matter, alleging that "since the entry of the [order confirming the registration of the Michigan judgment,] [Mr. Bryant] has become delinquent in his child support obligation and [Ms. Benford] is now in need of establishing arrears and setting a payment plan on the same[.]" After conducting a hearing on the State's motion and allegations, the trial court entered an order on 5 June 2008, permitting the State to intervene and ordering Mr. Bryant to pay $486.00 a month in child support beginning June 2008. The trial court's order, however, did not resolve "[t]he issue of arrears" and left the "issue [to] be recalendered for such determination in the future."

The matter was continued until 26 March 2009 when the trial court held an evidentiary hearing on "the issue of child support arrearages." In an order entered 30 November 2009, the trial court found that the Michigan judgment, which set Mr. Bryant's child support payments at $486.00 per month, "was duly registered in North Carolina for enforcement and/or modification"; that "[Mr. Bryant] ha[d] not filed any motion to modify the Michigan child support order"; that "[Mr. Bryant] testified he made no payments from September, 2007 until June, 2008, a period of ten (10) months or a total of $4,860.00"; and that "[Ms. Benford] testified she received no child support whatsoever for the ten month period 9/07-6/08." In the decretal portion of its order, the trial court set Mr. Bryant's arrearages at $2,916.00 and ordered him to "pay said sum by adding an additional

$100.00 per month to his existing child support obligation of $486.00, beginning with the April 2009 child support payment and continuing each month thereafter until fully paid." The State timely appealed to this Court.

Discussion

In its only contention on appeal, the State argues that the trial court's order determining the amount of child support arrears owed by Mr. Bryant under the Michigan judgment "wholly contradicts the dictates" of the Uniform Interstate Family Support Act ("UIFSA"), N.C. Gen. Stat. §§ 52C-1-100 to -9-902 (2009). Whether the trial court complied with the procedures set out in UIFSA is a question of law reviewed de novo on appeal. *State ex rel. Johnson v. Eason*, ––– N.C. App. –––, –––, 679 S.E.2d 151, 152 (2009); *State ex rel. Lively v. Berry*, 187 N.C. App. 459, 462, 653 S.E.2d 192, 194 (2007).

UIFSA, enacted in North Carolina in 1995, was "promulgated and intended to be used as [a] procedural mechanism[] for the establishment, modification, and enforcement of child and spousal support obligations." *Welsher v. Rager*, 127 N.C. App. 521, 524, 491 S.E.2d 661, 663 (1997); accord *New Hanover County ex rel. Mannthey v. Kilbourne*, 157 N.C. App. 239, 243, 578 S.E.2d 610, 613-14 (2003) ("Enacted by states as a mechanism to reduce the multiple, conflicting child support orders existing in numerous states, UIFSA creates a structure designed to provide for only one controlling support order at a time[.]"). UIFSA establishes a "one order system" in which "all states adopting UIFSA are required to recognize and enforce the same obligation consistently." *Welsher*, 127 N.C. App. at 525, 491 S.E.2d at 663. Accordingly, once a foreign support order is registered and confirmed by the courts of the responding state, as the Michigan judgment was here, "enforcement is compulsory." *Id.* at 526, 491 S.E.2d at 664; N.C. Gen. Stat. §§ 52C-6-603 and -6-607.

In enforcing a registered foreign support order, UIFSA authorizes the trial court to "[d]etermine the amount of any arrears, and specify a method of payment[.]" N.C. Gen. Stat. § 52C-3-305(b)(4); *accord State ex rel. George v. Bray*, 130 N.C. App. 552, 560, 503 S.E.2d 686, 692 (1998) ("Under G.S. 52C-3-305, the trial court in the responding state is authorized to determine the amount of arrears and the method of payment."). In calculating the amount of arrears, "[t]he court must . . . determine what arrearages have vested." *Kilbourne*, 157 N.C. App. at 245, 578 S.E.2d at 614. If the law of the state issuing the support order "provide[s] that the past-due child support amounts

are vested[,]" then the courts of the state in which the foreign support order is registered are required to "give full faith and credit to the other state's order and enforce the past-due support obligation." *Id.*, 578 S.E.2d at 615. *See Twaddell v. Anderson*, 136 N.C. App. 56, 66-67, 523 S.E.2d 710, 718 (1999) (holding full faith and credit clause requires North Carolina courts to enforce arrearages accruing under another state's child support order); *Transylvania County DSS v. Connolly*, 115 N.C. App. 34, 37, 443 S.E.2d 892, 894 (explaining that Georgia child support order was "entitled to full faith and credit to the extent it represents past due child support payments which are vested."), *disc. review denied*, 337 N.C. 806, 449 S.E.2d 758 (1994); *Fleming v. Fleming*, 49 N.C. App. 345, 349-50, 271 S.E.2d 584, 587 (1980) (concluding that "[a] decree for the future payment of . . . child support is, as to installments past due and unpaid, within the protection of the full faith and credit clause of the Constitution unless by the law of the state in which the decree was rendered" the amounts are not considered vested).

Michigan law provides that payments due under a support order vest when they accrue: "[A] support order that is part of a judgment or is an order in a domestic relations matter is a judgment on and after the date the support amount is due . . . , with the full force, effect, and attributes of a judgment of this state, and is not, on and after the date it is due, subject to retroactive modification." Mich. Comp. Laws § 552.603(2) (2009); *see also Fisher v. Fisher*, 276 Mich. App. 424, 428-29, 741 N.W.2d 68, 71 (2007) (explaining that "ramification[]" of Mich. Comp. Laws § 552.603 "is that a court may not retroactively modify an accumulated child support arrearage"). Consequently, the Michigan judgment at issue in this case is "entitled to full faith and credit and [is] conclusive as to amounts past due." *Fleming*, 49 N.C. App. at 350, 271 S.E.2d at 587.

As reflected in the trial court's findings, the Michigan judgment set Mr. Bryant's child support payments at $486.00 per month. Ms. Benford testified that she did not receive any payments from Mr. Bryant from September 2007 through June 2008. Mr. Bryant also testified that he did not make any payments during this 10-month period. The court found, based on the parties' testimony, that Mr. Bryant had failed to make 10 monthly payments, totaling $4,860.00. "[T]r[ying] to be . . . fair" to both parties, however, the court ordered Mr. Bryant to pay only the amount due for the six-month period starting after the registration of the Michigan judgment was confirmed in December 2007 until June 2008, totaling $2,916.00. This the court could not do.

As $4,860.00 in monthly support payments had accrued under the Michigan judgment and vested under Michigan law, "[t]he trial [court] was not free, consistent with full faith and credit, to find any other figure as [Mr. Bryant]'s debt under the [Michigan judgment]." *Id.* at 351, 271 S.E.2d at 587. *See also N.C. Dep't of Health & Human Services ex rel. Jones v. Jones*, 175 N.C. App. 158, 163, 623 S.E.2d 272, 276 (2005) ("Since the child support due under the 1994 Florida order vested when it became due, this State must give full faith and credit to the Florida order and enforce the past-due child support obligation."); *Connolly*, 115 N.C. App. at 38, 443 S.E.2d at 894 (holding that where child support arrearages could not be modified retroactively under Georgia law, "the trial court erred in modifying the Georgia support order by forgiving defendant for the accrued arrearages"). Accordingly, we reverse the trial court's order and remand for further proceedings consistent with this decision.

Reversed and remanded.

Judges CALABRIA and GEER concur.

BARRY THOMAS BETTS, PLAINTIFF v. REGINA ANN JONES, JOSEPH L. GLOVER, ENTERPRISE LEASING COMPANY SE, INC. AND LOWES FOODS, INC., DEFENDANTS

No. COA09-1572

(Filed 16 November 2010)

Premises Liability— store's duty to protect customers from third parties—acts of fleeing shoplifter—not foreseeable

The trial court correctly granted summary judgment for defendant Lowe's Foods on a negligence claim by a bystander in the parking lot who was injured when Regina Jones fled after being discovered shoplifting. It was not foreseeable that Jones would exit the store after the loss prevention officer revealed his identity, enter a vehicle parked 20 feet from the entrance, speed through the parking lot, turn left down the traffic aisle where plaintiff was standing, and strike plaintiff.

Appeal by plaintiff from order entered 4 June 2009 by Judge Henry E. Frye, Jr. in Randolph County Superior Court. Heard in the Court of Appeals 9 June 2010.

Rodney C. Mason, for plaintiff-appellant.

Smith Moore Leatherwood LLP, by Richard A. Coughlin and Elizabeth Brooks Scherer, and Burton & Sue LLP, by Gary K. Sue, for defendant-appellee Lowe's Foods, Inc.

STEELMAN, Judge.

Lowe's Foods employees had the right to apprehend an observed shoplifter. Plaintiff failed to show that Lowe's Foods employees took any additional action to increase the likelihood of harm to plaintiff in apprehending the shoplifter. The trial court properly granted summary judgment in favor of Lowe's Foods, Inc.

I. Factual and Procedural Background

On 1 October 2005, Lionel Hensley (Hensley) was working as a loss prevention officer at the Lowe's Foods store located at 737 West Dixie Drive in Asheboro, North Carolina. Hensley observed two women enter the store and proceed immediately to aisle 2 of the store. Hensley observed the women conceal 9 cans of Enfamil and 8 cans of Similac, both being high-dollar powdered baby formula products, in their pocketbooks. The two women, Regina Jones (Regina) and Adrian Jones (Adrian), then went to the end of aisle 2 and proceeded back down aisle 1, towards the store's entrance/exit. Hensley positioned himself at the end of aisle 1 between the two women and the exit. When they were approximately five feet from him, he displayed his badge and identified himself as being with loss prevention. Both women immediately moved towards Hensley in an aggressive manner, discarding their pocketbooks.

Regina struck Hensley on his left forearm, and Hensley tried to grab her. Regina broke away. Hensley tried to grab her again, and Regina punched him in the chest. Regina was pepper sprayed by Hensley, then broke free, and ran out of the store. Hensley did not pursue Regina or see her again. Hensley had called for assistance, and observed one of the baggers struggling with Adrian. Hensley went to assist the bagger. The struggle with Adrian moved from the store onto the sidewalk, where she broke free from Hensley. Eventually, Adrian was subdued in the parking lot, handcuffed, and turned over to police. During the initial struggle with Adrian, Hensley heard a sound and saw the flash of a vehicle leaving the parking lot.

Barry Thomas Betts (plaintiff) had come to the Lowe's Foods store on West Dixie Drive with his girlfriend to buy popsicles. They

entered the store, got the popsicles, and plaintiff walked out of the store to the vehicle while his girlfriend paid for the items. On the way into the store he had observed a white Jeep parked in the fire lane about 20 feet from the store entrance. He was 40-45 feet from the store entrance when he heard a commotion. Plaintiff turned to see what was happening, and was suddenly struck by the white Jeep being operated by Regina. As a result of the impact, he suffered serious personal injuries.

On 15 May 2008, plaintiff filed this action against Regina, Joseph Glover (lessee of the Jeep), Enterprise Leasing Company, SE Inc. (lessor of the Jeep), and Lowe's Foods, Inc. Plaintiff alleged that Lowe's Foods employees were negligent in attempting to detain Regina, and that this caused Regina to flee in the white Jeep, which struck plaintiff and caused his injuries.

On 8 January 2009, Lowe's Foods, Inc. filed a motion for summary judgment. On 4 June 2009, the trial court granted Lowe's Foods, Inc.'s motion and dismissed plaintiff's claims against Lowe's Foods, Inc. with prejudice.

Plaintiff appeals.

II. Standard of Review

The standard of review on a trial court's ruling on a motion for summary judgment is *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). The entry of summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). "The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense . . . ." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citation omitted).

III. Negligence of Lowe's Foods, Inc.

In his only argument, plaintiff contends that the trial court erred in granting summary judgment in favor of Lowe's Foods, Inc. because genuine issues of material fact existed as to whether its employees were negligent in the exercise of its lawful duty to apprehend Regina in a safe and reasonable manner. We disagree.

In order for plaintiff to establish a valid claim for negligence, he must show: "(1) that there has been a failure to exercise proper care in the performance of some legal duty which defendant owed to plaintiff under the circumstances in which they were placed; and (2) that such negligent breach of duty was a proximate cause of the injury." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citation omitted). The general duty imposed upon a business owner is "not to insure the safety of his customers, but to exercise ordinary care to maintain his premises in such a condition that they may be used safely by his invitees in the manner for which they were designed and intended." *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 638, 281 S.E.2d 36, 38 (1981) (citations omitted).[1] This Court has held that "[a] store owner's duty to invitees to maintain the premises in a reasonably safe condition extends to the manner in which the store owner deals with the criminal acts of third persons." *Jones v. Lyon Stores*, 82 N.C. App. 438, 440, 346 S.E.2d 303, 304, *disc. review denied*, 318 N.C. 506, 349 S.E.2d 861 (1986). Our Supreme Court has held that "[o]rdinarily the store owner is not liable for injuries to his invitees which result from the intentional, criminal acts of third persons. It is usually held that such acts cannot be reasonably foreseen by the owner, and therefore constitute an independent, intervening cause absolving the owner of liability." *Foster*, 303 N.C. at 638, 281 S.E.2d at 38 (citations omitted). Foreseeability is the test for determining a store owner's duty to safeguard his customers from the acts of third persons. *Id.* at 640, 281 S.E.2d at 39.

In the instant case, plaintiff was not injured as a result of a criminal act, but rather was injured by conduct incident to criminal activity. Plaintiff cites *Jones v. Lyon Stores*, *supra*, as the seminal case on this issue. In *Jones*, a person ran out of the store after being detained by the store manager for suspected shoplifting. *Id.* at 438, 346 S.E.2d at 303. It was the store's policy to lock the "Out" door while the suspected shoplifter was detained and the police were called. *Id.* The suspected shoplifter ran out of the store, using the "In" door, and collided with a customer entering the store causing injury to her. *Id.* at 439, 346 S.E.2d at 303-04. This Court held that summary judgment for the defendant was improper because the issue of whether it was reason-

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1. We note that the premises liability trichotomy, *i.e.*, invitee, licensee, and trespasser classifications, was abolished by our Supreme Court in *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998), and a reasonable care standard adopted. However, because reasonable care was the standard applied to invitees, or store customers, this change in the law does not impact our analysis.

ably foreseeable that locking the "Out" door increased the risk of harm to the customers was a question for a jury. *Id.* at 441, 346 S.E.2d at 305.

The facts of the instant case are distinguishable. Hensley observed Regina and Adrian conceal several powdered baby formula products in their pocketbooks. Hensley stopped the women and identified himself as a loss prevention officer. The women subsequently threw down their pocketbooks and moved aggressively towards Hensley. Regina struck Hensley's left arm and chest, and ran out the store exit into the parking lot. Hensley did not pursue her into the parking lot nor was she pursued by any other Lowe's Foods employee. The tape from the store's video surveillance cameras revealed that a full twenty-six seconds elapsed between the time Regina exited the store and when plaintiff was struck by the vehicle operated by Regina. During that time, Hensley and the other Lowe's Foods employees were focused entirely upon detaining Adrian. Plaintiff had walked out into the parking lot and was approximately 40-45 feet from the store entrance, standing in the middle of a traffic aisle, when he heard a commotion. Regina sped away in the white Jeep parked in the fire lane, made a left hand turn into the parking lot, struck plaintiff, and drove away. At no time did any Lowe's Foods employee chase Regina in the parking lot in an attempt to apprehend her.

Because "[t]he store owner unquestionably has the right to apprehend a shoplifter to retrieve his goods[,]" *Id.*, and no Lowe's Foods employee took any additional action to increase the likelihood and foreseeability of harm to plaintiff, Lowe's Foods Inc. did not breach its duty to safeguard its customers from the acts of third persons. We hold that it was not foreseeable that when Hensley revealed his identity to Regina that she would exit the store, enter a vehicle parked 20 feet from the store entrance, speed through the parking lot, turn left down the traffic aisle where plaintiff was standing, and strike plaintiff. The trial court properly granted summary judgment in favor of Lowe's Foods, Inc. *See Parish v. Hill*, 350 N.C. 231, 236, 513 S.E.2d 547, 550 (1999) ("[A]lthough it is seldom appropriate to grant summary judgment in a negligence action, it is proper if there are no genuine issues of material fact, and the plaintiff fails to demonstrate one of the essential elements of the claim." (citations omitted)).

AFFIRMED.

Judges STEPHENS and HUNTER, JR. concur.

JOSEPH BERNICE BEAVER AND ANN F. BEAVER, PLAINTIFFS v. GRANT MICHAEL FOUNTAIN, DEFENDANTS

No. COA10-198

(Filed 16 November 2010)

Statutes of Limitation and Repose— military service—action against airman—limitations tolled

The trial court did not err by denying defendant's motion on the pleadings in an automobile accident case where defendant, an Air Force reservist on active duty, had raised the statute of limitations. The federal Servicemembers' Civil Relief Act provides for the tolling of the statute of limitations by and against members of the military.

Appeal by defendant from order entered 25 November 2009 by Judge R. Allen Baddour, Jr. in Chatham County Superior Court. Heard in the Court of Appeals 1 September 2010.

Barron & Berry, L.L.P., by Vance Barron, Jr., for plaintiff-appellees.

Stephenson, Stephenson & Gray, LLP, by James B. Stephenson, II, for defendant-appellant.

STEELMAN, Judge.

Where the plain language of the federal Servicemembers' Civil Relief Act provides for the tolling of the statute of limitations in actions in which civilians have brought claims against members of the armed services, the trial court did not err in denying defendant's motion for judgment on the pleadings based upon the statute of limitations and in granting plaintiffs' motion for partial summary judgment as to that defense.

I. Factual and Procedural Background

At approximately 10:10 a.m. on 25 March 2006, Joseph and Ann Beaver (plaintiffs) were involved in a motor vehicle accident with Grant Fountain (defendant) near the intersection of North Elm Street and West Market Street in Greensboro. On 26 March 2009, three years and one day after the accident, plaintiffs filed a complaint against defendant and alleged that they suffered personal injuries and damages as a result of the negligence of defendant in the operation of his

vehicle. On 4 June 2009, defendant filed an answer denying the material allegations of the complaint and asserting plaintiffs' claims were barred by the applicable three-year statute of limitations. On 9 July 2009, plaintiffs filed an amended complaint and included an allegation that defendant was enlisted as a reservist in the United States Air Force and had been on active duty for several months prior to the filing of the complaint. Plaintiffs asserted that under the provisions of the Servicemembers' Civil Relief Act, 50 U.S.C.A. App. § 501, *et seq.*, any statute of limitations or repose had been tolled for the duration of defendant's active military service. On 5 August 2009, defendant filed a motion for judgment on the pleadings.

On 19 October 2009, plaintiffs filed a motion for partial summary judgment on defendant's statute of limitations defense and requested the trial court deny defendant's motion for judgment on the pleadings. On 25 November 2009, the trial court granted plaintiffs' motion for partial summary judgment, denied defendant's motion for judgment on the pleadings, and certified its order for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.

Defendant appeals.

II. Statute of Limitations

In his only argument, defendant argues that the trial court erred in granting plaintiffs' motion for partial summary judgment and denying his motion for judgment on the pleadings because plaintiffs' claims are barred by the applicable statute of limitations. We disagree.

N.C. Gen. Stat. § 1-52(16) (2009) provides that an action for personal injury or property damage must be filed within three years of the act or omission which gave rise to the claim. It is undisputed that plaintiffs failed to file their complaint within three years. The dispositive issue is whether the statute of limitations was tolled by the Servicemembers' Civil Relief Act. Defendant argues that the Act was enacted for "the exclusive benefit of servicemen" and that the benefits of the tolling provision should not apply to claims by non-military civilians. This issue has yet to be addressed by North Carolina appellate courts.

50 U.S.C.A. App. § 526(a) (2009) provides:

> (a) Tolling of statutes of limitation during military service
>
> The period of a servicemember's military service may not be included in computing any period limited by law, regula-

> tion, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States *by or against the servicemember* or the servicemember's heirs, executors, administrators, or assigns.

(Emphasis added.) We note that the federal tolling statute was previously codified as the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. App. § 525, and was effective until 19 December 2003. The relevant portion of the previous statute provided:

> The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government *by or against* any person in military service or *by or against* his heirs, executors, administrators, or assigns . . . .

50 U.S.C.A. App. § 525 (2003) (emphasis added). There is no material difference in the language of 50 U.S.C.A. App. § 525 (2003) and 50 U.S.C.A. App. § 526(a) (2009) dealing with the application of the tolling provision. Therefore, federal cases interpreting 50 U.S.C.A. App. § 525 are instructive. *See McCracken & Amick, Inc. v. Perdue*, ––– N.C. App. –––, –––, 687 S.E.2d 690, 695 n.4 (2009) ("Although not binding on North Carolina's courts, the holdings and underlying rationale of lower federal courts may be considered persuasive authority in interpreting a federal statute." (citation omitted)), *disc. review denied*, 364 N.C. 241, 698 S.E.2d 400 (2010).

Federal courts have held that "[s]ection 525 has been construed to mean what it says; and Courts have consistently held that in an action against a serviceman a statute of limitations otherwise applicable has, by virtue of § 525, been tolled during the period of military service." *Zitomer v. Holdsworth*, 178 F. Supp. 504, 505 (E.D. Pa. 1959) (citations omitted).

> The broad, unqualified, and mandatory language of section 525 leaves little room for judicial interpretation or oversight in its application; indeed, we have held quite plainly that "the tolling statute section 525 is unconditional. The only critical factor is military service; once that circumstance is shown, the period of limitations is automatically tolled for the duration of the service. . . ."

In re A.H. Robins Co., Inc., 996 F.2d 716, 718 (4th Cir. 1993) (quotation and alterations omitted); *see also Bickford v. United States*, 656 F.2d 636, 639 (Ct. Cl. 1981) ("There is not ambiguity in the language of § 525 and no justification for the court to depart from the plain meaning of its words.").

Federal courts have uniformly held that the plain language of the statute provides for the tolling of the statute of limitations in actions "by and against" members of the military. *See In re A.H. Robins Co., Inc.*, 996 F.2d at 718 ("The statute essentially tolls periods of limitation both in favor of and against 'persons in military service' to the extent that their 'period of military service' coincides with the limitations period." (citation, alteration, and footnote omitted)); *see also Ricard v. Birch*, 529 F.2d 214, 216 (4th Cir. 1975) ("[T]he parallel purpose of the Act is to protect the rights of individuals having causes of action against members of the armed forces." (citation omitted)); *Ray v. Porter*, 464 F.2d 452, 455 (6th Cir. 1972) ("The Soldiers' and Sailors' Civil Relief Act was adopted by the Congress to protect the rights of individuals in the military service of the United States, and *also to protect the rights of individuals having causes of actions against members of the Armed Forces of the United States*." (emphasis added)); *Mouradian v. John Hancock Companies*, 751 F. Supp. 272, 275 (D. Mass. 1990) ("The plain language of [50 U.S.C.A. App. § 525] makes its operation mandatory, subtracting all days of active military duty from the calculation of any limitations period in actions brought by or against servicemen."), *aff'd*, 930 F.2d 972 (1st Cir. 1991), *cert. denied*, 503 U.S. 951, 117 L. Ed. 2d 650 (1992).

In addition to federal case law, numerous state supreme courts have ruled that based upon the plain language of section 525 of the Soldiers' and Sailors' Civil Relief Act, civilians can invoke the tolling provision in the Act. *See, e.g., Henderson v. Miller*, 477 S.W.2d 197, 198 (Tenn. 1972); *Jones v. Garrett*, 386 P.2d 194, 200 (Kan. 1963); *Warinner v. Nugent*, 240 S.W.2d 941, 945 (Mo. 1951); *Blazejowski v. Stadnicki*, 58 N.E.2d 164, 166 (Mass. 1944). Defendant cites no cases that specifically deal with the tolling provision of the Act, which hold to the contrary.

We find the above-cited federal and state cases to be persuasive and hold that defendant's argument that the benefits of the tolling provision should not be afforded to a civilian who has an action pending against a servicemember to be without merit. It is undisputed that defendant "was on active military duty at Seymour Johnson Air Force

Base in Goldsboro, NC at the time the statute of limitations ran." Although his unit of assignment was at Seymour Johnson AFB, the record indicates defendant was to report for "Officer Basic Training" to Maxwell Air Force Base in Alabama on 6 November 2008. On 25 February 2009, an order was entered stating that defendant had completed his training, had been promoted to second lieutenant, and was to report to Columbus Air Force Base in Mississippi for flight school until 23 June 2010. Pursuant to 50 U.S.C.A. App. § 526(a), the statute of limitations was tolled during this time of active military service. Therefore, the three-year statute of limitations had not expired when plaintiffs filed their complaint on 26 March 2009. The trial court did not err in denying defendant's motion for judgment on the pleadings and in granting plaintiffs' motion for partial summary judgment.

AFFIRMED.

Judges BRYANT and BEASLEY concur.

ROGER P. EDWARDS, JR. AND AMANDA M. EDWARDS, PLAINTIFFS V. TERRENCE G. HILL AND LINDA LEE HILL, DEFENDANTS

No. COA09-1661

(Filed 7 December 2010)

1. Trespass— easements—parol evidence—parties' intentions

The trial court did not err by denying plaintiffs' claim for trespass and ruling that defendants had an easement over the pertinent portion of plaintiffs' property. The deeds, together with parol evidence emanating from both extrinsic documents and the circumstances surrounding the conveyances, created a material issue of fact regarding the parties' intentions which was appropriate for resolution by the trial court.

2. Appeal and Error— appellate rules violations—single-spaced brief—no sanctions

Although plaintiffs' brief was typed using single spacing in direct violation of N.C. R. App. P. 26(g)(1), the Court of Appeals chose not to impose sanctions because the violation was not a substantial failure or a gross violation that impaired the court's task of review or frustrated the adversarial process.

Appeal by Plaintiffs from order entered 11 May 2009 by Judge Ali B. Paksoy in Cleveland County District Court. Heard in the Court of Appeals 19 August 2010.

Cerwin Law Firm, P.C., by Todd R. Cerwin, for Plaintiff-Appellants.

The Schweppe Law Firm, P.A., by John V. Schweppe, III, for Defendant-Appellees.

BEASLEY, Judge.

Roger P. Edwards, Jr. and Amanda M. Edwards (Plaintiffs) appeal from the trial court's order denying their claim for trespass and ruling that Terrence G. Hill and Linda Lee Hill (Defendants) have an easement over that portion of Plaintiffs' property where the contested use was taking place. For the following reasons, we affirm.

The parties to this action own adjacent properties, both conveyed out of a larger tract, in Cleveland County, North Carolina. Plaintiffs' property consists of 20 acres located on the west side of Carpenters Grove Church Road,[1] and Defendants' 18.39 acre tract adjoins the western boundary of Plaintiffs' parcel. Plaintiffs and Defendants access their properties from Carpenters Grove Church Road by way of a 60 foot easement, which is not in dispute. Abutting the 60 foot easement is a soil road, along which both parties travel to get to and from their respective parcels. Plaintiffs admit that Defendants' have the right, pursuant to a 45 foot easement, to use the road where it meets the 60 foot easement and for a certain distance therefrom. Plaintiffs contend, however, that the 45 foot easement turns west at the northeastern corner of Defendants' property line and proceeds along Defendants' northern border, leaving the portion of the soil road south of that point unencumbered along Plaintiffs' western border. As such, Plaintiffs requested that Defendants "cease their use of that soil drive beyond the point where Defendants have access to their own property" argue that Defendants' continued use of the road alongside their eastern boundary to and from their driveway and residence constitutes a trespass. Thus arose this dispute: Plaintiffs claim

1. While the documentary evidence denoting Carpenters Grove Church Road in large part spells "Carpenters" without an apostrophe, as written above, "Carpenter's" with an apostrophe appears in some exhibits and transcript references. Thus, some quotations throughout the opinion contain the apostrophe if it appears in the original source, and, to avoid any confusion, we note that both spellings refer to the same road.

Defendants are making use of a portion of the road that is not subject to any pre-existing or granted right-of-way and Defendants respond that the 45 foot easement tracks the entire length of the soil road such that their right of use persists past the point at which Plaintiffs allege it terminates and extends to the point at which the road meets Defendants' driveway. We first review the chain of title.

The common tract from which the parties' parcels were conveyed was acquired by Native Land Homesites, LLC (NLH), which was owned by Eugene Grigg and Lewis Harrelson. NLH purchased approximately 61 acres to subdivide the parcel and convey several lots therefrom. The first conveyance was a 20 acre parcel granted to Brian Gaddy, Plaintiffs' predecessor in title, on 21 April 2003, by deed recorded in Deed Book 1370, Page 725 in Cleveland County (the "Primary Deed"). The deed was also made subject to an "existing Right-of-Way and Easement (45 feet in width) which crosses the most northwesterly portion of [the 20 acre tract]" and to the above-referenced 60 foot easement. Additionally, NLH "reserve[d] unto itself, its successors and assigns, the right to the use of the aforesaid [rights-of-way]."

Plaintiffs acquired Gaddy's 20 acre tract through two separate conveyances. On 6 October 2003, Gaddy deeded to Plaintiffs a 10 acre tract carved out of the southern half of his parcel (the "southernmost 10 acre tract"). Gaddy included in the conveyance a 45 foot easement along the northern and western boundaries of his upper parcel, allowing Plaintiffs' to cross his property "for ingress, egress and regress" between the 60 foot easement off of Carpenters Grove Church Road and the southernmost 10 acre tract. The second 10 acre conveyance was made by deed dated 23 September 2004, whereby Gaddy sold to Plaintiffs the remainder of his original parcel (the northernmost 10 acre tract). This deed was made "subject to . . . [t]hat certain 45-foot easement and right-of-way . . . running along the westerly and northerly side as shown on the survey referenced [in the Primary Deed]."

Defendants acquired their property from NLH by deed on 14 June 2005, which conveyed the 18.39 acre tract "together with a non-exclusive perpetual Right-of-Way and Easement (45 feet in width) which runs in a generally northeasterly direction to Carpenter's Grove Church Road as described in [several deeds listed therein]." The course of the soil road that Defendants use to access their residence from the 60 foot easement to their driveway is identified on the various surveys by calls L23 through L1. Only the area between the northern side of L5 and the southern end of L1 (hereinafter referred to

interchangeably as “L1 to L6” or “L6 to L1”) is contested. While Plaintiffs claim Defendants’ right to use the road ends at the unmarked point between lines L5 and L6 on the surveys (hereinafter referred to as “L5/L6”), Defendants maintain that their easement extends to L1 and have continued to use the soil road past that point to L1, where it turns onto their property.

On 24 July 2007, Plaintiffs filed a complaint for compensatory damages and an injunction based on allegations that Defendants committed trespass and damage to personal property. A bench trial was held on 19 March 2009, and after taking the matter under consideration, the trial court ruled that Defendants did not commit trespass across Plaintiffs’ property or damage Plaintiffs’ personal property. The trial court further decreed that Defendants have a 45-foot wide right-of-way and easement over the centerline of the existing soil road, including the contested portion from L1 to L6. Plaintiffs appeal.

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[1] We review a judgment entered after a non-jury trial to determine “whether there is competent evidence to support the trial court’s findings of fact and whether the findings support the conclusions of law and ensuing judgment.” *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (2002) (internal quotation marks and citation omitted). Additionally, the findings of fact are like jury verdicts in that they are conclusive on appeal if there is evidence to support them. *Stonecreek Sewer Ass’n v. Gary D. Morgan Developer, Inc.*, 179 N.C. App. 721, 725, 635 S.E.2d 485, 488 (2006). We review the record evidence to conduct our review pursuant to this standard.

NLH expressly reserved a 45 foot easement for itself, its successors, and assigns in its first conveyance to Gaddy. “An express easement in a deed, as in the instant case, is, of course, a contract.” *Williams v. Skinner*, 93 N.C. App. 665, 671, 379 S.E.2d 59, 63 (1989); *see also Brown v. Weaver-Rogers Assoc.*, 131 N.C. App. 120, 122, 505 S.E.2d 322, 324 (1998) (“Deeds of easement are construed according to the rules for construction of contracts so as to ascertain the intention of the parties as gathered from the entire instrument at the time it was made.”). Like the specificity required for contract terms, “an express easement must be sufficiently certain to permit the identification and location of the easement with reasonable certainty.” *Wiggins v. Short*, 122 N.C. App. 322, 327, 469 S.E.2d 571, 575 (1996) (internal quotation marks and citation omitted).

> When an easement is created by deed, either by express grant or by reservation, the description thereof "must either be certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which it refers. . . . *There must be language in the deed sufficient to serve as a pointer or a guide to the ascertainment of the location of the land.*"
>
> It is to be stressed that an alleged grant or reservation of an easement will be void and ineffectual only when there is such an uncertainty appearing on the face of the instrument itself that the court—reading the language in the light of all the facts and circumstances *referred to in the instrument*—is yet unable to derive there from the intention of the parties as to what land was to be conveyed.

Allen v. Duvall, 311 N.C. 245, 249, 316 S.E.2d 267, 270 (1984) (internal citations omitted). A survey referenced in a deed becomes a part thereof and need not be recorded. *Kaperonis v. Highway Commission*, 260 N.C. 587, 133 S.E.2d 464 (1963).

An ambiguity in the grant or reservation of an easement does not necessarily make the conveyance void and ineffectual. Indeed, "[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 therefore unenforceable." *King v. King*, 146 N.C. App. 442, 445, 552 S.E.2d 262, 264-65 (2001) (quoting *Lane v. Coe*, 262 N.C. 8, 13, 136 S.E.2d 269, 273 (1964)). However, "[a] description is latently ambiguous if it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made." *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 123, 388 S.E.2d 538, 551 (1990) (internal quotation marks omitted). If there is a latent ambiguity in an easement description, "parol evidence will be admitted to fit the description to the thing intended." *Thompson v. Umberger*, 221 N.C. 178, 180, 19 S.E.2d 484, 485 (1942). For, while "[a] patent ambiguity raises a question of construction[,] a latent ambiguity raises a question of identity." *Prentice v. Roberts*, 32 N.C. App. 379, 382, 232 S.E.2d 286, 288 (1977).

The determination that an ambiguity is latent opens the door for a party seeking establishment of an easement to " 'offer evidence, parol and other, with reference to such extrinsic matter tending to identify the property,' and the other party 'may offer such evidence with reference thereto tending to show impossibility of identifica-

tion.' " *King*, 146 N.C. App. at 445, 552 S.E.2d at 265 (quoting *Lane*, 262 N.C. at 13, 136 S.E.2d at 273).

> Although extrinsic evidence is not permitted in order to add to, detract from, or vary the terms of an integrated written agreement, extrinsic evidence is admissible in order to explain what those terms are. Therefore, extrinsic evidence as to the circumstances under which a written instrument was made has been held to be admissible in ascertaining the parties' expressed intentions, subject to the limitation that extrinsic evidence is not admissible in order to give the terms of a written instrument a meaning of which they are not reasonably susceptible.

Century Communications v. Housing Authority of City of Wilson, 313 N.C. 143, 146-47, 326 S.E.2d 261, 264 (1985) (internal citations omitted). Moreover, where doubt arises as to the parties' true intentions, "the court should construe the deed of easement with 'reason and common sense' and adopt the interpretation which produces the usual and just result." *Brown*, 131 N.C. App. at 122, 505 S.E.2d at 324 (quoting *Hundley v. Michael*, 105 N.C. App. 432, 435, 413 S.E.2d 296, 298 (1992)); *see also Allen*, 311 N.C. at 251, 316 S.E.2d at 271 ("The law endeavors to give effect to the intention of the parties, whenever [it] can be done consistently with rational construction.").

While construction of a plain and unambiguous contract is a question of law for the courts, *Cochran v. Keller*, 84 N.C. App. 205, 211, 352 S.E.2d 458, 462 (1987), here, the easement deed from NLH to Defendants (the "Defendants' Deed") is not plain and unambiguous. Specifically, NLH conveyed to Defendants 18.39 acres

> [t]ogether with a non-exclusive perpetual Right-of-Way and Easement (45 feet in width) which runs in a generally northeasterly direction to Carpenter's Grove Church road as described in Deed Book 1391 at Page 1653; Deed Book 1370 at Page 725; Deed Book 1387 at Page 954; and Deed Book 1412 at Page 709 which Easement is incorporated by reference as if fully set out herein.

Thus, although the Defendants' Deed leaves the parties' agreement as to the location of the 45 foot easement undisclosed, the easement description does expressly incorporate the description thereof provided in these four deeds. Accordingly, the Defendants' Deed does point to extrinsic evidence by which identification of the easement might possibly be made, and we treat the surveys referenced therein as having become part of the respective deeds.

One extrinsic document referenced therein is the Primary Deed in this action, appearing in Deed Book 1370 at Page 725, which made the conveyance to Gaddy subject to the rights of others to use the existing 45 foot easement crossing the northwesterly portion of the 20 acre parcel. The Primary Deed also indicated that the property was "more particularly described in accordance with an unrecorded plat and survey made thereof by T. Scott Bankhead, Registered Surveyor, dated April 07, 2003." NLH also reserved for itself, as Grantor, and its successors and assigns "the right to the use of the portion of the Right-of-Way and Easement (45 feet in width) which crosses the northwesterly boundary line" of the 20 acre parcel (the "Reserved Easement") as shown upon the 7 April 2003 survey. This survey depicts a "45' Easement to 10 Acre Tract" over a "line with soil road" traversing the northern boundary line of the 20 acre parcel from the 60' easement off of Carpenters Grove Church Road, curving along with then-Gaddy's western boundary, and deviating in a westerly direction at L5/L6 on the survey. The westerly deviation crosses what would ultimately become Defendants' northern boundary, and that portion was marked "Proposed 45' Easement" on the 7 April 2003 survey.

Eugene Grigg was qualified as an expert and testified at trial that the proposed right of way arose in connection with discussions between NLH and Bob Blaire regarding the latter's purchase of 10 acres west of the parcel that later became Defendants'. Although the deal fell through, the 7 April 2003 survey indeed identifies the area reached by the "Proposed 45' Easement" as "10 Acre Tract to be Deeded to Bob Blaire." Mr. Grigg continued that the purpose of that easement was to give Blaire a right of way from the 45' easement that crossed the 20 acre parcel up to the 10 acres he planned to buy. He said that easement had "nothing to do" with the Primary Deed or Defendants' easement, nor did it limit Defendants' rights to use the soil road from L6 to L1. Mr. Grigg further explained that the 7 April 2003 survey should have reflected the existing 45' right of way by continuing the dashes to illustrate that the easement extended to the point at which the soil road begins to run wholly within the boundary lines of the 18.39 acre parcel. He stated: "So even though Mr. Bankhead did not dot that off on—down there, that should have been dotted off and it should have been shown a right of way all the way up to L1." In fact, the legal description of the Primary Deed defines part of the western boundary of the 20 acre parcel going from a "new line" therein identified "to a point located in the centerline of an existing Right-of-Way and Easement (45 feet in width)." The descrip-

tion provides that "the following calls and distances" run "thence with the centerline of said Right-of-Way and Easement." The call for that point located in the center of the existing 45' right of way is marked as L1 on the survey, and the calls and distances listed in the deed as running with the existing easement are referred to as L1 through L23. Thus, the Primary Deed describes this existing right of way separately from the paragraph in which NLH reserves a 45' easement, and the former is unidentified on the survey referenced therein. Whether the easement at issue stops at L5/L6 or at L1, both alternatives could be said to "cross[] the northwesterly boundary line of the [20 acre] tract of property," as the Reserved Easement describes, leaving the precise identification of Defendants' right of way ambiguous. However, we may turn to the other extrinsic evidence, parol and other, referred to in the deeds.

The easement description in Defendants' Deed also references Deed Book 1931, Page 1653 ("Plaintiffs' First Deed"). The 45 foot easement described in Plaintiffs' First Deed actually defines an easement granted by Gaddy to Plaintiffs when they purchased the southernmost 10 acre tract (the "Gaddy Easement"). Plaintiffs' First Deed provides that the Gaddy Easement consists of "the 45 foot strip lying east and south of the western and northern boundaries of Grantor's adjacent property (that portion acquired by Grantor by deed recorded in Book 1370 at page 725 which is not being conveyed in this transaction)" and then describes the path of the easement with calls and distances. This separate and distinct easement, however, was extinguished by the doctrine of merger when Plaintiffs purchased the northernmost 10 acre tract from Gaddy, as there is no evidence of a pre-existing easement lying wholly within the 20 acre parcel at that location. *See Tower Development Partners v. Zell*, 120 N.C. App. 136, 143, 461 S.E.2d 17, 22 (1995) ("It is axiomatic in property law that one may not have an easement in his or her own land. . . . Ordinarily the doctrine of merger would apply and extinguish the easement[.]"). Thus, the Gaddy Easement is not at issue. Plaintiffs' First Deed also references a survey by Bankhead dated 14 August 2003 as more particularly depicting the 10 acre tract and the 45 foot and above-described 60 foot easements. While Plaintiffs' First Deed makes no mention of the 45 foot easement reserved by NLH in its earlier 20 acre conveyance to Gaddy, the 14 August 2003 survey depicts both an "Existing 45' Easement/Righ[t] of Way," referencing "DB 1370 Pg 725," and a "Proposed 45' Easement/Right of Way (to 10 Ac. Tract)." The third extrinsic document referred to in the easement description of

Defendants' Deed is a second deed from NLH to Gaddy (the "Second NLH-Gaddy Deed") recorded at Deed Book 1387, Page 954, which predated Gaddy's first conveyance to Plaintiffs and conveyed a 10 acre parcel situated west of Gaddy's original 20 acre tract and north of what would become Defendants' property. The Second NLH-Gaddy Deed was made subject to the rights of others to use the existing 45 foot easement crossing "the most southeasterly portion" of the subject premises as shown on a survey by Bankhead dated 6 August 2003. In this deed, NLH also reserved for itself, its successors, and assigns the right to use the portion of the 45 foot easement over the "southeasterly boundary line" of Gaddy's new 10 acre tract and referenced the 7 April 2003 survey for the description thereof.

Finally, Defendants' Deed also references Deed Book 1412 at Page 709, where a deed dated 19 April 2004 from NLH to Ruth M. Riegler (the "Riegler Deed") is recorded. The Reigler Deed conveyed a 13 acre parcel situated to the west of Defendants' tract and the property Gaddy acquired through the Second NLH-Gaddy Deed. The Riegler parcel consists of the 10 acres that were the subject of negotiations between NLH and Blaire and an additional 3 acres and is described in the Riegler Deed through reference to a survey by Bankhead dated 19 March 2004. The "Proposed 45' Easement" appearing on the 7 April 2003 from the unmarked point between L5 and L6 to the 10 acre tract to be deeded to Blaire is located in the same place as a "New 45' Easement—R/W" on the 19 March 2004 survey. The Riegler survey also draws the "Existing 45' Easement" over the "centerline of [the] existing soil road," with reference to the Primary Deed and the Second NLH-Gaddy Deed. Interestingly, the 19 March 2004 survey depicts this existing easement as extending past the point identified by L5/L6 on the other surveys. In fact, the dashes marking this easement across the existing soil road continue to the point where L1 would be had those calls and distances been reproduced on the Riegler survey.

The trial court also admitted as exhibits the surveys incorporated into the general property description sections of the parties' respective deeds. Although Defendants' Deed was made after the Riegler Deed, the survey referenced in the boundary description of Defendants' parcel was initially prepared on 21 October 2003. While it does not depict the continuation of the easement along the soil road past L5/L6, it does show an existing iron rebar at the southwestern end of L1. This survey was revised on 27 May 2004 to illustrate that the existing soil road, which connected the subdivision to the 60'

easement and Carpenters Grove Church Road, continued past L5/L6 to the rebar at L1 before crossing into and proceeding wholly within Defendants' parcel. Plaintiff's deed from Gaddy for the northernmost 10 acre tract also makes the conveyance subject to "[t]hat certain 45-foot easement and right-of-way for ingress, egress and regress running along the westerly and northerly side as shown on the survey . . . dated April 7, 2003." This deed references no other extrinsic document in the easement description and thus raises the same questions regarding the potential inaccuracies of the 7 April 2003 survey and the ambiguities presented by the Primary Deed, which was relied upon in the preparation of that survey.

While the above-described extrinsic documents reveal some inconsistencies between the relevant deeds and the surveys they reference, additional evidence before the trial court tended to remove any latent ambiguity that lingered after consulting the parties' deeds. For the following reasons, we conclude that the deeds, together with parol evidence emanating from both extrinsic documents and the circumstances surrounding the conveyances, created a material issue of fact regarding the parties' intentions which was appropriate for resolution by the trial court.

Our Supreme Court has held

> that the effect to be given unambiguous language contained in a written instrument is a question of law, but where the language is ambiguous so that the effect of the instrument must be determined by resort to extrinsic evidence that raises a dispute as to the parties' intention, the question of the parties' intention becomes one of fact. However, the determination of the parties' intention is not for the jury but is the responsibility of the judge in construing and interpreting the meaning of the instrument.

Runyon v. Paley, 331 N.C. 293, 305, 416 S.E.2d 177, 186 (1992). While the parties' intent must ordinarily be ascertained from the deed or instrument, "when the language used in the instrument is ambiguous, the court, in determining the parties' intention, must look to the language of the instrument, the nature of the restriction, the situation of the parties, and the circumstances surrounding their transaction."

The trial court made twenty findings of fact, including:

> 13. In [the Primary Deed], NLH conveyed to Gaddy, subject to the rights of others, the right to use the existing Right-of-Way

> and Easement 45 feet in width that crosses the most northwesterly portion of the twenty acre tract as shown [on] the survey dated April 7, 2003.
>
> 14. NLH reserved the right to use the portion of the said right of way and easement, 45 feet in width, crossing the northwesterly boundary line of the 20 acre tract conveyed to Gaddy and then to Plaintiffs.
>
> 15. Within the legal description of that [Primary Deed] is a reference to several calls running with the centerline of an existing Right-of-Way and Easement 45 feet in width. These calls are referenced on the April 7, 2003 survey as calls L1 through L23.
>
> 16. When NLH purchased the entire acreage, there was in existence a road running through the property. This road is shown on the April 7, 2003 survey by the calls of L1 through L23, and was in existence approximately 30 to 40 years before NLH purchased the tract. The existing road is large enough for cars and continues past the L1 call to the Defendants' property.
>
> 17. The intent of NLH was to develop the larger tract with reference to the existing road, and reference to the most northwesterly portion of Plaintiffs' boundary meant all the existing road beginning with call L1 as shown on the April 7, 2003 survey.
>
> 18. The intent of NLH was to extend over the exi[s]ting road 22.5 feet on each side of the center line from call L1 to the existing 60' easement as shown on the April 7, 2003 survey.

The trial court also found that Plaintiffs' objected to Defendants' use of that portion of the easement from L6 to L1 but that Defendants used the L6 to L1 portion of the road to put in a driveway, build their house, and travel to and from their property.

Initially, it is clear that NLH intended to reserve for itself, its successors, and its assigns an easement 45' in width across an existing right of way that traversed the northwestern boundary of the 20 acre tract it first conveyed from its larger parcel. We acknowledge Plaintiffs' argument regarding finding of fact 15 that the Primary Deed's reference to the calls running with the centerline of the existing right of way in the metes and bounds description of the tract being conveyed to Gaddy "does not by itself convey that property or object." However, the fact that the right of way so described follows

an existing road that appears on the survey referenced therein, where there is testimony from Mr. Grigg that the surveyor erred in failing to depict the portion of the Reserved Easement from L6 to L1 as intended by the grantor NLH, the question is not one of construction, which would render the ambiguity patent, but of identification, raising a latent ambiguity as to the length of the 45' easement in question. Moreover, attorney Mark Lackey was qualified as an expert in real estate law and testified at trial that the Primary Deed "does create an ambiguity about where—how–-how far the right of way goes when it refers specifically to the center line of a right of way that there are no dashed lines to on the plat."

"When the terms used in the deed leave it uncertain what property is intended to be embraced in it, parol evidence is admissible to fit the description to the land—never to create a description." *Allen*, 311 N.C. at 251, 316 S.E.2d at 271. This case is unlike *Oliver v. Ernul*, 277 N.C. 591, 178 S.E.2d 393 (1971), where although the road existed prior to the conveyance, the deed failed to create an easement for a road because no reference was made to it in the paper writing. Here, the description of the Reserved Easement in the Primary Deed, while indefinite, followed the description of an existing easement of the same 45-foot width in the same general location, raising the question of whether the "northwesterly boundary line" of the 20 acre parcel was to be gleamed from the 7 April 2003 survey or the calls tracking the road in the general property description of the same deed. Moreover, the Primary Deed, read in light of the circumstances and the nature of the land referred to in the instrument, does not leave the length of the easement in a state of absolute uncertainty. Plaintiffs' and Defendants' deeds also refer to extrinsic documents that serve as a guide to the ascertainment of the location of the easement. The only thing the language of the relevant deeds leaves unclear is which of two readily identifiable points was intended to represent the end of the 45' easement that NLH reserved and later granted to its successor, Defendants. Accordingly, "[p]arol evidence is resorted to merely to bring to light this intention," not "to create it," *Thompson*, 221 N.C. at 180, 19 S.E.2d at 485, such that "[Defendants] may offer evidence, parol and other, with reference to such extrinsic matter tending to identify the property, and [Plaintiffs] may offer such evidence with reference thereto tending to show impossibility of identification, i.e., ambiguity." *Prentice*, 32 N.C. App. at 382, 232 S.E.2d at 288 (internal quotation marks and citations omitted). Thus, the language of the Reserved Easement, together with the Primary Deed as a whole, is

sufficient to permit the trial court to admit proper evidence tending to fit the description to the land.

We conclude that each of the trial court's findings of fact are supported by competent evidence. Not only does the 7 April 2003 survey locate the original road on the ground, as described in the Primary Deed, but Mr. Grigg also testified that this survey, relied upon by Bankhead in preparing the subsequent surveys referenced in the extrinsic documents, inaccurately depicted the length of the easement. Thus, the trial court properly resolved this genuine issue of material fact by considering other admissible evidence clarifying the intention of the parties. The testimony introduced at trial showed the following regarding the nature of the land: the existing road was wide enough for vehicular travel; at point L1, it widens at a clearing broad enough for cars to turn around before the road turns into Defendants' property and proceeds entirely within the 18.39 acre parcel; and the steepness, grade, and dense forestry at other potential access points to Defendants' parcel would render construction of an alternate means of ingress and egress extremely difficult. Mr. Grigg described the part of the road that runs into Defendants' property as "be[ing] like a driveway that goes to somebody's house." Several photographs introduced at trial also depict the characteristics of the road and surrounding landscape near the area at which Plaintiffs contend the easement ends at L5/L6. Mr. Grigg also testified that he and his partner, Mr. Harrelson, walked the property three or four times before NLH purchased the 61 acres "to see where the corners were, [and they] walked the existing right of way that went up through the middle of the property." Where Mr. Grigg drafted the deeds from NLH, this is further evidence that he used the phrase "existing right of way" to refer to the soil road already in place. They had the road regraded and a culvert put in, as it was the intent of NLH that "L1 to L6 [would be] used to service, you know, a road that adjoined tracts." Mr. Grigg further provided his interpretation as the drafter of the various deeds that the phrases "most northwesterly portion" and "northwesterly boundary line" of the 20 acre parcel referred to that length of road from the 60' easement to L1. He continued that the northwestern property line is "roughly in the center line of the existing road bed[,] [a]nd so there's supposed to be—what we had intended was 22 and a half feet on each side of that property line." Mr. Grigg indicated that the Riegler survey, which drew the existing 45' easement down to where L1 would be on the other maps, better illustrates the intent of NLH with regard to the easements because the "intent was not to

limit [Defendants'] use to L5 or L6 in that area . . . [but to] allow access all the way to point L1."

We are also guided by precedent set by our Supreme Court in addressing situations affected by similar ambiguities:

> [W]here the grant of an easement of way does not definitely locate it, it has been consistently held that a reasonable and convenient way for all parties is thereby implied, in view of all the circumstances[.] . . . It is a settled rule that where there is no express agreement with respect to the location of a way granted but not located, the practical location and user of a reasonable way by the grantee, acquiesced in by the grantor or owner of the servient estate, sufficiently locates the way, which will be deemed to be that which was intended by the grant.

Allen, 311 N.C. at 249, 316 S.E.2d at 270 (internal quotation marks and citation omitted). Here, there was evidence that after NLH conveyed the 20 acres to Gaddy, NLH continued to use the L6 to L1 portion of the soil road to show prospective buyers the 18.39 acre tract and Gaddy acquiesced, acknowledging at trial that "it was a good way to come there." *See id.* at 251, 316 S.E.2d at 271 ("The use of the roads in question by plaintiffs' predecessors in title, acquiesced in by defendants' predecessors in title of the servient estate, sufficiently locates the roads on the ground, which is deemed to be that which was intended by the reservation of the easements."); *see also Prentice*, 32 N.C. App. at 383, 232 S.E.2d at 288 ("When the grant does describe with reasonable certainty the easement created and the dominant and servient tenements, but does not definitely locate it, the easement is not held void for uncertainty under the statute of frauds, but instead, the grantee is entitled to a reasonable and convenient way located in the manner and within the limits set forth in the grant. The easement may also be located by the practical location by the grantee, acquiesced in by the grantor." (internal quotations omitted)). Indeed, when Defendants met with Mr. Harrelson to look at the 18.39 acre property, they entered the parcel from "the top of the road where it widens out there at point L1" Defendant Terrence Hill testified that he and Mr. Harrelson discussed the easement that spanned Defendants' eastern property line until reaching point L1. Mr. Harrelson pointed out the iron rebar situated at L1, as depicted on the various surveys, and indicated that the significance of that visible marker was that it would enable Defendants to "always find that point [where their 45' easement ends]," further shedding light on the intent of grantor and

grantee at the time the easement at issue was conveyed to Defendants.

In light of the above-described deeds, along with the extrinsic documents they reference and in consideration of "the subject matter involved, the situation of the parties at the time of the conveyance and the purpose sought to be accomplished," *Cochran*, 84 N.C. App. at 212, 352 S.E.2d at 463, parol and other evidence was properly admitted to reveal the parties' intentions regarding the length of the easement. As such, the trial court had at its disposal an abundance of evidence that allowed it to find that NLH intended "to develop the larger tract with reference to the existing road" tracking "the most northwesterly portion of Plaintiffs' boundary [which] meant all the existing road beginning with call L1." Its finding that "[t]he intent of NLH was to extend over the exi[s]ting road 22.5 feet on each side of the center line from call L1 to the existing 60' easement" is also supported by competent evidence. We hold that the findings of fact also support the trial court's conclusions that Defendants have an easement over the centerline of the existing road 45 feet in width as identified by the calls beginning with L1 to the 60 foot easement referenced in the Primary Deed and shown on the 7 April 2003 survey and, thus, did not commit trespass across Plaintiffs' property. We also believe that in endeavoring to give effect to the parties' intentions, the trial court did in fact construe the deeds of easement with reason and common sense to adopt the interpretation that produced the usual and just result. *Brown*, 131 N.C. App. at 122, 505 S.E.2d at 324.

[2] Lastly, we address the format of Plaintiffs' brief. Plaintiffs' brief was typed using single spacing in direct violation of Appellate Rule 26(g)(1), which states that "[t]he body of text shall be presented with double spacing between each line of text." N.C.R. App. P. 26(g)(1). "Compliance with the rules . . . is mandatory." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 194, 657 S.E.2d 361, 362 (2008). "But '[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Id.* at 194, 657 S.E.2d at 363 (quoting *Hormel v. Helvering*, 312 U.S. 552, 557, 85 L. Ed. 1037 (1941)). While the Supreme Court of North Carolina has held that noncompliance with the our Appellate Rules may call for sanctions, to include dismissal, "noncompliance with the appellate rules does not, *ipso facto*, mandate dismissal of an appeal." *Id.* "Despite the Rules violations, we are able to determine the issues in this case on appeal. Furthermore, we note that Defendants, in filing a brief that thoroughly responds to Plaintiffs' arguments on appeal, were put on

sufficient notice of the issues on appeal." *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 192, 614 S.E.2d 396, 404 (2005) Though this Court has the authority to sanction Plaintiffs, "the appellate court may not consider sanctions of any sort when a party's noncompliance with nonjurisdictional requirements of the rules does not rise to the level of a 'substantial failure' or 'gross violation,' " which is established if the violations would "impair[] the court's task of review" or "frustrate the adversarial process." *Dogwood*, 362 N.C. at 199-200, 657 S.E.2d at 366-67 (explaining that N.C.R. App. P. 25(b) allows the appellate court to "impose a sanction . . . when the court determines that [a] party or attorney or both *substantially* failed to comply with these appellate rules" and that "[t]he court may impose sanctions of the type and in the manner prescribed by Rule 34"). A review of Plaintiffs' brief shows that these violations do not "impair the court's task of review" or "frustrate the adversarial process." Because this violation is not a "substantial failure" or a "gross violation," we have addressed the merits of Plaintiffs' appeal and choose not to impose sanctions. However, we admonish Plaintiff-Appellants' counsel to comply with N.C.R. App. P. 26(g)(1) in the future.

Affirmed.

Judges GEER and JACKSON concur.

CLINT M. LOVENDAHL, ADMINISTRATOR OF THE ESTATE OF NANCY LOVENDAHL WICKER, PLAINTIFF v. HOWARD BRADLEY WICKER, DEFENDANT

No. COA09-954

(Filed 7 December 2010)

1. Discovery— violations—asserting Fifth Amendment privileges in civil case—Rule 37 sanctions

The trial court did not err in a wrongful death case by imposing sanctions under N.C.G.S. § 1A-1, Rule 37 including striking defendant's affirmative defenses for failure to comply with discovery. Violation of an order compelling discovery that results from a motion for a protective order may be the basis for sanctions under Rule 37(b). Further, the trial court previously warned that there would be consequences if defendant elected to claim his privileges under the Fifth Amendment in this civil action.

2. Constitutional Law— right to remain silent—deposition—sanctions in civil case

The trial court did not violate defendant's Fifth Amendment rights in a wrongful death case by imposing sanctions based on defendant's failure to answer questions at his deposition. Defendant's assertion of rights was prejudicial to the due process rights of plaintiff because it served to impede plaintiff's ability to obtain accurate discovery about the nature of defendant's affirmative defenses.

3. Pleadings— striking affirmative defenses—consideration of alternative sanctions

The trial court did not abuse its discretion in a wrongful death case by allegedly failing to consider alternative sanctions before striking defendant's affirmative defenses. Although defendant contended that he offered to answer certain questions at the deposition, he failed to show that he ever committed to answering the questions relevant to plaintiff's response to his contributory negligence defense or that he committed to a specific time frame for answering them. Further, the trial court expressly considered staying the proceedings and found it to be an inadequate option.

Appeal by defendant from order entered 28 April 2009 by Judge Richard W. Stone in Guilford County Superior Court. Heard in the Court of Appeals 28 January 2010.

Hicks McDonald Noecker LLP, by David W. McDonald; and Rightsell & Eggleston, LLP, by Donald P. Eggleston, for plaintiff-appellee.

Teague, Rotenstreich, Stanaland, Fox & Holt, PLLC, by Paul A. Daniels, for defendant-appellant.

GEER, Judge.

This appeal concerns litigation arising from a single-vehicle accident in which Nancy Lovendahl Wicker, a passenger in the vehicle, was killed. Plaintiff Clint M. Lovendahl, Ms. Wicker's son and the administrator of her estate, brought a negligence action against Ms. Wicker's husband, defendant Howard Bradley Wicker, who was operating the vehicle at the time of the accident. Defendant faces criminal charges stemming from the accident and refused to answer deposition questions on Fifth Amendment grounds. The trial court had pre-

viously entered an order requiring defendant to submit to a deposition, acknowledging defendant's right to assert his Fifth Amendment rights, but providing that he could not do so without consequences in this civil action. Defendant appeals from a subsequent order striking his affirmative defenses—contributory negligence and gross contributory negligence—for failing to comply with the discovery order. We affirm because the trial court properly found that defendant's invocation of his Fifth Amendment privilege deprived plaintiff of the information he needed to respond to defendant's contributory negligence and gross contributory negligence defenses.

<u>Facts</u>

Ms. Wicker died after the vehicle in which she was riding ran off the road and overturned in Randolph County, North Carolina on 27 April 2008. Defendant, who was driving the vehicle, was not seriously injured in the wreck. He was ultimately charged with a number of criminal offenses, including second degree murder. Plaintiff, after being appointed executor of Ms. Wicker's estate, filed a wrongful death action against defendant on 19 August 2008, alleging that defendant's reckless, wanton, and grossly negligent operation of the vehicle caused Ms. Wicker's death.

Plaintiff alleged that when the accident occurred, defendant was speeding and operating the vehicle in a reckless manner without regard for the safety of others. He lost control of the vehicle, causing it to "leave the paved portion of the road, hit an embankment, run over a sign, cross the road, crash violently, and land upside down off the shoulder of the opposite-travelling [sic] lane."

On 17 October 2008, defendant filed an answer in which he asserted the defenses of contributory negligence and gross contributory negligence, alleging that he and Ms. Wicker had been drinking alcohol together for several hours before the accident. Defendant further alleged that, on the night of the accident, Ms. Wicker chose to ride as a passenger in his vehicle "after she had been in his presence for the past eight or ten hours and knew [or], by exercising reasonable care, should have known, of his intoxication or impairment level, the amount of alcohol or other impairing substance which he had consumed" and that it was unsafe to ride with him.

Defendant's deposition was scheduled by agreement of counsel for 22 October 2008. On the morning of 22 October 2008, defendant filed a motion to stay proceedings, objection to deposition, motion

for protective order and motion to stay discovery, and notice of hearing and request to calendar the motions for 4 December 2008. The trial court made the following unchallenged findings about what occurred at the 22 October 2008 deposition:

> 10. The record of the deposition of defendant was opened at 10:57 a.m. Defendant, together with his counsel, Kenneth B. Rotenstreich, Esq. of the Guilford County Bar and R. David Wicker, Jr., Esq. of the Granville County Bar was [sic] present. On the record, defendant's counsel Rotenstreich marked as Exhibit No. 1 the Objection to Deposition, Motion for Protective Order, and Motion to Stay Discovery. Rotenstreich further stated on the record, "And to proceed forward with this deposition without staying the proceedings, under the case of *Peterson versus Peterson*, which is a North Carolina Court of Appeals case, I think is inappropriate." Rotenstreich further stated for the record that "I will add that my client, after consultation with me, is intending to take his Fifth Amendment right against self-incrimination, based on the criminal charges pending. And that is the reason why I'm willing for the deposition to go forward, because the answers to the questions would be the same today than [sic] they would be next week or next month, because the criminal action is not set to be heard until sometime around December . . . [.]" Rotenstreich further stated for the record, "And we can go to the courthouse now and be heard on our motion to stay, based on the case law of *Peterson versus Peterson* and all of the cases that follow." Rotenstreich further stated for the record, "Well, we're not going to participate unless the hearing's had. You're welcome to stay on the record. We're going to walk out. I will go call the judge's champers [sic] and see if there are any judges available to hear our motion as—would you join me counsel?" Rotenstreich further stated on the record, "And again, I reiterate—and I don't need to, because these—we've already talked about it—that the answer that you're going to get, because of the criminal proceedings pending, will be the same today as they will be until the criminal proceedings are complete. So to us it makes no difference; the answers are the same." Rotenstreich further stated for the record, "Counsel for the witness is telling Counsel for the plaintiff as—that Exhibit 1 exists, it's been filed, and Exhibit 2 to this deposition is a statement that the defendant intends to read in response to the questions, based on advice of counsel."

The deposition was then adjourned.

On 13 November 2008, plaintiff filed a motion to strike defendant's answer and affirmative defenses and for entry of default as a sanction for defendant's failure to answer deposition questions. On 4 December 2008, the following motions were heard by the Honorable Catherine C. Eagles, Senior Resident Superior Court Judge: defendant's objection to deposition, defendant's motion for a protective order, defendant's motion to stay discovery, and plaintiff's motion to strike.

On 19 December 2008, Judge Eagles entered an order denying defendant's motion for a protective order and denying his motion for a stay. Judge Eagles ordered that "[d]efendant shall submit to deposition within forty-five days of the date of this Order, and may elect to claim his privileges under the Fifth Amendment of the United States Constitution; however, in the event defendant should elect to claim his privileges under the Fifth Amendment, he may not do so without consequence in the present civil action." She denied plaintiff's motion to strike without prejudice "should defendant elect to claim his privileges under the Fifth Amendment in his deposition."

On 22 January 2009, defendant's deposition was reconvened. The trial court made the following unchallenged findings about those deposition proceedings:

> 18. On January 22, 2009, the deposition of defendant was re-convened. At the deposition, defendant was present, together with Jeremy Kosin, Esq. of the Guilford County bar and R. David Wicker, Jr., Esq. of the Granville County Bar. On the record, defendant's counsel, R. David Wicker, Jr., stated: "I represent Howard Bradley Wicker in the criminal matter that's currently pending in Randolph County. For the record, that matter is 08-CR-6792. There are—that is second-degree murder. There are a series of related misdemeanors and also a felony death under another case caption. That matter is currently set for March the 24th on an administrative calendar." Wicker, Esq. further stated for the record: "And with that, it will be my instruction that Mr. Wicker can identify himself for the record. He can state what his current address is, but beyond that he will assert his Fifth Amendment right against self-incrimination to each and every question posed by the plaintiff in this matter. And that Fifth Amendment assertion and defense has been provided both to the plaintiff and to the court reporter. He will either read that into the record every

> time a question is asked or we will stipulate that that will be his answer to each and every question that you would ask, such that you don't have to ask each of your questions and he doesn't have to read that, and that will abbreviate what we have to do here today." The defendant was then sworn, and gave his name and current residence address. Other than this information, defendant, though [sic] counsel, affirmed that Exhibit 3 to the deposition would be and is interposed as a response to each and every question that the plaintiff may have asked.[]

On 5 February 2009, plaintiff filed a motion for sanctions, a motion to strike defendant's answer, a motion to strike his affirmative defenses, and a motion for entry of default. At the hearing on the motions before the Honorable Richard W. Stone, Superior Court Judge Presiding, defendant orally moved to continue the trial in this matter. On 19 March 2009, defendant filed a written motion for a continuance of the trial. Judge Eagles denied defendant's written motion for a continuance on 23 March 2009.

On 28 April 2009, Judge Stone entered an order imposing sanctions on defendant pursuant to Rule 37(b) of the Rules of Civil Procedure. In that order, Judge Stone first denied defendant's oral motion to continue the trial. He then found:

> 3. Defendant was presented with two opportunities to answer questions concerning his knowledge of the facts concerning the present civil action: the first opportunity on October 22, 2008, and the second three months later on January 22, 2009. In the interim, defendant was admonished by Order of the court that if defendant elected to claim his privilege against self-incrimination at the second convening of his deposition, consequences would ensue. Defendant was represented by civil and criminal counsel, including at least three attorneys in two law firms, in determining what course of action to take.
>
> 4. Defendant elected on January 22, 2009 to provide no information other than his name and residence address. As to all other questions which plaintiff might pose, defendant expressed clearly his intention to claim his privilege against self-incrimination provided by the Fifth and Fourteenth Amendments to the United States Constitution.
>
> 5. This cause is set for trial at the May 4, 2009 Civil Jury Session of Guilford County Superior Court.

The court continued:

> 6. The Court has considered the respective interests of the parties, and the function of the courts of justice to ascertain the truth.
>
> 7. Defendant has pled affirmative defenses in this cause, and should not have it within his power to silence his own adverse testimony when such testimony is relevant to the cause of action or the defense.
>
> 8. Defendant's continued assertion of his privilege against self-incrimination, while lawful, is prejudicial to the due process rights of plaintiff and plaintiff's ability to investigate defendant's affirmative defenses.
>
> 9. Defendant's assertion of his privilege against self-incrimination has served to impede plaintiff's ability to obtain accurate discovery about the nature of defendant's affirmative defenses.
>
> 10. The Court has carefully considered defendant's conduct, as well as its cumulative effect, and has also considered the available sanctions for such conduct, including, without limitation treating defendant as in contempt, staying proceedings until defendant elects to testify, prohibiting defendant from presenting evidence, and other lesser sanctions. After thorough consideration and balancing the interests of the parties, the Court has determined that sanctions less severe than striking defendant's affirmative defenses would not be adequate.

The trial court then ordered defendant's affirmative defenses struck "as a sanction for failing to comply with discovery in the Court's discretion." Defendant filed notice of appeal on 29 April 2009.[1]

I

[1] Defendant first contends that the trial court lacked authority to impose sanctions under Rule 37 at this stage of the litigation. The trial court ordered defendant's affirmative defenses stricken under Rule 37(b)(2) of the Rules of Civil Procedure, which provides that "[i]f a party . . . fails to obey an order to provide or permit discovery . . . a

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1. Although the merits of the underlying lawsuit have not yet been resolved, we have jurisdiction to hear this appeal because "an order imposing sanctions under Rule 37(b) is appealable as a final judgment." *Smitheman v. Nat'l Presto Indus., Inc.*, 109 N.C. App. 636, 640, 428 S.E.2d 465, 468, *disc. review denied*, 334 N.C. 166, 432 S.E.2d 366 (1993).

judge of the court in which the action is pending may make such orders in regard to the failure as are just . . . ." In general, "sanctions under Rule 37 are imposed only for the failure to comply with a court order." *Pugh v. Pugh*, 113 N.C. App. 375, 379, 438 S.E.2d 214, 217 (1994).

Defendant first contends that the trial court could not impose sanctions under Rule 37(b) because plaintiff never filed a motion to compel discovery pursuant to Rule 37(a). Defendant, however, moved pursuant to Rule 26(c) for an order protecting him from discovery until the criminal charges pending against him were resolved. Rule 26(c), which authorizes entry of a protective order upon motion and good cause shown, also provides that "[i]f the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery." A motion for a protective order under Rule 26(c) that is denied, therefore, may end in the same result as a motion to compel discovery under Rule 37(a): an order compelling discovery. We hold that violation of an order compelling discovery that results from a motion for a protective order may be the basis for sanctions under Rule 37(b).

Defendant next argues, citing *Bd. of Drainage Comm'rs of Pitt County Drainage Dist. No. 3 v. Dixon*, 158 N.C. App. 509, 510, 581 S.E.2d 469, 470 (2003), *aff'd per curiam and disc. review improvidently allowed per curiam*, 358 N.C. 214, 593 S.E.2d 763 (2004), that he could only be sanctioned under Rule 37 if he failed to physically appear at the deposition. In *Dixon*, like this case, the party was sanctioned after he appeared at his deposition and refused to answer questions on Fifth Amendment grounds.

What distinguishes this case from *Dixon*, however, is that the trial court in *Dixon* imposed sanctions under Rule 37(d) and not, as in this case, under Rule 37(b). Rule 37(d) provides that if a party fails "to appear before the person who is to take his deposition, after being served with a proper notice, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just . . . ." The Court, in *Dixon*, was construing what the word "appear" means for purposes of sanctions under Rule 37(d). 158 N.C. App. at 512, 581 S.E.2d at 471. The Court concluded that when a deposition has been noticed of a party, who is a natural person, and that "party physically appears at a deposition, the imposition of Rule 37(d) sanctions for failure to appear is not appropriate. The better course

of action would have been for [the deponent] to apply for a protective order pursuant to Rule 26(c). Then the trial court could define the scope of the examination in light of defendant's assertion of his Fifth Amendment privilege." *Id.*

In this case, the parties proceeded in accordance with "[t]he better course of action" recommended by *Dixon*. *Id.* Defendant filed a motion for a protective order, and Judge Eagles entered an order on 19 December 2008 denying that motion and ordering defendant to "submit" to the deposition. The issue here is not whether defendant failed to appear, within the meaning of Rule 37(d), but whether defendant violated Judge Eagles' order, thereby subjecting defendant to sanctions under Rule 37(b).

Defendant next argues that he did not, in fact, violate Judge Eagles' 19 December 2008 discovery order. Defendant claims that the order, by directing him to "submit to deposition within forty-five days of the date of this Order," only ordered that he physically appear at the deposition and did not require him to answer any questions. Defendant reasons that since he did appear for the deposition, he complied with the 19 December 2008 order.

If we were to accept defendant's reading of the 19 December 2008 discovery order, then we would have to conclude that Judge Eagles did nothing more than direct defendant to do exactly what he did in October 2008 at the first convening of the deposition—appear at the deposition and do nothing more. This construction of the order would render meaningless the warning in Judge Eagles' order that "in the event defendant should elect to claim his privileges under the Fifth Amendment, he *may not do so* without consequence in the present civil action." (Emphasis added.)

We instead construe the order as directing defendant to appear at the deposition and to either answer the questions posed to him or assert the Fifth Amendment privilege. The order further placed him on notice that if he chose not to answer the questions based on his Fifth Amendment privilege, there would be consequences in this civil action. Indeed, this is all Judge Eagles could legally do in denying defendant's motion for a protective order and ordering that defendant provide discovery. *See Roadway Express, Inc. v. Hayes*, 178 N.C. App. 165, 172, 631 S.E.2d 41, 46-47 (2006) (holding that trial court erred in ordering defendant to answer discovery requests following assertion of Fifth Amendment rights); *Sugg v. Field*, 139 N.C. App. 160, 164, 532 S.E.2d 843, 845-46 (2000) ("Though it is true that a court

cannot compel an individual to disclose information which may later be used against him in a criminal proceeding, this does not mean that an individual's decision to invoke the privilege may be done without consequence."). Based on the terms of this order, when defendant chose not to answer the questions, Judge Stone was then authorized to determine what the consequences of that choice would be in this case.

II

[2] Defendant further contends that the trial court's imposition of sanctions for his failure to answer questions at his deposition violated his Fifth Amendment rights. In *Cantwell v. Cantwell*, 109 N.C. App. 395, 397, 427 S.E.2d 129, 130, *disc. review improvidently allowed per curiam*, 335 N.C. 235, 436 S.E.2d 588 (1993), this Court recognized that a party may properly invoke his or her Fifth Amendment rights in a deposition in a civil proceeding. The Court stressed, however, that "[t]he privilege against self-incrimination is intended to be a shield and not a sword." *Id.* It reasoned that " 'if a plaintiff seeks affirmative relief or a defendant pleads an affirmative defense[,] he should not have it within his power to silence his own adverse testimony when such testimony is relevant to the cause of action or the defense.' " *Id.* (quoting *Christenson v. Christenson*, 281 Minn. 507, 517, 162 N.W.2d 194, 200 (1968)).

The Court consequently held that "a party has a right to seek affirmative relief in the courts, but if in the course of her action she is faced with the prospect of answering questions which might tend to incriminate her, she must either answer those questions or abandon her claim." *Id.* at 398, 427 S.E.2d at 131. The Court explained that in giving the party invoking the Fifth Amendment the choice to either (1) shield himself from criminal charges by refusing to answer questions and abandon his affirmative claim or (2) waive the privilege and pursue the claim, "an equitable balance" is created between the party's right to assert his or her privilege and the opposing party's right to defend him or herself against claims. *Id.*

In *Sugg*, 139 N.C. App. at 165, 532 S.E.2d at 846, this Court affirmed the trial court's dismissal of the plaintiff's complaint alleging that defendants had trespassed on his property, taken embarrassing videotapes belonging to plaintiff, and shown the videotapes to others. After the plaintiff refused to answer questions in his deposition about the whereabouts of the videotapes once the defendants had returned them, the defendants sought an order compelling disclosure. *Id.* at

162, 532 S.E.2d at 845. At the reconvened deposition, the plaintiff refused to answer questions based on his Fifth Amendment rights. *Id.*

On appeal from the trial court's order dismissing the action, this Court affirmed, stating that prior decisions had made it "clear that where the privileged information sought from a plaintiff in discovery is material and essential to the defendant's defense, plaintiff must decide whether to come forward with the privileged information or whether to assert the privilege and forego the claim in which such information is necessary." *Id.* at 164, 532 S.E.2d at 846. The Court acknowledged that "[d]ismissal is not automatic," but rather a trial court must employ a balancing test "weighing a party's privilege against self-incrimination against the other party's rights to due process and a fair trial." *Id.*

The Court concluded that the information the plaintiff refused to disclose "was essential to defendants' ability to defend against actual and punitive damages" because the plaintiff's testimony might have "significantly mitigated" the damages. *Id.* at 165, 532 S.E.2d at 846. The plaintiff's refusal to answer on Fifth Amendment grounds "severely limited defendants' ability to present a defense to plaintiff's claim for damages." *Id.* This Court concluded that the trial court had "carefully considered and balanced plaintiff's right to assert his privilege against self-incrimination as opposed to defendants' due process rights to defend against his allegations and determined that, without access to the information which plaintiff refused to divulge, defendants' rights were unduly prejudiced." *Id.* The Court, therefore, affirmed the order of dismissal. *Id.*

In *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 618 S.E.2d 819 (2005), *disc. review denied*, 360 N.C. 290, 628 S.E.2d 382 (2006), this Court applied the *Sugg* analysis. The only disputed issue in the pending action was the amount of the plaintiff's damages, and an important factor in calculating those damages was the amount of profit the plaintiff had received from a house. The trial court dismissed the action under Rule 37 and Rule 41 of the Rules of Civil Procedure based, in part, on the plaintiff's assertion of his Fifth Amendment privilege in response to questions by defense counsel related to the house sale. *Id.* at 250, 618 S.E.2d at 828.

This Court held that the trial court properly applied the *Sugg* balancing test. On the one hand, the plaintiff's "decision to assert the Fifth Amendment" rather than answer the deposition questions "served to impede [the defendant's] ability to obtain accurate discov-

ery" on an issue that the trial court found was of importance to the case. On the other hand, the trial court "properly indicate[d] that the value of asserting the Fifth Amendment was minimal in light of" conduct to which the defendant had already testified. *Id.* at 250-51, 618 S.E.2d at 828.

In *Roadway Express*, 178 N.C. App. at 172-74, 631 S.E.2d at 46-47, this Court held that this analysis also applies to a defendant's assertion of his Fifth Amendment rights. In *Roadway*, the defendant refused to respond based on the Fifth Amendment to the plaintiff's requests for information relating to any prescription drugs that defendant may have been under the influence of at the time of the accident. After concluding that the trial court erred in ordering the defendant to respond, *id.* at 172, 631 S.E.2d at 46-47, the Court observed that the defendant's refusal to respond to the discovery requests "may preclude him from asserting certain affirmative defenses." *Id.*, 631 S.E.2d at 47.

In *Roadway Express*, the defendant had raised the affirmative defenses of sudden emergency and contributory negligence. *Id.* at 173 & n.2, 631 S.E.2d at 47 & n.2. Although the Court concluded that the contributory negligence defense did "not appear to be affected by Defendant's invocation of his Fifth Amendment rights," *id.* at 173 n.2, 631 S.E.2d at 47 n.2, the Court determined that the "[d]efendant's state of mind, including whether he was under the influence of prescription drugs, at the time of the accident must be evaluated to determine whether Defendant had the ability to act as an ordinarily prudent person would have acted at the time of the accident." *Id.* at 173, 631 S.E.2d at 47. The Court, therefore, ruled that upon remand for trial

> our holding permits Defendant to assert his Fifth Amendment privilege to protect himself from self-incrimination in responding to Plaintiff's request for admissions and interrogatories relating to factual information on medications he may have been under the influence of at the time of the accident. However, at trial, if the trial court determines such responses are essential to evaluate the application of the sudden emergency doctrine, the trial court *must hold* that Defendant's choice to invoke his rights not to respond to the request for admissions and interrogatories precludes his assertion of the sudden emergency defense to Plaintiff's allegations.

Id. at 173-74, 631 S.E.2d at 47 (emphasis added).

Here, while, in contrast to *In re Pedestrian Walkway Failure*, the value to defendant of asserting his Fifth Amendment rights may be substantial, the trial court found that this assertion of rights "is prejudicial to the due process rights of plaintiff" because it "has served to impede plaintiff's ability to obtain accurate discovery about the nature of defendant's affirmative defenses." The trial court, after balancing the interests of both parties and considering other lesser sanctions, "determined that sanctions less severe than striking defendant's affirmative defenses would not be adequate." This conclusion was not manifestly unreasonable and, therefore, was not an abuse of discretion. *See In re Pedestrian Walkway Failure*, 173 N.C. App. at 246, 618 S.E.2d at 826 ("The imposition of sanctions under Rule 37 is in the sound discretion of the trial judge and cannot be overturned absent a showing of abuse of that discretion." (internal quotation marks omitted)).

Defendant alleged in his answer[2]:

> Prior to April 27, 2008, at 11:38 p.m., and specifically within the ten hours preceding that time and date, Howard Bradley Wicker, together with Nancy Lovendahl Wicker, had been together, in each others [sic] presence, and had been in a position to observe each other's behavior, including the participation in consuming alcoholic beverages and at the time of the accident, April 27, 2008, at 11:38 p.m., and for the thirty minutes to one hour before that time, Nancy Lovendahl Wicker, decedent, knew the condition of Defendant Howard Bradley Wicker, including but not limited to his level of intoxication or impairment and ability to drive an automobile.
>
> . . . .
>
> On this occasion and all times herein relevant, Nancy Lovendahl Wicker elected to ride as a passenger in the 2005 Volvo automobile owned and operated by Howard Bradley Wicker after she had been in his presence for the past eight or ten hours and knew, [or] by exercising reasonable care, should have known, of his intoxication or impairment level, the amount of alcohol or other impairing substance which he had consumed and knew, and exercised [sic] a reasonable care should have known, that [it] was

2. Defendant asserted only two affirmative defenses: contributory negligence and gross contributory negligence.

unsafe to ride as a passenger in the motor vehicle with Defendant Howard Bradley Wicker at that time.

. . . .

On this occasion and all times herein relevant, Nancy Lovendahl Wicker was careless and negligent in that she:

a) Rode as a passenger in a motor vehicle with the Defendant when she knew, [or] exercising reasonable care, should have known that he had consumed some sort of impairing substance to the point that he had impaired both of his mental and physical facilities and it was unsafe to drive;

b) Rode as a passenger in a motor vehicle with Defendant Howard Bradley Wicker after she knew, [or] exercising reasonable care, should have known that he was impaired by an impairing substance;

c) Rode as a passenger in a motor vehicle with Defendant Howard Bradley Wicker after she had been in [his] presence for such a sufficient period [of] time to have observed his behavior and have been aware of his condition and ability to drive or not be able to drive an automobile;

d) Rode as a passenger in a motor vehicle with Defendant Howard Bradley Wicker and failed to remonstrate;

e) Failed to exercise that degree of care which a reasonable and prudent person would have exercised under the same or similar circumstances; and

f) Was careless and negligent in other respects to be proven at trial[.]

To prevail on the defense of contributory negligence, defendant must show Ms. Wicker voluntarily chose to get in the car with him when she knew or should have known he was too impaired to drive. *See Coleman v. Hines*, 133 N.C. App. 147, 149, 515 S.E.2d 57, 59 (explaining that "where a passenger 'enters an automobile with knowledge that the driver is under the influence of an intoxicant and voluntarily rides with him, he is guilty of contributory negligence *per se*' " (quoting *Davis v. Rigsby*, 261 N.C. 684, 686-87, 136 S.E.2d 33, 35 (1964))), *disc. review denied*, 350 N.C. 826, 539 S.E.2d 281 (1999).

Defendant is the only person who was with Ms. Wicker prior to her becoming a passenger in defendant's car and while they were driving before the accident. Since Ms. Wicker is deceased, defendant has information that is essential to plaintiff's ability to respond to the contributory negligence defense contending that she negligently (or with gross negligence) drove with him knowing that he was intoxicated.

Defendant urges that there are other sources by which it could be determined whether Ms. Wicker voluntarily got into the car with defendant prior to the accident. Plaintiff, in discovery, identified a neighbor who witnessed defendant carry Ms. Wicker out of the house and put her in the car that day. Plaintiff also stated in his deposition that in his opinion, his mother should not have been conscious based on the blood alcohol level she was found to have after the accident, a fact that defendant argues could be used to indicate Ms. Wicker did not voluntarily get into the car that evening.

Defendant's argument, however, misses a critical point. Defendant could not assert contributory negligence as an affirmative defense in his answer unless the defense was "well grounded in fact and [was] warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . . ." N.C.R. Civ. P. 11(a). Thus, defendant must have a factual basis for his allegations that Ms. Wicker "elected to ride as a passenger" in a car operated by defendant, that she "failed to remonstrate" while defendant was driving, and she "[f]ailed to exercise that degree of care which a reasonable and prudent person would have exercised under the same or similar circumstances."

Plaintiff cannot learn that factual basis for the affirmative defenses and prepare to defend against it without obtaining discovery from defendant. Indeed, defendant, in arguing that plaintiff did not need to take his deposition, claims that in plaintiff's deposition, "[h]e also agreed that he had no basis to dispute the allegations contained in paragraph III of the affirmative defense that the Defendant and his wife had been together for 8-10 hours preceding the accident and had the opportunity to observe each other during that time and that Mrs. Wicker knew the level of the Defendant's intoxication or impairment." Since it appears that defendant is the only witness to those eight to 10 hours, plaintiff can have no basis for challenging that allegation without taking defendant's deposition.

We could speculate about the different options for addressing the potential factual bases for the contributory negligence defense. One

of those options would certainly be by presenting evidence that Ms. Wicker was not conscious when she was carried to the car, but plaintiff has no way of knowing, without discovery, whether defendant has a negligence theory that a lack of consciousness fails to rebut. Even as to the question of Ms. Wicker's consciousness, plaintiff needs to know what defendant would likely say at trial on that issue. *Cf. Prince v. Duke Univ.*, 326 N.C. 787, 789-90, 392 S.E.2d 388, 389-90 (1990) (recognizing that party is unfairly prejudiced when denied opportunity to depose a witness prior to trial because of inability to prepare for cross-examination).

Moreover, without deposing defendant, plaintiff would not be able to prepare to meet defendant's claim of contributory negligence with evidence that defendant acted willfully and wantonly negligent. *See Sloan v. Miller Bldg. Corp.*, 119 N.C. App. 162, 167, 458 S.E.2d 30, 33 (holding proof of willful and wanton negligence can overcome claim of contributory negligence), *disc. review denied*, 341 N.C. 652, 462 S.E.2d 517 (1995). Plaintiff also needs to know the evidentiary basis for defendant's contention—anticipating a willful and wanton argument—that Ms. Wicker was grossly contributorily negligent.

Although defendant argues that plaintiff can anticipate what defendant's testimony will be by looking at defendant's answer, the answer does not provide the detail necessary to prepare to respond to the defense or to cross-examine defendant. Moreover, defendant's answer is unverified, and there is no guarantee that he will testify at trial in line with what he has alleged in his pleadings. Indeed, the purpose of a pre-trial deposition is to test the allegations made in the pleadings under penalty of perjury and to obtain additional details that may undermine those allegations. It would be fundamentally unfair to require plaintiff to proceed to trial totally unprepared for what position defendant is going to take with regard to the contributory negligence defense.[3]

In *In re Edmond*, 934 F.2d 1304, 1306 (4th Cir. 1991), the defendant in a civil case had asserted his Fifth Amendment rights. Then, immediately before trial, he moved for summary judgment, attaching an unverified affidavit. On appeal from the trial court's denial of his motion for summary judgment, the Court affirmed, explaining:

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3. We note that defendant's reliance on his answer as a substitute for his testimony undermines his assertion of his Fifth Amendment rights. If defendant is representing to the Court that his testimony will be the same as the information in his answer, then this case may be similar to *In re Pedestrian Walkway Failure*, in which the plaintiff's admissions in his deposition rendered his assertion of his Fifth Amendment rights of "minimal" value.

> By selectively asserting his Fifth Amendment privilege, Edmond attempted to insure that his unquestioned, unverified affidavit would be the only version. But the Fifth Amendment privilege cannot be invoked as a shield to oppose depositions while discarding it for the limited purpose of making statements to support a summary judgment motion.

Id. at 1308. The Court then held that because the trial court had properly declined to consider the affidavit, the defendant had failed to meet his burden of showing that no genuine issue of material fact existed. *Id.*

Similarly, here, defendant is attempting to ensure that by virtue of his invocation of the Fifth Amendment privilege, his unverified pleading is the only version of the facts plaintiff has before him to prepare for trial. *See also SEC v. Zimmerman*, 854 F. Supp. 896, 898-99 (N.D. Ga. 1993) (holding defendant could not withhold evidence in discovery on Fifth Amendment grounds and then waive privilege at trial and surprise plaintiff with evidence, explaining that "[t]he Fifth Amendment privilege cannot be invoked to oppose discovery and then tossed aside to support a party's assertions").

Given these circumstances, we hold that the trial court properly balanced the interests of the parties. The court did not abuse its discretion in determining that since defendant chose to assert his Fifth Amendment rights, his affirmative defenses should be struck.

III

[3] Defendant, however, further argues that the trial court erred by not adequately considering alternative sanctions before striking his affirmative defenses. Although a trial court is required to consider less severe sanctions before dismissing a party's claim with prejudice under Rule 37, it retains the discretion to impose a dismissal after doing so. *Global Furn., Inc. v. Proctor*, 165 N.C. App. 229, 233, 598 S.E.2d 232, 235 (2004) ("The trial court is not required to *impose* lesser sanctions, but only to *consider* lesser sanctions."). "[T]his Court will affirm an order for sanctions where 'it may be inferred from the record that the trial court considered all available sanctions' and 'the sanctions imposed were appropriate in light of [the party's] actions in th[e] case.' " *In re Pedestrian Walkway Failure*, 173 N.C. App. at 251, 618 S.E.2d at 828 (quoting *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 179, 464 S.E.2d 504, 507 (1995)).

We have already concluded that the sanctions imposed were appropriate, but we must still consider whether the trial court considered less severe sanctions. In *In re Pedestrian Walkway Failure*, this Court held that a trial court had indicated that it fulfilled its duty to consider lesser sanctions when it stated in the order that it had considered the available sanctions and determined that sanctions less severe than dismissal would not be adequate. *Id.*, 618 S.E.2d at 829.

In this case, the trial court stated:

> 10. The Court has carefully considered defendant's conduct, as well as its cumulative effect, and has also considered the available sanctions for such conduct, including, without limitation treating defendant as in contempt, staying proceedings until defendant elects to testify, prohibiting defendant from presenting evidence, and other lesser sanctions. After thorough consideration and balancing the interests of the parties, the Court has determined that sanctions less severe than striking defendant's affirmative defenses would not be adequate.

This conclusion is even more specific than that found sufficient in *In re Pedestrian Walkway Failure* and, therefore, is adequate to demonstrate that the trial court considered lesser sanctions.

Defendant nonetheless contends that the trial court erred in failing to consider two alternative ways to resolve the parties' competing interests. First, defendant points out that he offered to answer certain questions at the deposition. The trial court found, however, that counsel for defendant stated on the record at the second deposition: " '[Defendant] can state what his current address is, but beyond that he will assert his Fifth Amendment right against self-incrimination to each and every question posed by the plaintiff in this matter.' " In any event, defendant has not shown that he ever committed to answering the questions relevant to plaintiff's response to his contributory negligence defense or that he committed to a specific time frame for answering them.

Defendant also points out that the trial court could have waited to proceed with the civil case until after the criminal proceedings had been resolved, at which point he would have answered any and all questions. The trial court expressly considered the option of staying proceedings and found it inadequate. Defendant has not cited any North Carolina case requiring the trial court to put off a civil case indefinitely—requiring a plaintiff to wait to prosecute his claims—until a criminal case is resolved, presumably including any appeal.

Moreover, Judge Eagles declined to stay discovery in her order entered 19 December 2008 and denied defendant's motion to continue the trial in an order entered 23 March 2009. The case was then set for trial on 4 May 2009. Defendant did not appeal either order refusing to postpone the case until after the criminal proceedings were resolved. His notice of appeal reads: "Defendant Howard Bradley Wicker[] hereby gives notice of appeal to the Court of Appeals of North Carolina from the Order dated April 28, 2009 in the Superior Court of Guilford Count[y] in which the Honorable Richard W. Stone struck the Defendant's Affirmative Defenses." The Defendant has not explained in what way Judge Stone's order was an abuse of discretion in light of Judge Eagles' denial of the motion for a continuance, requiring plaintiff and defendant both to proceed to trial on 4 May 2009.

We note that defendant asks in the conclusion of both his main brief and his reply brief that this Court, in addition to reversing the order striking defendant's affirmative defenses, also remand this case with instructions directing the trial court to stay the proceedings until the criminal action against defendant has been resolved. Because defendant did not appeal Judge Eagles' orders, the issue of a stay or the denial of a continuance is not before us.[4] Since, however, the trial court stayed this case pending appeal, defendant has effectively received a substantial stay of the proceedings.

In sum, we hold that Judge Stone did not abuse his discretion in entering the order striking defendant's affirmative defenses. The order is, therefore, affirmed.

Affirmed.

Judges CALABRIA and STEPHENS concur.

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4. We express no opinion whether such an appeal would be a permissible interlocutory appeal. *See Howerton v. Grace Hosp., Inc.*, 124 N.C. App. 199, 201, 476 S.E.2d 440, 442-43 (1996) (holding that trial court's denial of motion to stay state proceedings pending outcome of related federal proceedings was interlocutory order that could not be immediately appealed absent showing that substantial right would be affected).

IN THE MATTER OF THE FORECLOSURE OF THE DEED OF TRUST OF: VOGLER REALTY, INC., MORTGAGOR-GRANTOR, TO CHARLES N. STEDMAN, TRUSTEE-APPELLANT, AND J.B. LEE & COMPANY, A N.C. GENERAL PARTNERSHIP, NOTEHOLDER. AS RECORDED IN DEED OF TRUST BOOK 1090, PAGE 338

No. COA09-1714

(Filed 7 December 2010)

Trusts— foreclosure proceeding—attorney fees—audit of expenses in final report—reasonableness determination improper for superior court or clerk of court

The trial court erred by affirming a clerk of court's order disapproving a trustee's final report after a foreclosure proceeding, based on the amount of attorney fees. Neither the superior court nor the clerk of court had authority to make determinations of reasonableness of expenses when auditing the trustee's final report. Under N.C.G.S. § 45-21-33, the clerk was merely authorized to determine whether the entries in the report reflected the actual receipts and disbursements made by the trustee. An aggrieved party may challenge the trustee's actions in a separate action focused on the propriety of the trustee's actions instead of by motion filed at the time of the audit.

Judge HUNTER, Robert N., dissenting.

Appeal by Trustee from order entered 4 November 2009 by Judge Ronald L. Stephens in Superior Court, Alamance County. Heard in the Court of Appeals 12 May 2010.

Stedman Law, by Charles N. Stedman, for Trustee-Appellant.

Bell, Davis & Pitt, P.A., by Michael D. Phillips and Michael A. Myers, for CommunityOne Bank, N.A., Appellee.

McGEE, Judge.

Charles N. Stedman (the Trustee) was trustee on a deed of trust executed by Vogler Realty, Inc. (the Mortgagor-Grantor) and J.B. Lee & Company, to a parcel of land in Burlington. The Trustee, acting both as Trustee and the Trustee's Attorney, filed a foreclosure proceeding under power of sale as set forth in the deed of trust, on 20 March 2009. The Alamance County Clerk of Superior Court (the Clerk) conducted a hearing at which the Mortgagor-Grantor appeared, admitted its default, and did not contest the foreclosure.

The Clerk entered an order authorizing the Trustee to proceed with the foreclosure sale. After the sale was completed, the Trustee filed a Final Report and Account of Foreclosure Sale (the Final Report), for audit and approval, dated 26 June 2009. In the Final Report, the Trustee noted, *inter alia*, the following disbursements to himself: (1) "Trustee's Commission" in the amount of $16,813.12; and (2) "Attorney's Fee" in the amount of $33,573.82.

At the time of the sale, CommunityOne Bank, N.A. (the Bank) was a junior lienholder on the real property secured by the deed of trust. The Bank filed a "motion and objection to disbursements pursuant to the final report and account of foreclosure" on 13 July 2009. The Bank argued that the Trustee's Final Report authorized a disbursement of additional attorney's fees beyond that which was justified, and that the Trustee failed to properly support the amount of the attorney's fees. The Clerk entered an order on 27 July 2009, disapproving the Final Report and ordering the following:

1. The proposed Final Report and Account of Foreclosure Sale dated June 26, 2009 and showing a Trustee's Commission payable to the Trustee/Attorney in the amount of Sixteen Thousand Eight Hundred Thirteen Dollars and Twelve Cents ($16,813.12) and Attorney's fees payable to the Trustee/ Attorney in the amount of Thirty-Three Thousand Five Hundred Seventy-Three Dollars and Eighty Two Cents ($33,573.82) is not approved.

2. Within thirty (30) days of the docketing of this Order, Trustee/Attorney Charles N. Stedman is to prepare an Amended Final Report and Account of Foreclosure Sale reflecting receipt of Sixteen Thousand Eight Hundred Thirteen Dollars and Twelve Cents ($16, 813.12), being the Trustee's Commission of Five Percent (5%), plus additional attorney's fees in the amount of Four Thousand Seven Hundred Twenty Six Dollars and Eighty Eight Cents ($4,726.88), to be shown on separate lines of the amended Final Report and Account of Foreclosure Sale.

3. The Amended Final Report and Account of Foreclosure Sale shall be submitted to the Clerk of Superior Court for review, audit, and recording within thirty (30) days of the docketing of this Order, unless this Order is appealed to Alamance County Superior Court.

The Trustee appealed the Clerk's 27 July 2009 order to the superior court which, in an order entered 4 November 2009, "affirm[ed] the Clerk's Order, in its entirety." The Trustee appeals.

The Trustee first argues that the trial court erred in affirming the Clerk's order because neither the superior court nor the Clerk had authority to make determinations of reasonableness when auditing the Trustee's Final Report. We agree.

N.C. Gen. Stat. § 45-21.31(a) sets forth the procedure for distributing the proceeds of a sale from a foreclosure action:

> The proceeds of any sale shall be applied by the person making the sale, in the following order, to the payment of—
>
> (1) Costs and expenses of the sale, including the trustee's commission, if any, and a reasonable auctioneer's fee if such expense has been incurred;
>
> (2) Taxes due and unpaid on the property sold, as provided by G.S. 105-385, unless the notice of sale provided that the property be sold subject to taxes thereon and the property was so sold;
>
> (3) Special assessments, or any installments thereof, against the property sold, which are due and unpaid, as provided by G.S.105-385, unless the notice of sale provided that the property be sold subject to special assessments thereon and the property was so sold;
>
> (4) The obligation secured by the mortgage, deed of trust or conditional sale contract.

N.C. Gen. Stat. § 45-21.31(a) (2009). Likewise, N.C. Gen. Stat. § 45-21.33 provides for a: "Final report of sale of real property" and an audit by the clerk of superior court, as follows:

> (a) A person who holds a sale of real property pursuant to a power of sale shall file with the clerk of the superior court of the county where the sale is held a final report and account of his receipts and disbursements within 30 days after the receipt of the proceeds of such sale. Such report shall show whether the property was sold as a whole or in parts and whether all of the property was sold. The report shall also show whether all or only a part of the obligation was satisfied with respect to which the power of sale of property was exercised.

(b) The clerk shall audit the account and record it.

N.C. Gen. Stat. § 45-21.33 (2009).

In *In re Foreclosure of Ferrell Brothers Farms*, our Court addressed the scope of the statutory authority granted to the clerk of superior court when conducting an audit pursuant to N.C.G.S. § 45-21.33. *Ferrell*, 118 N.C. App. 458, 455 S.E.2d 676 (1995). In *Ferrell*, we reviewed the trial court's order granting the trustee in a foreclosure proceeding a trustee's commission, as well as allowing the payment of the trustee's attorneys' fees. *Id.* at 459, 455 S.E.2d at 677. After the sale, the holder of a second mortgage filed notice with the trial court, claiming ownership of any surplus funds from the foreclosure sale. *Id.* The trustee and the trustee's attorneys filed motions with the trial court to allow the commission and attorneys' fees, while the second mortgagee moved "to limit" the attorneys' fees and the trustee's commission. *Id.* The trial court conducted a hearing but did not allow the second mortgagee to present evidence as to the reasonableness of the commission and attorneys' fees. *Id.* The trial court determined that the requested commission and attorneys' fees were reasonable and that the trustee and attorneys were entitled to those disbursements. *Id.*

Our Court stated that the issue for review was "whether a trustee conducting a sale of real property pursuant to an express power of sale contained in a mortgage or deed of trust is required to receive court approval of the amount of disbursements made pursuant to N.C. Gen. Stat. § 45-21.31(a)." *Id.* "The only question is whether the legislature has provided or whether the instrument provides any means for [the second mortgagee] to contest the amount of disbursements made by the trustee. *The answer is no*." *Id.* at 460, 455 S.E.2d at 677-78 (emphasis added).

In reviewing the relevant law, our Court noted that: "The trustee is entitled to compensation 'as is stipulated in the instrument,' . . . [and] [a]lthough N.C. Gen. Stat. § 45-21.31(a) does not have specific reference to attorneys' fees, to the extent the instrument provides for the payment of such fees, they become an 'obligation secured by' the instrument." *Id.* at 460-61, 455 S.E.2d at 677. We therefore recognized that "any entitlement to and the amount of attorneys' fees required for the conduct of the sale is also controlled by the instrument and subject to deduction from the sale proceeds." *Id.* at 461, 455 S.E.2d at 677.

Our Court then addressed the issue of whether the trustee was required to seek approval of the amount of disbursements:

> Chapter 45, Article 2A contains no language that suggests the trustee must seek or obtain approval from either the clerk of the superior court or the court prior to making the disbursements permitted in N.C. Gen. Stat. § 45-21.31(a). . . . Thus, in this case, the disbursements made pursuant to N.C. Gen. Stat. § 45-21.31(a) are within the sole province of the trustee. The trustee is required to file a final report and that report must be audited by the clerk of the superior court. In conducting the "audit," however, *the clerk is merely authorized to determine whether the entries in the report reflect the actual receipts and disbursements made by the trustee.*
>
> Accordingly, the trial court did not err in refusing to allow [the second mortgagee] to present evidence on the reasonableness of the trustee's commission and attorneys' fees. *Indeed, the reasonableness of these expenses was not an issue properly before the trial court.*

Id., 455 S.E.2d at 678 (emphasis added). Thus, we held in *Ferrell* that a clerk of superior court, conducting an audit of a final report and account of sale pursuant to N.C.G.S. § 45-21.33, lacks the statutory authority to make determinations of the reasonableness of expenses listed on the report. *Id.*

Our Court revisited this issue in *In re Foreclosure of Webber*, 148 N.C. App. 158, 557 S.E.2d 645 (2001). In *Webber*, the trustee sought pre-approval from the clerk of superior court of certain costs, expenses, and obligations related to a foreclosure sale. *Id.* at 158-59, 557 S.E.2d at 645. The trustee allocated a payment of "$12,000.00 in legal fees." *Id.* at 160, 557 S.E.2d at 646. The mortgagees objected to certain of the proposed payments, and the clerk of superior court conducted a hearing. *Id.* at 159-60, 557 S.E.2d at 645-46. The clerk entered judgment disapproving the amount of attorney's fees and reducing them, which was appealed to the superior court. *Id.* at 160, 557 S.E.2d at 646. The superior court ruled, *inter alia*, that it had jurisdiction to conduct *de novo* review of the clerk's order; that the clerk did not exceed his authority in entering the order; and that the amount of attorney's fees should be increased in part. *Id.* The trustee and the mortgagors appealed. *Id.* On appeal to our Court, we noted that

> within the context of a foreclosure proceeding pursuant to Chapter 45, Article 2A, the legislature has not provided any means for a party to contest payments made by a trustee pursuant to [N.C.G.S. § 45-21.31] subsection (a), and that disputes

> regarding such payments are not issues properly before the clerk of superior court or the superior court as a part of a foreclosure proceeding.

Id. at 161, 557 S.E.2d at 647 (citing *Ferrell*, 118 N.C. App. at 461, 455 S.E.2d at 678). Our Court then held that the trustee's attorney's fees fell "within the costs, expenses, and other obligations listed in subsection (a) of N.C. Gen. Stat. § 45-21.31." *Id.* at 162, 557 S.E.2d at 647. Therefore, the trustee's proposed payments of attorney's fees were " 'within the sole province of the trustee.' " *Id.* (quoting *Ferrell*, 118 N.C. at 461, 455 S.E.2d at 678). Finally, our Court held that

> neither the clerk of superior court nor the superior court had statutory authority under Chapter 45, Article 2A, to review the trustee's proposed application of the proceeds of the foreclosure sale, or to allow, disallow, or modify the amount of such proposed payments, or to rule on whether the trustee had breached his fiduciary duties.

Webber, 148 N.C. App. at 162, 577 S.E.2d at 647-48.

In the case before us, we find *Ferrell* and *Webber* controlling. The facts in the present case show that the Trustee conducted a foreclosure sale under a deed of trust containing a power of sale pursuant to Chapter 45, Article 2A of the General Statutes. The Trustee filed a Final Report pursuant to N.C.G.S. § 45-21.33, dated 26 June 2009. In the Final Report, pursuant to N.C. Gen. Stat. § 45-21.31, the Trustee set forth several items, including the distribution of the proceeds of the sale. As stated in *Ferrell*, "any entitlement to and the amount of attorneys' fees required for the conduct of the sale is also controlled by the instrument and subject to deduction from the sale proceeds." *Ferrell*, 118 N.C. App. at 461, 455 S.E.2d at 677-78. The deed of trust in the case before us specifically provides that the Trustee may "retain an attorney to represent him in such proceedings [under power of sale] . . . [and that] [t]he proceeds of the Sale shall[,] after the trustee retains his commission, together with reasonable attorneys fees incurred by the Trustee in such proceeding, be applied to the costs of sale[.]" Thus, the Trustee's payment of attorney's fees and his own compensation fall within the "costs, expenses, and other obligations listed in subsection (a)" of N.C.G.S. § 45-21.31, and were " 'within the sole province of the trustee.' " *Webber*, 148 N.C. App. at 162, 557 S.E.2d at 647 (quoting *Ferrell*, 118 N.C. App. at 461, 455 S.E.2d at 678).

The Bank argued in its motion and objection to disbursements in the Final Report, and in its brief, that the Trustee's payment of additional attorney's fees to himself, as attorney for the Trustee, was prohibited by N.C. Gen. Stat. § 32-61 and by our Court's holding in *In re Foreclosure of Newcomb*, 112 N.C. App. 67, 434 S.E.2d 648 (1993). The Bank also relies on language from the *North Carolina Clerk of Superior Court Procedures Manual*, which states that: "Except in unusual circumstances, there is no authority to justify receipt by a trustee/attorney of both a trustee's fee and a separate attorney fee for a foreclosure under power of sale contained in a deed of trust." School of Government, University of North Carolina at Chapel Hill 2003 at 130.5. The Bank also refers us to the *Corpus Juris Secundum*. However, neither *Corpus Juris Secundum* nor the *Procedures Manual* are binding authority on this Court, whereas the North Carolina General Statutes and prior case law of our Court are.

In *Newcomb*, our Court addressed the clerk of superior court's authority, under former N.C. Gen. Stat. § 32-51, to review the reasonableness of an attorney-trustee's payment to himself of attorney's fees incurred during an incomplete foreclosure sale that was terminated pursuant to N.C. Gen. Stat. § 45-21.20. *Newcomb*, 112 N.C. App. 67, 434 S.E.2d 648. We note that the current N.C.G.S. § 32-61 contains substantially the same provisions as in the former N.C.G.S. § 32-51. N.C. Gen. Stat. § 32-61 provides that:

> The clerk of superior court may exercise discretion to allow counsel fees to an attorney serving as a fiduciary or trustee (in addition to the compensation allowed to the attorney as a fiduciary or trustee) where the attorney, on behalf of the trust or fiduciary relationship, renders professional services as an attorney that are different from the services normally performed by a fiduciary or trustee and of a type which would reasonably justify the retention of legal counsel by a fiduciary or trustee who is not licensed to practice law.

N.C. Gen. Stat. § 32-61 (2009).

In *Newcomb*, the trustee-attorney initiated a foreclosure sale, but the mortgagor decided to satisfy the outstanding debt prior to completion of the sale pursuant to N.C. Gen. Stat. § 45-21.20. *Newcomb*, 112 N.C. App. at 69, 434 S.E.2d at 649. The trustee-attorney agreed to the arrangement proposed by the mortgagor, but "insisted upon a commission of $10,000.00 to accomplish termination of the power of sale[.]" *Id.* Eventually, the property was sold by the mortgagor through

a private sale pursuant to N.C.G.S. § 45-21.20, and the trustee-attorney and the mortgagor brought the issue of the $10,000.00 commission before the clerk of superior court. *Id.* The clerk ordered $10,000.00 to be paid to the trustee-attorney as a commission. *Id.* The superior court affirmed, ruling that the trustee-attorney was entitled to the $10,000.00 as "*both* commission and compensation for legal services." *Id.* at 72, 434 S.E.2d at 651 (emphasis in the original).

Citing former N.C.G.S. § 32-51, our Court in *Newcomb* held:

> When a trustee of a deed of trust who is also a licensed attorney performs such extraordinary services as described in [former N.C.G.S. § 32-51] in connection with a foreclosure proceeding, . . . counsel is entitled under [N.C.]G.S. § 45-21.20 to an award of attorney's fees as an "expense[] incurred with respect to the sale or proposed sale . . . ."

Id. However, we noted that "[i]n passing on the allowance of attorney's fees pursuant to statutory authority . . . our appellate courts have consistently held a trial court's order 'must contain a finding or findings upon which a determination of the reasonableness of the award can be based[.]' " *Id.* (citation omitted). Our Court then reviewed the record and concluded that the "findings of fact and conclusions of law [did] not support the amount of attorneys' fees awarded as 'legal expenses[.]' " *Id.* at 74, 434 S.E.2d at 652.

Thus, as the Bank contends, *Newcomb* did recognize the role of the clerk in evaluating the reasonableness of an attorney-trustee's payment of fees to himself. However, the Bank's reliance on *Newcomb* is misplaced with respect to its argument that the clerk may review a trustee-attorney's payment of fees when auditing a final report. *Newcomb*, and its application of N.C.G.S. § 32-51, dealt solely with a foreclosure sale that was incomplete and terminated pursuant to N.C.G.S. § 45-21.20, which is a different context than that which faces us now.

In contrast, our Court in *Ferrell* and *Webber* dealt with cases where the trustee completed the foreclosure sale and filed a final report pursuant to N.C.G.S. § 45-21.33. Neither *Ferrell* nor *Webber* discussed the applicability of N.C.G.S. § 32-51 to a clerk's audit of a final report pursuant to N.C.G.S. § 45-21.33. The proceeding in the case before us arose from the Bank's objections to the Trustee's Final Report pursuant to N.C.G.S. § 45-21.33, and thus *Ferrell* and *Webber*, rather than *Newcomb*, are controlling. Under N.C.G.S. § 45-21.33, the

clerk "is merely authorized to determine whether the entries in the report reflect the actual receipts and disbursements made by the trustee." *Ferrell*, 118 N.C. App. at 461, 455 S.E.2d at 678.

The dissenting opinion contends that *Newcomb* is not limited to proceedings where a sale was terminated pursuant to N.C.G.S. § 45- 21.20. The dissent also maintains that there is an existing conflict between *Newcomb*, *Ferrell*, and *Webber* and questions the role of our Court in resolving that perceived conflict. Although we do not disagree that the holding in *Newcomb* is not expressly limited to circumstances involving N.C.G.S. § 45-21.20, we find that *Newcomb* is clearly distinguishable from *Webber*, *Ferrell*, and the present case because of the focus in *Webber* and *Ferrell* of the authority of a clerk regarding an audit of a final report and account of sale pursuant to N.C.G.S. § 45-21.33. In making this distinction, our interpretation of *Webber* and *Ferrell* reconciles the holdings in those two cases with that of *Newcomb* and is most applicable to the procedural posture in the case before us.

Our Court provided further guidance in *Webber*, stating:

> We suggest that the proper procedure, as contemplated by Chapter 45, Article 2A, was for the trustee to have: (1) made all payments pursuant to subsection (a) of N.C. Gen. Stat. § 45-21.31 as he deemed proper in his discretion; (2) either paid the surplus to the persons entitled thereto, or paid the surplus to the clerk if there were any dispute as to who was entitled thereto, pursuant to N.C. Gen. Stat. § 45-21.31(b); and (3) filed a final report and account with the clerk pursuant to N.C. Gen. Stat. § 45-21.33. We note that a party wishing to challenge payments made pursuant to N.C. Gen. Stat. § 45-21.31(a) may do so in a separate proceeding against the trustee for a breach of fiduciary duty once such payments have been made. *See Sloop v. London*, 27 N.C. App. 516, 219 S.E.2d 502 (1975) (action for wrongful foreclosure alleging, in part, breach of fiduciary duty by trustee).

Id. at 162-63, 577 S.E.2d at 648. In the case before us, the Bank challenged payments listed in the Final Report made pursuant to N.C.G.S. § 45-21.33. The "proper procedure," as set forth in *Webber*, would have been for the Trustee to make payments as he deemed proper under N.C.G.S. § 45-21.31 (a) and (b), and then to file his Final Report. The Clerk should have audited the Final Report solely to determine whether the payments were made as reflected in the Final Report. Thereafter, if the Bank wished "to challenge payments made

pursuant to N.C. Gen. Stat. § 45-21.31(a)[,] [it could] do so in a separate proceeding against the [T]rustee for a breach of fiduciary duty once such payments [had] been made." *Webber*, 148 N.C. App. at 163, 557 S.E.2d at 648. The "proper procedure" suggested by *Webber* focuses on the correctness of the foreclosure proceeding itself. Nothing in our holding affects the right of an aggrieved party to challenge the actions of a trustee in a separate action against the trustee focused on the propriety of the trustee's actions, just not by motion filed at the time of the audit where the clerk is without authority to resolve such matters.

Because the Clerk lacked statutory authority to assess the reasonableness of the payments set out in the Trustee's Final Report, the Clerk's order must be vacated. *Id.* We therefore vacate the Clerk's order and the trial court's order affirming it. In light of our ruling, we need not address the Trustee's remaining arguments.

Vacated.

Judge STROUD concurs.

Judge HUNTER, JR. dissents with a separate opinion.

HUNTER, JR., Robert N., Judge, dissenting.

For the reasons set forth herein, I must respectfully dissent.

The majority opinion addresses two lines of conflicting authority from this Court regarding the discretion, if any, the clerk of court and the superior court possess to approve or deny the attorney's fees charged by trustees in a foreclosure proceeding. *In re Foreclosure of Newcomb*, 112 N.C. App. 67, 434 S.E.2d 648 (1993) represents the first line of cases; and *In re Foreclosure of Ferrell Brothers Farms*, 118 N.C. App. 458, 455 S.E.2d 676 (1995), and *In re Foreclosure of Webber*, 148 N.C. App. 158, 557 S.E.2d 645 (2001), represent the second line of cases.

In *Newcomb*, this Court addresses the propriety of the trial court's order approving a request by the attorney-trustee for attorney's fees as a "fair and proper amount." 112 N.C. App. at 70, 434 S.E.2d at 650. The *Newcomb* Court noted that N.C. Gen. Stat. § 32-51 provides for "counsel fees," in addition to the compensation to be paid to an attorney for his services as a trustee when an attorney-trustee provides services during the foreclosure that would justify the

retention of counsel. *Id.* at 72, 434 S.E.2d at 651 (quoting N.C. Gen. Stat. § 32-51 (1991) (repealed 2005)).

I agree with the majority that the language of the statute supporting the decision in *Newcomb*, N.C. Gen. Stat. § 32-51, is substantially the same as the presently enacted section 32-61, which permits counsel fees for attorneys serving as fiduciaries. N.C. Gen. Stat. § 32-61 (2009). I further agree that *Newcomb* recognizes that the clerk of superior court and the superior court have discretion in determining the reasonableness of an attorney-trustee's request for disbursement of fees to himself. I cannot agree, however, that *Newcomb* limits the clerk's or the trial court's discretion in determining "reasonable attorneys' fees" to only those situations in which the foreclosure was arrested by payment of the underlying debt pursuant to N.C. Gen. Stat. § 45-21.20 (2009).

Longstanding North Carolina precedent permits the award of attorneys' fees only when the fees are provided for in an instrument and allowed by statute.

> As was stated by Chief Judge (now Justice) Brock in *Supply, Inc. v. Allen*, 30 N.C. App. 272, 276, 227 S.E.2d 120, 123 (1976), "[t]he jurisprudence of North Carolina traditionally has frowned upon contractual obligations for attorney's fees as part of the costs of an action." Certainly in the absence of any contractual agreement allocating the costs of future litigation, it is well established that the non-allowance of counsel fees has prevailed as the policy of this state at least since 1879. *See Trust Co. v. Schneider*, 235 N.C. 446, 70 S.E.2d 578 (1952); *Parker v. Realty Co.*, 195 N.C. 644, 143 S.E. 254 (1928). Thus the general rule has long obtained that a successful litigant may not recover attorneys' fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute. *Hicks v. Albertson*, 284 N.C. 236, 200 S.E.2d 40 (1972). Even in the face of a carefully drafted contractual provision indemnifying a party for such attorneys' fees as may be necessitated by a successful action on the contract itself, our courts have consistently refused to sustain such an award absent statutory authority therefor. *Howell v. Roberson*, 197 N.C. 572, 150 S.E. 32 (1929); *Tinsley v. Hoskins*, 111 N.C. 340, 16 S.E. 325 (1892).

Stillwell Enterprises v. Interstate Equipment Co., 300 N.C. 286, 289, 266 S.E.2d 812, 814-15 (1980).

In the foreclosure proceeding underlying the instant case, Volger Realtor (hereinafter "debtor") signed a promissory note dated 26 June 1997 in the principal amount of $250,000 to accrue interest at the rate of 9% per annum and payable in 179 equal monthly installments of $2,011.56. The promissory note's language provides for receipt of attorneys' fees as follows:

> Upon default the *holder* of this Note may employ an attorney to enforce the holder's rights and remedies and the . . . endorsers of this Note hereby agree to pay to the holder *reasonable attorneys' fees* not exceeding a sum equal to fifteen percent (15%) of the outstanding balance owing on said Note, plus all other reasonable expenses incurred by the holder in exercising any of the holder's rights and remedies upon default.

(Emphasis added.) The note further provides, "[t]his note is to be governed and construed in accordance with the laws of the State of North Carolina."

The debtor's obligation was secured by a "North Carolina Deed of Trust" form prepared by the N.C. Bar Association. This document provides the following language:

> If, however, there shall be any default (a) in the payment of any sums due under the Note, this Deed of Trust or any other instrument securing the Note and such default is not cured within ten (10) days from the due date, or (b) if there shall be default in any of the other covenants, terms or conditions of the Note secured hereby . . . and such default is not cured within fifteen (15) days after written notice, then in any of such events, without further notice, it shall be lawful for and the duty of the Trustee, upon request of the Beneficiary, to sell the land herein conveyed at public auction for cash . . . .
>
> The proceeds of the Sale shall after the Trustee retains his commission, together with *reasonable attorneys fees* incurred by the trustee in such proceeding, be applied to the costs of sale, including, but not limited to, costs of collection, taxes, assessments, costs of recording, service fees and incidental expenditures, the amount due on the Note hereby secured and advancements and other sums expended by the Beneficiary according to the provisions hereof and otherwise required by the then existing law relating to foreclosures.

(Emphasis added.) These are all the relevant terms of the instruments which govern the award of a trustee's commissions and a payment of attorneys' fees in this case.

A trustee in a foreclosure proceeding may or may not require the services of an attorney. When a non-attorney trustee employs an attorney, one assumes that the trustee examines the fee to be charged in discharge of his fiduciary duty to act as a reasonable person would act in conducting his own affairs and insure that the attorneys' fees charged are reasonable. When a trustee also serves as the attorney for the foreclosure proceeding, however, self-dealing makes the exercise of fiduciary duty problematic for the trustee and the determination of a "reasonable" fee under N.C. Gen. Stat. § 32-61 is given to the clerk.

For example, the trustee in prosecuting this foreclosure proceeding acted in conformance with North Carolina law provided in N.C. Gen. Stat. § 6-21.2 (2009) and § 32-61 that enables him to receive "reasonable attorneys' fees" under an instrument of indebtedness. For example, his affidavit contains the following language:

> In my experience, a reasonable attorney's fee for the attorney representing the trustee in a foreclosure special proceeding of fifteen percent (15%) of the outstanding balance due on a note immediately prior to the filing of a foreclosure special proceeding is a fair and reasonable fee and is supported by the statutory and case law of North Carolina.

In addition, the trustee filed with the clerk of court an itemization of his time spent in this matter as trustee and as attorney for the trustee and copies of the documents he prepared. These documents were submitted along with his motion to audit and approve his final account. An examination of the record reveals that the trustee in this matter submitted a factual basis for an award of attorneys' fees using the proper procedure, which I would hold needs to be utilized in all foreclosure proceedings. In my opinion, this action judicially estops the appellant from submitting a different argument on appeal than the argument he put forth in the underlying proceeding. Even if estoppel is not applicable here, it appears this appeal is not based on a difference in law as to what procedure should be used to determine a reasonable fee, but instead is based on a disappointment in the results of the procedure utilized.

The note and deed of trust should be read *in pari materia* to allow an attorney, or a trustee collecting on the note for the holder, to

collect reasonable counsel fees "not to exceed fifteen percent" of the note. When an instrument does not provide for calculation of the amount of "reasonable" attorneys' fees, as in the present case, our courts have held such calculation to be a proper subject for judicial determination. "When the court determines that an award of attorneys' fees is appropriate, but such amount is not fixed by statute or otherwise, the amount ordinarily lies with the discretion of the court." *Coastal Production Credit Ass'n v. Goodson Farms, Inc.*, 70 N.C. App. 221, 319 S.E.2d 650 (1984) (citing *Hill v. Jones*, 26 N.C. App. 168, 170, 215 S.E.2d 168, 170 (1975)).

The plain language of the deed of trust, as well as North Carolina law, imposes a duty to use diligence and fairness in conducting the sale and receiving and disbursing the proceeds of the sale. *Sloop v. London*, 27 N.C. App. 516, 219 S.E.2d 502 (1975). Our Supreme Court has described the duty of the trustee as follows:

> The relaxation of the strict rules equity imposes upon the mortgagor in relation to deeds of trust is predicated upon the theory that the trustee is a disinterested third party acting as agent both of the debtor and of the creditor, thus removing any opportunity for oppression by the creditor and assuring fair treatment to the debtor. He is trustee for both debtor and creditor with respect to the property conveyed. A creditor can exercise no power over his debtor with respect to such property because of its conveyance to the trustee with power to sell upon default of the debtor.
>
> The trustee for sale is bound by his office to bring the estate to a sale under every possible advantage to the debtor as well as to the creditor and he is bound to use not only good faith but also every requisite degree of diligence in conducting the sale and to attend equally to the interest of the debtor and the creditor alike, apprising both of the intention of selling, that each may take the means to procure an advantageous sale. He is charged with the duty of fidelity as well as impartiality, of good faith and every requisite degree of diligence, of making due advertisement and giving due notice. Upon default his duties are rendered responsible, critical and active and he is required to act discreetly, as well as judiciously, in making the best use of the security for the protection of the beneficiaries.

Mills v. Building & Loan Ass'n, 216 N.C. 664, 669, 6 S.E.2d 549, 552 (1940) (citations omitted).

Given this theory of foreclosure law, it is clear, whether the foreclosure is complete or partial, that a trustee is a fiduciary within the context of N.C. Gen. Stat. § 32-61. In this context, a debtor or his assignee, such as a second mortgagee whose pecuniary interest in the proceeds created by the sale (the *in rem* estate), adversely affected by a trustee's discretion, has the right to petition the clerk for relief. In this case, the original debtor's liability for funds due the second mortgagee is adversely affected where the trustee reduces the amount of proceeds available to the second mortgagor. I would hold a successor in interest to the debtor has sufficient standing to raise this issue before the clerk.

Newcomb has not been directly overruled by another panel of this Court. Our panel lacks the ability to overrule *Newcomb* as well. The two decisions cited by the majority in support of its opinion, *Ferrell* and *Webber*, postdate *Newcomb* without expressly overruling or modifying its holding. *Newcomb* ratified a well-established procedure in clerks' offices across the state. Until *Newcomb's* rationale has been overruled or affirmed by our Supreme Court, the effect of the majority's decision places in doubt a practice which is efficient and beneficial and does so without any compensating benefit.

The remedy that *Webber* suggests, that a person injured by a trustee's decision may bring a suit for breach of fiduciary duty, seems to me to be a problematic solution for both the fiduciary and the debtor. *Webber*, 148 N.C. App. at 162-63, 577 S.E.2d at 648. Foreclosure procedures are intended to be summary and expeditious. *Webber's* proposed solution unnecessarily lengthens the dispute and would be estopped by a clerk's approval of fees charged.

The prompt judicial review of attorneys' fees is routine in probate and special proceedings matters and is a procedure familiar to both clerks and the practicing bar. For example, the appellee in this case prepared and filed his petition containing sufficient information with which a clerk or judge could ascertain a "reasonable fee."

A trustee's commission fee is predetermined by the instrument or by statute. Permitting a trustee to set his own attorney's fees, however, when the fee is not established by the instruments is inherently a conflict of interest. For example, a trustee is prohibited from jointly representing himself and a noteholder under the North Carolina Rules of Professional Responsibility. *See* North Carolina Revised Rules of Professional Conduct, Rule 1.7 (2009). When a trustee self-deals with regard to fees he is charging a beneficiary, it would be dif-

ficult, if not impossible, for him to subsequently show he acted openly, honestly, and fairly taking no advantage of his beneficiary. On the other hand, when a fiduciary seeks judicial approval for his "reasonable" fees in advance, any interested party may object openly and have the matter promptly resolved by a neutral decision maker. This latter procedure would meet the transparency standard required for trustees establishing their own compensation from funds which are under their supervision.

As neither our General Assembly nor our Supreme Court has resolved the conflict presented by *Newcomb*, *Ferrell*, and *Webber*, the real property practitioner will continue to have difficulty applying the law regarding this matter of significant public interest.

Our statutes and case law hold that trustees are fiduciaries. *See* N.C. Gen. Stat. § 32-61; Sloop, 27 N.C. App. 516, 219 S.E.2d 502. Clerks are allowed to use discretion in the audit procedures contained in N.C. Gen. Stat. § 45-21.33 and § 32-61 for review of "reasonable" attorneys' fees when the instruments do not provide a method of calculating those sums and when a trustee is also serving as his own attorney.

STATE OF NORTH CAROLINA v. CITARIAN TYQUAN CRANDELL

No. COA10-439

(Filed 7 December 2010)

1. Homicide— first-degree murder—motion to dismiss—sufficiency of evidence—transferred intent

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder. The State introduced substantial circumstantial evidence that defendant fired the shot that killed the victim and that defendant acted with malice, premeditation, and deliberation under the doctrine of transferred intent.

2. Homicide— first-degree murder—instruction—premeditation and deliberation

The trial court did not err or commit plain error by instructing the jury on first-degree murder by premeditation and deliberation. There was sufficient evidence presented to submit this instruction to the jury.

3. Evidence— testimony—lay opinion—calibers of projectiles

The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion *in limine* to exclude a detective's testimony that a bullet removed from the victim was a .40 caliber projectile. The testimony regarding the calibers of the projectiles retrieved from the crime scene based upon the detective's own personal experience and observations relating to various calibers of weapons, and was admissible as a lay opinion under N.C.G.S. § 8C-1, Rule 701.

4. Evidence— expert witness—testimony—sufficiently reliable methods of proof

The trial court did not abuse its discretion or commit plain error in a first-degree murder case by qualifying a special agent as an expert witness without specifying the area in which he would be allowed to offer an expert opinion, nor did the witness's testimony constitute speculation as to whether defendant's gun fired the bullet that killed the victim. The testimony was based upon sufficiently reliable methods of proof in the area of bullet identification.

5. Indictment and Information— short form indictment—first-degree murder

The short form indictment used to charge defendant with first-degree murder was constitutional.

Appeal by defendant from judgment entered 10 November 2009 by Judge Cy A. Grant in Edgecombe County Superior Court. Heard in the Court of Appeals 13 October 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Melissa L. Trippe, for the State.

Geoffrey W. Hosford, for defendant-appellant.

STEELMAN, Judge.

Where the State introduced substantial evidence that defendant fired the shot that killed Derek Morris and that defendant acted with malice, premeditation and deliberation, the trial court properly denied defendant's motion to dismiss the charge of first-degree murder. The trial court did not abuse its discretion in allowing Detective Rothrock to give lay opinion testimony pursuant to Rule 701 of the

North Carolina Rules of Evidence concerning the calibers of bullets recovered at the crime scene. The trial court did not commit plain error in allowing Special Agent Tanner to testify as an expert witness in the field of bullet identification. The short-form murder indictment was sufficient to confer jurisdiction upon the trial court.

I. Factual and Procedural History

On 1 October 2008, Citarian Tyquan Crandell ("Defendant"), Leslie Perry ("Perry"), Cedric Corey ("Corey"), and Xavious Thomas ("Thomas") were at the EP Mart in Rocky Mount, North Carolina at approximately 2:00 a.m. Corey and Thomas arrived at the EP Mart together. Corey pumped gas while Thomas went into the store and paid for the gas. Thomas then returned to the car. Defendant walked towards the car, carrying a pistol. Perry was with Defendant. Defendant began shooting at Thomas, who jumped out of the car and returned fire. Thomas and Defendant each fired a number of rounds from their respective weapons. After the shots were fired, Corey got into the driver's seat of the car, Thomas jumped into the back seat, and they drove off. The fire fight arose out of a confrontation earlier that evening between Thomas and Perry in the parking lot of the D & I Club.

Derek Morris ("Derek") was sitting in the backseat of a car driven by his brother, Brandon Morris ("Brandon"), in the EP Mart parking lot. When the shots were fired, Brandon ducked down and started to drive away. When Brandon checked on Derek, he realized Derek had been shot in the head. Derek was taken to Nash General Hospital, where he was pronounced dead. Derek had no connection with either Thomas or Defendant, and was an innocent bystander.

At approximately 3:00 a.m. on 1 October 2008, Officer Stephen Walker ("Walker") of the Rocky Mount Police Department received a report that shots had been fired at the EP Mart. Walker was unable to locate any eyewitnesses to the shooting, but did locate fourteen .40 caliber Hornady casings. Later that morning, Corporal Scott Dew ("Dew") of the Rocky Mount Police Department went to the EP Mart to conduct an additional investigation. Dew located .32 caliber shell casings. Subsequently, a .40 caliber pistol was seized from Defendant, which was determined to have been purchased by Defendant. A .32 caliber pistol was located at Thomas' residence. Thomas admitted to having fired this weapon in the EP Mart parking lot on the morning of 1 October 2008.

Robert Rothrock ("Rothrock"), a detective with the Rocky Mount Police Department, weighed two different bullets retrieved from the Morris vehicle. One bullet appeared to be a .40 caliber projectile weighing 11.4 grams, and the other was a .32 caliber projectile weighing 4.54 grams. A fragment of a projectile retrieved from Derek's head weighed 6.2 grams. Agent Christopher Adam Tanner ("Tanner"), a special agent with the North Carolina State Bureau of Investigation, testified at trial that the bullet fragment retrieved from Derek's head was of a weight consistent with a bullet core weight of a .38 caliber or larger weapon.

On 9 February 2009, Defendant was indicted for first-degree murder. On 10 November 2009, the jury found Defendant guilty of first-degree murder. Defendant was sentenced to life imprisonment without the possibility of parole.

Defendant appeals.

II. Motion to Dismiss

[1] In his first argument, Defendant contends the trial court erred in denying his motion to dismiss the charge of first-degree murder, because the State failed to prove that Defendant was the person who shot Derek or that Defendant acted with malice, premeditation, or deliberation. We disagree.

A. Standard of Review

"The denial of a motion to dismiss for insufficient evidence is a question of law, which this Court reviews *de novo*." *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations omitted).

> Upon Defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of Defendant's being the perpetrator of such offense. If so, the motion is properly denied.
>
> . . . .
>
> The trial court in considering such motions is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. The trial court's function is to test whether a *reasonable inference* of the Defendant's guilt of the crime charged may be drawn from the evidence.

> The test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both. When the motion . . . calls into question the sufficiency of circumstantial evidence, the question for the Court is whether a reasonable inference of Defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the Defendant is actually guilty. In passing on the motion, evidence favorable to the State is to be considered as a whole in order to determine its sufficiency. This is especially true when the evidence is circumstantial since one bit of such evidence will rarely point to a Defendant's guilt.

State v. Powell, 299 N.C. 95, 98-99, 261 S.E.2d 114, 117-18 (1980) (internal citations and quotations omitted).

B. Identity of Defendant

Defendant first argues that the trial court erred in denying his motion to dismiss the first-degree murder charge since there was no evidence that he shot Derek.

As stated above, "[w]hen the motion . . . calls into question the sufficiency of circumstantial evidence, the question for the Court is whether a reasonable inference of Defendant's guilt may be drawn from the circumstances." *Id.* at 99, 261 S.E.2d at 117. The State presented evidence that only two guns were fired during the incident at the EP Mart in the early morning hours of 1 October 2008; that Defendant was one of the shooters; that Thomas fired a .32 caliber pistol; that .40 caliber shell casings were found at the scene; that a .40 caliber pistol was seized from Defendant after the incident; and that the bullet fragment retrieved from Derek's head came from a weapon that was .38 caliber or larger. When viewed in the light most favorable to the State, there was ample circumstantial evidence presented by the State that the fatal shot that resulted in Derek's death was fired by Defendant's .40 caliber pistol, and that Defendant was the perpetrator of the murder. This argument is without merit.

C. Malice, Premeditation, and Deliberation

Defendant next argues that the trial court erred in not granting his motion to dismiss because the State failed to present evidence that Defendant acted with malice, premeditation, or deliberation.

Defendant was convicted of first-degree murder based upon premeditation and deliberation. "Murder in the first degree is the unlaw-

ful killing of a human being with malice and with premeditation and deliberation." *State v. Burgess*, 345 N.C. 372, 386, 480 S.E.2d 638, 645 (1997) (quotation omitted). In the instant case, there is no question that an unlawful killing took place. In addition, "the law is well established in this State that the intentional killing of a human being with a deadly weapon implies malice . . . ." *State v. Burrage*, 223 N.C. 129, 133, 25 S.E.2d 393, 396 (1943). Evidence that Defendant used a .40 caliber pistol in the shooting provided sufficient evidence for the issue of malice to be submitted to the jury.

"Premeditation means thought beforehand for some length of time, however short. Deliberation means that the act is done in cool state of blood." *State v. Faust*, 254 N.C. 101, 106, 118 S.E.2d 769, 772 (1961) (internal quotations omitted), *cert. denied*, 368 U.S. 851, 7 L. Ed. 2d 49 (1961).

> Circumstances from which premeditation and deliberation may be inferred include:
>
> (1) lack of provocation on the part of the deceased, (2) the conduct and statements of the Defendant before and after the killing, (3) threats and declarations of the Defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

State v. Laws, 345 N.C. 585, 593-94, 481 S.E.2d 641, 645 (1997) (citation omitted). Defendant contends that "[a]t worst, the evidence here showed careless use of a firearm, not a fixed intent to kill Xavious Thomas, Derek Morris, or anyone else." Taken in the light most favorable to the State, the evidence showed a prior confrontation between Defendant and Thomas at the D & I Club; that Defendant happened upon Thomas at the EP Mart; and without provocation began firing his .40 caliber pistol at Thomas. This constituted competent evidence of factors one and four listed above. This was sufficient evidence of Defendant's premeditation and deliberation directed at Thomas to support the submission of first-degree murder to the jury.

The fact that it was Derek who was killed rather than Thomas is irrelevant for our analysis of premeditation and deliberation. Under the doctrine of transferred intent:

> [i]t is an accepted principle of law that where one is engaged in an affray with another and unintentionally kills a bystander or a third person, his act shall be interpreted with reference to his intent and conduct towards his adversary. Criminal liability, if any, and the degree of homicide must be thereby determined. Such a person is guilty or innocent exactly as [if] the fatal act had caused the death of his adversary. It has been aptly stated that "The malice or intent follows the bullet."

State v. Locklear, 331 N.C. 239, 245, 415 S.E.2d 726, 730 (1992) (quoting *State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971)).

Taken in the light most favorable to the State, we hold that there was sufficient evidence presented as to Defendant's malice, premeditation, and deliberation to warrant the submission of the charge of first-degree murder to the jury. This argument is without merit.

III. Jury Instructions

[2] In his fourth argument, Defendant contends that the trial court erred or committed plain error in instructing the jury on first-degree murder by premeditation and deliberation in the absence of any evidence supporting the instruction. We disagree. As discussed above, there was sufficient evidence presented to submit the charge of first-degree murder to the jury. This argument is without merit.

IV. Lay Witness Testimony

[3] In his second argument, Defendant contends that the trial court erred in denying his motion *in limine* to exclude Rothrock's testimony that the bullet removed from Derek was a .40 caliber projectile. We disagree.

A. Standard of Review

> A trial court has wide discretion in determining whether expert testimony is admissible, and may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision. Similarly, whether a lay witness may testify as to an opinion is reviewed for abuse of discretion.

State v. Washington, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000) (citation and internal quotation omitted), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001).

B. Analysis

Defendant filed a pretrial motion *in limine* requesting that the court prohibit State's witnesses from testifying that the bullet fragment removed from Derek's head was a .40 caliber bullet without first being qualified as expert witnesses. This motion was heard before the commencement of the trial, and denied by the trial court. At that hearing, counsel for Defendant acknowledged that he was not objecting to lay witnesses testifying as to what an object weighed, but only to a non-expert witness giving an opinion that the bullet recovered from Derek's head was a .40 caliber.

At trial, Rothrock testified that he recovered two bullets from the Morris vehicle, State's Exhibits 21 and 23. State's Exhibit 22 was the bullet fragment recovered from Derek's head. Rothrock weighed each of the bullets and testified as follows:

> Q. The projectile you're saying, State's Exhibit 21, appear [sic] to you to be a .32 caliber projectile. What was the weight of that?
>
> A. Correct. That was 4.54 grams.
>
> Q. All right. And State's Exhibit 23 it appeared to you to be a.40 [sic] caliber what was the weight of that?
>
> A. That one was 11.4 grams.
>
> Q. All right. Now, State's Exhibit 22 that you retrieved from the autopsy you weighed it.
>
> A. Correct.
>
> Q. And what was its weight?
>
> A. That was 6.2 grams for this particular—
>
> . . . .
>
> Q. Which means then it weighed more than the entire projectile that was a .32 caliber.
>
> A. Yes, that's correct.

We first note that Defendant's argument on appeal does not correlate with his objections at trial. The motion *in limine* and the argument on appeal are that Rothrock was not qualifed as an expert and could not testify that the bullet fragment recovered from Derek's head was a .40 caliber bullet. During Rothrock's testimony, Defendant

made two specific objections. First, he objected to Rothrock's testimony that of the two bullets recovered from the Morris vehicle (State's Exhibits 21 and 23), one appeared to be .32 caliber and the other .40 caliber. Second, he objected to Rothrock weighing the two bullet fragments found in the vehicle along with the fragment recovered from Derek's head. Neither of those objections was directed toward the argument made in the motions *in limine* or upon appeal. A motion *in limine* does not preserve a question for appellate review in the absence of the renewal of the objection at trial. *State v. Oglesby*, 361 N.C. 550, 554-55, 648 S.E.2d 819, 821 (2007); *State v. Tutt*, 171 N.C. App. 518, 518-19, 615 S.E.2d 688, 689 (2005).

We also note that Defendant has mischaracterized Rothrock's testimony. Rothrock did not state an opinion that the bullet fragment that came from Derek's head was a .40 caliber bullet. Rothrock testified that the smaller bullet (State's Exhibit 21) appeared to be a .32 caliber and weighed 4.54 grams, and the larger bullet (State's Exhibit 23) appeared to be a .40 caliber and weighed 11.4 grams. It was left for the jury to make the logical inference that the bullet recovered from Derek's head did not come from a .32 caliber weapon.

Rothrock testified that as a result of his training as a police officer, he was able to recognize the calibers of weapons and ammunition. Rule 701 of the North Carolina Rules of Evidence permits a lay witness to express an opinion that is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2009).

In the past, this Court has upheld the admission of testimony under North Carolina Rule of Evidence 701 in a similar situation. In *State v. Fisher*, this Court held that a detective's

> testimony regarding the location of shell casings when a bullet is fired from two different weapons was not based upon any "specialized expertise or training," but merely upon his own personal experience and observations in firing different kinds of weapons. Having failed to qualify [the detective] as an expert in shell casing ballistics, the State was not prevented from eliciting lay opinion testimony from him

State v. Fisher, 171 N.C. App. 201, 214, 614 S.E.2d 428, 437 (2005), *cert. denied*, 361 N.C. 223, 642 S.E.2d 711 (2007). In the instant case, we hold Rothrock's testimony regarding the calibers of the projectiles

retrieved from the Morris vehicle was testimony based upon Rothrock's own personal experience and observations relating to various calibers of weapons, and was admissible under Rule 701.

Even assuming *arguendo* that it was error for the trial court to admit Rothrock's testimony, the same evidence was presented to the jury through Tanner's testimony. Tanner testified without objection that the lead fragment retrieved from Derek's head was "consistent with bullet core weights of nominal .38 caliber and larger projectiles."

Defendant further contends that the trial court should have excluded testimony concerning the bullet calibers as being more prejudicial than probative under Rule 403 of the North Carolina Rules of Evidence. This rule states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C. Gen. Stat. 8C-1, Rule 403 (2009). "Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the Defendant; the question is one of degree." *State v. Weathers*, 339 N.C. 441, 449, 451 S.E.2d 266, 270 (1994). While, the testimony given by Rothrock was certainly prejudicial, we hold that the trial judge correctly ruled that its probative value was not substantially outweighed by the degree of prejudice. Rothrock's testimony helped the jury to understand the physical evidence in the case.

The trial court did not abuse its discretion in admitting Rothrock's testimony concerning the caliber of the bullets found in the Morris vehicle, and the caliber and location of shell casings recovered at the crime scene. An abuse of discretion only occurs when the trial court's decision is "so arbitrary that it could not have been the result of a reasoned decision." *Washington*, 141 N.C. App. at 362, 540 S.E.2d at 395. The trial court's decision to admit Rothrock's testimony was not "so arbitrary that it could not have been the result of a reasoned decision." *Id.*

This argument is without merit.

V. Expert Testimony

[4] In his third argument, Defendant contends the trial court abused its discretion or committed plain error in qualifying Tanner as an

expert witness without specifying the area in which he would be allowed to offer an expert opinion, and that Tanner's testimony constituted pure speculation as to whether Defendant's gun fired the bullet that killed Derek. We disagree.

A. Standard of Review

Defendant failed to object to Tanner's testimony at trial; therefore, this argument will be reviewed for plain error only. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). The trial court will only be overturned under plain error review when "the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *Id.* (quotation omitted).

B. Analysis

The North Carolina Supreme Court has "set forth a three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citations omitted).

> In North Carolina, while the better practice may be to make a formal tender of a witness as an expert, such a tender is not required. Further, absent a request by a party, the trial court is not required to make a formal finding as to a witness' qualification to testify as an expert witness. Such a finding has been held to be implicit in the court's admission of the testimony in question.

State v. Faulkner, 180 N.C. App. 499, 512, 638 S.E.2d 18, 27-28 (2006) (internal quotation and alteration omitted).

Tanner testified that he was a special agent with the North Carolina State Bureau of Investigation assigned to the firearm and tool mark section. Tanner stated that "the work of a firearms examiner is multi-faceted. The primary responsibility of the examiner is the determination of whether or not a bullet, a cartridge case or shot shell was fired by a particular weapon." Tanner was tendered as an expert without objection from the Defendant. Tanner testified as follows:

> Q. Is there anyway [the projectile retrieved from Derek's head] could have been a .32 caliber?

A. No, not with the .32 calibers that are commonly produced. The most common bullet weight for a .32 auto is 71 grains. And I do believe that [the projectile retrieved from Derek's head] weighed 96.18 grains. And it's just a portion of the core.

. . . .

A. Grain is a very archaic form of measurement which really only has any use in firearms work. It's how we measure the weights of bullets and the weights of gunpowder.

We hold that Tanner's testimony was based upon sufficiently reliable methods of proof in the area of bullet identification, that he was qualified as an expert in that area, and that the testimony was relevant. *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686.

It was not plain error for the trial court to qualify Tanner as an expert, and "the trial court is not required to make a formal finding as to a witness' qualification to testify as an expert witness. Such a finding has been held to be implicit in the court's admission of the testimony in question." *Faulkner*, 180 N.C. App. at 512, 638 S.E.2d at 28 (internal quotation omitted). The trial court will only be overturned under plain error review when "the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quotation omitted). The trial court did not commit error, much less plain error in this case.

This argument is without merit.

VI. Short-Form Indictment

[5] In his fifth argument, Defendant contends that the short-form indictment charging him with first-degree murder was fatally defective, and did not confer jurisdiction upon the trial court. We disagree.

Defendant acknowledges that this argument was made only for the purpose of preserving the issue for further appellate review. The North Carolina Supreme Court "has consistently held that indictments for murder based on the short-form indictment statute are in compliance with both the North Carolina and United States Constitutions." *State v. Braxton*, 352 N.C. 158, 174, 531 S.E.2d 428, 437 (2000) (citations omitted), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001).

This argument is without merit.

NO ERROR.

Judges BRYANT and ERVIN concur.

ROBERT L. GORE, JR., D/B/A VILLAGE DEVELOPMENT AND VILLAGE DEVELOPMENT GROUP, INC., PLAINTIFFS v. ASSURANCE COMPANY OF AMERICA, ZURICH AMERICAN INSURANCE COMPANY, MARYLAND CASUALTY COMPANY AND CALLAHAN & RICE INSURANCE GROUP, INC., DEFENDANTS

No. COA10-295

(Filed 7 December 2010)

1. Insurance— builder's risk policy—failure to comply with reporting provisions—not a waiver

A *de novo* review revealed the trial court did not err by granting summary judgment in favor of Defendants in plaintiffs' suit to recover $87,000 under a builder's risk insurance policy. An insurer's acceptance of reports or premium payments following an insured's failure to comply with the reporting provisions, specified as conditions of coverage, did not constitute a waiver of the condition. Plaintiffs breached the conditions of the policy such that no coverage existed under the policy.

2. Insurance— builder's risk policy—notice of cancellation not applicable to breach of conditions of coverage

Although plaintiffs contended the trial court erred by granting summary judgment in favor of Defendants in plaintiffs' suit to recover $87,000 under a builder's risk insurance policy based on a failure to mail or deliver a notice of cancellation of the policy at least fifteen days before the proposed effective date of cancellation, plaintiffs' reliance on the notice provisions of N.C.G.S. § 58-41-15(b) was misplaced. The statute imposed an obligation of notice only with respect to cancellation and had no application with respect to a breach of the conditions of coverage.

3. Insurance— builder's risk policy—material misrepresentation

The trial court did not err by granting summary judgment in favor of Defendants in plaintiffs' suit to recover $87,000 under a builder's risk insurance policy. A material misrepresentation by

an insured may prevent recovery under the policy. Plaintiffs' reporting of a property as a new start in August 2006, and then again in August 2007, at a time when the construction had been complete for nearly one year, constituted a willful and material misrepresentation by plaintiffs.

4. Insurance— builder's risk policy—agency—reporting irregularities

The trial court did not err by granting summary judgment in favor of Defendants in plaintiffs' suit to recover $87,000 under a builder's risk insurance policy. By its express terms, the insurance on the property was dependent upon plaintiffs' payment of premiums and submission of reporting forms. Plaintiffs' reporting irregularities abrogated the coverage under the policy.

Appeal by plaintiffs from orders entered 20 October 2009 by Judge Jack A. Thompson in Cumberland County Superior Court. Heard in the Court of Appeals 16 September 2010.

McCoy Wiggins Cleveland & O'Connor PLLC, by Richard M. Wiggins and Nicole Jones, for plaintiffs-appellants.

Manning Fulton & Skinner P.A., by Michael T. Medford, for Callahan & Rice Insurance Group, Inc., defendants-appellees.

Dean & Gibson, PLLC, by Jeremy S. Foster and Michael G. Gibson, for Assurance Company of America, Zurich American Insurance Company and Maryland Casualty Company, defendants-appellees.

JACKSON, Judge.

Village Development Group, Inc. ("Village Development") and Robert L. Gore, Jr., ("Gore") appeal from 20 October 2009 orders granting summary judgment in favor of Callahan & Rice Insurance Group, Inc. ("Callahan") and Assurance Company of America, Inc. ("Assurance") related to Village Development's law suit to recover $87,000.00 from Callahan and Assurance pursuant to a builder's risk insurance policy. For the reasons stated herein, we affirm.

Village Development is a North Carolina corporation, with its principal place of business in Cumberland County. It is engaged primarily in the development and construction of residential properties. Gore is the president and sole shareholder of Village Development.

In the mid-1990s,[1] Village Development obtained a "builder's risk" insurance policy for the purpose of protecting its construction projects against the risk of loss. Policy number 90604639 ("the policy") was issued by Assurance. Callahan, an independent insurance agency, acted as the agent for Assurance. According to an affidavit submitted by Callahan in support of its motion for summary judgment, a builder's risk policy is "intended to cover buildings owned by the policyholder while they [are] under construction. The buildings covered by the policy change[] over time based on reports submitted to Assurance by the policy holder[.]"

The coverage provided pursuant to the terms of Gore's policy was to "pay for direct physical *loss* to Covered Property from any Covered Cause of Loss." (Emphasis in original). A "covered property" was defined as "[p]roperty which has been installed, or is to be installed . . . *which you have reported to us*." (emphasis added).

Because the builder's risk policy contemplated coverage for a builder's fluctuating inventory, the terms of the policy included "reporting provisions" as a condition of coverage. The reporting provisions contained in Gore's policy were replaced by reporting terms set forth in a "Monthly Rate Endorsement" to the policy. Specifically, Section E3, addressing when coverage began and ended pursuant to the policy, provided that coverage would end "when you stop reporting the location." Section E4 of the monthly rate endorsement set forth the reporting requirements and specified that the reporting of covered properties was to occur on a monthly basis:

> a. Each month, you will report to us the *total estimated completed value* of all Covered Property for each location that was in your inventory during the previous month. Inventory includes both locations you started during the previous month and previously reported locations that were still in inventory at any time during the previous month. For the purpose of these reports, a location is started when you first put any building materials (including the foundation) on the construction site.

(Emphasis in original). The language of subparagraph a, therefore, established two categories of covered properties: (1) new starts and (2) previously-reported starts.

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1. The affidavit of Clara Koonce, an insurance agent with Callahan, states that the policy originally was issued "in or about 1994," but the sworn affidavit signed by Gore indicates that the policy originally was issued on 14 August 1996.

The monthly rate endorsement also provided the method by which the monthly premium due pursuant to the policy was to be calculated:

> b. You must pay premiums based on the *total estimated completed value* of the Covered Property using the rate we furnish. You must submit a report and premium payment for a location for each month in which that location is in inventory, beginning with the month in which that location was started. You must send your premium payment with the report for the reported location(s) to be covered.

(emphasis in original). The monthly rate endorsement specified the manner in which the monthly reports were to be made, providing that an insured "must make these reports on the form we provide."

Reports and premium payments that were not received on the form provided by Assurance or by the last day of the month in which the report was due "[were] late." The policy also addressed the consequences of late reporting and late premium payments:

> e. Our acceptance of a late report and premium payment for a location will not create coverage for a *loss* that occurred before we received the late report and premium payment. Our acceptance of a report and premium payment does not waive or change any part of this policy nor stop us from asserting any right we have under the terms of this policy.

(Emphasis in original). The monthly rate endorsement further provided, "It is your responsibility to report accurately and on time."

In the event of a loss, the policy expressly provided that payment for a loss would be made only if all reports and premiums for the location had been received:

> d. If, at the time of a *loss* on a location, we have not received all reports and premium payments that were due for that location, then we will not provide any payment for that *loss*. In addition, you must submit a report and premium payment for that location for the month in which the *loss* occurred, and we must receive that report and premium payment on time (i.e., by the last day of the month following the *loss*), or we will not cover that *loss*.

(Emphasis in original).

In August 2006, Village Development reported five separate locations as "new starts" on its monthly reporting form to Assurance, including Lot 9A of the Rivercliff subdivision, with the street address

2779 Rivercliff Road ("2779 Rivercliff").[2] The properties were reported and the premiums were calculated and paid for August and September 2006, consistent with the terms of the policy. For the months of November 2006 through July 2007,[3] Village Development neither reported any locations nor paid any premiums to Assurance. Gore's only justification or excuse for Village Development's failure to report properties or to pay premiums was that "[i]t seemed to be of no real significance."

On 9 October 2007, a reporting form for August 2007 was submitted, reporting three "new starts" located in the Rivercliff subdivision, including 2779 Rivercliff. When the August 2007 report was submitted, construction on 2779 Rivercliff had been complete for nearly one year. For the months of October, November, and December 2007, Village Development reported the three Rivercliff locations as "previous starts," calculated the premiums based upon the rate furnished by Assurance, and paid the premiums.[4] As reported by Village Development, the estimated completed value of 2779 Rivercliff was $230,000.00. The reporting forms and premium payments were accepted by Assurance.

On 15 December 2007, all three of the Rivercliff locations reported on the August 2007 reporting form, including 2779 Rivercliff, were destroyed by fire. Village Development notified Assurance of the loss and filed a claim as to each of the three locations in February 2008. Assurance denied Village Development's claim related to 2779 Rivercliff but paid approximately $143,000.00 to First South Bank, the mortgage holder for the property, pursuant to a loss-payee provision of the policy. Based upon Assurance's denial of the claim, Gore and Village Development (collectively "plaintiffs") filed suit.

On 6 November 2008, plaintiffs commenced a civil action to recover $87,000.00 pursuant to the policy related to the casualty loss that occurred at 2779 Rivercliff. Assurance, Zurich American

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2. At deposition, Gore testified that 2779 Rivercliff was first reported as early as June 2005 and that Callahan issued a certificate of insurance for the property to First South Bank, the mortgage holder, shortly thereafter. The earliest reporting form for 2779 Rivercliff that appears in the record is the report for August 2006.

3. The record does not contain a monthly reporting form for the month of September 2007.

4. The record does not contain any documentation related to reporting or payment of premiums for the month of September 2007. This may be due to the fact that the August 2007 reporting form was submitted in October 2007.

Insurance Company, Maryland Casualty Company, and Callahan were named as Defendants. Assurance filed an answer on behalf of itself and asserted that Zurich American Insurance Company and Maryland Casualty Company incorrectly had been designated as Defendants. In its answer, Assurance denied that it was indebted to plaintiffs pursuant to the policy, but alleged that, in the event that it was determined to be indebted to plaintiffs, any amount owed should be offset by the amount paid to First South Bank. Assurance also asserted plaintiffs' failure to comply with the provisions of the policy as an affirmative defense. Callahan also filed an answer, denying that it was indebted to plaintiffs and asserting as defenses that, *inter alia*, plaintiffs had failed to state a claim upon which relief could be granted and plaintiffs had been contributorily negligent.

Plaintiffs, Assurance, and Callahan each moved for summary judgment. A hearing on the motions was held on 5 October 2009. On 16 October 2009, the trial court entered separate orders granting the motions for summary judgment in favor of Assurance and Callahan. Those orders then were filed with the Clerk of Superior Court on 20 October 2009. Plaintiffs appeal.

Plaintiff's sole argument is that the trial court erred in granting summary judgment in favor of Assurance and Callahan. We disagree.

The standard of review of a trial court's granting a motion for summary judgment is *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citing *Builders Mut. Ins. Co. v. North Main Constr. Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006)). "On appeal, this Court views the record in the light most favorable to the non-moving party, drawing all reasonable inferences in the non-movant's favor." *Tyburski v. Stewart*, 204 N.C. App. 540, 543, 694 S.E.2d 422, 424 (2010) (citing *Gaskill v. Jennette Enters., Inc.*, 147 N.C. App. 138, 140, 554 S.E.2d 10, 12 (2001), *disc. rev. denied*, 355 N.C. 211, 559 S.E.2d 801 (2002)). 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) (2007).

Plaintiffs advance four reasons to support their argument that the trial court's grant of summary judgment was erroneous—waiver, lack of notice of cancellation, Assurance's presumed knowledge of its filings, and imputation of Callahan's conduct to Assurance. We address each of these in turn.

[1] Plaintiffs first argue that Assurance's unqualified, unconditional receipt of past-due payments constitutes a waiver of the conditions of coverage pursuant to the policy. We disagree.

Before addressing the substance of this argument, we note that plaintiffs' attempt to characterize the payments made between August and December 2007 as "past due payments" is a mischaracterization of those payments. Given the nature of the builder's risk policy and the monthly reporting requirements, the payments made in 2007 cannot be characterized as past-due payments, but rather, they were current payments due pursuant to the policy. The only payments that could be characterized as past-due payments would be the payments for the months of October 2006 through July 2007. Nothing in the record reflects that plaintiffs made any such past-due payments.

In North Carolina, the doctrines of waiver and estoppel " 'are not available to broaden the coverage of a policy so as to protect the insured against risks not included therein or expressly excluded' " from coverage. *Hannah v. Nationwide Mut. Fire Ins. Co.*, 190 N.C. App. 626, 631, 660 S.E.2d 600, 604 (2008) (quoting *Currie v. Insurance Co.*, 17 N.C. App. 458, 459-60, 194 S.E.2d 642, 643 (1973)). *See also Brendle v. Shenandoah Life Ins. Co.*, 76 N.C. App. 271, 276, 332 S.E.2d 515, 518 (1985) (holding that waiver and estoppel "cannot be used to create coverage which is nonexistent or expressly excluded from a policy"). Plaintiffs, by arguing for the application of the doctrine of waiver to the facts of this case, seek to expand the scope of their coverage—and thereby, Assurance's liability—pursuant to the policy. Our case law specifically prohibits that result.

North Carolina courts have declined to apply the doctrine of waiver to expand coverage pursuant to traditional types of coverage, such as a homeowner's insurance policy issued to protect against the risk of loss for one specific property and its contents. *See, e.g.*, *Hannah*, 190 N.C. App. at 627, 660 S.E.2d at 601. As Assurance argues, the policy at issue in the case *sub judice* differs substantially from the more traditional types of insurance policies. The builder's risk policy, by its terms, is intended to provide coverage for fluctuating inventory and is dependent upon the insured's compliance with the periodic reporting requirements of inventory and the payment of premiums based upon those reports as set forth in the policy.

Applying the doctrines of estoppel and waiver to a policy containing mandatory reporting provisions as a condition of coverage—such as the builder's risk policy at issue here—presents a question

which North Carolina has not addressed specifically: whether an insurer's acceptance of reports or premium payments following an insured's failure to comply with the reporting provisions of a reporting policy constitutes a waiver of the condition. Other jurisdictions have answered this precise question, and their reasoning is persuasive.

In *Six L's Packing Co., Inc. v. Florida Farm Bureau Mut. Ins. Co.*, Florida Farm Bureau Mutual Insurance Co. ("the insurance company") denied a claim filed by the plaintiff, the owner of a tomato packing shed, to recover the value of the contents of the shed after a fire destroyed it and all of its contents in October 1967. 268 So. 2d 560, 561 (Fla. Dist. Ct. App. 1972), *opinion adopted*, 276 So. 2d 37 (Fla. 1973). Pursuant to the policy at issue there, the insured's failure to file monthly reports meant that the policy "cover[ed] only at the locations and for not more than the amounts included in the last report of values . . . filed prior to the loss[.]" *Id.* at 561-62 (emphasis removed). Notwithstanding this condition, the plaintiff's last report on file prior to the fire was for June 1967 and reflected the contents of the shed as "none." *Id.* at 561. Reports for July, August, and September 1967 were filed ten days after the fire. *Id.*

When the plaintiff appealed the trial court's grant of summary judgment in favor of the insurance company, the *Six L's* court examined the policy at issue and concluded that "[p]rovisions of this type have been held to create conditions going to *coverage* and *not* conditions or grounds of *forfeiture*." *Id.* at 563 (citations omitted) (emphasis in original). It then affirmed the trial court, holding that, "while an insurer may be estopped by its conduct from seeking a *forfeiture* of a policy, the insurer's *coverage* or restrictions on the *coverage* cannot be extended by the doctrine of waiver and estoppel." *Id.* (emphasis in original).

Other jurisdictions have reached the same result based upon similar reasoning. *See, e.g., Finger v. St. Paul Fire and Marine Ins. Co.*, 423 S.W.2d 460 (Tex. Civ. App. 1968) (holding that doctrines of waiver and estoppel do not apply to inventory reporting provisions of policy, such that insurer was entitled to summary judgment for insured's noncompliance with monthly reporting endorsement); *Southern Sash of Columbia v. U.S. Fidelity and Guar. Co.*, 525 So. 2d 1388 (Ala. 1988) (affirming trial court's award of partial recovery to insured because unambiguous language of insurance policy's value reporting clause limited insurer's liability as a consequence of late reporting and doctrine of waiver did not apply); *Dalton Buick v. Universal Underwriters Ins. Co.*, 512 N.W.2d 633 (Neb. 1994) (holding that

insurer was not estopped from denying full coverage after acceptance of premium because reporting clause unambiguously limited insured's recovery).

As these cases illustrate, the language of the policy determines the coverage—and, therefore, the insurer's liability—in the event of a loss that occurs following late or irregular reporting pursuant to a value reporting policy, much like the builder's risk policy at issue here. Because the provisions of a value reporting policy create conditions of coverage, rather than forfeiture, and because pursuant to North Carolina law the doctrines of waiver and estoppel " 'are not available to broaden the coverage of a policy so as to protect the insured against risks not included therein or expressly excluded' " from coverage, *Hannah*, 190 N.C. App. at 631, 660 S.E.2d at 604 (citation omitted), we now hold that an insurer's acceptance of reports or premium payments following an insured's failure to comply with the reporting provisions, specified as conditions of coverage, does not constitute a waiver of the condition.

In the case *sub judice*, the policy at issue specifies that the reporting provisions set forth in the monthly rate endorsement are additional conditions of coverage. Further, the policy also contains language addressing the consequences of both late and irregular reporting. Paragraph d plainly and unambiguously provides the consequences for irregular reporting: "If, at the time of a loss on a location, we have not received all reports and premium payments that were due for that location, then we will not provide any payment for that loss." Paragraph e expressly provides that acceptance of late reports and payments does not constitute a waiver of the conditions: "Our acceptance of a report and premium payment does not waive or change any part of this policy nor stop us from asserting any right we have under the terms of this policy." Like the policy at issue in *Six L's*, these provisions created "conditions going to *coverage* and *not* conditions or grounds of *forfeiture*." *Six L's*, 268 So. 2d at 563 (emphasis in original).

The record plainly establishes that plaintiffs breached the conditions of coverage. At his deposition, Gore readily admitted—and provided no excuse or justification for—the fact that, after 2779 Rivercliff was reported as a new start in August 2006, no reports were made and no premiums were paid for the months of November 2006 through July 2007. In addition to Gore's deposition testimony, the record plainly reflects that plaintiffs made no reports and paid no premiums during that same time period. Viewed in the light most favor-

able to and drawing all reasonable inferences in favor of plaintiffs, *Tyburski*, 204 N.C. App. at 543, 694 S.E.2d at 424, plaintiffs breached the conditions of the policy such that no coverage existed pursuant to the policy and Assurance was entitled to judgment as a matter of law.

[2] In addition to their waiver argument, plaintiffs contend that the trial court's grant of summary judgment was error because Assurance failed to mail or deliver a notice of cancellation of the policy at least fifteen days before the proposed effective date of cancellation as required by statute. *See* N.C. Gen. Stat. § 58-41-15(b) (2007) ("Any cancellation . . . is not effective unless written notice of cancellation has been delivered or mailed to the insured, not less than 15 days before the proposed effective date of cancellation."). This argument lacks merit. As the record reflects, there is no dispute between the parties as to whether the builder's risk policy was in full force and effect at the time of the loss. As discussed *supra*, this dispute is one of *coverage*, not one of forfeiture or cancellation. Accordingly, plaintiffs' reliance upon the notice provisions of North Carolina General Statutes, section 58-41-15(b) is misplaced, because the statute imposes an obligation of notice only with respect to cancellation and has no application with respect to a breach of the conditions of coverage.

[3] Plaintiffs next argue that the trial court's grant of summary judgment was error because Assurance is deemed to have knowledge of the contents of its official files such that, to the extent that plaintiffs reported 2779 Rivercliff both as a "new start" and as a "previously reported start," Assurance cannot now seek to avoid the policy based upon an alleged misrepresentation. This argument lacks merit.

It is well-settled in North Carolina that a material misrepresentation by an insured may prevent recovery pursuant to the policy. *Luther v. Seawell*, 191 N.C. App. 139, 144, 662 S.E.2d 1, 4 (2008); *Tharrington v. Sturdivant Life Ins. Co.*, 115 N.C. App. 123, 127, 443 S.E.2d 797, 800 (1994). In *Luther*, we determined that a representation is material when " 'the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the contract[.]' " 191 N.C. App. at 144, 662 S.E.2d at 4 (quoting *Goodwin v. Investors Life Insurance Co. of North America*, 332 N.C. 326, 331, 419 S.E.2d 766, 769 (1992)).

Plaintiffs' reporting of 2779 Rivercliff as a new start in August 2006, and then again in August 2007, at a time when the construction had been complete for nearly one year, clearly constitutes a willful and material misrepresentation by plaintiffs. Pursuant to the policy,

coverage for completed structures only is obtained through an "existing structure" endorsement, which plaintiffs did not have for 2779 Rivercliff at the time of the loss. In light of the fact that plaintiffs only could obtain coverage for a completed structure by means of an existing structure endorsement, Assurance's knowledge that 2779 Rivercliff had been a completed structure for nearly one year at the time it was reported in August 2007 likely would have "influence[d] the judgment of the insurer in making the contract[,]" regardless of whether plaintiffs reported it as a new start or a previously reported start. *Id.* Accordingly, plaintiffs' material misrepresentation of 2779 Rivercliff prevents recovery pursuant to the policy.

[4] Plaintiffs' final argument—that the conduct of Callahan, acting as agent for Assurance by issuing certificates of coverage on two separate occasions for 2779 Rivercliff, is imputed to Assurance—also lacks merit. The affidavit of Clara Koonce, an insurance agent with Callahan, submitted in support of Callahan's motion for summary judgment, includes an "Evidence of Property Insurance" form as an attachment. The evidence of property insurance form expressly provides, "THE POLICY IS SUBJECT TO THE PREMIUMS, FORMS, AND RULES IN EFFECT FOR EACH POLICY PERIOD." By its express terms, the insurance on the property is dependent upon plaintiffs' payment of premiums and submission of reporting forms. As discussed *supra*, plaintiffs' reporting irregularities abrogated the coverage pursuant to the policy.

For the reasons discussed herein, we affirm the trial court's 20 October 2009 orders granting summary judgment in favor of Assurance and Callahan.

Affirmed.

Judges ELMORE and STEPHENS concurs.

LAMEZ WILLIAMS, PLAINTIFF v. AMERICAN EAGLE AIRLINES, INC., DEFENDANT

No. COA10-267

(Filed 7 December 2010)

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

Issues related to the trial court's rulings that were not specifically addressed in Defendant's brief or for which no reason or argument were made were deemed abandoned under N.C. R. App. P. 28(b)(6).

2. Jurisdiction— subject matter jurisdiction—breach of employment contract—tortious interference with contract—Railway Labor Act

The trial court lacked subject matter jurisdiction over plaintiff's claims for breach of employment contract and tortious interference with contract because those claims were preempted by the Railway Labor Act.

Appeal by Defendant from orders entered 3 June and 5 November 2009, by Judge Allen Baddour in Durham County Superior Court. Heard in the Court of Appeals 16 September 2010.

Ross S. Sohm and Bartina L. Edwards, for plaintiff-appellee.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Thomas A. Farr and Phillip J. Strach, for defendant-appellant.

JACKSON, Judge.

American Eagle Airlines, Inc. ("Defendant") appeals from orders entered on 3 June and 5 November 2009 denying Defendant's motion for judgment notwithstanding the verdict ("JNOV") and alternative motion for new trial made after entry of judgment upon a jury verdict in favor of Lamez Williams ("plaintiff") in the amount of $232,000.00. For the reasons stated herein, we vacate the judgment of the trial court and remand.

Defendant is a Delaware corporation engaged in the business of commercial aviation, conducting business in North Carolina, and employing more than 13,000 employees. Plaintiff was employed by Defendant as a fleet service clerk at Raleigh-Durham Airport on a part-time basis, working approximately twenty hours per week,

beginning 13 December 2004 and ending with her termination on 23 April 2007. Plaintiff's duties as a fleet service clerk included marshaling planes into the gate area, pushing planes away from the gate, collecting luggage from the ticketing area, loading and unloading luggage, cleaning the interiors of planes, and loading and unloading the galley areas with refreshments.

The terms and conditions of plaintiff's employment with Defendant as a fleet service clerk were governed by a collective bargaining agreement ("CBA") between Defendant and the Transport Worker's Union of America, AFL-CIO ("Union"). Plaintiff was a member of the Union and had served as a shop steward.

The CBA states in its preamble that it is "made and entered in accordance with the provisions of the Railway Labor Act . . . ." The Railway Labor Act ("RLA") is codified at Title 45, Chapter 8 of the United States Code. *See* 45 U.S.C. § 151 (2006) (providing that "[t]his Act may be cited as the 'Railway Labor Act.' "). The CBA further provides that Defendant recognizes the Union "as the sole bargaining agent for all Fleet Service employees employed by [Defendant]" and that, "in their behalf[,]" the Union has the authority "to negotiate and conclude an Agreement with [Defendant] with respect to rates of pay, rules and working conditions for all employees covered under this agreement . . . ."

Article 9 of the CBA addresses matters related to the seniority rights of fleet service clerks and consists of paragraphs labeled A through M. Paragraph H addresses factors which have a negative impact upon seniority status. In relevant part, it provides that, "[r]esignation, discharge for *just cause*, or failure to accept recall from layoff will result in forfeiture of seniority and all rights thereto." (emphasis added).

Article 12 of the CBA addresses matters related to the probationary period for fleet service clerks. Specifically, paragraph A of Article 12 states that "[n]ew employees will be considered on probation for the first six (6) months of active service." Paragraph A further specifies that, during the probationary period, "[p]robationary employees may be disciplined or discharged without recourse to the grievance and arbitration provisions . . . ." The grievance and arbitration provisions referred to in paragraph A of Article 12 are set forth in Articles 21 and 22 of the CBA, respectively.

Article 21 of the CBA establishes the grievance procedure for fleet service clerks. Paragraph A of Article 21 establishes a grievance

procedure for employees who believe that they have been "unjustly dealt with or that any provisions of [the] agreement [have] not been properly applied or interpreted . . . ." The grievance procedure set forth in Article 21 provides for the presentation and possible resolution of an employee grievance beginning with the employee's supervisor. If the decision of the supervisor is not satisfactory, the employee may appeal the supervisor's decision to the Regional Vice President of Field Service. If the decision of the Regional Vice President of Field Service is not satisfactory, that decision "may be appealed to the American Eagle Airlines, Inc. Board of Adjustment as provided for in Article 22 of [the] agreement . . . ."

Article 22 of the CBA establishes the Boards of Adjustment. Paragraph C of Article 22 establishes two types of boards of adjustment—a System Board and an Area Board—each having jurisdiction over particular types of matters. System Boards are granted jurisdiction "over disputes between the Company and the Union or any employee governed by this Agreement growing out of grievances involving interpretations or applications of this Agreement." Area Boards, on the other hand, are granted jurisdiction "over disputes between the Company and the Union involving discharge or discipline."

The boards of adjustment established by Article 22 of the CBA are for the purpose of conducting the arbitration system referred to in Article 12 of the CBA. Appeals related to discipline or discharge only can be resolved by majority vote of an Area Board. In the event a Board deadlocks, the final decision is made by a panel of three arbitrators consisting of a Company member of the Board, a Union member of the Board, and a jointly selected neutral arbitrator.

On or about 27 August 2006, plaintiff injured her left shoulder while she was unloading luggage from a plane. Plaintiff reported the injury; then she sought and received medical treatment. On 1 September 2006, plaintiff's doctor wrote a letter stating that plaintiff would be unable to return to work until 18 September 2006. On 5 September 2006, plaintiff signed two forms prepared by Defendant in connection with her work-related injury. The first form, entitled "Injured Employee Roles and Responsibilities," set forth the ways in which plaintiff was required to cooperate in the claims process during the time she was being treated for her injury. The second form, entitled "Injured Employee Information Letter," set forth twenty-three points of information for an injured employee, including the following relevant provisions:

> 18. Transitional Duty: You must notify your supervisor as soon as your doctor determines you can return to work. Both you and the company benefit when you return to work, even if your physical capabilities prevent you from performing your regular job. In most cases, Transitional Duty is available in your department. . . . Refusal of a Transitional Duty assignment may result in cancellation of state benefits, where applicable by state workers' compensation law.
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> . . . .
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> 21. Fraud and Abuse: . . . Workers' compensation fraud includes the following:
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> . . . .
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> - Working at another job, or performing tasks inconsistent with medical claims, while receiving workers' compensation benefits
>
> Workers' Compensation fraud is a violation of American Eagle's Rules of Conduct #34, and any employee found to have engaged in such conduct will be subject to termination . . . .

(original emphasis removed). Rule of Conduct #34 ("Rule 34"), referenced in the Injured Employee Information Letter, states that "Dishonesty of any kind in relations with the Company, such as . . . misrepresentation in obtaining employee benefits or privileges *will be grounds for dismissal* . . . ." (emphasis added).

On 7 September 2006, plaintiff's doctor completed a form indicating that plaintiff could return to work on 18 September 2006, subject to lifting restrictions to remain in effect through 21 September 2006. Plaintiff returned to work sometime after 21 September 2006 and reinjured herself.

After plaintiff reinjured her shoulder, her treating physicians prescribed that she not return to work until 1 November 2006. On 7 November 2006, plaintiff's doctor wrote a letter extending the time for plaintiff to remain out of work through 1 January 2007, with surgery scheduled for 13 December 2006 related to a disc herniation at the level of C5-6.

At the time plaintiff had sustained the original injury to her shoulder on 27 August 2006, she also was employed on a full-time basis in an administrative capacity at Duke University ("Duke"). Following

her injury, plaintiff advised Defendant's human resources department that she still was working at Duke. Defendant did not object to the fact that plaintiff continued to work at Duke because the work restrictions placed upon plaintiff in September 2006 were compatible with her administrative duties at Duke.

Plaintiff stopped working at her job at Duke at the time of her surgery in December 2006 but returned to work at that job at the end of January 2007. Plaintiff did not, however, return to work with Defendant or contact Defendant following her surgery. On or about 21 March 2007, Defendant received a letter from plaintiff's doctor stating that she was able to return to work with restrictions, including no bending, no twisting, and no lifting over five pounds. Then, on 5 April 2007, plaintiff's doctor followed up with another letter stating that plaintiff was unable to return to work until after an appointment scheduled for 14 June 2007.

After receiving two letters from plaintiff's doctor, which seemed to contradict each other, Defendant's manager for worker's compensation claims became suspicious of plaintiff's actions. On 12 April 2007, as part of an investigation, Defendant's worker's compensation manager called plaintiff's work number at Duke to determine whether plaintiff had returned to work there. When the worker's compensation manager called, plaintiff answered, "This is Lamez." The 12 April 2007 phone call established that plaintiff had returned to her job at Duke while continuing to receive worker's compensation benefits from Defendant based upon the representation contained in the letter from plaintiff's doctor dated 5 April 2007 that plaintiff was "advised . . . not to return to work until after her [14 June 2007] appointment[.]"

On 23 April 2007, Defendant terminated plaintiff's employment with Defendant based upon the ground that plaintiff had committed worker's compensation fraud in violation of Rule 34. Plaintiff did not avail herself of the grievance or arbitration procedures contained in the CBA, *see supra*; therefore, an Area Board was never constituted to review the merits of Defendant's decision to terminate plaintiff. Rather, on 19 September 2007, plaintiff filed a complaint with the Employment Discrimination Bureau of the North Carolina Department of Labor ("NCDOL"), alleging that Defendant had violated the North Carolina Retaliatory Employment Discrimination Act ("REDA") by terminating plaintiff's employment in retaliation for plaintiff's pursuit of a worker's compensation claim. By letter dated 14 January 2008, NCDOL determined that there was insufficient evidence to substantiate plaintiff's claim and notified plaintiff of the

time within which plaintiff was required to act should she decide to pursue the matter further.

On 11 April 2008, plaintiff filed suit against Defendant and asserted the following claims: (1) wrongful termination in violation of REDA; (2) wrongful discharge from employment in violation of North Carolina public policy; (3) breach of employee contract; (4) tortious interference with contract of employment; and (5) intentional infliction of emotional distress or alternatively, negligent infliction of emotional distress. On 18 April 2008, plaintiff amended her complaint, adding a sixth claim for "vicarious liability," related to the conduct of a manager for Defendant alleged to have acted as Defendant's agent in relation to the claims asserted by plaintiff. On 16 June 2008, Defendant filed an answer, denying the material allegations of plaintiff's complaint and asserting multiple affirmative defenses.

A jury trial commenced on 3 March 2009. On 9 March 2009, the trial court granted Defendant's motion for a directed verdict with respect to plaintiff's claims for wrongful discharge in violation of public policy, intentional infliction of emotional distress, and negligent infliction of emotional distress.

On 10 March 2009, the jury found in favor of plaintiff with respect to her claims for breach of the agreement and tortious interference with contract, awarding her damages in the amount of $232,000.00. However, the jury returned a verdict in favor of Defendant with respect to plaintiff's REDA claim. A judgment consistent with the jury's verdict was entered by the trial court on 14 September 2009.

[1] Following entry of judgment, Defendant filed a motion for JNOV, or in the alternative, for a new trial.[1] The trial court entered an order on 5 November 2009 denying both motions. On 18 November 2009, Defendant gave its notice of appeal, enumerating ten rulings by the trial court from which appeal is taken. On appeal, however, the arguments presented in Defendant's brief are limited to the trial court's denial of its motion for JNOV and, in the alternative, for new trial.

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1. Defendant filed a motion for JNOV, or in the alternative, motion for a new trial after the jury rendered its verdict but prior to the entry of judgment. Plaintiff responded to the motion, and defendant filed a reply to plaintiff's response. A hearing was held on defendant's motion on or about 7 May 2009. An order was entered denying defendant's motion on 3 June 2009. Thereafter, the trial court entered judgment with respect to the jury's verdict. Believing that its prior motion for JNOV had been premature, defendant renewed its motion by the filing of a second motion for JNOV and alternative motion for new trial.

Accordingly, issues related to the trial court's rulings that are not specifically addressed in Defendant's brief or for which no reason or argument has been made, are deemed to be abandoned. *See* N.C. R. App. P. 28(b)(6) (2009).

[2] On appeal, Defendant argues that plaintiff's claims for breach of employee contract and for tortious interference with contract are preempted by the RLA and, therefore, the trial court lacked subject matter jurisdiction over those claims, thereby rendering the judgment entered on the jury's verdict a legal nullity. We agree.

"Whether a trial court has subject-matter jurisdiction is a question of law, which is reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). Subject matter jurisdiction properly is determined by "the state of affairs existing at the time it is invoked." *In re Peoples*, 296 N.C. 109, 144, 250 S.E.2d 890, 910 (1978) (citations omitted), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). It is a time-honored principle that "proceedings of a court without jurisdiction over the subject matter are a nullity and its judgment [is] without effect either on the person or property." *Hart v. Motors.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956) (citations omitted).

The United States Supreme Court has held that, when an employee's claim is "firmly rooted in a breach of [a collective bargaining agreement]" and asserts no rights independent of that agreement, such claim is preempted by the RLA. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 257-58, 129 L. Ed. 2d 203, 214 (1994). *See also Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 323, 32 L. Ed. 2d 95, 99 (1972) (noting a prior Supreme Court decision that held, "before a state court action could be maintained for breach of such a contract, the employee must first '*attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress.' ") (quoting *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652, 13 L. Ed. 2d 580, 583 (1965) (emphasis in original)). In the case *sub judice*, the third claim for relief set forth in plaintiff's complaint, entitled "BREACH OF EMPLOYEE CONTRACT," is firmly rooted in, and asserts no rights independent of the CBA and, therefore, is preempted by the RLA. *Hawaiian Airlines*, 512 U.S. at 257-58, 129 L. Ed. 2d at 214.

The claim for breach of the employee contract pleaded in plaintiff's complaint alleges that, "by terminating Plaintiff from her position without *just cause*, . . . Defendant breached its contract with the Union and the Plaintiff." (Original underline replaced with italics). As is evidenced on the face of the complaint, the basis of plaintiff's claim for breach is Defendant's alleged lack of just cause to terminate plaintiff's employment. An obligation of just cause as a condition precedent to the termination of employment could arise only out of the CBA. *See Bowen v. United States Postal Service*, 459 U.S. 212, 220, 74 L. Ed. 2d 402, 411 (1983) (recognizing that "a collective-bargaining agreement is much more than traditional common-law employment terminable at will. Rather, it is an agreement creating relationships and interests under the federal common law of labor policy."). Therefore, it is axiomatic that plaintiff's claim for breach of employment contract, premised upon a lack of just cause, is firmly rooted in and asserts no rights independent of the CBA, and the claim is preempted by the RLA. *Hawaiian Airlines*, 512 U.S. at 257-58, 129 L. Ed. 2d at 214.

Plaintiff argues that her claim for breach of employee contract is not premised solely upon the CBA. According to plaintiff, Rule 34 created additional contractual obligations between Defendant and plaintiff that were violated upon Defendant's termination of plaintiff's employment. However, during oral argument counsel for plaintiff conceded that the agreement at issue with respect to the claim of breach was the CBA. The apparent contradiction in plaintiff's argument notwithstanding, plaintiff's argument that Rule 34 created contractual obligations between plaintiff and Defendant lacks merit for two reasons. First, it is a well-established principle of federal labor law that individual employees within a bargaining unit may not negotiate their own employment contract with their employer. *See*, *e.g.*, *J. I. Case Co. v. National Lab. Rel. Bd.*, 321 U.S. 332, 337-39, 88 L. Ed. 762, 767-69 (1944). Second, the CBA, by its terms, explicitly recognizes the Union as the *sole* bargaining agent for all Fleet Service employees employed by Defendant, with the *exclusive* power to negotiate and conclude an agreement with Defendant "with respect to rates of pay, *rules* and working conditions for all employees covered under this agreement . . . ." (emphasis added). Therefore, in view of established legal precedent as well as the express language of the CBA itself, Rule 34 could not create any *contractual* rights or obligations between plaintiff and Defendant.

Because plaintiff's breach of contract claim was preempted by the RLA, and because "the jurisdiction of a court depends upon the state of affairs existing at the time it is invoked," *In re Peoples*, 296 N.C. at 144, 250 S.E.2d at 910, the trial court lacked subject matter jurisdiction over plaintiff's claim for breach of the CBA and the judgment on this claim cannot stand. As our State Supreme Court has said, "proceedings of a court without jurisdiction over the subject matter are a nullity and its judgment [is] without effect either on the person or property." *Hart*, 244 N.C. at 90, 92 S.E.2d at 678.

Similarly, plaintiff's claim for tortious interference with contract of employment also is preempted.

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

Gupton v. Son-Lan Development Co., Inc., 205 N.C. App. 133, 142, 695 S.E.2d 763, 770 (2010) (quoting *Sellers v. Morton*, 191 N.C. App. 78, 81, 661 S.E.2d 915, 921 (2008)). As noted *supra*, individual employees subject to a CBA may not negotiate their own employment contracts with their employers. *See J. I. Case* Co., 321 U.S. at 337-39, 88 L. Ed. at 767-69. Accordingly, the only contract upon which this claim could be based is the CBA. Plaintiff's counsel conceded this point during oral argument. As we also discussed *supra*, employee claims that are firmly rooted in and assert no rights independent of a CBA are preempted by the RLA. *Hawaiian Airlines*, 512 U.S. at 257-58, 129 L. Ed. 2d at 214. Because plaintiff's tortious interference with contract claim was preempted by the RLA, and because "the jurisdiction of a court depends upon the state of affairs existing at the time it is invoked," *In re Peoples*, 296 N.C. at 144, 250 S.E.2d at 910, the trial court lacked subject matter jurisdiction over plaintiff's claim for tortious interference with contract, and the judgment on this claim cannot stand.

For the reasons discussed herein, we vacate the judgment entered by the trial court on 14 September 2009 and remand.

Vacated and Remanded.

Judges ELMORE and STEPHENS concur.

MARLON A. GOAD, BY HIS ATTORNEY IN FACT, CHARLES L. GUYNN, PLAINTIFF V. CHASE HOME FINANCE, LLC, BROCK & SCOTT, PLLC AND JOY WALMER, SUBSTITUTE TRUSTEE, DEFENDANTS

No. COA10-227

(Filed 7 December 2010)

Injunctions— preliminary injunction—foreclosure sale—upset bid period expired—mootness

A *de novo* review revealed that the trial court did not err by denying plaintiff's application seeking to have a foreclosure sale enjoined on the grounds that the hearing was not timely scheduled as required by N.C.G.S. § 45-21.34. The application was moot because the applicant was required to seek and obtain the requested injunction before the point at which the upset bid period expired. Further, the amount of the foreclosure sale did not appear inadequate or inequitable.

Appeal by Plaintiff from judgment entered 28 September 2009 by Judge Franklin F. Lanier in Brunswick County Superior Court. Heard in the Court of Appeals 30 August 2010.

Johnson & Moore, P.A., by Kimberly L. Moore, for plaintiff-appellant.

Ward & Smith, P.A., by Ryal Tayloe, for defendant-appellee, Chase Home Finance, LLC.

Brock & Scott, PLLC, by Jeremy B. Wilkins, for defendant-appellee, Brock & Scott, PLLC, and Joy Walmer, Substitute Trustee.

ERVIN, Judge.

Plaintiff Marlon A. Goad appeals from an order denying his application seeking to have a foreclosure sale enjoined pursuant to N.C. Gen. Stat. § 45-21.34. After careful consideration of Plaintiff's 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

On 24 March 2005, Plaintiff executed a deed of trust in favor of Defendant JP Morgan Chase Bank, N.A., which was recorded at Book

2114, Page 1086 in the Brunswick County Registry. The real property utilized to secure the underlying obligation was described in the deed of trust as "ALL of Lot 169, Block 15-R, according to a map of Sunset Beach appearing of record in Map Cabinet H, Page 358 of the Brunswick County, North Carolina Registry" and is located at 1214 Canal Drive in Sunset Beach, North Carolina. Constance R. Stienstra was designated as trustee in the original deed of trust. On 3 October 2008, Brock & Scott, PLLC or Joy Walmer were named substitute trustees in lieu of Ms. Stienstra.

On 5 November 2008, Defendants initiated a proceeding to foreclose on the 1214 Canal Drive property in accordance with the deed of trust. The amended notice of foreclosure sale, which was filed on 28 July 2009, indicated that the foreclosure sale would be conducted on 27 August 2009. On that date, Plaintiff received an offer to purchase the 1214 Canal Drive property for $450,000.00 and forwarded information concerning that offer to Defendants. In light of the making of this offer to purchase, Defendants filed a notice of postponement stating that "the sale originally scheduled on August 27, 2009 at 10:00AM . . . is hereby postponed until September 8, 2009 at 10:00AM[.]"

On 3 September 2009, Defendant mailed a copy of the notice of postponement to Plaintiff accompanied by a cover letter stating that "[t]he sale scheduled to take place on August 27, 2009 at 10:00AM has been postponed until September 8, 2009 at 10:00AM." Plaintiff received Defendants' mailing on 5 September 2009. The foreclosure sale was held as scheduled on 8 September 2009. At the postponed sale, Defendant Chase bid $423,932.55 for the 1214 Canal Drive property.

B. Procedural History

On 18 September 2009, Plaintiff filed an Application to Enjoin Foreclosure Sale Under N.C. [Gen. Stat.] § 45-21.34. Plaintiff's application was heard before the trial court on 28 September 2009. At the conclusion of the hearing, the trial court declined to enjoin the foreclosure sale in accordance with Plaintiff's request on the grounds that the "hearing was not timely scheduled as required by the provisions of N.C. Gen. Stat. [§§ 45-21.34-35], and, in addition, the amount bid at the foreclosure sale does not appear inadequate or inequitable." Plaintiff noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Standard of Review

The applicable standard of review utilized in an appeal from the denial of a request for a preliminary injunction is "essentially *de novo*." *Robins & Weill v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 696, *disc. review denied*, 312 N.C. 495, 322 S.E.2d 559 (1984). " '[A]n appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself.' " *Id.* (quoting *A.E.P. Industries v. McClure*, 308 N.C. 393, 402, 302 S.E.2d 754, 760 (1983)). However, "a trial court's ruling . . . is presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous." *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 465, 579 S.E.2d 449, 452 (2003).

B. Analysis of Trial Court's Decision

On appeal, Plaintiff asserts that the trial court erred by concluding that N.C. Gen. Stat. § 45-21.34 requires that the Plaintiff's application for the entry of an order enjoining the foreclosure sale be heard and decided prior to the time at which the rights of the parties to the sale become fixed. We are not persuaded by Plaintiff's contention.

N.C. Gen. Stat. § 45-21.34 provides, in pertinent part, that:

> Any owner of real estate . . . may apply to a judge of the superior court, prior to the time that the rights of the parties to the sale or resale becoming fixed pursuant to [N.C. Gen. Stat. §] 45-21.29A to enjoin such sale, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient.

According to Plaintiff, the provision of N.C. Gen. Stat. § 45-21.34 providing that an application seeking to enjoin a foreclosure sale be made "prior to the time that the rights of the parties . . . become fixed" requires nothing more than that the application be filed with the Clerk of Superior Court prior to the expiration of the time period allowed for upset bids. Defendant, however, argues that the relevant provision of N.C. Gen. Stat. § 45-21.34 requires that the application be filed, heard and decided prior to the end of the upset bid period in the absence of some other occurrence that prevents the rights of the parties to the sale from becoming fixed. The essential question before us

is, ultimately, one of statutory construction–what does it mean to "apply" to a judge of the Superior Court prior to the time that the "rights of the parties" have become "fixed" for purposes of N.C. Gen. Stat. § 45- 21.34? After careful study of the relevant statutory language and decisional law, including *Morroni v. Maitin*, No. COA03-992, 2004 N.C. App. LEXIS 997 (2004),[1] we conclude that such an application must be heard and decided, as well as filed, prior to the date upon which the rights of the parties to the sale became fixed in order for the Superior Court to retain the authority to enjoin a foreclosure sale.

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), *cert. denied*, 526 U.S. 1098, 143 L. Ed. 2d 671, 119 S. Ct. 1576 (1999). "The best indicia of that intent are the language of the statute . . ., the spirit of the act and what the act seeks to accomplish." *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980). "Individual expressions must be construed as a part of the composite whole and be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." *State v. Tew*, 326 N.C. 732, 739, 392 S.E.2d 603, 607 (1990) (citing *In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978). "The Court may also consider the policy objectives prompting passage of the statute and should avoid a construction which defeats or impairs the purpose of the statute." *O & M Indus. v. Smith Eng'r Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006) (citing *Elec. Supply Co. of Durham v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991)).

Any attempt to identify the point by which application for the entry of an order enjoining a foreclosure sale must be made requires a determination of when the rights of a party to a foreclosure sale have become "fixed." N.C. Gen. Stat. § 45-21.34. A review of the relevant statutory procedures governing the conduct of foreclosure proceedings indicates that determining the point at which the rights of the parties have become fixed depends, in the ordinary course of

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1. Although *Morroni* is an unpublished decision, we believe that it "has precedential value to a material issue in the case." N.C.R. App. P. 30(e)(3). A careful review of our opinion in *Morroni* leads us to conclude that the language upon which we rely in this case was not dicta, but was, on the contrary, critical to our holding in that case. Moreover, despite its unpublished status, *Morroni* appears to address the same essential issue that we have before us and relies upon persuasive logic. As a result, we find it appropriate to rely upon the approach adopted in *Morroni* in deciding this case.

events, upon the date by which an upset bid must be filed. According to N.C. Gen. Stat. § 45-21.27(a), an upset bid must be filed with the "clerk of superior court, with whom the report of sale or last notice of upset bid was filed by the close of normal business hours on the tenth day after the filing of the report of the sale or the last notice of upset bid." "If an upset bid is not filed [in compliance with N.C. Gen. Stat. § 45-21.27], the rights of the parties to the sale or resale become fixed." N.C. Gen. Stat. § 45-21.29A. As a result, in the absence of a properly filed upset bid, the rights of the parties to a foreclosure sale become fixed ten days after the filing of the report of the sale. *Id.* However, even if no upset bid is submitted, the rights of the parties to a foreclosure sale will not become fixed in the event that a temporary restraining order or preliminary injunction is properly obtained prior to the expiration of the ten-day period for filing upset bids. *Morroni*, 2004 N.C. App. LEXIS 997, at *6-7. As a result, the rights of the parties to a foreclosure sale become fixed upon either the expiration of the period for filing an upset bid, the provision of injunctive relief precluding the consummation of the foreclosure sale, or the occurrence of some similar event. Thus, having identified the point at which the rights of the parties to a foreclosure sale become fixed, we must now determine what it means to "apply" for the issuance of an injunction pursuant to N.C. Gen. Stat. § 45- 21.34.

In *Swindell v. Overton*, 310 N.C. 707, 714, 314 S.E.2d 512, 517 (1984), the Supreme Court explained that N.C. Gen. Stat. § 45-21.34 provides limited relief in foreclosure proceedings; moreover, the "relief provided by [N.C. Gen. Stat. §] 45-21.34 is available prior to the confirmation of the foreclosure sale." *In re Watts*, 38 N.C. App. 90, 93, 247 S.E.2d 427, 429 (1978). In *Morroni*, the plaintiffs filed a complaint seeking to enjoin a foreclosure proceeding. *Morroni*, 2004 N.C. App. LEXIS 997, at *2. During the pendency of the proceeding in which the plaintiffs sought injunctive relief, the time within which an upset bid was required to be filed expired. Thus, the rights of the parties to the foreclosure sale became fixed at a point when no upset bid was filed and no temporary restraining order or preliminary injunction had been properly obtained. After the date upon which the parties' rights became fixed, the defendants filed a motion seeking to have plaintiffs' effort to enjoin the foreclosure proceedings dismissed as moot. This Court upheld the trial court's decision to dismiss plaintiffs' complaint, explaining that, "[o]nce the rights to a foreclosure sale are fixed, a court cannot issue a prohibitory injunction" and that the "dispositive issue of law" was in fact "mootness." *Id.*, at *7; *4-5 (explain-

ing that " 'courts will not decide . . . cases in which there is no longer any actual controversy' " and that, " 'whenever . . . 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 proportions of law' ") (quoting *Black's Law Dictionary* 1025 (7th ed. 1999), and *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297, 99 S. Ct. 2859 (1979)). In reaching this conclusion, this court explained that the language of N.C. Gen. Stat. § 45-21.34 "contemplate[s] that a party seeking to avoid a foreclosure sale will take such action as is necessary to prevent the sale from becoming final." *Id.* at *7.

According to well-established North Carolina law, a " 'court cannot restrain the doing of that which has already been consummated.' " *Fulton v. Morganton*, 260 N.C. at 345, 347, 132 S.E.2d 687, 688 (1963) (quoting *Austin v. Dare County*, 240 N.C. 662, 83 S.E.2d 702 (1954), and *Ratcliff v. Rodman*, 258 N.C. 60, 127 S.E.2d 788 (1962)). An application to enjoin a foreclosure sale which remains undecided at the time that the parties' rights have become fixed is nothing more than a request that that which has already been consummated be restrained. *Bechtel v. Central Bank and Trust Co.*, 202 N.C. 855, 856, 164 S.E. 338, 338 (1932) (stating that, "as the sale which the plaintiff seeks to enjoin has already taken place, there is nothing now to restrain, and the action was properly dismissed") (citing *Rosseau v. Bullis*, 201 N.C. 12, 158 S.E. 553 (1931)); *see also*, *DuBose v. Gastonia Mutual Savings and Loan*, 55 N.C. App. 574, 580, 286 S.E.2d 617, 621 (explaining that the "question[] raised by plaintiffs [was] moot" because "the defendants have completed their foreclosure sale; the property has been conveyed . . . . and the sale has been confirmed;" and "plaintiffs obtained neither a stay of execution . . . . nor a temporary stay or a writ of supersedeas."), *disc. review denied*, 305 N.C. 584, 292 S.E.2d 5 (1982). Thus, absent sufficient action by a party seeking to avoid a foreclosure sale to prevent the sale from becoming final, any attempt to enjoin such a sale which has not been heard and decided by the date for the submission of upset bids becomes moot and subject to dismissal at that time.

In seeking to persuade us to reach a contrary result, Plaintiff argues that one "applies" for the issuance of an injunction by making the necessary filing with the office of the Clerk of Superior Court, so that, under the literal language of N.C. Gen. Stat. § 45-21.34, all that needs to have occurred in order for a party to make an effective

attempt to enjoin a foreclosure is to make the necessary filing. However, given that the adoption of this result would have the effect of elongating what is clearly intended to be an expeditious process, thereby casting doubt on otherwise vested rights, we believe that the adoption of the approach advocated by Plaintiff is inconsistent with the general intent and purpose of N.C. Gen. Stat. § 45-21.34 and traditional notions of mootness. Furthermore, given that temporary restraining orders may be issued on a *ex parte* basis in appropriate instances, N.C. Gen. Stat. § 1A-1, Rule 65(b) (stating that "[a] temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (i) it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (ii) the applicant's attorney certifies to the court in writing the efforts, if any, that have been made to give the notice and the reasons supporting the claim that notice should not be required"),[2] and given that "apply" can be defined as "[t]o make a formal request or motion," *Black's Law Dictionary* 96 (7th ed. 2009), an interpretation of N.C. Gen. Stat. § 45-21.34 that requires the applicant to seek and obtain the requested injunction before the point at which the upset bid period expires is completely consistent with the literal language and the underlying purpose sought to be achieved through the relevant statutory provision. Thus, we conclude that the construction of N.C. Gen. Stat. § 45-21.34 urged upon us by Plaintiff lacks persuasive force.

As we have already noted, the 1214 Canal Drive property was the subject of a foreclosure sale held on 8 September 2009. At the foreclosure sale, Defendant Chase bid $423,932.55 in order to purchase the property. Plaintiff filed an application to enjoin the foreclosure sale pursuant to N.C. Gen. Stat. § 45-21.34 ten days later. However, given that no upset bid was filed by the expiration of the statutorily-prescribed ten day period and given that Plaintiff did not obtain temporary or preliminary injunctive relief by the time that the upset bid period expired, the rights of the parties to the sale became fixed as of that date, rendering Plaintiff's application moot. Thus, given that the foreclosure sale became final before Plaintiff obtained any sort of

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2. The ability of an applicant to obtain temporary injunctive relief without notice adequately addresses Plaintiff's argument based on the fact that the Clerk of Superior Court's office evidently informed Plaintiff's counsel that the application could not be set for hearing earlier than 28 September 2009, some ten days after the date upon which it was filed.

injunctive relief, Plaintiff is left without the ability to prevent the consummation of the foreclosure on the 1214 Canal Drive property, since " 'a court cannot restrain the doing of an act which already has been consummated.' " *Morroni*, 2004 N.C. App. LEXIS 997, at *7 (quoting *Roberts v. Madison County Realtors Ass'n*, 344 N.C. 394, 401-02, 474 S.E.2d 783, 788 (1996). As a result, the trial court did not err by denying Plaintiff's request that the foreclosure be enjoined pursuant to N.C. Gen. Stat. § 45-21.34 on timeliness and mootness grounds.[3]

IV. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court did not err by dismissing that Plaintiff's application seeking to enjoin the foreclosure sale relating to the 1214 Canal Street property pursuant to N.C. Gen. Stat. § 45-21.34 as untimely and moot. As a result, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Judges MARTIN and STROUD concur.

TERESA L. GARNER, EMPLOYEE, PLAINTIFF v. CAPITAL AREA TRANSIT, EMPLOYER, AMERICA HOME ASSURANCE CO., CARRIER, AND AIG CLAIM SERVICES, INC., SERVICING AGENT, DEFENDANTS

No. COA10-149

(Filed 7 December 2010)

Workers' Compensation—injury by accident—unreliable testimony

The Industrial Commission did not err by denying plaintiff's claim for workers' compensation benefits. Competent evidence in the record supported the Commission's finding that plaintiff's testimony regarding a bus accident was inconsistent with the greater weight of the evidence. Further, plaintiff's medical causation testimony did not establish a compensable injury because it was based upon this unreliable testimony.

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3. Although Plaintiff also asserts that the trial court erred by concluding that the amount bid for the 1214 Canal Drive property was adequate and equitable and would not result in irreparable harm to Plaintiff, we need not reach these issues given our conclusion that Plaintiff failed to seek and obtain injunctive relief in a timely fashion.

Appeal by plaintiff from Opinion and Award entered 23 October 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 1 September 2010.

Patterson Harkavy LLP, by Valerie A. Johnson and Narendra K. Ghosh, for plaintiff-appellant.

Teague Campbell Dennis & Gorham L.L.P., by Jan N. Pittman, for defendant-appellees.

STEELMAN, Judge.

The Industrial Commission found that plaintiff's version of the alleged accident was not credible. Because the medical causation testimony was based upon this unreliable testimony, plaintiff failed to establish that she was injured as a result of a compensable accident under Chapter 97 of the General Statutes.

I. Factual and Procedural Background

In 2007, Teresa L. Garner (plaintiff) was employed by Capital Area Transit (CAT) as a bus driver. Prior to 2007, plaintiff was involved in three separate bus accidents and as a result injured her neck, back, and arm. On 9 March 2007, plaintiff was driving bus #103, which was parked behind bus #1235 waiting to begin its route at the station. At approximately 4:30 p.m., Bus #1235 rolled backwards towards plaintiff's bus and hit the front of bus #103. Plaintiff contended that this contact caused her to be thrown back and she "heard something pop[.]" Plaintiff and Stephanie Wright (Wright) filled out a Raleigh Transit Division ATC accident report, which did not indicate that any injuries had occurred. Police investigated the accident, but a report was not filed due to the lack of damage to the buses and lack of injuries. Wright described the impact as "a little nudge" and stated that the impact was less than going over a speed bump. Following the accident, plaintiff continued with her shift at 5:15 p.m. Plaintiff asserted that she subsequently began to feel pain and tightness in her neck. When plaintiff finished her shift at 7:17 p.m., she submitted a work injury report to CAT. Plaintiff asserted that she injured her neck, back, and shoulder.

On 10 March 2007, plaintiff visited the Wake Medical Center Emergency room. Plaintiff's chief complaint was neck pain. However, plaintiff's neck did not reveal any tenderness and she had good range of motion. The emergency room physician concluded "[p]atient's mechanism of injury and exam appear to be physiologically impossi-

ble to relate to her accident." Plaintiff was discharged and ordered to take two Tylenol every four hours. Two days later, plaintiff visited Concentra Medical Centers and presented to Dr. Michael J. Landolf. Plaintiff again complained of neck, shoulder, and back pain. An x-ray showed degenerative changes in plaintiff's cervical spine with anterior osteophytes at C5 and C6 and a reversal of the normal curvature of the spine. Dr. Landolf restricted plaintiff to no lifting over fifteen pounds, and no pushing or pulling over thirty pounds of force. Plaintiff was also directed not to drive a bus and was referred to physical therapy. On 15 March 2007, plaintiff's cervical strain was resolved and she was released to regular work duty. On 10 April 2007, plaintiff was continued on regular work activity and released from medical care. On that same day, CAT denied her claim for workers' compensation benefits.

On 13 June 2007, plaintiff presented to Dr. Paul B. Suh (Dr. Suh), an orthopaedic surgeon, without a referral. Plaintiff complained of neck, mid-back, and left-arm pain. Dr. Suh diagnosed plaintiff with cervical degenerative disc disease and cervical radiculopathy. Dr. Suh opined that the 9 March 2007 bus accident "served to aggravate a pre-existing condition of cervical degenerative disc disease." On 28 February 2008, Dr. Suh performed an anterior cervical diskectomy and fusion. After the surgery, plaintiff was unable to work in any capacity.

On 23 October 2009, the Full Commission entered an Opinion and Award denying plaintiff workers' compensation benefits. The Commission found that plaintiff's testimony regarding her version of the accident was inconsistent with the greater weight of the evidence, and that because Dr. Suh relied upon the veracity of plaintiff's version of events, his opinion regarding causation and aggravation of plaintiff's pre-existing condition was also inconsistent with the greater weight of the evidence. Plaintiff appeals.

II. Standard of Review

> The applicable standard of appellate review in workers' compensation cases is well established. Appellate review of an opinion and award from the Industrial Commission is generally limited to determining: "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (citing *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986)).

Hassell v. Onslow Cty. Bd. of Educ., 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008). The Commission is the sole judge of the credibility of the witnesses and the weight to be given to the evidence before it. *Id.* This Court does not "have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.* (quotations omitted). The Commission's findings of fact are conclusive when supported by competent evidence, even though there may be evidence that would support findings to the contrary. *Id.* The Commission's conclusions of law are reviewed *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

III. Medical Causation

In her first argument, plaintiff contends there is no competent evidence in the record to support the Commission's finding that Dr. Suh's opinion pertaining to causation was based upon unproven facts provided by plaintiff. We disagree.

"[A]ggravation of a pre-existing condition which results in loss of wage earning capacity is compensable under the workers' compensation laws in our state." *Smith v. Champion Int'l*, 134 N.C. App. 180, 182, 517 S.E.2d 164, 166 (1999). It is well-established that "[t]he claimant in a workers' compensation case bears the burden of initially proving each and every element of compensability, including a causal relationship between the injury and his employment." *Adams v. Metals USA*, 168 N.C. App. 469, 475, 608 S.E.2d 357, 361 (quotation omitted), *aff'd per curiam*, 360 N.C. 54, 619 S.E.2d 495 (2005). When a case involves "complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003) (quotation omitted).

In the instant case, only one medical expert was deposed and opined as to whether the 9 March 2007 accident aggravated plaintiff's pre-existing condition of cervical degenerative disc disease. The Commission made the following findings of fact regarding this issue:

> 19. Based upon the medical evidence, lay and expert testimony, and the video of the accident from Ms. Wright's bus, the Full Commission finds plaintiff's testimony to be inconsistent with the greater weight of the evidence.

> 20. Although Dr. Suh opined that the March 9, 2007 bus incident aggravated plaintiff's pre-existing condition of cervical degenerative disc disease, the greater weight of the evidence is to the contrary. Dr. Suh relies on the veracity of plaintiff's version of the events and complaints surrounding her cervical condition and his opinion regarding causation and aggravation of plaintiff's preexisting condition is inconsistent with the greater weight of the evidence.

The Commission then concluded that:

> As Dr. Suh's testimony regarding the causation of plaintiff's cervical condition was based upon unproven facts presented by plaintiff, Dr. Suh's opinion is not sufficiently reliable to qualify as competent evidence concerning the nature and cause of plaintiff's injuries. . . . *In the instant case, dubious histories related by plaintiff form the bases of information contained in medical records and other evidence.*

(Emphasis added.)

During his deposition testimony, Dr. Suh stated that his opinion on causation was "primarily" based upon plaintiff's description of the events that occurred on 9 March 2007 and the onset of her symptoms. Dr. Suh's opinion was based upon the following facts posed in a hypothetical question concerning what transpired when the buses collided: Plaintiff was driving a bus for CAT. Bus #1235 rolled into her bus and the impact was so great that it "[threw] her back." Plaintiff heard her neck pop and subsequently felt pain. She wrote an injury report several hours later and visited the emergency room the next day complaining of neck pain. Based upon that account of events, Dr. Suh opined that the bus incident exacerbated plaintiff's pre-existing cervical degenerative disc disease. Dr. Suh did not have any independent knowledge of how the incident occurred and acknowledged that his opinion was based upon the accuracy of the information related to him by plaintiff.

However, there was evidence presented to the Commission that contradicted plaintiff's account of events and her assertion that the impact was so great that she was thrown backwards. By plaintiff's account, she was sitting down and wearing a seatbelt when the incident occurred. The Commission viewed a surveillance video and found as a fact that "[a]ccording to the video surveillance from bus #1235 operated by Ms. Wright, Ms. Wright was standing at the time the buses made contact. *The incident did not cause Ms. Wright to*

be jerked or to fall. Ms. Wright indicated that she felt only a nudge when the buses made contact."[1] (Emphasis added.) Plaintiff asserts that the video shows the passengers standing on bus #1235 stumbling due to the impact. However, plaintiff failed to challenge the above finding of fact and it is therefore binding on appeal. *Estate of Gainey v. Southern Flooring & Acoustical Co.*, 184 N.C. App. 497, 501, 646 S.E.2d 604, 607 (2007). We also note that plaintiff did not include the surveillance video as part of the record on appeal. *See Hicks v. Alford*, 156 N.C. App. 384, 389, 576 S.E.2d 410, 414 (2003) ("It is the duty of the appellant to ensure that the record is complete." (citation omitted)).

In addition, defendant's expert witness, an engineer and accident reconstructionist, testified that bus #1235 rolled back approximately five feet and there was only a "slight" movement upon impact. The delta V, or the change in the speed of the vehicles, was 1 to 1.7 miles per hour. There was no damage to plaintiff's bus as a result of the accident. After the incident occurred, plaintiff resumed her bus route for two hours before she reported any injury. The next day, plaintiff presented to a physician at WakeMed Emergency Services and stated to him that "[s]he expects this will be a legal case and has legal representation." Plaintiff's neck did not reveal any tenderness and had good range of motion. The treating physician concluded that her "mechanism of injury and exam appear to be physiologically impossible to relate to her accident."

Defendant also presented deposition testimony from Michael L. Woodhouse, Ph.D. regarding the biomechanical analysis of the force acting upon the bus and its impact on plaintiff. Plaintiff's counsel objected to Woodhouse's deposition testimony in its entirety as being unreliable and having no probative value. The Commission made no findings of fact as to the reliability or admissibility of Woodhouse's deposition testimony. Nothing in the Opinion and Award of the Commission indicates that the Commission relied upon Woodhouse's testimony in rendering its decision.

It is clear from the Commission's findings and conclusions that it did not find plaintiff's testimony regarding the accident to be credible. It is well-established that "[t]he Commission is not required to accept the testimony of a witness, even if the testimony is uncontradicted." *Hassell*, 362 N.C. at 307, 661 S.E.2d at 715 (citation omitted);

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1. Wright testified that the impact from the collision was less than going over a speed bump.

see also Harrell v. Stevens & Co., 45 N.C. App. 197, 205, 262 S.E.2d 830, 835 ("[T]he Commission may properly refuse to believe particular evidence."), *disc. review denied*, 300 N.C. 196, 269 S.E.2d 623 (1980). We hold that competent evidence in the record supports the Commission's finding that plaintiff's testimony regarding the bus accident was "inconsistent with the greater weight of the evidence."

The Commission properly concluded that because Dr. Suh's opinion regarding causation was based upon "dubious histories related by plaintiff," that it was not sufficiently reliable to qualify as competent evidence as to the cause of her injuries. *See generally Hassell*, 362 N.C. at 308, 661 S.E.2d at 715 (holding that the Commission properly considered the expert witness's testimony regarding the plaintiff's alleged occupational disease and afforded it little weight because the expert could not speak to the validity of the plaintiff's complaints about the school work, and the expert only dealt with plaintiff's perceptions regarding her work environment). The Commission's Opinion and Award is affirmed.

AFFIRMED.

Judges BRYANT and BEASLEY concur.

STATE OF NORTH CAROLINA v. TIMOTHY RAY DOBBS

No. COA10-388

(Filed 7 December 2010)

1. Sentencing— felony classification—clerical error

The trial court erroneously classified defendant's conviction for sale and delivery of a Schedule III controlled substance as a Class G felony rather than a Class H felony. This offense was remanded for correction of the clerical error.

2. Drugs— trafficking by sale or delivery in more than four grams and less than fourteen grams—motion to dismiss—sufficiency of evidence—chemical analysis of pills

The trial court did not err by denying defendant's motion to dismiss at the close of all evidence the charge of trafficking by sale or delivery in more than four grams and less than fourteen

grams of dihydrocodeinone. Even assuming *arguendo* that defendant had properly preserved his argument that the State was required to test a sufficient number of pills to reach the minimum weight threshold for a trafficking offense, a chemical analysis test of a portion of the pills, coupled with a visual inspection of the remaining pills for consistency, was sufficient to support the conviction.

Appeal by defendant from judgment entered 17 August 2009 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 29 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Scott A. Conklin, for the State.

Sue Genrich Berry, for defendant-appellant.

STEELMAN, Judge.

Where the trial court incorrectly noted defendant's conviction of N.C. Gen. Stat. § 90-95(a)(1) as a Class G felony instead of a Class H felony, that offense is remanded for correction of a clerical error. Where defendant attempts to make an argument on appeal that was not made before the trial court, that argument is dismissed.

I. Factual and Procedural Background

The Brunswick County Sheriff's Department used undercover informants to assist it with combating the illegal sale and distribution of controlled substances. In August of 2008, an undercover informant advised the Brunswick County Sheriff's Department that he could purchase prescription medication from Timothy Ray Dobbs (defendant). A transaction was set up for 12 August 2008 where the informant was to purchase hydrocodone tablets from defendant at defendant's barbershop. After the purchase took place, the informant delivered the tablets he purchased to a deputy with the Brunswick County Sheriff's Department. The tablets were then sent to the North Carolina State Bureau of Investigation (SBI) laboratory for chemical analysis.

On 1 December 2008, defendant was indicted for possession with intent to manufacture, sell, or deliver a Schedule III controlled substance, and for sale and delivery of a Schedule III controlled substance. On 9 March 2009, defendant was indicted for trafficking in opium or an opium derivative by sale or delivery.

Defendant was tried before a jury at the 11 August 2009 session of Criminal Superior Court for Brunswick County. On 17 August 2009, the jury found defendant guilty of all charges. The trial court consolidated the charges and imposed an active sentence of 70 to 84 months imprisonment.

Defendant appeals.

II. Clerical Error

[1] In his first argument, defendant contends that the trial court erroneously classified Defendant's conviction for sale and delivery of a Schedule III controlled substance as a Class G felony rather than a Class H felony. The State concedes error, and we agree.

Defendant was convicted of the offense of sale or delivery of a Schedule III controlled substance, a violation of N.C. Gen. Stat. 90-95(a)(1). The punishment for this offense is set forth in N.C. Gen. Stat. 90-95(b)(2) as a Class H felony. The judgment entered by the trial court designated this charge as a Class G felony. This classification was in error. Because the judgment entered was a consolidated judgment and the active sentence imposed was based upon the trafficking offense, it is not necessary that there be a new sentencing hearing. Rather we treat this as a clerical error, and remand this matter to the trial court for its correction. *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696-97 (2008).

III. Sufficiency of the Evidence

[2] In his second argument, defendant contends that the trial court erred in denying his motion to dismiss at the close of all of the evidence based on the sufficiency of the evidence that defendant trafficked by sale or delivery in more than four grams and less than fourteen grams of Dihydrocodeinone. We disagree.

A. Standard of Review

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (quotation omitted). "Whether the evidence presented constitutes substantial evidence is a question of law for the trial court." *State v. Sexton*, 336 N.C. 321, 361, 444 S.E.2d 879, 902 (citation omitted), *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994). "Substantial evidence is evidence

from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986) (citation omitted). In our review of the trial court's decision, "we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (citation omitted).

B. Sufficiency of Evidence

N.C. Gen. Stat. § 90-95(h)(4) provides that:

> [a]ny person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate . . . or any mixture containing such substance, shall be guilty of a felony . . . and if the quantity of such controlled substance or mixture involved:
>
> (a) [i]s four grams or more, but less than 14 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000)[.]

N.C. Gen. Stat. § 90-95(h)(4)(a) (2009).

Special Agent Amanda Aharon (Agent Aharon) works as a drug chemist for the SBI. She received the eight tablets sent to the SBI laboratory by the Brunswick County Sheriff's Department. At trial, Agent Aharon was tendered and received, without objection, as an expert witness in the field of chemical analysis. Agent Aharon testified that she first compared the tablets with information contained in a pharmaceutical database. Each tablet was similar in coloration and had an identical pharmaceutical imprint. The pharmaceutical database indicated that the tablets were a combination of hydrocodone and acetaminophen. Agent Aharon then performed a confirmatory test on one of the tablets, using a gas chromatograph mass spectrometer. This test revealed that the tablet was hydrocodone. Hydrocodone is also known as Dihydrocodeinone and is an opiate derivative. The tablets submitted to the laboratory weighed a total of 8.5 grams.

Defendant argues that the evidence was insufficient to convict defendant of a trafficking offense under N.C. Gen. Stat. § 90-95(h)(4) because Agent Aharon only performed a chemical analysis on one of

the tablets. Defendant further contends that Agent Aharon was required to perform a chemical analysis on the number of tablets necessary to reach the four gram threshold set forth in N.C. Gen. Stat. § 90-95(h)(4)(a) to be a trafficking offense.

Defendant relies on *State v. Ward*, 364 N.C. 133, 694 S.E.2d 738 (2010), arguing that the State cannot rely upon a visual inspection of pills to determine that they are a controlled substance. In *Ward*, a number of defendant's convictions were based upon the expert testimony of an SBI special agent, whose opinion was based solely upon a visual examination of tablets, with no chemical testing conducted. *Id.* at 136, 694 S.E.2d at 740. Our Supreme Court held that: "the expert witness testimony required to establish that the substances introduced here are in fact controlled substances must be based on a scientifically valid chemical analysis and not mere visual inspection." *Id.* at 142, 694 S.E.2d at 744. However, the Supreme Court noted that the scope of a chemical analysis is "dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration." *Id.* at 148, 694 S.E.2d at 747.

We first note that defendant did not cross-examine Agent Aharon concerning the sufficiency of the sample that was chemically tested. Nor was the sufficiency of the sample argued as a basis for dismissal at the close of either the State's evidence or at the close of all of the evidence. As such, this argument must be dismissed. *See State v. Augustine*, 359 N.C. 709, 721, 616 S.E.2d 515, 525 (2005) ("This Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount . . . ." (quotation omitted)), *cert. denied*, 548 U.S. 925, 165 L. Ed. 2d 988 (2006). We further note that without some evidence in the record as to what was or was not a scientifically sufficient sample to be tested, we could not decide the issue presented by defendant on appeal.

Even assuming *arguendo* that Defendant had properly preserved his argument that the State was required to test a sufficient number of pills to reach the minimum weight threshold for a trafficking offense, we hold that this argument is without merit. In the case of *State v. Myers*, 61 N.C. App. 554, 556, 301 S.E.2d 401, 402 (1983), *cert. denied*, 311 N.C. 767, 321 S.E.2d 153 (1984), it was held that a chemical analysis test of a portion of the pills, coupled with a visual inspection of the remaining pills for consistency, was sufficient to support a conviction for trafficking in 10,000 or more tablets of methaqualone.

REMANDED FOR CORRECTION OF CLERICAL ERROR IN PART; DISMISSED IN PART.

Judges BRYANT and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 NOVEMBER 2010)

AM. DECORATIVE FABRICS, LLC v. JORDAN ALEXANDER, INC. No. 10-345	Caldwell (07CVS801)	Affirmed
BASILE v. CHRIS'S OPEN HEARTH STEAK HOUSE No. 10-160	Indus. Comm. (677965)	Affirmed
IN RE A.B.S.D., D.L.E., D.L.E., D.L.E., D.L.E., D.L.E. No. 10-440	Forsyth (04JT432) (08JT156)) (08JT154) (09JT59) (04JT430) (08JT155)	Affirmed
IN RE A.K.L. No. 10-541	Perquimans (09JT11)	Affirmed
IN RE A.N.W. & B.M.W. No. 10-692	Orange (08JT94-95)	Affirmed
IN RE A.S., C.S., A.S., K.S., A.R. No. 10-681	Wake (08JT601-608)	Affirmed
IN RE D.P.H. No. 10-624	Burke (05JT62)	Dismissed
IN RE DUKE ENERGY CAROLINAS No. 09-1273	Util. Comm. (E-7,) (SUB) (858)	Dismissed
IN RE E.E.L. No. 10-343	Burke (09J31)	Reversed and Remanded
IN RE FORTNER No. 10-552	Swain (07E20)	Reversed
IN RE J.J. No. 10-719	Stanly (08JT60)	Affirmed
IN RE J.W.S. No. 10-575	Wilkes (07JT144)	Affirmed

IN RE K.M. & J.M., III No. 10-678	Cumberland (08JA154-155)	Reversed and Remanded
IN RE L.J.B. No. 10-574	Wake (07JT253)	Affirmed
IN RE M.S. No. 10-609	Transylvania (08JT57)	Affirmed
IN RE O.L.S. No. 10-652	Richmond (07J135)	Affirmed
IN RE S.C.L. & J.G.L. No. 10-682	Randolph (07JT117-118)	Affirmed
IN RE S.L.C. No. 10-582	Guilford (09J692)	Affirmed
IN RE S.M.D. No. 10-363	Mecklenburg (09JB242)	Affirmed
IN RE T.E.L. No. 10-528	Guilford (09JT555)	Affirmed
IN RE V.L.J. No. 10-356	Stanly (09J30)	Reversed and Remanded
IN RE Z.A.E.P. & J.L.P. No. 10-733	Rockingham (07JT150-151)	Affirmed
MCDONALDS CORP. v. FIVE STARS, INC. No. 10-346	Hoke (08CVS304)	Affirmed
STATE v. CARTER No. 10-57	Guilford (09CRS23084) (08CRS87209)	No Error
STATE v. DAVIS No. 09-1707	Forsyth (08CRS28174) (08CRS57492-94)	No Error
STATE v. KINCER No. 09-1639	Pitt (08CRS55300)	No Error
STATE v. MILLER No. 09-1702	Forsyth (08CRS17221) (08CRS52051) (08CRS9728) (08CRS52050) (09CRS54288)	No Error

STATE v. MURPHY No. 10-430	Edgecombe (07CRS51971)	No prejudicial error
STATE v. ONEIL No. 10-142	Forsyth (08CRS30805) (08CRS56193-94)	No Error
STATE v. SWEET No. 10-428	Wilkes (07CRS53114-16)	Reversed in part; no error in part; no prejudicial error in part
STATE v. VALENCIA No. 10-232	Guilford (08CRS110890) (08CRS110889)	No Error
STATE v. WALKER No. 09-1514	Forsyth (07CRS61150) (08CRS1591)	No error in part, reversed and remanded in part

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 DECEMBER 2010)

BLAKE v. CREE, INC. No. 10-161	Indus. Comm. (781740) (773176)	Reversed and Remanded
BODIE v. BODIE No. 10-145	Transylvania (05CVD334)	Dismissed
BROWN v. STATEN No. 09-1271	Lenoir (08CVS10)	Affirmed in part; vacated and remanded in part
CAROLINA ORTHOPAEDIC SPECIALISTS, PA v. SMITH No. 10-657	Catawba (08CVD4767)	Reversed and Remanded
CRUMPLER v. AVENIR DEV., L.L.P. No. 10-103	New Hanover (08CVS2043) (06CVS4983)	Affirmed
GATES FOUR HOME-OWNERS ASS'N v. CITY OF FAYETTEVILLE No. 10-60	Cumberland (08CVS13276)	Affirmed
HOWARD v. ORTHO-CAROLINA, P.A. No. 10-108	Mecklenburg (08CVS13045)	Dismissed
HYATT v. N.C. DEP'T OF CORR. No. 10-107	Indus. Comm. (672659)	Affirmed
IN RE A.F., N.F., M.F. No. 10-735	Mecklenburg (06JT805-807)	Affirmed
IN RE A.M., S.G., A.G., P.G., I.G., E.G. No. 10-688	Mecklenburg (07JT354-358) (07JT956)	Affirmed
IN RE D.G., RK.G., C.G., R.G., A.G., S.H. No. 10-654	Cumberland (97JA98) (09JA231-235)	Affirmed
IN RE D.L.M. No. 10-907	Pasquotank (08JT86)	Dismissed

IN RE E.R. No. 10-724	Guilford (08JT615)	Affirmed
IN RE J.K., S.K., S.C. No. 10-649	Burke (08J8-10)	Vacated
IN RE K.B., K.R.B., J.W.B., M.J.G.G. & J.G. No. 10-771	Polk (06J15-19)	Affirmed
IN RE M.C., T.C., E.M. No. 10-651	Wake (08JT615-617)	Affirmed
IN RE N.M.J.I. No. 10-704	Guilford (08JT91)	Affirmed
IN RE O.J.C. & C.B.H. No. 10-783	Alleghany (06JT27-28)	Affirmed
IN RE P.W. No. 10-705	Lenoir (09JA78)	Reversed and Remanded
IN RE S.D.D., S.L.B., D.L.D., M.L.D., S.D.D., S.L.B. No. 10-815	Gaston (08JT210-215)	Affirmed
IN RE S.E.P. & L.U.E. No. 10-778	Iredell (02JT201) (04JT7)	Affirmed
IN RE Z.H. & T.H. No. 10-684	Mecklenburg (08JT291) (08JT293)	Affirmed
MCQUEEN v. CITY OF HAMLET No. 10-170	Richmond (09CVS664)	Affirmed
N.C. STATE BAR v. ERICKSON No. 09-765	State Bar (07DHC17)	Affirmed
NATIONWIDE MUT. INS. CO. v. CAUDILL No. 09-1681	Wilkes (08CVS2282)	Affirmed
OWENSBY v. ESTATE OF PHILLIPS No. 09-1469	Rutherford (08CVD1731)	Affirmed
SMITH v. FLATFOOT CONCRETE CONSTR. No. 10-443	Indus. Comm. (547707)	Affirmed

STATE v. BARTLETT No. 10-360	Camden (09CRS14) (08CRS50222-23)	No Error
STATE v. BENAVIDES No. 10-135	Buncombe (07CRS59698-99)	No Error
STATE v. BLACKWELL No. 10-132	Wake (09CRS9885-86)	Reversed and Remanded
STATE v. BROWN No. 10-338	Pitt (08CRS59385)	No Error
STATE v. BUTLER No. 10-414	Montgomery (08CRS51716)	Remanded
STATE v. CARPENTER No. 09-1310	Lincoln (07CRS5396)	No Error
STATE v. EDGE No. 10-527	Brunswick (09CRS3500-3503)	Affirmed
STATE v. GOSIER No. 10-486	Mecklenburg (07CRS203651-52)	No Error
STATE v. GRANT No. 10-261	Gaston (09CRS11251) (09CRS11249)	No Error
STATE v. GRAVES No. 10-76	Alamance (08CRS9746-47) (07CRS58631)	No Error
STATE v. HANDY No. 09-1422	Guilford (07CRS100171)	No Error
STATE v. HUGHES No. 09-1677	Caswell (08CRS50814)	No Error
STATE v. HUNTER No. 10-444	Guilford (04CRS75420)	Affirmed
STATE v. JOHNSON No. 10-485	Cherokee (08CRS50976-79)	No Error
STATE v. JUAREZ No. 10-487	Forsyth (04CRS63144) (04CRS63141)	No Error
STATE v. LYNCH No. 10-303	Edgecombe (08CRS52475)	No Error

STATE v. MANN No. 10-667	Pamlico (08CVD106)	Affirmed
STATE v. MARTIN No. 09-1692	Brunswick (07CRS54459) (07CRS54456)	No Error
STATE v. MCCLURE No. 10-297	Mecklenburg (05CRS257465)	Affirmed
STATE v. MIDDLETON No. 10-364	Sampson (09CRS51888-89)	No Error
STATE v. NEWKIRK No. 10-202	Duplin (08CRS50531)	No Error
STATE v. PERRY No. 10-488	Brunswick (07CRS55353) (07CRS55339)	No prejudicial error
STATE v. PERRY No. 10-502	Johnston (08CRS52307)	No Error
STATE v. PETTY No. 10-409	Guilford (09CRS72034)	No Error
STATE v. ROBERTSON No. 09-1706	Davie (08CRS50863)	No Error
STATE v. ROYSTER No. 10-290	Wake (07CRS36121) (08CRS1738)	New trial
STATE v. SAEIDIFAR No. 10-252	Onslow (07CRS58179)	No Error
STATE v. SMITH No. 10-400	New Hanover (07CRS65227)	No Error
STATE v. TRAPP No. 09-1719	Wake 07CRS41354 (07CRS41352-54)	No error in 07CRS41352; new trial in 07CRS41353 and 07CRS41354
STATE v. TYSON No. 10-533	Guilford (09CRS77885)	Remanded
STATE v. WINTERS No. 10-236	Wake (07CRS35133) (07CRS75097) (07CRS60468)	No Error

STATE v. WOOTEN No. 10-547	Durham (05CRS58018) (05CRS58018)	No Error
VINTAGE CONDOS. ASSOC. v. RICHARDSON No. 09-1678	Union (07CVS1890)	Affirmed
WILKINS v. FARAH No. 10-28	Guilford (08CVS3835)	Dismissed
WILLS GROVE HOMEOWNERS ASS'N v. YAECKEL No. 10-610	Wake (09CVD12359)	Affirmed

STATE OF NORTH CAROLINA v. JAMES PATRICK TREADWAY, DEFENDANT

No. COA10-287

(Filed 7 December 2010)

1. Evidence— account of victim's statements—no hearsay purpose—initiation of investigation

There was no plain error in a prosecution for first-degree sexual offense against a five-year-old child in the admission of a step-grandmother's testimony relating the things the child had said that defendant had done. The testimony was offered for the non-hearsay purpose of explaining the grandmother's subsequent actions and why investigative action was originally taken. Additionally, these prior statements served to corroborate the victim's trial testimony.

2. Evidence— accounts of victim's statements—corroboration —beyond trial testimony

Admitting the testimony of a step-grandmother relating statements made by a five-year-old sexual abuse victim about what was done to her was not plain error where the prior statements served to corroborate the child's trial testimony. Prior statements that went beyond the child's trial testimony affected only the weight of the evidence.

3. Evidence— hearsay—elicited on cross-examination

There was no plain error in a prosecution for first-degree sexual offense against a five-year-old child in the admission of testimony from a child mental health expert that defendant's son from a previous marriage had said that he had seen defendant on top of the victim at night doing "sex things." Defendant elicited the testimony on cross-examination.

4. Evidence— expert testimony—opinion of child's credibility

There was no plain error in a prosecution for first-degree sexual offense against a child where an expert clinical social worker testified without objection that she had diagnosed the victim as being sexually abused. The testimony amounted to an improper opinion about the victim's credibility since there was no physical evidence of abuse; however, it was not plain error

because the testimony was followed by properly admitted testimony that the victim exhibited behavior that was consistent with children who have been sexually abused. The challenged testimony was thus not based only on the victim's disclosures.

5. Sexual Offenses— first-degree—instructions—specific acts not specified

The trial court was not required in a prosecution for the first-degree sexual offense against a child to instruct the jury that the State had to prove the specific act alleged in the indictment.

6. Sexual Offenses— first-degree—two counts—instructions

There was no error in a prosecution for two counts of first-degree sexual offense where defendant alleged that the court did not properly instruct the jury that the two counts referred to two victims. The court properly instructed the jury, the jury was given verdict sheets that separated the charges, and the jury found defendant guilty of one and not guilty of the other.

7. Satellite-Based Monitoring— clerical error—basis of order—remanded

An order that defendant enroll in lifetime satellite-based monitoring was remanded for correction of a clerical error in the selection of the offense supporting the finding that defendant was guilty of a reportable conviction, and for consideration of whether defendant was a sexually violent predator, a recidivist, or whether his conviction involved the abuse of a minor, as well as whether defendant required the highest possible level of supervision and monitoring.

Appeal by defendant from judgment entered 30 July 2009 by Judge Christopher M. Collier in Alexander County Superior Court. Heard in the Court of Appeals 14 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Lauren M. Clemmons, for the State.

Kimberly P. Hoppin for defendant-appellant.

HUNTER, Robert C., Judge.

James Patrick Treadway ("defendant") appeals from a judgment entered pursuant to a jury verdict finding him guilty of one count of

first degree sexual offense. After careful review, we reverse and remand in part and find no prejudicial error in part.

Background

The evidence at trial tended to show that defendant and his girlfriend, Sally, moved in together in the fall of 2004, along with Lucy, Sally's six-year-old daughter, and the couple's son, Calvin.[1] Several months later, Sally's uncle, John, his girlfriend, Judy, and their five-year-old daughter, Amber, moved into the trailer. The sleeping arrangements were as follows: defendant and Sally shared a bedroom at one end of the trailer; Calvin had his own bedroom; Lucy and Amber shared a bedroom at the other end of the trailer; and John and Judy slept on a futon in the den approximately two to three feet outside of Lucy and Amber's bedroom.

At trial, Lane, Amber's step-grandmother, testified that on 22 January 2005, Amber told her that defendant "tr[ied] to put his pee pee in [her] pee pee," put his finger in her vagina, licked her vagina, and kissed her on the mouth. Lane then informed her husband, as well as John and Judy, of Amber's allegations. Amber's parents took her to the local hospital, but the hospital did not perform examinations to ascertain potential sexual abuse. The hospital did report the allegations to the Department of Social Services ("DSS"). Detective Mark St. Clair ("Detective St. Clair"), with the Alexander County Sheriff's office, investigated Amber's allegations. Detective St. Clair did not personally interview Amber, but he set up an interview through DSS. No charges were brought against defendant at that time.

In July 2005, Lucy made allegations that defendant sexually abused her as well. Detective St. Clair testified that when he interviewed Lucy, she pointed to the vaginal area on a diagram of a female child and stated that defendant touched her there with his fingers. Lucy claimed that the touching occurred at least four times when she was in bed at night. Lucy told Detective Donna Clanton ("Detective Clanton") that defend ant touched her "pee pee" with his fingers and "kissed her pee pee."

Defendant was indicted on four counts of first degree sexual offense—two counts against Amber (one count alleging digital penetration and one count alleging cunnilingus), and two counts against

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1. Pseudonyms are used throughout this opinion to protect the anonymity of the minor children.

Lucy (one count alleging digital penetration and one count alleging cunnilingus). At trial, both Amber and Lucy testified that defendant digitally penetrated them when they lived with him. Neither girl testified that defendant had engaged in cunnilingus, although several witnesses testified that the girls previously alleged cunnilingus. Defendant testified that he never sexually molested the two girls.

After the close of the State's evidence, defense counsel moved to dismiss the charges and the trial court granted the motion as to the two indictments alleging cunnilingus because the State failed to present sufficient evidence to support those charges. On 30 July 2009, the jury found defendant guilty of first degree sexual offense against Amber and not guilty of first degree sexual offense against Lucy. The trial court determined that defendant was a Prior Record Level II for sentencing purposes and sentenced defendant to 260 to 321 months imprisonment. The trial court then entered written findings of fact and ordered defendant to submit to satellite based monitoring ("SBM") for the remainder of his natural life. Defendant timely appealed to this Court.

Discussion

I. Hearsay

[1] Defendant argues that the trial court erred in allowing inadmissible hearsay to be entered into evidence. Defendant did not object to the testimony, but has requested plain error review. "[P]lain error review is limited to errors in a trial court's jury instructions or a trial court's rulings on admissibility of evidence." *State v. Golphin*, 352 N.C. 364, 460, 533 S.E.2d 168, 230 (2000), *cert. denied*, 121 S. Ct. 1379, 149 L. Ed. 2d 305 (2001). "The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to plain error, the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (internal citation and quotation marks omitted).

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 (2009). Rule 802 of the North Carolina Rules of Evidence provides that "[h]earsay is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-1, Rule 802 (2009).

First, defendant points to Lane's testimony that Amber told her that defendant "liked to have sex with her[,]" that "he tries to put his pee pee in [her] pee pee[,]" that "he would put his finger in her pee pee[,]" "lick her pee pee[,]" and "kiss[] her in the mouth." Lane further testified that Amber claimed defendant would follow her into the bathroom, make her take her clothes off, and sexually molest her. Upon review of the transcript, we hold that Lane's testimony was offered for the non-hearsay purpose of explaining Lane's subsequent conduct. *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990) (noting that statements are not hearsay if they are admitted for the purpose of explaining the subsequent conduct of the person to whom the statement was directed); *State v. Tate*, 307 N.C. 242, 244, 297 S.E.2d 581, 583 (1982) ("The statements of one person to another are admissible to explain the subsequent conduct of the person to whom the statements were made."). Here, Lane was describing Amber's original allegations against defendant, which prompted her to relay that information to Amber's parents so medical treatment could be obtained. Accordingly, Lane's statements were intended to establish why investigative action was originally taken, not to prove that defendant engaged in the conduct alleged.

[2] Additionally, these prior statements made by Amber to Lane served to corroborate Amber's trial testimony. "A prior consistent statement may be admissible as non-hearsay even when it contains new or additional information when such information tends to strengthen or add credibility to the testimony which it corroborates." *State v. Levan*, 326 N.C. 155, 167, 388 S.E.2d 429, 435 (1990). Out-of-court statements offered to corroborate a child's testimony regarding sexual abuse have been held to be non-hearsay. *Id.*; *State v. Gilbert*, 96 N.C. App. 363, 365, 385 S.E.2d 815, 816 (1989). "The trial court has wide latitude in deciding when a prior consistent statement can be admitted for corroborative, nonhearsay purposes." *State v. Call*, 349 N.C. 382, 410, 508 S.E.2d 496, 513 (1998). "When the statements are generally consistent with the witness' testimony, slight variations will not render them inadmissible. Such variations affect only the weight of the evidence which is for the jury to determine." *State v. Moore*, 300 N.C. 694, 697, 268 S.E.2d 196, 199 (1980) (internal citation omitted), *disapproved on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993). Although Lane's testimony provided statements about which Amber did not testify concerning cunnilingus and attempted penile penetration, we hold that Lane's testimony was sufficiently similar to Amber's testimony and served to corroborate

Amber's testimony regarding the abuse, particularly the act of digital penetration. The portions of Lane's testimony that varied from Amber's account at trial affected only the weight of the evidence. *Id.*

Second, defendant takes issue with the testimony of Tammy Mumford ("Ms. Mumford"), an expert in the area of clinical social work. Ms. Mumford, in relaying Amber's statements to her, testified as follows:

> [Defendant] had sex with her and that upon questioning what that meant, she told me that [defendant] had touched her private part and forced her to touch his. That she was forced to put her mouth on his penis and that he put his fingers inside her.

As with Lane's testimony, we hold that Ms. Mumford's testimony served to corroborate Amber's trial testimony. Although Ms. Mumford's testimony provided "new or additional information[,]" her testimony tended to "strengthen" Amber's testimony that she had been sexually abused by defendant. *State v. Lloyd*, 354 N.C. 76, 104, 552 S.E.2d 596, 617 (2001); *see also State v. Horton*, ––– N.C. App. –––, 682 S.E.2d 754, 759 (2009) (holding that child abuse counselor's testimony that child told her that, among other things, the defendant tickled her and gave her cigarettes did not constitute inadmissible hearsay).

We note that the jury was instructed as to the proper method of evaluating prior out-of-court statements by a testifying witness. The trial court stated:

> When evidence has been received tending to show that at an earlier time a witness made a statement which may be consistent with or may conflict with the witness' testimony at this trial, you must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe that such earlier statement was made and that it was consistent with or does conflict with the testimony of the witness at this trial, then you may consider this together with all other facts and circumstances bearing upon the witness' truthfulness, in deciding whether you will believe or disbelieve the witness' testimony at this trial.

[3] Third, defendant takes issue with the admission of testimony from Kathy Young-Shugar ("Ms. Young-Shugar"), an expert witness in the area of child mental health. Ms. Young-Shugar testified that she treated Kevin, John's son from a previous marriage, for "sexually reactive behavior" that was occurring between Kevin and Amber.

According to Ms. Young-Shugar's trial testimony, Kevin told her that he had seen defendant on top of Amber during the night " 'doing sex things.' " Defendant argues on appeal that Ms. Young-Shugar's testimony concerning Kevin's statements to her constitutes inadmissible hearsay. This arguments is without merit since defendant elicited this testimony on cross-examination when counsel asked Ms. Young-Shugar what she believed to be the source of Kevin's sexually reactive behavior. "Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." *State v. Fraley*, —— N.C. App. ——, 688 S.E.2d 778, 785 (2010).

In sum, we find no error, much less plain error in the admission of Lane's, Ms. Mumford's, or Ms. Young-Shugar's testimony regarding the out-of-court statements of other witnesses. Assuming, *arguendo*, that the trial court should have *ex mero motu* excluded the testimony of these three witnesses, defendant has not proven to this Court that the admissions constituted plain error. Amber testified at trial that defendant digitally penetrated her on multiple occasions. Ms. Mumford testified, as discussed in greater detail *infra*, that Amber's behavior was consistent with a child that had been sexually victimized. Moreover, the charge pertaining to cunnilingus was dismissed by the trial court because Amber did not testify that defendant had engaged in that act even though Lane and Ms. Mumford testified that Amber had previously alleged cunnilingus. Defendant was convicted of one count of first degree sex offense for the digital penetration of Amber. We cannot say that the outcome of the trial would have been different had this testimony been excluded.

II. Expert Testimony

[4] Next, defendant argues that the trial court erred in admitting the expert opinion of Ms. Mumford that she "diagnosed [Amber] with sexual abuse." Ms. Mumford was presented as an expert in clinical social work and defendant did not object. Defendant also did not object to Ms. Mumford's testimony, but has requested plain error review.

Rule 702 governs the admissibility of an expert opinion in sexual offense prosecutions. Rule 702 states in pertinent part: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2009). "Expert testimony is properly admis-

sible when it can assist the jury in drawing certain inferences from facts and the expert is better qualified than the jury to draw such inferences." *State v. Mackey*, 352 N.C. 650, 657, 535 S.E.2d 555, 558-59 (2000) (citation and quotation marks omitted). An essential question in determining admissibility of such evidence is "whether the witness, through study or experience, has acquired such skill that he is better qualified than the jury to form an opinion on the subject matter to which his testimony applies." *Id.* at 657, 535 S.E.2d at 559 (citation and quotation marks omitted).

It is well established that

> [i]n a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has in fact occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility. However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.

State v. Stancil, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (*per curiam*) (citing *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987), and *State v. Grover*, 142 N.C. App. 411, 543 S.E.2d 179, *aff'd per curiam*, 354 N.C. 354, 553 S.E.2d 679 (2001)). Where the expert testimony is based on a proper foundation, "[t]he fact that this evidence may support the credibility of the victim does not alone render it inadmissible." *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 367 (1987).

In the present case, Ms. Mumford testified that she "diagnosed [Amber] with sexual abuse . . . ." This diagnosis was improper given the lack of physical evidence of abuse. *Stancil*, 355 N.C. at 266-67, 559 S.E.2d at 789. In a similar case, *State v. Dixon*, 150 N.C. App. 46, 52-53, 563 S.E.2d 594, 598, *aff'd per curiam*, 356 N.C. 428, 571 S.E.2d 584 (2002), we held that an error occurred where a clinical psychologist, Dr. Powell, testified that it was his opinion that the victim, S.E., had been sexually abused where the only physical evidence of abuse was "nonspecific irritation" of the victim's vagina that was not conclusive of sexual abuse. The psychologist based his opinion on interviews with the victim, her grandparents, her aunt, her mother, and the defendant, as well as the report of the physician who completed the child medical exam, the victim's use of anatomically correct dolls,

and the results of a psychological evaluation. *Id.* at 50, 563 S.E.2d at 597. This Court held:

> Although there were no physical findings to support a diagnosis of sexual abuse, the psychologist, Dr. Powell, was permitted to state his opinion that S.E. had been sexually abused. The opinion was not supported by an adequate foundation and its admission was error. Though Dr. Powell's testimony with respect to the various psychological tests, interviews, and reports upon which he relied may have been a sufficient foundation to support an opinion that S.E. did or did not exhibit symptoms or characteristics of victims of child sexual abuse, it was not a sufficient foundation for the admission of his opinion, under Rule 702, that S.E. had *in fact* been sexually abused.

Id. at 53, 563 S.E.2d at 598-99.[2]

The recent case of *State v. Chandler*, 364 N.C. 313, 697 S.E.2d 327 (2010), further supports our holding. In *Chandler*, 364 N.C. at 314-15, 697 S.E.2d at 328-29, the defendant argued before the Supreme Court that *Stancil* and its progeny significantly changed the law with regard to expert testimony in child sexual abuse cases, and, therefore, he was entitled to a new trial under N.C. Gen. Stat. § 15A-1415(b)(7) (2009). The Court held that *Stancil* did not change the law with regard to the permissible scope of expert opinion testimony in child sexual abuse cases; rather, the *Stancil* Court "simply applied the existing law on expert opinion evidence as stated in *Trent*." *Id.* at 318, 697 S.E.2d at 331. The Court in *Chandler* made the following clarification with regard to existing case law:

> Whether sufficient evidence supports expert testimony pertaining to sexual abuse is a highly fact-specific inquiry. Different fact patterns may yield different results. We agree with the State that "reasonable jurists continue to disagree over how or whether the rule discussed in *Trent* [applies] to different situations." However, the rule has remained constant. Before expert testimony may be admitted, an adequate foundation must be laid. *And for expert testimony presenting a definitive diagnosis of sexual abuse, an adequate foundation requires supporting physical evidence of the abuse.*

2. The dissent in *Dixon* pointed out that the majority was adopting a bright line rule "that expert opinion testimony that a child victim has been sexually abused is *only* admissible under Rule 702 when there is *physical* evidence to support a diagnosis of sexual abuse[.]" *Id.* at 54, 563 S.E.2d at 599 (Campbell, J., dissenting). Our Supreme Court affirmed the majority *per curiam*. 356 N.C. 428, 571 S.E.2d 584.

Id. at 318-19, 697 S.E.2d at 331 (internal citations omitted) (emphasis added). Accordingly, we must hold that Ms. Mumford's diagnosis of sexual abuse absent physical evidence was erroneously admitted in this case.

We must now determine whether the improperly admitted statement amounted to plain error. In surveying the case law, this Court has found plain error where an expert testified that the victim had, in fact, been abused despite the absence of physical evidence. *State v. Delsanto*, 172 N.C. App. 42, 49, 615 S.E.2d 870, 875 (2005) (holding that admission of medical expert's testimony that child was sexually abused by defendant in absence of any physical evidence of abuse was plain error); *State v. Ewell*, 168 N.C. App. 98, 105, 606 S.E.2d 914, 919 (holding that it was plain error for the trial court to allow expert testimony that it was "probable that [the child] was a victim of sexual abuse" when the testimony was not based on physical evidence), *disc. review denied*, 359 N.C. 412, 612 S.E.2d 326 (2005); *State v. Bush*, 164 N.C. App. 254, 259, 595 S.E.2d 715, 718 (2004) (holding that expert's testimony that she diagnosed the victim as having been sexually abused by defendant was plain error when no physical evidence was admitted); *see also State v. O'Connor*, 150 N.C. App. 710, 712, 564 S.E.2d 296, 297 (2002) (holding it was plain error to admit into evidence a written medical report wherein the treating physician stated that the victim's disclosure to her that defendant "sodomized and performed oral sex on him . . . was credible"). In *State v. Couser*, 163 N.C. App. 727, 729-32, 594 S.E.2d 420, 422-24 (2004), where the only physical evidence of abuse were abrasions on the victim's introitus that were not specifically related to sexual abuse, we held that a medical expert's opinion that the child "probably had been sexually abused" was plain error because it amounted to an improper opinion concerning the victim's credibility.

Unlike the cases cited *supra*, this case presents a situation where improper opinion testimony is followed by testimony properly admitted under Rule 702 and our case law. While Ms. Mumford, who had been treating Amber for over four years, did improperly testify that she diagnosed Amber with sexual abuse, she subsequently testified that Amber displayed behavior that was consistent with children who have been sexually abused, as permitted by *Stancil*.

When asked about the basis of her diagnosis, Ms. Mumford responded:

> [Amber] has trouble with regulating her emotions, particularly with anxiety and anger and irritability. She is anxious often at times. It affects her functioning at school and at home; and she disclosed to me that she was sexually abused and that has been an ongoing issue for her since February '05.

Ms. Mumford also relayed reports made to her by Amber's family that she was exhibiting "clinging" behavior, was very anxious, and did not want to leave her house. Ms. Mumford did not directly relate this behavior to children who have been sexually abused; however, Ms. Mumford further testified that Amber had demonstrated "grooming behaviors," and that Amber felt that she had a special relationship with defendant, which was consistent with children who have been sexually abused. Additionally, Ms. Mumford related Amber's sexual abuse to the "sexually reactive" behavior between Amber and Kevin, stating that it is "typical of children who have been sexually abused to act out in these ways after their abuse . . . ." Ms. Mumford testified that "[i]t is normal with kids who have been sexually abused" to seek out something that traumatized them. Ms. Mumford stated that, in her experience, children Amber's age typically do not fantasize about sex. Ms. Mumford also testified that Amber would draw pictures of defendant "and act out her anger on the pictures and use a stabbing motion with a marker and tear them up and crumble them up[.]" When asked why a child would do that, Ms. Mumford responded that "[i]t was a release of her anger and her emotions against [defendant] and the trauma she's experienced." The above testimony was properly admitted and included a correlation between Amber's behavior and that of children who have been sexually abused. We also note that on cross-examination, Ms. Mumford acknowledged that, in her experience counseling children, Amber's behavior could be the result of some other event that happened in her past and not sexual abuse. This admission served to diminish the prejudicial impact of Ms. Mumford's improper diagnosis because it provided the jury with an alternative explanation for the diagnosis.

In addition to Amber's behavior, disclosures, the corroborating testimony of other witness, and the properly admitted portions of Ms. Mumford's testimony, there was some evidence that Kevin had seen defendant molest Amber. Although Kevin did not testify at trial that he saw defendant engaging in sexual activity with Amber, Ms. Young-Shugar testified that Kevin divulged to her that he had personally witnessed defendant " 'doing sex things' " with Amber at night. Ms.

Young-Shugar testified that Kevin also exhibited sexually reactive behavior which stemmed from witnessing these sex acts.

In sum, we hold that Ms. Mumford's statement that she diagnosed Amber with sexual abuse was erroneously admitted, but this error did not amount to plain error. *See State v. Boyd*, ––– N.C. App. –––, –––, 682 S.E.2d 463, 468 (2009) (holding that child forensic interviewer and social worker who testified that the victim's "disclosure was plausible and consistent" did not amount to plain error where the victim exhibited changed behavior and gave consistent statements to family, police, and DSS). Ms. Mumford properly testified that Amber exhibited behavior that was consistent with children who have been sexually abused, and, therefore, we conclude that her testimony was not based solely on Amber's disclosures. We do not believe that a different result would have been reached at trial had Ms. Mumford's diagnosis been excluded.

III. Jury Instructions

[5] Next, defendant argues that the trial court committed plain error by failing to instruct the jury that the State must prove that defendant digitally penetrated Amber's vagina, as alleged in the indictment. To amount to plain error, the instructional error must be "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

N.C. Gen. Stat. § 14-27.4 (2009) states: "A person is guilty of a sexual offense in the first degree if the person engages in a sexual act . . . [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]" A sexual act is defined as "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body[.]" N.C. Gen. Stat. § 14-27.1(4) (2009).

The indictment pertaining to Amber alleged each essential element of first degree sexual offense, but added that the sexual act committed was "digital penetration of the child's vagina." Defendant acknowledges that the State was not required to specify in the indictment the sexual act alleged. *State v. Edwards*, 305 N.C. 378, 380, 289 S.E.2d 360, 362 (1982) (noting that "an indictment without specifying which 'sexual act' was committed is sufficient to charge the crime of

first-degree sexual offense and to inform a defendant of such accusation"). It is undisputed that since the State specified digital penetration in the indictment, it was bound to provide substantial evidence at trial that digital penetration occurred. *State v. Loudner*, 77 N.C. App. 453, 453-54, 335 S.E.2d 78, 79 (1985) (holding that the State is bound to prove the sexual act listed in the indictment). Where the State fails to provide substantial evidence of the allegations in the indictment, the defendant's motion to dismiss the charge should be granted. *Id.* To be clear, defendant does not argue that the State failed to provide substantial evidence of digital penetration at trial. In fact, Amber testified that defendant digitally penetrated her. Accordingly, the issue is not whether there was a fatal variance between the indictment and the evidence presented at trial. The issue before us is whether the trial court was required to instruct the jury that the State must prove that defendant digitally penetrated Amber's vagina as alleged in the indictment.

This Court has held that a jury does not have to reach a unanimous conclusion as to which sex act the defendant performed when returning a verdict of guilty to first degree sexual offense. *See State v. Youngs*, 141 N.C. App. 220, 232, 540 S.E.2d 794, 802 (finding no error where defendant argued that the "trial court erred in not instructing the jury that it must be unanimous as to which sex act defendant committed in order to convict him of first-degree sexual offense"), *appeal dismissed and disc. review denied*, ––– N.C. –––, 547 S.E.2d 430 (2000); *State v. Petty*, 132 N.C. App. 453, 463, 512 S.E.2d 428, 434-35 (holding that the jury need only find that a sexual act occurred to convict the defendant of first degree sexual offense), *appeal dismissed*, 350 N.C. 598, 537 S.E.2d 490 (1999). However, the trial court must instruct the jury only on the sex act or acts supported by the evidence. *State v. Hughes*, 114 N.C. App. 742, 746, 443 S.E.2d 76, 79 (1994) (holding that the trial court erred in instructing the jury that it could find defendant guilty of first degree sexual offense based on the sex act of penetration by an object where there was no evidence to support that theory).

In the resent case, the indictment stated that defendant digitally penetrated Amber. The evidence at trial supported that allegation. The trial court then properly instructed the jury on each element of first degree sexual offense and stated that "[a] sexual act means any penetration, however slight, by an object into the genital opening of a person's body." The trial court left out cunnilingus, fellatio, analingus,

and anal intercourse from the definition of a sexual act, presumably because those theories were not supported by the evidence.

Defendant has not cited a case, and we have found none, where our Courts have required the trial court to instruct the jury that it could only find defendant guilty if the State proved beyond a reasonable doubt at trial that defendant committed the sex act stated in the indictment. Such a holding would be contrary to this Court's determination in *State v. Lark*, ––– N.C. App. –––, –––, 678 S.E.2d 693 (2009), *disc. review denied*, 363 N.C. 808, 692 S.E.2d 111 (2010). There, the defendant was tried and convicted on an indictment for felonious child abuse that listed "anal intercourse" as the underlying sex act. *Id.* at –––, 678 S.E.2d at 699. "[T]he trial court instructed the jury on the theory of anal intercourse that was alleged in the indictment. In addition, the trial court also instructed on the theory of fellatio that was not alleged in the indictment, but that was supported by the evidence." *Id.* at –––, 678 S.E.2d at 701. Defendant assigned error to the jury instructions, arguing that the trial court was not permitted to instruct the jury on a sex act not set out in the indictment. *Id.* at –––, 678 S.E.2d at 700. This Court found no error in the instructions and held that the trial court is permitted to instruct the jury on all sex acts supported by the evidence, even if those sex acts were not set out in the indictment. *Id.* at –––, 678 S.E.2d at 701-02. A holding in the present case that the trial court is required to instruct the jury that it must find the defendant guilty of the sex act stated in the indictment would not comport with the reasoning in *Lark*—that the trial court's instructions must conform to the evidence presented at trial, but are not limited to those sex acts alleged in the indictment.

Moreover, "the primary purpose of the indictment is to enable the accused to prepare for trial." *State v. Farrar*, 361 N.C. 675, 678, 651 S.E.2d 865, 866-67 (2007) (citation and quotation marks omitted). The State's discretionary decision to include the sexual act that formed the basis of the first degree sexual offense indictment gave more notice to defendant than is required and certainly enabled him to better prepare his defense. Requiring a jury instruction that the State must prove the sexual act specified in the indictment would dissuade the State from including such specification thereby defeating the primary purpose of the indictment—notice to defendant of the charges against him. In sum, we hold that the trial court properly instructed the jury on the offense charged and was not required to instruct the jury that the State had to prove digital penetration as alleged in the indictment.

[6] Defendant further contends that the trial court did not properly instruct the jury that the two counts of first degree sexual offense referred to two alleged victims. This argument is without merit. The trial court properly instructed the jury that "Defendant has been charged with two counts of first degree sexual offense. Each of which must be considered by you separately and independently." The jury was then given verdict sheets that separated the two charges and specified one as pertaining to Amber and the other as pertaining to Lucy. The jury then found defendant guilty as to Amber and not guilty as to Lucy. Even assuming error, defendant has not shown any prejudice where the jury clearly deliberated each charge separately. We find no error, much less plain error, in the trial court's jury instructions.

IV. SBM

[7] Finally, defendant argues that the trial court erred in ordering him to enroll in lifetime SBM. Defendant asserts that: (1) the trial court erroneously found as fact that defendant had been convicted of an offense against a minor pursuant to N.C. Gen. Stat. § 14-208.6 (2009), and (2) the trial court erroneously found as fact that defendant was convicted of an aggravated offense.[3]

First, the State concedes that the trial court incorrectly found as fact that defendant had been convicted of "an offense against a minor under G.S. 14-208.6(1i) . . . and defendant is not the parent of the victim." However, defendant admits that he was convicted of a reportable offense—a sexually violent offense under N.C. Gen. Stat. § 14-208.6(5). Therefore, it is undisputed that the trial court selected the wrong offense to support its finding that defendant was found guilty of a reportable conviction.

"We realize that in the process of checking boxes on form orders, it is possible for the wrong box to be marked inadvertently, creating a clerical error which can be corrected upon remand." *State v. Yow*, ––– N.C. App. –––, –––, 693 S.E.2d 192, 194 (2010). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.' " *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (quoting *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999)). A "clerical error" has been defined as "[a]n error resulting

3. The State argues that defendant failed to object to the imposition of SBM; however, our Courts have not required an objection where defendant challenges on appeal the trial court's written findings of fact.

from a minor mistake or inadvertence, in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quoting *Black's Law Dictionary* 563 (7th ed. 1999)).

This Court recently addressed this same issue in *State v. May*, —— N.C. App. ——, ——, 700 S.E.2d 42, 44 (2010) and held that the trial court committed a clerical error in checking Box 1(a) instead of Box 1(b) on the judicial findings and order for sex offenders form. The Court remanded the case back to the trial court for correction of the clerical error where, as here, the defendant admitted that he had committed a sexually violent offense. *Id.* at ——, 700 S.E.2d at 44.

Next, defendant argues that first degree sexual offense is not an aggravated offense, thus the trial court erred in finding as fact that defendant had committed an aggravated offense. An aggravated offense is defined as "any criminal offense that includes either": (i) "engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence"; or (ii) "engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old." N.C. Gen. Stat. § 14-208.6(1a) (2009). The State in this case indicted defendant under N.C. Gen. Stat. § 14-27.4(a)(1), which states:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim.

The State did not allege in the indictment, nor did it provide evidence at trial, that defendant was guilty of first degree sexual offense under N.C. Gen. Stat. § 14-27.4(a)(2), which requires use of force *and* either the use of a dangerous weapon, infliction of serious personal injury, or that the perpetrator was aided and abetted by one or more persons. The trial court instructed the jury on the elements of N.C. Gen. Stat. § 27.4(a)(1) and the judgment sets out defendant's conviction as being pursuant to N.C. Gen. Stat. § 27.4(a)(1). Accordingly, our holding in this case is limited to N.C. Gen. Stat. § 14-27.4(a)(1).

Defendant argues, and we agree, that *State v. Phillips*, —— N.C. App. ——, 691 S.E.2d 104 (2010) is controlling and requires a conclusion that first degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.4(a)(1) does not qualify as an aggravated offense. The State

makes no contrary argument, but seeks to preserve the issue for Supreme Court review. In *Phillips*, ––– N.C. App. at –––, 691 S.E.2d at 105, the defendant pled guilty to, *inter alia*, felonious child abuse pursuant to N.C. Gen. Stat. § 14-318.4(a2) (2009). The trial court found that the offense qualified as an aggravated offense under N.C. Gen. Stat. § 14-208.6(1a) and ordered the defendant to lifetime SBM. *Phillips*, ––– N.C. App. at –––, 691 S.E.2d at 105. The defendant argued on appeal that the offense did not qualify as an aggravated offense. *Id.* In making its decision, the Court in *Phillips* relied on the holding in *State v. Davison*, ––– N.C. App. –––, 689 S.E.2d 510 (2009), where, after reviewing the language of the statutes at issue, this Court held that the General Assembly's "repeated use of the term 'conviction' " compelled the conclusion that the trial court "is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction" when determining whether a defendant's "conviction offense [i]s an aggravated offense . . . ." *Id.* at –––, 689 S.E.2d at 517; *accord State v. Singleton*, ––– N.C. App. –––, ––– 689 S.E.2d 562, *disc. review improvidently allowed*, ––– N.C. –––, ––– S.E.2d ––– (2010).

The *Phillips* Court then reviewed the elements of felonious child abuse under N.C. Gen. Stat. § 14-318.4(a2), which provides: "Any parent or legal guardian of a child less than 16 years of age who commits or allows the commission of any sexual act upon the child is guilty of a Class E felony." The Court then reasoned:

> [I]f an offense does not involve engaging in a sexual act through the use of force or threat of serious violence, the offense can only be found to be an "aggravated offense" if it involves engaging in sexual acts involving penetration "with a victim who is less than 12 years old." However, felonious child abuse by the commission of any sexual act provides that the victim must be "a child less than 16 years of age." *Since "a child less than 16 years" is not necessarily also "less than 12 years old," without looking at the underlying facts, a trial court could not conclude that a person convicted of felonious child abuse by the commission of any sexual act committed that offense against a child less than 12 years old.* Therefore, in light of our review of the plain language of the statutes at issue, we must conclude that the trial court erred when it determined that defendant's conviction offense of felonious child abuse by the commission of any sexual act under N.C.G.S. § 14-318.4(a2) is an "aggravated offense" as defined under N.C.G.S. § 14-208.6(1a) because, when considering the ele-

> ments of the offense only and not the underlying factual scenario giving rise to this defendant's conviction, the elements of felonious child abuse by the commission of any sexual act do not "fit within" the statutory definition of "aggravated offense."

Phillips, ––– N.C. App. at –––, 691 S.E.2d at 107-08 (emphasis added) (internal citations omitted).

In the present case, the State alleged first degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.4(a)(1), which requires that the child victim be "under the age of 13." An aggravated offense requires that the child be "less than 12 years old." N.C. Gen. Stat. § 14-208.6 (1a). Clearly, a child under the age of 13 is not necessarily also a child less than 12 years old. Following the holdings of *Davison* and *Phillips*, we are obliged to hold that first degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.4(a)(1) is not an aggravated offense. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Nevertheless, even where a defendant has not committed an aggravated offense, the trial court may still impose SBM if it is determined that: (1) the defendant is a sexually violent predator; (2) the defendant is a recidivist; or (3) the conviction involved the physical, mental, or sexual abuse of a minor, and based on the risk assessment performed by the Department of Correction, the defendant requires the highest possible level of supervision and monitoring. N.C. Gen. Stat. § 14-208.40A (c), (d). In *Phillips*, N.C. App. at , 691 S.E.2d at 108, a risk assessment had already been performed by the Department of Correction and the defendant was found to be "low risk." Additionally, the trial court had already determined that the defendant was not a sexually violent predator or a recidivist. *Id.* Consequently, this Court found that the trial court could not possibly order the defendant to enroll in SBM and ordered the trial court to reverse its determination as to SBM on remand. *Id.* Here, the record indicates that the trial court did not determine whether defendant is a sexually violent predator or a recidivist, and a Department of Correction assessment has not been performed. Accordingly, we reverse the trial court's order and remand for correction of the mistake made by the trial court in its finding regarding the reportable conviction, and we remand for consideration of whether defendant is a sexually violent predator, a recidivist, or whether his conviction involved the physical, mental, or sexual abuse of a minor, and based on the risk assessment performed by the Department of Correction, defendant requires the highest possible level of supervision and monitoring.

Defendant seeks to preserve his argument that SBM violates the *ex post facto* clause of the United States Constitution, but acknowledges that this argument has been foreclosed pursuant to *State v. Bare*, ––– N.C. App. –––, 677 S.E.2d 518 (2009). Our Supreme Court recently held in *State v. Bowditch*, 364 N.C. 335, 700 S.E.2d 1 (2010), that imposition of SBM does not violate the *ex post facto* clause of the state or federal constitutions as it is a civil regulatory scheme and not a criminal punishment.

Conclusion

Based on the foregoing analysis, we hold that the trial court: (1) did not commit plain error in admitting the testimony of various witnesses; (2) did not commit plain error in its instructions to the jury; and (3) erred in its findings of fact pertaining to imposition of SBM.

No Prejudicial Error in part; Reversed and Remanded in part.

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

SEAN HAUGH, AND J. RUSSELL CAPPS, PLAINTIFFS v. COUNTY OF DURHAM, ELLEN W. RECKHOW, CHAIRMAN OF THE DURHAM COUNTY BOARD OF COMMISSIONERS, IN HER OFFICIAL CAPACITY, MICHAEL D. PAGE, VICE-CHAIRMAN OF THE DURHAM COUNTY BOARD OF COMMISSIONERS, IN HIS OFFICIAL CAPACITY; AND LEWIS A. CREEK, PHILLIP R. COUSIN, JR., AND BECKY M. HERON, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE DURHAM COUNTY BOARD OF COMMISSIONERS; MICHAEL M. RUFFIN, DURHAM COUNTY MANAGER, IN HIS OFFICIAL CAPACITY; AND NITRONEX CORPORATION, DEFENDANTS

No. COA09-167

(Filed 7 December 2010)

1. Jurisdiction— standing taxpayers—challenge to tax incentives

The trial court erred in concluding that plaintiff Haugh lacked standing to bring suit for alleged violations of the North Carolina Constitution based on tax incentives granted by defendant Durham County to defendant Nitronex Corporation. Haugh averred in the complaint that he is a citizen, resident and taxpayer in Durham County and that he pays various types of taxes to Durham County government, including sales taxes. The trial court did not err in concluding that plaintiff Capps lacked stand-

ing because his argument that he had been injuriously affected by the diminution of Nitronex's contribution toward Wake County's tax base failed.

2. Taxation— tax incentives—political question doctrine—action not barred

The trial court did not err in concluding that the propriety of tax incentives similar to those at issue had already been judicially established and that any further review of Durham County's decision as to whether to offer the incentives or the amount thereof was barred by the political question doctrine.

3. Taxation— authority to tax—Public Purpose Clauses—not violated—bound by prior precedent

The trial court did not err in granting summary judgment in favor of defendants with respect to alleged violations of the Public Purpose Clauses of the North Carolina Constitution. Incentives parallel to those at issue had already been held to comport to the Public Purpose Clauses of our State Constitution in view of the test articulated in *Madison Cablevision*, 325 N.C. 634, and the Court of Appeals was bound by that precedent.

4. Taxation— tax incentives—not exclusive emoluments

The trial court properly granted summary judgment in favor of defendants with respect to purported violations of Article I, section 32 of the North Carolina Constitution. Pursuant to the Court of Appeals' previous holdings in *Peacock*, 139 N.C. App. 487, and *Blinson*, 186 N.C. App. 328, and in view of its holding that challenged incentives offered by defendant Durham County to defendant Nitronex were for a public purpose, the incentives at issue necessarily were not exclusive emoluments.

Appeal by plaintiffs from order entered 9 July 2008 by Judge Howard E. Manning, Jr. in Durham County Superior Court. Heard in the Court of Appeals 2 September 2009.

North Carolina Institute for Constitutional Law, by Robert F. Orr and Jeanette K. Doran, for plaintiffs-appellants.

Durham County Attorney S.C. Kitchen, for County of Durham, defendants-appellees.

Wyrick Robbins Yates & Ponton, LLP, by K. Edward Greene and Tobias S. Hampson, for Nitronex Corporation, defendants-appellees.

JACKSON, Judge.

Sean Haugh ("Haugh") and J. Russell Capps ("Capps") (collectively, "plaintiffs") appeal from the trial court's order granting summary judgment in favor of the County of Durham[1] ("Durham") and Nitronex Corporation ("Nitronex") (collectively, "defendants"). For the reasons set forth below, we affirm in part and reverse in part.

Plaintiffs allege that Haugh is a citizen, resident, and taxpayer in Durham, North Carolina and that Capps is a citizen, resident, and taxpayer in Wake County, North Carolina. Plaintiffs further allege that they each pay "various types of taxes to" their respective counties of residence[2], "including sales taxes." Capps also asserts that he pays real estate taxes to Wake County.

Nitronex is a corporation chartered in Delaware and licensed to do business in North Carolina. From the time of its incorporation in 1999, Nitronex was headquartered in Raleigh, North Carolina. On or about 2 April 2002, Nitronex signed a memorandum of lease as a tenant for real property in Durham ("the Durham property").

In late 2005 and early 2006, Nitronex began searching for locations at which it could expand its operations to include semiconductor manufacturing facilities. Initially, Nitronex considered various locations in Wake County, the Durham property, and various locations in "Silicon Valley," California.

On or about 12 March 2007, the Durham County Board of Commissioners (the "Board") approved entering into an agreement with Nitronex to provide up to $100,000.00 from the Durham County Economic Development Investment Fund over a period of five years "contingent upon a new investment of Twenty-Four Million Dollars ($24,000,000.00), hiring two hundred ten (210) new employees and adding a minimum of Five Million Dollars ($5,000,000.00) in additional business personal property tax listings." Durham offered to pay

1. Plaintiffs do not appeal the dismissal of this action against the Durham County Board of Commissioners—Ellen W. Reckhow, Michael D. Page, Lewis A. Cheek, Phillip R. Cousin, Jr., and Becky M. Heron—or Durham County Manager Michael M. Ruffin.

2. We note that Haugh does not aver that he pays taxes to Wake County, and Capps does not aver that he pays taxes to Durham.

$30,000.00 "upon occupancy of the building located at 2305 Presidential Drive, RTP, NC, installation of equipment, and listing of [$5,000,000.00] new business personal property in Durham County; and payment of [$1,000.00] for each Durham County resident hired, up to a maximum of [$70,000.00]." On 22 March 2007, Nitronex announced its intention to relocate its corporate and manufacturing operations to Durham.

On 21 December 2007, plaintiffs filed an unverified complaint alleging violations of the North Carolina Constitution, including Article I, section 32 and Article V, sections 2(1) and 2(7), and seeking a declaration that Durham's resolution, grant, and terms and conditions of the agreement with Nitronex are unconstitutional. On 8 July 2008, the trial court granted summary judgment[3] in favor of defendants and dismissed the action after concluding that (1) plaintiffs lacked standing because they do not pay property taxes to Durham and (2) the court lacked subject matter jurisdiction pursuant to the political question doctrine to rule upon the economic incentives offered by Durham to Nitronex. Plaintiffs appeal.

[1] On appeal, plaintiffs first argue that the trial court erred in concluding that plaintiffs do not have standing to bring suit because neither pays property taxes to Durham. We agree with plaintiffs' assertion that the trial court erred in concluding that plaintiffs lack standing because they do not pay property taxes to Durham; however, we still conclude that Capps does not have standing as he did not allege that he has paid taxes of any kind to Durham.

We review an order allowing summary judgment *de novo*. *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 83, 609 S.E.2d 259, 261 (2005). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56 (2009). "An issue is 'genuine' if it can be proven by substantial evidence[,] and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citing *Bone International, Inc. v. Brooks*, 304 N.C. 371, 374-75, 283 S.E.2d 518, 520 (1981)). In deciding a motion for summary judgment, a trial court must consider the evidence in the light most

3. The trial court's order notes that defendants' motions originally were filed as motions to dismiss, but that the motions previously had been "converted by order of the Court to motions for summary judgment."

favorable to the non-moving party. *See Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). If there is any evidence of a genuine issue of material fact, a motion for summary judgment should be denied. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 471, 597 S.E.2d 674, 694 (2004). The moving party bears the burden of showing that no triable issue of fact exists. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citing *Texaco, Inc. v. Creel*, 310 N.C. 695, 699, 314 S.E.2d 506, 508 (1984)).

Furthermore,

> [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (2009). Our Supreme Court has explained:

> Subsection (e) of Rule 56 does not shift the burden of proof at the hearing on motion for summary judgment. *The moving party still has the burden of proving that no genuine issue of material fact exists in the case.* However, when the moving party by affidavit or otherwise presents materials in support of his motion, it becomes incumbent upon the opposing party to take affirmative steps to defend his position by proof of his own. If he rests upon the mere allegations or denial of his pleading, he does so at the risk of having judgment entered against him. The opposing party need not convince the court that he would prevail on a triable issue of material fact but only that the issue exists. *See* Shuford, *N.C. Civil Practice and Procedure*, § 56-9 (2d ed. 1981). However, subsection (e) of Rule 56 precludes any party from prevailing against a motion for summary judgment through reliance on conclusory allegations unsupported by facts. *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 152, 229 S.E.2d 278, 283 (1976). And, subsection (e) clearly states that the unsupported allegations in a pleading are insufficient to create a genuine issue of fact where the moving adverse party supports his motion by allowable evidentiary matter showing the facts to be contrary to that alleged in the pleadings.

Lowe, 305 N.C. at 370, 289 S.E.2d at 366 (emphasis added) (original emphasis removed).

In the case *sub judice*, in support of their motion with respect to plaintiffs' lack of standing, defendants submitted the affidavit of Kimberly H. Simpson ("Simpson"), Interim Tax Administrator for the County of Durham. Simpson averred that her "position combines the duties of the Tax Collector and Tax Assessor." Furthermore, "as part of [her] duties, [she] oversee[s] the listing and collection of property taxes." "[She] . . . examined the property tax records contained in [her] Office, and neither Plaintiff, Sean Haugh, [n]or Plaintiff, J. Russell Capps, listed property for taxation in Durham County for the tax year 2007, or paid taxes in Durham County for the tax year 2007."

North Carolina law is clear in that the payment of property taxes is a means of establishing taxpayer standing, but that payment of other types of taxes also may be sufficient to establish taxpayer standing. *See, e.g.*, *Goldston v. State*, 361 N.C. 26, 29-33, 637 S.E.2d 876, 879-81 (2006) (holding payment of "motor fuel taxes, title and registration fees, and other highway taxes which by law were collected expressly for application to the Highway Trust Fund" to be sufficient to allow the plaintiffs standing as taxpayers to challenge diversion of funds from the Highway Trust Fund, which was funded by the types of taxes the plaintiffs had paid). In *Goldston*, our Supreme Court reiterated North Carolina's expansive view of standing with respect to taxpayers. 361 N.C. at 28, 637 S.E.2d at 878 (reaffirming the Court's "long-standing holdings that taxpayers have standing to challenge unlawful or unconstitutional government expenditures . . . ."). The Court explained that

> the gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.

Id. at 30, 637 S.E.2d at 879 (citations omitted) (internal quotation marks omitted) (brackets omitted). The court noted that it had "recognized as early as the nineteenth century that taxpayers have standing to challenge the allegedly illegal or unconstitutional disbursement of tax funds by local officials." *Id.* at 30-31, 637 S.E.2d at 879-80 (citing *Stratford v. Greensboro*, 124 N.C. 110, 111-12, 32 S.E. 394, 395-96 (1899) (holding that a taxpayer had standing to challenge the con-

struction of a street that was alleged to have been undertaken for the benefit of a private citizen rather than for a public purpose and explaining that "[i]f such rights were denied to exist against municipal corporations, then taxpayers and property owners who bear the burdens of government would not only be without remedy, but be liable to be plundered whenever irresponsible men might get into the control of the government of towns and cities.")). *See also Maready v. City of Winston-Salem*, 342 N.C. 708, 712-13, 467 S.E.2d 615, 618-19 (1996) (explaining that the plaintiff was a citizen and resident of the City of Winston-Salem in Forsyth County, that the plaintiff owned real and personal property upon which the city and county levied property taxes, and that those types of taxes were the "primary source" of funds for the economic incentives the plaintiff challenged); *Blinson v. State*, 186 N.C. App. 328, 334, 651 S.E.2d 268, 273-74 (2007) (explaining that the defendants conceded that, pursuant to *Goldston*, the plaintiffs had standing as taxpayers to bring claims pursuant to the Public Purpose and Exclusive Emoluments Clauses of the North Carolina Constitution based upon the plaintiffs' contention that they would suffer an increased tax burden as a result of the incentives provided in that case), *appeal dismissed and disc. rev. denied*, 362 N.C. 355, 661 S.E.2d 240 (2008); *Peacock v. Shinn*, 139 N.C. App. 487, 489-91, 533 S.E.2d 842, 844-46 (explaining that, together with relevant, accompanying correspondence, the plaintiff's allegation that he was a "resident and taxpayer of the City of Charlotte" was sufficient to survive a motion to dismiss), *appeal dismissed and disc. rev. denied*, 353 N.C. 267, 546 S.E.2d 110 (2000), *reconsideration dismissed*, 353 N.C. 379, 547 S.E.2d 16 (2001).

In support of their motion for summary judgment with respect to standing, defendants only presented evidence that plaintiffs did not pay property taxes to Durham for the 2007 tax year. Therefore, defendants failed to meet their burden pursuant to Rule 56(e) to show that no genuine issue of fact existed as to plaintiffs' standing. *See Lowe*, 305 N.C. at 370, 289 S.E.2d at 366. Accordingly, the trial court erred insofar as it concluded that plaintiffs lacked standing based solely upon proof that neither paid *property* taxes to Durham.

Nonetheless, Capps averred that he "is a citizen, resident and taxpayer in Wake County, North Carolina," and that "[h]e pays various types of taxes to Wake County government, including real estate and sales taxes." Capps argues that he has been injured by Durham's incentives to Nitronex because the purportedly unconstitutional incentives illegally induced Nitronex's move to Durham, which diminished

the tax base in Wake County. Contrary to Capps's argument, the deposition of Charles Shalvoy ("Shalvoy"), C.E.O. of Nitronex, unequivocally explains that, although Nitronex initially had considered staying in Wake County, "relatively early on we concluded that Wake County would not be--would not have the--the facilities that we were looking for compared to alternative facilities that we were looking at in Durham and in Northern California." Shalvoy explained that Nitronex's semiconductor manufacturing facilities required "clean rooms," which were unavailable in Wake County, but which were readily available in Silicon Valley and could be made available in Durham. This uncontroverted deposition testimony demonstrates that Nitronex was prepared to leave Wake County, and its corporate officers were deciding whether to move to Durham or California. Therefore, Capps's argument that he had been injuriously affected by the diminution of Nitronex's contribution toward Wake County's tax base as a result of Durham's incentives fails, and we hold that the trial court's grant of summary judgment against Capps was correct. "If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) (citing *Sanitary District v. Lenoir*, 249 N.C. 96, 105 S.E.2d 411 (1958); *Hayes v. Wilmington*, 243 N.C. 525, 91 S.E.2d 673 (1956)). *See also Azar v. Presbyterian Hosp.*, 191 N.C. App. 367, 370-71, 663 S.E.2d 450, 453 (2008). However, unlike Capps, Haugh averred in the complaint that he "is a citizen, resident and taxpayer in Durham, Durham County, North Carolina[,]" and that "[h]e pays various types of taxes to Durham County government, including sales taxes." Defendants presented no evidence to contravene this averment.[4] The only contradiction to this assertion is the bare denial in Durham's Answer. Accordingly, we affirm the trial court's order with respect to Capps's standing, and we reverse the trial court's order with respect to Haugh's standing.

[2] Next, plaintiffs challenge the trial court's conclusion that

> Defendant, County of Durham, has awarded economic incentives to Defendant, Nitronex Corporation, through a contract authorized and awarded pursuant to N.C. Gen. Stat. § 158-7.1, which

4. Defendants asserted in their motions to dismiss that "Plaintiffs are not taxpayers in the County of Durham . . . ." However, as noted *supra*, defendants only presented evidence addressing plaintiffs' failure to pay property taxes. Defendants presented no evidence regarding plaintiffs' payment or nonpayment of sales taxes.

statute has previously been held to be constitutional by the North Carolina Appellate Courts, and that the Court therefore lacks subject matter jurisdiction under the political question doctrine.

Plaintiffs argue that the political question doctrine does not apply to questions of constitutional interpretation, including inquiries into that which constitutes a public purpose or an exclusive emolument, and therefore, the trial court was not deprived of subject matter jurisdiction. Plaintiffs further contend that their complaint alleges a violation of constitutional safeguards that are fundamental protections of public funds, and therefore, the Courts of this State must determine whether the legislative body's methods are barred by the North Carolina Constitution.

North Carolina General Statutes, section 158-7.1 applies to the actions taken by Durham. Section 158-7.1 provides, in relevant part, that

> [e]ach county and city in this State is authorized to make appropriations for the purposes of aiding and encouraging the location of manufacturing enterprises, making industrial surveys and locating industrial and commercial plants in or near such city or in the county; encouraging the building of railroads or other purposes which, in the discretion of the governing body of the city or of the county commissioners of the county, will increase the population, taxable property, agricultural industries and business prospects of any city or county. These appropriations may be funded by the levy of property taxes pursuant to G.S. 153A-149 and 160A-209 and by the allocation of other revenues whose use is not otherwise restricted by law.

N.C. Gen. Stat. § 158-7.1(a) (2007).

In *Maready*, our Supreme Court examined the constitutionality of section 158-7.1, and the majority held that section 158-7.1 did not violate the Public Purpose Clause of North Carolina Constitution, Article V, section 2(1) and that the statute was not impermissibly vague or ambiguous. *Maready*, 342 N.C. at 734, 467 S.E.2d at 631. In the Court's examination of the constitutional questions presented, the Court explained that "[t]he Constitution restricts powers, and powers not surrendered inhere in the people to be exercised through their representatives in the General Assembly; therefore, so long as an act is not forbidden, its wisdom and expediency are for legislative, not judicial, decision." *Id.* at 714, 467 S.E.2d at 619 (citing *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891-92 (1961)). However,

legislative declarations notwithstanding, "[i]t is the duty of this Court to ascertain and declare the intent of the framers of the Constitution and to reject any act in conflict therewith." *Id.* at 716, 467 S.E.2d at 620 (citations omitted). Thus, the Court's explanation of rules relevant to its analysis of the issues presented in that case clearly comports with the well-established contours of the political question doctrine, which " 'excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.' " *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (quoting *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230, 92 L. Ed. 2d 166, 178 (1986)), *cert. denied*, 533 U.S. 975, 150 L. Ed. 2d 804 (2001). However, "[i]t is the duty and prerogative of this Court to make the ultimate determination of whether the activity or enterprise is for a purpose forbidden by the Constitution of the state." *Madison Cablevision v. City of Morganton*, 325 N.C. 634, 645, 386 S.E.2d 200, 208.2 (1989) (citing *Foster v. Medical Care Comm.*, 283 N.C. 110, 195 S.E.2d 517 (1973)).

In the case *sub judice*, plaintiffs would have us read separately the portion of the trial court's conclusion that the political question doctrine deprives the court of subject matter jurisdiction as inaccurate and overly broad because fundamental questions of constitutional interpretation remain with the judiciary. We acknowledge such a reading would be a correct statement of the law, *see Maready*, 342 N.C. at 716, 467 S.E.2d at 620, but such a reading is incomplete. The remainder of the trial court's conclusion provides that the statutory authority pursuant to which Durham offered the challenged tax incentives to Nitronex already has been held to be constitutional by North Carolina's appellate courts, which also is a correct statement of the law. *See Maready*, 342 N.C. at 734, 467 S.E.2d at 631; *Blinson*, 186 N.C. App. at 330, 651 S.E.2d at 271; *Peacock*, 139 N.C. App. at 495-96, 533 S.E.2d at 848. Having reviewed the trial court's full conclusion, we understand the conclusion to mean that the propriety of tax incentives similar to those at issue already has been judicially established and that any further review of the relative wisdom of Durham as to whether to offer the incentives or the amount thereof would be barred by the political question doctrine. Accordingly, viewed as a whole, we believe the trial court's conclusion to be a correct interpretation of the relevant rules of law.

[3] Next, plaintiffs argue that Durham's tax incentive for the benefit of Nitronex violates the Public Purpose Clauses of the North Carolina

Constitution or otherwise offers an incentive for a wholly intrastate relocation undertaken five years prior to awarding the incentive. We disagree.

North Carolina Constitution, Article V, section 2(1) provides that "[t]he power of taxation shall be exercised in a just and equitable manner, *for public purposes only*, and shall never be surrendered, suspended, or contracted away." (Emphasis added). North Carolina Constitution, Article V, section 2(7) provides that "[t]he General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of *public purposes only*." (Emphasis added).

In *Maready*, our Supreme Court upheld allegedly unconstitutional expenditures pursuant to North Carolina General Statutes, section 158-7.1, which included several million dollars awarded to private companies for "on-the-job training, site preparation, facility upgrading, and parking." *Maready*, 342 N.C. at 713, 467 S.E.2d at 619. The Court applied the test set forth in *Madison Cablevision*, 325 N.C. at 646, 386 S.E.2d at 207, to determine whether North Carolina General Statutes, section 158-7.1 violated the Public Purpose Clause of North Carolina Constitution, Article V, section 2(1)[5]. *Maready*, 342 N.C. at 722-25, 467 S.E.2d at 624-26. The Court explained that

> [t]wo guiding principles have been established for determining that a particular undertaking by a municipality is for a public purpose: (1) it involves a reasonable connection with the convenience and necessity of the particular municipality; and (2) the activity benefits the public generally, as opposed to special interests or persons.

Id. at 722, 467 S.E.2d at 624 (quoting *Madison Cablevision*, 325 N.C. at 646, 386 S.E.2d at 207).

The Court held that the economic development incentives at issue satisfied the first prong of the *Madison Cablevision* test because "the activities N.C.G.S. § 158-7.1 authorizes invoke traditional governmental powers and authorities in the service of economic development." *Id.* at 723-24, 467 S.E.2d at 625. The Court

5. Although the Court's holding in *Maready* narrowly focused on the Public Purpose Clause set forth in Article V, section 2(1) of the North Carolina Constitution, *see Maready*, 342 N.C. at 734, 467 S.E.2d at 631, the Court noted that the development of the public purpose doctrine in North Carolina, which includes the Public Purpose Clause set forth in North Carolina Constitution, Article V, section 2(7), had led to the test articulated in *Madison Cablevision*.

explained that "[e]conomic development has long been recognized as a proper governmental function[,]" and acknowledged "judicial acceptance of the promotion of economic development as a valid public purpose." *Id.* at 723, 467 S.E.2d at 624-25 (citations omitted).

The Court further held that the incentives at issue satisfied the second prong of the *Madison Cablevision* test because,

> under the expanded understanding of public purpose, even the most innovative activities N.C.G.S. § 158-7.1 permits are constitutional so long as they primarily benefit the public and not a private party. "It is not necessary, in order that a use may be regarded as public, that it should be for the use and benefit of every citizen in the community." *Briggs v. City of Raleigh*, 195 N.C. 223, 226, 141 S.E. 597, 599-600 [(1928)]. Moreover, an expenditure does not lose its public purpose merely because it involves a private actor. Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose.
>
> Viewed in this light, section 158-7.1 clearly serves a public purpose. Its self-proclaimed end is to "increase the population, taxable property, agricultural industries and business prospects of any city or county." N.C.G.S. § 158-7.1(a). However, it is the natural consequences flowing therefrom that ensure a net public benefit. The expenditures this statute authorizes should create a more stable local economy by providing displaced workers with continuing employment opportunities, attracting better paying and more highly skilled jobs, enlarging the tax base, and diversifying the economy. Careful planning pursuant to the statute should enable optimization of natural resources while concurrently preserving the local infrastructure. The strict procedural requirements the statute imposes provide safeguards that should suffice to prevent abuse.
>
> The public advantages are not indirect, remote, or incidental; rather, they are directly aimed at furthering the general economic welfare of the people of the communities affected. While private actors will necessarily benefit from the expenditures authorized, such benefit is merely incidental. It results from the local government's efforts to better serve the interests of its people. Each community has a distinct ambience, unique assets, and special needs best ascertained at the local level. Section 158-7.1 enables each to formulate its own definition of economic success and to draft a developmental plan leading to that goal. This aim is no

> less legitimate and no less for a public purpose than projects this Court has approved in the past.

Id. at 724-25, 467 S.E.2d at 625-26.

In *Peacock*, this Court examined two agreements between the Charlotte Convention Center Authority and several parties representing the Charlotte Hornets basketball team that required the Authority to pay directly private parties a percentage of the revenue generated by the Charlotte Coliseum. *Peacock*, 139 N.C. App. at 489-92, 533 S.E.2d at 844-46. The plaintiffs alleged that various portions of the agreements violated the "public purpose" requirements of Article V, section 2 of the North Carolina Constitution as well as the "exclusive or separate emoluments or privileges" provision of Article I, section 32 of the North Carolina Constitution. *Id.* at 492-95, 533 S.E.2d at 846-48. We held that the payments were for "public purposes" pursuant to the *Madison Cablevision* test in view of the Court's holding and instruction in *Maready*, notwithstanding that the private parties would accrue a benefit as a result of the agreements with the Authority. *Id.* at 492-96, 533 S.E.2d at 846-48.

In *Blinson*, we held that incentives authorized by our General Assembly and offered by the City of Winston-Salem and Forsyth County to a computer company—Dell, Inc.—did not violate the Public Purpose Clauses of Article V, sections 2(1) and 2(7) of the North Carolina Constitution. *Blinson*, 186 N.C. App. at 335-41, 651 S.E.2d at 274-78. We examined our holding in *Peacock* and our Supreme Court's holding in *Maready*, and we held that the trial court properly dismissed the plaintiffs' claims because the claims focused on the benefits to Dell rather than alleging that "the legislative bodies were not acting with a motivation to increase the tax base or alleviate unemployment and fiscal distress." *Id.* at 341, 651 S.E.2d at 278. We explained that

> plaintiffs challenge incentives—provided by the General Assembly and defendants City of Winston-Salem and Forsyth County—that benefitted defendant Dell, Inc. when it constructed a computer manufacturing facility in Forsyth County.
>
> Whether these incentives are lawful under the North Carolina Constitution was settled by *Maready* and this Court's subsequent decision in *Peacock v. Shinn*, 139 N.C. App. 487, 533 S.E.2d 842, *appeal dismissed and disc. review denied*, 353 N.C. 267, 546 S.E.2d 110 (2000). We are not free to revisit the reasoning or hold-

> ings of those opinions. To the extent plaintiffs question the wisdom of the incentives and whether they will in fact provide the public benefit promised, they have sought relief in the wrong forum. Once the Supreme Court held in *Maready* that economic incentives to recruit business to North Carolina involve a proper public purpose, it became the role of the General Assembly and the Executive Branch—and not the courts—to determine whether such incentives are sound public policy. We are bound by *Maready* and *Peacock* and, therefore, affirm the trial court's decision . . . .

Id. at 329-30, 651 S.E.2d at 271.

Plaintiffs appear to attempt to distinguish the case *sub judice* from our holdings in *Peacock* and *Blinson* and our Supreme Court's holding in *Maready* by framing this as a novel case of intrastate competition between adjacent counties and characterizing Durham's action as a reward for consummating a plan Nitronex already had conceived and to which it already had committed. We are not persuaded, and hold that Shalvoy's undisputed deposition testimony contradicts plaintiff's position and places the remaining issues squarely within the purview of holdings that we are not at liberty to revisit. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (The Court of Appeals "has no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions until otherwise ordered by the Supreme Court." (citation and internal quotation marks omitted)); *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.").

Shalvoy's deposition unequivocally demonstrates that, although Nitronex initially had considered remaining in Wake County, the company quickly eliminated the county from discussion due to its lack of necessary clean room facilities. Although Nitronex had leased property in Durham since 2002, the facility was only partially developed, and "still required another two and a half or $3,000,000 worth of investment to finalize the clean room space and the other facilities, so that people could move into it." Shalvoy further explained that

> over and above that two and a half to $3,000,000 was an additional three to $4,000,000 of capital equipment, and that would be required for the company to support the company's growth.

Although that additional equipment also would have to be purchased if Nitronex moved to California, relocation to Silicon Valley provided the economic benefits of facilities with existing clean rooms and of "a very vibrant secondhand equipment market" because "some semiconductor companies are—are scaling back or they have excess capacity, and they sell off some of their unnecessary or excess equipment." We note these economic considerations and estimated investment amounts not to engage in a discussion of the propriety of Durham's incentives or to pass on whether the public ever will benefit from the incentives offered—for that is not the province of this Court—but to illustrate that the case *sub judice* is not solely one of intrastate competition between Wake County and Durham. *Cf. Maready*, 342 N.C. at 727, 467 S.E.2d at 627 ("The potential impetus to economic development, which might otherwise be lost to other states, likewise serves the public interest.").

Furthermore, notwithstanding the existence of a lease on a partially complete building in Durham, Nitronex's remaining in North Carolina was not a foregone conclusion. Rather, Nitronex's consideration was relocating to and outfitting a partially completed facility in Durham or moving to readily available facilities with readily available equipment in California. Shalvoy noted that, although "[t]he incentives and the overall support from the County of Durham was a very important factor in that decision," "[i]t would be fair to say there was no single factor that made the decision one way or the other. There were a whole series of different criteria that went into the final decision."

Therefore, plaintiffs' characterization is unavailing, and the case *sub judice* is materially indistinguishable from our holdings in *Peacock* and *Blinson* and our Supreme Court's holding in *Maready*. Here, the incentives offered were to be paid over a period of five years "contingent upon a new investment of Twenty-Four Million Dollars ($24,000,000.00), hiring two hundred ten (210) new employees and adding a minimum of Five Million Dollars ($5,000,000.00) in additional business personal property tax listings." Furthermore, Durham offered to pay $30,000.00 "upon occupancy of the building located at 2305 Presidential Drive, RTP, NC, installation of new equipment, and listing of [$5,000,000.00] new business personal property in Durham County; and payment of [$1,000.00] for each Durham County resident hired, up to a maximum of [$70,000.00]." Given that the incentives clearly were offered in view of economic development, the first prong of the *Madison Cablevision* test is satisfied pursuant to our Supreme Court's holding in *Maready*. *See Maready*, 342 N.C. at

722-23, 467 S.E.2d at 624. With respect to the second prong of the *Madison Cablevision* test, as noted in *Maready*, expenditures "should create a more stable local economy by providing displaced workers with continuing employment opportunities, attracting better paying and more highly skilled jobs, enlarging the tax base, and diversifying the economy." *Id.* at 724, 467 S.E.2d at 625. "Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose." *Id.* "While private actors will necessarily benefit from the expenditures authorized, such benefit is merely incidental. It results from the local government's efforts to better serve the interests of its people." *Id.* at 725, 427 S.E.2d at 625-26.

Accordingly, we affirm the trial court's granting of summary judgment in defendants' favor with respect to purported violations of the Public Purpose Clauses of the North Carolina Constitution. Incentives parallel to those at issue already have been held to comport to the Public Purpose Clauses of our State Constitution in view of the test articulated in *Madison Cablevision*, and we are bound by that precedent. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

[4] Finally, plaintiffs argue that the economic development incentives at issue constitute an unconstitutional exclusive emolument. We disagree.

North Carolina Constitution, Article I, section 32 provides that "[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

In *Peacock*, we explained that "[m]uch of the case law interpreting article I, § 32 addresses challenges to statutes providing exemptions or benefits to certain individuals or select groups." *Peacock*, 139 N.C. App. at 495, 533 S.E.2d at 848. We further explained that,

> [i]n addressing whether a particular statute violates article I, § 32, courts have applied a two-part test to the exemption or benefit: whether, (1) the exemption or benefit is intended to promote the general welfare rather than the benefit of the individual, and (2) there is a reasonable basis for the legislature to conclude that the granting of the exemption or benefit serves the public interest.

Id. (citations omitted). We concluded that, because we already had determined that the challenged portions of the agreements at issue "promote[d] the public benefit by means of optimum use of the

[Charlotte] Coliseum[,]" "the benefit was given in consideration of public services, intended to promote the general public welfare," rather than "for a private purpose, benefitting an individual or select group." *Id.* at 496, 533 S.E.2d at 848.

In *Blinson*, we explained that "[i]n *Peacock*, this Court held that when legislation is determined to 'promote the public benefit' under the Public Purpose Clauses, it necessarily is not an exclusive emolument." *Blinson*, 186 N.C. App. at 342, 651 S.E.2d at 278 (quoting *Peacock*, 139 N.C. App. at 496, 533 S.E.2d at 848). We concluded that we need not address whether the incentives and subsidies at issue were "in consideration of 'public services' " because we already had "concluded that the disputed incentives and subsidies were not exclusive emoluments[.]" *Id.* at 342, 651 S.E.2d at 278-79 (citations omitted).

Pursuant to our previous holdings in *Peacock* and *Blinson*, and in view of our holding that the challenged incentives in the case *sub judice* are for a public purpose (*i.e.*, " 'promote the public benefit' ") as contemplated by our Supreme Court's interpretation of the Public Purpose Clauses of the North Carolina Constitution, we hold that the incentives at issue "necessarily [are] not . . . exclusive emolument[s]." *Blinson*, 186 N.C. App. at 342, 651 S.E.2d at 278 (quoting *Peacock*, 139 N.C. App. at 496, 533 S.E.2d at 848). *See also In the Matter of Appeal from Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. Accordingly, we hold that the trial court properly granted summary judgment in defendants' favor with respect to purported violations of Article I, section 32 of the North Carolina Constitution.

For the foregoing reasons, we reverse the trial court's order with respect to Haugh's standing, and we affirm the remainder of the trial court's order.

Affirmed in Part; Reversed in Part.

Judges McGEE and STEELMAN concur.

[208 N.C. App. 321 (2010)]

JOSHUA WATSON BISSETTE, PLAINTIFF v. AUTO-OWNERS INSURANCE COMPANY AND BRYAN KEITH COTHRAN, DEFENDANTS

No. COA09-1721

(Filed 7 December 2010)

1. Insurance— duty to defend, indemnify, or cover—summary judgment proper

The trial court did not err in granting summary judgment in favor of plaintiff because there were no genuine issues of material fact as to whether defendant Auto-Owners Insurance Company had a duty under the insurance policy at issue to defend, indemnify, or cover defendant Cothran for the claims or judgments arising from plaintiff's lawsuit.

2. Insurance— failure to cooperate—coverage not voided

Defendant Cothran's failure to cooperate in his defense in an action resulting from an automobile accident did not void any coverage that defendant Auto-Owners Insurance Company was required to provide Cothran under the insurance policy at issue. Auto-Owners failed to show that Cothran's non-compliance was prejudicial.

Appeal by Defendant Auto-Owners Insurance Company from order entered 16 September 2009 by Judge Milton F. Fitch, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 12 May 2010.

Taylor Law Office, by W. Earl Taylor, Jr., for Plaintiff.

Brown, Crump, Vanore & Tierney, L.L.P., by O. Craig Tierney, Jr., for Defendant Auto-Owners Insurance Company.

No Brief for Defendant Bryan Keith Cothran.

STEPHENS, Judge.

At issue is whether the trial court erred in granting summary judgment in favor of Plaintiff because there were genuine issues of material fact regarding (1) Defendant Auto-Owners Insurance Company's ("Auto-Owners") duty to defend, indemnify, or cover Bryan Keith Cothran ("Cothran"),[1] and (2) the impact on Auto-Owners' duty to defend, indemnify, or cover Cothran in light of Cothran's failure to cooperate in his defense. For the reasons stated herein, we affirm the judgment of the trial court.

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1. Cothran is not a party to this appeal.

I. Procedural History and Evidence

Craig A. Cleveland ("Cleveland"), owner and President of Connected Fiber, Inc. ("Connected"), allegedly sold a 1997 Ford F-150 ("vehicle") to Cothran on 11 August 2007 in North Myrtle Beach, South Carolina. Cleveland sold the vehicle to Cothran on behalf of Connected. At the time of the sale, the vehicle was registered and titled in North Carolina.

When the vehicle was transferred to Cothran, the signed Certificate of Title was not notarized, nor were the North Carolina license plates removed. Cleveland gave Cothran the un-notarized, signed Certificate of Title, the keys to the vehicle, and possession of the vehicle. Cothran, a South Carolina resident, never registered the vehicle in South Carolina or obtained South Carolina license places for the vehicle. The vehicle remained titled in Connected's name in North Carolina.

On 14 October 2007, Cleveland sent an email to General Insurance Services, Connected's insurance agent, informing it that the vehicle had been sold and requesting that the vehicle be removed from Connected's insurance policy with Auto-Owners ("Policy") "at renewal." Renewal was to occur on 25 November 2007. Alicia Cathey of General Insurance Services received the email. Ms. Cathey notified Auto-Owners that the vehicle was to be removed from the Policy effective 25 November 2007.

On 16 November 2007, Cothran was driving the vehicle in Wilson County, North Carolina when he collided with a vehicle being driven by Plaintiff Joshua Watson Bissette ("Bissette"). Bissette sustained serious personal injuries. On 21 November 2007, General Insurance Services recorded a loss notice regarding the accident for the claim filed by Bissette. At that time, the vehicle was listed as an "insured vehicle" on the Policy, and Connected was listed as the vehicle's owner.

Bissette brought a negligence action against Cothran to recover for injuries he sustained in the accident. On 27 December 2007, Auto-Owners assigned attorney Ronald G. Baker ("Baker") to represent Cothran in that action.[2] Baker spoke with Cothran on the telephone on 29 January 2008. During that call, Baker informed Cothran of the lawsuit against him and stressed the importance of his cooperation, but did not discuss any specific details of the case with Cothran.

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2. Auto-Owners' retention of Baker was under a reservation of its right to contest its duty to defend Cothran.

Although Baker attempted to contact Cothran on numerous occasions thereafter, he was never able to speak with Cothran again, and Cothran did not appear at trial.

Due to his continued inability to contact Cothran, Baker filed a Motion to Intervene on behalf of Auto-Owners on 25 May 2008. The motion was granted on 25 August 2008. Baker thus defended Bissette's negligence suit in the name of Auto-Owners. Bissette prevailed in the negligence action on 27 October 2008, and was awarded $375,000 in compensatory damages and $80,000 in punitive damages.

Bissette initiated this declaratory judgment action against Auto-Owners on 28 October 2008 after Auto-Owners failed to pay the judgment, failed to acknowledge insurance coverage, and raised issues questioning the existence of coverage for the damages awarded Bissette. On 27 August 2009, Bissette filed a Motion for Summary Judgment. Following a hearing, Judge Fitch, Jr. granted Bissette's motion. From the order granting summary judgment, Auto-Owners appeals.

II. Discussion

A. Duty to Defend, Indemnify, or Cover

[1] Auto-Owners first contends that the trial court erred in granting summary judgment in favor of Bissette because there were genuine issues of material fact as to whether Auto-Owners had a duty under the Policy to defend, indemnify, or cover Cothran for the claims or judgments arising from Bissette's lawsuit. For the reasons stated herein, we conclude that the trial court properly granted summary judgment in favor of Bissette on this issue.

1. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). Furthermore, when considering a summary judgment motion, "all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (citation and quotation marks omitted). We review a trial court's order granting or denying summary judgment *de novo*. *Builders Mut. Ins. Co. v. N. Main Constr., Ltd.*, 361 N.C. 85, 88, 637

S.E.2d 528, 530 (2006). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment" for that of the lower tribunal. *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

2. Insurance Policy Coverage for the Vehicle

Where the language of an insurance policy is clear and unambiguous, the contract must be enforced "as the parties have made it." *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). Thus, a court is authorized to construe an insurance policy only when ambiguity exists in a policy provision. *Id.* In order for an ambiguity to exist, the language of an insurance policy provision must be "fairly and reasonably susceptible to either of the constructions for which the parties contend." *Id.* Our Supreme Court recently restated its longstanding view of insurance policy construction in *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 692 S.E.2d 605 (2010), when it stated that "[t]his Court resolves any ambiguity in the words of an insurance policy against the insurance company." *Id.* at 9, 692 S.E.2d at 612. Further, "this Court 'construe[s] liberally' insurance policy provisions that extend coverage 'so as to provide coverage[] whenever possible by reasonable construction[.]' " *Id.* at 9-10, 692 S.E.2d at 612 (quoting *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986)).

Auto-Owners specifically argues that at the time of the accident, the vehicle was not owned by Connected, and because Connected's policy with Auto-Owners provides liability coverage only for vehicles owned by Connected, no coverage is afforded to Cothran for the accident. We disagree.

The relevant portions of the Policy are as follows:

ITEM ONE

INSURED CONNECTED FIBER INC CRAIG CLEVELAND

. . . .

POLICY TERM
12:01 a.m. 11-25-2006 to 12:01 a.m. 11-25-2007

. . . .

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

ITEM TWO—SCHEDULE OF COVERED AUTOS AND COVERAGES

This policy provides only those coverages where a charge is shown in the premium column below. Each of these coverages will apply only to those "autos" shown as covered "autos[.]" "AUTOS" are shown as covered "autos" for a particular coverage by the entry of one or more symbols from the COVERED AUTO section of the Business Auto Coverage Form next to the name of the coverage.

COVERAGES . . . . Combined Liability
COVERED AUTOS SYMBOLS 7

LIMIT OF LIABILITY[[3]] . . . . $1Million ea acc[ident]

. . . .

ITEM THREE—Schedule of Covered Autos You Own, Additional Coverages and Endorsements. . . .

DESCRIPTION OF ITEM INSURED . . . .

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4. 1997 FORD F-150 . . . .

COVERAGES . . . . Combined Liability
LIMITS . . . . $1Million each acc[ident]

. . . .

BUSINESS AUTO COVERAGE FORM

. . . .

SECTION I - COVERED AUTOS

. . . .

A. DESCRIPTION OF COVERED AUTO DESIGNATION SYMBOLS

SYMBOL DESCRIPTION

. . . .

2 = OWNED "AUTOS" ONLY. Only those"autos" you own . . . .

3. FOR ANY ONE ACCIDENT OR LOSS

. . . .

> 7 = SPECIFICALLY DESCRIBED "AUTOS." Only those "autos" described in ITEM THREE of the Declarations for which a premium charge is shown . . . .

Under ITEM ONE of the Policy, coverage applied until the end of the Policy term at 12:01 a.m. on 25 November 2007. Auto-Owners acknowledged that on 14 October 2007, Cleveland sent an email to General Insurance Services, Inc. stating that he had sold the vehicle and that he desired to remove the vehicle from the Policy "at renewal." It is undisputed that the date of renewal was 25 November 2007, nine days after the 16 November 2007 accident. Thus, the vehicle was still covered by the Policy when the accident occurred.

Under "ITEM TWO—SCHEDULE OF COVERED AUTOS AND COVERAGES[,]" coverage applies to those autos shown as "covered 'autos[.]' " Autos are designated as "covered" by the entry of one or more symbols from the "COVERED AUTOS" section of the Business Auto Coverage Form. Coverage under Connected's Policy is described as "Combined Liability" coverage, and this "Combined Liability" coverage covers those autos that meet the coverage requirements of Symbol "7[.]"

The USINESS AUTO COVERAGE FORM, which defines symbol meanings, defines Symbol "7" as "SPECIFICALLY DESCRIBED 'AUTOS' . . . [o]nly those 'autos' described in ITEM THREE of the Declarations for which a premium charge is shown[.]" ITEM THREE of the policy specifically lists the 1997 Ford F-150 vehicle at issue and shows a premium charge for the vehicle. Thus, pursuant to these provisions of the Policy, liability coverage is afforded to the vehicle.

Auto-Owners contends that because the caption of ITEM THREE states, "ITEM THREE—Schedule of Covered Autos You *Own*, Additional Coverages and Endorsements[,]" (emphasis added), liability coverage is afforded only to those motor vehicles *owned* by Connected. Auto-Owners' argument is unavailing. The BUSINESS AUTO COVERAGE FORM designates a Symbol "2" for "OWNED 'AUTOS' ONLY." The Policy terms are clear that when liability coverage is intended to apply only to those motor vehicles owned by Connected, a Symbol "2" is inserted in ITEM TWO of the Declarations page instead of a Symbol "7[,]" which applies to those autos listed in ITEM THREE including the Ford F-150. Furthermore, the Policy description of Symbol "7" does not limit "SPECIFICALLY DESCRIBED AUTOS" to vehicles owned by the named insured.

Accordingly, resolving any ambiguity in the words of the Policy against Auto-Owners and construing the Policy's provisions liberally to provide coverage when possible by reasonable construction, *Harleysville Mutual Ins. Co.*, 364 N.C. at 9-10, 692 S.E.2d at 612, we conclude that the vehicle was covered under the Policy on the date of the accident.

3. Qualification as an "Insured" Under the Policy

Auto-Owners further argues that at the time of the accident, Cothran was not an "Insured" under the Policy, as he is not a named insured and does not qualify under the Policy provision providing coverage to "[a]nyone else while using with your permission a covered 'auto' you own, hire or borrow" subject to exceptions. We disagree.

The relevant portions of the Policy are as follows:

SECTION II—LIABILITY COVERAGE

A. COVERAGE

We will pay all sums an "Insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto[.]"

. . . .

We have the right and duty to defend any "suit" asking for such damages or a "covered pollution cost or expense." However, we have no duty to defend "suits" for "bodily injury" or "property damage" or a "covered pollution cost or expense" not covered by this Coverage Form. We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements.

1. WHO IS AN INSURED

The following are "Insureds:"

a. You for any covered "auto."

b. Anyone else while using with your permission a covered "auto" you own, hire or borrow

. . . .

As Auto-Owners notes, Section II(A)(1)(b) of the Policy states that "[a]nyone else while using with your permission a covered 'auto' you own, hire or borrow" is covered, subject to exceptions inapplicable to this case. Thus, as Cothran is not a named insured, in order to be covered under the Policy (1) he must have permission from Connected to operate the vehicle and (2) the vehicle must be owned, hired, or borrowed by Connected. Neither the hiring nor the borrowing of the vehicle is at issue here; thus, Connected must own the vehicle in order for Cothran to be covered and for Auto-Owners to be liable for that coverage.

i. Permission to Operate Vehicle

"Permission to use an automobile may be express, or may be implied from a course of conduct between the parties." *Nationwide Mut. Ins. Co. v. Land*, 78 N.C. App. 342, 349, 337 S.E.2d 180, 185 (1985), *aff'd*, 318 N.C. 551, 350 S.E.2d 500 (1986). In this case, it is undisputed that Cleveland gave Cothran the signed Certificate of Title, the keys to operate the vehicle, and possession of the vehicle. These actions clearly evidence Cleveland's intent, on behalf of Connected, to permit Cothran to operate the vehicle, and Auto-Owners has presented no evidence to the contrary.

ii. Ownership of the Vehicle

Under North Carolina law, an "owner" of a vehicle is "[a] person holding the legal title to a vehicle[.]" N.C. Gen. Stat. § 20-4.01(26) (2007). Pursuant to N.C. Gen. Stat. § 20-72(b),

> [i]n order to assign or transfer title or interest in any motor vehicle registered under the provisions of this Article, the owner shall execute in the presence of a person authorized to administer oaths an assignment and warranty of title on the reverse of the certificate of title in form approved by the Division, including in such assignment the name and address of the transferee; and no title to any motor vehicle shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee.

N.C. Gen. Stat. § 20-72(b) (2007). Applying the statutory definition of "owner," the statutory requirements for passing title, and the statutory requirements for liability insurance, we have held that for purposes of tort law and liability insurance coverage, no ownership passes to the purchaser of a motor vehicle which requires registration until:

> (1) the owner executes, in the presence of a person authorized to administer oaths, an assignment and warranty of title on the reverse of the certificate of title, including the name and address of the transferee; (2) there is an actual or constructive delivery of the motor vehicle; and (3) the duly assigned certificate of title is delivered to the transferee (or lienholder in secured transactions).

Jenkins v. Aetna Cas. and Sur. Co., 324 N.C. 394, 398, 378 S.E.2d 773, 776 (1989). Moreover, "[w]henever the owner of a registered vehicle transfers or assigns his title or interests thereto, he shall remove the license plates. The registration card and plates shall be forwarded to the Division unless the plates are to be transferred to another vehicle . . . ." N.C. Gen. Stat. § 20-72(a) (2007). Compliance with the statutory requirements for proper transfer of ownership are "mandatory" and "not within the discretion" of the parties involved in the transaction. *Thompson Cadillac-Oldsmobile, Inc. v. Silk Hope Auto., Inc.*, 87 N.C. App. 467, 473, 361 S.E.2d 418, 422 (1987), *disc. rev. denied*, 321 N.C. 480, 364 S.E.2d 672 (1988).

In this case, although the vehicle was actually delivered to Cothran and the certificate of title was given to Cothran at the time he took possession of the vehicle, Cleveland failed to "execute[], in the presence of a person authorized to administer oaths, an assignment and warranty of title on the reverse of the certificate of title, including the name and address of the transferee" on behalf of Connected. *Jenkins*, 324 N.C. at 398, 378 S.E.2d at 776. Thus, the certificate of title delivered to Cothran was insufficient to transfer ownership of the vehicle from Connected to Cothran. Accordingly, Connected remained the "owner" of the vehicle on the date of the accident.[4]

Auto-Owners argues, however, that under the "law of the case" doctrine, South Carolina law, not North Carolina law, governs the outcome. Auto-Owners further argues that under South Carolina law, Cothran was the owner of the vehicle. We disagree with both contentions.

"Pursuant to the law of the case doctrine, an appellate court ruling on a question governs the resolution of that question both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal." *Kanipe v. Lane Upholstery, Hickory Tavern Furniture Co.*, 151 N.C.

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4. We also note that at the time of the accident, the vehicle still bore the North Carolina license plates.

App. 478, 484-85, 566 S.E.2d 167, 171 (citation and quotation marks omitted), *disc. review denied and disc. review dismissed*, 356 N.C. 303, 570 S.E.2d 724, *petition for reconsideration dismissed*, 356 N.C. 437, 572 S.E.2d 784 (2002). The doctrine "only applies to points actually presented and necessary for the determination of the case and not to dicta." *Id.* at 485, 566 S.E.2d at 171.

In the underlying tort action between Bissette and Cothran, the trial court instructed the jury on South Carolina law as to the issue of ownership of the vehicle. Because the *trial* court's ruling on which state law applies does not govern the resolution of that issue on a subsequent appeal,[5] and because the underlying tort action was not appealed such that this Court ruled on the issue, Auto-Owner's reliance on the "law of the case" doctrine is misplaced.

Nonetheless, even if South Carolina law is applied to determine ownership of the vehicle, we conclude that Connected was the owner of the vehicle at the time of the accident.

The South Motor Vehicle Financial Responsibility Act describes an "owner" as "[a] person who holds the legal title of a motor vehicle[.]" S.C. Code Ann. § 56-9-20(9) (2007). Pursuant to S.C. Code Ann. § 56-19-360,

> [i]f an owner, manufacturer or dealer transfers his interest in a vehicle other than by the creation of a security interest, he shall, at the time of the delivery of the vehicle, execute an assignment and warranty of title to transferee in the space provided therefor on the certificate or as the Department of Motor Vehicles prescribes and cause the certificate and assignment to be mailed or delivered to the transferee or to the Department.
>
> Except as provided in § 56-19-370, the transferee shall, promptly after delivery to him of the vehicle, execute the application for a new certificate of title in the space provided therefor on the certificate or as the Department prescribes and cause the certificate and application to be mailed or delivered to the Department.
>
> Except as provided in § 56-19-370, and as between the parties, a transfer by an owner is not effective until the provisions of this section have been complied with.

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5. This assumes, *arguendo*, that the trial court's jury instruction constitutes a "ruling" that South Carolina law applies to the transfer of the vehicle.

S.C. Code Ann. § 56-19-360 (2007). However, unlike in North Carolina where strict compliance with statutory requirements is required to effect a transfer of ownership of a vehicle, a transferee may become the owner of a vehicle in South Carolina notwithstanding a lack of compliance with this statute as the issue of ownership of a vehicle in South Carolina is a question of fact for purposes of coverage under insurance policies. *South Carolina Farm Bureau v. Scott*, 262 S.E.2d 739 (S.C. 1980). The determination depends on the specific facts and circumstances of the case in question. *Id.* A certificate of title is *prima facie* evidence of ownership. S.C. Code Ann. § 56-19-320 (2007). The presumption of ownership evidenced by the certificate of title may, however, be overcome by evidence that the true owner of the vehicle is a person other than the one in whose name the vehicle is registered. *Bankers Ins. Co. of Pa. v. Griffin*, 137 S.E.2d 785, 787 (S.C. 1964).

In *Travelers Ins. Co. v. Lawson*, 281 S.E.2d 116 (S.C. 1981), a declaratory judgment action was brought by The Travelers Insurance Company ("Travelers") to determine whether it or defendant Pennsylvania National Mutual Casualty Insurance Company ("Penn National") was the insurer for a Pontiac automobile involved in an accident. The facts in that case were as follows:

> Lift Truck Services of Charlotte, Inc. (Lift Truck) owned the Pontiac and had a North Carolina Highway Department Certificate of Title. It was insured by Penn National. Lift Truck sold the Pontiac to Benjamin Bolt and delivered it to Bolt's residence in Myrtle Beach, S.C. The Pontiac was added to Bolt's insurance coverage with Travelers but no formal transfer of title from Lift Truck to Bolt was effected. During the dates of Travelers' policy coverage and prior to transfer of title from Lift Truck to Bolt, the Pontiac collided with Thelma Lawson. She sued Bolt and settled the case for $ 5,500.00. Travelers and Penn National had an understanding that this declaratory judgment action would be instituted for the purpose of determining which of the two companies would bear the brunt of the $ 5,500.00 settlement.

Id. at 117.

Based upon these facts, the Court concluded that

> [t]here can be no doubt but that it was the intent of both the seller and the buyer that title pass and that the buyer have all rights

> incident to property ownership. There can also be no doubt but that it was the intent of Travelers to protect the buyer against liability and, accordingly, a premium was charged and collected.

Id. at 118. Thus, the Court concluded that Travelers must assume full responsibility for paying the settlement. *Id.* The Court emphasized, however, that:

> [t]he registration statutes and the title and transfer statutes have as one of their purposes to assure insurance coverage at all times so as to protect the public. In holding that Travelers is responsible, we do not necessarily imply that Penn National and/or the seller would not under any circumstances be liable in a different factual situation. For example, *if the buyer had not procured insurance coverage, a different issue would be presented.*

Id. (emphasis added).

South Carolina appellate courts have deemed someone other than the actual titleholder to be the owner of a vehicle under other similar circumstances. *See, e.g.*, *Tollison v. Reaves*, 289 S.E.2d 163 (S.C. 1982) (finding person "true owner" of automobile titled to his mother, because person considered himself the owner, made the down payment and all other payments on the automobile, held his own insurance on the automobile, and had sole possession); *Grain Dealers Mut. Ins. Co. v. Julian*, 145 S.E.2d 685 (S.C. 1965) (holding a person not holding title was true owner where person had purchased and paid for automobile and possessed a bill of sale); *State Auto Ins. Co. v. Stuart*, 337 S.E.2d 698 (S.C. App. 1985) (person not holding title found to be owner of car where titleholder had loaned that person money to purchase car, had issued bill of sale, and had transferred possession).

The facts in this case are readily distinguishable from the cases cited above. Here, at the time of the accident, the certificate of title to the vehicle was issued by the North Carolina Division of Motor Vehicles in the name of Connected. Although Cleveland signed the back of the certificate of title when he gave it to Cothran, no certificate of title was issued to Cothran by the State of South Carolina. Accordingly, there was a presumption of Connected's ownership of the vehicle, as evidenced by the certificate of title issued in its name.

Additionally, the vehicle was registered with the North Carolina Division of Motor Vehicles in Connected's name, and the State of South Carolina never issued a South Carolina registration for the vehicle to Cothran. Furthermore, the license plates on the vehicle

were the North Carolina license plates which had been issued to Connected, and no license plates were ever issued in South Carolina to Cothran. In fact, the South Carolina Department of Motor Vehicles found no record for the vehicle at all. Moreover, unlike in *Travelers Ins. Co.* and *Tollison*, Cothran never obtained insurance on the vehicle while Connected's policy for the vehicle remained in effect on the date of the accident. Finally, although Cleveland gave Cothran the North Carolina certificate of title, the vehicle, and the keys, unlike in *Grain Dealers Mut. Ins. Co.* and *State Auto Ins. Co.*, no bill of sale was ever issued by Connected to Cothran.

While the facts indicate that Cothran had Connected's *permission* to use the vehicle, such facts are insufficient to show that title to the vehicle had passed and that Cothran had all rights incident to property ownership on the date of the accident. Moreover, there can be no doubt that it was the intent of Auto-Owners to protect Connected against liability until 25 November 2007 and, thus, a premium was charged and collected. Accordingly, as Auto-Owners failed to rebut the presumption of Connected's ownership of the vehicle, the trial court did not err in granting summary judgment in favor of Bissette on this issue.

B. Cothran's Non-Compliance

[2] Auto-Owners next argues that Cothran's failure to cooperate in his defense voided any coverage that Auto-Owners would have been required to provide Cothran under the Policy.

Section IV(A) of the Policy provides in pertinent part:

2. **DUTIES IN THE EVENT OF ACCIDENT, CLAIM, OR LOSS**

   a. In the event of "accident," claim, "suit" or "loss," you must give us or our authorized representative prompt notice of the "accident" or "loss." . . . .

   . . . .

   b. Additionally, you and any other involved "insured" must:

   . . . .

   (3) Cooperate with us in the investigation, settlement or defense of the claim or "suit."

In *Henderson v. Rochester Am. Ins. Co.*, 254 N.C. 329, 118 S.E.2d 885 (1961), our Supreme Court explained that the provisions of liability insurance policies imposing as conditions to liability the duty of the insured to give notice of accidents and to cooperate in the defense of actions which might result in a judgment against the insured

> are to be given a reasonable interpretation to accomplish the purpose intended, that is, to put [the] insurer on notice and afford it an opportunity to make such investigation as it may deem necessary to properly defend or settle claims which may be asserted, and to cooperate fairly and honestly with [the] insurer in the defense of any action which may be brought against [the] insured, and upon compliance with these provisions to protect and indemnify within the policy limits the insured from the result of his negligent acts. An insurer will not be relieved of its obligation because of an immaterial or mere technical failure to comply with the policy provisions. *The failure must be material and prejudicial.*

Id. at 332, 118 S.E.2d at 887 (emphasis added). The burden of proving material prejudice lies with the insurer. *See Lockwood v. Porter*, 98 N.C. App. 410, 411, 390 S.E.2d 742, 743 (1990) ("[F]ailure to cooperate under an insurance policy is an affirmative defense upon which [the insurer] has the burden of proof.").

In this case, Cothran did not notify Auto-Owners that the accident had occurred or that a lawsuit had been filed against him, did not contact Baker or provide Baker with any information regarding the accident, and did not appear at trial. Auto-Owners argues that this lack of cooperation materially prejudiced Auto-Owners and relieved it of its duty to indemnify Cothran.[6] We disagree.

Although Cothran did not notify Auto-Owners of the claim, Auto-Owners received timely notice of the law suit and assigned attorney Baker to the case on 27 December 2007. Baker, an attorney in Ahoskie, North Carolina who has been engaged in civil litigation for 34 years, represented Cothran and eventually Auto-Owners in the underlying lawsuit. At deposition, Baker testified that early in his defense of the case, he talked with Cothran on one occasion. During that conversation, he did not inquire into any details of the accident. After that conversation, Baker was not able to reach Cothran again, and Cothran did not appear at trial.

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6. Auto-Owners makes no claim that Connected failed in any way to cooperate with Auto-Owners in the investigation, settlement, or defense of the claim against Cothran.

Baker testified that there was "never any question in [my] mind" concerning Cothran's negligence and that based on the evidence that was available to Baker, he did not believe that liability could be contested. He thus stipulated at trial that Cothran's negligence was a proximate cause of the accident. Baker further testified that Bissette introduced a videotape of the collision at trial and presented evidence that Cothran had a blood alcohol level of .21. Baker also testified that he had all of Bissette's medical records and was able to fully explore the damages issue presented by Bissette's claim. Baker took no discovery depositions because there was "nothing to be gained" by doing so. Finally, Baker maintained that admitting negligence was the "right decision," and that in terms of the admission of Cothran's liability, there is "nothing [he] would have done different[ly]."

Auto-Owners nonetheless argues that, according to Baker, the prejudice to Auto-Owners included, but was not limited to:

> 1. Auto-Owners having to appear in its own name—thus allowing knowledge of liability insurance to be before the jury;
>
> 2. Auto-Owners tried the case with an "empty chair" and the jury had no opportunity to see and evaluate Mr. Cothran;
>
> 3. The jury was left with an impression that Cothran "doesn't really care;"
>
> 4. Mr. Cothran could not tell the jury why he was drinking or how much he drank;
>
> 5. Mr. Baker never got the benefit of discussing the facts of the accident with Mr. Cothran;
>
> 6. Mr. Cothran was not present to express contrition for his acts;
>
> 7. Mr. Cothran's absence has a significant impact on the outcome of the case, including but not limited to the damage award.

We first note that, contrary to Auto-Owners' seventh contention above, Baker did not testify that Cothran's absence had a "significant impact on the outcome of the case," but rather that his absence had a "significant *potential* for having an adverse impact on the outcome of the case." (Emphasis added). Moreover, Auto-Owners' examples of alleged prejudice, which assume that Cothran's presence would have been beneficial to his defense, reflect mere speculation concerning potential prejudice. Auto- Owners has failed to show that Cothran's

absence could have been prejudicial when Cothran's liability was so clear that Baker stipulated to it. In light of this stipulation, the only issue that remained for the jury to consider was damages. Baker acknowledged that he had in his possession all of Bissette's medical records such that he could fully defend the case on damages. Additionally, Baker testified at deposition that he did not consider the damages ultimately awarded by the jury to be excessive, and, thus, he did not move to set aside the jury's verdict on damages.

Based on our review of the record, we conclude that Auto- Owners has failed to carry its burden of proving material prejudice based on Cothran's failure to cooperate in his defense. Accordingly, the trial court did not err in granting summary judgment for Bissette on this issue.

The judgment of the trial court is affirmed.

AFFIRMED.

Judges HUNTER and GEER concur.

HILMAR LEIBER, Plaintiff v. ARBORETUM JOINT VENTURE, LLC, AAC-ARBORETUM JOINT VENTURE CONSOLIDATED LIMITED PARTNERSHIP, AAC-FRANKLIN SQUARE LIMITED PARTNERSHIP, FRANKLIN III LIMITED PARTNERSHIP, AAC-FRANKLIN DEVELOPMENT GP LIMITED PARTNERSHIP, AAC-FRANKLIN DEVELOPMENT, INC., FRANKLIN SQUARE IV, LLC, SOUTHLAKE LIMITED PARTNERSHIP, AAC RETAIL PROPERTY DEVELOPMENT AND ACQUISITION FUND, LLC, AAC RETAIL FUND MANAGEMENT, LLC, AMERICAN ASSET CORPORATION COMPANIES, LTD., AAC INVESTMENTS, INC., GASTONIA LIMITED PARTNERSHIP, ARBOR LIMITED PARTNERSHIP, BANK OF AMERICA and WACHOVIA BANK, Defendants

No. COA09-1284

(Filed 7 December 2010)

1. Appeal and Error— appealability—interlocutory order—partial summary judgment—certification—possibility of inconsistent verdicts

An opinion and order granting a partial summary judgment affected a substantial right and was immediately appealable where it did not dispose of plaintiff's claims against all parties, but was final as to one party and the trial court certified it for appellate review. Whether the trial court had jurisdiction because

the certification was entered following the appeal was immaterial because plaintiff was deprived of a substantial right in that plaintiff was subjected to the possibility of inconsistent verdicts.

2. Agency— receipt of investment checks—relationship with plaintiff—summary judgment inappropriate

The trial court erred by concluding that there was no genuine issue of material fact as to whether Spreti (a deceased third-party) was acting as plaintiff's agent for the receipt of redemption checks in an action arising from investments made by plaintiff (who resided in Germany) through Spreti in North Carolina. The various claims and cross-claims primarily turned on the issue of Spreti's agency relationship with plaintiff, but a single inference could not be drawn from the evidence and summary judgment was inappropriate.

3. Conversion— investment checks—not received personally —issue of fact on agency—summary judgment denied

The trial court correctly denied a motion for summary judgment by defendant banks on a conversion claim arising from investment checks that were not received by plaintiff personally where there was a genuine issue of material fact as to the existence of an agency relationship between plaintiff and the person who received the checks.

4. Conversion— warranties of presentment—not a shield against conversion

Warranties of presentment did not eliminate genuine issues of material fact from a conversion claim arising from investment redemption checks that were not received by plaintiff.

5. Conversion— imposter defense—issue of fact as to agency —addressed before defense

In a claim involving forged investment redemption agreements, the genuine issues of material fact as to agency and authority to receive the instrument should have been addressed before the imposter defense, and the trial court correctly denied a motion for summary judgment based on that defense.

6. Banks and Banking— investment proceeds—investor's agency issue—determined before cross-claim between banks

Genuine issues of material fact existed in one bank's cross-claim against another in an action arising from investment pro-

ceeds not received by the investor where the first bank's warranty defense would only become active if plaintiff's conversion claim against the banks was successful, and that claim depended upon an unsettled agency issue.

Appeal by Plaintiff from an order entered 8 July 2009 by Judge Ben F. Tennille in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 March 2010.

Bishop, Capitano & Moss, P.A. by J. Daniel Bishop, for Plaintiff.

Robinson, Bradshaw & Hinson, P.A. by Douglas M. Jarrell and Heyward H. Bouknight for Defendant Wachovia Bank.

Driscoll Sheedy, P.A. by James W. Sheedy and Susan E. Driscoll for Defendant Bank of America.

K&L Gates, LLP by Kiran H. Mehta and Samuel T. Reaves for Defendants Arboretum Joint Venture, LLC, AAC-Arboretum Joint Venture Consolidated Limited Partnership, AAC-Franklin Square Limited Partnership, Franklin III Limited Partnership, AAC-Franklin Development GP Limited Partnership, AAC-Franklin Development, Inc., Franklin Square IV, LLC, Southlake Limited Partnership, AAC Retail Property Development and Acquisition Fund, LLC, AAC Retail Fund Management, LLC, American Asset Corporation Companies, Ltd., and AAC Investments, Inc.

BEASLEY, Judge.

Plaintiff appeals from an order granting the AAC Defendants' motion for summary judgment. For the reasons stated herein, we conclude that the trial court did indeed erroneously grant the AAC Defendants' motion for summary judgment and we reverse.

Plaintiff, Hilmar Leiber, is a German national who at times relevant to this action, resided in Germany. While living in Germany Plaintiff met fellow German national, Wolfram Count von Spreti. During their initial meeting, Plaintiff learned that Spreti had successfully invested money in several United States-based companies. Shortly thereafter, Spreti invited Plaintiff to begin making investments in the "AAC Defendants, a collection of entities that was

founded in Charlotte, North Carolina, beginning in the late [1980's]. The AAC Defendants primarily develop commercial real estate.[1]"

Plaintiff began his investment relationship with Spreti by transferring $210,000 from a Swiss Bank to Southlake, an AAC Defendant. However, Plaintiff failed to research the AAC Defendants and utilized Spreti as his sole source of information. Following the initial investment in Southlake, Plaintiff made several investments in AAC Defendants Arbor and Gastonia. "Arbor and Gastonia were both partnerships that held limited partnerships interests in other AAC entities. Spreti was the general partner of both Arbor and Gastonia." Throughout the course of the entire investment relationship, Plaintiff invested approximately $445,000 in the AAC Defendants.

Following apparent instruction from Spreti, all distribution checks, and documentation were sent directly to Spreti in Germany. Between 1990 and 2003 Spreti received approximately $315,000 in distribution checks and approximately $78,000 in tax refunds intended for Plaintiff. Of the amounts distributed by the AAC Defendants to Spreti, Plaintiff only received approximately $75,000. Despite being aware that distribution checks were being sent directly to Spreti, Plaintiff never objected to Spreti's receipt of the distribution checks and tax refunds.

"In July 2000, the AAC entities created the AAC Retail Fund. It was created to consolidate the AAC entities' interests in several commercial properties into one entity to facilitate an increased borrowing limit." Southlake was one of the AAC Defendants that contributed to the AAC Retail Fund in 2002. Plaintiff, along with other investors in Southlake, were given the opportunity to either roll their investment into the newly formed Retail Fund or sell their Southlake interest to the AAC Retail Fund. Plaintiff's election form was mailed to Spreti. After receiving the election form, Spreti opted to sell Leiber's interest in Southlake to the AAC Retail Fund and allegedly forged Plaintiff's signature on the document.

Thereafter, "the AAC Retail Fund issued a Wachovia Bank check . . . payable to [Plaintiff] in the amount of $151,274" for the purchase

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1. The AAC Defendants consists of the following defendants: Arboretum Joint Venture, LLC, AAC-Arboretum Joint Venture Consolidated Limited Partnership, AAC-Franklin Square Limited Partnership, Franklin III Limited Partnership, AAC-Franklin Development GP Limited Partnership, AAC-Franklin Development, Inc., Franklin Square IV, LLC, Southlake Limited Partnership, AAC Retail Property Development and Acquisition Fund, LLC, AAC Retail Fund Management, LLC, American Asset Corporation Companies, Ltd., and AAC Investments, Inc.

of Plaintiff's interest in Southlake. Plaintiff alleges that Spreti forged his indorsement on the check, cashed it at a German bank, and retained the proceeds. When Spreti cashed the Wachovia check, the German bank transferred the Wachovia Bank check to American Express Bank for collection. American Express Bank presented the Wachovia Check to Wachovia for payment, and Wachovia paid in full.

In January 2001, AAC Defendants Arbor and Gastonia contributed to the AAC Retail Fund. In 2003, Plaintiff was given the option to sell his interest in Arbor and Gastonia to the AAC Retail Fund or roll them into the ACC Retail Fund. Again, forging Plaintiff's signatures on the election forms, Spreti opted to sell Plaintiff's interests in Arbor and Gastonia. After receiving the signed documents, the AAC Retail Fund "issued a Bank of America check . . . payable to Leiber in the amount of $254,858." Plaintiff again alleges that Spreti forged his indorsement on the check and retained the proceeds from the sale of the Arbor and Gastonia interests. To obtain the funds from the sale, "Spreti negotiated the [Bank of America Check] at Oberbank, AG. Oberbank transferred the [Bank of America Check] to Wachovia for collection. Thereafter, Wachovia presented the check to [Bank of America] for payment, and [Bank of America] paid in full."

In November 2004, Spreti committed suicide prior to meeting scheduled with Plaintiff to discuss his investments in the AAC Defendants. Plaintiff alleges that he did not learn about Spreti's actions until after his suicide. On 19 October 2005, Plaintiff filed suit against Wachovia, Bank of America, and the AAC Defendants. In an amended Complaint Plaintiff alleged causes of action for unjust enrichment, breach of contract, reinstate/winding up of partnerships, breach of fiduciary duty, negligence, conversion, and unfair and deceptive trade practices against the AAC Defendants. In his claims against AAC Defendants, Plaintiff argued that disbursement payments from the AAC Defendants should not have been delivered to Spreti because he *was not* Plaintiff's authorized agent. Against Wachovia and Bank of America, Plaintiff alleged causes of action for conversion, arguing that Spreti *was* acting as an authorized agent when receiving the bank checks. Additionally, by cross-claim, Bank of America filed suit against Wachovia Bank alleging that Wachovia breached the warranty of presentment by enforcing a check that bore a "forged or unauthorized payee indorsement."

On 29 February 2008, AAC Defendants filed a motion for summary judgment arguing, in pertinent part, that "the undisputed evidence

in this case establishes that Spreti was [Plaintiff's] agent, and had the authority to sign the redemption agreement in question and to receive the checks on [Plaintiff's] behalf to buy out his interest in the AAC Defendants." Bank of America and Wachovia filed summary judgment motions, arguing that Spreti was not Plaintiff's agent and could therefore not be held liable for statutory conversion of the bank checks because Plaintiff never received "delivery" of the checks as required for a statutory conversion claim.

On 8 July 2009, the trial court granted the AAC Defendants' motion for summary judgment, denied Wachovia's and Bank of America's motions for summary judgment against Plaintiff and granted Bank of America's motion for summary judgment on the cross-claim. In its opinion and order the trial court found that "as a matter of law . . . Spreti was [Plaintiff's] agent for purposes of receipt of the Redemption Checks." However, in a footnote within the opinion and order, the trial court observed that "[Plaintiff] has straddled the fence on the question of Spreti's agency. Accordingly, he could not and did not move for summary judgment with respect to his claims against the Banks. Those claims remain for trial."

On 21 July 2009, Plaintiff filed a motion seeking to modify the order to "include a certification of no just reason for delay pursuant to Rule 54(b) in order to make the order explicitly appealable." On 5 August 2009, Plaintiff filed notice of his intent to appeal the trial court's opinion and order. The day after Plaintiff filed his notice of appeal, the trial court entered a Rule 54(b) certification. On 13 August 2009, Bank of America and Wachovia filed notice of cross-appeal.

On appeal Plaintiff argues that: (I) the trial court erroneously concluded that Spreti was Plaintiff's agent for the purpose of receiving redemption and distribution checks; (II) the trial court erroneously resolved the issue of Spreti's agency in favor of the AAC Defendants and left the same issue for trial as against the Bank Defendants; (III) the trial court erred by concluding that he was not entitled to sue derivatively, in the alternative, on behalf of Arbor limited partnership and Gastonia limited partnership; and (IV) the trial court erred or abused its discretion in concluding that other limited partners were necessary parties and in dismissing claims for failure to join such limited partners. Before addressing the substantive issues on appeal, we must first examine a motion to dismiss filed by the AAC Defendants.

Motion to Dismiss

[1] By motion, the AAC Defendants attempt to dismiss Plaintiff's appeal and the cross appeals of Bank of America and Wachovia. In their motion to dismiss, the AAC Defendants argue that "this appeal is premature, in that the Order & Opinion from which [the] appeal is taken is interlocutory, no substantial right is affected, and there is thus no appellate jurisdiction." We disagree.

"Interlocutory orders are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy." *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999) (citing *Veazey v. City of Durham*, 231 N.C. 357, 361, 57 S.E.2d 377, 381 (1950)). "As a general rule, interlocutory orders are not immediately appealable." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (citation omitted). However,

> [t]here are . . . two means by which an interlocutory order may be appealed: (1) 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 pursuant to N.C. R. Civ. P. 54(b) or (2) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

Turner v. Norfolk S. Corp., 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) (citations and internal quotation marks omitted).

The trial court's opinion and order in this case fails to dispose of Plaintiff's claims against the banks, rendering the order interlocutory. However, despite the interlocutory nature of the trial court's order, Plaintiff's appeal to this Court is ripe for appellate review. The trial court's order granting the AAC Defendants' motion for summary judgment is final as to Plaintiff's claims against them. Because the trial court's order is final as to one party and the trial judge certified that there was no just reason to delay the appeal, the trial court order was appropriate for appellate review. *See James River Equip., Inc. v. Tharpe's Excavating, Inc.*, 179 N.C. App. 336, 340, 634 S.E.2d 548, 552 (2006). However, the AAC Defendants contend that the trial court lacked jurisdiction to certify the appeal for immediate appellate review because the trial court entered its Rule 54(b) certification following Plaintiff's appeal to this Court. Assuming arguendo that the contention of the AAC Defendants is correct, the error is immaterial where the trial court's order also deprives Plaintiff of a substantial

right. An interference with a plaintiff's right to avoid facing the possibility of two trials may be an interference with a substantial right if "the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue." *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982). "This Court has interpreted the language of *Green* and its progeny as creating a two-part test requiring a party to show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 735-36, 460 S.E.2d 332, 335 (1995).

Here, the trial court's opinion and order affects a substantial right and is therefore immediately appealable. The trial court found that

> [u]ltimately, the alternative liability of the AAC Defendants or the Banks will turn on whether Spreti was or was not [Plaintiff's] agent. Based on the record in the instant case, the Court finds as a matter of law that Spreti was [Plaintiff's] agent for purposes of receipt of the Redemption Checks.

The trial court's finding essentially eliminated Plaintiff's cause of action against the AAC Defendants. However, the trial court order also left Plaintiff's cause of action against the banks, including the agency issue, to be decided at a subsequent trial. Therefore, jurors in a subsequent trial could find that Spreti was not acting as Plaintiff's agent with respect to the banks, however, if the trial court's summary judgment order were reversed on appeal, jurors in a second trial may find that Spreti was indeed acting as Plaintiff's agent. Because both trials could address the same factual issues and reach different conclusions, thereby subjecting Plaintiff to the possibility of inconsistent verdicts, this appeal is appropriate for appellate review.

The AAC Defendants argue that "since [Plaintiff's] trial against the Banks would likely focus on different issues than any future trial against the AAC Defendants, any risk of inconsistent verdicts is slight at best." While we agree that Plaintiff's subsequent trial against the Banks would require Plaintiff to address issues other than Spreti's agency, the issue of agency will be an issue at the subsequent trial, creating a risk of inconsistent verdicts on appeal. Accordingly, we deny the AAC Defendants' motion to dismiss.

Plaintiff's Appeal from Summary Judgment

I.

[2] Plaintiff first argues that the trial court erroneously concluded that there was no genuine issue of material fact as to whether Spreti was acting as his agent for receipt of the Redemption checks. We agree.

Summary judgment is appropriately granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). "The rule is designed to eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim of a party is exposed." *Dalton v. Camp*, 353 N.C. 647, 650, 548 S.E.2d 704, 707 (2001). "The party moving for summary judgment has the burden of establishing the lack of any triable issue." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). All evidence is viewed in the light most favorable to the non-moving party. *See id.* The doctrine of summary judgment requires cautious application, ensuring that no litigant is unjustly deprived of his right to try disputed factual issues. *Barbee v. Johnson*, 190 N.C. App. 349, 352, 665 S.E.2d 92, 95-96 (2008).

Our Supreme Court has stated that "[a]n agent is one who acts for or in the place of another by authority from him." *Trust Co. v. Creasy*, 301 N.C. 44, 56, 269 S.E.2d 117, 124 (1980). "Two factors are essential in establishing an agency relationship: (1) [t]he agent must be authorized to act for the principal; and (2) [t]he principal must exercise control over the agent." *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 532-33, 463 S.E.2d 397, 400 (1995). Typically, the agency question is a factual determination that must be made by the jury, however, "if only one inference can be drawn from the facts then it is a question of law for the trial court." *Vares v. Vares*, 154 N.C. App. 83, 87, 571 S.E.2d 612, 615 (2002) (citation, quotations, and brackets omitted).

In this case, the trial court erroneously determined that there was no genuine issue of material fact as to whether Spreti was Plaintiff's agent for the purposes of receiving redemption checks from the AAC Defendants. The trial court based its conclusion on the theories of apparent authority, apparent agency, implied actual authority, and ratification. While all the theories relied on by the trial court are different, they share many common elements.

To support its determination that Spreti was authorized to receive the redemption checks under the doctrines of apparent authority and apparent agency, the trial court was required to find that the AAC Defendants reasonably relied on representations by Plaintiff. *See Zimmerman v. Hogg & Allen*, 286 N.C. 24, 31, 209 S.E.2d 795, 799 (1974) (explaining that to hold the principal liable for an agent's actions done under the scope of apparent authority, "the determination of a principal's liability . . . must be [based] [upon] what authority the third person in the exercise of reasonable care was justified in believing that the principal had, under the circumstances, conferred upon his agent."); *See also Deal v. N.C. State University*, 114 N.C. App. 643, 442 S.E.2d 360 (1994) (explaining that apparent agency is a form of equitable estoppel and estoppel requires the harmed party to have justifiably relied on the representations by the principal).

To support its conclusion the trial court generally found that: (1) Plaintiff did not exercise due diligence before making his investments in the AAC Defendants and relied solely upon the advice and oversight of Spreti in the execution of the investment documents; (2) Plaintiff relied upon Spreti to manage his investments in the AAC Defendants; (3) During the course of their fifteen year investment relationship Plaintiff never raised objection to Spreti's receipt of disbursement checks from the AAC Defendants; and (4) Spreti was a general partner of Arbor and Gastonia. "Given that all partners are agents for each other, [Plaintiff's] investment in Arbor and Gastonia indicates an agency relationship between [Plaintiff] and Spreti." The trial court relied on these same factual findings throughout the order to support its conclusions of law. While we agree that the facts relied on by the trial court could support a finding of apparent agency and apparent authority, various facts in the record create a genuine issue of material fact as to whether the AAC Defendants reasonably relied on representations by Plaintiff.

In a Southlake partnership agreement Plaintiff provided the address of a Swiss bank employee as his Address of Notices. Documentation in which Plaintiff expressly indicated that an individual other than Spreti was to receive notices, conflicts with the notion that the AAC Defendants' reliance on the alleged representations by Plaintiffs was justifiable. While acknowledging that the Southlake investment document was evidence "that [Plaintiff] wanted someone other than Spreti handling his investments in the United States," the trial court found that this argument was not persuasive. The trial court reasoned that Plaintiff testified that he was not responsible for

filling out the Address of Notices provision of the document and "had reached no agreement with anyone regarding disbursements or notices concerning his investments in the AAC Defendants." However, as discussed above, both doctrines are examined from the perspective of the aggrieved third party. Therefore, a principal's unexpressed intentions and motivations would have no affect on the reliance of a third party. Without a representation by Plaintiff, the AAC Defendants could not have known that the Address of Notice provision was not a reflection of his actual intent. Because there is evidence that the AAC Defendants' reliance on Plaintiff's representations may have been unreasonable, the trial court erroneously determined that there was no genuine issue of material fact with respect to the doctrines of apparent agency and apparent authority.

In its order the trial court also concluded that Plaintiff provided Spreti with implied actual authority to receive the redemption checks. In reaching its conclusion the trial court relied on the same general facts as with respect to the doctrines of apparent agency and apparent authority. "Actual authority is that authority which the agent reasonably thinks he possesses, conferred either intentionally or by want of ordinary care by the principal." *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 830, 534 S.E.2d 653, 655 (2000). "Actual authority may be implied from the words and conduct of the parties and the facts and circumstances attending the transaction in question." *Id.*

In this case, the trial court erroneously failed to determine that there was a genuine issue of material fact as to whether Spreti reasonably believed that he was authorized to receive the redemption checks. As discussed above, Plaintiff signed an investment document identifying someone other than Spreti as the appropriate party to receive notices. Because there is no evidence that Plaintiff expressly provided Spreti with any authority regarding his United States investments, documentation signed by Plaintiff indicating that Spreti lacked authority creates a genuine issue of material fact as to the reasonableness of Spreti's belief. Additionally, there is evidence that Spreti forged Plaintiff's signature on a number of checks and other investment documents, retained the proceeds from several of Plaintiff's investments, and committed suicide before a meeting to discuss Plaintiff's investments. This evidence does not demonstrate that Spreti reasonably believed that he was within the scope of his authority as to Plaintiff's United States investments. Accordingly, a jury should determine whether Plaintiff conferred upon Spreti the actual authority to receive the redemption checks.

The trial court also erroneously determined that there was no genuine issue of material fact as to whether Leiber ratified the actions of Spreti. Addressing the doctrine of ratification, our Court has explained that:

> Ratification is defined as "the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." Restatement (Second) of Agency § 82 (1958). "Ratification requires intent to ratify plus full knowledge of all the material facts." *Contracting Corp. v. Bank of New Jersey*, 69 N.J. 352, 361, 354 A.2d 291, 296 (1976). It "may be express or implied, and intent may be inferred from failure to repudiate an unauthorized act . . . or from conduct on the part of the principal which is inconsistent with any other position than intent to adopt the act." *Id.*

American *Travel Corp. v. Central Carolina Bank*, 57 N.C. App. 437, 442, 291 S.E.2d 892, 895 (1982). In this case, the trial court found that "[Plaintiff] was aware of all material facts because he received numerous disbursement checks from Spreti over the course of fifteen years. [Plaintiff] failed to object to Spreti receiving the disbursement checks on each and every occasion." However, there is no evidence in the record that Plaintiff was aware of the number of disbursement checks that Spreti actually received from the AAC Defendants. Moreover, there is no evidence that Plaintiff was aware of Spreti's receipt of the redemption checks. Accordingly, there is a genuine issue of material fact as to whether Plaintiff had full knowledge of all material facts.

While there is evidence indicating that Spreti was acting as Plaintiff's agent for the purpose of receiving the redemption checks, there is also contrary evidence in the record. Because a single inference cannot be drawn from the evidence, summary judgment is inappropriate in this case. The resolution of the conflicting factual issues is a role appropriately reserved for a jury. The various claims and cross-claims raised by the banks in this case primarily turn on the issue of Spreti's agency relationship with Plaintiff. Accordingly, the trial court appropriately denied the banks' motions for summary judgment on Plaintiff's conversion claim.

Bank of America and Wachovia's Motions for Summary Judgment

In its order the trial court denied the banks' motion for summary judgment as to Plaintiff's conversion cause of action because the trial court found that genuine issues of material fact remain. Wachovia and Bank of America appeal the trial court's decision. As we have discussed above, the banks' appeal from the trial court's interlocutory order is ripe for appellate review.

I.

[3] The banks first argue that there is no genuine issue of material fact as to Plaintiff's conversion cause of action because the checks were not delivered to Plaintiff or his agent. We disagree. Adopting language from the Uniform Commercial Code, our General Assembly has explained that:

> An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument, or (ii) a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent ora co-payee.

N.C. Gen. Stat. § 25-3-420(a) (2009); U.C.C. § 3-420(a). There is no evidence in the record indicating that Plaintiff received the bank checks personally. Moreover, we have already determined that there is a genuine issue of material fact as to Spreti's agency relationship with Plaintiff. Therefore, there is a factual dispute as to whether Plaintiff ever "received" any allegedly converted instrument. The trial court's decision to deny the banks' motion for summary judgment with respect to Plaintiff's conversion cause of action was not erroneous.

II.

[4] Next, Bank of America argues that the trial court failed to determine that the presentment warranties eliminated the need to try Plaintiff's conversion cause of action. We disagree.

A party presenting a check to a drawee bank for payment is warranting that:

> (1) [t]he warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or autho-

> rized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft;
>
> (2) The draft has not been altered; and
>
> (3) The warrantor has no knowledge that the signature of the purported drawer of the draft is unauthorized.

N.C. Gen. Stat. § 25-4-207.1(a) (2009). In *North Carolina Nat. Bank v. Hammond*, our Supreme Court explained that:

> [a]ny adjudicated or noncontested forgery triggers this warranty. Thus, if a payor/drawee bank suffers a loss by paying a check over a proven forged indorsement, it may sue the collecting bank which presented the check to it on a theory of breach of warranty of good title. That collecting bank in turn may sue the next collecting bank and so on down the collection chain. Final liability for the check with a forged indorsement under the Uniform Commercial Code rests ultimately on the initial depository bank which presumably could have guarded against the loss by inspecting the indorsement more closely.

298 N.C. 703, 708, 260 S.E.2d 617, 621 (1979) (citation omitted).

Here, while Bank of America may be able to argue that the presentment warranties allow them to file suit against the collecting bank, it does not act as a shield from Plaintiff's conversion suit. As explained in *Hammond*, the presentment warranties shift liability up the chain of collecting banks until it reaches the initial depository bank that could have best protected against the forgery. It is only after Bank of America suffers a loss on Plaintiff's conversion action that the warranties of presentment defense becomes available. Accordingly, the warranties of presentment do not eliminate the genuine issues of material fact from Plaintiff's conversion cause of action.

III.

[5] Wachovia Bank argues that because the impostor rule is a complete defense to Plaintiff's conversion cause of action, the trial court erred by denying their motion for summary judgment. We disagree. Explaining the impostor rule our General Assembly has provided that:

> (a) If an impostor, by use of the mails or otherwise, induces the issuer of an instrument to issue the instrument to the impostor, or to a person acting in concert with the impostor, by impersonating the payee of the instrument or a person authorized to act for the

> payee, an indorsement of the instrument by any person in the name of the payee is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

N.C. Gen. Stat. § 25-3-404(a) (2009). Wachovia Bank contends that by "forging [Plaintiff's] signature on the redemption agreements, Spreti impersonated Plaintiff." However, the scope of Spreti's agency relationship with Plaintiff remains unsettled. Therefore, a genuine issue of material fact remains as to whether Spreti was authorized to receive the instrument in this case. Accordingly, the impostor defense should be addressed following a trial settling the nature of Spreti's agency relationship with Plaintiff.

Bank of America and Wachovia Cross-Claim

[6] By cross-claim Bank of America filed suit against Wachovia Bank alleging that if "[Plaintiff] can maintain an action against Bank of America for conversion of the Bank of America Check, then Bank of America is entitled to summary judgment against Wachovia because Wachovia breached the presentment warranties upon the presentment of the Bank of America Check with a forged payee indorsement." As discussed above, Bank of America's warranty defense only becomes active if Plaintiff's conversion claims against the banks is successful. *See Hammond*, 298 N.C. at 708, 260 S.E.2d at 621 (explaining that "if a payor/drawee bank suffers a loss by paying a check over a proven forged indorsement, it may sue the collecting bank which presented the check to it on a theory of breach of warranty of good title."). Because Plaintiff's conversion claim depends upon the unsettled agency issue, genuine issues of material fact remain with respect to Bank of America's cross-claim.

Reversed.

Judges BRYANT and STEELMAN concur.

LISA SANDERSON RABON, PLAINTIFF v. FAY ELIZABETH HOPKINS AND KEYSTONE FREIGHT CORP. DEFENDANTS

No. COA10-455

(Filed 7 December 2010)

1. Pleadings— leave to amend answer properly denied—undue delay—no abuse of discretion

The trial court did not abuse its discretion in denying defendants' motion for leave to amend their answer to a negligence action to include the affirmative defense of contributory negligence where defendants failed to offer any sufficient explanation for the nine-month delay in seeking the amendment.

2. Negligence— contributory negligence—motion to preclude evidence properly granted

The trial court did not err by granting plaintiff's motion to preclude defendants from offering evidence of plaintiff's contributory negligence as the trial court correctly denied defendants' motion for leave to amend their answer to include contributory negligence. Because plaintiff's contributory negligence was not at issue in the case, any probative value of evidence of plaintiff's conduct was outweighed by the danger of such evidence confusing the jury.

3. Evidence— expert testimony—within scope of expertise—admissible

The trial court did not err by allowing plaintiff's expert to testify about the operation of the brakes of the tractor-trailer involved in an automobile accident. The testimony was within the scope of the expert's expertise and was therefore admissible.

4. Negligence— judgment notwithstanding verdict—sufficient evidence—motion properly denied

The trial court did not err by denying defendants' motion for judgment notwithstanding the verdict in a negligence action arising out of a vehicular accident. Even if plaintiff had failed to offer sufficient evidence that defendant Hopkins failed to properly connect an air line which controlled the brakes on her tractor-trailer, there was sufficient evidence that defendant Hopkins failed to take the appropriate steps to avoid a collision following the onset of that emergency situation.

5. Evidence— jury instructions—spoliation of evidence—excessive speed—proper

The trial court did not err by denying defendants' motion for new trial in a negligence case as the trial court's jury instructions on spoliation of evidence and excessive speed were proper.

Appeal by Defendants from judgment entered 27 July 2009 by Judge John O. Craig, III in Guilford County Superior Court. Heard in the Court of Appeals 26 October 2010.

Bretzmann & Aldridge, L.L.P., by Raymond A. Bretzmann, for Plaintiff.

Dickie, McCamey & Chilcote, PC, by John T. Holden, for Defendants.

STEPHENS, Judge.

Facts

On 11 April 2008, Plaintiff Lisa Sanderson Rabon was involved in a collision with a tractor-trailer owned by Defendant Keystone Freight Corporation ("Defendant Keystone") and operated by Defendant Fay Elizabeth Hopkins ("Defendant Hopkins").

On 12 June 2008, Plaintiff filed a complaint against Defendants in Guilford County Superior Court, setting forth claims for relief based on the alleged negligence of Defendant Hopkins, imputed negligence of Defendant Keystone under the theory of *respondeat superior*, and negligent entrustment by Defendant Keystone. On 3 September 2008, Defendants filed their answer, which set forth the affirmative defenses of unavoidable accident and sudden emergency.

On 13 July 2009, following extensive discovery by both parties, the trial court permitted Defendants to substitute counsel. On 15 July 2009, the day the trial was set to begin, Defendants filed a motion for leave to amend their answer to include the defense of contributory negligence. The trial court denied Defendants' motion and also granted Plaintiff's motion to preclude Defendants from presenting any evidence of alleged negligence by Plaintiff. The case was tried before a jury at the 13 July 2009 Civil Session of the Superior Court of Guilford County, the Honorable John O. Craig, III presiding.

The evidence presented at trial tended to show that on 11 April 2008, Defendant Hopkins was employed by Defendant Keystone as a truck driver and, in the course of that employment, was operating a Volvo tractor that was pulling a trailer loaded with K-Mart goods. Traveling southwest from Greensboro, North Carolina, where she had picked up the trailer from the K-Mart distribution center, Defendant Hopkins merged onto the exit ramp from Interstate 85 at the Randolph Street exit in Thomasville, North Carolina. Defendant Hopkins testified that as she pulled onto the exit ramp, she noticed a warning light on her truck indicating that the air pressure for the trailer's air brakes was low. Defendant Hopkins testified that she unsuccessfully attempted to slow the truck as it approached a red light at the bottom of the exit ramp. As Defendant Hopkins entered the intersection against a red light, Plaintiff's vehicle collided with Defendant Hopkins' tractor-trailer. Plaintiff suffered severe injuries and was taken by ambulance to the hospital; Plaintiff testified that she had no recollection of the collision. A witness who observed the tractor-trailer was traveling at approximately fifty miles per hour when it was driven through the intersection. After the collision, it was observed that the air line for the trailer's brakes was disconnected from the tractor.

Following the presentation of evidence, the jury returned a verdict finding Defendant Hopkins negligent and awarding Plaintiff $150,000 in damages for personal injuries and $3,500 for property damage. Defendants appeal.

I. Denial of Defendants' motion for leave to amend their answer

[1] Defendants first argue that the trial court's denial of Defendants' motion for leave to amend their answer to include the affirmative defense of contributory negligence was error. We disagree.

Motions to amend are governed by North Carolina Civil Procedure Rule 15(a), which, as applicable to this case, provides that "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15(a) (2009). A ruling on a motion for leave to amend is addressed to the sound discretion of the trial judge and the denial of such a motion is not reviewable absent a clear showing of abuse of discretion. *Martin v. Hare*, 78 N.C. App. 358, 360-61, 337 S.E.2d 632, 634 (1985).

A trial court abuses its discretion only where no reason for the ruling is apparent from the record. *Ledford v. Ledford*, 49 N.C. App.

226, 233-34, 271 S.E.2d 393, 398-99 (1980). Our Courts have held that reasons justifying denial of leave to amend are undue delay, bad faith, undue prejudice, and futility of amendment. *See*, *e.g.*, *Walker v. Walker*, 143 N.C. App. 414, 418, 546 S.E.2d 625, 628 (2001); *Members Interior Constr.*, *Inc. v. Leader Constr. Co.*, 124 N.C. App. 121, 124, 476 S.E.2d 399, 402 (1996), *disc. rev. denied*, 345 N.C. 754, 485 S.E.2d 56 (1997); *Martin*, 78 N.C. App. at 361, 337 S.E.2d at 634.

It is apparent from the record in this case that the bases for the trial court's denial of Defendants' motion were undue delay and futility of amendment.

The trial court's denial on grounds of futility of amendment appears justified based on Plaintiff's inability to recall the collision and Defendant Hopkins' testimony that she did not believe Plaintiff was at fault in the collision. Nevertheless, in determining whether the trial court abused its discretion in denying Defendants leave to amend their answer, we address undue delay as the apparent basis for the court's ruling.

This Court has held that a trial court may appropriately deny a motion for leave to amend on the basis of undue delay where a party seeks to amend its pleading after a significant period of time has passed since filing the pleading and where the record or party offers no explanation for the delay. *See Media Network*, *Inc. v. Long Haymes Carr*, *Inc.*, 197 N.C. App. 433, 447-48, 678 S.E.2d 671, 681 (2009) (affirming denial of leave to amend where defendant filed motion three months after filing answer and offered no credible explanation for the delay); *Walker v. Sloan*, 137 N.C. App. 387, 402, 529 S.E.2d 236, 247 (2000) (affirming denial where there was nothing in the record to explain why plaintiff waited until three months after defendant filed answer); *Caldwell's Well Drilling*, *Inc. v. Moore*, 79 N.C. App. 730, 731, 340 S.E.2d 518, 519 (1986) (affirming denial of leave to amend where record did not indicate why plaintiff waited three months from filing of answer before moving to amend complaint).

In this case, Defendants' answer was filed 3 September 2008 and raised the affirmative defenses of unavoidable accident and sudden emergency. It was not until 15 July 2009—following the conclusion of discovery, on the day the jury was to be impaneled, and over nine months after Defendants' answer was filed—that Defendants moved the court to grant leave to amend the answer to include the defense of contributory negligence.

In their motion for leave to amend, Defendants argued that leave should be granted because the contributory negligence defense was "inadvertently omitted" from the answer. However, Defendants abandoned this explanation at the colloquy on the motion and admitted that the defense was, in fact, deliberately omitted.

Defendants further argued in their motion for leave to amend, and reiterate on appeal, that, in this type of case, the reasonableness of a plaintiff's actions is always at issue such that Plaintiff should have been on notice that contributory negligence was going to be argued by Defendants. We find this argument to be as unpersuasive as it is disingenuous.

Defendants' argument is wholly at odds with our Rules of Civil Procedure, especially the concept of notice pleading. Rule 8(c) requires that, in a responsive pleading, a party must "set forth affirmatively" the defense of contributory negligence, including a "short and plain statement . . . sufficiently particular *to give the court and the parties notice*" of the occurrences to be proved. N.C. Gen. Stat. § 1A-1, Rule 8(c) (2009) (emphasis added). Further, because Defendants failed to plead contributory negligence as an affirmative defense in the answer, that defense was waived. *Nationwide Mut. Ins. Co. v. Edwards*, 67 N.C. App. 1, 6, 312 S.E.2d 656, 660 (1984). Accordingly, instead of supporting Defendants' position that Plaintiff was on notice of a contributory negligence defense despite Defendants' *deliberate* failure to raise that defense in their answer, Rule 8(c) supports the exact opposite position: Plaintiff was not on notice of a contributory negligence defense precisely because of Defendants' failure to properly raise that defense in their answer.

Defendants also argue that Defendants' substitution of counsel in the days leading up to trial gave Defendants the right to assert any defense of their choosing, including any affirmative defense waived before the substitution. This argument borders on the absurd. We find no legal support, and none is presented by Defendants, for the position that a party who voluntarily substitutes counsel in the week before trial is entitled to delay trial in order to present any affirmative defenses the new counsel conjures up, especially one waived by former counsel after indicating to the trial court that "he [prior counsel] could not claim the defense of [c]ontributory [n]egligence in good faith." In their final argument as to why the denial of their motion was error, Defendants offer as the explanation for the delay the fact that the defense of contributory negligence "became vastly more impor-

tant when it became apparent the case would be tried" such that leave should have been granted. This "reasoning" is not only wholly unpersuasive; it offends common sense. Disregarding Defendants' odd determination of the relative importance of a contributory negligence defense at different points pretrial, it must have become "apparent the case would be tried" at some point before the day the case was actually set to be tried.

Because Defendants fail to offer any sufficient explanation for the nine-month delay in seeking to amend their answer, we conclude that the trial court did not abuse its discretion in denying Defendants' motion for leave to amend to include the affirmative defense of contributory negligence.

II. Grant of Plaintiff's motion to preclude Defendants from presenting evidence of contributory negligence

[2] Defendants next argue that the trial court erred by granting Plaintiff's motion to preclude Defendants from offering evidence of Plaintiff's contributory negligence on grounds that the evidence was "relevant to the issues in the case" and that "Plaintiff raised no claim of prejudice or unfair surprise to the assertion of the affirmative defense." Insofar as Defendants' arguments on this issue address their entitlement to raise the affirmative defense of contributory negligence, that portion of the arguments is overruled as we have already concluded, *supra*, that the trial court did not abuse its discretion in denying Defendants' motion for leave to amend their answer.

As for Defendants' argument that evidence of Plaintiff's contributory negligence was "relevant to the issues[,]" the North Carolina Rules of Evidence provide that evidence is relevant if it has "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). Defendants argue that "[q]uestions of the reasonableness of each driver's actions are always at issue in [a two-car accident] motor vehicle case" such that the evidence was relevant. As discussed *supra*, however, because Defendants failed to raise the issue of contributory negligence in their answer, the "reasonableness" of Plaintiff's actions was not at issue and evidence of Plaintiff's actions offered in support of an unpleaded, and thus waived, affirmative defense was not relevant.

Further, assuming *arguendo* it was in any way relevant, evidence of Plaintiff's conduct was appropriately excluded by the trial court because any probative value was substantially outweighed by the danger of confusion of the issues under Rule of Evidence 403. N.C. Gen. Stat. § 8C-1, Rule 403 (2009). In granting Plaintiff's motion to preclude the evidence of contributory negligence, the trial court stated that "I'm inclined to not allow the jury to be confused by any questions or certainly any arguments about contributory negligence, they're not going to receive it as an issue in the case and they're not going to receive instruction on it." Because Plaintiff's contributory negligence was not at issue in the case, any probative value of evidence of Plaintiff's conduct was certainly outweighed by the danger of such evidence confusing the jury. Accordingly, the trial court did not err by precluding Defendants from presenting evidence of Plaintiff's contributory negligence.

Defendants further argue, irrespective of the admissibility of the evidence, that the trial court erred by granting Plaintiff's motion because that decision "deprived []Defendants of any opportunity to develop a record for a motion for directed verdict or motion for judgment notwithstanding the verdict." Defendants support this argument by citing several cases that stand for the proposition that unpleaded defenses, when raised by the evidence, should be considered in resolving a motion for summary judgment. *See Miller v. Talton*, 112 N.C. App. 484, 487, 435 S.E.2d 793, 796 (1993); *Ridings v. Ridings*, 55 N.C. App. 630, 632, 286 S.E.2d 614, 615-16, *disc. rev. denied*, 305 N.C. 586, 292 S.E.2d 571 (1982).

The oft-stated reason for considering unpleaded defenses in resolving a summary judgment motion is the policy favoring liberality in amendment of pleadings. *See, e.g.*, *North Carolina Nat'l Bank v. Gillespie*, 291 N.C. 303, 306, 230 S.E.2d 375, 377 (1976) (noting the policy favoring liberality in the amendment of pleadings and holding that unpleaded defenses, when raised by the evidence, should be considered in resolving a motion for summary judgment); *Cooke v. Cooke*, 34 N.C. App. 124, 125, 237 S.E.2d 323, 324 (holding that the nature of summary judgment procedure, coupled with our generally liberal rules relating to amendment of pleadings, require that unpleaded affirmative defenses be deemed part of the pleadings where such defenses are raised in a hearing on motion for summary judgment), *disc. rev. denied*, 293 N.C. 740, 241 S.E.2d 513 (1977). In the context of summary judgment, this policy of liberality urges the trial court to consider evidence of the unpleaded affirmative defense

by either deeming the answer amended to conform to the evidence, or permitting formal amendment of the answer prior to considering the proof. *North Carolina Nat'l Bank*, 291 N.C. at 306, 230 S.E.2d at 377.

In evaluating Defendants' argument on this issue, we note that if the trial court were to consider the unpleaded defense of contributory negligence during a hypothetical hearing on a motion for directed verdict, the trial court would be required to deem the answer amended or to permit formal amendment of the answer. *See id.* Paradoxically then, Defendants are arguing that although in this case the trial court already denied Defendants' motion for leave to amend, the trial court's exclusion of evidence of contributory negligence was error because the trial court might have granted leave to amend later in the proceedings. We find this argument unpersuasive and, indeed, nonsensical.

Based on the foregoing, we conclude that the trial court did not err by excluding evidence of the unpleaded affirmative defense of contributory negligence. Defendants' argument is overruled.

III. Denial of Defendants' motion to preclude expert testimony

[3] At trial, Plaintiff called Reginald Hines ("Hines") as an expert witness "qualified to testify as an expert in the area of motor carrier safety, the requirements of the Federal Motor Carrier Safety Regulations [("the Regulations")] and North Carolina motor vehicle law." Defendants argue that the trial court erred by allowing Hines to testify about the operation of the tractor-trailer brakes because, based on Hines' own admission during *voir dire* that "the mechanical features on the brakes" were "outside the area of [his] expertise," the testimony allowed by the trial court was outside the scope of Hines' expertise and therefore inadmissible.

It is well established that trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citing N.C. Gen. Stat. § 8C-1, Rule 104(a)). "Whether a witness has the requisite skill to qualify as an expert in a given area is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial court." *State v. Goodwin*, 320 N.C. 147, 150, 357 S.E.2d 639, 641 (1987). A trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion. *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686.

The first portion of Hines' testimony to which Defendants objected was Hines' affirmative response to the question, "Is [the attachment mechanism for the air line to the trailer's brakes] designed so that it will stay in place as a tractor[-]trailer travels in the ordinary course of it's [sic] transporting?"

At *voir dire*, the trial judge asked Hines "what knowledge and experience he has of the [attachment] mechanism of the [air line] valve itself. Not necessarily the entire braking system, but the way the valve connects the truck and the trailer." Hines responded as follows:

> Yes. I've done thousands of truck inspections and at times we had to take that [] loose. For example, I was a judge for truck driving championships and we would go out there, prepare trucks for the drivers to come inspect to see if they would catch those type of things. So we unhooked the [attachment mechanism]. All it is is a mechanism so that the air can get from the truck to the trailer. And they hook together like this and the nature of it is that they lock so that it won't come loose shaking down the road.

Defendants argue that to answer the challenged question, one would need to be an engineer, which Hines was not. We disagree. It is obvious that an expert in the field of motor carrier safety who had done thousands of truck inspections would know whether the air line was designed to stay attached during the normal course of transport, regardless of whether the expert was an engineer who could explain the exact physical forces that keep the air line in place. Further, Rule of Evidence 702, which governs the admissibility of expert testimony, has been interpreted by our Courts to require "only that the expert be better qualified than the jury as to the subject at hand, with the testimony being helpful to the jury." *State v. Davis*, 106 N.C. App. 596, 601, 418 S.E.2d 263, 267 (1992) (internal quotation marks omitted), *disc. rev. denied*, 333 N.C. 347, 426 S.E.2d 710 (1993). In this case, there can be no doubt that Hines was better qualified than the jury such that the trial court correctly concluded that Hines was qualified to explain to the jury about the attachment mechanism. Accordingly, the trial court did not abuse its discretion in admitting Hines' testimony on this subject.

The second portion of Hines' testimony to which Defendants objected was Hines' explanation of what theoretically would happen to the air pressure if the air line became disconnected. After Hines read and explained a lengthy portion of the Regulations detailing the "compliance requirements on combination trucks with air brakes[,]"

Plaintiff's counsel asked Hines, "[W]hat would happen to the air pressure if [the air line], as you've identified in that photograph, were to [] become disconnected[?]" Hines then testified that there would be a reduction of air pressure and ultimately the brakes of the trailer would lock down. Once again, although Hines admitted that he was unfamiliar with the "mechanical features on the brakes," his experience with motor carrier safety and his knowledge of the Regulations were sufficient to permit Hines to testify as to the types of brake systems required by the Regulations and to the interplay between those brake systems. Accordingly, the trial court did not abuse its discretion in admitting Hines' testimony on this subject.

The final portion of Hines' testimony to which Defendants objected was a reading from the North Carolina commercial drivers manual about safe driving practices following brake failure. Because Hines was proffered as an expert on North Carolina motor vehicle law, and because Hines' testimony on this subject involved simply reading to the jury sections of the North Carolina commercial drivers manual, we conclude that this testimony was clearly not outside the scope of Hines' expertise.

Based on the foregoing, we conclude that the trial court did not abuse its discretion in admitting the portions of Hines' testimony to which Defendant objected.[1]

IV. Denial of Defendants' motion for judgment notwithstanding the verdict

[4] Defendants next argue that the trial court erred by denying their motion for judgment notwithstanding the verdict.

In ruling on a motion for judgment notwithstanding the verdict, the trial court must consider the evidence in the light most favorable to the nonmoving party, giving him the benefit of all reasonable inferences to be drawn therefrom and resolving all conflicts in the evidence in his favor. *Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986). When determining the correctness of the trial court's denial of directed verdict or judgment notwithstanding the verdict, the question is

1. Defendants also argue that the testimony regarding the Regulations was irrelevant because "[n]o claim was ever made by the [P]laintiff that any violation of the . . . Regulations caused or contributed in any way to the occurrence of the accident." However, Plaintiff's third claim for relief alleges that Defendant Keystone negligently failed to train the driver in the Regulations. Although a directed verdict was eventually granted on the third claim for relief, the claim was still viable at the time of the trial court's ruling on the admissibility of Hines' testimony. Accordingly, this argument is overruled.

whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury. *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 323, 411 S.E.2d 133, 138 (1991).

On appeal, Defendants contend that the evidence was insufficient to support the jury's verdict and, therefore, insufficient to support the judgment based on the jury's verdict. As such, Defendants argue that the trial court should have granted their motion for judgment notwithstanding the verdict.

Specifically, Defendants contend that "[t]his case involves a single allegedly negligent act": failure of Defendant Hopkins to properly connect an air line which controlled the brakes on the trailer portion of her tractor-trailer. Defendants argue that because Plaintiff did not present sufficient evidence of this allegedly negligent act, Plaintiff did not establish a *prima facie* case of negligence, and that, accordingly, their motion should have been granted.

Disregarding the merits of Defendants' argument on that specific allegation of negligence, we note, as did the trial court in its denial of the motion and as did Plaintiff in her brief, that Defendants' argument overlooks the allegations and supporting evidence tending to establish that Defendant Hopkins was negligent in failing to reduce speed after the reduction in braking power by engaging other braking mechanisms, downshifting her engine, or by maneuvering evasively to avoid the collision. Because the evidence of these other negligent acts, taken in the light most favorable to Plaintiff, tended to show that, regardless of the cause of the emergency situation, Defendant Hopkins failed to take the appropriate steps to avoid a collision following the onset of that emergency situation, we conclude there was sufficient evidence for the jury to find in favor of Plaintiff. Accordingly, we hold that the trial court did not err in denying Defendants' motion. Defendants' argument is overruled.

V. Denial of Defendants' motion for a new trial

[5] Defendants next argue that the trial court erred by denying their motion for a new trial on grounds that the trial court's jury instructions on spoliation of evidence and excessive speed were improper.

Defendants' argument as to spoliation cites absolutely no legal authority in violation of Appellate Rule 28(b)(6). N.C. R. App. P. 28(b)(6) (2009) ("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."). Accordingly, it would not be

improper to deem this argument abandoned. *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (holding that "[i]t is not the duty of this Court to supplement an appellant's brief with legal authority"), *supersedeas denied and disc. rev. denied*, 360 N.C. 63, 623 S.E.2d 582 (2005). Nevertheless, we address Defendants' argument and note that, in discovery, Defendant Keystone denied the existence of any photographs of the truck following the accident. However, at trial, Defendant Hopkins testified that she took pictures of the accident and gave them to her supervisor at Keystone. Further, Defendants denied in discovery the existence of any device that records data concerning the operation of the truck. At trial, however, Plaintiff's expert John Flannigan testified that the type of truck owned by Defendant Keystone and operated by Defendant Hopkins would have had such a device. Defense counsel later argued to the trial court that the truck had been put back into service and that the data was unavailable.

Because Defendants almost certainly were aware of a potential claim by Plaintiff at the time the photographs and recorded data were in Defendant Keystone's control, *cf. McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 187, 527 S.E.2d 712, 718 (noting that the obligation to preserve evidence may arise prior to the filing of a complaint where the opposing party is on notice that litigation is likely to be commenced), *disc. rev. denied*, 352 N.C. 357, 544 S.E.2d 563 (2000), these contradictions were sufficient to support a jury instruction on spoliation. *See Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 527, 613 S.E.2d 274, 281 (2005) (upholding a trial court's instructions on spoliation and noting that where a party fails to introduce in evidence documents relevant to the matter in question and within his control, there is a presumption that the evidence withheld, if forthcoming, would injure his case).

Finally, Defendants argue that their motion for a new trial should have been granted because the trial court's instruction on excessive speed was improper. Regarding Plaintiff's allegation that Defendant Hopkins drove in excess of the legally posted speed limit, the trial court instructed the jury as follows:

> [T]he motor vehicle law provides that it is unlawful to operate a motor vehicle at a speed greater than 35 miles per hour inside municipal corporate limits unless another maximum speed limit is posted. A violation of this safety statute is negligence in and of itself.

Defendants argue that this instruction was error because the speed limit on the exit ramp is not thirty-five miles per hour as it is elsewhere in Thomasville. *See* N.C. Gen. Stat. § 20-141(b) (2009) ("Except as otherwise provided in this Chapter, it shall be unlawful to operate a vehicle in excess of . . . [t]hirty-five miles per hour inside municipal corporate limits for all vehicles."). In support of this argument, Defendants cite *Whiteheart v. Garrett*, 128 N.C. App. 78, 493 S.E.2d 493 (1997), for the proposition that "[interstate exit] ramps which are part of the interstate highway system are not part of a local municipality and not subject to the rules and regulations of the local municipality." Despite Defendants' interpretation otherwise, *Whiteheart* merely holds that N.C. Gen. Stat. § 136-129 should be interpreted so that interstate exit ramps are considered part of the "right-of-way" of the interstate for purposes of the Department of Transportation billboard regulations. *See id.* The holding in *Whiteheart* does not stand for the proposition that interstate exit ramps are not subject to regulations of municipalities. *See id.*

Irrespective of any questions as to the governing speed limit on an interstate exit ramp, however, the fact remains that *Plaintiff* was not traveling on the interstate exit ramp when her vehicle collided with Defendants' tractor-trailer. Accordingly, at some point, even if that point was the point of collision, Defendants' tractor-trailer was traveling in excess of thirty-five miles per hour in the thirty-five-mile-per-hour municipal speed zone. Because the trial court's instruction stated that "it is unlawful to operate a motor vehicle at a speed greater than 35 miles per hour inside municipal corporate limits[,]" and because Defendants' tractor-trailer was being operated in excess of that speed while inside the municipal corporate limits at the time of the collision, we conclude that the trial court's instruction was not error. Accordingly, the trial court did not err by denying Defendants' motion for a new trial. Defendants' argument is overruled.

NO ERROR.

Chief Judge MARTIN and Judge STROUD concur.

STATE OF NORTH CAROLINA v. LINDA DANIEL, DEFENDANT

No. COA09-1264

(Filed 7 December 2010)

Motor Vehicles— driving while impaired—length of detention

In a case dealing with the length of time driving while impaired defendant was detained and the denial of defendant's motion to dismiss the charge, the trial court's finding that defendant's roommate was determined not to fulfill the statutory requirements of being a sober, responsible adult was supported by the evidence. Further more, the court's conclusion that no substantial violation of defendant's rights had occurred was supported by the evidence.

Judge ELMORE dissenting.

Appeal by defendant from judgment entered 23 April 2009 by Judge Jesse B. Caldwell, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 March 2010.

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

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for defendant-appellant.

JACKSON, Judge.

Linda Daniel ("defendant") appeals her 23 April 2009 conviction for driving while impaired based upon the 18 December 2008 denial of her motion to dismiss the charge. For the reasons discussed herein, we affirm.

At approximately 8:26 p.m. on 29 December 2007, Charlotte-Mecklenburg Police Officer A.L. Holt ("Officer Holt") observed a red GMC Jimmy ("the car") swerve outside of the appropriate travel lane multiple times. It was later determined that defendant was the driver of the car. Officer Holt activated his blue lights to stop defendant's car; she came to a stop in a left turn lane but began to drive away when the traffic light turned green. Officer Holt "bang[ed] on the side of the car" and defendant stopped ten to fifteen feet from her original stopping

point. Officer Holt observed that defendant was sitting in the driver's seat of the car, that there was "a strong odor of alcohol about her breath[,]" and that defendant had bloodshot eyes and dilated pupils. When asked, defendant denied that she had been drinking.

Officer Holt asked defendant to step out of the car in order to take three field sobriety tests. Defendant held onto the door of the car when she exited it and "stumbled" as she stepped out. Defendant subsequently failed the "one legged stand" test, the "walk and turn" test, and the "finger to nose" test, leading Officer Holt to form the opinion that defendant was appreciably impaired by alcohol. Officer Holt placed defendant under arrest for driving while impaired (DWI), driving while license revoked, and transporting an open container. He then transported her to the Mecklenburg County Intake Center.

Meanwhile, two other Charlotte-Mecklenburg police officers arrived at the scene to conduct a search of the car. That search produced nine empty or open containers of beer, several bottle caps, and a half-full cup of beer in a cup holder. Officer D. Pogue ("Officer Pogue") remained with the car until defendant's roommate, Jack Bruce ("Bruce"), arrived at the scene on foot in order to take possession of the car. Officer Pogue testified that Bruce "had the smell of alcoholic beverage coming from his mouth, his person." Nonetheless, he gave Bruce the car keys. According to Officer Pogue, the "main concern is to relinquish control [of the car] out of our custody" in case "something happens to the vehicle[.]"

Upon arrival at the Intake Center, defendant was asked to submit to a chemical analysis of her breath via the Intoxilyzer. Defendant consented and waived her statutory right to have either an attorney or witness present. The analysis was conducted at 10:32 p.m., and defendant's Intoxilyzer results indicated a blood alcohol concentration of 0.17, more than twice the legal limit of 0.08.

Bruce arrived at the jail sometime between 11:00 p.m. and 12:25 a.m. He talked with a sheriff's deputy and then with "a lady behind a window." The woman asked Bruce if he had had anything to drink that day, and he responded that he "had dr[u]nk a beer at . . . supper." She informed him of "the amount of the bond" and "the charges[.]" According to Bruce, she then "insisted that [he] needed to get a female to get [defendant] out." According to police records, defendant's processing was not completed until approximately midnight. At approximately 12:40 a.m., Bruce personally met with defendant. He met with her for approximately eight minutes, spoke with and

observed her, and testified that "she definitely appeared upset[,]" "she had been crying," and "her speech was good." Defendant was not released into Bruce's custody until 6:34 p.m. on 30 December 2007, nearly twenty-four hours after her initial traffic stop.

Defendant's motion to dismiss the DWI charge was heard and denied on 18 December 2008. On 23 April 2009, following a trial by jury, defendant was found guilty of DWI. Defendant appeals.

Defendant's sole argument on appeal is that the trial court erred by denying her motion to dismiss, because the lengthy detention violated her statutory rights to the point of irreparably prejudicing any preparation of a defense to the charge. We disagree.

Our review of the denial of a motion to dismiss based upon alleged violations of statutes is limited to " 'whether there is competent evidence to support the findings and the conclusions. If there is a conflict between the [S]tate's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal.' " *State v. Labinski*, 188 N.C. App. 120, 124, 654 S.E.2d 740, 743 (quoting *State v. Lewis*, 147 N.C. App. 274, 277, 555 S.E.2d 348, 351 (2001)), *disc. rev. denied*, 362 N.C. 367, 661 S.E.2d 889 (2008). "Findings of fact which are not challenged 'are presumed to be correct and are binding on appeal.' " *Id.* (quoting *State v. Eliason*, 100 N.C. App. 313, 315, 395 S.E.2d 702, 703 (1990)).

"Dismissal of charges for violations of statutory rights 'is a drastic remedy which should be granted sparingly. Before a motion to dismiss should be granted . . . it must appear that the statutory violation caused irreparable prejudice to the preparation of defendant's case.' " *Id.* at 124, 654 S.E.2d at 742-43 (quoting *State v. Rasmussen*, 158 N.C. App. 544, 549-50, 582 S.E.2d 44, 50, *disc. rev. denied*, 357 N.C. 581, 589 S.E.2d 362 (2003)) (emphasis removed).

In *State v. Knoll*, our Supreme Court set forth the analysis governing dismissal of charges based upon alleged statutory violations. 322 N.C. 535, 369 S.E.2d 558 (1988) ("*Knoll II*"). In that case, three separate cases were consolidated. *Id.* at 536, 369 S.E.2d at 559. In each of the three cases, the trial courts had dismissed the DWI charges based upon the State's violations of numerous statutes. *Id.* On appeal, this Court had reversed the trial courts, noting that

> [b]ecause of the change in North Carolina's driving while intoxicated laws, denial of access is no longer inherently prejudicial to

> a defendant's ability to gather evidence in support of his innocence in every driving while impaired case. While denial of access was clearly prejudicial in *Hill*, under the current 0.10 statute, a defendant's only opportunity to obtain evidence is not lost automatically, when he is detained, and improperly denied access to friends and family. Prejudice may or may not occur since a chemical analysis result of 0.10 or more is sufficient, on its face, to convict.

State v. Knoll, 84 N.C. App. 228, 233, 352 S.E.2d 463, 466 (1987) ("*Knoll I*"), *rev'd by Knoll II*, *supra*. Even though our Supreme Court agreed with this Court's holding that "prejudice will not be assumed to accompany a violation of defendant's statutory rights, but rather, defendant must make a showing that he was prejudiced in order to gain relief[,]" *Knoll II*, 322 N.C. at 545, 369 S.E.2d at 564, it reversed this Court and affirmed the trial courts, *id.* at 548, 369 S.E.2d at 565-66. According to the *Knoll II* Court, each of the defendants in these cases made a sufficient showing of a substantial statutory violation and of the prejudice arising therefrom to warrant relief. More precisely, we conclude that the findings of the district court in each case were in no way challenged, that the evidence presented in each case was adequate to support the finding of fact that the defendant was prejudiced, and that this finding in turn supports the trial judge's conclusion that defendant was irreparably prejudiced.

Id. at 545-46, 369 S.E.2d at 564.

In *Knoll II*, our Supreme Court emphasized the findings of the separate trial courts and that such findings, if unchallenged or if supported by competent evidence, would not be disturbed on appeal. *Id.* at 547, 369 S.E.2d at 565. Specifically, the *Knoll II* Court noted that each trial court had made findings that (1) the defendant was cooperative and did not create any disturbance; (2) the time of confinement was crucial to the defendant's ability to gather evidence for his defense; and (3) the magistrate had "failed to carry out his responsibilities regarding pretrial release under N.C.G.S. §§ 15A-511(b), -533(b), and -534(c)." *Id.* at 543, 369 S.E.2d at 563. These findings supported each trial court's determination that dismissal of the defendant's charge was warranted. *Id.* at 545-46, 369 S.E.2d at 564. We are not confronted with the same dilemmas in the instant case.

First, unlike the trial courts in Knoll II, the trial court here denied defendant's motion to dismiss. Pursuant to our standard of review, we must determine only whether the trial court's finding of fact—"It

appears that that magistrate determined Mr. Bruce not to be a sober, responsible adult willing to assume responsibility for the defendant"—is supported by competent evidence, because defendant's assignments of error challenged only that finding.[1]

Here, the trial court had evidence before it that (1) a police officer had smelled alcohol on Bruce's breath earlier in the evening and (2) Bruce had responded in the affirmative when asked whether he had been drinking prior to being denied access to defendant. Furthermore, when asked whether he was given a reason as to why defendant was not released to him, Bruce testified, "They said because I had dr[u]nk a beer earlier in the day." The trial court's findings reflect this evidence:

> Officer Pogue noticed an odor of alcohol on Mr. Bruce's person, but nonetheless relinquished to Mr. Bruce the keys to the defendant's vehicle.
>
> . . . .
>
> Mr. Bruce has testified when he appeared at the jail the lady behind the glass asked him if he had had anything to drink that day, [to] which he answered yes, that he had consumed one beer with his dinner.

As noted *supra*, defendant does not challenge either of these findings. Based upon these findings, the trial court further found

> [t]his testimony, coupled with the testimony of Officer Pogue that he noticed an odor of alcohol about the breath or person of Mr. Bruce, creates at least some indication that the persons charged with making the determinations . . .
>
> [interruption to discuss whether the person who talked with Bruce was, in fact, a magistrate]
>
> . . . determined Mr. Bruce not to be a sober, responsible adult willing to assume responsibility for the defendant.

Even though defendant introduced evidence that Bruce was told that he was denied access based upon his gender, the trial court resolved that evidentiary conflict, and it is not our province to disturb its

1. Although our current Rules of Appellate Procedure require an appellant to provide only general "issues presented on appeal" in order to preserve questions for appeal, this appeal was filed prior to 1 October 2009, and therefore, is subject to the stricter "assignments of error" analysis. N.C.R. App. P. 10(c)(1) (2007).

determination. *See Labinski*, 188 N.C. App. at 124, 654 S.E.2d at 743 (quoting *State v. Lewis*, 147 N.C. App. 274, 277, 555 S.E.2d 348, 351 (2001)). Our task is not to re-weigh the evidence before the trial court but to uphold the trial court's findings so long as they are supported by competent evidence, even if there also exists evidence to the contrary. *State v. Lewis*, 147 N.C. App. 274, 277, 555 S.E.2d 348, 351 (2001) (citing *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982)). Accordingly, as in *Knoll II*, we uphold the trial court's finding—that Bruce was determined not to fulfill the statutory requirements of being a sober, responsible adult—because it is supported by the evidence.

Second, in *Knoll II*, three separate statutes, intended to provide procedural protections to people suspected of driving while intoxicated, were violated in each of the cases before that Court. North Carolina General Statutes, section 15A-511(b) requires that the magistrate inform a defendant during her initial appearance of "(1) [t]he charges against [her]; (2) [her] right to communicate with counsel and friends; and (3) [t]he general circumstances under which [s]he may secure release under the provisions of Article 26, Bail." N.C. Gen. Stat. § 15A-511(b) (2005). North Carolina General Statutes, section 15A-533(b) provides that, in noncapital cases, a defendant "must have conditions of pretrial release determined, in accordance with G.S. 15A-534." N.C. Gen. Stat. § 15A-533(b) (2005). According to North Carolina General Statutes, section 15A-534(c),

> In determining which conditions of release to impose, the judicial official must, on the basis of available information, take into account the nature and circumstances of the offense charged; the weight of the evidence against the defendant; the defendant's family ties, employment, financial resources, character, and mental condition; whether the defendant is intoxicated to such a degree that [s]he would be endangered by being released without supervision; the length of [her] residence in the community; [her] record of convictions; [her] history of flight to avoid prosecution or failure to appear at court proceedings; and any other evidence relevant to the issue of pretrial release.

N.C. Gen. Stat. § 15A-534(c) (2005).

Here, in contrast with *Knoll II*, defendant does not argue that multiple statutes were violated in her detention. She does not contend that violations of her rights occurred during her initial appearance; her sole argument is that, even though the conditions of her

pretrial release were satisfied, she was not released. Specifically, defendant contends that her rights were violated only pursuant to North Carolina General Statutes, section 15A-534.2(c), which provides that

> [a] defendant subject to detention under this section has the right to pretrial release under G.S. 15A-534 when the judicial official determines either that:
>
> . . . .
>
> (2) A sober, responsible adult is willing and able to assume responsibility for the defendant until [her] physical and mental faculties are no longer impaired. . . .

N.C. Gen. Stat. § 15A-534.2(c) (2005). In the instant case, no such determination was reached. Although Bruce presented himself as the person "willing and able to assume responsibility for [] defendant[,]" he was determined not to be "[a] sober, responsible adult[.]" Therefore, defendant's argument must fail.

Third, the trial court's two conclusions of law, only the first of which was challenged by defendant, were as follows:

> [G]iven the fact that [defendant] met personally with Mr. Bruce and did not request a witness and was not denied the opportunity for a witness to view the chemical analysis, that the defendant has failed to demonstrate any prejudice in the manner in which she was detained or any denial of her access to friends or family during the period of the detention, to serve to deprive her of the benefit of any evidence that might have been used on her behalf in defense of these charges.
>
> . . . .
>
> [T]he violations, if any, of the defendant's rights under the statute G.S. 15A-534.2, as well as her rights under the United States Constitution and the Constitution of the State of North Carolina, had not been violated so f[l]agrantly at least so as to bear a dismissal of these proceedings.

Taken together, it is clear that the trial court concluded that (1) no statutory violation occurred, and (2) even if a violation occurred, defendant has not shown that she was "irreparably prejudiced" by such violation.

Pursuant to our standard of review, we must determine whether the challenged conclusion is supported by the evidence. In the instant

case, the State presented evidence that (1) defendant was advised that she could request an attorney or other witness to observe her Intoxilyzer test, (2) defendant declined to request a witness for the test, (3) Bruce was allowed to see defendant within twenty-five minutes of her exiting the magistrate's office, (4) Bruce met personally with defendant, and (5) Bruce was able to talk with and observe defendant for approximately eight minutes. The trial court made findings of fact that reflect this evidence, and defendant does not challenge these findings.

Because the procedural protections of the statutes challenged in *Knoll II* remained intact in the instant case, the trial court's conclusion that no *substantial* violation of defendant's rights occurred is supported by the evidence before it. Furthermore, its findings of fact, which are supported by the evidence as discussed *supra*, support its conclusions of law. Even though the extensive detention of defendant was inexcusable, she was permitted to have a witness when the Intoxilyzer was administered, which she declined. She also personally met with her friend for eight minutes during the crucial period of time subsequent to her arrest. Accordingly, pursuant to our standard of review, we affirm the trial court's order denying defendant's motion to dismiss.

Affirmed.

Judge STROUD concurs.

Judge ELMORE dissents in a separate opinion.

ELMORE, Judge, dissenting.

Because I would reverse the trial court's denial of Linda Daniel's (defendant) motion to dismiss, I respectfully dissent.

Defendant argues to this Court that a lengthy detainment irreparably prejudiced her defense against the charge. I agree, and so would reverse.

Around 8 p.m. on 29 December 2007, Charlotte-Mecklenburg Police Officer A. Holt saw a car driven by defendant swerve outside of the appropriate travel lane multiple times. Officer Holt activated his blue lights to stop defendant's car; she came to a stop in a left turn lane, but began to drive away when the traffic light turned green. Officer Holt "bang[ed]" on the side of the car to get her attention, and

defendant stopped ten to fifteen feet from the original stopping point. Officer Holt observed that defendant was operating the car, that there were no passengers, that there was a strong odor of alcohol, and that defendant had bloodshot eyes and dilated pupils. When asked, defendant denied she had been drinking.

Officer Holt asked defendant to step out of the car and take three field sobriety tests. Defendant held onto the door of the car when she exited the vehicle and stumbled as she stepped out. Defendant subsequently failed the "one legged stand" test, the "walk and turn" test, and the "finger to nose" test, leading Officer Holt to form the opinion that defendant was appreciably impaired by alcohol. Officer Holt placed defendant under arrest for driving while impaired (DWI), driving while license revoked, and transporting an open container. He then transported her to the Mecklenburg County Intake Center.

Meanwhile, two other Charlotte Mecklenburg police officers arrived at the scene to conduct a search of the car. That search produced nine empty or open beer bottles, several bottle caps, and a half-full cup of beer in a cup holder. While the officers were conducting the search, defendant's roommate, Jack Bruce, arrived at the scene seeking to take possession of the car. Officer Donnie Pogue testified that Mr. Bruce gave off an odor of alcohol, but gave him the keys to the car; he testified that the "main concern is to relinquish control [of the car] out of our custody" in case "something happens to the vehicle[.]"

Upon arrival at the Intake Center, defendant was asked to submit to a chemical analysis of her breath via the Intoxilyzer. Defendant consented and waived her statutory right to have either an attorney or witness present. The analysis was conducted at 10:32 p.m., and defendant's Intoxilyzer results showed a blood alcohol concentration of 0.17, more than twice the legal limit of 0.08.

Mr. Bruce arrived at the jail at 12:25 a.m. and was allowed to speak with defendant after she was processed in the magistrate's office. However, for reasons not completely clear in the record, defendant was not allowed to be released into Mr. Bruce's custody. Instead, Mr. Bruce was told to come back the next day; the person with whom he spoke—again not clear in the record—"kept stressing you have [to have] a female to come up here and get her out tonight." Defendant was eventually released into Mr. Bruce's custody at 6:34 p.m. on 30 December 2007, nearly twenty-four hours after her initial traffic stop.

Defendant's motion to dismiss the DWI charge was heard and denied on 18 December 2008. After a trial by jury, defendant was found guilty of DWI on 23 April 2009.

Defendant appeals the trial court's denial of her motion to dismiss the DWI charge, asserting that her lengthy detention violated her statutory rights to the point of irreparably prejudicing any preparation of a defense to the charge. As stated in this Court's ruling in *State v. Knoll* (a consolidation of three similar DWI cases), "[n]o case should be dismissed for the violation of a defendant's statutory rights unless, at the very least, these violations cause irreparable prejudice to the defendant's preparation of his case." *See State v. Knoll*, 84 N.C. App. 228, 231, 352 S.E.2d 463, 465 (1987) ("*Knoll I*") (citation omitted), *rev'd on other grounds*, 322 N.C. 535, 369 S.E.2d 558 (1988) ("*Knoll II*"). Thus, the first issue is whether defendant's statutory rights were violated.

Defendant's primary argument on this point is that her right to be released when "[a] sober, responsible adult is willing and able to assume responsibility for the defendant until his physical and mental faculties are no longer impaired," N.C. Gen. Stat. § 15A-534.2(c)(2) (2009), was violated by her continued detention after Mr. Bruce arrived at the jail. Defendant argues that she should have been allowed to have been released to Mr. Bruce's custody after her bond was set. Defendant asserts that Mr. Bruce must have already been deemed a "sober, responsible adult" by the Charlotte-Mecklenburg Police when they gave him custody of defendant's car and, as such, there was no legitimate basis for not releasing her into his custody when he arrived at the jail at 12:25 a.m. I agree.

In its oral ruling on the motion to dismiss, the trial court drew the same inference as defendant: namely, that the officer who turned over the keys to Mr. Bruce

> did not form a conclusion that his bodily or mental faculties or both were appreciably impaired from the use of alcohol at that time, or he wouldn't have turned the keys over.
>
> It stands to reason to me that he didn't think he was impaired to the point that he shouldn't be operating a motor vehicle, or he wouldn't have turned those keys over.

The court then recounted the ensuing events of the evening, pausing to question one of the attorneys as to whom Mr. Bruce spoke to once at the jail. After that exchange, the trial court deduced that it was

likely a magistrate who informed Mr. Bruce that a female must return to pick up defendant, and concluded:

> *It appears* that that magistrate determined Mr. Bruce not to be a sober, responsible adult willing to assume responsibility for the defendant. Now, whether or not I agree with that determination, it doesn't matter. I'm not sure that I would have agreed if I had been faced with the same decision when she made that decision. And there is at least some evidence that tends to support that determination.
>
> *For that reason* my conclusion is that the violations, if any, of the defendant's rights under the statute G.S. 15A-534.2 . . . had not been violated so f[l]agrantly at least so as to bear a dismissal of these proceedings.

(Emphasis supplied.)

A trial court's findings of fact will not be disturbed on appeal, so long as they are supported by competent evidence. *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982). However, contrary to the trial court's statement, I can find no evidence in the record to support the determination that Mr. Bruce was not deemed a sober, responsible adult.

Where, as here, the hearing left it unclear as to whether a magistrate had made such a determination, we may look to the record for evidence on the point. *See*, *e.g.*, *State v. Haas*, 131 N.C. App. 113, 118-19, 505 S.E.2d 311, 314-15 (1998) (examining evidence in the record to determine whether the adult could be considered sober and willing per the statute when trial court declined to do so). The record on appeal tends to show that Mr. Bruce was indeed a sober, responsible adult, and provides little or no evidence to the contrary. As the trial court noted, the officer who dealt with Mr. Bruce at the scene of the arrest, Officer Pogue, testified that Mr. Bruce did smell of alcohol, but that he did not administer any field sobriety tests, and that he released the car into Mr. Bruce's custody. The only other person whose opinion as to Mr. Bruce's condition would be relevant is the unidentified person who spoke with Mr. Bruce through a glass partition, and the most that can be said regarding that person's conclusion is the trial court's statement that "*[i]t appears* that that magistrate determined Mr. Bruce not to be a sober, responsible adult willing to assume responsibility for the defendant." Indeed, the reason explicitly given by the magistrate for not releasing defendant into Mr. Bruce's custody was not his condition but rather his gender.

As such, I cannot agree with the majority that this finding of fact is supported by competent evidence. Per the record, Mr. Bruce met the requirements of N.C. Gen. Stat. § 15A-534.2(c)(2), and when defendant was not released to him, her rights under the statute were violated.

Having concluded that defendant's statutory rights were indeed violated, I turn now to the question of whether defendant has shown that the violation—that is, her prolonged detainment and failure to be released when Mr. Bruce came to the jail—caused her case to be irreparably prejudiced. As we held in *Knoll I*, "denial of access is no longer inherently prejudicial to a defendant's ability to gather evidence in support of his innocence in every driving while impaired case." 84 N.C. App. at 233, 352 S.E.2d at 466. "[A]t the very least, a defendant must show that 'lost evidence or testimony would have been helpful to his defense, that the evidence would have been significant, and that the evidence or testimony was lost' as a result of the statutory deprivations of which he complains." *Id.*, 84 N.C. App. at 234, 352 S.E.2d at 466 (quoting *State v. Deitz*, 289 N.C. 488, 493, 223 S.E.2d 357, 360 (1976)).

Here, the evidence to which defendant points is Mr. Bruce's observation in the eight minutes he met with her that she had been crying, leaving her eyes red, and that her speech at that time was clear and not slurred. As our Supreme Court concluded regarding the three defendants in *Knoll II*,

> [e]ach defendant's confinement in jail indeed came during the crucial period in which he could have gathered evidence in his behalf by having friends and family observe him and form opinions as to his condition following arrest. This opportunity to gather evidence and to prepare a case in his own defense was lost to each defendant as a direct result of a lack of information during processing as to numerous important rights and because of the commitment to jail. The lost opportunities, in all three cases, to secure independent proof of sobriety, and the lost chance, in one of the cases, to secure a second test for blood alcohol content constitute prejudice to the defendants in these cases. That the deprivations occurred through the inadvertence rather than the wrongful purpose of the magistrate renders them no less prejudicial.

Knoll II, 322 N.C. at 547-48, 369 S.E.2d at 565 (citation omitted). The same is true in the case at hand, where defendant was detained during the sole period in which she might have obtained evidence helpful to her defense.

I note that, in *Knoll II*, the Supreme Court emphasized the fact that the trial court in each case had found that such evidence was lost as a result of the statutory deprivations, and that no such finding was made by the trial court in the case *sub judice*. *Id.*, 322 N.C. at 543-44, 369 S.E.2d at 563-64. However, as discussed above, the trial court found that no statutory deprivation occurred, and thus did not consider whether any such evidence was lost.

In the three cases considered by *Knoll II*, each defendant was permitted to speak to an attorney, family member, or friend only briefly; and, in the two cases in which those visitors came to the jail, each defendant was inexplicably held for several hours (over six in one case and over eight in the other) *after* the visitors arrived there willing to take custody of the defendant. *Knoll II*, 322 N.C. at 537-42, 369 S.E.2d at 560-63. Here, defendant was permitted to speak to Mr. Bruce for approximately eight minutes and was held for over eighteen hours after he arrived at the jail willing to take custody of her. As such, pursuant to *Knoll II*, I would reverse the trial court's ruling and hold that the motion to dismiss should have been granted.

STATE OF NORTH CAROLINA v. ANTONIO LAMONT BAKER

No. COA10-98

(Filed 7 December 2010)

1. Appeal and Error— standard of review—denial of motion to suppress—no findings or conclusions

The appropriate standard of appellate review for the denial of a motion to suppress where the trial court did not make findings of fact and conclusions of law was whether the trial court provided the rationale for its ruling from the bench and whether there was a material conflict in the evidence presented at the suppression hearing. If both criteria are met, then the findings are implied and shall be binding on appeal if supported by competent evidence. If either is not met, then the failure to make findings and conclusions is fatal.

2. Criminal Law— denial of motion to suppress—material conflict in evidence—definition

For purposes of N.C.G.S. § 15A-977(f) (which requires findings and conclusions after the denial of a motion to suppress), a

material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter is likely to be affected.

3. Criminal Law— denial of motion to suppress—material conflict of evidence—defendant's freedom to leave

There was a material conflict in the evidence presented at a suppression hearing where defendant's evidence that he did not feel free to leave controverted the State's evidence in a manner that affected the outcome of the matter to be decided. The trial court was therefore required to make findings and conclusions and its failure to do so was fatal to the validity of its denial of defendant's motion to dismiss.

Appeal by defendant from judgment entered 17 September 2009 by Judge Alma L. Hinton in Halifax County Superior Court. Heard in the Court of Appeals 2 September 2010.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General John J. Aldridge, III, for the State.

Greene & Wilson, P.A., by Thomas Reston Wilson, for defendant-appellant.

JACKSON, Judge.

Antonio Lamont Baker ("defendant") appeals his 17 September 2009 conviction for carrying a concealed gun and possession of a firearm by a felon and his sentence of imprisonment. For the reasons stated herein, we reverse and remand with instructions.

During the evening of 23 October 2008 Officer Mike Moseley ("Officer Moseley"), a seven-year veteran of the Roanoke Rapids Police Department ("RRPD"), was on duty and conducting routine patrol. Officer Moseley and other officers were patrolling in the general vicinity of a nursing facility known as Guardian Care with the purpose of investigating past crimes and preventing future crime. Within the immediately preceding twenty-four hour period, just before midnight on 22 October 2008, Officer Moseley had responded to two incidents of breaking and entering of a vehicle that occurred in the parking lot of Guardian Care as well as two incidents of vandalism that occurred at separate locations within one block of Guardian Care. At the time of the 23 October 2008 patrol, RRPD did not have any suspects in custody related to the 22 October 2008 inci-

dents. Officer Moseley testified that the only description of possible perpetrators of the 22 October 2008 crimes was that "people from Guardian Care observed males in the vicinity."

Just before 11:00 p.m. on 23 October 2008, Officer Moseley encountered defendant walking in front of Guardian Care. Defendant was wearing dark outer clothing, including a jacket and pants. Upon seeing defendant, Officer Moseley activated his blue lights and maneuvered his patrol vehicle to a position behind defendant. Officer Moseley made radio contact with dispatch at 10:57 p.m. to notify them that he was exiting his patrol vehicle for the purpose of making a "field contact."[1] A second officer, Officer Hardy, arrived at the scene and assumed the role of backup officer. Other officers arrived at the scene during Officer Moseley's encounter with defendant.

After exiting his patrol vehicle, Officer Moseley approached defendant and asked him for his name, what he was doing on the street at that time of the night, and whether he had any outstanding warrants. Defendant responded by providing his name, denying that he had any warrants, and stating that he was walking home from his girlfriend's house. While defendant was speaking, Officer Moseley detected the odor of alcohol and observed that defendant was "real fidgety" and "looking around." Officer Moseley told defendant he was going to "pat him down real quick" and asked defendant if he had any weapons on him, to which defendant replied "no." In response to Officer Moseley's statement of intent to pat him down, defendant raised his hands as if to submit to the search.

The pat-down search performed by Officer Moseley consisted of Officer Moseley placing his right hand over the top of defendant's shirt and outer jacket at the level of defendant's waistband, and revealed an object that felt like the butt of a gun. Officer Moseley announced the presence of what he believed to be a gun to Officer Hardy, who was standing several feet behind defendant. Officer Moseley then handed Officer Hardy a pair of handcuffs, and Officer Hardy handcuffed defendant while Officer Moseley retrieved the gun from defendant's waistband.

The officers charged defendant with misdemeanor carrying a concealed gun in violation of North Carolina General Statutes, sec-

1. A "field contact" refers to a form routinely filled out by RRPD officers that records information related to contact made with citizens within an officer's patrol area that are "out and about at night." The field contact forms are retained by the RRPD and used to identify potential suspects of crimes reported at or near locations of a field contact.

tion 14-269(A1) and possession of a weapon while intoxicated in violation of section 131.02 of the Roanoke Rapids Code of City Ordinances. Upon learning that defendant previously had been convicted of a felony, officers charged defendant with possession of a firearm by a felon in violation of North Carolina General Statutes, section 14-415.1. On 16 February 2009, a grand jury returned a true bill of indictment regarding the statutory criminal offenses. On 17 September 2009, the trial court dismissed the charge of possession of a weapon while intoxicated due to insufficient evidence.

On 16 September 2009, defendant moved to suppress the evidence against him, reasoning that the evidence was the fruit of an unlawful search and in violation of the rights guaranteed to him by the Fourth and Fourteenth Amendments of the United States Constitution and similar provisions of the North Carolina Constitution. The evidence presented at the suppression hearing held on 17 September 2009 consisted of testimony from both Officer Moseley and defendant. After receiving the evidence and hearing the arguments of counsel, the trial court denied defendant's motion to suppress, stating "the stop was not unreasonable." A jury trial on the remaining criminal charges immediately followed the suppression hearing on 17 September 2009, concluding with a verdict of guilty and convicting defendant of carrying a concealed gun and possession of a handgun by a felon. That same day, the trial court entered a judgment and commitment order sentencing defendant to a term of imprisonment between twenty and twenty-four months. From the judgment of conviction and sentencing, defendant appeals.

[1] Defendant's first assignment of error is that the trial court's failure to make findings of fact and conclusions of law in connection with its ruling on defendant's motion to suppress in violation of North Carolina General Statutes, sections 15A-977 (d) and (f) constitutes reversible error. We agree.

When a motion to suppress is not summarily denied, the trial court "must make the determination after a hearing and finding of facts." N.C. Gen. Stat. § 15A-977(d) (2007). The trial court then "*must* set forth in the record [her] findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2007) (emphasis added).

Both defendant and the State contend the standard of review for a trial court's ruling on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting, and the trial court's con-

clusions of law are fully reviewable. *State v. Leach*, 166 N.C. App. 711, 715, 603 S.E.2d 831, 834 (2004). Defendant, however, recognizing that he has assigned as error the trial court's failure to make findings of fact and conclusions of law pursuant to North Carolina General Statutes, sections 15A-977(d) and (f), urges this Court to exercise its discretion to determine whether the trial court's failure to comply with section 15A-977(f) deprived defendant of meaningful review. The State argues that a trial court's conclusions of law regarding whether an officer had reasonable suspicion to detain defendant are reviewable *de novo*. *State v. Brooks*, 337 N.C. 132, 446 S.E.2d 579 (1994); *State v. Kincaid*, 147 N.C. App. 94, 555 S.E.2d 294 (2001); *State v. Munoz*, 141 N.C. App. 675, 541 S.E.2d 218 (2001).

The standard of review urged by defendant and the State cannot be the appropriate standard of review when the trial court's failure to make findings of fact and conclusions of law is assigned as error. We take this opportunity to clarify the appropriate standard of review.

We observe that the language of section 15A-977(f) is mandatory—a trial court "*must* set forth in the record [her] findings of fact and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2007) (emphasis added). *Compare In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978) (noting that, when a statute employs the word "may," it ordinarily shall be construed as permissive and not mandatory, but legislative intent must control the statute's construction) *with State v. Inman*, 174 N.C. App. 567, 621 S.E.2d 306 (2005) (observing that use of the words "must" and "shall" in a statute are deemed to indicate a legislative intent to make the provision of the statute mandatory such that failure to observe it is fatal to the validity of the action), *disc. rev. denied*, 360 N.C. 652, 638 S.E.2d 907 (2006).

The language of section 15A-977(f) has been interpreted as mandatory to the trial court "*unless* (1) the trial court provides its rationale from the bench, *and* (2) there are no material conflicts in the evidence at the suppression hearing." *State v. Williams*, 195 N.C. App. 554, 555, 673 S.E.2d 394, 395 (2009) (citing *State v. Shelly*, 181 N.C. App. 196, 204-05, 638 S.E.2d 516, 523, *disc. rev. denied*, 361 N.C. 367, 646 S.E.2d 768 (2007)) (emphasis added). "If these two criteria are met, the necessary findings of fact are implied from the denial of the motion to suppress." *Id.*[2] The North Carolina Supreme Court has

2. The holding of *Williams* notwithstanding, the authority upon which *Williams* relies raises a question of whether satisfaction of both criteria is a necessary condition precedent to relieving a trial court from the mandate of section 15A-977(f) to make findings

articulated its preference that a trial court make findings of fact, even when no material conflict in the evidence exists, opining that "it is always the better practice to find all facts upon which the admissibility of the evidence depends." *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980). A record containing findings of fact and conclusions of law will facilitate "a meaningful appellate review of the [trial court's] decision." *State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984).

In the absence of controlling authority to the contrary, and in light of the mandatory language contained in section 15A-977(f), we conclude that when a trial court's failure to make findings of fact and conclusions of law is assigned as error, the appropriate standard of review on appeal is as follows: The trial court's ruling on the motion to suppress is fully reviewable for a determination as to whether the two criteria set forth in *Williams* have been met—(1) whether the trial court provided the rationale for its ruling on the motion to suppress from the bench; and (2) whether there was a material conflict in the evidence presented at the suppression hearing. If a reviewing court concludes that both criteria are met, then the findings of fact are implied by the trial court's denial of the motion to suppress, *Williams*, 195 N.C. App. at 555, 673 S.E.2d at 395, and shall be binding on appeal if supported by competent evidence, *Leach*, 166 N.C. App. at 715, 603 S.E.2d at 834. If a reviewing court concludes that either of the criteria is not met, then a trial court's failure to make

of fact and conclusions of law. In *Williams*, this Court relied on *Shelly* as authority for the stated rule. The *Shelly* Court relied on the holdings of two other cases to identify instances in which a trial court's failure to make findings of fact was held not to constitute reversible error. Specifically, the *Shelly* Court relied on *State v. Jacobs*, 174 N.C. App. 1, 620 S.E.2d 204 (2005), as authority for the proposition that a trial court does not commit reversible error when it fails to enter written findings of fact if the trial court provided the rationale for its ruling from the bench. *State v. Shelly*, 181 N.C. App. 196, 204, 638 S.E.2d 516, 523, *disc. rev. denied*, 361 N.C. 367, 646 S.E.2d 768 (2007). The *Shelly* Court relied on *State v. Phillips*, 300 N.C. 678, 268 S.E.2d 452 (1980), as authority for the proposition that a trial court does not commit error when it admits challenged evidence without making specific findings of fact when no material conflict in the evidence exists. *Shelly*, 181 N.C. App. at 204-05, 638 S.E.2d at 523. The *Shelly* Court then concluded that both conditions had been satisfied in the case it was deciding. There is no discussion or other language appearing in *Shelly* to indicate that both conditions must be satisfied as conditions precedent to relieving a trial court of the mandate of section 15A-977(f). We conclude, however, that *Williams* controls this appeal since "a subsequent panel of the same court is bound by" the decisions of a prior panel "unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Any concerns the parties may have as to controlling legal authority for this appeal, therefore, "must be addressed to the Supreme Court and the General Assembly." *Jailall v. Dept. of Public Instruction*, 196 N.C. App. 90, 91, 675 S.E.2d 79, 80, *disc. rev. and cert. denied*, ––– N.C. –––, 682 S.E.2d 212 (2009).

findings of fact and conclusions of law, contrary to the mandate of section 15A-977(f), is fatal to the validity of its ruling and constitutes reversible error. *See Inman*, 174 N.C. App. at 570, 621 S.E.2d at 309 (2005), *disc. rev. denied*, 360 N.C. 652, 638 S.E.2d 907 (2006). Accordingly, because the defendant assigns error to the trial court's failure to make findings of fact and conclusions of law in connection with its ruling on defendant's motion to suppress, we must review the trial court's ruling for a determination of whether the trial court provided the rationale for its ruling from the bench and whether there was a material conflict in the evidence presented at the hearing on defendant's motion to suppress.

[2] Our analysis begins with the issue we identify as dispositive relating to defendant's first assignment of error—whether a material conflict in the evidence presented at the suppression hearing exists. The State argues that the mandate of section 15A-977(f) does not apply because there was no material conflict in the evidence presented at the hearing on defendant's motion to suppress. While the State concedes that a conflict in the evidence exists regarding defendant's location in the roadway when Officer Moseley first encountered defendant—on the side of the road versus in the middle—the State contends that a conflict of this nature does not rise to the level of a material conflict because it would not affect the ultimate question of whether the stop was reasonable. Defendant argues the trial court was not relieved from the mandate of section 15A-977(f) because a material conflict in the evidence exists relating to the length of the stop, the number of officers on the scene, the purpose of the stop, and the reasonableness of the stop based on an objective standard.

Our analysis requires that we first determine when a "material conflict in the evidence" exists. The phrase "material conflict" neither appears in the language of section 15A-977(f) nor has it been specifically interpreted by either of our appellate courts.

Turning to the cases cited by defendant and the State for guidance, we observe that no reviewing court in North Carolina has held a trial court's failure to make findings of fact and conclusions of law constituted reversible error because of a material conflict in evidence presented at the suppression hearing. *See Horner*, 310 N.C. 274, 311 S.E.2d 281; *Phillips*, 300 N.C. 678, 268 S.E.2d 452; *Williams*, 195 N.C. App. 554, 673 S.E.2d 394; *State v. Toney*, 187 N.C. App. 465, 653 S.E.2d 187 (2007); *State v. Shelly*, 181 N.C. App. 196, 204-05, 638 S.E.2d 516, 523, *disc. rev. denied*, 361 N.C. 367, 646 S.E.2d 768 (2007); *State v.*

Jacobs, 174 N.C. App. 1, 620 S.E.2d 204 (2005); *State v. Norman*, 100 N.C. App. 660, 397 S.E.2d 647 (1990).

Notwithstanding the lack of precedent establishing when a material conflict in evidence exists, these cases are instructive because in each of these cases, the evidence presented at the suppression hearing was unchallenged by the opposing party. For example, in *Williams*, a case with facts very similar to the case *sub judice*, the Court's conclusion that no material conflict in the evidence existed at the suppression hearing is supported by the fact that the only evidence received during the suppression hearing was offered by the State, consisting only of the testimony of Officer Nathan Smith. *Williams*, 195 N.C. App. at 555-56, 673 S.E.2d at 395. *See also Toney*, 187 N.C. App. 465, 653 S.E.2d 187 (concluding no material conflict in the evidence existed when a police officer was the only witness to testify in connection with the defendant's motion to suppress such that the trial court's failure to make findings of fact was not reversible error). It previously has been determined that a material conflict in the evidence does not arise when the record on appeal demonstrates that defense counsel cross-examined the State's witnesses at the suppression hearing. *See Jacobs*, 174 N.C. App. at 8-9, 620 S.E.2d at 209 (holding no material conflict in the evidence existed where the evidence presented during the suppression hearing consisted of the testimony of law enforcement officers who were cross-examined by defense counsel). These cases therefore, are distinguishable from the case *sub judice* because both the State and defendant presented evidence at the suppression hearing.

The fact that defendant presented evidence is not, and cannot, by itself, be dispositive of whether a material conflict in the evidence existed. In its argument that no material conflict in the evidence exists, the State urges an interpretation of "material" consistent with its legal definition: "Having some logical connection with the consequential facts; Of such a nature that knowledge of the item would affect a person's decision-making; significant; essential." Black's Law Dictionary, 1066 (9th ed. 2009). "Material," as used in a context other than section 15A-977(f), also provides guidance. For example, Rule 56(c) of the North Carolina Rules of Civil Procedure provides that a party is entitled to summary judgment if there is no "genuine issue as to any *material fact*." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007) (emphasis added). In the context of Rule 56(c), facts are material if they are "of such nature as to affect the result of the action." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). Based

on the foregoing, we hold that, for purposes of section 15A-977(f), a material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected.

[3] Having determined what constitutes a material conflict in the evidence, we must now determine whether, at the hearing on defendant's motion to suppress, defendant presented evidence that controverts evidence presented by the State such that questions of the constitutionality of the stop and, ultimately, the suppression of evidence were likely to be affected. At issue at the hearing on defendant's motion to suppress was whether defendant was searched and seized in a manner permissible pursuant to the Fourth Amendment of the United States Constitution. Our Supreme Court has articulated factors to be considered when making a determination of whether a seizure has occurred. Those factors include "the number of officers present, whether the officer displayed a weapon, the officer's words and tone of voice, any physical contact between the officer and the individual, whether the officer retained the individual's identification or property, the location of the encounter, and whether the officer blocked the individual's path." *State v. Icard*, 363 N.C. 303, 309, 677 S.E.2d 822, 827 (2009). Accordingly, evidence by defendant that controverts the State's evidence relating to any one of these factors could create a material conflict in the evidence.

The State argues that the only conflict in the evidence relates to defendant's location in the road at the time Officer Moseley encountered defendant—the middle of the road versus side of the road—but that a conflict of this nature is not material because it is not likely to affect the ultimate question of the reasonableness of the stop. Defendant argues that a material conflict in the evidence presented at the suppression hearing exists as it pertains to the length of the stop, the purpose of the stop, defendant's location on the road, the number of officers present at the scene, and when the other officers arrived at the scene.

The record reveals that defendant did not present any evidence to controvert the length of the stop. Officer Moseley testified that approximately two to three minutes had elapsed from the time he exited his patrol vehicle to the time he commenced the pat-down search of defendant. Defendant's counsel neither cross-examined Officer Moseley regarding the length of the stop nor elicited testimony from defendant regarding the length of the stop during direct examination.

The record does reveal, however, that defendant presented evidence to controvert Officer Moseley's testimony regarding the number of officers present at the scene and when the other officers arrived. Officer Moseley testified that he and Officer Hardy arrived on the scene at approximately the same time and acknowledged that other officers arrived at the scene, but he could not remember whether the officers were present when he patted down defendant and detected the gun. Defendant testified that a total of four officers in four separate police cars were present at the time Officer Moseley asked defendant for his name, with two officers on the same side of the street as defendant and two officers on the other side of the street, with only the blue lights on Officer Moseley's car activated. Defendant further testified that, after Officer Moseley activated his blue lights, he no longer felt free to leave.

Defendant's evidence controverts the State's evidence and creates a material conflict in the evidence because it is likely to affect the outcome—the ultimate questions of the constitutionality of the encounter between Officer Moseley and defendant and whether the evidence should be suppressed. The Supreme Court of the United States has declared that a seizure occurs when "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Michigan v. Chesternut*, 486 U.S. 567, 573, 100 L. Ed. 2d 565, 571-72 (1988). Application of the "reasonable person" standard is meant to "ensure[] that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached." *Id.* Defendant argues that he was seized for purposes of the Fourth Amendment when Officer Moseley activated his blue lights. The State contends that defendant was free to leave until the time the gun was found.

Both defendant and the State agree that Officer Moseley activated his blue lights at the time he first encountered defendant. Officer Moseley testified the reason he activated his blue-lights was to notify other motorists of the presence of his patrol vehicle parked "in the middle of the road partially." Officer Moseley further testified that defendant was free to leave until the time the gun was detected and that he had not done anything to impede or prevent defendant from leaving. For example, Officer Moseley testified that by positioning his patrol vehicle behind defendant he did not obstruct or impede defendant's movement. Defendant, however, testified that he did not feel free to leave once Officer Moseley activated his blue-lights because he was aware that he was the only person on the street other than the officers.

The activation of blue lights on a police vehicle has been included among factors for consideration to determine when a seizure occurs. *See State v. Williams*, 201 N.C. App. 566, 686 S.E.2d 905 (2009) (concluding no seizure occurred for purposes of the Fourth Amendment when officer did not physically block defendant's vehicle from leaving the driveway with his patrol vehicle and neither activated the siren or blue-lights).[3]

Defendant also testified that, by the time Officer Moseley asked him his name, a total of four police officers, including Officers Moseley and Hardy, were present in four separate patrol vehicles, two on his side of the street and two on the other side of the street, all four officers having arrived at or near the same time. This testimony by defendant controverts the testimony of Officer Moseley that "[o]ther officers were arriving at some point. I don't recall if they were there by the time I found the gun or not. I don't think they were."

In ruling on defendant's motion to suppress, the trial court was faced with deciding, *inter alia*, whether a seizure for purposes of the Fourth Amendment occurred and, if so, whether the seizure was properly supported by probable cause or reasonable suspicion. The record indicates the trial court's ruling on the motion to suppress consists only of the following:

> THE COURT: Your motion to suppress is denied. I find that the stop was not unreasonable. A person in defendant's position could just as well have been a person who was in distress at that time of night, and the officer would have had an obligation to make—to stop and see if this person needed help, as well as preventing possible crimes and investigating past crimes, and that the length of the stop prior to the discovery of the weapon was not unreasonable, and therefore the motion to suppress is denied.

At the hearing on defendant's motion to suppress, it was incumbent upon the trial court to determine whether a reasonable person in the position of the defendant would not have felt free to leave. *See State v. Freeman*, 307 N.C. 357, 298 S.E.2d 331 (1983). While the State presented evidence to the effect that defendant's freedom to leave had not been impeded upon or restricted and that defendant was free

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3. *But see State v. Collins*, 198 N.C. App. 704, 681 S.E.2d. 866 (2009) (unpublished) (concluding the trial court's finding of fact that "the officer activated his blue lights and initiated a seizure of the defendant and his vehicle[,]" related to the denial of defendant's motion to suppress, was binding on appeal because it was supported by competent evidence).

to leave until the time Officer Moseley detected the gun on defendant's person, defendant presented evidence to the effect that defendant did not feel free to leave when Officer Moseley activated his blue lights and, further, that he was surrounded by a total of four officers in four separate patrol vehicles.

We conclude that a material conflict in the evidence presented at the suppression hearing exists because defendant's evidence controverts the State's evidence in a manner that affected the outcome of the matter to be decided. Because a material conflict in the evidence presented at the suppression hearing exists, the trial court, by virtue of the mandate of section 15A-977(f) and our holding in *Williams*, was required to make findings of fact and conclusions of law. The mandate of section 15A-977(f) notwithstanding, we reiterate our Supreme Court's instruction that "it is always the better practice to find all facts upon which the admissibility of the evidence depends." *Phillips*, 300 N.C. at 685, 268 S.E.2d at 457. The trial court's failure to make findings of fact and conclusions of law, contrary to the mandate of section 15A-977(f), is fatal to the validity of its denial of defendant's motion to dismiss in this case.

Defendant also assigned as error the trial court's failure to suppress the fruits of an unlawful stop and search of defendant in violation of the rights guaranteed by the Constitutions of the United States and of North Carolina. Our ability to undertake meaningful review of this assignment of error is impaired as a consequence of the lack of findings of fact and conclusions of law related to defendant's first assignment of error. As our Supreme Court said in *Horner*, "[f]indings and conclusions are required in order that there may be a meaningful appellate review of the decision," 310 N.C. at 279, 311 S.E.2d at 285. Due to our inability to conduct a meaningful appellate review, and because the trial court committed reversible error related to defendant's first assignment of error, we need not address the merits of this issue.

Accordingly, we reverse and remand to the Superior Court, Halifax County, for findings of fact and conclusions of law relating to the denial of defendant's motion to suppress.

Reversed and Remanded.

Judges ELMORE and STEPHENS concur.

STATE v. CLARK

[208 N.C. App. 388 (2010)]

STATE OF NORTH CAROLINA v. TRACY LAMONT CLARK

No. COA10-235

(Filed 7 December 2010)

1. Indictment and Information— indictment—breaking or entering into a motor vehicle with the intent to commit larceny of the same vehicle—no fatal defect

The trial court did not lack subject matter jurisdiction to try defendant for breaking or entering into a motor vehicle because defendant's indictment on that charge was not fatally defective. An indictment charging a defendant with breaking or entering into a motor vehicle with the intent to commit larceny of the same motor vehicle contains no fatal defect, so long as the remaining elements of the offense are also charged in the indictment.

2. Burglary and Unlawful Breaking or Entering— sufficiency of evidence—motion to dismiss properly denied

The trial court did not err by denying defendant's motion to dismiss the charge of breaking or entering into a motor vehicle. The State presented substantial evidence that defendant broke and entered into a pickup truck which was worth more than $1000 with the intent to steal it.

3. Larceny— sufficiency of evidence—motion to dismiss properly denied

The trial court did not err by denying defendant's motion to dismiss the charge of attempted nonfelonious larceny as the State presented substantial evidence of all the elements of the offense.

4. Sentencing— habitual felon conviction—argument overruled

Defendant's argument that the trial court erred by sentencing defendant as an habitual felon was overruled. Defendant's argument was premised upon his challenge to his breaking or entering into a motor vehicle conviction, which was rejected by the Court of Appeals.

Appeal by defendant from judgment entered 25 August 2009 by Judge Edwin G. Wilson, Jr. in Rockingham County Superior Court. Heard in the Court of Appeals 15 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General David W. Boone, for the State.

J. Edward Yeager, Jr., for defendant-appellant.

CALABRIA, Judge.

Tracy Lamont Clark ("defendant") appeals from a judgment entered upon (1) jury verdicts finding him guilty of breaking or entering into a motor vehicle, attempted non-felonious larceny, and injury to personal property; and (2) his plea of guilty to attaining the status of an habitual felon. We find no error.

I. Background

In he early morning hours of 31 July 2008, Callie Mae Thomas ("Ms. Thomas") heard several loud noises emanating from outside the front window of her apartment. When Ms. Thomas looked out her window, she saw two men inside a blue and white 1978 Chevrolet pickup truck ("the pickup truck"), which Ms. Thomas knew belonged to her neighbor, Debro McAdoo ("McAdoo"). After unsuccessfully attempting to contact McAdoo, Ms. Thomas called 911 to report the men.

Officer B. Patterson ("Officer Patterson") and Sergeant Doyle O'Bryant ("Sgt. O'Bryant") (collectively "the officers") of the Reidsville Police Department responded to Ms. Thomas' 911 call. Upon their arrival, the officers witnessed the two men exit the pickup truck. Defendant came out of the driver's side of the pickup truck and was subsequently arrested by the officers.

The officers then awoke McAdoo and had him examine the pickup truck. McAdoo noted that the steering column had been damaged and that some tools he had placed behind the seat on the driver's side had been strewn about the pickup truck. McAdoo spent approximately six or seven hundred dollars to restore the pickup truck to working condition.

Defendant was indicted for breaking or entering into a motor vehicle, attempted felony larceny, and misdemeanor injury to personal property. The indictment for breaking or entering into a motor vehicle specifically stated that defendant broke or entered into the pickup truck with the intent to commit felonious larceny of the same pickup truck. Defendant was also separately indicted for attaining the status of an habitual felon.

Beginning 24 August 2009, defendant was tried by a jury in Rockingham County Superior Court. At the close of the State's evidence, defendant made a motion to dismiss all charges, which was denied by the trial court. Defendant presented two witnesses that testified that the value of the pickup truck was less than $1000. Defendant declined to testify on his own behalf. At the close of all evidence, defendant renewed his motion to dismiss all charges, and the motion was again denied by the trial court.

On 25 August 2009, the jury returned verdicts finding defendant guilty of breaking or entering into a motor vehicle, attempted non-felonious larceny, and injury to personal property. Defendant then pled guilty to attaining the status of an habitual felon. As a result, the trial court sentenced defendant to a minimum of 144 months to a maximum of 182 months in the North Carolina Department of Correction. Defendant appeals.

II. Sufficiency of Indictment

[1] Defendant argues that the trial court lacked subject matter jurisdiction to try defendant for breaking or entering into a motor vehicle because defendant's indictment on that charge was fatally defective. We disagree.

Initially, we note that defendant did not object to the breaking or entering a motor vehicle indictment at trial. However,

> [w]here there is a fatal defect in the indictment, verdict or judgment which appears on the face of the record, a judgment which is entered notwithstanding said defect is subject to a motion in arrest of judgment. A defect in an indictment is considered fatal if it "wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty." When such a defect is present, it is well established that a motion in arrest of judgment may be made at any time in any court having jurisdiction over the matter, even if raised for the first time on appeal.

State v. Patterson, 194 N.C. App. 608, 612, 671 S.E.2d 357, 360 (2009) (quoting *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998)).

> For the State to successfully obtain a conviction for breaking and entering a motor vehicle, the State must prove the following five elements beyond a reasonable doubt: (1) there was a breaking or

> entering by the defendant; (2) without consent; (3) into a motor vehicle; (4) containing goods, wares, freight, or anything of value; and (5) with the intent to commit any felony or larceny therein.

State v. Jackson, 162 N.C. App. 695, 698, 592 S.E.2d 575, 577 (2004) (emphasis omitted) (citing N.C. Gen. Stat. § 14-56 (2003)). The dispute in the instant case concerns element (5) ("the fifth element"). The indictment for breaking or entering into a motor vehicle specifically charged defendant with the intent to commit felonious larceny of the pickup truck. Defendant contends that he could not be charged with breaking or entering into a motor vehicle with the intent to commit larceny of the same motor vehicle under the statute.

The State argues that it is unnecessary to consider this argument since "the language concerning the larceny of the truck itself is surplusage[.]" In making this argument, the State relies upon our Supreme Court's opinion in *State v. Worsley*, 336 N.C. 268, 443 S.E.2d 68 (1994). The *Worsley* Court held that, pursuant to N.C. Gen. Stat. § 15A-924(a)(5), an indictment charging a defendant with first-degree burglary was not required to state the specific felony the defendant intended to commit at the time of the breaking and entering. *Id.* at 280-81, 443 S.E.2d at 74. We agree with the State that this holding is equally applicable to an indictment charging a defendant with breaking or entering into a motor vehicle. However, we do not agree with the State that this holding renders that portion of the indictment which alleges that defendant intended to commit felony larceny of the pickup mere surplusage.

"It is the State that draws up the indictment and crafts its language before submitting the indictment to the grand jury." *State v. Silas*, 360 N.C. 377, 383, 627 S.E.2d 604, 608 (2006). As a result, our Supreme Court has held that "in felonious breaking or entering cases, as in burglary cases, 'when the indictment alleges an intent to commit a particular felony, the State must prove the particular felonious intent alleged.' " *Id.* (quoting *State v. Wilkinson*, 344 N.C. 198, 222, 474 S.E.2d 375, 388 (1996)). This holding is also applicable to the offense of felonious breaking or entering into a motor vehicle. Since the State decided to charge defendant with the intent to commit a specific felony, we must determine whether the breaking or entering into a motor vehicle with the intent to commit larceny of the same motor vehicle is a valid offense under N.C. Gen. Stat. § 14-56 (2009), when all other statutory requirements are met.

> The primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute. The first step in

> determining a statute's purpose is to examine the statute's plain language. Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.

State v. Hooper, 358 N.C. 122, 125, 591 S.E.2d 514, 516 (2004) (internal quotations and citations omitted). The offense of breaking or entering into a motor vehicle requires as its fifth element "the intent to commit any felony or larceny therein[.]" N.C. Gen. Stat. § 14-56 (2009). Defendant does not contest that felonious larceny of an automobile satisfies the "any felony or larceny" language of the statute, but instead argues that it cannot satisfy the "therein" portion of the statute. Defendant contends that the "intent to commit any felony or larceny therein" portion of N.C. Gen. Stat. § 14-56 requires an intent to commit a crime that can be completed only within the physical confines of the vehicle itself and cannot refer to a crime involving the vehicle. We disagree.

"The word 'therein' has been commonly understood to mean 'in that place.' " *People v. Steppan*, 473 N.E.2d 1300, 1304 (Ill. 1985) (quoting Black's Law Dictionary 1325 (5th ed. 1979)); *see also State v. Stephens*, 601 So.2d 1195, 1196 (Fla. 1992) ("In common English usage, 'therein' means '[i]n that place.' ") (quoting American Heritage Dictionary 1261 (2d ed. 1985)).

> The use of the word "therein" plainly indicates that the crime of burglary can exist if the defendant formed an intent to commit a crime "in that place." There is no requirement that the crime must be one that can be completed solely within the fixed limits of that particular place, only that the crime is intended to be committed there. This obviously can include an intent to commit car theft, because such a crime can be committed "in that place."

Id.; *accord Steppan*, 473 N.E.2d at 1304.

We find the Florida Supreme Court's reasoning persuasive, as it relies upon the plain meaning of the word "therein," and we use this reasoning to aid our interpretation of N.C. Gen. Stat. § 14-56. A defendant can form the intent to commit felonious larceny of a motor vehicle in the place where he is breaking or entering into the same motor vehicle, and there is no reason why a defendant cannot be punished for both the breaking or entering into a motor vehicle and the larceny of the same motor vehicle, as these ultimately constitute two separate offenses. As explained by the Florida Supreme Court, the offense

of burglary of a conveyance (the Florida equivalent offense to our breaking or entering into a motor vehicle offense) is

> complete the moment the defendant enters or remains within the vehicle with the requisite intent. Even if the defendant changes plans and decides not to steal the vehicle, the crime of burglary still would exist. However, if the defendant then takes the additional step of starting the vehicle and driving away with it, the separate crime of auto theft then will be complete. In sum, two separate evils involving two distinct temporal events are involved in the typical auto theft. Nothing in our law prohibits the charging of both offenses merely because both often occur within a single transaction.

Stephens, 601 So.2d at 1197. Thus, we hold that charging a defendant with breaking or entering into a motor vehicle with the intent to commit larceny of the same motor vehicle satisfies the fifth element of N.C. Gen. Stat. § 14-56. In reaching this holding, we note that it is consistent with cases in other jurisdictions, in addition to the Florida and Illinois cases cited above, which have also considered this question and have uniformly permitted the offense of larceny of a motor vehicle to serve as the intended offense element of breaking and entering or burglary of the same motor vehicle. *See*, *e.g.*, *State v. Ealom*, 763 P.2d 1108, 1988 Kan. App. LEXIS 722 (Kan. Ct. App. 1988) (unpublished); *People v. Teamer*, 25 Cal. Rptr. 2d 296 (Cal. Ct. App. 1993); *State v. Hernandez*, 865 P.2d 1206 (N.M. Ct. App. 1993); *State v. Brown*, 936 P.2d 181 (Ariz. Ct. App. 1997); and *State v. Ralph*, 6 S.W.3d 251 (Tenn. 1999).

Defendant contends that this interpretation of the fifth element of N.C. Gen. Stat. § 14-56 cannot be reconciled with this Court's opinion in *Jackson*. In *Jackson*, the defendant was charged with breaking and entering into a 1988 Honda, which was owned by an auto dealership. 162 N.C. App. at 699, 592 S.E.2d at 578. The State provided no evidence that there were any items of value in the car other than the keys and other parts of the car. *Id.* Consequently, this Court held that the State failed to present substantial evidence of the fourth element of the offense, that the motor vehicle contain "goods, wares, freight, or anything of value," ("the fourth element") and dismissed the charge. *Id.* at 699, 592 S.E.2d at 577-78. In reaching this holding, the *Jackson* Court rejected the State's argument that the "seats, carpeting, visors, handles, knobs, cigarette lighters, and radios," i.e., the parts of the car into which the defendant broke and entered, could be used to

satisfy the fourth element. *Id.* at 698, 592 S.E.2d at 577. The *Jackson* Court stated that the State's argument would render the fourth element of the offense superfluous, and thus held that "the larceny element of the breaking and entering pertain[ed] to objects within the vehicle, separate and distinct from the functioning vehicle." *Id.* at 699, 592 S.E.2d at 577. Defendant argues that this holding of the *Jackson* Court created a distinction between larceny offenses and all other felonies for the purposes of the fifth element of breaking or entering into a motor vehicle.

Defendant's argument misreads Jackson to create a non-existent distinction in N.C. Gen. Stat. § 14-56. While its holding references the term "larceny," it is clear from a close reading of the case that the *Jackson* Court was specifically discussing only the requirements necessary to satisfy the fourth element of the offense. We agree with the *Jackson* Court that, pursuant to our caselaw, the fourth element of N.C. Gen. Stat. § 14-56 cannot be satisfied without evidence of some items of value within the motor vehicle, separate and distinct from the functioning vehicle. However, contrary to defendant's argument, this holding is equally applicable regardless of which intended felony or larceny satisfies the fifth element of the offense, as the fourth element of the offense must always be satisfied in order to obtain a conviction under N.C. Gen. Stat. § 14-56.

Thus, we do not read *Jackson*, which did not discuss the fifth element in any detail, to limit the possible offenses that would satisfy the fifth element. The fourth element must be independently satisfied by objects within the vehicle which are separate and distinct from the functioning vehicle in all cases, regardless of the specific felony or larceny that satisfies the fifth element. This includes cases where the fifth element of the offense is satisfied by felonious larceny of the vehicle which is being broken or entered into.

We cannot adopt defendant's interpretation of the fifth element without reading the "any felony or larceny" language out of N.C. Gen. Stat. § 14-56. This is impermissible, as "[i]t is well established that a statute must be construed, if possible, to give meaning and effect to all of its provisions." *State v. Braxton*, 183 N.C. App. 36, 42, 643 S.E.2d 637, 641 (2007) (internal quotations and citation omitted). As defendant concedes, the indictment in the instant case charged defendant with breaking or entering into a motor vehicle, which contained items of value, with the intent to commit a felony; specifically, defendant was charged with the intent to commit larceny of the motor vehicle broken into. N.C. Gen. Stat. § 14-56 does not contain an exception to

its fifth element for felony larceny of the vehicle that is broken or entered into, and we decline to judicially create such an exception.

Therefore, we hold that an indictment charging a defendant with breaking or entering into a motor vehicle with the intent to commit larceny of the same motor vehicle contains no fatal defect, so long as the remaining elements of the offense are also charged in the indictment. Defendant does not dispute that the indictment alleged the remaining elements of breaking or entering into a motor vehicle. Thus, the indictment in the instant case contained no fatal defect, and consequently, the trial court had jurisdiction to try defendant for violating N.C. Gen. Stat. § 14-56. This assignment of error is overruled.

III. Motion to Dismiss

[2] Defendant argues that the trial court erred by denying his motion to dismiss the charges of breaking or entering into a motor vehicle and attempted felonious larceny. We disagree.

> We review a trial court's denial of a motion to dismiss criminal charges *de novo*, to determine whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. Substantial evidence is evidence that a reasonable mind might find adequate to support a conclusion. The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom[.]

State v. Fraley, ––– N.C. App. –––, –––, 688 S.E.2d 778, 783 (internal quotations and citations omitted), *disc. rev. denied*, 364 N.C. 243, 698 S.E.2d 660 (2010).

A. Breaking or Entering Into a Motor Vehicle

Defendant first contends that evidence that he intended to commit larceny of the pickup truck was insufficient to prove breaking or entering into a motor vehicle because the intent to commit larceny of the motor vehicle broken or entered into cannot satisfy the fifth element of the offense. As we have already rejected this argument, we need not address it further. As defendant concedes, the State presented substantial evidence that defendant broke and entered into the pickup truck with the intent to steal it.

Defendant also argues that even if larceny of the pickup truck satisfies the fifth element, the State failed to present substantial evi-

dence that the pickup truck was worth $1000. Defendant is correct that felony larceny constitutes "[l]arceny of goods of the value of more than one thousand dollars[.]" N.C. Gen. Stat. § 14-72(a) (2009). However, a review of the record reveals that the State presented evidence that the pickup truck was worth more than $1000.

As defendant acknowledges, the State presented the testimony of three witnesses—McAdoo, Officer Patterson, and Sgt. O'Bryant—who each testified that they believed the pickup truck was worth more than $1000. The fact that defendant presented witnesses who valued the pickup truck below $1000 was immaterial, because "[c]ontradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve[.]" *Fraley*, ––– N.C. App. at –––, 688 S.E.2d at 783. Considering the evidence in the light most favorable to the State, there was substantial evidence presented that the pickup truck was worth more than $1000. This assignment of error is overruled.

B. Attempted Felonious Larceny

[3] Defendant argues that the trial court erred by denying his motion to dismiss the charge of attempted felonious larceny. However, because defendant was only found guilty of the lesser included offense of nonfelonious larceny at trial, we determine only whether the trial court erred by denying defendant's motion to dismiss this lesser included offense. *Cf. State v. Williams*, 184 N.C. App. 351, 355, 646 S.E.2d 613, 616 (2007) (reviewing the denial of the defendant's motion to dismiss for the lesser included offense of Class E felony child abuse, rather than Class C felony child abuse, when both offenses were submitted to the jury and the defendant was convicted of the lesser included offense.).

The elements of nonfelonious larceny are the same as felonious larceny, except that for nonfelonious larceny the stolen goods must be worth $1000 or less. N.C. Gen. Stat. § 14-72(a) (2009). Since defendant only argues that the State failed to present substantial evidence that the pickup truck challenge that defendant committed attempted larceny of the pickup truck, his argument necessarily fails. This assignment of error is overruled.

IV. Habitual Felon

[4] Defendant argues that the trial court erred by sentencing defendant as an habitual felon. Defendant's argument is premised upon a successful challenge to his breaking or entering into a motor vehicle

conviction. Since we have rejected defendant's arguments regarding this conviction, this assignment of error is without merit.

V. Conclusion

The record on appeal includes an additional assignment of error not addressed by defendant in his brief to this Court. Pursuant to N.C.R. App. P. 28(b)(6) (2008), we deem this assignment of error abandoned and need not address it. There was no fatal defect in the indictment which charged defendant with breaking or entering into a motor vehicle with the intent to commit larceny of that same motor vehicle. Additionally, the State presented substantial evidence of each element of the offenses for which defendant was convicted. Finally, the trial court properly sentenced defendant as an habitual felon. Defendant received a fair trial, free from error.

No error.

Judges McGEE and GEER concur.

STATE OF NORTH CAROLINA v. MARSHALL EUGENE BLACKMON

No. COA10-417

(Filed 7 December 2010)

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

Defendant's argument that the trial court erred by denying his motion to dismiss the charges against him was not reviewed. Defendant failed to renew his motion at the close of all evidence and, therefore, waived appellate review of this issue.

2. Constitutional Law— effective assistance of counsel—Strickland test

Defense counsel's failure to renew his motion to dismiss the charges of felonious breaking and entering and larceny after breaking and entering at the close of all evidence did not constitute ineffective assistance of counsel. As the State presented sufficient evidence that defendant was the perpetrator of the offenses and that defendant obtained possession of the property

dishonestly, a second motion to dismiss would not have altered the result in this case and defendant could not satisfy the second prong of the test set forth in *Strickland*, 466 U.S. 668.

3. Burglary and Unlawful Breaking or Entering— larceny breaking and entering—inconsistent verdicts—not mutually exclusive

The trial court did not err in denying defendant's motion for judgment notwithstanding the verdict based on his contention that the jury verdicts were logically inconsistent. Based on *Mumford*, 364 N.C. 394, defendant's conviction of larceny after breaking and entering was merely inconsistent with the trial court's declaration of a mistrial on the felonious breaking and entering charge because the jury was deadlocked, but was not mutually exclusive.

Appeal by defendant from judgments entered 7 January 2010 by Judge Timothy L. Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 September 2010.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.

William B. Gibson, for defendant-appellant.

JACKSON, Judge.

Marshall Eugene Blackmon ("defendant") appeals his 7 January 2010 convictions for felonious larceny and being an habitual felon. For the reasons stated herein, we hold no error.

On 13 June 2008, Sonya Sullivan ("Sullivan") left her fifteen-year-old son, Jaccuehas, and eight-year-old daughter, Carrie, alone in her house while she went to work. At approximately 12:00 p.m., the children heard a loud noise coming from downstairs. They barricaded themselves in a bedroom and hid in a closet. Jaccuehas called 911 at 12:29 p.m. and reported that someone had broken into the house. The police arrived shortly after the call was made.

Sullivan arrived home at approximately 1:00 p.m. Sullivan's computer and television were on the grass outside the home; her camcorder, PlayStation 2, and some video games were missing. The electricity meter had been pulled off the wall, the glass window in the entry door was broken, and a large rock was on the kitchen floor.

Crime scene specialists arrived at the house and recovered several fingerprints, only one of which was determined to be of "AFIS quality[.]" That print, found on the computer tower sitting outside the house, matched defendant's left ring finger. Sullivan told police that she had never met defendant.

Defendant was indicted on three counts: felonious breaking and entering, pursuant to North Carolina General Statutes, section 14-54(a); larceny after breaking and entering, pursuant to North Carolina General Statutes, section 14-72(b)(2); and being an habitual felon, pursuant to North Carolina General Statutes, section 14-7.1. N.C. Gen. Stat. §§ 14-54(a), -72(b)(2), -7.1 (2007).

At his 4 January 2010 trial, defendant testified that, on 13 June 2008, he had walked from his house to a nearby Food Lion supermarket in order to buy diapers and beer. Defendant had used a "cut through" behind Sullivan's town home as a shortcut to the supermarket. Defendant claimed that his fingerprint was on the computer because he had "turned it over to check out the jacks" when he had noticed it on his way home. Defendant testified that he believed the computer to have been discarded but that he decided not to take it because it had been sitting in the heat and probably was damaged. Defendant further testified that he did not see any damage to the town home nor did he hear sirens or see police.

At the close of the State's evidence, defendant moved to dismiss the case in its entirety. The trial court denied the motion. Defendant then presented evidence and did not renew his motion to dismiss at the close of all evidence.

On 6 January 2010, defendant was found guilty of the felonious larceny charge and of being an habitual felon, but the trial court declared a mistrial as to the breaking or entering charge because the jury was deadlocked. Defendant moved for judgment notwithstanding the verdict based upon the inconsistent result reached by the jury, which the trial court denied. Defendant was sentenced to between 121 and 155 months in jail and ordered to pay restitution of $2,057.25. Defendant appeals.

[1] Defendant first argues that the trial court erred by denying his motion to dismiss the charges against him. Because defendant failed to preserve this issue, we do not review it.

Our Rules of Appellate Procedure require a defendant in a criminal case to make his motion to dismiss at a specified time in order to preserve the issue for appeal:

> If a defendant makes such a motion after the State has presented all its evidence and . . . that motion is denied and the defendant then introduces evidence, defendant's motion for dismissal . . . is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

N.C.R. App. P. 10(a)(3) (2009). Although Rule 10 contradicts North Carolina General Statutes, section 15A-1446(d), which provides that some errors "may be the subject of appellate review even though no objection, exception or motion has been made in the trial division[,]" our Supreme Court has held that Rule 10 controls. *State v. Stocks*, 319 N.C. 437, 439, 355 S.E.2d 492, 493 (1987) ("To the extent that N.C.G.S. 15A-1446(d)(5) is inconsistent with N.C.R. App. P. 10(b)(3),[1] the statute must fail.").

Here, defendant moved to dismiss the charges at the close of the State's evidence but failed to renew the motion at the close of all evidence. Therefore, in accordance with Rule 10, defendant has waived appellate review of this issue.

[2] Defendant next argues that his attorney's failure to move to dismiss the charges at the close of all evidence constitutes a deprivation of his right to effective counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution. We disagree.

The United States Supreme Court has set forth the test for determining whether a defendant received constitutionally ineffective assistance of counsel, which our Supreme Court expressly adopted in *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). Pursuant to the two-part test,

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). With respect to the first element, "a court must indulge a

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1. The subsection of Rule 10 cited by the *Stocks* Court is now subsection (a)(3), pursuant to our revised Rules of Appellate Procedure that took effect on 1 October 2009.

strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689, 80 L. Ed. 2d at 694-95 (citation and internal quotation marks omitted). The second element of the *Strickland* test requires that the defendant show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 80 L. Ed. 2d at 698. Our Supreme Court also has noted that defendants who seek to show ineffective assistance of counsel must satisfy both prongs: "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249. Here, defendant urges us to hold that his trial counsel's failure to renew the motion to dismiss constitutes ineffective assistance. However, we do not think that renewing the motion would have affected the outcome of the case.

The State, in order to survive a motion to dismiss, must present substantial evidence of each element of the crimes charged and of defendant's identity as the perpetrator. *See State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). The trial court should concern itself only with the sufficiency of the evidence, not its weight. *State v. Mercer*, 317 N.C. 87, 96-97, 343 S.E.2d 885, 891 (1986). The evidence need not rule out the possibility of innocence. *State v. Tirado*, 358 N.C. 551, 582, 599 S.E.2d 515, 536 (2004). However, if the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed. This is true even though the suspicion aroused by the evidence is strong." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983) (internal citations omitted). When ruling on a motion to dismiss, the trial court must give the State the benefit of "every reasonable inference" presented by the evidence. *State v. Cross*, 345 N.C. 713, 717, 483 S.E.2d 432, 434 (1997).

In the case *sub judice*, defendant specifically challenges the State's evidence as to two points. First, he argues that the State did not present sufficient evidence to establish his identity as the perpetrator of the crime charged beyond reasonable doubt. Defendant also contests the third element of the doctrine of recent possession—"that defendant had possession of this property so soon after it was stolen and under such circumstances as to make it unlikely that he obtained possession honestly"—upon which the State relied to prove the larceny charge. *State v. Osborne*, 149 N.C. App. 235, 238, 562 S.E.2d 528, 531 (citation omitted), *aff'd*, 356 N.C. 424, 571 S.E.2d 584 (2002) (per curiam).

Our Supreme Court has held that

> testimony by a qualified expert that fingerprints found at the scene of the crime correspond with the fingerprints of the accused, when accompanied by substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed, is sufficient to withstand motion for nonsuit and carry the case to the jury.

Cross, 345 N.C. at 717, 483 S.E.2d at 435 (quoting *State v. Miller*, 289 N.C. 1, 4, 220 S.E.2d 572, 574 (1975)) (emphasis removed). In some cases, the circumstances are such that fingerprint evidence alone is sufficient to withstand a motion to dismiss. *See State v. Williams*, 95 N.C. App. 627, 628-29, 383 S.E.2d 456, 457 (1989) (holding that fingerprints on both sides of window of room with missing television constituted sufficient evidence to submit case to jury); *State v. Bradley*, 65 N.C. App. 359, 362, 309 S.E.2d 510, 512 (1983) (holding that fingerprints in non-public portion of building where defendant was not an employee support reasonable inference of guilt and submission of case to jury).

In the instant case, the State presented an "AFIS quality" fingerprint taken from the computer tower that matched defendant's print. The computer tower was located outside Sullivan's house after having been removed from it. The State also presented substantial circumstantial evidence as to both the possessory and the identity elements. Officer Bradley Edwards testified that the computer equipment was in full view of Sullivan's back door and that if someone were to inspect the equipment while it was there, he would be able to see the broken glass in the back door. Sullivan testified that there was no path behind her house, just "a wall and woods," "not a sidewalk." Sullivan also told police that she did not know defendant and that he did not have permission to be at her house.

Accordingly, a second motion to dismiss would not have altered the result in this case. The State presented sufficient evidence "that a reasonable mind might accept as adequate to support" the conclusion that defendant was the perpetrator and that defendant obtained possession of the property dishonestly. *Smith*, 300 N.C. at 78, 265 S.E.2d at 169. Defendant, therefore, cannot satisfy the second prong of the *Strickland* test, because his counsel's failure to renew his motion to dismiss was not the but—for cause of the result in the case.

[3] Defendant's third contention is that the jury verdicts are logically inconsistent and that the trial court should have granted his motion for judgment notwithstanding the verdict. We disagree.

When this Court has addressed the issue of inconsistent verdicts, it rarely has set forth its standard of review. However, the majority of those cases appears to have employed a *de novo* review. *See, e.g., State v. Shaffer*, 193 N.C. App. 172, 177-78, 666 S.E.2d 856, 859-60 (2008). As discussed *infra*, if the inconsistent verdicts are determined to be merely inconsistent, rather than mutually exclusive, then the verdicts will stand so long as the State has presented substantial evidence as to each element of the charges. *State v. Mumford*, 364 N.C. 394, 400, 699 S.E.2d 911, 915, (2010) (citing *State v. Toole*, 106 N.C. 564, 566, 11 S.E. 168, 169 (1890)).

Our Supreme Court has revisited and clarified the law with respect to inconsistent and contradictory verdicts. *See id.* The defendant in *Mumford* was convicted of felony serious injury by vehicle, pursuant to North Carolina General Statutes, section 20-141.4(a3), but was found not guilty of driving while impaired, pursuant to North Carolina General Statutes, section 20-138.1. *Id.* at 397, 699 S.E.2d at 914. In order to be convicted of felony serious injury by vehicle, a defendant must be "engaged in the offense of impaired driving under G.S. 20-138.1 or 20-138.2[.]" N.C. Gen. Stat. § 20-141.4(a3)(2) (2007). The defendant in that case appealed his convictions as mutually exclusive. *Mumford*, 364 N.C. at 398, 699 S.E.2d at 914.

This Court reversed the *Mumford* defendant's conviction, holding that the conviction was both "legally inconsistent and contradictory[.]" *Id.* Our Supreme Court then reversed this Court and offered guidance as to the legal "distinction . . . between verdicts that are merely inconsistent and those which are legally inconsistent *and* contradictory." *Id.*

According to our Supreme Court, inconsistent verdicts fall into one of two categories. First, some verdicts are inconsistent only.

These verdicts "represent[] an apparent flaw in the jury's logic[,]" such as in the *Mumford* case when "presumably, a finding of guilt in the greater offense would establish guilt in the lesser offense." *Id.* at 400, 699 S.E.2d at 915. The second category consists of verdicts that are inconsistent because they are mutually exclusive in that "a verdict purports to establish that the [defendant] is guilty of two separate and distinct criminal offenses, the nature of which is such that guilt of one necessarily excludes guilt of the other." *Id.* (citation and internal quotation marks omitted) (alteration in original).

Inconsistencies, the Court concluded, are "permissible, and not . . . legally contradictory, as long as there was sufficient evidence to support the guilty verdict." *Id.* The Court reasoned that, "because each count of an indictment is, in fact and theory, a separate indictment," juries may return inconsistent verdicts, "as long as there was sufficient evidence to support the guilty verdict." *Id.* (citing *State v. Toole*, 106 N.C. 564, 566, 11 S.E. 168, 169 (1890)) (internal quotation marks omitted).

The *Mumford* Court further held that consistency in verdicts is not necessary, noting that inconsistencies "may have been the result of compromise, or of a mistake on the part of the jury . . . [b]ut verdicts cannot be upset by speculation or inquiry into such matters." *Id.* at 399, 699 S.E.2d at 915 (quoting *Dunn v. United States*, 284 U.S. 390, 394, 76 L. Ed. 356, 359 (1932)). The Court explained that

> [t]he rule that the defendant may not upset [an inconsistent] verdict embodies a prudent acknowledgment of a number of factors. First . . . inconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. But in such situations the Government has no recourse if it wishes to correct the jury's error; the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause.
>
> Inconsistent verdicts therefore present a situation where "error," in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given this uncertainty, and the fact that the

> Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course.

Id. at 400, 699 S.E.2d at 915 (quoting *United States v. Powell*, 469 U.S. 57, 57-58, 83 L. Ed. 2d 461, 463-64 (1984)) (alterations in original). Therefore, in accordance with *Mumford*, inconsistency alone will not lead to a new trial for a defend-ant; *only* verdicts that are mutually exclusive require relief. *Id.*

In the instant case, defendant received verdicts that are inconsistent but not mutually exclusive. Here, as in *Mumford*, defendant was charged with an offense that includes within it a second statutorily-defined offense. *See* N.C. Gen. Stat. § 14-72(b)(2) (2007) (Larceny becomes a felony if "[c]ommitted pursuant to a violation of G.S. . . . 14-54 [breaking or entering.]"); *Mumford*. N.C. at 394-95, 699 S.E.2d at 912. ("To be convicted under N.C.G.S § 20-141.4(a3), felony serious injury by vehicle, a person must be engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2.") (citation and internal quotation marks omitted). The *Mumford* Court noted that the "larger" offense "does not require a *conviction* of [the "smaller" offense] . . . but only requires a finding that the defendant was engaged in the conduct described under either of [the] offenses." *Mumford*, 364 N.C. at 401, 699 S.E.2d at 916 (emphasis in original).[2] Based upon *Mumford*, we hold that defendant's convictions are merely inconsistent, rather than mutually exclusive. Because, as discussed *supra*, the State presented substantial evidence as to each element of the charged offenses, the trial court did not err in denying defendant's motion for judgment notwithstanding the verdict.

No error.

Judges ELMORE and THIGPEN concur.

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2. We note that the Court in *Mumford*, 364 N.C. at 402, 699 S.E.2d at 916 specifically overruled two prior cases very similar to the instant case. *See State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982) (affirming the decision of this Court to vacate the defendant's sentence for felonious larceny when the defendant was found guilty of felonious larceny but acquitted of breaking or entering) and *State v. Holloway*, 265 N.C. 581, 144 S.E.2d 634 (1965) (per curiam) (ordering a new trial when the defendant was found guilty of felonious larceny but acquitted of breaking or entering).

STATE v. DUBOSE

[208 N.C. App. 406 (2010)]

STATE OF NORTH CAROLINA v. NOBBIE LEE DUBOSE, III

No. COA10-213

(Filed 7 December 2010)

1. Firearms and Other Weapons— conspiracy to discharge a firearm into occupied property—sufficient evidence

The trial court did not err by denying defendant's motion to dismiss the charge of conspiracy to discharge a firearm into occupied property. The State presented substantial evidence of an agreement for defendant to discharge a firearm at an individual standing in front of the doors to an occupied gymnasium and there was a substantial likelihood that the bullets would enter or strike the building.

2. Sentencing— aggravating factors—criminal street gang activity—finding made outside of defendant's presence

The trial court erred by finding in each of two judgments that the offenses of discharging a firearm on educational property and conspiracy to discharge a firearm into occupied property involved criminal street gang activity pursuant to N.C.G.S. § 14-50.25. The findings were made outside of defendant's presence and without giving him an opportunity to be heard.

3. Appeal and Error— constitutional question—not reached—case resolved on other grounds

The Court of Appeals did not reach the issue of whether N.C.G.S. § 14-50.25 is constitutionally invalid because the Court disposed of the case on other grounds. The Court will not decide a constitutional question when the disposition of the case may be resolved on other grounds.

Appeal by defendant from judgments entered 27 July 2009 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 29 September 2010.

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

Glenn, Mills, Fisher & Mahoney, P.A., by Carlos E. Mahoney, for defendant-appellant.

American Civil Liberties Union of North Carolina Legal Foundation, by Andrew Lee Farris and Katherine Lewis Parker; Legal Aid of North Carolina-Advocates for Children's Services, by Lewis Pitts; North Carolina Advocates for Justice, by Burton Craige; and North Carolina Prisoner Legal Services, Inc., by Mary S. Pollard, amici curiae.

STEELMAN, Judge.

Where the State presented substantial evidence of an agreement for defendant to discharge a firearm at an individual standing in front of the doors to an occupied gymnasium and there was a substantial likelihood that the bullets would enter or strike the building, the trial court did not err by denying defendant's motion to dismiss the charge of conspiracy to discharge a firearm into occupied property. Where the trial court made a determination pursuant to N.C. Gen. Stat. § 14-50.25 that the offenses involved criminal street gang activity outside of defendant's presence and without giving him an opportunity to be heard, the judgments must be vacated and remanded for a new sentencing hearing.

I. Factual and Procedural Background

On 27 January 2009, Nobbie Dubose, III (defendant), Raasheive Ray (Ray), Caprecia Johnson (Johnson), and Keona Phelps (Phelps) attended a basketball game at Clayton High School. Defendant and Phelps were members of a gang called Nine Trey Scarface. During the game, defendant spotted Anthony Hinton (Hinton), a member of a rival gang, the 85/95 Bloods, standing next to the gymnasium doors with other members of the 85/95 gang. Defendant, Ray, Johnson, and Phelps decided to leave because of the presence of the 85/95 gang members. When defendant walked past Hinton, he said, "What's popping?" Hinton replied, "You already know." Defendant walked to the parking lot and stated that "he was about to roll."[1] When defendant reached Johnson's vehicle, a gun was retrieved from underneath the driver's seat.[2] Johnson allowed Ray to drive her vehicle because "evidently, [Ray and defendant] were about to do something." Ray

1. Phelps testified that defendant's statement meant that he was about to kill someone.

2. Conflicting evidence was presented as to who retrieved the gun from underneath the driver's seat. Phelps testified that Ray retrieved the gun. Ray testified that it was defendant who retrieved the gun. Johnson stated that Phelps retrieved the gun and handed it to defendant.

entered the vehicle and sat in the driver's seat, defendant sat in the front passenger's seat, and Phelps and Johnson sat in the back seat. Ray and defendant then argued over who was going to fire the gun. It was decided that defendant was going to fire the gun, and he told Johnson and Phelps to duck down in the back seat. Ray then drove past the gymnasium and defendant fired the gun twice. The group then sped away.

Defendant fired the gun in the direction of Hinton, who was standing in front of the gymnasium with two of his friends. No one was injured. The bullets struck a brick column that was located directly in front of the gymnasium doors and was part of the structure. After the shooting occurred, Ray drove defendant to Benson, where he ran into the woods and hid the gun.

On 2 March 2009, defendant was indicted for discharging a firearm on educational property and discharging a firearm into occupied property. On 30 March 2009, defendant was also indicted for conspiracy to discharge a firearm on educational property and conspiracy to discharge a firearm into occupied property. Defendant pled not guilty to each of these charges. On 16 July 2009, the State gave notice of its intent to seek a jury determination of two aggravating factors: (1) that the offense was committed for the benefit of, or at the direction of, any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members pursuant to N.C. Gen. Stat. § 15A-1340.16(d)(2a); and (2) that defendant had been found to be in willful violation of the conditions of his probation during the ten-year period prior to the commission of the offenses pursuant to N.C. Gen. Stat. § 15A-1340.16(d)(12a).

On 21 July 2009, defendant's case was called for trial. During the course of the trial, the State dismissed the charge of discharging a firearm into occupied property. On 24 July 2009, the jury found defendant guilty of the three remaining charges. Following the jury verdict, the State informed the trial court that it would not pursue the gang-related aggravating factor (2a) because defendant had been convicted of conspiracy. Defendant pled no contest to the aggravating factor that he had a prior probation violation (12a) as to each of the three charges of which he was found guilty.

The trial court found defendant to be a prior record level II for felony sentencing purposes and sentenced defendant from the aggravated range to consecutive sentences of 22 to 27 months imprison-

ment on the convictions of discharging a firearm on educational property and conspiracy to discharge a firearm on occupied property. The trial court arrested judgment on the other conspiracy conviction. On 27 July 2009, the trial court filed two written judgments. On each of the judgments, the trial court found that the "designated offense(s) involved criminal street activity" pursuant to N.C. Gen. Stat. § 14-50.25. Defendant appeals.

II. Motion to Dismiss—Conspiracy

[1] In his first argument, defendant contends that the trial court erred by denying his motion to dismiss the charge of conspiracy to discharge a firearm into occupied property based upon the sufficiency of the evidence. We disagree.

A. Standard of Review

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted). Substantial evidence is defined as "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992) (citation omitted). The appellate court views the evidence "in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. Contradictions and discrepancies must be resolved in favor of the State . . . ." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387-88 (1984) (internal citations omitted).

B. Analysis

In order for a defendant to be found guilty of the substantive crime of conspiracy, the State must prove there was an agreement to perform every element of the underlying offense. *State v. Suggs*, 117 N.C. App. 654, 661, 453 S.E.2d 211, 215 (1995). The elements of discharging a firearm into occupied property are "(1) willfully and wantonly discharging (2) a firearm (3) into property (4) while it is occupied." *State v. Rambert*, 341 N.C. 173, 175, 459 S.E.2d 510, 512 (1995) (citation omitted); *see also* N.C. Gen. Stat. § 14-34.1 (2009). Therefore, the State had the burden of showing substantial evidence of an agreement to perform each of the elements of discharging a firearm into occupied property.

"In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice. Nor is it necessary that the unlawful act be completed." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (internal citations omitted). The existence of a conspiracy may be established through direct or circumstantial evidence. *State v. Bindyke*, 288 N.C. 608, 616, 220 S.E.2d 521, 526 (1975). "Direct proof of the charge is not essential, for such is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933) (citation omitted).

In the light most favorable to the State, the evidence presented at trial showed that defendant, Ray, Johnson, and Phelps decided to leave the Clayton High School basketball game because of the presence of members of the 85/95 gang. As they walked to the parking lot, defendant stated that he was about to "roll," meaning he was going to kill someone. Once the group reached Johnson's vehicle, a gun was retrieved from underneath the driver's side seat. Johnson agreed to allow Ray to drive her vehicle and defendant to sit in the front passenger's seat because "evidently, [Ray and defendant] were about to do something." While inside the vehicle, Ray and defendant argued over who was going to fire the gun at Hinton. Once it was decided, Ray drove slowly by the gymnasium while defendant fired the gun twice at Hinton, who was standing by a column located in front of the gymnasium doors.

Defendant argues that the State's evidence failed to prove an agreement to discharge the firearm into occupied property because Hinton was standing outside the building. In *State v. Canady*, the defendant discharged a firearm and the bullet struck the exterior wall of an apartment. 191 N.C. App. 680, 684, 664 S.E.2d 380, 382 (2008), *disc. review denied*, 363 N.C. 132, 673 S.E.2d 662 (2009). On appeal, the defendant argued that the State presented insufficient evidence to show he had shot "into" the apartment. *Id.* at 686, 664 S.E.2d at 384. The defendant contended that in order to satisfy the element of "into property," the bullet must have penetrated an interior wall of the apartment, or entered the apartment. *Id.* at 687, 664 S.E.2d at 384. This Court disagreed and held:

> the plain meaning of "into" includes "against" as in "crashed *into* a tree." This sentence does not mean "crashed *through* a tree."

> Similarly, discharging a firearm "into" an enclosure does not have to mean "through" the wall of the enclosure. . . . The exterior wall is nonetheless a wall, which the bullet was fired against, thereby fulfilling the requirement of being fired "into" the enclosure.

Id. (internal citation omitted).

In the instant case, the evidence presented showed that defendant, Ray, Johnson, and Phelps all understood and impliedly agreed that defendant would shoot at Hinton as the group slowly drove by the occupied gymnasium. Hinton was standing by a brick column in front of the gymnasium doors. There was a substantial likelihood that the bullets shot would enter or strike the building. We hold that the State presented substantial evidence of an agreement for defendant to discharge a firearm into an occupied building. The trial court did not err by denying defendant's motion to dismiss the charge of conspiracy to discharge a firearm into an occupied building.

This argument is without merit.

III. N.C. Gen. Stat. § 14-50.25

[2] In his second argument, defendant contends that the trial court erred by finding in each judgment that the offenses involved criminal street gang activity without defendant having notice or an opportunity to be heard on that issue. We agree.

In the instant case, the trial court entered findings pursuant to N.C. Gen. Stat. § 14-50.25 of the North Carolina Street Gang Suppression Act, which provides:

> When a defendant is found guilty of a criminal offense, other than an offense under G.S. 14-50.16 through G.S. 14-50.20, the presiding judge shall determine whether the offense involved criminal street gang activity. If the judge so determines, then the judge shall indicate on the form reflecting the judgment that the offense involved criminal street gang activity. The clerk of court shall ensure that the official record of the defendant's conviction includes a notation of the court's determination.

N.C. Gen. Stat. § 14-50.25 (2009). However, in the instant case, the trial court made these findings without notice to defendant and outside of his presence. Following the jury verdict, the State informed defendant and the court that it would not pursue the aggravating factor of criminal street gang activity (2a) at sentencing. The trial court

then pronounced its judgment in open court. The trial court made no mention that it was finding that defendant's convictions involved criminal street gang activity pursuant to N.C. Gen. Stat. § 14-50.25. Rather, these findings first appeared in the trial court's written judgments. Defendant was not given an opportunity to be heard regarding these findings nor to object to the trial court entering such findings to create an adequate record for appellate court review.

It is well-established that a criminal defendant has a right to be present when his sentence is imposed. *State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999); *see also State v. Pope*, 257 N.C. 326, 330, 126 S.E.2d 126, 129 (1962) ("The right to be present at the time sentence or judgment is pronounced is a common law right, separate and apart from the constitutional or statutory right to be present at the trial." (citation omitted)). In *Crumbley*, the trial court rendered judgment in open court and imposed multiple sentences upon the defendant, but did not indicate whether those sentences should run concurrently or consecutively. 135 N.C. App. at 61, 519 S.E.2d at 96. The trial court subsequently entered the written judgment, which provided that the sentences would run consecutively. *Id.* This Court held that "[the] substantive change in the sentence could only be made in the Defendant's presence, where he and/or his attorney would have an opportunity to be heard," and rejected the State's argument that there was no error because the defendant was present in open court at the time the sentence was originally rendered. *Id.* at 67, 519 S.E.2d at 99. We concluded that "[b]ecause there is no indication in this record that Defendant was present at the time the written judgment was entered, the sentence must be vacated and this matter remanded for the entry of a new sentencing judgment." *Id.* at 66, 519 S.E.2d at 99.

Although the trial court did not alter defendant's sentence in its written judgments, it did make a specific finding that defendant had engaged in criminal street gang activity pursuant to N.C. Gen. Stat. § 14-50.25. Such a finding could be used in future criminal prosecutions or civil proceedings. N.C. Gen. Stat. §§ 14-50.16, -50.26 (2009). N.C. Gen. Stat. § 14-50.16 provides that it is unlawful to conduct or participate in a pattern of criminal street gang activity. N.C. Gen. Stat. § 14-50.16(a)(1) (2009). A "pattern of criminal street gang activity" is defined as having a conviction for at least two prior incidents of criminal street gang activity. N.C. Gen. Stat. § 14-50.16(d) (2009). A violation of N.C. Gen. Stat. § 14-50.16 is generally classified as a Class H

felony. N.C. Gen. Stat. § 14-50.16(a). In addition, N.C. Gen. Stat. § 14-50.26 provides that "[a] conviction of an offense defined as criminal gang activity shall preclude the defendant from contesting any factual matters determined in the criminal proceeding in any subsequent civil action or proceeding based on the same conduct." N.C. Gen. Stat. § 14-50.26.

We hold that making a finding of criminal street gang activity was a "substantive change" in the judgments that was required to be made in defendant's presence where he would have had an opportunity to be heard. The judgments in this matter are vacated and the cases remanded for a new sentencing hearing.

[3] Defendant and the *amici curiae* brief request that this Court invalidate N.C. Gen. Stat. § 14-50.25 on constitutional grounds. However, it is well-established that an appellate court will not decide a constitutional question when the disposition of the case may be resolved on other grounds. *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957) ("[A] constitutional question will not be passed on even when properly presented if there is also present some other ground upon which the case may be decided." (citations omitted)); *State v. Muse*, 219 N.C. 226, 227, 13 S.E.2d 229, 229 (1941) (an appellate court will not decide a constitutional question "when the appeal may be properly determined on a question of less moment." (citation omitted)).

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges BRYANT and ERVIN concur.

STATE OF NORTH CAROLINA v. ALBERT BEDFORD

No. COA10-255

(Filed 7 December 2010)

1. Homicide— second-degree murder instruction refused—evidence of premeditation and deliberation—not negated

The trial court properly refused to instruct on second-degree murder in a first-degree murder prosecution where the State presented evidence supporting premeditation and deliberation and defendant did not present evidence to negate the State's showing. Voicemail messages supported only an inference of drug impairment and passion but not anger or emotion strong enough to disturb defendant's ability to reason.

2. Evidence— photographs—decomposed body—illustrative purposes

The trial court did not abuse its discretion in a first-degree murder prosecution by admitting evidence about decomposition of the victim's body. The photographs were used to illustrate the testimony of the officers who unearthed the body and of the pathologist who conducted the autopsy. The wounds the victim suffered were circumstantial evidence of defendant's premeditation and deliberation.

Appeal by defendant from judgment dated 9 December 2009 by Judge Jay D. Hockenbury in Onslow County Superior Court. Heard in the Court of Appeals 13 October 2010.

Attorney General Roy Cooper, by Assistant Attorney General Joan M. Cunningham, for the State.

Janet Moore for defendant-appellant.

BRYANT, Judge.

Where the State presented evidence of each element of first-degree murder, including premeditation and deliberation, and no evidence negated these elements, the trial court properly refused to instruct the jury on second-degree murder. Where the victim suffered many distinct injuries to different parts of her body and eighteen photographs were admitted to illustrate relevant testimony regarding an element of the crime for which defendant was charged, the trial court did not abuse its discretion.

Facts

Defendant Albert Bedford was tried and convicted of a single count of first-degree murder for the 2008 killing of Vickie Lewis. The evidence at trial tended to show the following. In 2008, defendant had been married to his wife Rosalie for thirty-five years, and Ms. Lewis had been married to her husband Tony for twenty-six years. Despite this, defendant and Ms. Lewis had been romantically involved for several years, a fact known to their spouses and families. The two families had cookouts and spent holidays together at the Lewis home, and defendant and Ms. Lewis sometimes spent the night together at Ms. Lewis' home. Defendant and Ms. Lewis also shared a drug habit, including crack cocaine use.

During 2008, the relationship between defendant and Ms. Lewis deteriorated. In May, Ms. Lewis told her adult daughter that defendant had choked her during an argument. In October, he threatened to kill Ms. Lewis and ran a car she was driving off the road. Several witnesses testified about defendant's behavior at the time, stating that he had been agitated, acting crazy, and in a jealous rage. In November, defendant threatened Ms. Lewis with a knife and took her keys. The State presented recordings of voicemail messages to Ms. Lewis that defendant left between 13 and 21 November 2008, along with documentation of more than 200 phone calls defendant made to her. The messages ranged from tearful pleading for Ms. Lewis to return to defendant to profanity-ridden rages accusing Ms. Lewis of mistreating him. Mr. Lewis last saw his wife on 18 November when they discussed plans to do some Thanksgiving shopping together on 24 November. When she had not returned home on 24 November, Mr. Lewis began looking for his wife and he eventually reported her missing on 27 November 2008.

Because of the holiday weekend, Detective Thomas Robinson of the Onslow County Sheriff's Department began his investigation on 2 December 2008. On 3 December, Det. Robinson interviewed defendant at the sheriff's department; defendant claimed he had last seen Ms. Lewis on 23 November. On 4 December, Det. Robinson and another officer went to defendant's residence where they noticed a white van in front of the home. The van's windows were rolled down and it smelled of cleaning solvent; the officers also noted that the back seat was missing and the carpet appeared to have been washed. Defendant consented to a search of the van and a large bloodstain was found under the carpet; tests revealed that the blood belonged to

Ms. Lewis. On 5 December, Det. Robinson interviewed defendant again after giving him *Miranda* warnings. Defendant first explained that the blood was from Ms. Lewis' nosebleeds and menstruation. He also stated that he had last seen her on 24 November. When Det. Robinson and crime scene investigators continued to confront defendant with the evidence and tell him it didn't match his explanation, he began crying and stated that he should have burned the van. However, defendant denied killing Ms. Lewis.

On 6 December, defendant's daughter contacted law enforcement and asked them to come to her property to check some recently disturbed dirt and leaves on the wooded lot. She testified that defendant had driven his van to her home on 25 November. On that day, defendant had arrived to drop off items for Thanksgiving dinner. He had chatted with his daughter and then spent about thirty minutes outside alone on the property. Defendant had then come back inside to watch television and play with his grandson. On 6 December, investigators found Ms. Lewis' decomposing body wrapped in a quilt and tarp in a shallow grave on defendant's daughter's property. Her head had been struck multiple times and her nose, both eye sockets and her upper and lower jaw bones had been broken. The pathologist testified that Ms. Lewis's injuries were consistent with being hit repeatedly with a heavy-edged object like a brick or two-by-four piece of lumber. Bruising indicated that Ms. Lewis had been alive for at least ten to fifteen minutes after she was beaten about the head. Ms. Lewis' body also showed other injuries, including a slit throat and stab wounds in the chest and thigh. The pathologist opined that the head injuries and slit throat had been the causes of Ms. Lewis' death. The pathologist also explained decomposition of bodies and illustrated her testimony with color photographs of Ms. Lewis' corpse which were projected onto a six by four foot screen in the courtroom.

At the close of all evidence, defendant asked the court to instruct the jury on second-degree murder, but the trial court denied the request and instructed solely on first-degree murder under theories of premeditation and deliberation. The jury returned a verdict of guilty of first-degree murder and the trial court sentenced defendant to life in prison without parole. Defendant appeals.

Defendant makes two arguments on appeal: that the trial court erred in (I) denying his motion for a jury instruction on second-degree murder, and (II) admitting irrelevant and inflammatory evidence regarding Ms. Lewis' decomposition into evidence.

I

[1] Defendant first argues that the trial court erred in denying his motion for a jury instruction on second-degree murder. We disagree.

"[A] defendant is entitled to have a lesser-included offense submitted to the jury only when there is evidence to support it." *State v. Johnson*, 317 N.C. 193, 205, 344 S.E.2d 775, 782 (1986).

> The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements.

State v. Leroux, 326 N.C. 368, 378, 390 S.E.2d 314, 322, *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d 155 (1990). "First-degree murder is, *inter alia*, the unlawful killing of a human being committed with malice, premeditation, and deliberation." *State v. Geddie*, 345 N.C. 73, 94, 478 S.E.2d 146, 156 (1996), *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1997); *see also* N.C. Gen. Stat. § 14-17 (2009). "The unlawful killing of a human being with malice but without premeditation and deliberation is murder in the second degree." *Id.*

> Premeditation and deliberation generally must be established by circumstantial evidence, because they ordinarily are not susceptible to proof by direct evidence. "Premeditation" means that the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing. "Deliberation" means an intent to kill executed by the defendant in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.

State v. Bonney, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991) (internal citations omitted).

Circumstances that may tend to prove premeditation and deliberation include:

> (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulties between the parties; (5) the dealing of

lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

State v. Gladden, 315 N.C. 398, 430-31, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986). The nature and number of the victim's wounds can also support an inference of premeditation and deliberation. *Id.* at 431, 340 S.E.2d at 693. "If the evidence satisfies the State's burden of proving each element of first-degree murder, including premeditation and deliberation, and there is no evidence to negate these elements other than defendant's denial, the trial court should exclude second-degree murder from the jury's consideration." *Geddie*, 345 N.C. at 94, 478 S.E.2d at 156 (citation omitted).

In considering the existence of premeditation and deliberation, "the term 'cool state of blood' does not mean an absence of passion and emotion. One may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and, to a large extent, controlled by passion at the time." *Bonney*, 329 N.C. at 77, 405 S.E.2d at 154 (internal citations omitted). "The fact that a defendant was angry or emotional will not negate the element of deliberation during a killing unless there was evidence the anger or emotion was strong enough to disturb [the] defendant's ability to reason." *State v. Rios*, 169 N.C. App. 270, 280, 610 S.E.2d 764, 771 (citation omitted), *appeal dismissed and disc. review denied*, 360 N.C. 75, 623 S.E.2d 37 (2005). "[A] person may be excited, intoxicated and emotionally upset, and still have the capability to formulate the necessary plan, design, or intention to commit murder in the first[-]degree." *State v. Mash*, 323 N.C. 339, 347, 372 S.E.2d 532, 537 (1988) (internal quotation marks and citation omitted). Further, "[n]o inference of the absence of deliberation and premeditation arises from intoxication, as a matter of law." *Id.* (internal quotation marks and citation omitted).

Here, on appeal, defendant contends that the evidence would have supported a reasonable inference by the jury, that defendant killed Ms. Lewis in a "frenzied, crack-fueled explosion of [his] long-simmering "rage of jealousy." However, as noted above, premeditation and deliberation do not imply a lack of passion, anger or emotion. Nor does defendant's possible drug intoxication at the time of the killing support an inference that he did not premeditate and deliberate in his actions. The State presented evidence regarding: defendant's conduct and statements before the killing, including threats to

harm Ms. Lewis; ill-will and previous difficulties between the parties; lethal blows rendered after Ms. Lewis was been felled and rendered helpless; the brutality of the killing; and the extreme nature and number of Ms. Lewis' wounds. This evidence supported the State's burden of proving premeditation and deliberation in the killing of Ms. Lewis. Defendant did not present evidence to negate the State's showing on these *Gladden* circumstances. The only evidence defendant cites to show his state of mind were the voicemail messages heard by the jury. These messages support only an inference of drug impairment and passion, and do not indicate "anger or emotion . . . strong enough to disturb defendant's ability to reason[,]" such as would negate the elements of premeditation and deliberation. *Rios*, 169 N.C. App. at 280, 610 S.E.2d at 771. This argument is overruled.

II

[2] Defendant next argues that the trial court erred in admitting irrelevant and inflammatory evidence regarding Ms. Lewis' decomposition. We disagree.

We review a trial court's decision to admit evidence under the balancing test of Rule 403 of the North Carolina Rules of Evidence for an abuse of discretion. *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "Whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in light of the illustrative value of each likewise lies within the discretion of the trial court." *Id.* (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation omitted).

Rule 403 of the North Carolina Rules of Evidence provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2009).

> Photographs are usually competent to explain or illustrate anything that is competent for a witness to describe in words, and properly authenticated photographs of a homicide victim may be introduced into evidence under the trial court's instructions that their use is to be limited to illustrating the witness's testimony. . . . Photographs may also be introduced in a murder trial to illustrate

> testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree, and for this reason such evidence is not precluded by a defendant's stipulation as to the cause of death. Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury.

Hennis, 323 N.C. at 283-84, 372 S.E.2d at 526 (internal quotation marks and citations omitted). "As a general rule, the fact that a photograph is gory and may tend to arouse prejudice does not render it inadmissible, so long as it is otherwise relevant and material. . . . This holds true even where the photographs depict remains in an advanced state of decomposition." *State v. Harris*, 323 N.C. 112, 126-27, 371 S.E.2d 689, 698 (1988) (internal citations omitted). "This Court has recognized, however, that when the use of photographs that have inflammatory potential is excessive or repetitious, the probative value of such evidence is eclipsed by its tendency to prejudice the jury." *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526.

Here, defendant filed a pretrial motion to prevent the State from introducing three photographs of Ms. Lewis' body, taken just after it had been removed from the shallow grave. The State voluntarily withdrew one of the photographs. In denying defendant's motion, the trial court correctly noted the standard under Rule 403 to be applied, and concluded that, because the two photographs showed different portions of the body, they were not repetitious. These photographs of Ms. Lewis' decomposed body were used to illustrate the testimony of law enforcement officers who unearthed her body. We see no abuse of discretion in the trial court's decision regarding these photographs.

The trial court also admitted twenty color photographs of Ms. Lewis' decomposing body to illustrate the testimony of the pathologist who conducted the autopsy. At trial, defendant did not object to any specific photographs, but rather to the number and cumulative effect of the photographs. The State voluntarily withdrew two of the photographs after an in-chambers conference between the trial court and counsel to review the photographs. The trial court allowed the remaining photographs into evidence after determining that they showed different views of Ms. Lewis' body and her wounds with little repetition. Four of the photographs showed Ms. Lewis' reconstructed skull; in those, the bones had been cleaned. The photographs were projected onto a six-foot by eight-foot screen near the bench.

Defendant argues that the trial court abused its discretion in admitting these photographs because they had little probative value, but were highly prejudicial due to their graphic nature. Defendant notes that he offered to stipulate to the victim's identity and did not contest the cause of death. However, as the Supreme Court noted in *Hennis*, "[p]hotographs may . . . be introduced in a murder trial to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree, and for this reason such evidence is not precluded by a defendant's stipulation as to the cause of death." 323 N.C. at 284, 372 S.E.2d at 526. As noted in our discussion of defendant's argument I *supra*, the pathologist's testimony about the dealing of lethal blows after Ms. Lewis was rendered helpless but still alive, and the brutality and number of her wounds were circumstantial evidence of defendant's premeditation and deliberation, elements of first-degree murder. We conclude that the trial court did not abuse its discretion in admitting eighteen photographs to illustrate relevant testimony regarding an element of the crime for which defendant was charged, particularly where the victim suffered so many distinct injuries to different parts of her body. This argument is overruled.

In his brief, defendant challenges testimony by the pathologist about the process of decomposition and to the manner of projection of the photographs. However, as he acknowledges, defendant did not raise these objections in the trial court, and thus, would be entitled only to our review for plain error. Because defendant does not argue plain error in his brief to this Court, he has waived appellate review of his arguments. *See State v. Braxton*, 352 N.C. 158, 196, 531 S.E.2d 428, 450-51 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *see also State v. Mobley*, ––– N.C. App. –––, –––, 684 S.E.2d 508, 510 (2009), *disc. review denied*, 363 N.C. 809, 692 S.E.2d 393 (2010).

No error.

Judges STEELMAN and ERVIN concur.

STATE OF NORTH CAROLINA v. JARVIS LEON WILLIAMS

No. COA10-58

(Filed 7 December 2010)

Constitutional Law— right to confrontation—lab results

A defendant's Sixth Amendment right to confrontation was violated where lab results were presented by a forensic chemist who did not herself perform the tests on which her testimony was based, nor was she present when those tests were performed. Cross-examination was important to expose, among other things, the care or lack of care with which a chemist conducted tests.

Appeal by defendant from judgments entered 1 September 2009 by Judge Calvin E. Murphy in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 September 2010.

Roy Cooper, Attorney General, by Daniel D. Addison, Special Deputy Attorney General, for the State.

Don Willey for defendant-appellant.

MARTIN, Chief Judge.

Defendant was indicted upon charges of possession with intent to sell or deliver cocaine and of having attained the status of an habitual felon. Defendant pled not guilty.

At trial, the evidence tended to show that on 2 April 2008, a confidential informant told Sergeant Brian Scharf that a black male named Jarvis was selling cocaine from the front porch of 429 Heflin Street. The informant told the officer that the cocaine was located in a hanging flower pot. Sergeant Scharf and Officer Gilliland responded to the tip by driving to 429 Heflin Street, where they saw defendant sitting on the front porch. They also observed a hanging flower pot. Sergeant Scharf saw a small plastic bag sticking out of the flower pot. He handcuffed defendant and searched him. During the search of defendant, he found and collected $195 in small denominations. He retrieved the bag out of the flower pot. The bag contained a substance which Sergeant Scharf believed to be crack cocaine.

At the police station, defendant made the following statement to the police:

> [t]he cocaine that Officer Scharf found at 429 Heflin Street was put there by a black male named Chris. He put it there to sell it. When I got there, Chris told me the cocaine was there so I could sell it for him until he got back. I sold about thirty or forty dollars worth today. The cocaine was not mine. The cocaine was in a clear plastic bag in a flower pot hanging from the porch ceiling.

Sergeant Scharf testified that, during the course of his eleven-year employment at Charlotte Mecklenburg Police Department (CMPD), he had received training in the identification of drugs and controlled substances. He had been trained to identify crack cocaine "[b]y the way it looks, by the way it's shaped, by the way it's packaged, the color." He testified that crack cocaine has "a certain smell to it because it's made with powder cocaine chemicals, bringing it together to make it a hard substance to be able to ingest it by smoking it." He stated that he has identified substances and then had lab results confirming his identifications that were "accurate a hundred percent of the time." Scharf testified that, over the course of his career, he had participated in "[o]ver a thousand" drug and narcotic arrests—between three quarters and two thirds of which involved crack cocaine—and that each time, he observed the substance. He testified that he believed that the substance seized from the flower pot in the present case was crack cocaine.

Officer Gilliland testified that, during the course of his eight year employment at CMPD, he had also received training in identifying substances and drug paraphernalia. He testified that he had been directly involved in approximately 75 arrests that involved cocaine or crack cocaine. He then testified that "Scharf retrieved the baggie from the flower pot, which had crack cocaine in it." Gilliland confirmed that he had been able to observe the bag's contents.

At trial, over defendant's objection, CMPD crime lab forensic chemist Ann Charlesworth detailed the process that chemists in the lab follow when testing substances. She explained that forensic chemists first conduct a preliminary color test on a substance, and then extract a small amount of the substance to put with a solvent in a GC Mass Spec instrument. Charlesworth testified that in this case a color test was done twice and a GC Mass Spec test was done once. She testified that these are the same tests that she and other experts in her field reasonably rely upon when forming an opinion as to the weight and nature of substances.

Charlesworth explained that the GC Mass Spec generates a graphical result which a forensic chemist must interpret. Chemists look at retention time, which is specific for each chemical substance, and the graphical result from the GC Mass Spec, in order to see how well the graph matches the known standard for the substance.

Once a chemist has completed his or her analysis of a substance, all cases are then peer reviewed. In explaining what is done during a peer review, Charlesworth testified:

> I look at a worksheet and see what the description of the item was, how much the item weighed, and what tests were conducted. And then I also look at the instrument printouts from the GC Mass Spec, and I interpret those and see if I agree with the results that the chemist came up with, and then I look at the report and make sure it looks to be correct.

Charlesworth stated that she conducted the same type of review that she would have had she been the peer-reviewer. She agreed with the original forensic chemist, DeeAnne Johnson, "that from the printouts from the GC Mass Spec that the cocaine did come out, and it chemically matche[d] with the cocaine standard . . . in [the] library."

On cross-examination, it was clarified that Charlesworth herself did not analyze the substance itself. Nor was Charlesworth present on 16 September 2008 when the tests were run. Charlesworth also did not generate her own report. Rather, she explained that it was her role to assure that Johnson followed the protocol and procedures to correctly analyze the substance.

On 1 September 2009, the jury found defendant guilty of possession with intent to sell and/or deliver cocaine. Defendant then pled guilty to being an habitual felon. He was sentenced to 107 to 138 months' imprisonment.

Defendant appeals, arguing that the testimony of Charlesworth violated his Sixth Amendment right to confrontation. We agree.

This Court reviews alleged violations of constitutional rights *de novo*. *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007). Under the *de novo* standard of review, this Court "considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)).

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Our Court in *State v. Brewington*, ––– N.C. App. –––, 693 S.E.2d 182 (2010), recently traced the lineage of the Confrontation Clause as it applies to situations where a chemist testifies to a "peer review" of tests done by other chemists. *See id.* at –––, 693 S.E.2d at 187-88 (discussing *State v. Galindo*, ––– N.C. App. –––, 683 S.E.2d 785 (2009), *State v. Mobley*, ––– N.C. App. –––, 684 S.E.2d 508 (2009), *disc. review denied*, 363 N.C. 809, 692 S.E.2d 393 (2010), *State v. Davis*, ––– N.C. App. –––, 688 S.E.2d 829 (2010), *State v. Hough*, ––– N.C. App. –––, 690 S.E.2d 285 (2010), and *State v. Brennan*, ––– N.C. App. –––, 692 S.E.2d 427 (2010)). After discussing the development of this line of cases, the *Brewington* Court noted that:

> [c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials. Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination.
>
> . . . [T]he purpose of requiring the analysts themselves testify is so that their honesty, competence, and the care *with which they conducted the tests* in question could be exposed to testing in the crucible of cross-examination. Thus, to allow a testifying expert to reiterate the conclusions of a non-testifying expert would eviscerate the protection of the Confrontation Clause.

Id. at –––, 693 S.E.2d at 189 (internal quotation marks and citations omitted). The Court then went on to describe a four-pronged test which applies in these cases:

> (1) determine whether the document at issue is testimonial; (2) if the document is testimonial, ascertain whether the declarant was unavailable at trial and defendant was given a prior opportunity to cross-examine the declarant; (3) if the defendant was not afforded the opportunity to cross-examine the unavailable declarant, decide whether the testifying expert was offering an independent opinion or merely summarizing another non-testifying expert's report or analysis; and (4) if the testifying expert summarized another non-testifying expert's report or analysis, determine whether the admission of the document through another testifying expert is reversible error.

Id.

Turning now to the present case, it is clear that the report detailing the tests done by Johnson and then "peer reviewed" and testified about by Charlesworth is testimonial. *See Melendez-Diaz v. Mass.*, ––– U.S. –––, –––, 174 L. Ed. 2d 314, 321 (2009) (notingthat testimonial evidence includes " 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial' ") (quoting *Crawford v. Washington*, 541 U.S. 36, 52, 158 L. Ed. 2d 177, 193 (2004)). Moreover, there is nothing in the record supporting any conclusion that defendant was given the opportunity to cross-examine Johnson.

This brings us to the third prong of the test: determining whether Charlesworth was offering an independent opinion or merely summarizing Johnson's report. Defendant argues that Charlesworth merely summarized Johnson's results, thus making this a case similar to *Brennan*, ––– N.C. App. at –––, 692 S.E.2d at 431 (holding that testimony from the non-testing chemist eroded the defendant's constitutional rights and that the defendant was entitled to a new trial), or *Brewington*, ––– N.C. App. at –––, 693 S.E.2d at 191 (holding that testimony from a chemist who conducted no independent analysis of the substance was admitted in error and defendant was therefore entitled to a new trial). The State, on the other hand, analogizes Charlesworth's testimony to the testimony given in *Mobley*, ––– N.C. App. at –––, 684 S.E.2d at 511-12 (holding that there was no error when the testifying DNA analyst testified to her own independent analysis which was merely based on the analysis of the testing analyst). The State argues that Charlesworth did not merely restate Johnson's results but "reviewed the underlying report to determine if Ms. Johnson had followed all standard testing protocols . . . [and] the data on which Ms. Johnson's conclusions were based [in order to] form her own expert opinion about the composition of the suspected cocaine."

The present case is distinguishable from *Mobley*. In *Mobley*, the testifying expert compared the DNA profile from a buccal swab taken from the defendant to the DNA profile taken from a vaginal swab of the victim. *Mobley*, ––– N.C. App. at –––, 684 S.E.2d at 511. The expert then testified "not just to the results of other experts' tests, but to her own technical review of those tests, her own expert opinion of the accuracy of the non-testifying experts' tests, and her own expert opinion *based on a comparison of the original data*." *Id.* (emphasis

added). In the present case, on the other hand, Charlesworth did not even see the original substance.

The State also relies upon *Hough*, ––– N.C. App. at –––, 690 S.E.2d at 291 (holding that there was no error where a testifying chemist provided her own analysis and expert opinion regarding the accuracy of a testing chemist's report based on her "peer review"). The difficulty that this Court finds with making a distinction between *Hough*, pointed to by the State on the one hand, and *Brennan* and *Brewington*, to which defendant directs us on the other hand, is that, despite their different holdings, the testimony given by Charlesworth was substantively the same as the testimony given by the expert in all three of those cases. The *Brewington* Court drew a narrow distinction in order to explain the "no error" holding in *Hough* by noting that, "[d]espite the fact that the testifying expert in *Hough* did not conduct the tests on the contraband in issue, we concluded that the testifying expert conducted a 'peer review' of her colleague's work." *Brewington*, ––– N.C. App. at –––, 693 S.E.2d at 188. The *Brewington* Court cautioned that it was not the holding of *Hough* "that every 'peer review' will suffice to establish that the testifying expert is testifying to his or her expert opinion; however, [in *Hough*, the expert's] testimony was sufficient to establish that her expert opinion was based on her own analysis of the lab reports." *Id.* (quoting *Hough*, ––– N.C. App. at –––, 690 S.E.2d at 291).

While the relevancy of a "peer review" of underlying lab reports which themselves are not admitted for the truth of the matter asserted may be questioned, *Brewington* correctly emphasizes the importance of cross-examination as a tool to expose, among other things, the care (or lack thereof) with which a chemist conducted tests on a substance. *Brewington*, ––– N.C. App. at –––, 693 S.E.2d at 189.

With this in mind, we turn to the present case and note that Charlesworth did not conduct any tests on the substance, nor was she present when Johnson did. We think that these facts are decisive and show that Charlesworth could not have provided her own admissible analysis of the relevant underlying substance. *See State v. Craven*, ––– N.C. App. –––, –––, 696 S.E.2d 750, 755 (2010). We therefore now hold that Charlesworth's testimony detailing her "peer review" was merely a summary of the underlying analysis done by Johnson. Therefore admitting this testimony was error.

This brings us to the fourth prong of the test identified in *Brewington*, whether the admission of this hearsay testimony was

reversible error. The State bears the burden of proving the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2009) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt.").

Defendant was charged with possession of cocaine, which requires the State to show beyond a reasonable doubt that the substance defendant possessed was actually cocaine. *See* N.C. Gen. Stat. § 90-95(a)(1) (2009). Besides Charlesworth's testimony as to the chemical composition of the substance seized, the only other evidence that the substance sold by defendant was in fact cocaine was the testimony of Officer Gilliland and Officer Scharf that the substance seized from the flower pot was cocaine and the statement given by the defendant that "Chris told me the cocaine was there so I could sell it for him until he got back. I sold about thirty or forty dollars worth today. The cocaine was not mine." The State contends that this evidence renders any error harmless. We disagree.

The testimony of defendant and police officers alone, despite both officers' credentials and experience, is insufficient to show that the substance possessed was cocaine. The State must still present evidence as to the chemical makeup of the substance. *State v. Nabors*, ––– N.C. App. –––, –––, 700 S.E.2d 153, 158 (2010) ("[M]ere lay opinion that a substance is a controlled substance based solely on its physical appearance is insufficient evidence from which a jury could find beyond a reasonable doubt that the substance is, in fact, controlled."); *State v. Meadows*, ––– N.C. App. –––, –––, 687 S.E.2d 305, 309 (" '[E]xisting precedent suggests that controlled substances defined in terms of their chemical composition can only be identified through the use of a chemical analysis rather than through the use of lay testimony based on visual inspection.' ") (quoting *State v. Ward*, ––– N.C. App. –––, –––, 681 S.E.2d 354, 371 (2009), *aff'd*, 364 N.C. 133, 694 S.E.2d 738 (2010)), *cert. denied*, 364 N.C. App. 245, 699 S.E.2d 640 (2010); *State v. Llamas-Hernandez*, 189 N.C. App. 640, 653, 659 S.E.2d 79, 87 (2008) (Steelman, J., concurring in part and dissenting in part), *rev'd and dissent adopted*, 363 N.C. 8, 673 S.E.2d 658 (2009).

Because we conclude that this error was not harmless, defendant is entitled to a

New trial.

Judges STROUD and ERVIN concur.

JOHN DOMINGUE, Plaintiff v. NEHEMIAH II, INC., a North Carolina Corporation, WANDA GARWOOD, an Individual, and Does 1 through 50, Defendants

No. COA10-300

(Filed 7 December 2010)

1. Construction Claims— subsequent owner—claim sufficiently stated

The trial court erred by granting defendants' motion to dismiss a claim of negligent home construction under N.C.G.S. § 1A-1, Rule 12 (b)(6) where plaintiff was a subsequent owner of the home. Controlling precedent does not require a showing of statutory violations or defects materially affecting structural integrity for a subsequent builder to maintain an action.

2. Contracts— home construction—subsequent owner—claim sufficiently stated

Plaintiff's allegations of breach of contract in the construction of a house were sufficient to survive a motion to dismiss under N.C.G.S. § 1A-1, Rule 12 (b)(6) where plaintiff was a subsequent purchaser who asserted that he was the successor-in-interest to any claims under the original owner's contracts to build the house and to correct construction defects. The record was not clear as to whether plaintiff was, in fact, an assignee of any possible claims the original owners may have had.

3. Appeal and Error— interpretation of complaint—not addressed below

The Court of Appeals did not address the issue of whether a complaint sufficiently set forth a claim of breach of the implied warranty of habitability where that theory of relief was not addressed by defendants or the trial court.

Appeal by plaintiff from order entered 27 October 2009 by Judge Walter H. Godwin in Pasquotank County Superior Court. Heard in the Court of Appeals 14 September 2010.

Berliner Cohen, by John Domingue, for plaintiff-appellant.
G. Elvin Small, III, for defendant-appellees.

HUNTER, JR., Robert N., Judge.

John H. Domingue ("plaintiff"), a subsequent owner to the original homeowner, brought claims of negligence and breach of contract against Nehemiah II, Inc., and Wanda Garwood ("defendants") for alleged defective construction of a dwelling. Plaintiff's claims were dismissed under Rule 12(b)(6) for failure to state a claim for which relief could be granted, in part due to lack of privity and lack of duty of care. We conclude plaintiff's complaint sufficiently alleged negligence, and the trial court erred in dismissing the complaint. Accordingly, we reverse the trial court's order.

I. Facts and Procedural History

The present appeal arises from a complaint filed on 19 May 2008 by plaintiff against defendants and fifty unnamed individuals who were alleged to be the agents or employees of Nehemiah II, Inc., and Wanda Garwood. Plaintiff's complaint set forth two causes of action: negligence by all defendants in the construction of plaintiff's residence located in Elizabeth City, North Carolina; and breach of contract by defendants Nehemiah II, Inc., and Wanda Garwood for failing to perform the construction with ordinary care and failing to repair construction defects. Defendants filed a Rule 12(b)(6) motion to dismiss for failure to state a claim for relief. A hearing on this motion was held on 26 October 2009 and defendants' motion to dismiss was granted on 27 October 2009. Plaintiff gave timely notice of appeal from a final order under N.C. Gen. Stat. § 7A-27(b) (2009) seeking reversal of the order to dismiss.

During August 2003, defendants completed construction on plaintiff's residential home located at 102 Kiwi Court in Elizabeth City, North Carolina. Plaintiff is not the original owner of the residence and he does not refer to the original owners by name in his complaint. The only mention of the original owners' name is found in a footnote in plaintiff's reply brief, referring to "the Boyles" as the prior owners. Nor does the record reveal when plaintiff acquired ownership of the residence. Plaintiff alleges, however, to be the Boyles' successor-in-interest.

According to plaintiff, defendants executed a written contract with the Boyles to construct the residence in a "good and workmanlike manner," and that defendants substantially completed construction on or about August 2003. Plaintiff also alleges that defendants entered into a written contract on 13 June 2005 to "correct all problems" with the house.

Although the record does not disclose how or when plaintiff discovered the alleged defects, plaintiff contends that defendants' construction was not completed in a good and workmanlike manner and resulted in multiple defects in the residence including: damaged roof shingles requiring replacement of the roof or sections thereof; improperly installed or defective flashings that permitted water to intrude behind the siding; failure to properly waterproof doorjambs and install doors resulting in water intrusion, fungal growth, and damage to the subfloor; a defective foundation and defective floor joists that resulted in sagging floors, as well as cracked walls and tiles.

Plaintiff alleges these defects evidence that defendants breached their duty to plaintiff to exercise ordinary care in the construction of the residence. Defendants' negligence, plaintiff argues, has resulted in unspecified damages to correct the defects and loss of property value to the extent any defects cannot be remedied.

Plaintiff further alleges that as a result of defendants' negligent construction, defendants breached both the contract for the construction of the residence and the subsequent contract for correcting all defects. Plaintiff contends, however, that he and the Boyles satisfied all of their obligations under the contracts with defendants, including payment of the full contract price for the construction and repairs.

Plaintiff filed this suit on 19 May 2008, with two causes of action, negligence and breach of contract. Defendants did not file an answer, but on 1 December 2008, defendants filed a motion to dismiss as to all of plaintiff's claims asserting that the claims were barred by the statute of limitations pursuant to N.C. Gen. Stat. §§ 1-50 and 1-52 (2009), and that the complaint failed to state a claim upon which relief could be granted pursuant to North Carolina Rules of Civil Procedure 12(b)(6). Defendants also sought dismissal of all claims against "Does 1 through 50," alleging these defendants had not been identified, served, or made parties to the suit.

Following a hearing on the motion held 26 October 2009 the trial court granted defendants' motion. Plaintiff appeals the trial court's order.

II. Jurisdiction and Standard of Review

Because the trial court entered a final order as to all of plaintiff's claims, this Court has jurisdiction to hear plaintiff's appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2009).

This Court reviews *de novo* a trial court's dismissal of a complaint for failure to state a claim for relief. *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 606, 659 S.E.2d 442, 447 (2008). This Court must determine " 'whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.' " *Id.* at 606, 659 S.E.2d at 448 (citation omitted). Dismissal of a complaint under Rule 12(b)(6) is proper "(1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985).

III. Analysis

A. Plaintiff's Claim for Negligent Construction

[1] In his first argument on appeal, plaintiff contends that the trial court erred in granting defendants' motion to dismiss plaintiff's claim that defendants were negligent in the construction of his home. We agree and conclude that plaintiff's complaint alleged a claim of negligence sufficient to survive defendants' Rule 12(b)(6) motion to dismiss.

Plaintiff contends that, as a subsequent owner of the home, he has standing to assert a claim of negligence against the builder for breaching his duty to plaintiff to use ordinary care in the construction of the home. Plaintiff insists our Supreme Court's holding in *Oates v. JAG, Inc.* is controlling on this issue. 314 N.C. at 277, 333 S.E.2d at 223-24. We agree.

The house that was the subject of the litigation in *Oates* was constructed by the defendant and subsequently sold to two successive owners before being purchased by the plaintiffs who were the third owners. *Id.* at 277, 333 S.E.2d at 224. These subsequent owners discovered numerous latent defects in the home's construction. *Id.* As a result of these defects, the plaintiffs incurred monetary damages for extensive repairs. *Id.* The plaintiffs sued the builder for negligent construction seeking compensation for these repairs. *Id.* at 278, 333 S.E.2d at 224. The defendant moved for dismissal of the plaintiffs' complaint for, among other reasons, failure to state a claim upon which relief could be granted. *Id.* The trial court granted the motion, the plaintiffs appealed, and this Court affirmed the order concluding that due to the plaintiffs' lack of privity with the defendant the plain-

tiffs could not sustain a claim for relief for negligent construction against the builder. *Oates v. JAG, Inc.*, 66 N.C. App. 244, 244, 246-47, 311 S.E.2d 369, 370-71 (1984), *rev'd*, 314 N.C. 276, 333 S.E.2d 222 (1985).

Our Supreme Court granted certiorari and reversed and remanded the case. *Oates*, 314 N.C. at 284, 333 S.E.2d at 227. Noting that while many jurisdictions deny subsequent purchasers the right to maintain a claim based on the traditional theory of implied warranty, the Court reasoned that plaintiffs claiming latent construction defects by a defendant-builder should not be denied relief in tort solely for lack of contractual privity with the builder, holding: "[A] subsequent purchaser can recover in negligence against the builder of the property if the subsequent purchaser can prove that he has been damaged as a proximate result of the builder's negligence." *Id.* at 281, 333 S.E.2d at 226.

In the present case, plaintiff's complaint alleged defendants' construction breached defendants' duty of care to plaintiff as the construction was not performed in a good and workmanlike manner, and resulted in specific and numerous defects that will require costly repairs and potential loss of property value. Thus, plaintiff's complaint sufficiently alleged a claim of negligence against defendants, and it was error for the trial court to dismiss the claim.

On appeal, defendants concede that a subsequent purchaser of a residence may sustain a claim of negligence against the builder. Defendants argue, however, that *Oates*, and a subsequent decision by our Supreme Court, *Floraday v. Don Galloway Homes*, 340 N.C. 223, 456 S.E.2d 303 (1995), require the subsequent purchaser to show either a violation of a building code, constituting negligence *per se*, or defects in construction that materially affect the structural integrity of the dwelling. We conclude defendants' interpretation of the case law is incorrect.

While the plaintiffs in the case before the *Oates* Court alleged several violations of the North Carolina Uniform Residential Building Code, we find nothing in the Court's opinion to require a showing of statutory violations. 314 N.C. 276, 333 S.E.2d 222. Nor can we accept defendants' contention that the Court's decision in *Floraday* limited *Oates*' holding to only those instances in which the alleged construction defects materially affect the structural integrity of the dwelling.

The plaintiffs in *Floraday* were subsequent purchasers of their home having bought their house from the original owner who con-

tracted with the builder for its construction. 340 N.C. at 224, 456 S.E.2d at 304. The plaintiffs sued the builder for negligent construction of a backyard retaining wall alleging the retaining wall's defects threatened the structural integrity of the house. *Id.* at 223-24, 456 S.E.2d at 304. This Court reversed the trial court's entry of summary judgment for the defendant-builder holding that a subsequent purchaser of a home may hold the builder liable for the negligent construction of a structure on the premises that materially affects the "use and enjoyment of the house itself." *Floraday v. Don Galloway Homes*, 114 N.C. App. 214, 217, 441 S.E.2d 610, 612 (1994), *aff'd*, 340 N.C. 223, 456 S.E.2d 303 (1995).

Upon discretionary review, our Supreme Court affirmed but limited the holding of the Court of Appeals such that "a subsequent purchaser of a home may hold the builder liable for the negligent construction of *other structures* where the defective construction materially affects the *structural integrity* of the house itself." *Floraday*, 340 N.C. at 229, 456 S.E.2d at 307 (emphasis added). Thus, contrary to defendants' contention, our Supreme Court affirmed the holding of *Oates* and expanded its reach to encompass a category of defects in structures other than the house that materially affect the house's structural integrity. *Id.* As plaintiff's complaint in the present case concerns defects only in the house itself and not in other structures, our Supreme Court's holding in *Floraday* is distinguishable. *Oates*, however, is controlling, and supports plaintiff's claim of negligent construction against defendants. Because we find plaintiff has made sufficient allegations of negligence, we hold it was error for the trial court to dismiss plaintiff's claim.

B. Plaintiff's Claim for Breach of Contract

[2] Plaintiff's second argument on appeal is that the trial court erred in dismissing his claim for breach of contract. To sustain a claim for breach of contract, plaintiff must allege a valid contract existed and breach of the terms of that contract. *See Sanders v. State Personnel Comm'n*, 197 N.C. App. 314, 320, 677 S.E.2d 182, 187 (2009), *disc. review denied*, 363 N.C. 806, 691 S.E.2d 19, *disc. review dismissed*, 363 N.C. 806, 691 S.E.2d 20 (2010). While defendants contend that plaintiff cannot maintain a breach of contract claim due to a lack of privity, our statutes and case law provide "[t]he right of the assignee of a chose in action arising out of contract to sue therefor in his own name has been declared by statute . . . and has been upheld in numerous decisions of this court." *Rickman v. Holshouser*, 217 N.C. 377,

378, 8 S.E.2d 199, 199 (1940); *Morton v. Thornton*, 259 N.C. 697, 699, 131 S.E.2d 378, 380 (1963) ("An assignee of a contractual right is a real party in interest and may maintain the action."); N.C. Gen. Stat. § 1-57 (2009) ("An action may be maintained by a grantee of real estate in his own name, when he or any grantor or other person through whom he derives title might maintain such action . . . ."). Further, this Court has recognized the right of an assignee of a construction contract to maintain a claim for damages resulting from alleged construction defects. *See Land v. Tall House Bldg. Co.*, 150 N.C. App. 132, 135-36, 563 S.E.2d 8, 10 (2002).

In the instant case, the record is unclear as to whether plaintiff is, in fact, an assignee of any possible claims the Boyles may have had against defendants. Pursuant to defendants' Rule 12(b)(6) motion to dismiss, however, we must accept the allegations in plaintiff's complaint as true and determine if the allegations are sufficient to state a claim for relief. *See S.N.R. Mgmt. Corp.*, 189 N.C. App. at 606, 659 S.E.2d at 448. We conclude plaintiff has met his burden.

Plaintiff's complaint alleged that the Boyles entered into a contract with defendants for the construction of the residence in a "good and workmanlike manner," and a separate contract to correct all construction defects. Plaintiff asserts that he is the Boyles' successor-in-interest to any claims under these contracts, and as such, has standing to enforce them. Finally, plaintiff contends defendants breached these contracts by their negligent construction and failure to make necessary corrections. We conclude plaintiff alleged the elements for a breach of contract claim and the trial court erred in dismissing plaintiff's claim.

C. Breach of Implied Warranty

[3] In addition to his claims of negligent construction and breach of contact, plaintiff asks this Court to liberally construe his complaint to have set forth an additional cause of action for breach of implied warranty of habitability. Our review of plaintiff's complaint and the transcript of the hearing on defendants' motion to dismiss reveals that this theory of relief was not addressed by defendants or the trial court. Because the trial court did not address whether plaintiff's complaint could support a cognizable claim for breach of implied warranty of habitability, we need not reach this issue either. Our reversal of the trial court's order for dismissal of plaintiff's claims of negligence and breach of contract is sufficient to dispense with this appeal.

IV. Conclusion

We conclude that the trial court erred in dismissing plaintiff's claim for negligence and breach of contract. Accordingly, the trial court's order dismissing plaintiff's claims is

Reversed.

Judges HUNTER, Robert C., and WALKER concur.

ROBERT DALE RICHARDS AND WIFE, AMELIA P. WEAST, D/B/A, BROAD RIVER PALLETS AND HEAT TREATING, PETITIONERS v. GLADYS JENNINGS JOLLEY AND HUSBAND, BOBBY JOE JOLLEY, RHONDA BURKE BARRON, GARY BURKE, JR., MICHAEL E. BURKE, AND WIFE, JILL T. BURKE, JAMES TIMOTHY HORD, AND H.H. MCKINNEY, RESPONDENT

No. COA10-374

(Filed 7 December 2010)

Highways and Streets— cartway—business with existing access

The trial court correctly granted summary judgment for respondents in a cartway proceeding where petitioners operated a small unincorporated pallet business on the property and contended that the access they had was not adequate for their business or for future growth. Although the definition of industrial plant in the context of a cartway proceeding does not exclude petitioners' small business, cartway petitioners are not entitled to ideal access.

Appeal by petitioners from order entered 6 November 2009 by Judge Laura J. Bridges in Superior Court, Rutherford County. Heard in the Court of Appeals 11 October 2010.

Law Offices of Travis S. Greene, PC, by Travis S. Greene, for petitioner-appellants.

King Law Offices, PLLC, by John B. Crotts, for respondent-appellees.

STROUD, Judge.

Petitioners appeal an order granting summary judgment in favor of respondents. For the following reasons, we affirm.

I. Background

On or about 6 November 2009, the trial court issued an order granting summary judgment in favor of respondents based upon the following determinations it labeled as findings of fact:

9. The Petitioners purchased their property in 1998 and share a right of way with the Respondents, commonly known as Montgomery Road Extension, which varies in width between twelve and fourteen feet in most areas.

10. Prior to the Petitioners purchasing the property, the area in which the subject properties are located had been agricultural and residential in nature. The Petitioners were aware of the nature of the property at the time the property was purchased.

11. Beginning in 1998, the Petitioners began operating a pallet business under the name of Richards' Pallets. The primary operation of Petitioners' business at that time was manufacturing and recycling pallets.

12. Prior to 2005, the Petitioner and his [sic] customers used the right of way for ingress, egress, and regress to and from Petitioners['] business. A variety of vehicles were used to transport pallets to and from Petitioners' business, including cars, pickup trucks, trucks with attached trailers, boxed trucks, flatbed trucks, and straight trucks.

13. The use of the right of way substantially increased noise and traffic along the existing right of way. As a result, the Respondent Bobby Jolley placed speed limit signs and signs reminding travelers that children were playing.

14. Some time in 2005, the Petitioner[s] purchased a "heat treater" for purposes of treating pallets in compliance with federal law.

15. The Petitioners experienced an increase in business and traffic flow as a result of his [sic] new heat treating service.

16. The Petitioners attempted to bring eighteen wheelers (i.e., tractor trailers) to Petitioners['] business, but the right of way proved to be too narrow to facilitate tractor trailers.

17. Sometime in 2005, fencing was replaced along the right of way and Petitioners felt the right of way was being interfered with by some of the Respondents. An action was filed in Superior Court by the Petitioners regarding this incident, but the action was subsequently dismissed through arbitration.

18. Since 2005 when the heat treater was purchased, the Petitioner and his [sic] customers have continued to use the right of way for ingress, egress, and regress to and from Petitioners['] business. A variety of vehicles have continued to be used to transport pallets to and from Petitioners' business, including cars, pickup trucks, trucks with attached trailers, boxed trucks, flatbed trucks, and straight trucks.

19. Approximately half of Petitioner's [sic] business consists of pallets the business manufactures and distributes itself.

20. Most business for Petitioner's [sic] heat treating comes by way of pick-up truck, with the remaining business coming in boxed trucks or straight trucks.

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

6. That the Petitioners have failed to sufficiently meet their burden of proving all of the necessary elements for establishing a cartway.

7. The right of way being used by the Petitioner[s] since purchasing the property in 1998, commonly known as Montgomery Road Extension, has afforded reasonable alternative access to Petitioners' property.

8. The granting of a cartway is not necessary given the access Petitioners currently have with the established right of way. Petitioners appeal.

II. N.C. Gen. Stat. § 136-69(a)

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted). Entitlement to a cartway is governed by N.C. Gen. Stat. § 136-69(a), which provides as follows:

> If any person, firm, association, or corporation shall be engaged in the cultivation of any land or the cutting and removing of any standing timber, or the working of any quarries, mines, or minerals, or the operating of any industrial or manufacturing plants, or public or private cemetery, or taking action preparatory to the operation of any such enterprises, to which there is leading no public road or other adequate means of transportation, other than a navigable waterway, affording necessary and proper means of ingress thereto and egress therefrom, such person, firm, association, or corporation may institute a special proceeding as set out in the preceding section (G.S. 136-68), and if it shall be made to appear to the court necessary, reasonable and just that such person shall have a private way to a public road or watercourse or railroad over the lands of other persons, the court shall appoint a jury of view of three disinterested freeholders to view the premises and lay off a cartway . . . .

N.C. Gen. Stat. § 136-69(a) (2007).

Our Court has determined that in order to be entitled to a cartway pursuant to N.C. Gen. Stat. § 136-69, the petitioner must show

> proof that (1) the land in question is used for one of the purposes enumerated in the statute, (2) the land is without adequate access to a public road or other adequate means of transportation affording necessary and proper ingress and egress, and (3) the granting of a private way over the lands of other persons is necessary, reasonable and just. N.C. Gen. Stat. 136-69 infringes on the rights of private property owners and must be strictly construed. Thus, a proposed cartway may not be approved simply because it is more convenient or less expensive than alternative outlets to a public road available for use by petitioner. To obtain a cartway alternative outlets must be shown to be inadequate.

Campbell v. Connor, 77 N.C. App. 627, 629, 335 S.E.2d 788, 789-90 (1985), *aff'd per curiam*, 316 N.C. 548, 342 S.E.2d 391 (1986).

On appeal, petitioners present two main arguments which are somewhat contradictory. Petitioners first argue that there are genuine issues of material fact and thus the trial court erred in granting summary judgment in favor of respondents; petitioners then argue that there are no genuine issues of material fact and thus summary judgment should have been granted in petitioners' favor. The trial court's order includes findings of fact, and the parties essentially

agree that there is no issue of fact as to the matters stated by the trial court.[1] In fact, both parties moved for summary judgment on the basis that there is no genuine issue of material fact; instead, the parties differ on the application of the controlling legal principles to the undisputed facts. Thus, although petitioners have "labeled" two separate arguments within their brief, they are actually arguing only that the trial court erred in its determination that they are not entitled to a cartway because the undisputed facts establish that summary judgment should have been granted in their favor. However, respondents do argue that there is some minor dispute as to the facts regarding the use of the petitioners' land, so we will first address this issue.

A. Purpose of Land Use

In order to be entitled to a cartway, petitioners must show they are

> engaged in the cultivation of any land or the cutting and removing of any standing timber, or the working of any quarries, mines, or minerals, or *the operating of any industrial or manufacturing plants*, or public or private cemetery, or taking action preparatory to the operation of any such enterprises[.]

N.C. Gen. Stat. § 136-69(a) (emphasis added).

In their verified amended petition for a cartway petitioners allege that their "use of their property is industrial and/or manufacturing in nature." Respondent Bobby Joe Jolley filed an affidavit in which he stated that "[t]he primary operation of Petitioners' business at . . . [its inception] was manufacturing and recycling pallets." Mr. Jolley went on to state that "[a]pproximately half of Petitioner's [sic] business consists of pallets the business manufactures and distributes itself." Respondent Mr. Gary Burke, Jr. also filed an affidavit and made the same statements as Mr. Jolley regarding the nature of petitioners' business on the land at issue. In respondents' brief in support of their motion for summary judgment, respondents state, "[a] substantial amount of Petitioners' business continues to be pallet manufacturing which can be done by straight trucks." Therefore, petitioners and respondents agree that petitioners' business involves "manufacturing," so "there is no genuine issue as to any material fact[,]" *In re Will of Jones* at 573, 669 S.E.2d at 576, as to the nature of petitioners' business.

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1. "We note that ordinarily findings of fact and conclusions of law are not required in the determination of a motion for summary judgment, and if these are made, they are disregarded on appeal." *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 261, 400 S.E.2d 435, 440 (1991).

However, respondents contend that "Petitioners['] small unincorporated business could hardly be considered a plant." Essentially, respondents argue that the term "plant" requires a manufacturing operation of a certain unspecified size which is larger than petitioners' business. N.C. Gen. Stat. § 136-69 does not contain any definition of the word "plant," but in common usage a "plant" is defined as "the land, buildings, machinery, apparatus, and fixtures employed in carrying on a trade or an industrial business[.]" Merriam-Webster's Collegiate Dictionary 948 (11th ed. 2005). The definition of the word "plant" in this context does not include any qualification as to size of the operation. *See id.* Thus, "Petitioners['] small unincorporated business[,]" which respondents acknowledge "manufactures" pallets, is a "plant." *See id.* The trial court properly concluded that petitioners are "entitled to a judgment as a matter of law[,]" *In re Will of Jones* at 573, 669 S.E.2d at 576, as to the first element for entitlement to a cartway as "there is no genuine issue as to any material fact[,]" *id.*, that "the land in question is used for one of the purposes enumerated in the statute," *Campbell* at 629, 335 S.E.2d at 789, specifically, a "manufacturing plant[]." N.C. Gen. Stat. § 136-69(a).

B. Adequate Access or Adequate Means of Transportation

In order for their petition for a cartway to be granted, petitioners must also show that "the land is without adequate access to a public road or other adequate means of transportation affording necessary and proper ingress and egress[.]" *Campbell* at 629, 335 S.E.2d at 789. "[A]dequate" has been defined as "sufficient for a specific requirement[,] . . . barely sufficient or satisfactory [or] . . . lawfully and reasonably sufficient[.]" Merriam-Webster's Collegiate Dictionary 15. Our Supreme Court has also determined that

> [t]here is no material difference . . . in requiring petitioners to show they have no 'adequate means of transportation affording necessary and proper means of ingress and egress' and in requiring them to show that a cartway is 'necessary, reasonable and just.' The difference is only in the approach to the question—the former has a negative and the latter an affirmative approach.

Candler v. Sluder, 259 N.C. 62, 68, 130 S.E.2d 1, 6 (1963). Thus, "adequate access" or "adequate means of transportation[,]" *Campbell* at 629, 335 S.E.2d at 789, is merely access or a means of transportation that is "sufficient[,]" "barely sufficient or satisfactory" or "lawfully and reasonably sufficient[.]" Merriam-Webster's Collegiate Dictionary 15. Furthermore, if petitioners already have "adequate access" or "ade-

quate means of transportation[,]" *Campbell* at 629, 335 S.E.2d at 789, then a cartway is not "necessary, reasonable and just." *Id.*

Petitioners do not deny that they have access or means of transportation to their land but instead contend that the access or means of transportation is not "adequate" for "necessary and proper ingress and egress" because of the type of business they conduct and the scope of the business they allege that they have the potential to conduct, if they had better access. *See id.* Petitioners contend that we must look at the context of their claim as a pallet business in order to determine if the access or means of transportation is "adequate[.]" Petitioners then direct our attention to numerous other pallet businesses which use tractor trailers.

Although our Courts have considered the nature of the use of the property in making the determination as to "adequate" access, prior cases have not determined that cartway petitioners are entitled to ideal access or access identical to that of other similar businesses; in fact, our Courts have found "adequate access" and "adequate means of transportation" for "necessary and proper ingress and egress" when the route was merely temporary in nature or more costly than a cartway. *Id*; *see Turlington v. McLeod*, 79 N.C. App. 299, 305, 339 S.E.2d 44, 49 (affirming the trial court's judgment denying a petition for a cartway because "the facts found support the judge's conclusion that petitioner has failed to establish that he does not have other reasonable means of access. Petitioner presently has permission to use the Fred McLeod Road which he has been using, along with the road he built over Harry Matthews' land, to get to his land. The fact that such permission may be temporary in nature, and may be withdrawn at some future time, is not relevant to our decision. Petitioner is not entitled to condemn a cartway if he presently has access to a public road."), *disc. review denied*, 316 N.C. 557, 344 S.E.2d 18 (1986); *Taylor v. Askew*, 17 N.C. App. 620, 624, 195 S.E.2d 316, 319 (1973) (affirming the trial court's judgment denying a cartway because "[p]etitioners are not entitled to condemn a cartway across respondents' lands merely because this might prove the least expensive means for obtaining access to their property"). Petitioners' access, which enables them to conduct business in every way desired except for the use of tractor trailers, is "adequate." *See Turlington* at 305, 339 S.E.2d at 49; *Taylor* at 624, 195 S.E.2d at 319. The trial court's determination that petitioners were not entitled to a cartway was therefore proper considering the undisputed facts as to the nature of petitioners' access; the fact that petitioners may not be able to use

one preferred mode of transportation does not demonstrate, as a matter of law, that petitioners lack "adequate access to a public road or other adequate means of transportation affording necessary and proper ingress and egress[.]" *Campbell* at 629, 335 S.E.2d at 789. Accordingly, petitioners have failed to meet the requirements for a cartway pursuant to N.C. Gen. Stat. § 136-69(a). *See id.*

C. Cartway is Necessary, Reasonable, and Just

We need not address the last requirement for entitlement to a cartway as our Supreme Court has determined that there is no difference between the second and third requirements of the cartway statute, N.C. Gen. Stat. § 136-69(a). *See Candler* at 68, 130 S.E.2d at 6.

III. Conclusion

As the trial court correctly determined that respondents were "entitled to a judgment as a matter of law[,]" *In re Will of Jones* at 573, 669 S.E.2d at 576, because petitioners were unable to show that they are entitled to a cartway pursuant to N.C. Gen. Stat. § 136-69(a), we affirm the trial court order granting summary judgment in favor of respondents.

AFFIRMED.

Chief Judge MARTIN and Judge STEPHENS concur.

STATE OF NORTH CAROLINA v. TOBIAS JOHNSON

No. COA10-519

(Filed 7 December 2010)

1. Robbery— sufficiency of evidence—intent to commit a taking

The trial court erred in denying defendant's motion to dismiss the charge of attempted robbery with a firearm because there was insufficient evidence from which an intent to commit a taking could be inferred.

2. Burglary and Unlawful Breaking or Entering— sufficiency of evidence—insufficient evidence of predicate felony

The trial court erred in denying defendant's motion to dismiss the charge of felony entering based upon insufficient evidence.

The predicate felony for defendant's conviction of felony entering was attempted robbery and the trial court erred in denying defendant's motion to dismiss the charge of attempted robbery with a firearm based on insufficient evidence.

3. Criminal Law— felony entering—discharging firearm into an occupied dwelling—not mutually exclusive offenses—occurred in succession

The trial court did not err in entering judgments for both felony entering and discharging a firearm into an occupied dwelling inflicting serious bodily injury where the two offenses occurred in succession and were not mutually exclusive.

Appeal by defendant from judgments entered 26 March 2009 by Judge Quentin T. Sumner in Washington County Superior Court. Heard in the Court of Appeals 3 November 2010.

Attorney General Roy Cooper, by Assistant Attorney General David D. Lennon, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for defendant-appellant.

STEELMAN, Judge.

Where there was insufficient evidence of an attempt by defendant to take personal property, the trial court erred in denying defendant's motion to dismiss the charge of attempted robbery with a firearm. In the absence of a predicate felony, the trial court erred in denying defendant's motion to dismiss the charge of felony entering. Where defendant and Lamont, acting in concert, fired through Ruffin's front door, defendant was properly convicted of discharging a firearm into an occupied dwelling inflicting serious bodily injury.

I. Factual and Procedural History

On 14 January 2008, Johnny Ruffin ("Ruffin") was at his home in Plymouth, North Carolina with his uncle. At approximately 5:45 p.m. Ruffin was gathering trash to take outside when he heard someone at the door. Ruffin opened the door, and Tobias Johnson ("defendant") was standing directly in front of the door on the screened-in porch and Corey Lamont ("Lamont") was standing to the blind side of the door. Lamont told Ruffin that he and defendant were going to kill Ruffin, and Lamont inserted his foot into the door, preventing Ruffin

from shutting it. Ruffin's front door opened into the house, and as the struggle over the door continued Lamont inserted his gun through the opening. At some point Lamont removed the gun from the door opening, and someone fired shots through the door. Ruffin was shot twice, once in his left shoulder and once in his left thumb. At this point Ruffin yelled to his uncle to "get the gun." Defendant and Lamont fled.

After defendant and Lamont fled, Ruffin shut the door, locked it, called his brother, and asked him to call law enforcement. An ambulance and police officers arrived approximately fifteen minutes later. Ruffin was taken to Washington County Hospital, and was subsequently airlifted to Pitt Memorial Hospital in Greenville. The bullet that entered Ruffin's shoulder remains there, but the bullet that entered his hand worked its way out about two months later. Corporal Mickey Robbins ("Robbins") responded to Ruffin's residence, and found one .380 shell casing on the porch to the left of the door, when facing the house. Robbins also observed a bullet hole through Ruffin's front door approximately six inches above the deadbolt lock.

Ruffin recognized defendant and Lamont because he had seen them four days prior to the shooting. Defendant and Lamont had walked by Ruffin's home, and asked Ruffin who he was and introduced themselves. Defendant asked whether Ruffin knew defendant's father, and Ruffin stated that he did. After the shooting, Ruffin told police that he could not identify his attackers by name, but gave the police the names of their parents. Police used this information to identify defendant and Lamont, and prepared two photo lineups from which Ruffin identified defendant and Lamont. Ruffin indicated that the attacker carrying the gun was the shorter of the two men. One of the investigating officers identified Lamont as being shorter than defendant.

On 25 February 2008, defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury, attempted robbery with a dangerous weapon, discharge of a weapon into an occupied dwelling inflicting serious bodily injury, and first-degree burglary. On 26 March 2009, a jury found defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury, attempted robbery with a firearm, discharging a firearm into an occupied dwelling inflicting serious bodily injury, and felony entering. The trial court found defendant to be a prior record level III, and sentenced him to two terms of 116 to 149 months imprisonment for assault with a deadly weapon with intent to kill inflicting serious

injury and discharging a firearm into an occupied dwelling inflicting serious injury, one term of 103 to 133 months imprisonment for attempted robbery with a firearm, and one term of 10 to 12 months imprisonment for felony entering. Each of these sentences were to be served consecutively.

On 22 September 2009, this Court granted defendant's petition for writ of *certiorari* to review these judgments.

II. Motion to Dismiss Attempted Robbery with a Firearm Charge

[1] In his second argument, defendant contends the trial court erred in denying his motion to dismiss the charge of attempted robbery with a firearm based upon the sufficiency of the evidence. We agree.

A. Standard of Review

> Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.
>
> If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed. This is true even though the suspicion so aroused by the evidence is strong.
>
> . . . .
>
> The test of sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both.

State v. Powell, 299 N.C. 95, 98-99, 261 S.E.2d 114, 117 (1980) (internal citations omitted).

B. Analysis

> The essential elements of the crime of attempted robbery with a dangerous weapon are: (1) the unlawful *attempted taking* of personal property from another; (2) the possession, use or threatened use of a firearm or other dangerous weapon, implement or means; and (3) danger or threat to the life of the victim.

State v. Trusell, 170 N.C. App. 33, 37, 612 S.E.2d 195, 198 (2005) (quotation omitted), *disc. review denied*, 359 N.C. 856, 620 S.E.2d 196

(2005). The State does not contend that any statement was made or overt act undertaken on the night in question from which intent to commit a taking could be inferred; rather, the State contends that when defendant and Lamont came by Ruffin's residence four days earlier they were there to "case the joint." While we recognize evidence can be direct or circumstantial, this does not rise to the level of sufficient circumstantial evidence, but merely raises a suspicion that defendant was attempting a taking.

There is no evidence that when defendant and Lamont spoke with Ruffin four days prior to the shooting they had any opportunity to observe the layout or contents of Ruffin's home, things they certainly would have done if they were "casing the joint." The fact that there was no ill will between defendant and Ruffin is also not significant. The lack of evidence of defendant's motive for the shooting does not enable this Court to infer defendant was attempting a robbery.

In *State v. McDowell*, the North Carolina Supreme Court vacated the defendant's conviction for attempted armed robbery due to the insufficiency of the evidence. 329 N.C. 363, 389, 407 S.E.2d 200, 214 (1991). In *McDowell*, there was some evidence that the defendant had stated that " '[h]e was going to get him some money even if he had to burn somebody.' " *Id.* at 389, 612 S.E.2d at 215. The defendant then shot and killed a woman while she was sitting in her car, but left the scene of the crime without taking her purse located on the seat next to her. *Id.* at 389-90, 612 S.E.2d at 215. There is even less evidence of an attempted robbery in the instant case than there was in *McDowell*. In *McDowell*, there was a prior statement by the defendant indicating a motive of robbery. However, in the instant case there were no statements whatsoever, made by defendant or Lamont, indicating an intent to steal anything from Ruffin.

The evidence in the instant case was "sufficient only to raise a suspicion" that defendant was attempting to rob Ruffin. *Powell*, 299 N.C. at 98, 261 S.E.2d at 117. The trial court erred in denying defendant's motion to dismiss the charge of attempted robbery with a firearm. The judgment on that charge is ordered vacated by the trial court.

III. Motion to Dismiss Charge of Felony Entering

[2] In his third argument, defendant contends the trial court erred in denying his motion to dismiss the charge of felony entering based upon the sufficiency of the evidence. We agree.

"The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein. The breaking or entering must be without the consent of the owner or occupant." *State v. Williams*, 330 N.C. 579, 585, 411 S.E.2d 814, 818 (1992) (citations omitted). The predicate felony for defendant's conviction of felony entering was attempted robbery. As discussed above the trial court erred in denying defendant's motion to dismiss the charge of attempted robbery with a firearm. Therefore, the trial court also erred in denying defendant's motion to dismiss the charge of felony entering.

However, the jury found defendant guilty of felony entering, finding that the State had proven all of the elements of that offense. "Misdemeanor breaking or entering, G.S. 14-54(b), is a lesser included offense of felonious breaking or entering and requires only proof of wrongful breaking or entry into any building." *State v. O'Neal*, 77 N.C. App. 600, 606, 335 S.E.2d 920, 924 (1985) (citations omitted). Since our holding above only negates the element of the defendant's intent to commit attempted robbery, the defendant was guilty of misdemeanor entry based upon the jury's verdict. We direct the trial court to arrest judgment on the charge of felony entering and remand for entry of judgment on misdemeanor entry. *State v. Silas*, 168 N.C. App. 627, 635, 609 S.E.2d 400, 406 (2005) (citing *State v. Moses*, 154 N.C. App. 332, 572 S.E.2d 223 (2002)), *modified and aff'd*, 360 N.C. 377, 627 S.E.2d 604 (2006).

IV. Mutually Exclusive Offenses

[3] In his first argument, defendant contends the trial court erred in entering judgments for both felony entering and discharging a firearm into an occupied dwelling inflicting serious bodily injury because the two offenses were mutually exclusive. We disagree.

While we have vacated the judgment for felony entering, we are remanding to the trial court for entry of judgment against defendant for misdemeanor entering. Accordingly, this argument is not moot, and we will address it.

Defendant contends that judgment should not have been entered against him for discharging a firearm *into* Ruffin's dwelling, because defendant and Lamont had already entered the dwelling by inserting the gun through the crack in Ruffin's front door when the shots in question were fired. We hold that this argument is not supported by the evidence. Ruffin testified "[Lamont] put the gun inside [the door],

and then he took it out, and then they [defendant and Lamont] shot through the door." Ruffin's testimony makes it clear that defendant first entered Ruffin's home when Lamont inserted his hand into the crack in the door, and then Lamont discharged a firearm into an occupied dwelling inflicting serious bodily injury. These offenses were submitted to the jury as to defendant based upon the theory of acting in concert. Ruffin's testimony was corroborated by Robbins' testimony that there was a bullet hole through the front door approximately six inches above the deadbolt lock. The offenses of entering Ruffin's dwelling and discharging a firearm were not mutually exclusive offenses, but rather offenses that occurred in succession. As the State's brief points out "[t]he mere fact that the shooter entered Mr. Ruffin's house at one point does not mean that the shooter was at all times thereafter inside Mr. Ruffin's house."

For these same reasons, the instant case is distinguishable from *State v. Surcey*, 139 N.C. App. 432, 533 S.E.2d 479 (2000), which defendant cites for the proposition that the offenses of first-degree burglary and discharging a firearm into an occupied dwelling are mutually exclusive. In *Surcey*, "[t]he evidence [was] uncontradicted that at the time defendant fired the shot at [the victim], he was standing on [the victim's] porch outside the residence and was holding the shotgun *inside* [the victim's] living room window." *Id.* at 436, 533 S.E.2d at 482 (emphasis added). In the instant case, defendant and Lamont, acting in concert, removed the gun from the interior of Ruffin's residence before firing, and fired the weapon through Ruffin's front door; therefore, based on these facts the two offenses in question were not mutually exclusive but instead occurred in succession.

Defendant further argues that these offenses are mutually exclusive because defendant and Lamont entered Ruffin's dwelling as they came on Ruffin's screened-in porch, and therefore they could not have fired *into* Ruffin's home. Defendant cites *State v. Watts*, for the proposition that entering through an unlocked door onto the porch of a house is sufficient to show a breaking and entering. 76 N.C. App. 656, 659, 334 S.E.2d 68, 70 (1985), *disc. review denied*, 315 N.C. 596, 341 S.E.2d 37 (1986). While this is an accurate statement of the holding in *Watts*, it is not controlling in a case where a completely different criminal charge is involved.

In State v. Cockerham, the defendant was convicted of discharging a firearm into occupied property when the defendant fired shots from his apartment through a common wall into another apartment.

155 N.C. App. 729, 574 S.E.2d 694 (2003), *disc. review denied*, 357 N.C. 166, 580 S.E.2d 702 (2003). Defendant argued that since he was entirely inside his apartment when he fired the shots he could not have fired into an occupied dwelling. *Id.* In upholding defendant's conviction, this Court noted that "our Supreme Court has stated that the 'protection of the occupants of the building was the primary concern and objective of the General Assembly when it enacted G.S. 14-34.1,' " the statute defining the offense of discharging a weapon into an occupied dwelling. *Id.* at 735, 574 S.E.2d at 698 (citing *State v. Williams*, 284 N.C. 67, 72, 199 S.E.2d 409, 412 (1973)). "A person who fires a gun through a common wall of an apartment is engaged in the same mischief as a person shooting into the building from the outside." *Cockerham*, 155 N.C. App. at 735, 574 S.E.2d at 698. This rationale is equally applicable to the instant case. Lamont fired through the door into Ruffin's residence. Whether he was standing on the porch or in the yard, his actions created the same sort of danger to the occupants of Ruffin's dwelling. Further, the evidence shows that Ruffin considered the interior of his home a separate and more protected area than his screened-in porch. There was a deadbolt lock on the door between Ruffin's porch and his home. We hold that defendant and Lamont were not in Ruffin's dwelling when standing on his screened-in porch for purposes of the offense of discharging a firearm into an occupied dwelling.

The trial court committed no error relating to defendant's conviction for discharging a firearm into an occupied dwelling inflicting serious bodily injury.

NO ERROR in part, REVERSED and VACATED in part, REMANDED in part.

Judges STEPHENS and HUNTER, JR. concur.

STATE OF NORTH CAROLINA v. RASEAN MARQUIS POTTS

No. COA10-516

(Filed 7 December 2010)

1. Appeal and Error— preservation of issues—objection not renewed

Defendant did not preserve for appellate review the question of whether the trial court erred by admitting into his cocaine prosecution testimony that he was identified through a computer program that included people arrested in Mecklenburg County. The prosecutor withdrew the question after defendant objected, but asked it again without objection.

2. Appeal and Error— preservation of issues—anticipatory corroboration—no motion to strike

Defendant did not preserve for appellate review the admission of what one officer said to another about defendant's shoe size where the testimony was admitted as anticipatory corroboration and defendant did not move to strike when it became clear that the testimony was not corroborative.

Appeal by defendant from judgment entered 23 September 2009 by Judge Ronald E. Spivey in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 October 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel D. Addison, for the State.

Michele Goldman for defendant.

ELMORE, Judge.

Rasean Marquis Potts (defendant) was found guilty by a jury of felony possession of cocaine. Defendant was sentenced to a minimum of five months and a maximum of six months in the custody of the Department of Corrections. The trial court suspended this sentence and placed defendant on supervised probation for twenty-four months. The court also required defendant to provide a DNA sample pursuant to N.C. Gen. Stat. § 15A-266.4 and to pay $2,990.50 in attorney fees, restitution, fines, and court costs. Defendant now appeals, alleging evidentiary errors. After careful consideration, we hold that defendant received a trial free from error.

[1] Defendant first argues that the trial court erred by allowing the jury to learn that defendant had previously been arrested. Defendant bases his argument on the following colloquy between the prosecutor and one of the investigating officers, Detective Warren Flowers of the Charlotte-Mecklenburg Police Department:

> Q. Had you ever seen or known the Defendant prior to November the 7th, 2007?
>
> A. I saw his picture on KDCOPS, but I never had any direct contact with him.
>
> Q. What is KDCOPS?
>
> A. KCOPS [sic] is a reporting system by the Charlotte-Mecklenburg Police Department.
>
> [Defense counsel]: Objection, Your Honor.
>
> COURT: Overruled. I will allow him to state the foundation value.
>
> [Prosecutor]: I will withdraw the question at this time, Your Honor.
>
> COURT: Okay. The question is withdrawn.
>
> * * *
>
> [Detective Flowers]: . . . At this point in time we went to the KDCOPS system to identify who we later found to be Mr. Darryl Potts.
>
> Q. And what is KDCOPS?
>
> A. KDCOPS is a reporting system that is used by the Charlotte-Mecklenburg Police Department where reports are made in the system. It is also used to identify the people that have been arrested in Mecklenburg County.
>
> Q. You may continue. How did you end up at [address] on that date?

Defendant argues that the trial court erred by admitting Detective Warren's testimony that he had used KDCOPS to identify defendant because it violated Rule 404(b) of our Rules of Evidence. Rule 404(b) states that "[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." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2009).

We do not reach the merits of defendant's argument because he failed to preserve it for appellate review. Although defendant objected after the first mention of KDCOPS, the prosecutor withdrew the question. Then, when the prosecutor asked again if Detective Flowers would explain KDCOPS, defendant did not object. Detective Flowers answered the question, and defendant did not object. Assuming *arguendo* any benefit from defendant's objection to the first KDCOPS question, "the benefit of an objection is lost when the same or similar evidence is later admitted without objection." *State v. Holadia*, 149 N.C. App. 248, 256, 561 S.E.2d 514, 520 (2002). Accordingly, defendant did not preserve the issue for our review. N.C.R. App. P. 10(b)(1) (2009). "Defendant has further waived his opportunity for plain error review of this issue. Rule 10(c)(4) of the North Carolina Rules of Appellate Procedure requires that an assignment of error be 'specifically and distinctly contended to amount to plain error.' " *State v. Bell*, 359 N.C. 1, 27, 603 S.E.2d 93, 111 (2004) (quoting N.C.R. App. P. 10(c)(4)). Because defendant has not argued plain error, we cannot consider his argument and it is dismissed.

[2] Defendant next argues that the trial court erred by allowing Detective Flowers to testify that another police officer, Officer J.E. Grier, told him that defendant wore a size eight and a half shoe. This was particularly damning testimony for defendant because the cocaine was found in a pair of Nike shoes, size eight and a half, and defendant was prosecuted under a theory of constructive possession. Detective Flowers's initial testimony about defendant's shoe size occurred during redirect examination by the State:

> [Prosecutor]: What made you think that the shoes, the Nike shoes, belonged to [defendant]?
>
> [Detective Flowers]: The size of the shoe was eight and a half, and Officer Grier advised that the Defendant . . .
>
> [Defense counsel]: Objection as to what Officer Grier advised.
>
> [Prosecutor]: You can't testify to anything that . . .
>
> COURT: Is he going to testify to the jury? Well, I will sustained [*sic*] it.
>
> [Prosecutor]: Yes. He is going to testify. You can testify as to what Officer Grier said.

COURT: You are going to have Officer Grier testify to that?

[Prosecutor]: Yes.

COURT: Okay.

[Defense counsel]: As to what Officer Grief will say . . .

[Prosecutor]: It will be for corroboration purposes.

COURT: Members of the jury, the Court will allow this testimony only as to the extent that it corroborates the testimony later in this trial from Officer Grier.

The State's question again?

REDIRECT EXAMINATION BY [THE PROSECUTOR] (Continued):

Q. What made you think that the shoe belonged to [defendant]?

A. The Nike—the blue and white Nike was a size eight and a half and I was advised by Officer Grier that the Defendant in fact wore an eight and half [*sic*].

Q. Repeat that last statement.

A. I was advised by Officer Grier that the Defendant's shoe size that he had on at that time was eight and a half.

Q. But you don't know how that was determined?

A. Officer Grier went into the room and he told me that he looked at the shoe.

When Officer Grier testified, the prosecutor asked him about the blue and white Nikes:

Q. Did you investigate who the shoe belonged to?

A. Based on what we found, the mail, in the room and there was a lot of clothing that was for a smaller individual, which we thought matched [defendant].

[Defense counsel]: Objection.

COURT: Overruled. I will allow him to give his opinion that it was certainly a possibility.

During re-cross examination, defense counsel probed further into Officer Grier's knowledge about the blue and white Nikes:

Q. Have you ever worked in a shoe store?

A. No, sir.

Q. Have you ever measured anybody's foot for shoes?

A. No.

Q. But your testimony is that you can look at someone and tell how tall they are and tell what size shoe they wear?

A. I can tell height but not about the shoe size.

Q. You can guess what height they are?

A. Yes.

Q. But you can't guess the shoe size?

A. The shoe size, no.

Q. You have no idea what size shoe my client wears, do you?

A. No.

We agree with defendant that Officer Grier did not testify either that he told Detective Flowers that defendant wore a size eight and a half shoe or that he had personal knowledge that defendant wore a size eight and a half shoe. Detective Flowers's testimony, which otherwise would have been hearsay, was admitted for the purpose of corroborating Officer Grier's anticipated testimony. Now defendant argues that, because Officer Grier did not offer the testimony anticipated by the court's decision to admit Detective Flowers's corroborative testimony, we should award him a new trial.

As a general rule, "[p]rior consistent statements of a witness are admissible as corroborative evidence even when the witness has not been impeached. However, the prior statement must in fact corroborate the witness' testimony." *State v. Riddle*, 316 N.C. 152, 157, 340 S.E.2d 75, 78 (1986) (citations omitted). Although normally this rule applies to prior statements, we have also applied it to anticipated testimony. *See, e.g.*, *State v. Thompson*, 73 N.C. App. 60, 67, 325 S.E.2d 646, 651 (1985) (finding no error when the trial court allowed Witness A to testify about what Witness B told him before Witness B testified because Witness A's "testimony was offered to corroborate the anticipated testimony of" Witness B). Our Supreme Court has also applied the rule, but noted, as a practical matter, that admitting corroborating testimony before the testimony to be corroborated is "premature." *State v. Hinson*, 310 N.C. 245, 253, 311 S.E.2d 256, 262 (1984).

Regardless, defendant did not preserve this issue for appellate review. He should have alerted the trial court by, for example, moving to strike Detective Flowers's testimony once it became clear that Officer Grier had not offered the anticipated evidence about defendant's shoe size. When a defendant fails "to make a timely objection when [he] had . . . the opportunity to learn that the evidence was objectionable," he waives the inadmissibility of the evidence. *State v. Jeeter*, 32 N.C. App. 131, 134, 230 S.E.2d 783, 785 (1977) (citations omitted). In *Riddle*, the defendant argued that the trial court improperly admitted evidence by a witness, Amy Collins, who testified about what another witness, Pamela Riddle, had told her. *Riddle*, 316 N.C. at 156, 340 S.E.2d at 77. The defendant objected after the State asked Collins whether Pamela Riddle "had told her about any conversations that she had had with her sister, Lisa." *Id.* However, the defendant did not move to strike the answer, but argued on appeal "that the question asked of Ms. Collins anticipated or suggested that the answer would be inadmissible, and therefore his objection was sufficient and alone preserved the issue for appellate review." *Id.* The Supreme Court disagreed, explaining,

> Where inadmissibility of the answer is not indicated or suggested by the question, but becomes apparent by some feature of the answer, the objection should be made as soon as the inadmissibility becomes known and should be in the form of a motion to strike out the answer or the objectionable part of it.

Id. (citation omitted.) The Court concluded, "Thus, even assuming, *arguendo*, that the answer was not corroborative, the defendant's failure to move to strike it waived his objection." *Id.*

Here, defendant did not move to strike Detective Flowers's testimony once it became clear that it was not corroborative, nor did he alert the trial court in any other manner of that fact. In accordance with *Riddle*, we hold that defendant did not preserve this issue for appellate review, and so we do not consider the merits of his argument.

No error.

Judges JACKSON and THIGPEN concur.

IN THE MATTER OF: APPEALS OF: LOUISIANA PACIFIC CORPORATION FROM THE DECISIONS OF THE WILKES COUNTY BOARD OF EQUALIZATION AND REVIEW

No. COA10-500

(Filed 7 December 2010)

Jurisdiction— subject matter jurisdiction—notice of appeal not timely

The North Carolina Property Tax Commission (Commission) lacked subject matter jurisdiction to consider taxpayer's appeal from the decisions of the Wilkes County Board of Equalization and Review regarding the valuation of taxpayer's property because taxpayer did not file timely notice of appeal to the Commission.

Appeal by Wilkes County from order entered 22 January 2010 by the Property Tax Commission sitting as the State Board of Equalization and Review. Heard in the Court of Appeals 28 October 2010.

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Anthony R. Triplett, for the County.

Bell, Davis & Pitt, P.A., by John A. Cocklereece, Jr., D. Anderson Carmen, and Justin M. Hardy, for the taxpayer.

ELMORE, Judge.

Wilkes County (County) appeals an order by the North Carolina Property Tax Commission (Commission) granting Louisiana Pacific Corporation (taxpayer) a new hearing regarding the valuation of the taxpayer's real and business personal property in Wilkes County. The County makes only one argument on appeal: The Commission lacked subject matter jurisdiction to consider the taxpayer's appeal because the taxpayer did not file timely notices of appeal to the Commission from the decisions of the Wilkes County Board of Equalization and Review (County Board). After careful consideration, we reverse the order of the Commission.

On 4 September 2009, the County's Board of Equalization and Review (BER) sent a letter to the taxpayer's agent, Gene Acuff, rendering a decision in the taxpayer's appeal from the County's valuation of the taxpayer's property.[1] The letter stated that further appeal from

1. The underlying merits of this case are not before us on appeal, and we express no opinion as to the proper valuation of the taxpayer's real and business personal property.

the decision could be made to the Commission, but that "[a]ppeals to the Property Tax Commission must be received by them no later than **thirty (30) days** from the date of this notice." (Emphasis in original.) On 21 October 2009, the Commission received the taxpayer's notice of appeal from the 4 September 2009 decision by the County's BER. The letter is dated 20 October 2009. A few days later, on 23 October 2009, the Commission sent the taxpayer's attorney two letters acknowledging receipt of the taxpayer's notice of appeal. The first letter referenced the taxpayer's business personal property appeal (09 PTC 828), and the second letter referenced the taxpayer's real property appeal (09 PTC 829). The letters are otherwise identical, and, for that reason, we refer to them simply as "the letter." Similarly, all of the letters, motions, and other responses that followed appear in duplicate—one each for the business personal property appeal and the real property appeal; where we refer to plural letters or motions, but only recite language from a single letter or motion, it is because the language in the two communications is identical. We return now to the Commission's 23 October 2009 letter, which included the following paragraphs discussing the possibility that the taxpayer's appeal was untimely:

> Appeals to the Property Tax Commission must be filed (postmarked or received in the Commission's office) within 30 days after the mailing of the decision of the County board. The County's notice to you was apparently mailed on September 4, 2009, and your notice of appeal to the Commission was received October 21, 2009. If the County's notice was, in fact, mailed on September 4, 2009, then the 30-day period for appealing to the Property Tax Commission would have expired on October 4, 2009.
>
> We are providing this information in order to avoid any misunderstanding in this matter since the Property Tax Commission has no lawful authority to extend the time for filing appeals. Accordingly, if your notice of appeal was not timely filed, and the County moves to dismiss the appeal, the Commission may have no choice but to grant the motion.

The taxpayer responded by letters dated 9 November 2009, which included the following relevant language:

> In your acknowledgment letter to our appeal, you observed that the County's BER decision was apparently mailed on September 4, 2009, that our appeal was not received until October 21, 2009,

> and that, therefore, the appeal may be untimely. To the best of the taxpayer's determination, it was never given notice of the date of the BER hearing on this matter and, therefore, was not given an opportunity to be heard at the BER. Given this, it is the taxpayer's position that the BER decision was defective, that any purported notice of a decision arising from such hearing is defective, and that the time period for filing an appeal cannot have expired. I believe this defect can be cured by the [Commission] either hearing the case on its merits or sending the case back to the BER for a hearing once proper notice is given.

The taxpayer then applied to the Commission for a hearing on its appeal from the BER's 4 September 2009 decision. The taxpayer set forth five grounds for appeal, two of which are relevant to this appeal:

> d. The [BER] held its hearing to determine the matter at issue in this appeal without giving proper and adequate notice to the property owner of the date, time, or location of said hearing.
>
> E. The [BER] issued its decision with respect to the issue in this appeal without giving the property owner an opportunity to come before it and present evidence.

On 12 November 2009, the County moved to dismiss the taxpayer's appeal as untimely. In its motions, the County stated that it had mailed notice of its decision to the taxpayer on 4 September 2009 and that the taxpayer had filed notice of appeal from that decision more than thirty days later. The Commission acknowledged the motions by letter dated 17 November 2009 and informed the parties that it would hear the motions during its January 2010 session. In anticipation of the hearing, set for 13 January 2010, the County's Tax Administrator and Tax Assessor, Alex Hamilton, submitted an affidavit. In that affidavit, Hamilton stated that the BER's decision not to change the taxpayer's real property or business personal property valuations was "duly mailed under date of September 4, 2009," to the taxpayer's agent, Gene Acuff.

On 22 January 2010, the Commission issued its order denying the County's motions to dismiss the taxpayer's appeals for lack of timeliness. The Commission concluded that the taxpayer had shown good cause to "appear before the appropriate County Board for a hearing as to the valuation of the real and business personal property in Wilkes County" and remanded the matter "to the appropriate County

Board" for a hearing. The Commission based its conclusions and order on the following findings of fact:

> 1. The [taxpayer], through counsel, filed notices of appeal to the Commission on October 21, 2009 appealing the September 4, 2009 decisions of the County Board. The appeals were acknowledged as untimely filed by letters dated October 23, 2009.
>
> 2. On November 12, 2009, Wilkes County, through counsel, filed a motion to dismiss the appeals for lack of subject matter jurisdiction because the [taxpayer]'s notices of appeal were not timely filed.
>
> 3. In his Affidavit, Mr. Gene Acuff states that the [taxpayer] "was never sent a notice of a scheduled Board hearing" and was not given an opportunity to present evidence.
>
> 4. The September 4, 2009 decisions are not valid when the county failed to give [taxpayer] notice of the August 20, 2009 hearing in order for the [taxpayer] to appear.

The County now appeals from this order.

The question before us is whether the Commission erred by considering an appeal that was not timely filed. The question is complicated by the taxpayer's claim that it did not receive notice of the hearing that led to the 4 September 2009 BER decision from which it appealed after the statutory time limit. However, the taxpayer does not claim that it did not receive the 4 September 2009 BER decision or that the BER did not send that decision on 4 September 2009. Assuming for the sake of argument that the taxpayer did not receive notice of the 20 August 2009 hearing, does that lack of notice excuse the taxpayer from timely filing its appeal from the 4 September 2009 decision? In a word, no.

General Statute section 105-345.2 "is the controlling judicial review statute for appeals from the Property Tax Commission." *In re McElwee*, 304 N.C. 68, 74, 283 S.E.2d 115, 120 (1981). The statute sets out the following relevant guidelines for reviewing appeals from the Commission:

> (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings;

> or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> * * *
>
> (2) In excess of statutory authority or jurisdiction of the Commission; or
>
> * * *
>
> (4) Affected by other errors of law[.]

N.C. Gen. Stat. § 105-345.2(b) (2009). "The statute also provides that we are to review 'the whole record' in determining the foregoing[.]" *MAO/Pines Ass'n v. New Hanover County Bd. of Equalization*, 116 N.C. App. 551, 556, 449 S.E.2d 196, 199 (1994) (citations omitted); *see* N.C. Gen. Stat. § 105-345.2(c) (2009).

General Statute section 105-290 sets out the time limit for appeals from a board of equalization and review to the Property Tax Commission: "Time Limits for Appeals.—A notice of appeal . . . from a board of equalization and review shall be filed with the Property Tax Commission within 30 days after the date the board mailed a notice of its decision to the property owner." N.C. Gen. Stat. § 105-290(e) (2009). "To perfect an appeal from the county board, an appellant must file a written notice of appeal with the clerk of the board of county commissioners and with the Property Tax Commission within 30 days after the county board has mailed notice of its decision pursuant to G.S. 105-322(g)(2)d." *Brock v. North Carolina Property Tax Com.*, 290 N.C. 731, 739, 228 S.E.2d 254, 260 (1976). In *In re Appeal of Bass Income Fund*, this Court affirmed the Commission's order dismissing taxpayers' appeal for lack of jurisdiction because the taxpayer had narrowly missed the thirty-day deadline. 115 N.C. App. 703, 707, 446 S.E.2d 594, 596 (1994). We concluded: "Because taxpayers' notice of appeal was not received by the Commission until after expiration of the 30 day limitation period in G.S. § 105-290(e), therefore, the Commission's determination it was without jurisdiction to entertain taxpayers' appeal is affirmed." *Id.* These cases lead us to the conclusion that the thirty-day "Time Limit for Appeals" set out in § 105-290(e) is jurisdictional. This conclusion is consistent with other cases in which the Courts have held that an appellant's failure to file a timely notice of appeal deprives the reviewing body of jurisdiction. *See Booth v. Utica Mutual Ins. Co.*, 308 N.C. 187, 189, 301 S.E.2d 98, 99-100 (1983) ("Failure to give timely

notice of appeal in compliance with [N.C.] G.S. 1-279 and Rule 3 of the North Carolina Rules of Appellate Procedure is jurisdictional, and an untimely attempt to appeal must be dismissed."); *Water Tower Office Assocs. v. Town of Cary Bd. of Adjustment*, 131 N.C. App. 696, 698, 507 S.E.2d 589, 590-91 (1998) (holding that a property owner's untimely appeal from a zoning enforcement officer to the Cary Board of Adjustment under the Cary zoning ordinance deprived the Board of Adjustment of subject matter jurisdiction to review the property owner's appeal); *Gummels v. N.C. Dept. of Human Resources*, 98 N.C. App. 675, 678, 392 S.E.2d 113, 115 (1990) (holding that a nursing home owner's untimely appeal from a denial of a certificate of need deprived the Office of Administrative Hearings from considering the nursing home owner's appeal). In addition, "because the right to appeal to an administrative agency is granted by statute, compliance with statutory provisions is necessary to sustain the appeal." *Gummels*, 98 N.C. App. at 677, 392 S.E.2d at 114 (citation omitted).

Here, the taxpayer did not perfect its appeal within the statutory guideline. This deprived the reviewing body, the Commission, of jurisdiction to hear the appeal. That the substance of the appeal may have had merit does not render the time limit for appeals inapplicable. Accordingly, the Commission erred by denying the County's motion to dismiss and entertaining the taxpayer's appeal. We reverse the 22 January 2010 order denying the County's motion to dismiss and remand the matter to the Commission for entry of an order granting the County's motion to dismiss for lack of subject matter jurisdiction.

Reversed and remanded.

Judges JACKSON and THIGPEN concur.

TEIJI KIMBALL, PLAINTIFF v. DINA VERNIK, DEFENDANT

No. COA10-406

(Filed 7 December 2010)

1. Process and Service— service of process—purposeful avoidance—alias and pluries summons

Plaintiff's argument that the trial court erred by dismissing his complaint because defendant purposefully and knowingly

avoided service of process and because defendant's insurance company may have assisted him in avoiding service was overruled. There was no evidence in the record to substantiate plaintiff's baseless allegations and it was plaintiff's own failure to timely sue out his alias and pluries summons, and not defendant's alleged avoidance of service, that caused plaintiff's action to be barred by the statute of limitations.

2. Estoppel— equitable estoppel—motion to dismiss denied—no abuse of discretion

The trial court did not abuse its discretion by denying plaintiff's motion for a continuance in a negligence case, thereby denying plaintiff the opportunity to develop competent evidence concerning his equitable estoppel claim, where the Court of Appeals determined that plaintiff's equitable estoppel claim was meritless.

Appeal by Plaintiff from order entered 12 November 2009 by Judge Shannon R. Joseph in Durham County Superior Court. Heard in the Court of Appeals 26 October 2010.

Stark Law Group, PLLC, by Thomas H. Stark, for Plaintiff.
Teague Rotenstreich Stanaland Fox & Holt, PLLC, by Paul A. Daniels, for Defendant.

STEPHENS, Judge.

On 22 April 2006, Plaintiff Teiji Kimball and Defendant Dina Vernik were involved in an automobile collision in Durham, North Carolina. On 16 April 2009, Plaintiff filed a complaint in Durham County Superior Court, alleging physical and economic injuries resulting from Defendant's alleged negligent driving and seeking compensatory damages in excess of $10,000. In connection with the filing of the complaint, a summons was issued by the Clerk of Superior Court of Durham County on 16 April 2009.

On 24 April 2009, Plaintiff first attempted service of the complaint and summons on Defendant by certified mail to an address in Durham. However, the documents were returned unclaimed and without service on 20 May 2009. On 26 May 2009, after determining that Defendant was a student at Duke University, Plaintiff attempted service of process by certified mail addressed as follows:

Dinah [sic] Vernik
c/o Duke University -
Fuqua School of Business
Box 90120
Durham, NC 27708-1020

On 6 June 2009, Plaintiff's attempted service of Defendant through Duke University was returned unserved with an indication that Defendant was no longer at Duke.

On 31 July 2009, Plaintiff had issued an alias and pluries summons from the Durham County Clerk of Superior Court.

On 8 September 2009, Defendant filed a motion to dismiss Plaintiff's claim on grounds of "lack of proper service or jurisdiction" and failure to state a claim upon which relief may be granted. In support of the second basis, Defendant asserted that Plaintiff's claim was barred by the applicable three-year statute of limitations because the alias and pluries summons was issued more than ninety days after the issuance of the original summons, such that the action was deemed commenced on 31 July 2009—one hundred days after the statute of limitations expired on 22 April 2009.

At the 12 November 2009 hearing on Defendant's motion to dismiss, Plaintiff filed a motion to continue, in which Plaintiff's attorney alleged that he had attempted to serve Defendant without success and that Defendant's "avoidance of service [was] well known by [Defendant], her counsel, and her [insurance] carrier." In the motion, Plaintiff requested that the court allow Plaintiff ninety days to "conduct additional discovery on these and related issues[.]"

Following the hearing, the trial court denied Plaintiff's motion for continuance and dismissed Plaintiff's claims with prejudice. From the trial court's order, Plaintiff appeals.

Discussion

[1] Plaintiff first argues that the trial court erred by dismissing his complaint because Defendant "purposefully and knowingly avoided service of process" and that Defendant's insurance company "may have assisted [Defendant] in avoiding service, failed to disclose Defendant['s] whereabouts, and filed an immediate motion for dismissal when Plaintiff[] was unable to serve Defendant[] prior to the expiration of the summons period." Based on these allegations, Plaintiff argues that Defendant should be equitably estopped from

relying on the statute of limitations defense. *Cf. Friedland v. Gales*, 131 N.C. App. 802, 806, 509 S.E.2d 793, 796 (1998) ("North Carolina courts have recognized and applied the principle that a defendant may properly rely upon a statute of limitations as a defensive shield against 'stale' claims, but may be equitably estopped from using a statute of limitations as a sword, so as to unjustly benefit from his own conduct which induced a plaintiff to delay filing suit.").

As support for his allegations, Plaintiff offers the following: naked suspicion and bare conjecture. And despite Plaintiff's contention otherwise, the record on appeal is absolutely devoid of any "evidence suggesting that Defendant[] and her insurance company purposefully and knowingly avoided service[.]" Accordingly, we decline Plaintiff's self-styled "good faith" invitation to extend the doctrine of equitable estoppel "to include deliberate attempts to conceal the whereabouts of an insured defendant in order to avoid service of process[,]" where not a shred of evidence exists in the record to substantiate Plaintiff's baseless allegations.

Furthermore, and irrespective of Plaintiff's unfounded allegations of misconduct by Defendant, Plaintiff's asserted inability to serve Defendant "prior to the expiration of the summons period" evinces a clear misapprehension of Rule 4 of the North Carolina Rules of Civil Procedure, specifically of the duration or "expiration" of the summons period.

Rule 4 provides that a plaintiff who is unable to serve a defendant within the sixty-day period allowed for service following the initial issuance of a summons may continue the action by suing out an alias and pluries summons. N.C. Gen. Stat. § 1A-1, Rule 4(d) (2009). "Such alias or pluries summons may be sued out at any time *within 90 days after the date of issue of the last preceding summons*[.]" N.C. Gen. Stat. § 1A-1, Rule 4(d)(1) (emphasis added).

> When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed. Thereafter, alias or pluries summons may issue, or an extension be endorsed by the clerk, but, as to such defendant, *the action shall be deemed to have commenced on the date of such issuance or endorsement.*

N.C. Gen. Stat. § 1A-1, Rule 4(e) (emphasis added).

In this case, Plaintiff failed to sue out his alias and pluries summons within the ninety-day period and, thus, his action was deemed to have commenced on the eventual date of issuance of the alias and pluries summons: 31 July 2009. Therefore, the action was deemed commenced one hundred days after the date the statute of limitations expired, and Plaintiff's claim was barred by the statute of limitations and properly dismissed by the trial court. N.C. Gen. Stat. § 1-52(5) (2009); *see also Long v. Fink*, 80 N.C. App. 482, 484-85, 342 S.E.2d 557, 559 (1986) (holding that "[a] statute of limitations can be the basis for dismissal on a Rule 12(b)(6) motion if the face of the complaint discloses that plaintiff's claim is so barred[,]" and noting that "[a]n action for damages for personal injury arising out of an accident between two vehicles must be commenced within three years of the date on which the accident occurred").

Accordingly, it was not Defendant's alleged avoidance of service that caused Plaintiff's action to be barred by the statute of limitations. Rather, it was Plaintiff's own failure to timely sue out his alias and pluries summons. Therefore, Plaintiff's "claim" of equitable estoppel is meritless as Plaintiff's own conduct, and not Defendant's, led to the dismissal of Plaintiff's complaint. We further note that it does not appear that any action by Defendant was the cause of Plaintiff's decision to delay filing suit in this case for nearly three years and within a few days of the expiration of the statute of limitations. As such, we conclude that the trial court did not err in dismissing Plaintiff's complaint, despite Plaintiff's allegations of Defendant's misconduct.

[2] Plaintiff next argues that the trial court erred by denying his motion for a continuance on grounds that this action by the court "improperly denied any opportunity to develop competent evidence concerning [Plaintiff's] equitable estoppel claims." Our standard of review for a trial court's denial of a motion to continue is abuse of discretion. *Cornett v. Watauga Surgical Gp., P.A.*, 194 N.C. App. 490, 498, 669 S.E.2d 805, 810 (2008). Because we have already determined that Plaintiff's equitable estoppel claim is meritless, we conclude that the trial court did not abuse its discretion in denying Plaintiff's motion for continuance.

The order of the trial court is

AFFIRMED.

Chief Judge MARTIN and Judge STROUD concur.

KEVIN JAMES SMITH, PLAINTIFF v. CHRISTOPHER BRUCE HEATH, IN HIS OFFICIAL CAPACITY AS A DEPUTY OF LENOIR COUNTY SHERIFF'S DEPARTMENT WILLIAM E. SMITH AS SHERIFF OF LENOIR COUNTY SHERIFF'S DEPARTMENT AND LENOIR COUNTY SHERIFF'S DEPARTMENT, A BODY POLITIC, DEFENDANT

No. COA10-501

(Filed 7 December 2010)

Appeal and Error— record on appeal—sovereign immunity waiver—insurance policy not included

An appeal was dismissed where the issue involved sovereign immunity for a deputy sheriff and the record did not include the County's insurance policy and an exclusion that would in effect have retracted the waiver of sovereign immunity.

Appeal by defendant from order entered 10 December 2009 by Judge Clifton W. Everett, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 3 November 2010.

Mako & Associates, P.A., by Garron T. Michael and Sue E. Mako, for plaintiff-appellee.

Frazier, Hill, & Fury, RLLP, by Torin L. Fury and William L. Hill, for defendant-appellant.

STEELMAN, Judge.

Defendant's appeal of the trial court's denial of his summary judgment motion is dismissed for lack of a sufficient record on appeal.

I. Factual and Procedural Background

On 26 March 2008, Kevin James Smith ("plaintiff") and another prisoner were being transported by Christopher Bruce Heath ("Heath"), a deputy sheriff with the Lenoir County Sheriff's Department, from Lenoir County to the State Correctional Facilities in Hyde County and Pasquotank County. At approximately 10:38 p.m., while traveling east on North Carolina Highway 33 in Pitt County, Heath saw what he believed to be a body lying in the roadway and attempted to avoid colliding with it. Heath lost control of the car, which ran off the roadway and into a ditch where it struck a tree, overturned, and came to rest in a field. Following the accident, plaintiff complained of low back pain and was taken to a hospital.

On 16 December 2008, plaintiff filed his amended complaint in Pitt County Superior Court against Heath in his official capacity as a deputy sheriff of Lenoir County, William E. Smith as Sheriff of Lenoir County, and the Lenoir County Sheriff's Department (collectively "defendants") seeking monetary damages for personal injuries that he alleged were caused by the negligence of Heath. On 10 November 2009, defendants filed a motion for summary judgment based upon sovereign immunity, and specifically an exclusion contained in the County's liability insurance policy.

The trial court granted defendants' motion for summary judgment as to the claims against the Lenoir County Sheriff's Department and Sheriff Smith. The trial court denied defendants' motion for summary judgment as to Heath in his official capacity finding that an issue of material fact exists as to whether a special relationship existed between plaintiff and Heath.

Heath appeals the trial court's order denying his motion for summary judgment based upon sovereign immunity.

II. Interlocutory Appeal

An order denying a motion for summary judgment is interlocutory, and as a general rule this Court does not review interlocutory orders. *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). However, "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) (2008). *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999) (citations omitted).

III. Standard of Review

"When the denial of a summary judgment motion is properly before this Court, as here, the standard of review is *de novo*." *Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 191 N.C. App. 581, 583, 664 S.E.2d 8, 10 (2008) (citation omitted). Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2008). "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 defendant[] upon the assertion of the defenses of

the public duty doctrine and sovereign immunity." *Lassiter v. Cohn*, 168 N.C. App. 310, 315, 607 S.E.2d 688, 691 (2005), *disc. review denied*, 359 N.C. 633, 613 S.E.2d 686 (2005).

IV. Failure to Include Lenoir County's Insurance Policy in Record

In his only argument on appeal, Heath contends that the trial court erred in denying his motion for summary judgment based upon sovereign immunity and the exclusion contained in Lenoir County's liability insurance policy. Because we only have the exclusion, and not the entire insurance policy, we dismiss Heath's appeal.

In his complaint, plaintiff alleged that Lenoir County "purchased a plan of insurance and has thus waived its immunity from civil liability" under N.C. Gen. Stat. § 153A-435 (2008). At the hearing on defendants' summary judgment motion, defendants presented the affidavit of Ron Massey, a Claims and Litigation Manager for Trident Insurance Company, which contained a copy of an endorsement containing the following exclusion:

> the policy(ies), . . . provide(s) no coverage for any "occurrence", "offense", "accident", "wrongful act", claim or suit for which any insured would otherwise have an exemption or no liability because of sovereign immunity, any governmental tort claims act or laws, or any other state or federal law. Nothing in this policy, coverage part or coverage form waives sovereign immunity for any insured.

In North Carolina, tort claims against governmental entities are generally barred by the doctrine of sovereign immunity. However, under the provisions of N.C. Gen. Stat. § 153A-435, the purchase of liability insurance "waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function." In the instant case, Lenoir County did in fact purchase liability insurance, which would waive its governmental immunity. Heath relies upon an exclusion that would in effect retract this waiver of sovereign immunity. Where a defendant is relying upon an exclusion in a policy of insurance to establish that there is no coverage, it is the defendant's burden of proof to show that the exclusion applies. *Ins. Co. v. McAbee*, 268 N.C. 326, 328, 150 S.E.2d 496, 497 (1966) (citation omitted).

"The vast majority of courts have held that the insurer bears the burden of establishing the existence and applicability of a policy exclusion, ..." *Home Indem. Co. v. Hoechst Celanese Corp.*, 128

N.C. App. 189, 202, 494 S.E.2d 774, 783 (1998) (citation omitted), *disc. review denied*, 348 N.C. 72, 505 S.E.2d 870 (1998). Additionally, it is a well settled principle of insurance policy construction that "[a]n insurance policy is to be construed as a whole, giving effect to each clause, if possible." *Chavis v. Southern Life Ins. Co.*, 76 N.C. App. 481, 484, 333 S.E.2d. 559, 561-62 (1985), *aff'd*, 318 N.C. 259, 347 S.E.2d 425 (1986). We have before us only the exclusion, and not the entire liability insurance policy for Lenoir County.

Pursuant to the North Carolina Rules of Appellate Procedure, the record on appeal shall contain so much evidence "as is necessary for an understanding of all issues presented on appeal." N.C. R. App. P. 9(a)(1)(e). Furthermore, "it is the appellant's responsibility to make sure that the record on appeal is complete and in proper form." *Miller v. Miller*, 92 N.C. App. 351, 353, 374 S.E.2d. 467, 468 (1988) (citation omitted). "It is incumbent upon the appellant to see that the record on appeal is properly made up and transmitted to the appellate court. The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects appeal to dismissal." *Fortis Corp. v. Northeast Forest Products*, 68 N.C. App. 752, 754, 315 S.E.2d 537, 538-39 (1984) (citations omitted). Without Lenoir County's insurance policy included in the record on appeal, this Court is unable to determine *de novo* whether the "Sovereign Immunity Non-Waiver Exclusion" serves to retract Lenoir County's waiver of sovereign immunity which was accomplished by the purchase of the liability insurance policy.

We therefore dismiss Heath's appeal.

DISMISSED.

Judges STEPHENS and ROBERT N. HUNTER, Jr., concur.

FRANCES HUFFMAN, ROGER D. KENNEDY, MARILYN DAWN KIDD, THOMAS P. MARSH, FRANKIE McCASKILL, DEBORAH K. ROGERS, SHARON P. SCOTT, EMPLOYEES, PLAINTIFF-APPELLANTS v. MOORE COUNTY, EMPLOYER; SEDGWICK OF THE CAROLINAS, INC. CARRIER, DEFENDANT-APPELLEES

No. COA09-1324

(Filed 21 December 2010)

1. Workers' Compensation— compliance with prior mandate—findings of fact

The Industrial Commission did not err in a workers' compensation case by allegedly failing to comply with the Court of Appeals mandate in *Huffman* II. The Commission complied with the mandate by revising its findings of fact to avoid the noted deficiencies.

2. Workers' Compensation— findings of fact—evidentiary support—test results

The Industrial Commission did not err in a workers' compensation case by its findings of fact. Plaintiffs' challenge to the evidentiary support for the findings was an attack upon the relevance of the environmental testing results rather than an attack upon the accuracy of the Commission's description of the test results. It was the Commission's job to weigh the credibility of the evidence.

3. Workers' Compensation— burden of proof—occupational disease—sufficient exposure to cause symptoms

The Industrial Commission did not err in a workers' compensation case by allegedly utilizing an incorrect legal standard to determine whether the evidence concerning exposure to toxic or pathogenic substances sufficed to meet plaintiffs' burden of proof. Contrary to plaintiffs' assertion, the Commission did not require plaintiffs to prove the exact level of harmful chemicals to which they were exposed rather than simply requiring them to prove sufficient exposure to cause their symptoms.

4. Workers' Compensation— occupational disease—expert witnesses—qualifications—credibility

The Industrial Commission did not err in a workers' compensation case by relying on the expert testimony of two doctors that plaintiffs did not suffer from a compensable occupational dis-

ease. Both doctors were qualified as experts under N.C.G.S. § 8C-1, Rule 702 based upon their knowledge, skill, experience, training, or education. Further, it was the Commission's job to weigh the credibility of the evidence.

Appeal by Plaintiffs from Opinion and Award entered 20 April 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 April 2010.

Lennon & Camak, P.L.L.C., by George W. Lennon and Michael W. Bertics, for plaintiff-appellants.

Teague Campbell Dennis & Gorham, L.L.P., by George W. Dennis, III, and J. Matthew Little for defendants-appellees.

ERVIN, Judge.

Plaintiffs appeal from an Opinion and Award entered by Chair Pamela T. Young and concurred in by Commissioners Dianne C. Sellers and Christopher Scott denying their request for workers' compensation benefits based on a determination that Plaintiffs had failed to establish that they contracted an occupational disease while working for Defendant Moore County. On appeal, Plaintiffs contend that the Commission failed to comply with the mandate issued by this Court in deciding a previous appeal, made factual findings that lacked adequate record support, applied an incorrect legal standard, and relied on incompetent medical testimony. After carefully considering Plaintiffs' challenges to the Commission's order in light of the record and the applicable law, we conclude that the Commission's order should be affirmed.

I. Factual Background

A. Substantive Facts

1. Design and History of the Community Services Building

Defendant Moore County converted the Community Services Building (CSB) into county employee offices after purchasing it from Ren Electronics in the late 1980s. A one story structure constructed on a concrete slab that initially featured fixed windows, the building originally utilized a septic system, components of which were located beneath the building. Use of the septic system was discontinued when the CSB was connected to a municipal water and sewer system several years before the County began using the building.

Ren Electronics manufactured electrical wiring assemblies. According to Budd Hill Shirer, who worked for Ren Electronics at the CSB from 1980 until 1982, a large number of chemicals were used during the manufacturing process, including Trichloroethylene, Methyl Ethyly Ketone, Toluene, Krylon sprays, and various cleaning products. Mr. Shirer testified that there were "no procedures for proper handling of chemicals" and that, "at the end of the day, they were disposed of in floor drains, sinks, urinals, [and] toilets," all of which connected to the septic system, and "outside the doorway."

The heating, ventilating, and air conditioning system in the CSB was a closed loop. Open floor drains led to the septic system. The septic system vent went into the open area between the suspended tile ceiling and the roof instead of exiting the building. A stale smell reminiscent of sewage could be detected where the vent stack was located. The HVAC system did not have a fresh air return. On the contrary, "the air conditioner had a free return on it, so if any-any fumes or anything, it had to be pulling it through the air conditioner and blowing it right back out into the cubicles." According to Robert Lake, an HVAC technician, negative air pressure from the HVAC system could "draw stuff through the [septic] trap" into the CSB, and heat could evaporate the tanks in the septic tank vents so as to allow septic gas to pass without obstruction.

Robert Privott, a former County property manager, confirmed that pesticides had been sprayed in the CSB. Antex Exterminating had contracted with Defendant Moore County to apply pesticides in approximately 20 of the County's buildings on a monthly basis. Although the Antex-Moore County contract permitted the use of either safrotin or boric acid aerosols, Antex only used the former, which is approved for use in offices. In addition, Antex only used half the manufacturer's recommended concentration level.

<u>2. Testing and Renovation Work at the CSB</u>

In early June 1994, after complaints were made concerning air quality in the CSB, Sam Fields, supervisor of the Environmental Health Section of the Moore County Health Department, and Mr. Lake performed a walk-through of the building. Based on this inspection, Mr. Fields recommended that the building's air handling system be changed in order to increase the amount of fresh air introduced into the CSB. Carol T. Thomas, Defendant Moore County's General Services Coordinator, recommended on 15 June 1994 that "corrective measures . . . be implemented as soon as possible." On 20 June 1994,

Mr. Lake sent a memorandum to David McNeill, Jr., the County Manager, which explained the corrective measures as follows:

> Remove[ed] condensate line from sewer vent and rerouted to the outside per code requirements.
>
> Added supply vent to offices that did not have them, hallways and rest rooms.
>
> Added return filter grills in hallways to facilitate regular filter changes.
>
> Added fresh air intake louver from outside, added fresh air intake filter box to filter outside air.
>
> Ran new duct work to supply fresh air to each system approximately 25% per system (500 CFM per unit).

On 21 June 1994, William J. Pate, an industrial hygiene consultant, conducted an air quality inspection in the CSB. At the time of his initial examination, Mr. Pate noted the presence of stained ceiling tiles, "indicating that there have been condensate or roof leaks," stained carpeting, and a floor drain covered with tape. Mr. Pate concluded that carbon dioxide levels in the CSB were 500 to 550 parts per million and noted that such levels should not exceed 1,000 parts per million. In addition, Mr. Pate detected carbon monoxide levels of 10 to 11 parts per million in the garage area; these readings slightly exceeded the EPA maximum level of 9 parts per million. However, Mr. Pate did not detect the presence of carbon monoxide outside the garage area. Mr. Pate did not detect elevated levels of air pollutants or identify any explanation for the symptoms reported by certain CSB-based employees. After completing his initial inspection, Mr. Pate recommended that Defendant take the following measures to improve the indoor air quality in the CSB:

> Replace water stained ceiling tiles.
>
> Clean or remove the carpet. Consider replacing the carpet with hard surface flooring especially in high traffic areas.
>
> Remove the tape from the floor drain in the recreation department. Either permanently seal the drain or keep the drain filled with water.
>
> . . . .

> Minimize the use of pesticides. Use only when necessary. Application should be made by a licensed pesticide applicator.
>
> Routinely inspect and clean cooling coils and condensate drain pans.

On 19 and 20 July 1994, the septic tanks associated with the CSB were drained and abandoned.[1] On 20 July 1994, Mr. Pate performed additional testing for the purpose of determining whether there were residual pesticide concentrations in the building's air and obtained results indicating that safrotin, dursban, chlordane, heptachlor and diazinon were not present and that volatile organic compounds were detected at levels lower than those deemed acceptable by the Occupational Safety and Health Administration and the American Conference of Governmental Industrial Hygienists.

More extensive testing of both soil and indoor air samples was performed by Acurex Environmental Corporation on 29 August 1994. Soil gas samples were collected at nine locations within the building, including six sites suspected of being above abandoned septic system lines. Two samples were collected from the soil beneath the concrete slab on which the CSB had been constructed at locations that were also believed to be above portions of the septic system. The soil gas samples targeted 72 volatile organic compounds for quantification; however, Acurex did not detect the presence of any of these compounds. Although carbon disulfide was detected in all samples, it was believed to be a "background contaminant." The amount of acetone and m- and p-xylene detected during the testing was "consistent with expectations" in light of the CSB's location. A number of identifiable volatile organic compounds were found in the indoor air samples tested by Acurex. However, the levels of each of these compounds were within the range of typical indoor measurements and consistent with those found in large buildings containing paint, carpeting, ceiling tiles, composite wood products, and various plastics.

On 2 August 1994, peppermint oil was poured into the sewer line clean out and the septic lines in order to determine if there were any leaks in the system. No odor of peppermint oil was detected inside the building, demonstrating that the septic system was removing air from the building. A similar test was performed on the three drain lines with the same result.

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1. According to Philip Boles, Defendant County's Public Works Director, the draining process did not remove 100% of the material contained in the septic tanks, thus, "there would still have been some material present in those tanks."

On 9 September 1994, Flint Worrell, a waste management specialist with the Hazardous Waste Section of the North Carolina Department of Environment and Natural Resources, obtained soil samples from the trenches associated with the abandoned leach lines. According to Mr. Worrell, waste remnants may leach into the soil after filtering through the sewer system, and any massive accumulation of chemicals would have been visible in the drain line. However, test results revealed no indication of toxic substances. On 25 March 1996, Mr. Worrell removed sludge from the bottom of two of the three septic tanks, leading to the discovery of small quantities of barium and arsenic. The level of barium present in the septic tanks was "well below hazardous waste levels," and the detected level of arsenic was the "lowest level that the lab could identify." An additional sample taken six feet from the building, near the doorway, revealed the presence of low levels of barium. Because the substance levels detected did not constitute hazardous wastes, Mr. Worrell thought that it was unnecessary to abandon the septic tanks.

In a letter dated 26 October 1994, Mr. Pate informed Defendant that there was no need to routinely monitor methane in the building since the septic tank, which was the potential source for that substance, had been remediated and since the indoor air sampling performed by Acurex did not show the presence of methane. According to Mr. Pate, nothing in the indoor methane testing results created concern for the safety or health of the CSB's occupants. Neither Mr. Pate nor Acurex identified the presence of any factor that might explain Plaintiffs' symptoms.

3. Medical Evidence

All seven of the Plaintiffs worked for some period of time in the CSB, and each reported experiencing symptoms such as shortness of breath, fatigue, dizziness, sinus infections, musculoskeletal pain, headaches, and difficulty in concentrating. In addition, Plaintiff Thomas Marsh reported suffering from hives and swelling. Plaintiff Frankie McCaskill was a long-term cigarette smoker and had been treated for similar symptoms before working in the CSB. Similarly, Plaintiff Debbie Rogers' husband smoked cigarettes.

Plaintiffs sponsored the expert medical testimony of Dr. William Bell, a family physician practicing in Robbins, North Carolina, who examined and treated all of the Plaintiffs except Plaintiff Marsh; Dr. Charles Lapp, an internist and certified independent medical examiner who examined Plaintiffs Huffman, Scott, and Kidd; Dr. William

Meggs, a faculty member at East Carolina University Medical School who practices emergency medicine and toxicology at Pitt County Memorial Hospital and who examined and tested all seven Plaintiffs; and Dr. Robert Taylor, an otorhynolaryngologist who focuses on ear, nose and throat issues and allergies and who examined and treated Plaintiffs Scott, Huffman, and Rogers. Dr. Bell explained that, with the exception of Plaintiff McCaskill, none of the Plaintiffs had any history of chemical exposure or chronic long-term respiratory problems; that Plaintiffs' symptoms exist and are categorized as asthma and reactive airway disease; that it was unlikely that all of the Plaintiffs under his care would have developed similar symptoms without exposure to some common agent; and that it was unlikely that Plaintiffs' symptoms had a psychological origin. Dr. Lapp believed Plaintiffs to be suffering from irritant rhinosinusitis and reactive airway disease and opined that exposure to chemicals in the CSB substantially contributed to their symptoms, which he believed to be genuine. Dr. Lapp stated that Plaintiffs' symptoms were genuine, since their coughing and wheezing can be measured on pulmonary function tests, since examination reveals the presence of knots and tender points, and since they have balance difficulties and lightheadedness not found in others. Dr. Meggs testified that the results of certain tests, including rhinoscopies and nasal biopsies, were consistent with chemical exposure and that Plaintiffs' symptoms resulted, more likely than not, from their employment in the CSB and resulting exposure to substances, particularly pesticides. According to Dr. Taylor, the histories provided by Plaintiffs Scott, Huffman, and Rogers were consistent with chemical and pesticide exposure. In addition, Dr. Taylor indicated that exposure to pesticides and other chemicals, such as Tricholorethylene, Toluene, and Methyl Ethyl Ketone constituted significant or definite factors contributing to Plaintiffs' current symptoms.

On the other hand, Defendants presented the testimony of Dr. Staudenmeyer, a psychologist with the Behavioral Medicine and Biofeedback Clinic in Denver, Colorado, and Dr. John B. Whitfield, the head of the Division of Rheumatology and Immunology in the Department of Internal Medicine at the University of North Carolina School of Medicine. Both Dr. Staudenmeyer and Dr. Whitfield testified that, in their opinion, factors other than exposure to chemicals in the CSB caused Plaintiffs' symptoms, and criticized the methodologies employed by Dr. Lapp, Dr. Meggs, and Dr. Taylor as inconsistent with applicable scientific norms.

B. Procedural Background

Plaintiffs filed timely claims seeking workers' compensation benefits on the grounds that they had contracted a compensable occupational disease in the course and scope of their employment with Defendant Moore County. Defendants denied each claim on the grounds that Plaintiffs had not contracted an occupational disease and that the condition upon which Plaintiffs predicated their claims was not employment-related. Plaintiffs' claims were consolidated for hearing and heard before Deputy Commissioner Chrystal R. Stanback on 22-24 August 2001. On 7 July 2004, Deputy Commissioner Stanback issued an Opinion and Award concluding that Plaintiffs' medical conditions were "compensable occupational diseases as defined under the Workers' Compensation Act" and that they were entitled to receive workers' compensation benefits. Defendants appealed Deputy Commissioner Stanback's order to the Commission.

On 25 October 2005, the Commission entered an Opinion and Award issued by Chair Young and joined by Commissioners Sellers and Scott concluding that "Plaintiffs . . . failed to establish that they suffer from an occupational disease within the meaning of N.C. Gen. Stat. § 97-53(13) and therefore [were] not entitled to benefits[.]" Plaintiffs noted an appeal to this Court from the Commission's order. On 19 June 2007, this Court filed an unpublished opinion remanding this case "for further findings" relating to the issue of spoliation. *Huffman v. Moore Cty.*, 184 N.C. App. 187, 645 S.E.2d 899 (2007) (*Huffman I*).

On 27 September 2007, the Commission entered an amended Opinion and Award issued by Chair Young, with Commissioners Sellers and Scott concurring, denying Plaintiffs' request for workers' compensation benefits on the grounds that "Plaintiffs have failed to prove that they suffer from an occupational disease within the meaning of N.C. Gen. Stat. § 97-53(13) and therefore are not entitled to benefits under the Act." Plaintiffs appealed to this Court from the Commission's remand order. By means of an opinion filed 16 December 2008, this Court remanded this case to the Commission to make "proper findings of fact." *Huffman v. Moore County*, 194 N.C. App. 352, 359, 669 S.E.2d 788, 793 (2008) (*Huffman II*).

On 17 December 2008, Defendants wrote the Commission to suggest that "the parties . . . submit proposed Opinions and Awards for its consideration." On 23 December 2008, Plaintiffs "request[ed] an opportunity to present an argument and answer any questions the

panel may have." On 4 February 2009, the Commission asked Defendants to "submit a proposed Opinion and Award supporting [their] position that reflects the concerns expressed by the Court of Appeals regarding clarification of the Findings of Fact." On 20 February 2009, Plaintiffs moved that the Commission judicially notice a study performed by "the Research Advisory Committee on Gulf War Veteran's Illnesses" and provide "an opportunity to [submit] . . . a brief and/or [provide] oral argument in support of their position." Two days later, Defendants objected to Plaintiffs' request that the Commission judicially notice the Research Advisory Committee study. On 25 February 2009, Defendants submitted the requested proposed order. Plaintiffs objected to certain of Defendants' proposed findings on 27 February 2009. Defendants responded to Plaintiffs' objections on the same date. By means of an Opinion and Award issued by Chair Young, with the concurrence of Commissioners Sellers and Scott, on 20 April 2009, the Commission denied Plaintiffs' motion and determined that "Plaintiffs [had] not established that their symptoms were caused by or significantly aggravated by their employment with Defendant-Employer." Plaintiffs appealed to this Court from the Commission's order.

II. Legal Analysis

A. Standard of Review

Plaintiffs' claims rest on the contention that each of them contracted a compensable occupational disease during their employment by Defendant Moore County. Since the occupational disease that Plaintiffs claim to have contracted is not one of those specifically enumerated in N.C. Gen. Stat. § 97-53, Plaintiffs had to prove that they suffered from "[a] disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." N.C. Gen. Stat. § 97-53(13). "[T]here are three elements necessary to prove the existence of a compensable 'occupational disease:' (1) the disease must be characteristic of a trade or occupation, (2) the disease is not an ordinary disease of life to which the public is equally exposed outside of the employment, and (3) there must be proof of causation, *i.e.*, proof of a causal connection between the disease and the employment." *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 105-06 (1981) (citing *Booker v. Medical Center*, 297 N.C. 458, 468, 256 S.E.2d 189, 196 (1979)). The employee has the

burden of persuasion with respect to each element of a workers' compensation claim. *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003) (stating that the "[p]laintiff has the burden to prove each element of compensability") (citing *Harvey v. Raleigh Police Dept*, 96 N.C. App. 28, 35, 384 S.E.2d 549, 553, *disc. review denied*, 325 N.C. 706, 388 S.E.2d 454 (1989), and *Taylor v. Twin City Club*, 260 N.C. 435, 437, 132 S.E.2d 865, 867 (1963)).

Appellate review in workers' compensation cases "is limited to a determination of (1) whether the Commission's findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings." *Snead v. Carolina Pre-Cast Concrete, Inc.*, 129 N.C. App. 331, 334, 499 S.E.2d 470, 472, *cert. denied*, 348 N.C. 501, 510 S.E.2d 656 (1998) (citing *Sidney v. Raleigh Paving & Patching*, 109 N.C. App. 254, 256, 426 S.E.2d 424, 426 (1993)). "[E]ven where there is evidence to support contrary findings, the Commission's findings of fact are conclusive on appeal if supported by any competent evidence." *Snead*, 120 N.C. App. at 335, 499 S.E.2d at 472 (citing *Watkins v. City of Asheville*, 99 N.C. App. 302, 303, 392 S.E.2d 754, 756, *disc. rev. denied*, 327 N.C. 488, 397 S.E.2d 238 (1990)). The "Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony." *Russell v. Lowes Products Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citing *Anderson v. Motor Co.*, 233 N.C. 372, 376, 64 S.E.2d 265, 268 (1951)).

A different standard of review is, however, utilized in reviewing the Commission's decisions concerning legal issues. "The Commission's conclusions of law[, for example,] are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004). Furthermore, "[i]f the conclusions of the Commission are based upon a deficiency of evidence or misapprehension of the law, the case should be remanded so 'that the evidence may be considered in its true legal light.' " *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611-12, 636 S.E.2d 553, 555 (2006) (quoting *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005)). Finally, the extent to which expert testimony suffices to establish a disputed fact or component of a plaintiff's claim is also subject to *de novo* review. *Holley*, 357 N.C. at 233, 581 S.E.2d at 753 (stating that "a review of the expert testimony reveals that neither of plaintiff's physicians could establish the required causal connection between plaintiff's accident and her" condition).

B. Discussion

1. Compliance with Prior Mandate

[1] First, Plaintiffs argue that the Commission erred by failing to comply with this Court's mandate in *Huffman II*. "Following an appeal to this Court if the case is remanded to the Commission, the full Commission must strictly follow this Court's mandate without variation or departure." *Crump v. Independence Nissan*, 112 N.C. App. 587, 590, 436 S.E.2d 589, 592 (1993). Plaintiffs contend that the Commission failed to honor our previous mandate when it (1) did not comply with Rule 702A of the Workers' Compensation Rules and otherwise deprived Plaintiffs of a right to be heard in the course of making its remand decision and (2) relied on a proposed Opinion and Award submitted by Defendants in drafting its order. After reviewing the record, we do not believe that the Commission engaged in an act of "judicial insubordination" as suggested by Plaintiffs.

According to Rule 702A of the Workers' Compensation Rules, when a case is remanded to the Commission from the appellate courts:

> each party may file a statement with the Full Commission, supported by a brief if appropriate, setting forth its position on the actions or proceedings, including evidentiary hearings or depositions, required to comply with the court's decision. This statement shall be filed within 30 days of the issuance of the court's mandate[.]

On 16 December 2008, we remanded this case to the Commission for "proper findings." On 17 December 2008, Defendants requested that both parties be allowed to submit proposed Opinions and Awards for the Commission's consideration. On 23 December 2008, Plaintiffs requested permission to present oral argument. The mandate in *Huffman II* was issued on 5 January 2009. N.C.R. App. P. 32(b). On 4 February 2009, the last day of the 30 day period specified in Rule 702A, the Commission requested Defendants to submit a proposed Opinion and Award. Over two weeks later, Plaintiffs requested that the Commission judicially notice the Research Advisory Committee study and asked for oral argument or the right to submit a brief. After the submission of Defendants' proposed Opinion and Award, Plaintiffs objected to certain of Defendants' proposed findings of fact. The Commission issued its Opinion and Award on 20 April 2009, approximately six weeks after the parties' last filing.[2]

2. In its second Opinion and Award on remand, the Commission specifically rejected Plaintiffs' request that the Research Advisory Committee report be judicially

The record clearly demonstrates that Plaintiffs did not file the statement and supporting brief permitted by Rule 702A within the required 30 day period and elected to seek oral argument before the Commission instead. Although Plaintiffs requested leave to submit an additional brief after the 30 day period specified in Rule 702A had already expired, the record is devoid of any Commission order prohibiting such a filing. Plaintiffs have not pointed to any authority establishing that they had a right to present oral argument in lieu of the statement and supporting brief maintained in Rule 702A. Had they taken advantage of the opportunities afforded by Rule 702A, Plaintiffs would have had ample opportunity to be heard on remand. Thus, Plaintiffs' explicit contention that the Commission violated Rule 702A and their implicit contention that the Commission deprived them of an adequate opportunity to be heard on remand both lack merit.

Secondly, even if the Commission did primarily rely on Defendants' proposed Opinion and Award in drafting its second order on remand, we do not believe that such an action would violate our mandate in *Huffman II*. We have previously held that "[i]t is acceptable for the deputy commissioner to request one side or the other to prepare the proposed opinion and award so long as the deputy commissioner has made his own decision and is free to ignore, amend, modify, etc., the draft," *Rierson v. Commercial Service, Inc.*, 116 N.C. App. 420, 422, 448 S.E.2d 285, 287 (1994), and that, "[w]here the trial court adopts verbatim a party's proposed findings of fact, those findings will be set aside on appeal only where there is no competent evidence in the record to support them." *Weston v. Carolina Medicorp, Inc.*, 102 N.C. App. 370, 381, 402 S.E.2d 653, 660, *disc. review denied*, 330 N.C. 123, 409 S.E.2d 611 (1991); *see also United Leasing Corp. v. Guthrie*, 192 N.C. App. 623, 633, 666 S.E.2d 504, 510 (2008). Thus, the fact that the Commission obtained a proposed Opinion and Award from Defendants and utilized it in drafting its order does not, standing alone, invalidate the Commission's decision.

Plaintiffs also suggest, without explicitly arguing, that the Commission erred by failing to reopen the evidentiary record. However, except for requesting the Commission to judicially notice the Research Advisory Committee report, Plaintiffs never described the additional evidence that they wished the Commission to receive.

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noticed on the grounds that "[t]he materials submitted by Plaintiffs are the subject of dispute in the medical and scientific communities" and are "not the sort of evidence of which the Commission should take judicial notice." Plaintiffs have not challenged the Commission's refusal to judicially notice this report on appeal.

In *Huffman II*, we stated that "the Commission may, in its discretion, reopen the case for new evidence" given that, "in the intervening [ten] years [since the submission of Plaintiffs' original claims,] the medical community may have gained a greater understanding of [fibromyalgia and multiple chemical sensitivity.]" *Huffman II*, 194 N.C. App. at 359, 669 S.E.2d at 793. A discretionary decision by a trial court or administrative agency "may be reversed . . . only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). In view of the fact that Plaintiffs did not provide the Commission with any information concerning the additional evidence that they wished to present on remand except for their judicial notice request, we cannot say that the Commission abused its discretion by failing to reopen the evidentiary record.

At bottom, our remand instructions in *Huffman II* focused on the need for "proper findings of fact" which were "more than a mere summarization or recitation of the evidence." *Huffman II*, 194 N.C. App. at 355, 669 S.E.2d at 790 (quoting *Lane v. American Nat'l Can Co.*, 181 N.C. App. 527, 531, 640, S.E.2d 732, 735 (2007), *disc. review denied*, 362 N.C. 236, 659 S.E.2d 735 (2008)). A careful study of the second Opinion and Award on remand indicates that the Commission complied with our mandate by revising its findings of fact to avoid the deficiencies pointed out in *Huffman II*. As a result, we are not persuaded that the Commission failed to follow our mandate in *Huffman II*.

<u>2. Evidentiary Support for Commission Findings</u>

[2] Secondly, Plaintiffs contend that the Commission's findings of fact lack sufficient evidentiary support because they rely upon irrelevant test results. Although Plaintiffs specifically challenge Findings of Fact Nos. 12, 17, 26, 36, 37 and 106, they also state that "[d]iscussing each of the Findings of Fact imputing relevancy into defendants' environmental testing is not feasible within the space allowed." We do not find Plaintiffs' arguments to be persuasive.

The Commission stated in Finding of Fact No. 12 that:

> On August 2, 1994, peppermint oil was poured into the sewer line clean out and vents to determine if there were any leaks in the septic system. During the test, no peppermint odor was detected inside the building. Mr. Boles opined and the Full Commission finds as fact that the lack of peppermint odor established that

there was positive pressure and that the sewer line was drawing air out of the building, not pushing it in. A similar experiment was conducted with the three drain lines. Again, there was no peppermint odor, which established that there was no negative pressure that would have sucked the oil in through the slab.

In contesting Finding of Fact No. 12, Plaintiffs argue that it "fails to recognize the HVAC was completely renovated from June 17 through June 20, 1994, to allow fresh air intake and eliminate the negative pressure problem."[3] Similarly, in Finding of Fact No. 17, the Commission found that:

> In his deposition testimony, Roy Fortmann, Ph.D., a senior scientist in indoor air quality research at Acurex Environmental, testified that volatile organic compounds were detected in the indoor air samples, but the specific types of compounds identified and the concentrations were what would be considered "typical" of indoor air in an office building. None of the volatile organic compounds present in the air sampling were in excess of the limits of OSHA or ACIGH. The Full Commission finds Dr. Fortmann's testimony to be credible and persuasive. The Full Commission further finds that the air in the CSB during the time Plaintiffs worked there was typical of indoor air in an office building.

In challenging this finding, Plaintiffs argue that, because Acurex did not inspect the building until after the renovations had been completed, Mr. Fortmann had "no way of knowing the air quality in the CSB . . . at the times the plaintiffs were working there" and that, despite having found Mr. Fortmann's testimony credible, the Commission had "stated a conclusion apparently based on his testimony **exactly opposite** his testimony" (emphasis in the original). In Finding of Fact No. 24, the Commission found that:

> On March 25, 1996, Flint Worrell, a waste management specialist from the North Carolina Department of Environment, Health and Natural Resources, conducted a sampling of two septic tanks and two soil samples from the area. The first sample consisted of soil and sludge taken from the bottom of the first septic tank. The second sample consisted of soil and sludge taken from the bottom of the

3. We have not, in our review of the material upon which Plaintiffs rely in support of this assertion, found any evidence tending to address the extent, if any, to which the modifications to the HVAC system in the CSB altered internal atmospheric pressures.

> third septic tank. The third sample consisted of soil collected five feet from the building in front of the exterior doorway and the fourth was taken approximately six feet from the building. Tests were conducted for heavy metals, volatile organic chemicals, and semi-volatile organic chemicals. It would be likely to find some amount of chemicals inside a septic tank. The testing revealed that the concentration of chemicals was below hazardous waste levels. Accordingly, since the testing did not reveal hazardous waste, the abandoned septic tanks were not required to be removed. The third septic tank had previously been pumped out and filled with sand and was, therefore, not tested by Mr. Worrell.

According to Plaintiffs, "[t]his Finding fails to recognize the septic tanks had previously been pumped out and filled with sand."[4] Plaintiffs contend that "[t]his misunderstanding of the Full Commission culminates in Finding of Fact [No.] 26," in which the Commission found that:

> No volatile organic compounds or other toxic or pathogenic substances were ever detected in the CSB at a level in excess of OSHA's permissible exposure limits or the ACIGH's threshold limits value. The Full Commission finds that no volatile organic compounds or other toxic or pathogenic substances were present in the CSB during the relevant time period at a level in excess of OSHA's permissible exposure limits or the ACIGH's threshold limits value.

Once again, Plaintiffs argue that, "[a]s recognized by Mr. Fortmann, the testing did not reflect the state of the CSB at the relevant points in time" and that "there is simply no evidence supporting the Commission's [finding] that there were no chemicals or other pathogenic substances at elevated levels during the relevant time periods." Finally, Plaintiffs point to Findings of Fact Nos. 36 and 37, in which the Commission stated that:

> 36. The environmental testing performed does not support Plaintiffs' allegations that they were victims of chemical exposure or that they were subjected to a greater risk of developing an occupational disease than the general public during their employment in the CSB.

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4. Plaintiffs' argument overlooks the testimony of Mr. Boles, who clearly stated that the entire contents of those tanks had not been removed.

> 37. The competent and credible evidence of record fails to establish that there were toxic or pathogenic substances in the CSB at harmful or elevated levels. Therefore, since Plaintiffs were not subjected to an increased risk due to their employment with Defendant [Moore County], any diseases that Plaintiffs may have are not characteristic of and peculiar to their occupations.

According to Plaintiffs, these findings "clearly show [that] the . . . Commission believed the testing was relevant and [that P]laintiffs were not exposed to chemicals capable of causing their conditions." Thus, Plaintiffs' challenge to the evidentiary support for the enumerated findings is really an attack upon the relevance of the environmental testing results rather than an attack upon the accuracy of the Commission's description of the test results themselves.

A careful analysis of the record indicates that the Commission could appropriately conclude that the results of the testing performed at the CSB were not rendered irrelevant by the renovation work performed there. First, the record shows that the air quality testing performed in the CSB occurred when stained ceiling tiles and other allegedly contaminated items remained in the building and when pesticide spraying continued to occur. In fact, some of the renovations eventually made to the CSB stemmed from recommendations made by Mr. Pate at the time of his initial air quality testing. Secondly, despite Plaintiffs' repeated attacks upon the peppermint oil testing, the record contains no evidence tending to show that the renovations to the HVAC affected the extent to which negative air pressure in the CSB would have drawn air from the septic system back into the building. In the absence of such evidence, the Commission could have concluded that the results of the air quality testing were reflective of pre-renovation conditions. Thirdly, the record contains evidence tending to show that the soil in the leach lines and outside the building and a residue of the materials in the tested septic tanks had not been disturbed during the renovation process, rendering the testing performed upon those materials relevant to an analysis of pre-renovation conditions at the CSB. Finally, the record contains evidence tending to show that the pesticides utilized in the CSB were approved for interior use and were applied at concentrations lower than those approved for use inside buildings. Although Dr. Fortmann did note in his final report that there was "no way of knowing if there were any sources of chemicals, particulate matter, or microbiological organisms present prior to the renovations that may have caused the health-related problems in the

building," this evidence does not in any way negate, and instead actually supports, the Commission's finding that "[t]he environmental testing performed does not support Plaintiffs' allegations" and that "competent and credible evidence of record fails to establish that there were toxic or pathogenic substances in the CSB." Thus, the Commission's decision to rely on this evidence represents nothing more than a resolution of a weight and credibility issue that we are not authorized to disturb on appeal. Plaintiffs' challenge to the Commission's decision to rely on these test results lacks merit.[5]

3. Application of Incorrect Legal Standard

[3] Thirdly, Plaintiffs argue that the Commission utilized an incorrect legal standard in determining whether the evidence concerning their exposure to toxic or pathogenic substances in the CSB sufficed to meet their burden of proof. In essence, Plaintiffs claim that the Commission erroneously required them to prove the exact level of harmful chemicals to which they were exposed rather than simply requiring them to prove sufficient exposure to cause their symptoms. A careful review of the Commission's order demonstrates that the Commission did not impose an impermissible burden on Plaintiffs.

In support of this contention, Plaintiffs cite Findings of Fact Nos. 37 and 106, in which the Commission stated that:

> 37. The competent and credible evidence of record fails to establish that there were toxic or pathogenic substances in the CSB at harmful or elevated levels. Therefore, since Plaintiffs were not subjected to an increased risk due to their employment

5. Plaintiffs' argument that the Commission erred by failing to mention the testimony of witness Giles D. Hopkins in its order is equally without merit. The record and the Commission's order are replete with descriptions of the Plaintiffs' symptoms. Although the Commission may not discount competent evidence by failing to mention the competent testimony of an important witness in its order, *Sheehan v. Perry M. Alexander Constr. Co.*, 150 N.C. App. 506, 515, 563 S.E.2d 300, 306 (2002), the Commission "is not required to find facts as to all credible evidence," since such a "requirement would place an unreasonable burden on the Commission." *London v. Snak Time Catering, Inc.*, 136 N.C. App. 473, 476, 525 S.E.2d 203, 205 (2000) (citing *Woolard v. N.C. Dept. of Transportation*, 93 N.C. App. 214, 218, 377 S.E.2d 267, 269, *cert. denied*, 325 N.C. 230, 381 S.E.2d 792 (1989)). A careful review of the record suggests that Mr. Hopkins' testimony did not provide information that would have been of real significance to the Commission's determination of the extent, if any, to which Plaintiffs' symptoms resulted from exposure to chemicals occurring during the time that they worked in the CSB. In essence, a specific reference to Mr. Hopkins' testimony would have shown that an additional CSB-based employee claimed to have developed symptoms like those reported by the seven Plaintiffs. Despite Plaintiffs' contentions to the contrary, we are unable to see how this testimony would have materially altered the Commission's evaluation of Plaintiffs' claims.

with Defendant-employer, any diseases that Plaintiffs may have are not characteristic of and peculiar to their occupations.

. . . .

106. There is insufficient evidence regarding what, if any, exposure Plaintiffs may have had to chemicals, molds, or any other potentially toxic, harmful, or pathogenic matter while employed by Defendant-Employer, or that any alleged exposure aggravated any pre-existing condition. The medical and other evidence was insufficient to conclude that there is a causal connection between Plaintiffs' symptoms and their employment with Defendant-Employer.

Despite Plaintiffs' contentions to the contrary, these findings make no mention of any requirement that Plaintiffs demonstrate the existence of a specific, quantifiable level of exposure.

Establishing the existence of a compensable occupational disease necessarily requires proof that Plaintiffs were exposed to a level of toxic or pathogenic substances sufficient to cause the symptoms from which they suffer. For that reason, it logically follows that some threshold level of exposure must have occurred in order for a Plaintiff to prove that the hazards to which he or she was exposed exceeded those experienced by the public at large. *Gay-Hayes v. Tractor Supply Co.*, 170 N.C. App. 405, 408-09, 612 S.E.2d 399, 402, *disc. review denied*, 359 N.C. 851, 619 S.E.2d 505 (2005) (stating that "[o]ur courts have held that an individual's personal sensitivity to chemicals does not result in an occupational disease compensable under our workers' compensation scheme" and upholding a Commission finding that a plaintiff's personal sensitivities did not support a valid workers' compensation claim despite the fact that "plaintiff's employment with defendant, which stocked various chemicals, pesticides, and farming supplies, put her at a greater risk than members of the general public") (citing *Nix v. Collins & Aikman Co.*, 151 N.C. App. 438, 443-44, 566 S.E.2d 176, 180 (2002)). A careful review of the challenged findings establishes that they merely state that Plaintiffs did not satisfy their burden of proving that a sufficient level of employment-related exposure to toxic and pathogenic substances had occurred. Moreover, while Plaintiffs suggest that the testimony of Dr. Taylor, Dr. Meggs, Dr. Lapp, and Dr. Bell demonstrates the existence of the required level of exposure, this aspect of Plaintiffs' argument goes to the weight and credibility of the evidence, which is a determination to be made by the Commission,

rather than its sufficiency. *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (stating that " '[t]he Industrial Commission is the sole judge of the credibility of the witnesses and the evidentiary weight to be given their testimony' ") (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). Although the testimony of Dr. Bell, Dr. Lapp, Dr. Meggs, and Dr. Taylor is favorable to Plaintiffs' position, the record is devoid of evidence tending to show that toxic chemicals were introduced into the CSB septic system after 1982. Furthermore, the testing performed in the mid-1990s, which was properly available for the Commission's consideration, undercut the strength of Plaintiffs' claim. Given this set of circumstances, we conclude that the Commission did not err by requiring Plaintiffs to show that they were exposed to sufficient quantities of toxic or pathogenic substances during their employment with Defendant Moore County to cause the symptoms from which they suffered and determining that Plaintiffs failed to meet their burden of showing such a level of exposure.

4. Reliance on Testimony of Defendants' Experts

[4] Finally, Plaintiffs contend that the Commission erred by relying on the expert testimony of Dr. Winfield and Dr. Staudenmayer to the effect that Plaintiffs did not suffer from a compensable occupational disease. According to Plaintiffs, the Commission erroneously accepted the opinions of Defendants' expert witnesses because their testimony addressed subjects outside their area of expertise and was based on an "assumption of facts that the record fails to support." We do not find Plaintiffs' argument persuasive.

Although Plaintiffs couch this argument as a challenge to the legal sufficiency of the testimony of Defendants' expert witnesses, it is better characterized as an attack upon the credibility of their testimony. As we have already noted, the Commission is required to make credibility judgments and must necessarily give greater weight to the testimony of some doctors as compared to others in deciding particular cases. *Hensley v. Industrial Maint. Overflow*, 166 N.C. App. 413, 420, 601 S.E.2d 893, 898 (2004), *disc. review denied*, 359 N.C. 631, 613 S.E.2d 690 (2005) (stating that "[t]he Commission was entitled to choose, as it did, to give greater weight to Dr. Griffin than Dr. Cappiello") (citing *Johnson v. Southern Tire Sales and Serv.*, 358 N.C. 701, 711, 599 S.E.2d 508, 515 (2004), and *Drakeford v. Charlotte Express*, 158 N.C. App. 432, 441, 581 S.E.2d 97, 103 (2003)). As long as an expert witness is qualified to render an opinion concerning the

subject at issue and bases his or her opinions on evidence properly contained in the record, *Thacker v. City of Winston-Salem*, 125 N.C. App. 671, 675, 482 S.E.2d 20, 23, *disc. review denied*, 346 N.C. 289, 487 S.E.2d 571 (1997) (holding that "evidence elicited by plaintiff's hypothetical question was not competent because it required Dr. de la Torre to assume the truth of facts that the record does not support"), the Commission is entitled to rely on that testimony in making its decision.

The record clearly supports the Commission's determination that Dr. Staudenmeyer and Dr. Winfield were qualified to testify concerning the causal relationship, if any, between Plaintiffs' work in the CSB and their symptoms. Although Plaintiffs challenge Dr. Winfield's qualifications to testify about this issue because he is "board certified only in internal medicine and practicing only in the fields of internal medicine and rheumatology" and argue that Dr. Staudenmayer "is a psychologist (who has had his license suspended)" and "not a medical doctor" or possessed of "expertise in medical toxicology or medical allergy and immunology," the record contains considerable evidence that tends to support a contrary determination. For example, Dr. Winfield has treated patients claiming to have been exposed to toxic or pathogenic substances and has published an article entitled "Psychologic Determinants of Fibromyalgia and Related Syndromes" in the *Current Review of Pain*, a peer-reviewed journal. In addition, Dr. Winfield extensively reviewed the research performed by leading medical organizations concerning the methodology adopted by Plaintiffs' experts and determined that position papers issued by various medical organizations had criticized their preferred approach. At the time of his deposition, Dr. Winfield was conducting a study of 400 fibromyalgia patients. Similarly, after obtaining his doctorate, Dr. Staudenmayer participated in a post-doctoral program housed at an institution that primarily serves as a respiratory illness center. Moreover, Dr. Staudenmayer has had 20 years of experience focused on research into psychosomatic and psychogenic illnesses allegedly relating to chemical and toxic agent exposure. Dr. Staudenmayer's work has been multidisciplinary in nature and has involved the preparation of articles; the writing of a book entitled *Environmental Illness, Myth and Reality*; and participation in a World Health Organization conference on multiple chemical sensitivity. As a result, the record clearly supports the Commission's determination that both Dr. Winfield and Dr. Staudenmayer, based upon their "knowledge, skill, experience, training, or education," N.C. Gen. Stat.

§ 8C-1, Rule 702, are "qualified as . . . expert[s] in the subject area about which [they testified.]" *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 461, 597 S.E.2d 674, 688 (2004) (citing *State v. Goode*, 341 N.C. 513, 529, 461 S.E.2d 631, 640 (1995)).

In addition to challenging the credentials of Defendants' expert witnesses, Plaintiffs argue that the testimony of Dr. Winfield and Dr. Staudenmayer was incompetent because they both assumed that Plaintiffs were not exposed to chemical or pathogenic agents. As we understand Plaintiffs' argument, they contend that, because the test results were irrelevant and because Plaintiffs presented evidence tending to show the presence of certain substances in the CSB, the opinions of Dr. Winfield and Dr. Staudenmayer did not support a Commission determination contrary to the position espoused by Plaintiffs. We have already concluded that the Commission was entitled to consider the evidence relating to the testing performed in and around the CSB. Similarly, given the test results, the fact that Plaintiffs have not presented any evidence tending to show that any toxic or pathogenic elements were introduced into the CSB after 1982 except for certain pesticides, the fact that these pesticides were approved for indoor use and applied at lower concentrations than authorized by applicable standards, and the fact that the record contains no indication that the specific pesticides used in the CSB were capable of causing Plaintiffs' symptoms, we are not persuaded by Plaintiffs' challenge to the competency of the testimony of Defendants' experts.

Although both Plaintiffs and Defendants expended significant energy debating the positions taken by their respective experts, we see no need to address that topic in any detail. Reduced to its essence, the record reveals a sharp conflict in the evidence concerning the cause of Plaintiffs' symptoms, with one group of experts attributing those symptoms to employment-related exposure to toxic and pathogenic substances and the other group contending that Plaintiffs' symptoms were psychological in nature. After carefully reviewing the evidence, the Commission concluded that the testimony of Dr. Staudenmayer and Dr. Winfield was more credible than the testimony of Dr. Bell, Dr. Lapp, Dr. Meggs, and Dr. Taylor.[6] Such credibility judg-

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6. In a related argument, Plaintiffs challenge the lawfulness of the Commission's decision not to credit the testimony of Dr. Taylor concerning pesticide exposure issues on the grounds that "[t]here is no competent medical evidence disputing Dr. Taylor's opinions on the admitted pesticide exposure and their ability to cause the plaintiffs' symptoms." However, given that Dr. Taylor had no information that any of the Plaintiffs

ments are the province of the Commission, not the appellate courts. As a result, Plaintiffs' challenge to the lawfulness of the Commission's decision to rely on the testimony of Defendants' experts lacks merit.

III. Conclusion

Thus, for the reasons set forth above, we conclude that all of Plaintiffs' challenges to the Commission's order lack merit. As a result, the Commission's order should be, and hereby is, affirmed.

AFFIRMED.

Chief Judge MARTIN and Judge JACKSON concur.

STEVEN COHEN, PLAINTIFF v. CHARLES L. McLAWHORN, JR., AND McLAWHORN & ASSOCIATES, P.A., DEFENDANTS

No. COA09-1578

(Filed 21 December 2010)

1. Appeal and Error— interlocutory order—substantial right

Although an appeal from the dismissal of a legal malpractice case may have been from an interlocutory order since the record contained no indication that defendants' counterclaim for legal fees was resolved, a substantial right would have been affected in the absence of an immediate appeal. Further, since no party appealed from a trial judge's order or suggested that it lacked jurisdiction to enter the order, that order returning the case to another trial judge stood and was binding on appeal.

2. Appeal and Error— preservation of issues—failure to raise at trial

Although plaintiff contended that the trial court erred by dismissing a legal malpractice action based on defendant's violation of the local rules when calendaring this case for trial, plaintiff failed to preserve this issue by raising it at trial as required by N.C. R. App. P. 10(b)(1).

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had ever complained of the symptoms of acute pesticide exposure, that he knew of no scientific studies concerning the effects of chronic pesticide exposure, and that his opinions concerning multiple chemical sensitivity and chronic fatigue syndrome represented a minority point of view, the Commission did not err by declining to credit his testimony.

3. Civil Procedure— motion to dismiss under Rule 41(b) granted—-failure to prosecute—legal malpractice claim

The trial court did not abuse its discretion by dismissing plaintiff's legal malpractice action under N.C.G.S. § 1A-1, Rule 41(b) for failure to prosecute. The trial court appropriately considered the three factors in *Wilder*, 146 N.C. App. 574. Given plaintiff's failure to take any action to prosecute this case, his disregard of a properly noticed and calendared trial, the prejudice to defendants of having the allegations pending with no ability to disprove them, and the fact that plaintiff had previously disregarded a mediation order and an official calendar, the trial court's decision to dismiss was not unreasonable.

Appeal by plaintiff from order entered 29 June 2009 by Judge William C. Griffin, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 10 June 2010.

Mills & Economos, L.L.P., by Larry C. Economos, for plaintiff-appellant.

Herrin & Morano, by Mickey A. Herrin, for defendants-appellees.

GEER, Judge.

Plaintiff Steven Cohen appeals from the trial court's order dismissing this action pursuant to Rule 41(b) of the Rules of Civil Procedure after plaintiff failed to appear at trial and failed to take any other steps to prosecute the action. Plaintiff does not dispute that the trial court considered the factors set out in *Wilder v. Wilder*, 146 N.C. App. 574, 553 S.E.2d 425 (2001), but argues that the court's conclusions of law as to those factors are not supported by the findings of fact.

Based on our review of the record, we hold that the trial court made sufficient findings based on the evidence to support its conclusions regarding plaintiff's unreasonable delay in prosecuting the action, the prejudice suffered by defendants, and the need for dismissal with prejudice. Accordingly, we affirm the trial court's order dismissing the action with prejudice.

Facts

Plaintiff filed a legal malpractice lawsuit against attorney Charles L. McLawhorn, Jr. and his law firm, McLawhorn & Associates, P.A., on 17 February 2005. The complaint was 11 pages long and attached 12

exhibits purportedly supporting the complaint's allegations. According to the complaint, plaintiff was the founder and majority shareholder of Internet East, Inc. Defendants represented Internet East in a business dispute that resulted in litigation brought against another company. The complaint alleges that defendants provided negligent legal representation, violated the Rules of Professional Conduct, and did not act in plaintiff's best interests.

On 9 May 2005, defendants filed an answer that included a counterclaim for legal fees in the amount of $30,000.00. Plaintiff did not file any reply to the counterclaim. Subsequently, on 2 June 2005, the trial court entered an order for a mediated settlement conference. The order set a deadline of 1 September 2005 for completion of the settlement conference. A mediation was never held.

Although plaintiff had filed the lawsuit *pro se*, Larry C. Economos —who is representing plaintiff on this appeal—apparently represented plaintiff in some capacity in the case because on 28 September 2005, Mr. Economos filed a motion to withdraw on the grounds that plaintiff had failed to pay legal fees owed for services performed. At that time, plaintiff was incarcerated in a federal prison in Petersburg, Virginia. On 7 October 2005, the trial court allowed the motion to withdraw and ordered that further pleadings and papers be served on plaintiff at the federal prison's address and on Linda Leggett, who held plaintiff's power of attorney.

More than a year after the lawsuit was filed, defendants filed a calendar request asking to schedule the case for a two-day jury trial beginning on 17 April 2006. Defendants served the calendar request along with a notice of hearing on 27 March 2006 by mailing the documents to plaintiff at the address in the court's 7 October 2005 order and to Ms. Leggett, as specified in that order. The trial court administrator subsequently sent a copy of the trial calendar to plaintiff—also at the addresses specified in the 7 October 2005 order—setting this case for trial on 17 April 2006. Plaintiff did not take any action with respect to the upcoming trial date—he did not move for a continuance or a stay or otherwise communicate with the court or defendants regarding the trial.

On 17 April 2006, defendants appeared for trial, but plaintiff did not attend or have anyone present representing him. Judge William C. Griffin, Jr. involuntarily dismissed the action pursuant to Rule 41(b) in an order filed 17 April 2006. The order stated:

> This case appearing on the April 17, 2006, trial calendar for the Pitt County Superior Court and it appearing to the undersigned that the plaintiff received due notice of the calendaring of this case and it further appearing to the court that the plaintiff is not present in court nor represented at the call of the calendar and it further appearing that the defendant, by and through counsel, has moved for a dismissal of this action, the court is of the opinion and finds as a fact that the defendant is entitled to have this action dismissed.
>
> NOW, THEREFORE, pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure this action is hereby dismissed.

Plaintiff did not appeal this order.

On 16 April 2007, a year after the dismissal, plaintiff, represented by Mr. Economos, filed a new action with an identical complaint to the one dismissed by Judge Griffin. Defendants were never served in this second action, although four alias and pluries summonses were issued between May 2007 and February 2008.

On 5 June 2007, plaintiff, through Mr. Economos, filed a Rule 60(b)(6) motion in this action that was heard on the same day with defendants' consent. In his motion, plaintiff primarily argued that Judge Griffin failed to comply with *Wilder*. Plaintiff also argued that because of plaintiff's incarceration and the lack of any prejudice to defendants in waiting for plaintiff's March 2007 release, "sanctions, if any, imposed upon the Plaintiff for failure to appear at calendar call should have been far short of dismissal of his action operating under Rule 41(b) as a dismissal with prejudice." Plaintiff did not attach any supporting affidavits to his Rule 60(b)(6) motion.

Judge Clifton W. Everett, Jr. entered an order on 13 June 2007 directing that the matter be returned to Judge Griffin. In the order, Judge Everett explained:

> [T]his Court cannot determine from the face of the Order entered by Judge Griffin on April 17, 2006, whether Judge Griffin addressed those three factors set forth in [*Wilder*] before dismissing the Plaintiff's case for failure to prosecute under Rule 41(b) of the North Carolina Rules of Civil Procedure, it further appear[s] to the Court, with the agreement of all parties, as expressed in open Court, that the ends of justice would best be served by returning the Honorable William C. Griffin, Jr.'s Order dated April 17, 2006, to Judge Griffin for such further entries or modifications, if any,

that he may deem appropriate to more fully and accurately reflect his ruling at the time that said Order was entered.

Plaintiff did not, however, take any steps to return the matter to Judge Griffin.

On 29 May 2009, just shy of the two-year anniversary of Judge Everett's order, *defendants' counsel* wrote to Judge Griffin advising him of plaintiff's Rule 60(b)(6) motion and Judge Everett's order that the matter be returned to Judge Griffin. Defendants' counsel included with his letter to Judge Griffin a copy of Judge Everett's order, a copy of plaintiff's Rule 60(b)(6) motion, "material that was in the Court file" as of 17 April 2006 (the date the original order of dismissal was entered), and a proposed amended order of dismissal for Judge Griffin's consideration. All of the materials sent to Judge Griffin were delivered to Mr. Economos on the same day.

Subsequently, on 5 June 2009, Mr. Economos wrote a letter to Judge Griffin, "objecting to the signing of the Amended Order of Involuntary Dismissal" that defendants' counsel had sent to Judge Griffin and setting forth his argument as to why Judge Griffin should not have entered the original order dismissing the case under Rule 41(b). Mr. Economos requested that, as an alternative to Judge Griffin's setting aside the Rule 41(b) dismissal, Judge Griffin schedule a hearing on the matter.

On 29 June 2009, Judge Griffin entered an amended order of involuntary dismissal with detailed findings of fact explaining the basis for the dismissal and conclusions of law following *Wilder*. Plaintiff appealed from this amended order.

I

[1] Although the parties have not addressed the issue, we must first consider whether this Court has jurisdiction over this appeal. Since defendants asserted a counterclaim against plaintiff, and the record contains no indication that the counterclaim was ever resolved—even though plaintiff was in apparent default—this appeal may be interlocutory. The trial court, however, in its order, did not simply dismiss plaintiff's claims, but rather dismissed "the action." This language suggests that the order was intended to dispose of the entire case.

In any event, we hold that a substantial right would be affected in the absence of an immediate appeal. *See, e.g.*, *Crouse v. Mineo*, 189

N.C. App. 232, 236, 658 S.E.2d 33, 36 (2008) (holding that appeal from dismissal of plaintiffs' claims while counterclaims remained pending was permissible because plaintiffs' claims and counterclaims involved identical issues, creating potential for inconsistent verdicts resulting from separate trials of claims); *Essex Group, Inc. v. Express Wire Servs., Inc.*, 157 N.C. App. 360, 362, 578 S.E.2d 705, 707 (2003) (holding that sanctions order striking answer and entering default judgment against defendants affected substantial right).[1]

Defendants, however, argue that plaintiff is precluded from appealing because he did not appeal the original Rule 41(b) order. Defendants have cited no authority for their argument. Defendants do not contend that the trial court lacked jurisdiction to amend its order; nor have defendants cross-appealed from the amended order. Indeed, it appears from the record that defendants consented to Judge Everett's returning the matter to Judge Griffin for findings of fact and conclusions of law in accordance with *Wilder*.

Since no party has appealed from Judge Everett's order or suggested that he lacked jurisdiction to enter the order, that order returning the case to Judge Griffin stands and is binding on appeal. *See In re J.M.W., E.S.J.W.*, 179 N.C. App. 788, 795, 635 S.E.2d 916, 921 (2006) ("Because the order was not appealed, it is valid and binding in every respect.").[2] As a result, Judge Griffin's amended order superceded his prior order. Since plaintiff timely appealed from the amended order, this appeal is properly before us.

II

[2] Plaintiff first contends that the trial court erred in dismissing the action because defendants violated the local rules when calendaring the case for trial. The record, however, contains no indication that this issue was ever raised below.

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1. We also note that a dismissal of this appeal as interlocutory would prolong the prejudice to defendants that was the basis for the trial court's order dismissing this action for failure to prosecute.

2. It is also well established that the granting of a Rule 60(b) motion "relieves parties from the effect of [the prior] order." *Charns v. Brown*, 129 N.C. App. 635, 639, 502 S.E.2d 7, 10, *disc. review denied*, 349 N.C. 228, 515 S.E.2d 701 (1998). *See also Van Engen v. Que Scientific, Inc.*, 151 N.C. App. 683, 690, 567 S.E.2d 179, 184 (2002); N.C.R. Civ. P. 60(b) (providing that "the court may relieve a party or his legal representative from a final judgment" for specified reasons). Once Judge Everett granted Rule 60(b)(6) relief, therefore, plaintiff was relieved of the effect of the original order.

Under Rule 10(b)(1) of the applicable version of the Rules of Appellate Procedure,[3] in order "to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion." Since it does not appear that plaintiff raised this objection below and, in any event, plaintiff did not obtain a ruling on this objection, he has waived review of this issue on appeal. *See Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) ("[I]ssues and theories of a case not raised below will not be considered on appeal[.]").

III

[3] In *Wilder*, this Court held that a trial judge must address three factors before dismissing an action for failure to prosecute under Rule 41(b): "(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice." 146 N.C. App. at 578, 553 S.E.2d at 428. There is no dispute that, in the amended order, the trial court made conclusions of law addressing each of the *Wilder* factors. Plaintiff, however, contends that these conclusions are not sufficiently supported by appropriate findings of fact.

The standard of review for a Rule 41(b) dismissal is "(1) whether the findings of fact by the trial court are supported by competent evidence, and (2) whether the findings of fact support the trial court's conclusions of law and its judgment." *Dean v. Hill*, 171 N.C. App. 479, 483, 615 S.E.2d 699, 701 (2005). Unchallenged findings of fact " 'are presumed to be supported by competent evidence, and are binding on appeal.' " *Justice for Animals, Inc. v. Lenoir County SPCA, Inc.*, 168 N.C. App. 298, 305, 607 S.E.2d 317, 322 (quoting *Miles v. Carolina Forest Ass'n*, 167 N.C. App. 28, 35, 604 S.E.2d 327, 331 (2004)), *aff'd and modified per curiam*, 360 N.C. 48, 619 S.E.2d 494 (2005).

The trial court addressed the first *Wilder* factor in its first conclusion of law: "The plaintiff has acted in a manner which deliberately or unreasonably delayed the disposition of this case[.]" This conclu-

3. Under the recently amended Rules of Appellate Procedure, the former Rule 10(b) is now Rule 10(a). Because plaintiff filed his notice of appeal prior to 1 October 2009, the effective date of the amended rules, we refer to Rule 10(b).

sion is supported by a number of findings of fact, including the following. Plaintiff filed this action on 17 February 2005. Although defendants asserted a counterclaim on 9 May 2005, plaintiff never replied to that counterclaim. Plaintiff also failed to comply with the order requiring a mediated settlement conference by 1 September 2005. Plaintiff's attorney filed a motion for leave to withdraw as counsel for plaintiff and was allowed to do so on 7 October 2005. More than a year after plaintiff filed suit, defendants properly served plaintiff—in accordance with the trial court's order on 7 October 2005—with a calendar request and notice of hearing by mailing the documents to both plaintiff and his power of attorney. When the case was called for trial on 17 April 2006, the civil trial coordinator announced in open court that she had sent the calendar to plaintiff and that the calendar had not been returned as undelivered mail. There was no communication from plaintiff or his representative indicating that plaintiff desired or needed any stay of the proceedings or that he could not or would not attend to the case as any litigant is required to do.

The court pointed out that plaintiff could have filed, in advance of the trial date, a motion to stay the proceedings, a motion to continue the trial, or a voluntary dismissal without prejudice. The court also pointed out that plaintiff could have advised the court in writing or by calling court personnel regarding when he would be released from prison and his availability to go to court. The trial court noted that plaintiff had previous experience as a litigant in the Pitt County courts. Nevertheless, plaintiff exercised none of these alternatives and did not arrange to have any evidence presented when the case was called for trial.

Of these findings, plaintiff first challenges finding of fact 13: that he could have filed a motion to stay the proceedings, a motion to continue the trial, or a voluntary dismissal without prejudice. These procedural avenues recited by the trial court are set out in the Rules of Civil Procedure or are a matter of common trial practice and were potentially available to plaintiff as an alternative to appearing for trial. *See* N.C.R. Civ. P. 40(b) (providing that continuance may be granted for "good cause shown and upon such terms and conditions as justice may require"); N.C.R. Civ. P. 41(a) (providing that plaintiff may dismiss action without prejudice by filing notice of dismissal at any time before plaintiff rests his case); *Lovendahl v. Wicker*, 208 N.C. App. 193, 211, 702 S.E.2d 529, 540 (2010) (defendant moved for stay pending resolution of criminal proceedings); *Barker Indus. v. Gould*, 146 N.C. App. 561, 563, 553 S.E.2d 227, 229 (2001) (trial

court granted 30-day stay of proceedings to enable defendant to retain new counsel).

Although plaintiff argues that this finding of fact was inappropriate because plaintiff was appearing *pro se*, our courts have emphasized that the Rules of Civil Procedure "must be applied equally to all parties to a lawsuit, without regard to whether they are represented by counsel." *Goins v. Puleo*, 350 N.C. 277, 281, 512 S.E.2d 748, 751 (1999). *See also State v. Vestal*, 34 N.C. App. 610, 611, 239 S.E.2d 275, 276 (1977) ("When a defendant makes a voluntary and knowledgeable decision to represent himself he must be deemed to know the law which will govern the trial of his case and he must be expected to conduct himself in accordance with the rules established by the courts and legislature of this state. To accept his later claim of ignorance of the law would frustrate the policies of the rules of procedure which are so important to the orderly administration of justice."). Plaintiff—who does not challenge the finding that he is an experienced litigant in Pitt County—was bound to and presumed to know the rules providing for a stay, continuance, or voluntary dismissal.

Plaintiff further argues that the notion that he could file anything at all is merely speculative since he was incarcerated in federal prison. He repeats this argument in challenging finding of fact 14 in which the trial court stated that plaintiff could have advised the court in writing or by calling court personnel regarding when he would be released from prison and his availability to go to court. Plaintiff does not, however, address the fact that plaintiff had a power of attorney who was also served with all documents and notices and could have acted on his behalf.

In any event, prisoners not only are able to file pleadings and documents with the courts, but they also have a constitutional right to do so. *See Bounds v. Smith*, 430 U.S. 817, 828, 52 L. Ed. 2d 72, 83, 97 S. Ct. 1491, 1498 (1977) (establishing that State was required by federal constitution "to assist inmates in the preparation and filing of meaningful legal papers"). Moreover, *pro se* inmates are held to the same standards as other *pro se* litigants. *See Jones v. Boyce*, 60 N.C. App. 585, 586, 299 S.E.2d 298, 300 (1983) (upholding dismissal pursuant to Rule 41(b) for *pro se* inmate's failure to comply with Rule 8(a)(2) of Rules of Civil Procedure); *see also Perkinson v. Hawley*, 179 N.C. App. 225, 633 S.E.2d 892, 2006 WL 2347653, *2, 2006 N.C. App. LEXIS 1810, *4 (Aug. 15, 2006) (unpublished) ("Because of plaintiff [inmate's] multiple violations of the appellate rules, his appeal

must be dismissed notwithstanding his *pro se* status."), *disc. review denied*, 361 N.C. 429, 648 S.E.2d 843 (2007). Consequently, we hold that the trial court did not err in making findings of fact 13 and 14.[4]

Plaintiff argues that, regardless, none of the findings of fact establish that plaintiff engaged in "a delaying tactic." Under the first *Wilder* prong, however, the plaintiff must have "acted in a manner which deliberately *or unreasonably delayed* the matter." 146 N.C. App. at 578, 553 S.E.2d at 428 (emphasis added). Here, the trial court's findings demonstrate that plaintiff did nothing whatsoever to pursue the case after filing the complaint, he wholly ignored the fact that his case was calendared for trial, and he did not appear or send a representative to attend the trial. Plaintiff, however, quotes *Eakes v. Eakes*, 194 N.C. App. 303, 669 S.E.2d 891 (2008) (quoting *Green v. Eure*, 18 N.C. App. 671, 672, 197 S.E.2d 599, 600-01 (1973)), for the principle that a plaintiff has to " 'manifest[] an intention to thwart the progress of the action to its conclusion, or by some delaying tactic . . . fail[] to progress the action toward its conclusion,' " and contends that his conduct in this case did not rise to the level necessary under the first prong of *Wilder*.

This Court rejected a similar argument in *Barbee v. Walton's Jewelers, Inc.*, 40 N.C. App. 760, 253 S.E.2d 596, *disc. review denied*, 297 N.C. 608, 257 S.E.2d 435 (1979). In *Barbee*, the plaintiff, relying on *Green*, 18 N.C. App. at 672, 197 S.E.2d at 601, pointed out that the record was silent as to why the plaintiff was not in court for trial and that there was no finding of fact in the order of dismissal that indicated the plaintiff intentionally delayed the proceedings. 40 N.C. App. at 762, 253 S.E.2d at 598. The plaintiff argued that his failure to proceed did not arise out of a deliberate attempt to delay, but out of a misunderstanding. *Id.* This Court, however, observed that the plaintiff had not challenged the trial court's findings that a final trial calendar was prepared and mailed to the attorneys of record, that neither the plaintiff nor his counsel made any request to have the matter continued prior to the call of the case for trial, and that neither

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4. We are not persuaded by plaintiff's suggestion that because the trial court denied his request for a hearing before entering the amended order, "it remains unknown whether the Plaintiff, being incarcerated at the time, actually received the Defendant's Calendar Request or Notice of Hearing prior to 17 April 2006." Plaintiff has not specifically challenged on appeal the trial court's decision not to hold a hearing when plaintiff had not, in two years, followed through on Judge Everett's order that the matter be referred back to Judge Griffin. We note further that plaintiff did not at any time over the three-year period between the initial dismissal and the entry of the amended order ever file an affidavit or make any other written suggestion that he did not receive the notices.

the plaintiff nor his attorney advised the clerk or defense counsel that the plaintiff could not be present for the trial. *Id.* Given those findings of fact, the Court held that the trial court's order was sufficient under Rule 41(b), and the Court affirmed the dismissal. *Id.* at 763, 253 S.E.2d at 598. This case is materially indistinguishable from *Barbee*.

Plaintiff's reliance on *Eakes* and *Lusk v. Crawford Paint Co.*, 106 N.C. App. 292, 416 S.E.2d 207 (1992), *disc. review improvidently allowed*, 333 N.C. 535, 427 S.E.2d 871 (1993), is misplaced. In *Eakes*, the plaintiff contended that the trial court erred in *denying* her motion to dismiss for the defendant's failure to prosecute. 194 N.C. App. at 308, 669 S.E.2d at 895. In holding that the trial court's decision was not an abuse of discretion, this Court pointed out that the trial court had found that (1) although considerable time had passed since the defendant filed his motion to show cause, the file indicated that numerous other issues had since been addressed in an attempt to ready the issue for hearing, and (2) the plaintiff had not in fact been prejudiced, and the defendant had not sought to delay the hearing to prejudice the plaintiff or for any other improper purpose. *Id.* at 309, 669 S.E.2d at 895-96. *Eakes* is simply not pertinent to this case, in which the trial court ordered a dismissal when defendants were prejudiced by plaintiff's taking no action after filing the complaint.

In *Lusk*, although the plaintiff timely served summonses on the defendants, he did not serve the complaint until eight months later. This Court stated that "[t]he dispositive question before us is whether plaintiff's action was subject to dismissal for failure to 'timely' serve his complaint, and whether the delay of the service of his complaint constituted failure to 'timely' prosecute his action." 106 N.C. App. at 297, 416 S.E.2d at 210. After pointing out that the Rules of Civil Procedure do not specify a time within which a complaint must be served, the Court noted that our Supreme Court held in *Smith v. Quinn*, 324 N.C. 316, 378 S.E.2d 28 (1989), that a trial court could properly dismiss an action when the plaintiff's counsel deliberately withheld delivery of a summons so that the defendant would not learn about the action for eight months. *Lusk*, 106 N.C. App. at 297, 416 S.E.2d at 210. Because the Court, in *Lusk*, could not conclude that the failure to serve the complaint was intentional, but rather the circumstances showed "only arguable inadvertence or neglect of counsel," the Court reversed the order dismissing the action for failure to prosecute. *Id.* at 298, 416 S.E.2d at 210.

Here, in contrast to *Lusk*, we are not talking about a delay in performing a single task. Instead, plaintiff did absolutely nothing to

prosecute his case over more than a year's time, and, then, when defendants calendared the trial in order to have the case resolved, plaintiff ignored the trial. Under *Wilder*, the trial court could properly find that this inaction constituted "unreasonably delay[ing] this matter." 146 N.C. App. at 578, 553 S.E.2d at 428. We also hold that such a wholesale failure to prosecute can constitute a delaying tactic. Accordingly, the trial court's findings are sufficient to support the court's conclusion of law regarding the first *Wilder* factor.

We next turn to the second *Wilder* factor, which addresses the amount of prejudice, if any, to defendants. *Id.* In its amended order, the trial court concluded: "The defendant [sic] has been prejudiced by the delay caused by the plaintiff in that his [sic] professional competence has been impugned by the unsubstantiated and unproven allegations contained in the Complaint, which is a document of public record available to the general public[.]"

Pertinent to this factor, the trial court found that plaintiff's lawsuit alleged "that the defendants undertook to represent the plaintiff in certain legal matters and that the defendants were negligent in their representation of the plaintiff, causing damages to the plaintiff[.]" In finding of fact 12, the court further found: "The defendant [sic] is a practicing attorney who would have a desire and a need for this Complaint alleging legal malpractice against the defendant [sic] to move along in an expeditious manner through the Court system and would likely suffer unwarranted damages to his professional reputation and to his business so long as the lawsuit remained pending yet unresolved[.]"

We believe that these findings are sufficient to support the determination that defendants were prejudiced by plaintiff's failure to prosecute. Plaintiff, however, argues that finding of fact 12 "is nothing more than an inappropriate finding suggesting that because the Defendant is an 'attorney' he is entitled to special consideration." We disagree. The focus in finding of fact 12 and the trial court's conclusion of law based on that finding is on the damage done to defendants in their profession or business as a result of the inability to have the claims of professional negligence and unethical behavior resolved.

North Carolina has long recognized the harm that can result from false statements that "impeach a person in that person's trade or profession"—such statements are deemed defamation *per se*. *Renwick v. News & Observer Publ'g Co.*, 310 N.C. 312, 317, 312 S.E.2d 405, 409, *cert. denied*, 469 U.S. 858, 83 L. Ed. 2d 121, 105 S. Ct. 187 (1984). The

mere saying or writing of the words is presumed to cause injury to the subject; there is no need to prove any actual injury. *Barker v. Kimberly-Clark Corp.*, 136 N.C. App. 455, 460, 524 S.E.2d 821, 825 (2000). This Court has already held that a statement describing a lawyer as incompetent "degrades plaintiff's legal ability and disgraces him in his capacity as an attorney. *Such imputations tend to prejudice plaintiff in his livelihood.*" *Clark v. Brown*, 99 N.C. App. 255, 261, 393 S.E.2d 134, 137, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 675 (1990) (emphasis added).

Here, defendants could clear their name from plaintiff's allegations of professional incompetence and unethical behavior only by having the case resolved on the merits. After plaintiff took no action to pursue his claims for more than a year, defendants requested that the trial court schedule the case for trial. That attempt to have the allegations resolved was thwarted by plaintiff's complete disregard of the scheduled trial. We do not believe that the trial court erred in determining that plaintiff's inaction prejudiced defendants by denying them an opportunity to show that plaintiff's accusations were false.

Plaintiff contends, citing *Deutsch v. Fisher*, 39 N.C. App. 304, 250 S.E.2d 304, *disc. review denied*, 296 N.C. 736, 254 S.E.2d 177 (1979), that the only prejudice recognized for purposes of Rule 41(b) is prejudice "flowing specifically to loss of otherwise available defenses to plaintiff's claims for damages." In *Deutsch*, however, this Court simply noted the fact that no defenses had been lost in concluding that there had been no prejudice given the circumstances of that case. *Id.* at 310, 250 S.E.2d at 308. Nothing in the opinion suggests an intent to establish a black letter rule that only a defendant's loss of defenses warrants a dismissal under Rule 41(b) for failure to prosecute.

Finally, we turn to the third *Wilder* factor, which requires the trial court to state "the reason, if one exists, that sanctions short of dismissal would not suffice." 146 N.C. App. at 578, 553 S.E.2d at 428. This Court has explained: "Because the drastic sanction of dismissal 'is not always the best sanction available to the trial court and is certainly not the only sanction available,' dismissal 'is to be applied only when the trial court determines that less drastic sanctions will not suffice.' " *Foy v. Hunter*, 106 N.C. App. 614, 619, 418 S.E.2d 299, 303 (1992) (quoting *Harris v. Maready*, 311 N.C. 536, 551, 319 S.E.2d 912, 922 (1984)). The trial court must, before dismissing an action with prejudice, make findings and conclusions which indicate that it has considered less drastic sanctions. *Id.* at 620, 418 S.E.2d at 303.

In *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 251, 618 S.E.2d 819, 829 (2005), *disc. review denied*, 360 N.C. 290, 628 S.E.2d 382 (2006), the trial court's order dismissing the plaintiff's claims under Rule 41(b) for failure to comply with a discovery order recited that " '[t]he Court has carefully considered each of [the plaintiff's] acts [of misconduct], as well as their cumulative effect, and has also considered the available sanctions for such misconduct. After thorough consideration, the Court has determined that sanctions less severe than dismissal would not be adequate given the seriousness of the misconduct . . . .' " This Court, in affirming the trial court's order, held that this language "sufficiently demonstrate[d] that [the trial court] considered lesser sanctions before ordering a dismissal." *Id.*

Here, in conclusion of law number three, the court stated:

> Sanctions short of this dismissal will not suffice in this case since the plaintiff has provided no information or facts as to why he or his representative did not appear when this case was called for trial to present evidence in the case and further the plaintiff has provided the Court with no information as to when it may be possible for this case to proceed, if it is not dismissed[.]

Under *Pedestrian Walkway Failure*, this conclusion of law was sufficient to show that the trial court fulfilled the requirement that the court consider lesser sanctions before ordering a dismissal with prejudice. *See also Baker v. Charlotte Motor Speedway, Inc.*, 180 N.C. App. 296, 301, 636 S.E.2d 829, 833 (2006) (holding trial court properly indicated it considered lesser sanctions where court stated that after careful consideration, court determined that sanctions less severe than dismissal would not be adequate given seriousness and repetition of misconduct), *disc. review denied*, 361 N.C. 425, 648 S.E.2d 204 (2007).

Since we have concluded that the trial court properly considered the third *Wilder* factor, the trial court's order may be reversed only for an abuse of discretion. *Foy*, 106 N.C. App. at 620, 418 S.E.2d at 303. Given plaintiff's failure to take any action to prosecute this case, his total disregard—despite proper notice—of the calendared trial, the prejudice to defendants of having the allegations pending with no ability to disprove them, and the fact that plaintiff had previously disregarded a mediation order and an official calendar, the trial court's decision to dismiss the action under Rule 41(b) for failure to prosecute was not unreasonable and, therefore, not an abuse of discretion. We, therefore, affirm the Rule 41(b) dismissal of the action.

Affirmed.

Judges JACKSON and BEASLEY concur.

STATE OF NORTH CAROLINA v. JAMEZ DORJAN HUNTER

No. COA10-483

(Filed 21 December 2010)

1. Search and Seizure— validity of warrant—incorrect address

The trial court did not err in a second-degree murder case by denying defendant's motion to suppress evidence obtained during the search of the victim's residence based on an alleged invalid search warrant. Standing alone, an incorrect address on a search warrant did not invalidate the warrant where other designations were sufficient to establish with reasonable certainty the premises, vehicles, or persons to be searched, and a description or designation of the items constituting the object of the search and authorized to be seized.

2. Confessions and Incriminating Statements— motion to suppress statement to law enforcement—voluntariness

The trial court did not err in a second-degree murder case by failing to suppress defendant's statement to law enforcement even though defendant contended he was under the influence of cocaine and unable to sufficiently understand what he was saying or doing. Defendant's statements were his free and voluntary acts, no promises were made to defendant, and he was not coerced in any way. Defendant was knowledgeable of his circumstances and cognizant of the meaning of his words at all times during which he was interrogated.

3. Homicide— first-degree murder—motion to dismiss—sufficiency of evidence—malice—perpetrator

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder. The evidence was sufficient to support the element of malice and for a jury to conclude that defendant was the perpetrator of the crime.

4. Sentencing— aggravating factors—offense especially heinous, atrocious, or cruel

The trial court did not err in a second-degree murder case by instructing the jury on the aggravating factor that the offense committed was especially heinous, atrocious, or cruel. A reasonable juror could determine from the evidence presented that defendant's fatal assault upon his seventy-two-year-old grandmother, whom he stabbed with a knife, struck in the head with a clothes iron, strangled with a power cord from the iron, and impaled with a golf club shaft eight inches into her back and chest, was especially heinous, atrocious, and cruel.

5. Criminal Law— motion for mistrial—prosecutor's improper argument not prejudicial—trial court admonition

The trial court did not err in a second-degree murder case by failing to declare a mistrial or failing to instruct the jury to disregard the prosecutor's comments during his closing argument. The prosecutor's characterization of defendant's comments as falsehoods, while improper, did not reach the level of prejudicial error which so infected the trial with unfairness as to make the resulting conviction a denial of due process. Further, the trial court's admonition to the prosecutor neutralized the improper statements.

Appeal by defendant from judgment entered 14 October 2009 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 26 October 2010.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

William D. Spence for defendant-appellant.

BRYANT, Judge.

Because the unchallenged findings of fact indicate that defendant was not under the influence of any impairing substance and answered questions appropriately at the time of his confession, the fact that defendant ingested "crack" cocaine several hours prior to his confession is not sufficient to invalidate a trial court's finding that defendant's statements were freely and voluntarily made. For the reasons stated herein, we affirm the trial court's denial of defendant's motions to suppress evidence and his statement to law enforcement and his

motion to dismiss the first-degree murder charge. We also affirm the trial court's refusal to declare a mistrial.

On the morning of 7 May 2007, the body of seventy-two year old Rosia Hunter was found in her home at 124 West Union Street, in Marshville, by two of her young grandchildren. Ms. Hunter had been beaten about the face, strangled, and stabbed, but the cause of death was as a result of being impaled upon a golf club shaft that pierced her aorta. Missing were Ms. Hunter's vehicle and her twenty-four year old grandson, defendant Jamez Hunter.

Ten days later, on 17 May, Ms. Hunter's vehicle was discovered in Lancaster, South Carolina and her grandson located nearby. In the trunk of the vehicle, officers found a bloody shirt. In the room where defendant was found, officers discovered shoes and jeans with blood on them. The design of the shoes matched the twenty-two footprints found in the blood stains in Ms. Hunter's house. In custody, defendant spoke with agents from the North Carolina State Bureau of Investigation (SBI), Brandon Blackman and Christie Hearne. After being given his *Miranda* rights, defendant gave a signed ten page statement describing the events of the night his grandmother died. Defendant was indicted for first-degree murder and robbery with a dangerous weapon. In pre-trial motions, defendant requested that any evidence seized pursuant to the search of Ms. Hunter's home and his statement to law enforcement be suppressed. The trial court denied both motions.

Defendant was tried before a jury in Union County Superior Court and found guilty of second-degree murder. The jury also found as aggravating factors that the offense was especially heinous, atrocious, or cruel; the victim was very old; and defendant took advantage of a position of trust or confidence. Defendant was sentenced as a Level III offender in the aggravated range to a term of 276 to 341 months in the custody of the Department of Correction. Defendant appeals.

On appeal, defendant raises eleven issues, which comprise five arguments: Did the trial court err in denying defendant's (I) motion to suppress evidence obtained during a search of the victim's property and (II) his statement to law enforcement officers and in (III) denying defendant's motion to dismiss the murder charge. Did the trial court err in (IV) instructing the jury on the aggravating factor of heinous, atrocious or cruel and (V) failing to declare a mistrial after the prosecutor's closing remarks.

I

[1] Defendant argues that the trial court erred in denying his motion to suppress evidence obtained during the search of Ms. Hunter's residence. Defendant contends that the search warrant executed at the victim's residence was invalid because the application for the search warrant and the search warrant itself referenced an incorrect street address. We disagree.

Defendant acknowledges the precedent of this Court which dictates that, standing alone, an incorrect address on a search warrant will not invalidate the warrant where other " 'designation[s] [are] sufficient to establish with reasonable certainty the premises, vehicles, or persons to be searched,' and a 'description or a designation of the items constituting the object of the search and authorized to be seized.' " *State v. Moore*, 152 N.C. App. 156, 159, 566 S.E.2d 713, 715 (2002) (quoting N.C. Gen. Stat. §§ 15A-246(4) and 15A-246(5) (2001)); *see also State v. Walsh*, 19 N.C. App. 420, 423, 199 S.E.2d 38, 40-41 (1973) (reasoning that the defendants were "requiring exactness in the description of the premises, whereas the statute only requires a description with reasonable certainty.").[1] Notwithstanding his acknowledgment, defendant nevertheless asks that we reexamine our holdings in those cases and find reversible error in the denial of his motion to suppress.

"In reviewing the denial of a motion to suppress, we examine the evidence introduced at trial in the light most favorable to the State to determine whether the facts are supported by competent evidence and whether those factual findings in turn support legally correct conclusions of law." *Moore*, 152 N.C. App. at 159, 566 S.E.2d at 715 (citations omitted).

Here, the trial court made the following findings of fact:

1. On May 7, 2007, North Carolina State Bureau of Investigation Special Agent T.A. Underwood applied for a search warrant to search, *inter alia*, the premises identified in the agent's affidavit for the warrant generally as 120 West Union Street, Marshville, North Carolina, the premises being more particularly described as the crime scene, the manner of arrival at same being to "travel east on US 74 from Wingate to Marshville. Turn left on Main Street. Turn left on North Elm

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1. In his brief, defendant cites the relevant holdings of *Moore*, 152 N.C. App. 156, 566 S.E.2d 713, and *Walsh*, 19 N.C. App. 420, 199 S.E.2d 38.

> Street and cross the railroad tracks. Turn left just past Hall's Auction house on West Union Street. Travel past two brick houses on the right." 120 West Union Street was then described in the affidavit and being "located in the curve of West Union Street and is described as a single story white vinyl siding residence with blue shutters. Attached to the front door is a set of wooden steps leading to the front door . . ."
>
> . . .
>
> 3. With the exception of the numerical address on West Union Street, the crime scene house was otherwise as described in the application for search warrant as set forth above. To the extent that the description in the application for the warrant made reference to *a single story white vinyl residence with blue shutters, to which was attached a set of wooden steps leading to the front door*, the description in the application for the warrant is also consistent with State's . . . photograph identified as a photograph of the crime scene residence.

Based on these findings, the trial court concluded, the following:

> Notwithstanding the numerical inaccuracy with respect to the street address set forth in the application for the warrant, the description of the premises in the search warrant was sufficient to support the requisite probable cause to search the premises that were in fact searched and to support the lawful seizure of the items listed on the return.

In the light most favorable to the State, it is clear that the trial court's findings of fact "are supported by competent evidence and those factual findings in turn support legally correct conclusions of law." *Id.* Therefore, we uphold the trial court's denial of defendant's motion to suppress. Defendant's argument is overruled.

II

[2] Next, defendant argues that the trial court erred in failing to suppress his statement to law enforcement. Defendant argues that the evidence presented and the trial court's findings of fact do not support the conclusions that defendant *knowingly*, intelligently, and understandingly waived his *Miranda* rights before speaking to law enforcement officers and then knowingly, freely, and voluntarily made a statement before Agent Blackman. Defendant contends that he was under the influence of cocaine and unable to sufficiently understand what he was saying or doing. We disagree.

> A trial court's findings of fact regarding the voluntary nature of an inculpatory statement are conclusive on appeal when supported by competent evidence. However, a trial court's determination of the voluntariness of a defendant's statements is a question of law and is fully reviewable on appeal. Conclusions of law regarding the admissibility of such statements are reviewed de novo.

State v. Wilkerson, 363 N.C. 382, 430, 683 S.E.2d 174, 203 (2009) (internal citations and quotations omitted).

"The standard for judging the admissibility of a defendant's confession is whether it was given voluntarily and understandingly. Voluntariness is to be determined from consideration of all circumstances surrounding the confession." *State v. Chapman*, 343 N.C. 495, 500, 471 S.E.2d 354, 356 (1996) (citing *State v. Schneider*, 306 N.C. 351, 355, 293 S.E.2d 157, 160 (1982)).

> North Carolina follows the federal test to determine voluntariness. [*State v. Jackson*, 308 N.C. 549, 581, 304 S.E.2d 134, 152 (1983), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027, 109 S. Ct. 3165 (1989)]. The confession should be the "product of an essentially free and unconstrained choice by its maker." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26, 36 L. Ed. 2d 854, 862, 93 S. Ct. 2041 (1973) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602, 6 L. Ed. 2d 1037, 1057-58, 81 S. Ct. 1860 (1961)). If "one's will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Id.* at 225-26, 93 S. Ct. at 2047, 36 L. Ed. 2d at 862.

State v. McKinney, 153 N.C. App. 369, 373, 570 S.E.2d 238, 242 (2002). Our Supreme Court "has held that a defendant's intoxication at the time of confession does not preclude the conclusion that a defendant's statements were freely and voluntarily made." *State v. Perdue*, 320 N.C. 51, 59-60, 357 S.E.2d 345, 350-51 (1987) (citing *State v. Parton*, 303 N.C. 55, 277 S.E.2d 410 (1981), *overruled on other grounds*, *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985)). "An inculpatory statement is admissible unless the defendant is so intoxicated that he is unconscious of the meaning of his words." *Wilkerson*, 363 N.C. at 431, 631 S.E.2d at 204 (quoting *State v. Oxendine*, 303 N.C. 235, 243, 278 S.E.2d 200, 205 (1981), *superceded by statute*, N.C.G.S. § 8C-1, Rule 607 (1983), *on other grounds as recognized in State v. Covington*, 315 N.C. 352, 357, 338 S.E.2d 310, 314 (1986)).

In *Parton*, the defendant argued that, due to "his intoxication and illness at the time of his arrest, he was unable to comprehend the reading of his constitutional rights and incapable of intelligently waiving these rights, rendering his subsequent statement inadmissible under the holding in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966)." *Id.* at 69, 277 S.E.2d at 420. Before the trial court, the arresting officer testified that, at the time the defendant was arrested, he believed the defendant to have been intoxicated; however, the defendant "was not staggering and appeared coherent." *Id.* at 70, 277 S.E.2d at 420. "After being advised of his constitutional rights and stating that he understood them, [the] defendant . . . [stated] that he wished to confess to a murder. This statement was not made in response to police interrogation; it appeared totally unsolicited and voluntary." *Id.* Our Supreme Court affirmed the trial court's determination that, notwithstanding the defendant's intoxication, the defendant's statement was "a free, voluntary waiver of defendant's rights consistent with the requirements of *Miranda v. Arizona*, *supra*, as reiterated by [the] Court in *State v. Connley*, 297 N.C. 584, 256 S.E.2d 234, *cert. denied*, 444 U.S. 954, 100 S.Ct. 433, 62 L. Ed. 327 (1979)." *Id.* at 70, 277 S.E.2d at 420-21.

Here, after an evidentiary hearing conducted on defendant's motion to suppress his statement, the trial court made the following unchallenged pertinent findings of fact: On 17 May 2007, at 11:40 p.m., SBI agents Blackmon and Hearne woke defendant and escorted him from his cell to a room with approximate dimensions of 10 feet by 12 feet; the agents did not have weapons; and defendant was not restrained. "The defendant was responsive to the agents' instructions and was fully advised of his Miranda rights, the defendant nodding affirmatively after each Miranda right was read to him." At 11:46 p.m., defendant signed a *Miranda* rights form indicating he understood his rights and waived them. When questioned as to whether he was under the influence of any alcohol or drugs, defendant "indicated that he was not under the influence of any alcohol or drugs, but that he been 'on the stem,' i.e. used crack cocaine, at around 1:00 or 2:00 p.m. that same day (May 17, 2007)." When questioned about the events of 6 May 2007, "defendant indicated that he was doing drugs," "that he 'blacked out,' and awakened to find his grandmother, Rose [sic] Hunter, dead with a golf club handle sticking from her neck and blood on him . . . ." Agent Blackmon indicated that defendant answered questions appropriately and that, after Agent Blackmon compiled a written summary of their conversation, defendant was given the statement to read and

make changes as appropriate. Both "defendant and Blackmon signed each page of the 10-page document at approximately 2:41 a.m. on May 18, 2007." "[A]t the conclusion of the interrogation there were expressions of thanks by both Blackmon (for defendant's cooperation) and the defendant, the defendant indicating that he was glad to 'get all of this off [his] chest.' " Based on these findings, the trial court concluded, and we agree, "defendant's statements were his free and voluntary acts; no promises were made to the defendant, and he was not coerced in any way. Defendant was at all times during which he was interrogated knowledgeable of his circumstances and cognizant of the meaning of his words." The trial court's findings of fact are fully supported and its conclusions legally correct. Therefore, we uphold the trial court's denial of defendant's motion to suppress his statement to law enforcement.

III

[3] Next, defendant argues the trial court erred in denying his motion to dismiss the first-degree murder charge. Defendant argues the State failed to establish malice and failed to show that defendant was the perpetrator of the crime. We disagree.

"In reviewing [a] trial court's ruling on a defendant's motion to dismiss a charge of first-degree murder, this Court evaluates the evidence presented at trial in the light most favorable to the State." *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005) (citing *State v. Walters*, 275 N.C. 615, 623, 170 S.E.2d 484, 490 (1969)). "A trial court must deny a motion to dismiss where there exists 'substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it.' " *State v. Santiago*, 148 N.C. App. 62, 69, 557 S.E.2d 601, 606 (2001) (citing *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988)).

> " 'Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.' " *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 919 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). When the evidence presented amounts to circumstantial evidence, "the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *Id.* "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 singularly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty." ' " *Id.* (emphasis in original).

State v. Bowman, 183 N.C. App. 631, 635, 644 S.E.2d 596, 599 (2007) (emphasis omitted).

"Malice is a condition of mind that prompts one to take the life of another intentionally, without just cause, excuse, or justification." *State v. Perdue*, 320 N.C. 51, 58, 357 S.E.2d 345, 349-50 (1987) (quoting *State v. Robbins*, 309 N.C. 771, 309 S.E.2d 188 (1983)). The intentional use of a deadly weapon which proximately results in death gives rise to the presumption the killing was done with malice. *State v. Shuford*, 337 N.C. 641, 650, 447 S.E.2d 742, 748 (1994) (citing *State v. Weeks*, 322 N.C. 152, 173, 367 S.E.2d 895, 907-08 (1988)). Applying these principles to the facts, we hold that the State presented sufficient evidence of malice. Dr. James Sullivan, who performed an autopsy on the body of the victim, testified for the State as an expert witness in the area of forensic pathology. The victim's body sustained injury from being stabbed in the torso with a golf club shaft, which entered the victim's body from the back near the base of her neck downward and forward toward the center of her chest to a depth of eight inches, where it perforated her aorta just above her heart, and from being stabbed with a knife to a depth of three inches. The victim's face sustained blunt force trauma consistent with being struck with a clothes iron. There was also evidence the victim was strangled. Dr. Sullivan testified that the perforation of Ms. Hunter's aorta by the golf club shaft was fatal. We hold the evidence presented is sufficient to support the element of malice necessary for second-degree murder. *See id.*

Defendant also contends the State failed to show that he was the perpetrator of the crime. We disagree.

Defendant testified that, on the evening of 6 May 2007, his grandmother talked to him about getting a job, keeping a job, and "hanging around the people I was hanging around . . . [and] that she was just disappointed in me or whatever. So I got up and I went in the bathroom and I took the Ecstacy pill and smoked a few pieces of crack." Later, defendant "went back in the bathroom to smoke some more crack." Defendant testified that he "got kind of light headed," "disoriented," and "that's the last thing I remember before I came to."

> When I came to, I was sitting on the kitchen floor up against the refrigerator. I had blood all over me, blood all over the floor and my grandmother was laying there on the floor. . . . Well, I shook her to see if I could get a response and about that time I noticed the golf club in her back. And I—I—I knew she was dead. . . . I took her car keys and the money and left.

Defendant sustained cuts on his hands that were still visible when SBI agents interviewed him more than ten days after Ms. Hunter was killed. SBI Special Agent Karen Winningham, a forensic biologist, testified that neither the DNA of defendant nor Rosia Hunter could be excluded from the DNA sample taken from the power cord attached to the iron. Further, DNA taken from blood stains on defendant's jeans matched Rosia Hunter's DNA. The SBI analyzed twenty-two shoe prints found in blood spatter in Ms. Hunter's residence. Of the twenty-two impressions analyzed, eight impressions were consistent with the pattern on the bottom of defendant's right shoe and fourteen were consistent with the pattern on the bottom of defendant's left shoe. Defendant's jeans and shoes were discovered in the place he stayed while in Lancaster. There was no evidence presented that anyone other than defendant was in Ms. Hunter's residence at the time she was killed. Therefore, we hold this evidence sufficient for a jury to conclude that defendant was the perpetrator of the crime. Defendant's arguments are overruled.

IV

[4] Defendant next contends that the trial court erred in instructing the jury on the aggravating factor that the offense committed was especially heinous, atrocious, or cruel because the evidence at trial was insufficient to support such an instruction. We disagree.

"The State bears the burden of proving, by a preponderance of the evidence, that an aggravating factor exists." *State v. Harrison*, 164 N.C. App. 693, 696, 596 S.E.2d 834, 837 (2004) (citing *State v. Radford*, 156 N.C. App. 161, 164, 576 S.E.2d 134, 136 (2003)).

> "In determining whether the evidence is sufficient to support the trial court's submission of the especially heinous, atrocious, or cruel aggravator, we must consider the evidence 'in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom.' " *State v. Flippen*, 349 N.C. 264, 270, 506 S.E.2d 702, 706 (1998) (quoting [*State v. Lloyd*, 321 N.C. 301, 319, 364 S.E.2d 316, 328, *sentence vacated on other*

> *grounds*, 488 U.S. 807 102 L. Ed. 2d 18 (1988)]), *cert. denied*, [526 U.S. 1135, 143 L. Ed. 2d 1015] (1999). "Contradictions and discrepancies are for the jury to resolve; and all evidence admitted that is favorable to the State is to be considered." [*State v. Robinson*, 342 N.C. 74, 86, 463 S.E.2d 218, 225 (1995), cert. denied, 517 U.S. 1197, 134 L. Ed. 2d 793, 116 S. Ct. 1693 (1996)].

State v. Brewington, 352 N.C. 489, 525, 532 S.E.2d 496, 517 (2000) (quoting *State v. McNeil*, 350 N.C. 657, 693, 518 S.E.2d 486, 508 (1999)).

From the evidence presented a reasonable juror could determine that defendant's fatal assault upon his seventy-two year old grandmother whom he stabbed with a knife, struck in the head with a clothes iron, strangled with a power cord from the iron and impaled with a golf club shaft eight inches into her back and chest was especially heinous, atrocious and cruel.

Following the jury's determination of guilt, the trial court instructed as follows:

> If you find from the evidence beyond a reasonable doubt that the offense was especially heinous, atrocious or cruel, the victim was very old, the defendant took advantage of a position of trust or confidence, which includes a domestic relationship, to commit the offense then you will write yes in the space after the aggravating factor on the verdict sheet.

Viewed in the light most favorable to the State and granting every reasonable inference to be drawn therefrom, we hold there was sufficient evidence presented to support the trial court's submission of the heinous, atrocious, or cruel aggravating factor.

V

[5] Last, defendant argues that the trial court erred in failing to declare a mistrial or failing to instruct the jury to disregard the prosecutor's comments during the prosecutor's closing argument. We disagree.

Our Supreme Court "has firmly established that 'trial counsel are granted wide latitude in the scope of jury argument, and control of closing arguments is in the discretion of the trial court.' " *State v. Thomas*, 350 N.C. 315, 360, 514 S.E.2d 486, 513 (1999) (quoting *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992)).

> "[F]or an inappropriate prosecutorial comment to justify a new trial, it 'must be sufficiently grave that it is prejudicial [error].' "

> *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487-88 (1992) (quoting *State v. Britt*, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977) (alteration in original)). "In order to reach the level of 'prejudicial error' in this regard, it now is well established that the prosecutor's comments must have 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *State v. Green*, 336 N.C. 142, 186, 443 S.E.2d 14, 40 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181, (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974))), *cert. denied*, 513 U.S. 1046 (1994). However, [our Supreme] Court has held that when the trial court instructs the jury to disregard improper arguments and instructs counsel to confine his arguments to those matters contained in evidence, such an instruction renders the error caused by the improper arguments cured. *See State v. Sanders*, 303 N.C. 608, 618, 281 S.E.2d 7, 13, *cert. denied*, 454 U.S. 973 (1981).

State v. Peterson, 361 N.C. 587, 607, 652 S.E.2d 216, 229-30 (2007). Moreover,"a trial court does not commit reversible error when it fails to give a curative jury instruction absent a request by defendant." *State v. Williams*, 350 N.C. 1, 24, 510 S.E.2d 626, 641 (1999) (citing *State v. Norwood*, 344 N.C. 511, 537, 476 S.E.2d 349, 361 (1996); *State v. Rowsey*, 343 N.C. 603, 628, 472 S.E.2d 903, 916 (1996)).

Here, defendant challenges several of the prosecutor's statements made during closing arguments. In describing the moment when defendant was first arrested, the prosecutor stated that when police officers from the Lancaster, South Carolina found Rosia Hunter's vehicle, "they started looking for the defendant, they started asking around. And they found him. Only when they found him the defendant said his name was Jason, the first of many lies offered by the defendant." Defendant objected, and the trial court cautioned the prosecutor to "stay within the bounds of the evidence presented." The prosecutor went on to state to the jury

> there was a reason that I was feverishly taking notes while the defendant was up on the stand, or any other witness, and that was because I wanted to capture for you as accurately as possible what was said and to remind you of what was said. The defendant lied.

Again, defendant objected. The trial court sustained the objection and admonished the prosecutor: "[d]on't characterize the evidence in that manner." Later, the following exchange occurred:

Prosecutor: Motive is not an element of the crime, it is not something that we are required to prove to you, yet I want to talk about it for a second because human nature wants to know why. . . . [H]e said that he took the money, at least a hundred dollars, which he promptly went out and spent. On what? Crack. Drugs, more money for the drugs, anger, frustration that she has threatened to kick him out.

Now, remember that I talked about the lies that have been told.

Defendant: Objection to the lies, Your Honor.

The Court: All right. I am going to sustain it as to that characterization.

. . .

I caution counsel again, don't use that term.

The prosecutor's characterization of defendant's comments as falsehoods, while clearly improper, do not appear to have reached the level of prejudicial error which "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Peterson*, 361 N.C. at 607, 652 S.E.2d at 230. Further, the trial court's admonition to the prosecutor in effect neutralized the improper statements. Accordingly, defendant's argument is overruled.

Affirmed as to the motions to suppress.

No error as to the trial.

Judges STEELMAN and ERVIN concur.

JAMES BLACKBURN, PLAINTIFF v. DOMINICK J. CARBONE, M.D., WAKE FOREST UNIVERSITY BAPTIST MEDICAL CENTER, THE NORTH CAROLINA BAPTISTS HOSPITALS, INC., NORTH CAROLINA BAPTIST HOSPITAL AND WAKE FOREST UNIVERSITY HEALTH SCIENCES, DEFENDANTS

No. COA10-602

(Filed 21 December 2010)

1. Appeal and Error— preservation of issues—motion to dismiss converted to motion for summary judgment—failure to request continuance or additional time to produce evidence—waiver

The trial court did not err in a gross negligence, spoliation of evidence, and common law obstruction case by converting defendants' motion to dismiss plaintiff's complaint under N.C.G.S. § 1A-1, Rule 12(b)(6) to a motion for summary judgment under N.C.G.S. § 1A-1, Rule 56. Having failed to request a continuance or additional time to produce evidence and having participated in the hearing on the motion for summary judgment without objection or request for continuance, plaintiff waived the right to argue this issue on appeal.

2. Obstruction of Justice— failed to show intentional acts for purpose of disrupting or obstructing—summary judgment properly granted

A *de novo* review revealed that the trial court did not err by granting summary judgment in favor of defendants with respect to a common law obstruction of justice claim. In the absence of a properly served subpoena or other process or a judicial decree requiring his presence, defendant doctor had no duty to appear and testify at the trial of plaintiff's automobile accident case. Further, plaintiff failed to allege or forecast any specific facts tending to show defendant intentionally created an erroneous medical report and then failed to correct it for the purpose of disrupting or obstructing plaintiff's automobile accident case.

Appeal by plaintiff from order entered 19 January 2010 by Judge Anderson D. Cromer in Wilkes County Superior Court. Heard in the Court of Appeals 1 December 2010.

Franklin Smith for plaintiff-appellant.

Nexsen Pruet, PLLC, by Gary L. Beaver and Stephen W. Coles, for defendant-appellees.

ERVIN, Judge.

Plaintiff James Blackburn appeals from the trial court's order granting summary judgment in favor of Defendants. On appeal, Plaintiff contends that the trial court erred by converting Defendants' dismissal motion to one for summary judgment and by failing to conclude that Plaintiff had stated a claim for common law obstruction of justice in his complaint. After careful consideration of Plaintiff's arguments in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Factual Background

On 24 April 2009, Plaintiff filed a complaint against Defendants Dr. Dominick J. Carbone, Wake Forest University Baptist Medical Center, The North Carolina Baptist Hospitals, Inc., North Carolina Baptist Hospital, and Wake Forest University Health Services in which he alleged that Dr. Carbone prepared an inaccurate medical report for use in connection with a separate negligence action arising from injuries that Plaintiff sustained in an automobile accident. In that report, Dr. Carbone stated that Plaintiff's injuries were sustained in the "workplace" instead of in an automobile collision. Despite a request for a correction from Plaintiff's counsel, Dr. Carbone did not revise that portion of his report alluding to the circumstances under which Plaintiff's injuries were sustained before Plaintiff settled his automobile accident claim. Although Plaintiff's counsel told Dr. Carbone that "he was to appear" for the purpose of testifying at the trial of Plaintiff's automobile accident case and had obtained the issuance of a subpoena directed to Dr. Carbone compelling him to appear and testify on that occasion, "Plaintiff's counsel discovered . . . [that] the Sheriff's Department had been unable to locate Dr. Carbone for service," forcing Plaintiff's counsel to "retain[] the services of . . . a licensed private investigator[] to complete service of the Subpoena upon Dr. Carbone." Dr. Carbone's "repeated failure and refusal to communicate with Plaintiff's counsel" allegedly resulted in Plaintiff settling his lawsuit for $17,000 when the actual damages were estimated to be "at least $100,000." As a result of the fact that Dr. Carbone's actions allegedly constituted gross negligence, the fact that Dr. Carbone allegedly acted with malice, and the fact that Dr. Carbone's actions should be imputed to the remaining Defendants, Plaintiff alleged that he was entitled to recover compensatory and punitive damages from Dr. Carbone for common law obstruction of justice, gross negligence, and spoliation of evidence.

On 26 June 2009, Defendants filed an answer denying the material allegations of Plaintiff's complaint and moving to dismiss it pursuant to N.C. Gen. Stat. § 1A-1, Rules 9(j) and 12(b)(6). On 6 October 2009, Defendants filed a separate dismissal motion pursuant to N.C. Gen. Stat. § 1A-1, Rules 9(j) and 12(b)(6). At a hearing held on 30 November 2009, the trial court heard argument concerning Defendants' dismissal motions. In view of the fact that it considered various materials tendered by Plaintiff in deciding the issues raised by Defendants' dismissal motion, the trial court treated Defendants' motion as a request for the entry of summary judgment. After considering the arguments of counsel, the authorities submitted by the parties, and the materials submitted by Plaintiff, the trial court found that there were no genuine issues of material fact and that Defendants were entitled to judgment in their favor as a matter of law. Plaintiff noted an appeal to this Court from the trial court's order.[1]

II. Analysis

A. Conversion of Motion to Dismiss

[1] In his first challenge to the trial court's order, Plaintiff argues that the trial court erred by converting Defendants' motion to dismiss Plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) to a motion for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56. We disagree.

At he hearing held in connection with Defendants' dismissal motion, Plaintiff tendered a number of documents for the trial court's consideration, including a series of letters that Plaintiff's counsel sent

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1. In their brief, Defendants argue that we should "address" a number of instances in which Plaintiff allegedly violated various provisions of the North Carolina Rules of Appellate Procedure, including discussing an additional issue in the conclusion section of his brief without having mentioned that issue in the list of issues for review set out at the beginning of his brief in violation of N.C.R. App. P. 28(b)(2), failing to set out his entire argument in the appropriate section of his brief and omitting a statement of the applicable standard of review with respect to each issue as required by N.C.R. App. P. 28(b)(6), and failing to include a statement of the specific relief sought on appeal contrary to N.C.R. App. P. 28(b)(7). Although we agree that Plaintiff's brief does not strictly comply with the relevant provisions of N.C.R. App. P. 28, we do not believe that these deficiencies are jurisdictional in nature or constitute any sort of default. Instead, we believe that they constitute a violation of nonjurisdictional requirements that "normally should not lead to dismissal of the appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 194, 198, 657 S.E.2d 361, 363, 365 (2008). Since Plaintiff's noncompliance with various aspects of N.C.R. App. P. 28 has not impaired our ability to review Plaintiff's challenges to the trial court's order or otherwise frustrated the adversarial process, *Id.*, at 200, 657 S.E.2d at 366-67, we decline Defendants' invitation to refrain from considering certain of Plaintiff's arguments on appeal.

to Dr. Carbone's office, a copy of several subpoenas directed to Dr. Carbone, a copy of the report that Dr. Carbone transmitted to Plaintiff's counsel, a copy of the police report relating to the motor vehicle collision in which Plaintiff was injured, and copies of various facsimile transmission statements and a postal service receipt.[2] As we understand the record, no party objected to Plaintiff's request that the trial court consider these documents in ruling on Defendants' dismissal motion. In its order, the trial court noted that it considered the exhibits tendered by Plaintiff in making its decision and was, for that reason, required to treat Defendants' dismissal motion as a motion for summary judgment in accordance with N.C. Gen. Stat. § 1A-1, Rule 12(b). On appeal, Plaintiff contends that the trial court's decision to convert Defendants' dismissal motion into one for summary judgment deprived him of his right to proper notice and precluded him from deposing various potential witnesses, including Dr. Carbone.[3]

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2. A trial court's decision to consider documents referenced in a plaintiff's complaint in deciding a dismissal motion made pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) does not result in the conversion of that motion into a motion for summary judgment made pursuant to N.C. Gen. Stat. § 1A-1, Rule 56. *Turner v. Hammocks Beach Corp.*, 192 N.C. App. 50, 57 n.1, 664 S.E.2d 634, 639 n.1 (2008), *aff'd in part and rev'd in part on other grounds*, 363 N.C. 555, 681 S.E.2d 770 (2009) (stating that "the trial court's review of [certain documents] did not convert the motion to dismiss into a summary judgment motion" because "Plaintiffs referred to these documents in their complaint and because Plaintiffs' claims relied upon these documents"); *Brackett v. SGL Carbon Corp.*, 158 N.C. App. 252, 255, 580 S.E.2d 757, 759 (2003) (holding that the trial court was entitled to consider an administrative complaint and right-to-sue letter referenced in the plaintiff's complaint without converting the defendant's motion into one for summary judgment). Each of the letters that were tendered to the trial court were referenced in Plaintiff's complaint. Plaintiff's complaint mentions Dr. Carbone's report as well. Although several of the letters mention that copies of subpoenas directed to Dr. Carbone were enclosed, there is no reference to the copy of Dr. Carbone's initial report or the accident report relating to Plaintiff's motor vehicle collision in any of these letters. As a result, we are unable to conclusively determine whether all of the documents that were tendered to the trial court were originally components of the letters referenced in Plaintiff's complaint or were otherwise mentioned in that filing. In the event that all of the documents that were tendered to the trial court were mentioned in or associated with the letters discussed in Plaintiff's complaint, there would have been no need for the trial court to convert Defendants' dismissal motion into one for summary judgment, depriving Plaintiff's challenge to the trial court's conversion decision of merit for that reason as well.

3. As we understand Plaintiff's argument, he is not contending that the trial court erred by considering the documents that he tendered during the hearing; instead, he essentially argues that the trial court erred by failing to give him time to develop and present even more evidentiary materials. Having invited any error that the trial court may have committed by considering these materials, *State v. Chatman*, 308 N.C. 169, 177, 301 S.E.2d 71, 76 (1983) (stating that " 'invited error [is not] grounds for a new

> If, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C.R. Civ. P. 12(b); *see also Charlotte Motor Speedway, Inc. v. Tindall Corp.*, 195 N.C. 296, 300, 672 S.E.2d 691, 693 (2009) (stating that " '[a] motion to dismiss for failure to state a claim is "converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court" ' ") (quoting *King v. Cape Fear Mem Hosp., Inc.*, 96 N.C. App. 338, 342, 385 S.E.2d 812, 815 (1989), *disc. review denied*, 326 N.C. 265, 389 S.E.2d 114 (1990). "Reviewing courts have looked to cues in the trial court's order to determine whether it considered matters outside the pleadings." *Id.* at 300, 672 S.E.2d at 693 (citing *Lowder v. Lowder*, 68 N.C. App. 505, 506, 315 S.E.2d 520, 521 (1984)). Although a party confronted with the conversion of a dismissal motion into a summary judgment motion is entitled to "be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56," "[i]t is significant that the rule provides [for] a 'reasonable opportunity' rather than requiring that the presentation of materials be in accordance with Rule 56." *Raintree Homeowners Assoc.*, 62 N.C. App. at 673, 303 S.E.2d at 582; *see also Kemp v. Spivey*, 166 N.C. App. 456, 462, 602 S.E.2d 686, 690 (2004) (holding that the trial court erred by converting a dismissal motion to a summary judgment motion without affording the parties " 'a reasonable opportunity to present all material made pertinent to such a motion by Rule 56' ") (citing N.C. Gen. Stat. § 1A-1, Rule 12(b)). However, in the event that a party faced with a trial court's decision to consider materials outside the

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trial' ") (quoting *State v. Waddell*, 289 N.C. 19, 25, 220 S.E.2d 293, 298 (1975), *vacated in part by* 428 U.S. 904, 49 L. Ed. 2d 1210, 96 S. Ct. 3211 (1976), and citing *State v. Gaskill*, 256 N.C. 652, 657, 124 S.E.2d 873, 877 (1962); *State v. Williams*, 255 N.C. 82, 88, 120 S.E.2d 442, 447 (1961); *State v. Case*, 253 N.C. 130, 139, 116 S.E.2d 429, 435 (1960), *cert. denied*, 365 U.S. 830, 5 L. Ed. 2d 707, 81 S. Ct. 717 (1961); *State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971); *Overton v. Overton*, 260 N.C. 139, 145, 132 S.E.2d 349, 353 (1963), Plaintiff cannot successfully contend that the trial court abused its discretion by considering materials that he submitted for its review. *Belcher v. Fleetwood Enters., Inc.*, 162 N.C. App. 80, 84, 590 S.E.2d 15, 18 (2004) (stating that "[t]he standard of review of a trial court's decision to convert a Rule 12(b)(6) motion to a Rule 56 motion is abuse of discretion") (citing *Raintree Homeowners Assoc. v. Raintree Corp.*, 62 N.C. App. 668, 673-74, 303 S.E.2d 579, 582, *disc. review denied*, 309 N.C. 462, 307 S.E.2d 366 (1983).

pleadings in connection with a dismissal motion lodged pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) does "not request a continuance or additional time to produce evidence under Rule 56(f)" and "fully participates in the hearing," that party "cannot now complain that they were denied a reasonable opportunity to present materials to the court." *Belcher*, 162 N.C. App. at 84, 590 S.E.2d at 18 (2004) (citing *Knotts v. City of Sanford*, 142 N.C. App. 91, 97-98, 541 S.E.2d 517, 521 (2001); *see also Tindall*, 195 N.C. App. at 300, 672 S.E.2d at 693-94) (stating that, "where non- movants fully participated in the hearing on a motion to dismiss, observed that matters beyond the pleadings were being considered, and failed to request additional time to produce evidence, reviewing courts have not been persuaded that dismissal was inappropriate") (citing *Belcher*, 162 N.C. App. at 84, 590 S.E.2d at 18), *Homeowners Assoc.*, 62 N.C. App. at 673, 303 S.E.2d at 582 (stating that, in the event that material outside the pleadings is tendered to the trial court at a hearing held in connection with a dismissal motion filed pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), "the proper action for counsel to take is to request a continuance or additional time to produce evidence" and that, "[b]y participating in the hearing and failing to request a continuance or additional time to produce evidence, a party waives his right to [the] procedural notice" otherwise afforded by N.C. Gen. Stat. § 1A-1, Rule 12(b)) (citing *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 667-68, 248 S.E.2d 904, 907 (1978) and *Story v. Story*, 27 N.C. App. 349, 219 S.E.2d 245 (1975).

The record clearly reflects that, after tendering the additional materials described above, Plaintiff did not request additional time in order to engage in discovery or present other materials for the trial court's consideration, move to continue the hearing, or lodge an objection to any decision by the trial court to consider material outside the pleadings. Having failed to "request a continuance or additional time to produce evidence" and having "participated in the hearing on the motion for summary judgment without objection or request for continuance," *Raintree Homeowners Assoc.*, 62 N.C. App. at 674, 303 S.E.2d at 582, Plaintiff waived the right to argue on appeal that the trial court erred by treating Defendants' dismissal motion as one for summary judgment and deciding it on the merits in light of the materials presented at the hearing. As a result, we conclude that Plaintiff is not entitled to relief on appeal based on the trial court's decision to treat Defendants' dismissal motion as one for summary judgment and to decide that motion without providing for additional notice, discovery, or development of the record.

B. Summary Judgment

[2] Secondly, Plaintiff contends that the trial court erred by granting summary judgment in favor of Defendants with respect to his claim for common law obstruction of justice on the grounds that he adequately stated a claim for relief in his complaint.[4] Once again, we disagree.

Orders granting summary judgment are subject to *de novo* review. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). "[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) (citing *Wilmington Star News v. New Hanover Regional Medical Center*, 125 N.C. App. 174, 178, 480 S.E.2d 53, 55, *appeal dismissed*, 346 N.C. 557, 488 S.E.2d 826 (1997)). "[T]he evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Id.* Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). "A genuine issue of material fact has been defined as one in which 'the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail.' " *Smith v. Smith*, 65 N.C. App. 139, 142, 308 S.E.2d 504, 506 (1983) (quoting *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1975) (quoting *McNair v. Boyette*, 282 N.C. 230, 235, 192 S.E.2d 457, 460 (1972))). "A defendant may show entitlement to summary judgment by: '(1) proving that an essential element of the plaintiff's claim is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim." *Carbone v. JBSS*,

4. In their brief, Defendants note that Plaintiff's complaint appears to assert claims for gross negligence and common law spoliation of evidence in addition to a claim for common law obstruction of justice. However, since Plaintiff has not argued on appeal that the trial court erred by granting summary judgment in favor of Defendants with respect to these claims, we need not address the extent, if any, to which the trial court erred by entering judgment in favor of Defendants with respect to these claims. N.C.R. App. P. 28(a) (stating that "[i]ssues not presented and discussed in a party's brief are deemed abandoned").

LLC, ––– N.C. App. –––, –––, 684 S.E.2d 41, 46 (2009) (quoting *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995)). "As a result, summary judgment may be entered against a party if the nonmovant fails to allege or forecast evidence supporting all elements of his claim." *One Beacon v. United Mechanical Corp.*, ––– N.C. App. –––, –––, 700 S.E.2d 121, 123 (2010) (citing *Edwards v. GE Lighting Sys., Inc.*, 193 N.C. App. 578, 582, 668 S.E.2d 114, 116 (2008) and *Fabrikant v. Currituck Cty.*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25-26 (2005) (other citation omitted).[5]

"Obstruction of justice is a common law offense in North Carolina." *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983). "It is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice." *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 33, 588 S.E.2d 20, 30 (2003) (citing *Burgess v. Busby*, 142 N.C. App. 393, 408-09, 544 S.E.2d 4, 12, *disc. review improvidently allowed*, 354 N.C. 351, 553 S.E.2d 679 (2001)). As a result, "acts which obstruct, impede or hinder public or legal justice . . . amount to the common law offense of obstructing justice," so that a complaint alleging that the defendants engaged in such activities states a claim for relief. *Henry v. Deen*, 310 N.C. 75, 87, 310 S.E.2d 326, 334 (1984); *see also Grant v. High Point Reg'l Health Sys.*, 184 N.C. App. 250, 255-56, 645 S.E.2d 851, 855 (2007), *disc. review improvidently allowed*, 362 N.C. 502, 666 S.E.2d 757 (2008) (stating that the "[p]laintiff's complaint stated a cause of action for common law obstruction of justice" in that it alleged " 'acts which obstruct, impede or hinder public or legal justice and would amount to the common law offense of obstructing justice' ") (quoting *Henry*, 310 N.C. at 87, 310 S.E.2d at 334).

" 'The common law offense of obstructing public justice may take a variety of forms.' " *Kivett*, 309 N.C. at 670, 309 S.E.2d at 462 (quoting 67 C.J.S. *Obstructing Justice* §§ 1, 2 (1978)). In *Henry* and *Grant*, allegations that the defendants had destroyed certain medical records and created other false medical records for the purpose of defeating a medical negligence claim were held to be sufficient to state a claim for common law obstruction of justice. *Henry*, 310 N.C.

5. As a result of the fact that the allegations in Plaintiff's complaint essentially restate the material facts revealed by the letters and other materials tendered to the trial court at the hearing, we will base our analysis of the sufficiency of Plaintiff's evidentiary forecast upon the facts, as compared to the legal conclusions, stated in Plaintiff's complaint and reiterated in the materials tendered at the hearing.

at 88, 310 S.E.2d at 334-35 (stating 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, and injuries are pleaded and proven, a claim for the resulting increased costs of the investigation will lie"); *Grant*, 184 N.C. App. at 255-56, 645 S.E.2d at 855 (stating that allegations that "Defendant destroyed the medical records of the decedent" so as to "effectively preclude[] Plaintiff from obtaining the required Rule 9(j) certification" and prevent " 'Plaintiff from being able to successfully prosecute a medical malpractice action against . . . Defendant . . . and others' " "stated a cause of action for common law obstruction of justice"). Similarly, this Court has held that "Plaintiff's complaint sufficiently allege[d] a cause of action for common law obstruction of justice in that it alleges (1) defendant alerted health care providers to the names of the jurors [who returned a verdict against another health care provider in a medical negligence case] in retaliation for their verdict; (2) this retaliation was designed to harass plaintiffs; and (3) defendant's conduct was meant to obstruct the administration of justice[.]" *Burgess*, 142 N.C. App. at 409, 544 S.E.2d at 13. As a result, any action intentionally undertaken by the defendant for the purpose of obstructing, impeding, or hindering the plaintiff's ability to seek and obtain a legal remedy will suffice to support a claim for common law obstruction of justice.[6]

At the hearing held before the trial court and on appeal, Plaintiff contends that Dr. Carbone's failure to appear for the purpose of testifying at Plaintiff's negligence trial and his statement in the medical report indicating that Plaintiff's injuries were work-related rather than having their origin in a motor vehicle collision constituted "intentional, willful, wanton and malicious" acts that damaged Plaintiff by causing him to settle his automobile accident case for less than its actual value. As a general proposition, a refusal to appear to testify or obstructing the efforts of others to appear and testify, 67 C.J.S. *Obstructing Justice* § 37 (2002), or the falsification of

6. The necessity for showing an intentional act of misconduct by the defendant is delineated in a number of criminal obstruction of justice cases. *State v. Dietze*, 190 N.C. App. 198, 201, 660 S.E.2d 197, 199 (2008) (stating that the State is required to adduce evidence of "malicious intent" to prove obstruction of justice); *State v. Wright*, ––– N.C. App. –––, 696 S.E.2d 832, 835 (2010) (stating that intent is an element of felonious common law obstruction of justice); *see also Hess v. Medlock*, 820 F.2d 1368, 1373 (4th Cir. 1987) (stating that "[[t]he [South Carolina] common law crime of obstruction of justice . . . is committed whenever a defendant intentionally performs 'any act which prevents, obstructs, impedes, or hinders the administration of justice' ") (applying South Carolina law).

evidence, 67 C.J.S. *Obstructing Justice* § 32 (2002), could, under certain circumstances, support a finding of liability for common law obstruction of justice. We do not believe, however, that the facts disclosed in the present record provide any basis for holding Dr. Carbone and, vicariously, the other Defendants, liable under either of the theories that Plaintiff has espoused.

The record clearly indicates that Plaintiff never obtained proper service of a subpoena requiring Dr. Carbone to appear and testify at the trial of Plaintiff's automobile accident.[7] As this Court has noted, "[s]ubject to the protections of [N.C. Gen. Stat. § 1A-1,] Rule 45(c), the obligation to appear as a witness is perfected when the subpoena is served on the witness." *Greene v. Hoekstra*, 189 N.C. App. 179, 181, 657 S.E.2d 415, 417 (2008); *see also* N.C. Gen. Stat. § 1A-1, Rule 45(e)(1) (stating that a "[f]ailure by any party without adequate cause to obey a subpoena served upon the party shall also subject the party to the sanctions provided in Rule 37(d)"). In the absence of a properly served subpoena or other process or a judicial decree requiring his presence, Dr. Carbone had no duty to appear and testify at the trial of Plaintiff's automobile accident case. The fact that a witness fails to appear and testify at a civil trial without having been properly served with a valid subpoena simply does not suffice to support a finding of liability for common law obstruction of justice in the absence of allegation and proof that the person in question took affirmative action to preclude service of the required subpoena. The record is completely devoid of any information tending to show that Dr. Carbone did anything to obstruct the ability of others to serve such a subpoena on him. Thus, the first theory upon which Plaintiff seeks to have Dr. Carbone and the remaining Defendants found liable for common law obstruction of justice is without merit.

Although Plaintiff argues vigorously that Dr. Carbone rendered himself liable for common law obstruction of justice by stating in his report that Plaintiff's injuries stemmed from an incident in the workplace rather than from an automobile accident and by failing to correct this error once it was brought to his attention, we do not find this aspect of Plaintiff's argument persuasive either. First, the available

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7. Although Plaintiff tried to serve Dr. Carbone with a subpoena both personally and through the use of registered mail, a nurse employed in Dr. Carbone's office actually received the subpoena instead of Dr. Carbone on each occasion when service was attempted. According to N.C. Gen. Stat. § 1A-1, Rule 45(b)(1), "service of a subpoena upon a person named therein shall be made by delivering a copy thereof to that person or by registered or certified mail, return receipt requested."

decisional law tends to suggest that no cause of action for common law obstruction of justice lies against "any third party that fails to produce documents or other materials requested by a potential litigant." *Grant*, 184 N.C. App. at 257, 645 S.E.2d at 856 (stating that "[w]e are not concerned" by the prospect that a decision in the plaintiff's favor would result in third party liability for "fail[ing] to produce" such materials because Plaintiff's allegations were directed at an entity which would have been a defendant in the medical malpractice case). Simply put, we are not aware of any authority establishing that a mere witness, such as Dr. Carbone, could be held liable for common law obstruction of justice on the basis of a failure to provide an accurate report or a failure to correct an allegedly inaccurate report requested by a party to litigation. Secondly, aside from the fact that the error in Dr. Carbone's report could easily be explained as a typographical error, Plaintiff has neither alleged nor forecast any factual basis for believing that the alleged error in the report that Dr. Carbone provided to Plaintiff's counsel or any failure on the part of Dr. Carbone to correct that error at the request of Plaintiff's counsel represented an intentional act on the part of Dr. Carbone undertaken for the purpose of deliberately obstructing, impeding or hindering the prosecution of Plaintiff's automobile accident case. For example, the record contains absolutely no indication that Dr. Carbone received any benefit or avoided any detriment as the result of having made the alleged error.[8] Thus, even when the information in the record is taken in the light most favorable to Plaintiff, Plaintiff has failed to allege or forecast any specific facts tending to show that Dr. Carbone intentionally created an erroneous medical report and then failed to correct it for the purpose of disrupting or obstructing plaintiff's automobile accident case.[9] As a result, given the absence of any allegation

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8. Although Plaintiff has alleged that Dr. Carbone's conduct was intentional and malicious, "an affiant's legal conclusions, as opposed to facts 'as would be admissible in evidence,' are not to be considered by the trial court on a motion for summary judgment." *Strickland v. Doe*, 156 N.C. App. 292, 296, 577 S.E.2d 124, 129 (citing *Singleton v. Stewart*, 280 N.C. 460, 467, 186 S.E.2d 400, 405 (1972)), *disc. review denied*, 357 N.C. 169, 581 S.E.2d 447 (2003). Thus, given the absence of any factual basis for Plaintiff's contentions concerning Dr. Carbone's mental state, we conclude that Plaintiff has failed to sufficiently forecast evidence that Dr. Carbone acted with the degree of deliberation and intentionality necessary to establish liability for common law obstruction of justice.

9. We need not address the extent, if any, to which Dr. Carbone's conduct constituted an act of professional negligence or the extent to which Plaintiff's claim might be barred under an election of remedies theory given that Plaintiff has not asserted such a professional negligence claim in his complaint or argued on appeal that Dr. Carbone might be liable to him on that basis and given that Defendants have not argued at trial or on appeal that Plaintiff's claim is barred by the doctrine of election of remedies. N.C.R. App. P. 28(a).

or forecast of specific facts tending to show that Dr. Carbone deliberately inserted an inaccuracy into his report and then intentionally failed to correct it for the purpose of obstructing, impeding, or hindering Plaintiff's ability to maintain his automobile accident claim, we conclude that the trial court properly granted summary judgment in favor of Defendants on this aspect of Plaintiff's common law obstruction of justice claim as well. *Broughton*, 161 N.C. App. at 33, 588 S.E.2d at 30 (stating that, given the absence of any "evidence that [the plaintiff's case] was in some way judicially prevented, obstructed, impeded or hindered by the acts of defendants," the trial court properly granted summary judgment in favor of the defendants with respect to the plaintiff's common law obstruction of justice claim).

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Plaintiff's challenges to the trial court's order have merit and that the trial court properly granted summary judgment in favor of Defendants. As a result, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Chief Judge MARTIN and Judge McGEE concur.

IN THE MATTER OF: A.S.Y.

No. COA10-631

(Filed 21 December 2010)

Termination of Parental Rights— guardian ad litem for parent —required to be at termination hearing

The trial court erred by terminating respondent mother's parental rights because it allowed her guardian *ad litem* (GAL) to withdraw at the beginning of the termination hearing. Since the GAL was appointed in accordance with N.C.G.S. § 7B-602 and N.C.G.S. § 1A-1, Rule 17, it was the duty of the GAL to act as a guardian of procedural due process for that parent, and to assist in explaining and executing her rights. Even in the absence of respondent, the GAL was still required to remain and represent

respondent to the fullest extent feasible during the hearing. The order was remanded for a new hearing.

Appeal by respondent-mother from order entered 17 February 2010 by Judge Page Vernon in Orange County District Court. Heard in the Court of Appeals 27 October 2010.

No brief filed for petitioner-appellee Orange County Department of Social Services.

GAL Appellate Counsel Pamela Newell, for guardian ad litem.

Charlotte Gail Blake, for respondent-appellant mother.

CALABRIA, Judge.

Respondent-mother appeals the trial court's order terminating her parental rights to her minor child, "Amanda."[1] We vacate the trial court's order and remand for a new termination hearing.

I. Background

Respondent-mother is the biological mother of Amanda, who was born on 25 December 2007.[2] On 28 October 2008, respondent-mother, who was homeless, contacted the Orange County Department of Social Services ("DSS" or "petitioner") seeking assistance for Amanda and herself. On 29 October 2008, DSS filed a juvenile petition alleging that Amanda was a neglected and dependent juvenile because of respondent-mother's homelessness, lack of support system, and lack of employment. Petitioner assumed non-secure custody of Amanda the same day and Amanda was placed in foster care.

On 30 October 2008, at a non-secure custody hearing, respondent-mother initially waived her right to assistance of counsel. However, later in the hearing, the trial court appointed counsel and a guardian *ad litem* ("GAL") for respondent-mother. The trial court also continued non-secure custody of Amanda with DSS.

After a hearing on the neglect and dependency petition on 30 December 2008, the trial court entered an adjudication and disposition order on 23 January 2009, adjudicating Amanda as a neglected and dependent juvenile. The trial court also continued custody of Amanda with DSS and awarded respondent-mother weekly visita-

1. "Amanda" is a pseudonym used to protect the identity of the minor child.

2. R.H., Amanda's father, relinquished his parental rights on 21 January 2010 and is not a party to this appeal

tions. The trial court further ordered respondent-mother to undergo a full psychiatric and/or psychological evaluation and fully disclose to DSS her previous mental health treatment and evaluations. Respondent-mother appealed to this Court, and we affirmed the adjudication and disposition order. *In re A.Y.*, ––– N.C. App. –––, 687 S.E.2d 541, 2009 N.C. App. LEXIS 1522, 2009 WL 2930773 (2009) (unpublished).

During the pendency of the appeal of the adjudication and disposition order, the trial court held a permanency planning hearing on 21 May 2009. By order entered 6 July 2009, the trial court found that respondent-mother had made "absolutely no progress on identifying goals or correcting any of the safety concerns in her life[,]" and that she had not "engaged in services, [wa]s actively refusing to take part in any case planning and [wa]s refusing to submit for a psychological or psychiatric evaluation as court ordered." The trial court also found that further efforts to reunify Amanda with respondent-mother would be futile or inconsistent with Amanda's best interests. Consequently, the trial court ordered the permanent plan for Amanda to be adoption, ceased respondent-mother's visitation with Amanda, relieved DSS of having to pursue efforts toward reunification, and directed DSS to file a motion to terminate respondent-mother's parental rights.

DSS filed a motion in the cause to terminate respondent-mother's parental rights to Amanda on 17 June 2009. The motion alleged that grounds existed to terminate respondent-mother's parental rights in that, due to respondent-mother's mental illness, Amanda was a neglected juvenile when she lived with respondent-mother. In addition, DSS alleged that respondent-mother appeared to be mentally ill, engaged in "bizarre behaviors," and had other "mental health impairments" which made her incapable of providing for the proper care and supervision of Amanda such that Amanda was a dependent juvenile. Respondent-mother filed an answer in response on 3 September 2009, generally denying petitioner's allegations.

The trial court conducted a hearing on the motion to terminate respondent-mother's parental rights on 21 January 2010. Respondent-mother did not appear at the hearing, and upon inquiry by the trial court, respondent-mother's attorney stated the following regarding her absence:

> This case has a—long history. And I appreciate the opportunity to tell you that my client, ah, informed me of her objection, which

> has been continuous, through the beginning of the case. And the appeal of the adjudication, that D.S.S. does not have jurisdiction over her. She contends that if she were to appear here, that that would give ju [sic], D.S.S. jurisdiction over her.
>
> She has instructed me to assert that defense. And the general defense that they don't have sufficient—reason—from the beginning to have taken her child from her and, ah, I think it was November of last year.

Prior to the presentation of evidence at the hearing, Karen Murphy ("Ms. Murphy"), the GAL appointed to represent respondent-mother's interests in the juvenile case, asked to be released from the case. The trial court inquired of both parties' counsel if there were any objections to releasing Ms. Murphy and received none. As a result, the trial court relieved Ms. Murphy from further duties in the matter and continued conducting the hearing.

On 17 February 2010, the trial court entered an order terminating respondent-mother's parental rights to Amanda. The court concluded that grounds existed to terminate respondent-mother's parental rights in that Amanda was neglected and that there was a probable repetition of neglect if the juvenile were returned to respondent-mother's custody. The trial court also found that grounds existed to terminate respondent-mother's parental rights because she was incapable of providing for the proper care and supervision of Amanda such that Amanda was a dependent juvenile, and there was a reasonable probability that the incapability would continue for the foreseeable future. Respondent-mother appeals.

II. Guardian *ad Litem*

Respondent-mother argues that the trial court erred in allowing her GAL to withdraw at the beginning of the termination hearing. We agree.

A. Appointment of Ms. Murphy

Initially, we examine the procedure which led to the appointment of Ms. Murphy as respondent-mother's GAL. The Juvenile Code permits the trial court to appoint a GAL for a parent in both abuse, neglect or dependency proceedings and termination of parental rights proceedings. N.C. Gen. Stat. §§ 7B-602 and 7B-1101.1 (2009). In the instant case, the trial court appointed Ms. Murphy as GAL for respondent-mother in the first hearing after the neglect and

dependency proceeding was initiated by DSS. This appointment was governed by N.C. Gen. Stat. § 7B-602(c), whichstates:

> On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent in accordance with G.S. 1A-1, Rule 17, if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest. The parent's counsel shall not be appointed to serve as the guardian ad litem.

N.C. Gen. Stat. § 7B-602(c) (2009). Thus, although the trial court was not required to appoint a GAL for respondent-mother, it chose to do so in its discretion, based upon its belief that respondent-mother was either incompetent or had diminished capacity and thus could not adequately act in her own interest. Neither party contends that the appointment of Ms. Murphy was inappropriate.

Ms. Murphy continued to assist respondent-mother through Amanda's adjudication as a neglected and dependent juvenile and subsequent permanency planning hearings. DSS then filed its motion to terminate respondent-mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1102(a):

> (a) When the district court is exercising jurisdiction over a juvenile and the juvenile's parent in an abuse, neglect, or dependency proceeding, a person or agency specified in G.S. 7B-1103(a) may file in that proceeding a motion for termination of the parent's rights in relation to the juvenile.

N.C. Gen. Stat. § 7B-1102(a) (2009). The motion contained several allegations referencing respondent-mother's apparent mental illness and also referred to respondent-mother's bizarre behaviors and mental health impairments. Since this motion was filed as part of the original neglect and dependency action, Ms. Murphy's appointment pursuant to N.C. Gen. Stat. § 7B-602(c) was still in effect. As a result, Ms. Murphy continued to assist respondent-mother in preparation for the termination of parental rights hearing. However, when respondent-mother failed to appear at the termination hearing, Ms. Murphy was permitted to withdraw by the trial court. Respondent-mother contends that this was error.

B. Duties of a GAL

This Court has struggled to define the role of a parent's GAL during a termination hearing. Prior to 2005, the only statutory refer-

ence to the duties of a GAL appointed for a parent in a termination proceeding were those applicable to all guardians *ad litem* appointed pursuant to Rule 17 of the Rules of Civil Procedure:

> Any guardian ad litem appointed for any party pursuant to any of the provisions of this rule shall file and serve such pleadings as may be required within the times specified by these rules, unless extension of time is obtained. After the appointment of a guardian ad litem under any provision of this rule and after the service and filing of such pleadings as may be required by such guardian ad litem, the court may proceed to final judgment, order or decree against any party so represented as effectually and in the same manner as if said party had been under no legal disability, had been ascertained and in being, and had been present in court after legal notice in the action in which such final judgment, order or decree is entered.

N.C. Gen. Stat. § 1A-1, Rule 17(e) (2009); *see also In re Shepard*, 162 N.C. App. 215, 227, 591 S.E.2d 1, 9 (2004). Considering Rule 17 and our Supreme Court's brief explanation of a GAL's role in *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984), this Court held that "Rule 17 and the case law addressing the duties of GALs assigned to alleged 'incapable' parents suggest the role of the GAL as a guardian of procedural due process for that parent, to assist in explaining and executing her rights." *Shepard*, 162 N.C. App. at 227, 591 S.E.2d at 9.

In 2005, the General Assembly revised the Juvenile Code, with the revisions applicable to petitions or actions filed on or after 1 October 2005. *See* 2005 N.C. Sess. Laws 398. The revised version of N.C. Gen. Stat. § 7B-602 provided a non-exclusive list of practices that may be performed by a GAL appointed under its provisions:

> (e) Guardians ad litem appointed under this section may engage in all of the following practices:
>
> > (1) Helping the parent to enter consent orders, if appropriate.
> >
> > (2) Facilitating service of process on the parent.
> >
> > (3) Assuring that necessary pleadings are filed.
> >
> > (4) Assisting the parent and the parent's counsel, if requested by the parent's counsel, to ensure that the parent's procedural due process requirements are met.

N.C. Gen. Stat. § 7B-602(e) (2009).[3]

The effect of these new statutorily defined GAL practices was examined in *In re L.B.*, 187 N.C. App. 326, 653 S.E.2d 240 (2007), *aff'd per curiam*, 362 N.C. 507, 666 S.E.2d 751 (2008). In *L.B.*, the respondent-parents were each appointed a GAL pursuant to N.C.Gen. Stat. § 7B-1101.1. *Id.* at 328, 653 S.E.2d at 242. At that time, N.C. Gen. Stat. § 7B-1101.1 essentially stated that "the court may appoint a GAL to represent a parent having only a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest." *Id.* at 330, 653 S.E.2d at 243. The statute made no reference to Rule 17.[4] *Id.*

After the trial court terminated the respondent-parents' parental rights, they attempted to appeal the order; however, the notices of appeal were signed only by the respondent-parents' counsel and GALs, not by the parents themselves. *Id.* at 328, 653 S.E.2d at 242. The question before the *L.B.* Court was whether these signatures were sufficient to comply with the Rules of Appellate Procedure. To answer this question, the *L.B.* Court interpreted N.C. Gen. Stat. § 7B-1101.1(e) as follows:

> [A] GAL [appointed pursuant to N.C. Gen. Stat. § 7B-1101.1]'s authority is more limited. Pursuant to North Carolina General Statutes, section 7B-1101.1(e), a GAL "may engage in all of the following practices:" (1) helping the parent to enter consent orders, as opposed to entering consent orders on behalf of the parent; (2) facilitating service of process on the parent, as opposed to accepting service of process on behalf of the parent; (3) assuring that necessary pleadings are filed, as opposed to filing pleadings on behalf of the parent; and (4) assisting the parent, as opposed to acting on the parent's behalf, to ensure that the parent's procedural due process requirements are met. *See* N.C. Gen. Stat. § 7B-1101.1(e) (2005).
>
> . . .

3. N.C. Gen. Stat. § 7B-1101.1 (2009) contains the exact same language regarding the suggested practices of a GAL appointed under that statute. As a result, we rely upon cases interpreting either provision, as the analysis of one of these statutes is equally applicable to the other statute. *See In re C.B.*, 171 N.C. App. 341, 346, 614 S.E.2d 579, 582 (2005).

4. N.C. Gen. Stat. § 7B-1101.1 was subsequently amended to add a reference to Rule 17, effective 1 October 2009. *See* 2009 N.C. Sess. Laws 311.

> [T]he language of the General Assembly is clear that the GAL's role is limited to one of assistance, not one of substitution. The General Assembly could have stated that the GAL was authorized to enter consent orders, accept service of process, file pleadings, or otherwise act on a parent's behalf, but it did not.

Id. at 329, 653 S.E.2d at 242. Thus, the Court concluded that "the language of section 7B-1101.1 plainly indicates the role of the GAL is to *assist* the parents rather than *replace* their authority to undertake acts of legal import themselves." *Id.* at 330-31, 653 S.E.2d at 243. Accordingly, the Court determined that the GALs' signatures on the respondent-parents' notices of appeal failed to comply with the Rules of Appellate Procedure and dismissed the appeal. *Id.* at 331-32, 653 S.E.2d at 243-44.

While *L.B.* discusses the role of a GAL during a termination proceeding at length, it is important to note that the Court was relying on a different statutory provision than the one at issue in the instant case. In reaching its conclusion, the *L.B.* Court heavily emphasized the General Assembly's decision to omit any language regarding Rule 17 in the newly created N.C. Gen. Stat. § 7B-1101.1. *Id.* at 330, 653 S.E.2d at 243. In the absence of any reference to Rule 17, the Court limited its determination of the role of a parent's GAL in termination proceedings to an examination of the suggested practices listed in N.C. Gen. Stat. § 7B-1101.1(e). *Id.* at 329-30, 653 S.E.2d at 242-43. Thus, it was important to the *L.B.* Court that "[t]he General Assembly could have stated that the GAL was authorized to enter consent orders, accept service of process, file pleadings, or otherwise act on a parent's behalf, but it did not." *Id.* at 329, 653 S.E.2d at 242.

In contrast, respondent-mother's GAL was appointed pursuant to N.C. Gen. Stat. § 7B-602(c), which explicitly states that "the court may appoint a guardian ad litem for a parent *in accordance with G.S. 1A-1, Rule 17*." N.C. Gen. Stat. § 7B-602(c) (2009) (emphasis added). The consideration of Rule 17 in conjunction with N.C. Gen. Stat. § 7B-602(e) significantly alters the analysis of a GAL's duties and leads us to reach a different conclusion on the matter than the *L.B.* Court.[5] Under Rule 17, the GAL "shall file and serve such pleadings as may be required . . . ." N.C. Gen. Stat. § 1A-1, Rule 17(e) (2009). Moreover, Rule 17 further states that:

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5. However, our determination of the GAL's duties *during* a termination proceeding does not require us to touch upon or otherwise disturb the ultimate question determined by the *L.B.* Court, that a notice of appeal signed by the GAL but not the parent is insufficient to grant jurisdiction of the appeal to this Court.

> [i]n actions . . . when any of the defendants are . . . incompetent persons, . . . they must defend by . . . guardian ad litem appointed as hereinafter provided[.] . . . The guardian so appointed shall, if the cause is a civil action, file his answer to the complaint within the time required for other defendants, unless the time is extended by the court; and if the cause is a special proceeding, a copy of the complaint, with the summons, must be served on him. After 20 days' notice of the summons and complaint in the special proceeding, and after answer filed as above prescribed in the civil action, the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said infant or incompetent persons or defendants.

N.C. Gen. Stat. § 1A-1, Rule 17(b)(2). Ultimately, after the appointment of a GAL,

> the court may proceed to final judgment, order or decree against any party so represented as effectually and in the same manner as if said party had been under no legal disability, had been ascertained and in being, and had been present in court after legal notice in the action in which such final judgment, order or decree is entered.

N.C. Gen. Stat. § 1A-1, Rule 17(e). Thus, Rule 17 contemplates active participation of a GAL in the proceedings for which the GAL is appointed. The presence and active participation of a GAL appointed according to the provisions of Rule 17 effectively removes any legal disability of the party that is so represented.

"[T]he appointment of a guardian ad litem will divest the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination." *In re J.A.A. & S.A.A.*, 175 N.C. App. 66, 71, 623 S.E.2d 45, 48 (2005) (citation omitted). While N.C. Gen. Stat. § 7B-602(e) emphasizes that the primary role of the parent's GAL in a termination proceeding is to act as "a guardian of procedural due process for [the] parent, to assist in explaining and executing her rights," *Shepard*, 162 N.C. App. at 227, 591 S.E.2d at 9, this is not the sole role of the GAL. "[A] guardian ad litem is considered an officer of the court and as such has a duty to represent the party he is appointed to represent to the fullest extent feasible and to do all things necessary to secure a judgment favorable to such party." Alan D. Woodlief, Jr., *Shuford North Carolina Civil Practice and Procedure* § 17:20 (6th ed. 2003) (footnotes omitted). Thus, while in many cases the GAL may fulfill his or her duties in a termination pro-

ceeding by merely assisting the parent, at times it will be necessary for the GAL to take further action during the proceeding in order to represent the parent to the fullest extent feasible and to secure a judgment favorable to that parent.

C. Application to the Instant Case

"[The GAL's] powers are coterminous with the beginning and end of the litigation in which he is appointed." *Hagins v. Redevelopment Comm.*, 275 N.C. 90, 101, 165 S.E.2d 490, 497 (1969). Thus, once the trial court determined, in its discretion, that respondent-mother was "incompetent or ha[d] diminished capacity and c[ould not] adequately act in his or her own interest" and appointed her a GAL pursuant to N.C. Gen. Stat. § 7B-602, it was necessary for respondent-mother to be represented by a GAL throughout the neglect and dependency and termination proceedings, as long as the conditions that necessitated the appointment of a GAL still existed.

In the instant case, the evidence before the trial court was that the conditions which led to the appointment of respondent-mother's GAL still existed at the time of the termination hearing. Petitioner's motion to terminate respondent-mother's parental rights alleged that respondent-mother's mental illness prevented her from providing Amanda with proper care when they lived together. Additionally, DSS alleged in its motion that respondent-mother appeared to be mentally ill and that she engaged in bizarre behaviors indicating that respondent-mother may have had Obsessive Compulsive Disorder and other mental impairments.

Respondent-mother failed to appear for the termination hearing. Therefore, it was impossible for respondent-mother's GAL to assist her during the hearing. However, even in the absence of respondent-mother, the GAL was still required to remain and represent respondent-mother to the fullest extent feasible during the termination hearing. Instead, the trial court simply allowed Ms. Murphy's motion to withdraw as respondent-mother's GAL and then failed to appoint a substitute GAL.

The presence and participation of a GAL for respondent-mother was necessary, under Rule 17, for the trial court to "proceed to final judgment, order or decree against any party so represented as effectually and in the same manner as if said party had been under no legal disability. . . ." N.C. Gen. Stat. § 1A-1, Rule 17(e). Because respondent-mother was initially appointed a GAL pursuant to N.C. Gen. Stat.

§ 7B-602 and Rule 17, but not ultimately represented by a GAL during the termination hearing, the order terminating her parental rights to Amanda was invalid.

Amanda's GAL argues that it was unnecessary for respondent-mother to be represented by a GAL during the termination hearing because respondent-mother was represented by an attorney. However, N.C. Gen. Stat. § 7B-602(c) explicitly states that "[t]he parent's counsel shall not be appointed to serve as the guardian ad litem." N.C. Gen. Stat. § 7B-602(c) (2009). Thus, the statute makes clear that the parent's counsel and GAL serve different roles during the termination proceeding. Since these roles are not interchangeable, the fact that respondent-mother was represented by counsel during the termination hearing is insufficient to correct the trial court's error. Consequently, we must vacate the trial court's order terminating respondent-mother's parental rights to Amanda and remand the case for a new termination hearing.

III. Conclusion

When a GAL is appointed in accordance with Rule 17 for a parent in an abuse, neglect, or dependency proceeding, or a termination of parental rights proceeding, it is the duty of the GAL to act "as a guardian of procedural due process for that parent, to assist in explaining and executing her rights." *Shepard*, 162 N.C. App. at 227, 591 S.E.2d at 9. In addition, the GAL appointed pursuant to Rule 17 "has a duty to represent the party he is appointed to represent to the fullest extent feasible and to do all things necessary to secure a judgment favorable to such party." Woodlief, Jr., *supra*, § 17:20. Finally, once a parent has been appointed a GAL according to Rule 17, the presence and participation of the GAL is necessary in order for the trial court to "proceed to final judgment, order or decree against any party so represented. . . ." N.C. Gen. Stat. § 1A-1, Rule 17(e).

Since the trial court determined that respondent-mother could not adequately represent her own interests and appointed a GAL to represent respondent-mother pursuant to N.C. Gen. Stat. § 7B-602(c), the requirements of Rule 17 applied to the termination proceedings. Thus, the trial court erred by conducting the termination hearing without the presence and participation of a GAL for respondent-mother, and the trial court's order terminating respondent-mother's parental rights to Amanda was invalid. Accordingly, we vacate the trial court's order and remand the case for a new termination hearing that complies with the requirements of Rule 17. This disposition

makes it unnecessary to address respondent-mother's remaining issue on appeal.

Vacated and remanded.

Judges HUNTER, Robert C. and GEER concur.

STATE OF NORTH CAROLINA v. JUSTIN HASTINGS CHILLO

No. COA10-622

(Filed 21 December 2010)

1. **Indictment and Information— sufficiency of indictment—legal entity capable of owning property—trusts**

   A *de novo* review revealed that the trial court did not err when it entered judgment on the charge of breaking and entering a motor vehicle even though defendant contended the underlying indictment was fatally defective. The language of the indictment indicated that the victim was a trust, and a trust is a legal entity capable of owning property.

2. **Burglary and Unlawful Breaking or Entering— breaking and entering motor vehicle—insufficient evidence of intent to commit larceny**

   A *de novo* review revealed that the trial court erred when it entered judgment on the charge of breaking and entering a motor vehicle. There was insufficient evidence to establish defendant's intent to commit larceny based upon the State's failure to show that defendant intended to permanently deprive the owner of property.

Appeal by defendant from judgment entered 28 October 2009 by Judge Clifton W. Everett, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 3 November 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kimberly D. Potter, for the State.

Anne Bleyman, for defendant-appellant.

JACKSON, Judge.

Justin Hastings Chillo ("defendant") appeals his 28 October 2009 conviction of breaking or entering a motor vehicle. For the reasons set forth below, we reverse.

On 6 December 2008 at approximately 1:00 a.m., defendant picked up his friend, Cameron Moser ("Moser"), from Moser's mother's residence in Bethel, North Carolina. Moser understood that they would be "hanging out" with two girls that night. Defendant drove them to Walmart in Greenville, North Carolina, and, according to Moser, defendant stole a spark plug from Walmart's hardware department at approximately 1:30 a.m.

After leaving Walmart, defendant drove to the Lynndale neighborhood in Greenville, where defendant "drove around the neighborhood for a little bit . . . ." While in Lynndale, defendant parked and exited his vehicle and used a blunt object to break the spark plug into two pieces. According to Moser, defendant then drove up the street, stopped, again exited his vehicle, and threw the spark plug at the passenger side window of a 2007 Dodge Caravan parked on the side of the road. The spark plug bounced off the window; however, upon throwing it a second time, defendant broke the Caravan's window. After the window was broken, defendant got back into his car, and he and Moser "just left."

Upon leaving Lynndale, defendant drove Moser through the Brook Valley neighborhood. Defendant indicated to Moser that he had been in Brook Valley earlier and "went into a car . . . or something like that" during his previous trip.

Before taking Moser home, defendant stopped at a gas station to get gas. According to Moser, defendant parked across the street and got his gas using gas cans. Moser testified that defendant did this "[s]o he wouldn't get the car on videotape."

The Caravan at issue was in the possession of Ansley Stroud ("Stroud"). Stroud's employer, Rite-Aid Pharmacy, provided her with this vehicle to use in her job as a pharmacy district manager. The Caravan is owned by and registered to D.L. Peterson Trust. Officer Scott Lascallette ("Officer Lascallette") testified that, upon examining the vehicle after the window was broken, "nothing was out of sorts in [the Caravan] . . . . [E]verything looked in order."

On 8 June 2009, the Pitt County Grand Jury issued an indictment charging defendant with felonious breaking and entering a motor vehicle. On 28 October 2009, a jury returned a verdict finding defendant guilty of breaking or entering a motor vehicle. The trial court sentenced defendant to a term of six to eight months imprisonment. However, the term was suspended, and defendant was placed on supervised probation for thirty months. Defendant appeals from his conviction.

[1] On appeal, defendant first argues that the trial court erred when it entered judgment on the charge of breaking and entering a motor vehicle because the underlying indictment was fatally defective. In relevant part, the indictment alleged that "the defendant . . . unlawfully, willfully and feloniously did break and enter a motor vehicle, a 2007 Dodge Caravan, the personal property of D.L. Peterson Trust. . . ." Defendant argues that the indictment was fatally defective because it failed to allege that the victim was a legal entity capable of owning property. We disagree.

Our review of whether the indictment was fatally defective is *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (citing *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729-30 (1981)), *disc. rev. denied*, 362 N.C. 368, 661 S.E.2d 890 (2008). Furthermore, our Supreme Court has held that

> [a] bill of indictment is insufficient to confer jurisdiction unless it charges all essential elements of a criminal offense. (W)here no crime is charged in the warrant or bill of indictment upon which the defendant has been tried and convicted the judgment must be arrested.
>
> A charge in a bill of indictment must be complete in itself, and contain all of the material allegations which constitute the offense charged. . . .

State v. Benton, 275 N.C. 378, 381-82, 167 S.E.2d 775, 777 (1969) (internal citations and quotation marks omitted) (second alteration in original).

"Because the State is required to prove ownership, a proper indictment must identify as victim a legal entity capable of owning property. An indictment that insufficiently alleges the identity of the victim is fatally defective and cannot support [the] conviction . . . ." *State v. Woody*, 132 N.C. App. 788, 790, 513 S.E.2d 801, 803 (1999). "If the entity named in the indictment is not a person, it must be alleged

'that the victim was a legal entity capable of owning property[.]' " *State v. Phillips*, 162 N.C. App. 719, 721, 592 S.E.2d 272, 273 (2004) (quoting *Woody*, 132 N.C. App. at 790, 513 S.E.2d at 803).

In *State v. Turner*, 8 N.C. App. 73, 173 S.E.2d 642 (1970), the defendant alleged that an indictment for larceny, listing "City of Hendersonville" as the owner of stolen property, was fatally defective because "it fail[ed] to allege that the owner of the property allegedly stolen is either a natural person or a legal entity capable of owning property." *Id.* at 74, 173 S.E.2d at 642. We held that the "City of Hendersonville" denotes a "municipal corporate entity[,]" capable of owning personal property. *Id.* at 75, 173 S.E.2d at 643. To support our holding, we noted that North Carolina General Statutes, section 160-2(4) provides that "[m]unicipal corporations are expressly authorized to purchase and hold personal property." *Id.* at 75, 173 S.E.2d at 643 (citing N.C. Gen. Stat. § 160-2(4)). As such, we held that the indictment was proper because "[i]t is well established that judicial notice will be taken of [the] laws of this State[.]" *Id.* at 74, 173 S.E.2d at 643 (citation omitted).

In the case *sub judice*, the indictment states that "the defendant . . . unlawfully, willfully and feloniously did break and enter a motor vehicle . . . the personal property of D.L. Peterson Trust . . . ." The express language of the indictment clearly indicates that the entity in question is a trust. *But cf. State v. Price*, 170 N.C. App. 672, 674, 613 S.E.2d 60, 62 (2005) (holding that the words "City of Asheville Transit and Parking Services" do not indicate a legal entity capable of owning property "because the additional words after 'City of Asheville' make it questionable what type of organization it is"). Unlike the indictment in *Price*, the indictment in the instant case leaves no question that a trust is the legal entity charged with owning the Caravan.

As a trust, "D.L. Peterson Trust," is a legal entity capable of owning property. *See*, *e.g.*, N.C. Gen. Stat. § 36C-4-401 (2009) (setting forth a property requirement for the creation of a trust); 2 James B. McLaughlin, Jr. & Richard T. Bowser, *Wiggins: Wills and Administration of Estates in North Carolina* § 23:2 (rev. 4th ed. 2005) (explaining that property, the trust *res*, is a necessary requirement for the creation of a trust). Like "City of Hendersonville" in *Turner*, a trust is capable of holding property pursuant to applicable state law. *Turner*, 8 N.C. App. at 74-75, 173 S.E.2d at 643. The indictment names D.L. Peterson Trust as the owner of the Caravan, and,

pursuant to North Carolina law, the word "trust" is a "term capable of notifying a criminal defendant either directly or by clear import that the victim is a legal entity capable of holding property." *Woody*, 132 N.C. App. at 791, 513 S.E.2d at 803. As such, we hold that the indictment was not fatally defective and that defendant's argument is without merit.

[2] Next, defendant argues that his conviction for breaking or entering a motor vehicle must be vacated because there was insufficient evidence to establish his intent to commit larceny. We agree.

We review the denial of a motion to dismiss *de novo*. *See State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations omitted). Our Supreme Court has set forth the standards governing our review of motions to dismiss:

> When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. The trial court must decide only whether there is substantial evidence of each essential element of the offense charged and of the defendant['s] being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. When the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted. However, so long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence.

State v. Miller, 363 N.C. 96, 98-99, 678 S.E.2d 592, 594 (2009) (internal citations and quotation marks omitted). Therefore, "[i]f there is more than a scintilla of competent evidence to support the allegations in the warrant or indictment, it is the court's duty to submit the case to the jury." *State v. Horner*, 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958) (citations omitted).

North Carolina General Statutes, section 14-56 provides:

> If any person, with intent to commit any felony or larceny therein, breaks or enters any railroad car, motor vehicle, trailer, aircraft, boat, or other watercraft of any kind, containing any goods, wares, freight, or other thing of value, or, after having committed

> any felony or larceny therein, breaks out of any railroad car, motor vehicle, trailer, aircraft, boat, or other watercraft of any kind containing any goods, wares, freight, or other thing of value, that person is guilty of a Class I felony. It is prima facie evidence that a person entered in violation of this section if he is found unlawfully in such a railroad car, motor vehicle, trailer, aircraft, boat, or other watercraft.

N.C. Gen. Stat. § 14-56 (2009). The offense proscribed by the statute contains five essential elements: "1) a breaking or entering 2) without consent 3) into any motor vehicle 4) containing goods, freight, or anything of value 5) with the intent to commit any felony or larceny therein." *State v. Riggs*, 100 N.C. App. 149, 155, 394 S.E.2d 670, 673 (1990), *disc. rev. denied*, 328 N.C. 96, 402 S.E.2d 425 (1991).

In the instant case, defendant's indictment specified that he "feloniously did break and enter a motor vehicle . . . with the intent to commit larceny therein, in violation of G.S. 14-56." Our Supreme Court has held that "when the indictment alleges an intent to commit a particular felony, the State must prove the particular felonious intent alleged." *State v. Wilkinson*, 344 N.C. 198, 222, 474 S.E.2d 375, 388 (1996) (citation omitted), *cert. denied*, 353 N.C. 279, 546 S.E.2d 394 (2000). Therefore, since the State indicted defendant for breaking and entering a motor vehicle based upon the intent to commit larceny therein, the State was required to prove defendant intended to commit larceny upon breaking and entering into the vehicle.

"The essential elements of larceny are: (1) taking the property of another; (2) carrying it away; (3) without the property owner's consent; and (4) with the intent to deprive the owner of the property permanently." *State v. Wilson*, 154 N.C. App. 686, 690, 573 S.E.2d 193, 196 (2002) (citations omitted). "Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974) (citations omitted), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). For example, "the intent to commit larceny may be inferred from the fact that defendant committed larceny." *State v. Thompkins*, 83 N.C. App. 42, 43, 348 S.E.2d 605, 606 (1986) (citation omitted).

To prove defendant's intent to commit larceny, the State relies upon Moser's testimony that (1) defendant had stolen a spark plug from Walmart; (2) defendant told Moser that "he went into a car" in the Brook Valley neighborhood earlier; and (3) defendant parked

across the street from a gas station and refueled his vehicle with gas cans "[s]o he wouldn't get the car on videotape." However, the State acknowledges that defendant's stated purpose for obtaining the spark plug was "to show [Moser] how to break glass." Furthermore, the State acknowledges that once defendant and Moser heard the Caravan's glass shatter, they "left the scene." Once they left, defendant drove through the Brook Valley neighborhood and told Moser that he previously "went into a car there." Later, defendant parked across the street from the gas station and used gas cans to refuel his vehicle. Moser testified that, although defendant did not say so, it was Moser's opinion that defendant did this because he did not want his car to be recorded on videotape. The State contends that defendant's intent to commit a larceny inside the Caravan properly can be inferred by the foregoing circumstantial evidence.

Although we are bound to review the facts in the light most favorable to the State, *see Miller*, 363 N.C. at 98, 678 S.E.2d at 594, we do not think defendant's intent to commit the crime charged can be inferred from the evidence presented. The State's evidence adduced on direct examination of its witnesses limits the purpose of stealing the spark plug simply to show Moser "how to break glass," and Moser's testimony establishes that he and defendant left once they heard the Caravan's glass break. Furthermore, Officer Lascallette testified that he observed a hole in the middle of the Caravan's front passenger window, which was perhaps large enough to fit his arm through, but he "determined that entrance into the van was probably not made" because he observed that "the glass had collected on the inside of the door." He explained that "if the door had been opened, the glass would have spilled out, but that was not the case." Additionally, Officer Lascallette explained that "nothing was out of sorts in [the Caravan.] Usually, when a car's been broke [sic] into, the glove compartments are pulled open and they don't take the time to put anything back together. So--but everything looked in order." Finally, Stroud testified that, although she had CDs and other personal items in the Caravan, nothing had been taken.

Although Moser testified that defendant claimed that he previously "went into a car" in the Brook Valley neighborhood, defendant's assertion with respect to the alleged commission of a different potential violation of North Carolina General Statutes, section 14-56 serves as a point of distinction from the charge at issue in light of (1) Moser's testimony that defendant's sole intent with respect to the Caravan was "to show [Moser] how to break glass" with a spark plug, (2)

Moser's testimony that he and defendant left the Caravan upon hearing the glass break, and (3) testimony from Officer Lascallette and Stroud that "nothing was out of sorts" or taken from the Caravan at issue.

Finally, with respect to Moser's opinion that defendant parked his car across the street from the gas station to avoid his car's being recorded by surveillance cameras, we note this action may indicate some acknowledgment of culpability on the part of defendant, but we do not believe that our standard of review contemplates such a liberal reading of the facts so as to divine defendant's intent to commit a larceny in the Caravan rather than to avoid detection for simply breaking the window.

The circumstantial evidence upon which the State relies does not align with instances where such evidence has supported an intent to commit larceny. *Cf.*, *e.g.*, *State v. Baskin*, 190 N.C. App. 102, 109-10, 660 S.E.2d 566, 572 (holding that the State had presented sufficient evidence to overcome a motion to dismiss upon showing that the defendant shared a common purpose to commit a larceny after breaking and entering a motor vehicle when another man was seen taking a satchel from a truck to the defendant's vehicle, the defendant hastily drove away, and the satchel soon was thrown from the defendant's vehicle), *disc. rev. denied*, 362 N.C. 475, 666 S.E.2d 648 (2008); *Riggs*, 100 N.C. App. at 155, 394 S.E.2d at 673 (holding that the State had presented evidence sufficient to overcome a motion to dismiss when testimony established that the defendant and his accomplices had been seen walking toward a truck, and, after a loud noise, they emerged carrying boxes of wine, and that the truck's padlock was discovered to have been broken and the wine to have been taken without authority). As distinguished from those cases in which we held that there was intent to commit larceny, there is no evidence in the instant case showing that defendant fled the scene before being able to complete the crime, and, furthermore, there was nothing missing or "out of sorts in [the Caravan]."

As the State failed to meet its burden of proving defendant's intent to commit the crime of larceny based upon its failure to show that defendant intended to deprive the owner of property permanently, we hold that the trial court erred in denying defendant's motion to dismiss.

For the foregoing reasons, we reverse the conviction for breaking or entering a motor vehicle with intent to commit a larceny.

Reversed.

Judges HUNTER and ELMORE concur.

IN THE MATTER OF: D.H.H.

No. COA10-722

(Filed 21 December 2010)

Termination of Parental Rights— grounds—willful failure to pay reasonable portion of cost of child's care—willfully left child in foster care for over twelve months

The trial court did not err by terminating respondent father's parental rights to his minor daughter. Respondent did not challenge the trial court's conclusion that he willfully failed to pay a reasonable portion of the cost of the child's care. Further, the findings were sufficient to support the conclusion that respondent willfully left the child in foster care for over twelve months and had not made reasonable progress to correct the conditions which led to the child's removal from the home.

Appeal by Respondent-Father from orders entered 23 March 2010 by Judge J. Stanley Carmical in District Court, Robeson County. Heard in the Court of Appeals 22 November 2010.

Susan J. Hall for Petitioners-Appellees.

David A. Perez for Respondent-Appellant Father.

No brief filed for Guardian ad Litem.

McGEE, Judge.

Respondent-Father appeals from adjudication and disposition orders terminating his parental rights to D.H.H., his three-year-old daughter. Petitioners are the foster parents and appointed guardians of D.H.H. We affirm the trial court's orders terminating Respondent-Father's parental rights to D.H.H.

The Robeson County Department of Social Services (DSS) received a neglect referral report regarding D.H.H. and two of her

three older siblings on 20 December 2007.[1] The fourth child was staying with out-of-town relatives at the time. According to the report, Respondent-Father and D.H.H.'s mother[2] engaged in family violence in front of the children and Respondent-Father stabbed the mother with a knife on 20 December 2007. In April 2007, the three older children had been removed from the home. D.H.H. was born while the three older children were out of the parents' home and was only a few months old at the time of the 20 December 2007 incident. The three older children had been returned to the parents' home for a trial placement on 12 December 2007.

After the 20 December 2007 incident, a DSS social worker interviewed the parents and the older children. The children described the incident between their parents, confirmed that Respondent-Father stabbed their mother, and told the social worker that their parents had rolled "brown stuff" and smoked it. The mother also told the social worker that Respondent-Father stabbed her. Respondent-Father, however, claimed that he did not remember much about the incident because he was tired from staying up all night with D.H.H. Respondent-Father denied stabbing the mother and stated that he fell on top of the mother with a knife.

The mother voluntarily placed D.H.H. in a kinship placement with the mother's cousin. The mother signed a safety assessment with DSS on 21 December 2007, agreeing to go to a domestic violence shelter. DSS permitted the mother to remove D.H.H. from the kinship placement on the condition that she take D.H.H. to the shelter. However, on Christmas Day, the mother removed D.H.H. from the kinship placement, but did not go to the shelter. DSS then obtained an order for nonsecure custody of D.H.H. and placed D.H.H. in a foster home with Petitioners. The trial court entered an order on 8 February 2008 adjudicating D.H.H. neglected. The trial court continued custody with DSS, giving DSS placement authority for D.H.H., and declined to give Respondent-Father visitation.

The trial court conducted a review hearing on 4 June 2008 regarding all four children. In an order entered 7 July 2008, the

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1. D.H.H.'s older siblings are not the subject of this action, but they were part of the juvenile proceedings in the trial court. All four children have the same mother. Respondent-Father appears to be the father of two of the older children; the other child has a different father.

2. The mother was involved in the juvenile court proceedings and the trial court also terminated her parental rights as to D.H.H. However, the mother did not appeal.

trial court awarded guardianship of D.H.H. to Petitioners. The trial court also awarded guardianship of the older siblings to their respective paternal grandparents.

Petitioners filed a petition on 14 July 2009 to terminate both parents' rights to D.H.H. Petitioners alleged the following grounds for termination of parental rights as to both parents: (1) willfully failing to pay a reasonable portion of the cost of care for D.H.H., pursuant to N.C. Gen. Stat. § 7B-1111(3) and (2) willfully leaving D.H.H. in foster care for more than twelve months without showing reasonable progress to correct the conditions that led to removal, pursuant to N.C. Gen. § 7B-1111(2). Petitioners also alleged two additional grounds against Respondent-Father: (1) willful abandonment, pursuant to N.C. Gen. Stat. § 7B-1111(7) and (2) failure to legitimate his relationship with D.H.H., pursuant to N.C. Gen. Stat. § 7B-1111(5).

The trial court conducted hearings in the matter on 20 January 2010, 10 February 2010, and 24 February 2010. In an adjudication order entered on 23 March 2010, the trial court concluded that the following grounds existed to terminate Respondent-Father's parental rights: (1) willfully leaving D.H.H. in foster care for more than twelve months without showing reasonable progress to correct the conditions that led to removal; (2) willfully failing to pay a reasonable portion of the cost of care for D.H.H.; and (3) failure to legitimate. In a separate disposition order entered on the same day, the trial court concluded that it was in the best interest of D.H.H. to terminate Respondent-Father's parental rights. Respondent-Father appeals.

Respondent-Father contends that the trial court erred in tutory grounds existed for termination of his parental rights. We review the trial court's orders to determine "whether the trial court's findings of fact were based on clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental termination should occur." *In re Oghenekevebe*, 123 N.C. App. 434, 435-36, 473 S.E.2d 393, 395 (1996) (citation omitted). As an initial matter, we note that Respondent-Father does not challenge any of the trial court's findings of fact. Accordingly, the findings of fact are presumed to be supported by competent evidence and are therefore binding on appeal. *See In re J.D.S.*, 170 N.C. App. 244, 252, 612 S.E.2d 350, 355, *cert. denied*, 360 N.C. 64, 623 S.E.2d 584 (2005); *see also In re M.D.*, ––– N.C. App. –––, –––, 682 S.E.2d 780, 785 (2009) ("Respondent-Father has not challenged any of the above findings of fact made by the trial court as lacking adequate evidentiary support. As a result, these find-

ings of fact are deemed to be supported by sufficient evidence and are binding on appeal.").

Therefore, we turn to the grounds for termination found by the trial court. Pursuant to N.C. Gen. Stat. § 7B-1111(a) (2009), a trial court may terminate parental rights upon a finding of one of the ten enumerated grounds. In the present case, the trial court found the existence of three grounds to terminate Respondent-Father's parental rights as to D.H.H.: (1) willfully leaving the juvenile in foster care for more than twelve months without showing reasonable progress in correcting the conditions which led to the removal; (2) willfully failing to pay a reasonable portion of the cost of care for the juvenile; and (3) failure to legitimate. Although the trial court found that three grounds existed, "[a] single ground . . . is sufficient to support an order terminating parental rights." *In re J.M.W.*, 179 N.C. App. 788, 789, 635 S.E.2d 916, 917 (2006). Therefore, if we determine that the findings of fact support one of the grounds, we need not review the other grounds. *See In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426-27 (2003).

However, in the present case, Respondent-Father challenges the trial court's determination as to only two of the three grounds in his brief. Respondent-Father argues that the trial court erred in concluding (1) that he willfully failed to make reasonable progress to correct the conditions that led to D.H.H.'s removal and (2) that he failed to legitimate D.H.H. Respondent-Father does not challenge the trial court's conclusion that he willfully failed to pay a reasonable portion of the cost of care for D.H.H., the third ground for termination. Therefore, this ground is conclusive on appeal. *See In re J.M.W.*, 179 N.C. App. 788, 792, 635 S.E.2d 916, 919 (2006) ("Since the unchallenged grounds are sufficient to support the trial court's order of termination, we affirm without examining Respondent-mother's arguments as to the other grounds."). Therefore, the trial court's conclusion that Respondent-Father willfully failed to pay a reasonable portion of the cost of care for D.H.H. is a sufficient basis for terminating Respondent-Father's parental rights. However, in reviewing the record, we find that the trial court's undisputed findings of fact are sufficient to support at least one additional ground for termination.

Pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) (2009), the trial court may terminate parental rights if it finds that (1) the parent willfully left the juvenile in foster care for over twelve months and (2) the parent has not made reasonable progress to correct the conditions which

led to the removal of the juvenile. *In Re O.C.*, 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005). Under this ground for termination, "willfulness does not require a showing of fault by the parent." *Oghenekevebe*, 123 N.C. App. at 439, 473 S.E.2d at 398. Indeed, "willfulness is not precluded just because respondent has made some efforts to regain custody of the child." *Id.* at 440, 473 S.E.2d at 398; *see also In Re Tate*, 67 N.C. App. 89, 94, 312 S.E.2d 535, 539 (1984) ("The fact that appellant made some efforts within the two years does not preclude a finding of willfulness or lack of positive response.").

The following findings of fact by the trial court address this ground for termination:

6. That [D.H.H.] has resided with the Petitioners since December 27, 2007.

. . .

10. That the [parents] have had ongoing domestic violence issues.

. . .

12. That the [parents] have failed to stay drug free and maintain suitable housing for D.H.H.

. . .

20. That . . . Respondent-Father was to continue treatment for his crack cocaine addiction and make repairs to the home.

21. That on December 20, 2007, . . . Respondent-Father stabbed the [mother] in the presence of the minor children.

. . .

24. That . . . Respondent-Father was jailed due to the assault on the [mother] in 2007.

. . .

33. That . . . Respondent-Father completed a 28 day program in April of 2008 for Substance Abuse.

. . .

35. That the [parents] did not successfully complete their treatment at Associate Behavioral Services.

. . .

38. That [Respondent-Father] left treatment on several occasions. He was placed in two different facilities, and jumped the fence in early 2008 at Tanglewood Arbor. However, he did complete a 28 day program in Selma in April 2008.

39. That Ms. Gail Locklear of the Robeson County Department of Social Services Child Support unit determined that no support was paid by either parent for the use and benefit of [D.H.H.].

. . .

44. That [Respondent-Father] continues to abuse drugs to include Xanax.

45. That . . . Respondent Father has worked with his father [] remodeling trailers.

46. That the parent[s'] home has the same holes in the walls that [Respondent-Father] punched into them in a fit of rage that was there when the children were removed.

. . .

48. That there is no furniture in any bedroom in the [parents'] home except their bedroom.

49. That the home has exposed electricalwork.

. . .

51. That [Respondent-Father] has had a recent Larceny and Marijuana Possession conviction.

. . .

54. That . . . Respondent-Father attended a visit under the influence.

We determine that these findings of fact are sufficient to support the conclusion that Respondent-Father willfully left D.H.H. in foster care for over twelve months and has not made reasonable progress to correct the conditions which led to removal of D.H.H. from the home.

Respondent-Father argues that the trial court should not have found the existence of this ground for termination because guardians for D.H.H. had been appointed pursuant to N.C. Gen. Stat. § 7B-600. Respondent-Father argues that even if he complied with his DSS case

plan, because of the provisions for termination of guardianship in N.C. Gen. Stat. § 7B-600, he could not have regained custody of D.H.H. Therefore, Respondent-Father argues that the trial court should have looked only at the period prior to the guardianship in determining whether a ground for termination exists under N.C. Gen. Stat. § 7B-1111(a)(2). We disagree with Respondent-Father's argument, and we note that N.C. Gen. Stat. § 7B-1111(a)(2) does not require the juvenile to be in DSS custody in order for the trial court to find existence of this ground. Contrary to Respondent-Father's suggestion, N.C. Gen. Stat. §§ 7B-600 and 7B-1111(a)(2) do not intersect in any way. Indeed, had Respondent-Father made sufficient progress, Petitioners would not have been able to prove that termination of Respondent-Father's parental rights was justified pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). Simply stated, the two sections are independent, and guardianship does not necessarily affect a parent's ability to correct the conditions which led to the juvenile's removal from the parent's home. Accordingly, the trial court did not err in concluding that grounds existed to terminate Respondent-Father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2).

Affirmed.

Chief Judge MARTIN and Judge BRYANT concur.

CHAD McLEOD, EMPLOYEE, PLAINTIFF v. NORTH CAROLINA INDUSTRIAL COMMISSION WAL-MART STORES, INC., EMPLOYER, AMERICAN HOME ASSURANCE, CARRIER, (CLAIMS MANAGEMENT, INC., THIRD-PARTY ADMINISTRATOR), DEFENDANTS

No. COA09-1645

(Filed 21 December 2010)

1. Workers' Compensation— Parsons presumption—additional medical treatment—directly related to compensable injury

The Industrial Commission did not err in a workers' compensation case by concluding that defendants had not rebutted the *Parsons* presumption that additional medical treatment was directly related to the compensable injury. A doctor's statements as to "some correlation" did not satisfy defendants' burden of showing that the medical treatment was not directly related to the compensable injury.

2. Workers' Compensation— suitable work—physical limitations

The Industrial Commission did not err in a workers' compensation case by concluding that a floor crew/maintenance associate position was unsuitable for plaintiff based on his physical limitations.

3. Appeal and Error— preservation of issues—failure to cross-appeal

Although plaintiff contended in his brief in a workers' compensation case that he was entitled to temporary total disability benefits until he returned to a suitable employment position, he failed to properly preserve this issue by cross-appealing.

Appeal by defendants from Opinion and Award entered 13 July 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 June 2010.

Hardison & Cochran P.L.L.C., by J. Adam Bridwell, for plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Dalton B. Green, for defendant-appellants.

STROUD, Judge.

Defendants appeal an opinion and award awarding plaintiff benefits and determining that defendant-employer had not provided plaintiff with suitable employment. For the following reasons, we affirm.

I. Background

On 13 July 2009, the Full Commission made the following uncontested findings of fact:

> 9. Defendants submitted a job description for plaintiff's position, entitled "maintenance associate." The description includes the following essential functions: "reaching . . . below knee level and bending, twisting or stooping"; "constantly lifting, sorting, carrying, and placing merchandise and supplies of varying sizes weighing up to 50 pounds without assistance, and regularly lifting and pushing over 50 pounds with team lifting"; and "constantly utilizing power equipment, such as a floor buffer, pallet jack, and burnisher."

. . . .

11. On July 22, 2006, plaintiff injured his low back while trying to move a stack base that weighed over 100 pounds. He immediately experienced low back pain and pain down his right leg.

12. Plaintiff began treating for this second injury with Dr. James Maultsby's office, which was the provider designated by defendants. On July 22, 2006, Dr. Maultsby's nurse practitioner assessed plaintiff with low back pain with radiation and restricted him to no lifting over five pounds. On July 26, 2006, Dr. Maultsby assessed plaintiff with degenerative joint disease at L5-S1 and a lumbosacral strain and restricted him to limited stooping and bending and no lifting over 10 pounds.

13. Over the next several months, Dr. Maultsby's office gradually lifted the restrictions on plaintiff, and plaintiff gradually worked more hours.

. . . .

15. A lumbar MRI on July 31, 2006 showed a small central disc herniation at L5-S1 with no nerve root compression.

16. Plaintiff went back to Dr. Huffmon on October 5, 2006, complaining of low back pain radiating down his right leg. Dr. Huffmon assessed plaintiff with sacroiliitis and referred him for an injection and chiropractic treatment.

. . . .

19. Plaintiff saw Dr. Maultsby for the last time on January 10, 2007. That day, plaintiff reported that he was better and working his regular shift. Dr. Maultsby attributed any remaining problems to conditions that existed before plaintiff's July 22, 2006 injury, including rheumatoid arthritis, and he released plaintiff from his care.

20. On July 5, 2007, plaintiff presented to Dr. Adam Brown, a neurosurgeon, for a second opinion evaluation on his permanent partial disability rating. Dr. Brown noted that plaintiff was still showing low back and right leg symptoms, and he opined that they "are probably exacerbated by his current job." Dr. Brown further noted that "He would probably be better off in a management or desk type position than he is now and I would suggest this if possible."

> 21. As of the hearing before the Deputy Commissioner, defendant employer had not offered plaintiff any other job, and he continued working on the floor crew.
>
> 22. Plaintiff continued to have low back pain at work, with pain shooting down both legs. He was taking Oxycontin to try to control his pain.

Based on its findings of fact and conclusions of law the Full Commission ordered, *inter alia*:

> Defendants shall pay all medical expenses incurred by plaintiff as a result of this injury by accident. Dr. Huffmon is hereby designated as plaintiff's treating physician, and defendants shall authorize and pay for the treatment that Dr. Huffmon recommends for plaintiff's compensable low back condition, including, but not limited to, diagnostic testing, surgery, physical therapy, prescriptions, referrals and mileage.

Defendants appeal.

II. Standard of Review

> Our review of the Commission's opinion and award is limited to determining whether competent evidence of record supports the findings of fact and whether the findings of fact, in turn, support the conclusions of law. If there is any competent evidence supporting the Commission's findings of fact, those findings will not be disturbed on appeal despite evidence to the contrary. However, the Commission's conclusions of law are reviewed *de novo*.

Graham v. Masonry Reinforcing Corp. of Am., 188 N.C. App. 755, 758, 656 S.E.2d 676, 679 (2008) (citation omitted).

III. Benefits Awarded

[1] On or about 15 August 2006, defendant-employer signed a Form 60 regarding plaintiff's 22 July 2006 "injury by accident[.]" Pursuant to *Perez v. Am. Airlines/AMR Corp.*:

> [a] party seeking additional medical compensation pursuant to N.C. Gen. Stat. § 97-25 must establish that the treatment is directly related to the compensable injury. Where a plaintiff's injury has been proven to be compensable, there is a presumption that the additional medical treatment is directly related to the compensable injury. The employer may rebut the presumption

> with evidence that the medical treatment is not directly related to the compensable injury.
>
> The employer's filing of a Form 60 is an admission of compensability. Thereafter, the employer's payment of compensation pursuant to the Form 60 is an award of the Commission on the issue of compensability of the injury. As the payment of compensation pursuant to a Form 60 amounts to a determination of compensability, we conclude that the *Parsons* presumption applies in this context. . . . It follows logically that because payments made pursuant to a Form 60 are an admission of compensability under the Workers' Compensation Act, these payments are the equivalent of an employee's proof that the injury is compensable. As compensability has been determined by the employer's Form 60 payments, the *Parsons* presumption applies to shift the burden to the employer.

174 N.C. App. 128, 135-36, 620 S.E.2d 288, 292-93 (2005) (quotation marks omitted), *disc. review allowed*, 360 N.C. 364, 630 S.E.2d 186, *review improvidently allowed*, 360 N.C. 587, 634 S.E.2d 887 (2006). As defendants have filed a Form 60, the burden was upon them to show "that the medical treatment is not directly related to the compensable injury." *Id.* at 135, 620 S.E.2d at 292.

Defendants argue that "Plaintiff's degenerative low back condition is the result of Plaintiff's pre-existing degenerative disc disease, and is not related to the long-resolved low back muscular strain work injury of 22 July 2006." Defendants direct our attention to the testimony of Dr. Adam Brown and Dr. James Maultsby as evidence "that the medical treatment is not directly related to the compensable injury." *Id.*

Dr. Brown testified that there was "some correlation" between plaintiff's degenerative disk disease and plaintiff's "pain . . . [and] limitation of activity[.]" However, Dr. Brown's statements as to "some correlation" do not satisfy defendants' burden of showing "that the medical treatment is not directly related to the compensable injury." *Id.*

Dr. Maultsby testified that he felt plaintiff's "back strain had resolved. I felt he had pain in extremity from a preexisting problem at that time." Dr. Maultsby was asked, "What preexisting condition did you feel was causing his pain?," to which he replied:

> Well, of the arthritis that he was being treated for that he was taking Methotrexate for his arthritis. I felt that he may have had

> some preexisting scarring. I don't have his complete record from Dr. Huffmon as far as the things he was treating him for, but I think it was some kind of neurological problem within the nerve, not in the musculoskeletal system, the ligaments and things. He was—again, he was seeing at least two or three different doctors for various conditions, even before he had his injury, and I thought some of these other things were contributing to his pain in his extremity at that time.

Even assuming *arguendo* that Dr. Maultsby's testimony regarding plaintiff's preexisting condition, if found to be credible and given sufficient weight, was enough to rebut the *Parsons* presumption, *see id.* at 135-36, 620 S.E.2d at 292-93, "[t]he [F]ull Commission is the sole judge of the weight and credibility of the evidence. This Court is not at liberty to reweigh the evidence and to set aside the findings simply because other conclusions might have been reached." *Roberts v. Century Contr'rs, Inc.*, 162 N.C. App. 688, 691, 592 S.E.2d 215, 218 (2004) (citations, quotation marks, ellipses, and brackets omitted). Obviously, the Full Commission did not give much weight to Dr. Maultsby's testimony as they noted that he was originally plaintiff's treating physician and found in finding of fact 19 that "Dr. Maultsby attributed any remaining problems to conditions that existed before plaintiff's July 22, 2006 injury, including rheumatoid arthritis, and he released plaintiff from his care[,]" but went on to note that Dr. Brown later found "plaintiff was still showing low back and right leg symptoms" and ultimately awarded plaintiff further medical expenses as directed by Dr. Huffmon, not Dr. Maultsby. We conclude that the Full Commission did not err in determining that defendants had not rebutted the *Parsons* presumption, *see Perez* at 135-36, 620 S.E.2d at 292-93, and therefore defendant was entitled to further compensation. This argument is overruled.

IV. Suitable Employment

[2] Defendants also argue that "the Full Commission erred in concluding the floor crew/maintenance associate position is unsuitable." (Original in all caps.) "Suitable employment is defined as any job that a claimant is capable of performing considering his age, education, physical limitations, vocational skills and experience. The burden is on the employer to show that an employee refused suitable employment." *Munns v. Precision Franchising, Inc.*, 196 N.C. App. 315, 317-18, 674 S.E.2d 430, 433 (2009) (citation and quotation marks omitted).

The Full Commission found that "[a]ll three physicians, Drs. Maultsby, Huffmon and Brown, agreed that working outside Dr. Huffmon's restrictions and/or doing heavy duty work would worsen plaintiff's pain." At Dr. Maultsby's deposition he was asked:

> Let me ask you this real quick, if I could. What is the—what's the danger, I guess, negative consequence of somebody having a lumbosacral strain, and then, you know, continuing to work heavy duty on it? I mean, what is the like heavy duty, I mean, lifting hundreds of pounds and stuff like that, what could be the negative consequences or outcomes of that?

to which Dr. Maultsby responded, "It will recur, it will recur." Dr. Huffmon testified that if plaintiff was working beyond the work restrictions he placed on him, which included "pushing or pulling up to 40 pounds [and] avoid[ing] bending or stooping," plaintiff would be at risk for increased pain. Dr. Brown testified that plaintiff "would be better off in a management or desk type position . . . like a light-duty position[.]" Thus, there is competent evidence to support the Full Commission's finding that "[a]ll three physicians, Drs. Maultsby, Huffmon and Brown, agreed that working outside Dr. Huffmon's restrictions and/or doing heavy duty work would worsen plaintiff's pain."

Defendants do not challenge the description of plaintiff's job as a "maintenance associate," and the Full Commission in uncontested finding of fact 9 noted that the job required, *inter alia*:

> reaching . . . below knee level and bending, twisting or stooping; constantly lifting, sorting, carrying, and placing merchandise and supplies of varying sizes weighing up to 50 pounds without assistance, and regularly lifting and pushing over 50 pounds with team lifting; and constantly utilizing power equipment, such as a floor buffer, pallet jack, and burnisher.

(Quotation marks omitted.); *see generally Davis v. Hospice & Palliative Care*, ––– N.C. App. –––, 692 S.E.2d 631, 638 (2010) ("Unchallenged findings of fact by the Commission are binding on appeal."). Accordingly, the tasks plaintiff was performing as a "maintenance associate" were outside of Dr. Huffmon's restrictions, and as described by the doctors' testimonies also qualify as "heavy duty." Thus, plaintiff's job "would worsen plaintiff's pain." Therefore, we conclude that the Full Commission did not err in concluding that plaintiff's job was not suitable employment as plaintiff is not "capable of performing [it] considering his . . . physical limitations[.]" *Munnsat*

317, 674 S.E.2d at 433. Defendant-employer has failed to meet its burden of "show[ing] that . . . [plaintiff] refused suitable employment." *Id.* at 318, 674 S.E.2d at 433. This argument is overruled.

V. Temporary Total Disability

[3] Plaintiff also notes in his brief that he "is entitled to temporary total disability benefits until he returns to a suitable employment position[.]" (Original in all caps.) However, plaintiff did not cross-appeal this issue, and thus we will not address it. *See generally Harllee v. Harllee*, 151 N.C. App. 40, 51, 565 S.E.2d 678, 684 (2002) ("[T]he proper procedure for presenting alleged errors that purport to show that the judgment was erroneously entered and that an altogether different kind of judgment should have been entered is a cross-appeal."); *see also* N.C.R. App. P. 28(c) (allowing for appellee to raise additional questions without filing a notice of appeal or without assignments of error in certain situations not applicable to the present case).

VI. Conclusion

We conclude that the Full Commission did not err in awarding plaintiff benefits and in concluding that defendant had not provided plaintiff with suitable employment. Therefore, we affirm.

AFFIRMED.

Judges McGEE and ERVIN concur.

STATE OF NORTH CAROLINA v. RICHARD EUGENE FOY

No. COA10-331

(Filed 21 December 2010)

Search and Seizure— search incident to arrest—carrying concealed weapon

The trial court erred by partially granting defendant's motion to suppress contraband found during the search of his truck after defendant was arrested for carrying a concealed weapon. A search incident to arrest for evidence related to the charge of

carrying a concealed weapon was within the allowable scope of *Arizona v. Gant*, 556 U.S. 332.

Appeal by State from order entered 14 December 2009 by Judge Jack Hooks in New Hanover County Superior Court. Heard in the Court of Appeals 13 October 2010.

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

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

STEELMAN, Judge.

Where defendant consented to an officer entering his truck, and a concealed weapon was thereby discovered, it was not unreasonable for the officers to search the truck for additional offense-related contraband under the second exception to *Arizona v. Gant*, 556 U.S. ––, 173 L. Ed. 2d 485 (2009).

I. Factual and Procedural Background

At approximately 3:15 a.m. on 3 April 2009, Sergeant Rob Miller ("Miller"), of the Wrightsville Beach Police Department, observed a pickup truck operated by Richard Foy ("defendant") travel across the fog line and swerve inside its lane. Miller stopped the truck under suspicion that the operator was driving while intoxicated. Miller asked defendant to step down from his truck and, as he was doing so, Miller observed a leather sheath in the cab of the truck. Defendant stated that the sheath contained a knife. Miller noticed that defendant's speech was slurred, and defendant admitted that he had consumed alcohol that night. Due to a shortage of manpower that night, Miller decided to allow defendant to have someone pick him up rather than charging him with driving while impaired. Defendant asked to call his wife, and consented to an officer retrieving his cell phone from the truck.

In retrieving defendant's cell phone, the officer observed beneath the fold-down center console the barrel of a .357 revolver in a holster. This firearm had not been previously visible to Miller. Upon discovery of the pistol, defendant was placed under arrest for carrying a concealed weapon. Following the arrest, officers searched defendant's truck. The search revealed an open bottle of wine, an open beer can, an AR 15 rifle, over 200 rounds of ammunition for the rifle, a .45

caliber pistol and rounds for the pistol, marijuana, and magazines for the rifle and pistol. After defendant's arrest, it was discovered that he had been previously convicted of the felony of forgery and uttering in 1986. Defendant was charged with possession of a firearm by a felon, possession of marijuana up to one-half of an ounce, possession of drug paraphernalia, carrying a concealed gun, operating a motor vehicle with an open container of an alcoholic beverage after consuming alcohol, and a designated lane violation.

On 12 October 2009, defendant served a motion to suppress upon the State, seeking to suppress the contraband found during the search of his truck. Defendant asserted that the search "was not supported by a reasonable suspicion, valid search warrant, or consent." On 14 December 2009, the trial court granted in part and denied in part defendant's motion to suppress. The trial court concluded that the initial entry into the truck to find defendant's cell phone was with the consent of defendant and that the .357 revolver was in plain view of the officer. The court then held that the remainder of the evidence found during the search of the truck should be suppressed because the arrest of defendant negated any immediate danger to the officers and that the search should have been done pursuant to a search warrant.

The State appeals the portion of the order granting defendant's motion to suppress pursuant to N.C. Gen. Stat. §§ 15A-979(c) (2009) and 15A-1445(b)(2009).

II. Standard of Review

Appellate review of a trial court's order upon a motion to suppress is limited to a determination of whether its findings of fact are supported by competent evidence and whether the findings of fact support the trial court's conclusions of law. *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735 (2004), *writ of supersedeas denied*, *disc. review denied*, 358 N.C. 240, 594 S.E.2d 199 (2004). In the instant case, the State does not challenge the trial court's findings of fact, and they are thus binding on appeal. *Id.* at 132, 733 S.E.2d at 735-36. The trial court's conclusions of law are subject to full review, and will be sustained if they are correct in light of its findings of fact. *State v. McCollum* 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993), *cert denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

III. Motion to Suppress Evidence

In its only argument on appeal, the State contends that the trial court erred in partially granting defendant's motion to suppress. We agree.

The trial court correctly found as a matter of law that the investigative stop of defendant was lawful, that defendant consented to the entry into the truck, and that the seizure of the .357 revolver was lawful. However, the trial court went on to hold that the items seized during the search of the truck should be suppressed, since the arrest of defendant negated any issue of officer safety. The trial court held that a search warrant should have been obtained prior to the search.

This case is controlled by the search incident to arrest doctrine. The broad application of this doctrine was recently limited by the United States Supreme Court in the case of *Arizona v. Gant*, 556 U.S. ––, 173 L. Ed. 2d 485 (2009). In *Gant*, the Supreme Court limited the permissible scope of searches incident to arrest, finding that "[p]olice may search a vehicle incident to a recent occupant's arrest" only in two circumstances: 1) "if the arrestee is within reaching distance of the passenger compartment at the time of the search" or 2) "it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at ––, 173 L. Ed. 2d at 501. The Court went on to explain that, "[w]hen these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies." *Id.*

In the instant case, defendant was arrested for carrying a concealed weapon prior to the search of his truck. Under the rationale of *Gant*, in order for the search of defendant's truck to be valid, the officers conducting the search must have had reason to believe that evidence relating to the charge of carrying a concealed weapon could be found in the truck. *Id.* This issue was addressed by the United States District Court for the Western District of North Carolina in *United States v. Leak*, No. 3:09-cr-81-W, 2010 U.S. Dist. LEXIS 45564 (W.D.N.C. April 5, 2010). In *Leak*, the defendant was arrested for driving with a suspended license. During the arrest, the arresting officer discovered that the defendant was carrying a concealed weapon. *Id.* The search incident to arrest of the defendant's vehicle yielded contraband, which he moved to suppress. *Id.* The court in *Leak* concluded that "because Defendant was arrested for carrying a concealed weapon, the officers reasonably believed that the vehicle contained evidence concerning the gun and a search of the vehicle was proper." *Id.* at *14. We find this reasoning persuasive in analyzing the instant case.

The State argues that the facts in the present case are similar to *Leak*. The State argues that the discovery of one concealed weapon

gave the officers reason to believe that further evidence of this crime, such as another concealed weapon, ammunition, a receipt, or a gun permit, could exist in the truck. Not only would the discovery of this evidence compound the crime, such evidence would be necessary and relevant to show ownership or possession, could serve to rebut any defenses offered by defendant at trial, and would aid the State in prosecuting the crime to its full potential.

Permitting a search incident to arrest to discover offense-related evidence for the crime of carrying a concealed weapon is consistent with the United States Supreme Court's holding in *Gant*. In *Gant*, the United States Supreme Court limited the scope of vehicle searches incident to arrest to cases where evidence of the crime was reasonably believed to be present based on the nature of the suspected offense. 566 U.S. at —–, 173 L. Ed. 2d at 501. The United States Supreme Court held that there could be no search incident to arrest following arrest for driving without a license, because there is no reason to believe that further evidence would be discovered in those cases. *Id.* at —–, 173 L. Ed. 2d at 497. Unlike driving without a license and certain other traffic violations, the crime of carrying a concealed weapon is more akin to illegal narcotics possession, where evidence of the crime of arrest may be found in the vehicle, than it is to a simple traffic violation. See *U.S. v. Vinton*, 594 F.3d 14, 25-26 (D.C. Cir. 2010); *Leak*, 2010 U.S. Dist. LEXIS 45564; *People v. Osborne*, 96 Cal. Rptr. 3d 696, 705 (Cal. Ct. App. 2009). A search incident to arrest for evidence related to the charge of carrying a concealed weapon was within the scope allowable under the second exception set forth in *Gant*.

This Court previously analyzed *Gant* in the context of a search incident to arrest in *State v. Toledo*, —– N.C. App. —–, 693 S.E.2d 201 (2010). In *Toledo*, an officer lawfully stopped a defendant to issue a citation, and subsequently obtained the defendant's consent to search the vehicle. *Id.* at —–, 693 S.E.2d at 201-02. During the consent search, the officer discovered a strong odor of marijuana emanating from a tire in the luggage area of the vehicle and placed the defendant under arrest. *Id.* at —–, 693 S.E.2d at 202. A subsequent search incident to arrest uncovered a substantial amount of marijuana in that tire and in another tire which was located in the undercarriage of the vehicle. *Id.* The trial court admitted the evidence discovered as a result of the consent search, but suppressed the evidence discovered as a result of the subsequent search incident to arrest. *Id.* Although we recognized that *Gant* limits searches incident to arrest, we noted

that the Supreme Court found there will be times when " 'circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." " *Id.* at ––, 693 S.E.2d at 203 (quoting *Gant*, 556 U.S. at ––, 173 L. Ed. 2d at 496). In *Toledo*, we held that the evidence discovered during the consent search justified the subsequent search incident to arrest because it was " 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.' " *Id.* We find the analysis applied by this Court in *Toledo* controlling and dispositive of the instant case.

It was reasonable for the officers in this case to believe that offense-related evidence would be in defendant's truck. Thus, the search of defendant's truck incident to his arrest for carrying a concealed weapon for evidence relating to that crime is consistent with the United States Supreme Court's ruling in *Gant*. The trial court erred in its conclusions of law based on an erroneous standard that the search following the discovery of the .357 revolver was unlawful and that such evidence should be suppressed.

REVERSED AND REMANDED.

Judges BRYANT and ERVIN, concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 DECEMBER 2010)

BACSTROM v. FOYE No. 10-568	Franklin (08CVD1612)	Affirmed
BLUEJACK ENTERS., LLC v. TOWN OF EDENTON No. 10-171	Chowan (08CVS378)	Affirmed
DAWES v. AUTUMN CORP. No. 10-249	Indust. Comm. (473729)	Dismissed
DILLAHUNT v. FIRST MT. VERNON INDUS. LOAN No. 10-13	Craven (08CVS1688)	Affirmed
DUNKLE v. UTLEY No. 10-429	Carteret (06CVD1210)	Reversed and Remanded
GARRETT v. MURPHY No. 10-129	Cherokee (07CVS323)	Reversed and Remanded
HAYNIE v. N.C. STATE BD. OF EXAM'RS OF ELEC. No. 09-1607	Wake (09CVS1654)	Affirmed
HAYNIE v. N.C. STATE BD. OF EXAM'RS OF PLUMBING No. 09-1606	Wake (09CVS3496)	Affirmed
IN RE A.H. No. 10-922	Wake (10JA79)	Affirmed
IN RE A.T., T.L., I.T. No. 10-803	Person (05J58-59) (07J19)	Affirmed
IN RE H.M.H. No. 10-819	Granville (09J55)	Affirmed in part; vacated and remanded in part
IN RE I.R.T. No. 10-790	Cleveland (07JT62)	Affirmed
IN RE N.A. No. 10-861	Cumberland (07JA503)	Affirmed
IN RE S.A.F. No. 10-674	New Hanover (08JT221)	Affirmed

IN RE S.K. No. 10-641	Buncombe (08JA321)	Affirmed
IN RE S.L.R., & A.D.R. No. 10-857	Randolph (08JT94-95)	Affirmed
IN RE T.L.T., J.W.T., A.M.T. No. 10-807	Rockingham (08JT136-138)	Affirmed
IN RE T.M. No. 10-835	Durham (09JT54)	Affirmed
IN RE TRICE No. 10-339	Buncombe (09SPC531)	Reversed
IN RE W.B. No. 10-806	Durham (08J303)	Affirmed
IN RE W.S.P. No. 10-775	Rowan (08JT103)	Affirmed
LIVINGSTON v. GOODYEAR RUBBER & TIRE CO. No. 10-131	Indust. Comm. (815245)	Affirmed
MAYNARD v. BOWLES No. 10-274	Davidson (09CVS152)	Affirmed
MCMANAWAY v. LDS FAMILY SERVS. No. 09-889	Orange (08CVS1771)	Affirmed
RICHARDSON v. MANCIL No. 09-1400	Union (08CVS2596)	Affirmed in Part and Reversed in Part
ROLLS v. ROLLS No. 10-328	Guilford (08CVD12537)	Dismissed in part; affirmed in part
SEC. CREDIT CORP. v. BAREFOOT No. 09-877	Johnston (08CVS142)	Affirmed
STATE v. BASS No. 09-1434	Wake (07CRS88892)	No Error
STATE v. DANCY No. 10-258	Guilford (08CRS78089-92) (08CRS78349-50) (08CRS78332) (08CRS78000) (08CRS78341-42)	No Error

STATE v. DEVONE No. 10-317	Johnston (09CRS1198) (09CRS1193) (08CRS58802)	No Error
STATE v. FORTUNE No. 10-81	Durham (04CRS48779)	No Error
STATE v. FRECK No. 10-700	Buncombe (09CRS63314-15)	No Error
STATE v. GRAY No. 09-1198	Forsyth (08CRS935) (08CRS58243)	No Error
STATE v. HALLMAN No. 09-1697	Cabarrus (08CRS52053)	No Error
STATE v. JOYNER No. 10-353	Sampson (09CRS51) (09CRS50004-05)	Affirmed
STATE v. KIRK No. 10-566	Mecklenburg (09CRS42324) (CRS46095) (07CRS234277)	No error in part; remand in part
STATE v. LEE No. 10-663	Onslow (08CRS55418-19)	No Error
STATE v. MARTIN No. 10-662	Macon (08CRS426-428)	No Error
STATE v. PATTON No. 10-526	Henderson (05CRS56285-86)	No Error
STATE v. POLLARD No. 10-677	Pitt (09CRS7269)	No error in part; dismissed without prejudice in part
STATE v. RAYBURN No. 09-1634	Cherokee (08CRS50859)	No prejudicial error
STATE v. RIVERS No. 09-1290	Cabarrus (08CRS53293-94)	Affirmed
STATE v. SANDERS No. 10-633	Mecklenburg (08CRS209836)	No error in part; vacated and remanded in part

STATE v. TOWNSEND No. 10-477	Cumberland (08CRS53363) (08CRS52044-45)	No Error
STATE v. WILSON No. 10-366	Stanly (08CRS51755) (09CRS2069) (08CRS1859)	No Error
STATE v. WOOTEN No. 10-215	Gaston (08CRS58646)	No prejudicial error

BOHANNAN v. McMANAWAY

[208 N.C. App. 572 (2010)]

MARVILYN B. BOHANNAN AND CECIL L. BOHANNAN, JR., PLAINTIFFS JOHNNY BRANCH AND KRISTIN BRADLEY BRANCH, PLAINTIFF INTERVENORS v. EMILY M. MCMANAWAY AND JOHNNIE MICHAEL MURRAY, DEFENDANTS

No. COA09-887

(Filed 21 December 2010)

1. Child Custody and Support— motion to set aside custody order —abuse of discretion—motion to set aside consent order

The trial court abused its discretion by denying defendant's Rule 60(b) motion to set aside a child custody order where the trial court failed to hear any testimony in the matter. Defendant's failure to appear at the custody hearing did not obviate the need for a hearing on the issue of custody. Furthermore, the Court of Appeals strongly urged the trial court to consider on remand defendant's arguments concerning the validity of a previously entered consent order.

2. Child Custody and Support— motion to intervene— wrongfully granted

The trial court erred in granting plaintiff-intervenors' motion to intervene in a child custody action because they failed to make a sufficient showing to support a determination of standing in the matter. Moreover, even if plaintiff-intervenors had standing, their motion did not contain grounds for modification of the custody order nor did it allege any changes in circumstances affecting the welfare of the child.

3. Jurisdiction— subject matter jurisdiction—order from another state

The trial court did not err by failing to dismiss a child custody action *ex mero motu*. The Nevada district court concluded that North Carolina had jurisdiction, and the Court of Appeals cannot disturb an order from another state's district court, even if it is based on an order from this State that may be void.

Appeal by defendant Emily M. McManaway from orders entered 16 January 2009, 29 January 2009, and 7 April 2009 by Judge Joseph M. Buckner in Orange County Superior Court. Heard in the Court of Appeals 27 January 2010.

Coleman, Gledhill, Hargrave & Peek P.C., by Leigh Ann Peek, for plaintiffs and plaintiff-interveners.

Betsy J. Wolfenden for defendant Emily M. McManaway.

ELMORE, Judge.

Emily McManaway (defendant) is the mother of child Bobby,[1] and defendant Johnny Murray is the putative father. Bobby was born 30 August 2003 in Nevada, but defendant brought him to North Carolina on 16 September 2003. Cecil Bohannan is defendant's brother. Cecil Bohannan and his wife, Marvilyn (together, plaintiffs), took physical custody of Bobby. Defendant then returned to Nevada without Bobby. In March 2004, defendant asked plaintiffs to return Bobby to her in Nevada, which they did. Nevada Protective Services took custody of Bobby on 5 March 2006. After a hearing in Nevada, plaintiffs took custody of Bobby and returned to North Carolina. Plaintiffs arranged for plaintiff-interveners Johnny and Kristen Branch to care for Bobby. Plaintiffs then filed a complaint seeking custody of Bobby. This appeal, for the most part, stems from that complaint.

Background

"The procedural quagmire that confronts us here is best unraveled by a chronological account of the proceedings in the trial court." *Bailey v. Gooding*, 301 N.C. 205, 206, 270 S.E.2d 431, 432 (1980).

On 14 November 2003, a consent order was filed in Orange County. The consent order had file number 03 CVD 2183 and stated that the cause came "on to be heard . . . during a regularly scheduled session of Civil District Court" and, "at the call of the calendar for trial, counsel indicated to the court that an Agreement with regard to the issues of child custody had been executed and was ready for entry of judgment[.]" The consent order decreed that Bobby would be "placed in the temporary joint legal and physical custody of Emily M. McManaway and Marvilyn and Cecil Bohannan Jr.," and Bobby's primary residence would be with plaintiffs, with whom he had lived since 16 September 2003. The consent order also decreed that plaintiffs would "be responsible for providing health insurance for the minor child who is the subject of this action, and shall be vested with the authority to authorize and commission any and all health or medical care services as they deem fit and proper." Both plaintiffs and defend-

1. "Bobby" is not the child's real name.

ant signed the consent order before notaries. The order contains the signature of District Court Judge M. Patricia DeVine.

Plaintiffs filed their complaint on 13 October 2006 in Orange County District Court. According to the complaint, the Court in Clark County, Nevada, and the Court in Orange County participated in a Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) telephonic hearing on 27 September 2006 and determined that North Carolina had jurisdiction over Bobby. In the prayer for relief, plaintiffs asked the court to consolidate the action (06 CVD 1810) with the earlier action (03 CVD 2183), to place Bobby in their sole legal and physical custody, and to waive custody mediation. The complaint appears to have been properly served.

Defendant filed her answer and counterclaim on 17 November 2006. She asked that defendant Murray not be added as a party and that the court find "that the best and proper placement" for Bobby was with defendant. The answer includes a sheet titled "VERIFICATION" that states the following:

> Emily McManaway, being first duly sworn, deposes and says that he/she is the Defendant in the foregoing action, that he/she has read the foregoing ANSWER and COUNTERCLAIM and knows the contents thereof to be true of his/her own personal knowledge except for those matters and things alleged therein upon information and belief; and as to those matters and things; he/she believes same to be true.

A notary in Clark County, Nevada, notarized the verification on 16 November 2006. The record also includes an affidavit of service of process by registered or certified mail, stating that defendant mailed by certified mail a copy of the answer to "Leigh Ann Peak [*sic*]," plaintiffs' attorney. The record also includes the return receipt, signed by an agent of Ms. Peek on 20 November 2006. Defendant also filed a petition to sue as an indigent, swearing that she was "financially unable to advance the costs of filing th[e] action or appeal." The petition was denied as moot, with a notation that "no filing fee or other costs are required," presumably because defendant was the defendant and therefore not suing anybody. This petition was filed in Orange County on 17 November 2006 and was denied by the Clerk of Superior Court on the same date.

Plaintiffs then issued notice by publication to defendant because she "did not answer the Complaint" and plaintiffs claimed that defend-

ants McManaway and Murray were "concealing themselves or their whereabouts to avoid service of process, or are simply refusing service via Rule 5[.]"

The trial court entered a custody order on 15 March 2007 (the 2007 custody order) granting permanent custody of Bobby to plaintiffs. According to the custody order, the Postal Service returned calendar requests and notices of hearing for 2 January 2007 and marked "refused." According to the order, after defendants did not appear at the 2 January 2007 hearing, plaintiffs used service by publication. Also, according to the order, neither defendant appeared at the March 2007 hearing. In the order, the trial court found "it appropriate to consolidate the November 2003 North Carolina action, 03 CVD 21[3]3, with this action, in order that [defendant] Murray may be included as a proper party to this action involving the custody of the minor child." On 5 July 2007 in Surry County, the plaintiff-intervener Branches filed a petition for adoption of a minor child, seeking to adopt Bobby. However, District Court Judge Spencer G. Key, Jr., later dismissed the Branches' petition for adoption for lack of subject matter jurisdiction.

On 15 October 2007, defendant filed a Rule 60 motion seeking relief from the 15 March 2007 custody order. According to the Rule 60 motion, plaintiffs' counsel misrepresented to the trial court that defendant had not filed an answer, that plaintiffs' alias and pluries summons was issued more than ninety days after the initial summons was issued on 13 October 2006, and that plaintiffs failed to exercise due diligence in ascertaining defendant's address or phone number. More disturbingly, the motion alleges that Judge Buckner never held a hearing on the matter in March 2007, despite the custody order's statement that he did hold such a hearing.

On 13 November 2007, Johnny Lee Branch and Kristin Bradley Branch filed a motion to intervene pursuant to Rule 24 as well as a motion for permanent custody. The Branches later moved to amend their motion to intervene to contain the allegation that they had "a parent-child relationship" with Bobby.

On 11 March 2008, defense counsel filed a motion to have Judge Buckner recused from hearing the case because he had committed various errors in handling the case, including: signing a custody order during calendar call, granting plaintiffs' prayers for relief without reviewing the court file, entering a court order out of session and without reviewing the court file to determine whether defendant had received proper notice, entering an order that recites that the matter

had been heard before Judge Buckner in March 2007 when the clerk's log has no record of such a hearing, and entering an order containing false findings of fact. Defense counsel alleged that "the propriety of the entry of the March 15, 2007 Custody Order is at issue in this case" and that Judge Buckner should not hear the Rule 60 motion to ensure that defendant would receive an impartial hearing.

On 25 July 2008, defendant filed another motion to recuse, this time moving the court to recuse all of the district court judges in District 15-B (Orange County) from hearing any matters in the case. On 8 August 2008, she filed a motion requesting an outside judge to hear her motions to recuse. On 24 November 2008, defendant filed a Rule 12 motion to dismiss the instant action because the trial court did not have subject matter jurisdiction to enter the 2003 consent judgment and, thus, plaintiffs did not have standing to file the 2006 suit.

On 16 January 2009, Judge Buckner filed an order denying defendant's motions to recuse and motions for relief pursuant to Rule 60. On 29 January 2009, Judge Buckner granted the Branches' motion to intervene after finding that the Branches had an alleged parent-child relationship with Bobby and, thus, had standing to intervene as plaintiffs. On 13 February 2009, defendant filed her notice of appeal from the 16 January 2009 and 29 January 2009 orders.

On 2 February 2009, defendant filed a Rule 60(b)(4) motion for relief from the 2003 consent order, asking that it be set aside as void. On 5 February 2009, defendant filed a motion in the cause, alleging that the Orange County District Court was required to relinquish jurisdiction to Nevada pursuant to the Interstate Compact on the Placement of Children.

On 27 February 2009, the Branches filed a motion to stay the proceedings on defendant's 2 February 2009 Rule 60(b)(4) motion and 3 February 2009 motion in the cause. Judge Buckner granted this motion by order filed 7 April 2009. In that same motion, Judge Buckner denied defendant's various motions to continue and recuse as well as her motion for attorneys' fees.

On 15 April 2009, defendant filed her notice of appeal from the 6 April 2009 order denying her motions for attorneys' fees and motions to continue and recuse. Before us now on appeal are Judge Buckner's orders entered 16 January 2009, 29 January 2009, and 7 April 2009.

Arguments

Rule 60 Motion

[1] We first address the order entered 16 January 2009, which denied defendant's Rule 60(b) motion and her motion to recuse. On appeal, defendant argues that the trial court abused its discretion by denying defendant's motion to set aside the 15 March 2007 order. We agree.

Rule 60(b) allows a court to relieve a party "from a final judgment, order or proceeding" if the judgment is void or for "[a]ny other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2009). "[T]he standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion." *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006).

Defendant, in her Rule 60 motion, alleged that the trial court "erred by issuing or signing a custody order during calendar call without reviewing the court file" and based upon plaintiffs' counsel's "proffer." She also alleged various lapses in service of process. With respect to defendant's claim that the trial court entered the custody order without taking evidence, defendant made the following relevant allegations in her motion:

> 6. Defendant Emily M. McManaway was not present at Calendar Call on January 2, 2007[,] because she did not receive Plaintiffs' notice of hearing.
>
> 7. At the call of the instant case, Plaintiffs' counsel represented to the Court that Defendant Emily M. McManaway had not filed an answer. Said representation was false. . . .
>
> 8. Based upon Plaintiffs' counsel's representation that Defendant Emily M. McManaway had not filed an answer in this case, the Honorable Joseph M. Buckner either signed an order provided by Plaintiff's counsel during calendar call granting Plaintiffs sole permanent legal and physical custody of the minor child, or, issued an order from the bench during calendar call granting Plaintiffs sole permanent legal and physical custody of the minor child and instructed Plaintiffs' counsel to provide an order. The clerk's calendar call log from January 2, 2007[,] states that an order was signed; however, the custody order prepared by Plaintiffs' counsel states that the order was issued from the bench during calendar call and that Judge Buckner instructed her to "provide an appropriate custody order for entry." . . .

Plaintiffs' own brief on appeal recites the circumstances of the entry of the order as follows: "As no one appeared on behalf of either Defendant, and as neither Defendant had filed a legally effective answer to the Complaint as of that time, the Court instructed Appellee's counsel to hand up an order based upon the verified pleadings." However, it is undisputed that defendant filed an answer on 17 November 2006 and that she had served a copy of the answer on plaintiffs' counsel. Plaintiffs repeatedly stress that the answer was not signed or verified and was, therefore, not "legally effective." However, Plaintiffs cite no legal authority for this argument, and we find no legal requirement that an answer in a custody matter be verified. *See* N.C. Gen. Stat. § 1A-1, Rule 11(a) (2009) ("Except where otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit."). Moreover, defendant's answer clearly and specifically addressed the complaint by admitting some allegations, denying others, and requesting specific relief, including that custody of the minor child be granted to defendant. Despite everyone's acknowledgment that this answer was filed with the trial court and served upon plaintiffs' counsel, the 2007 order includes as finding of fact 4: "Neither Defendant has answered or even contacted Plaintiff's attorney or the court." Plaintiffs have not provided any explanation why such a finding, which is patently false, would be included in the 2007 order.

It is also undisputed that the trial court entered the 2007 custody order without hearing any evidence. This was error, even though defendant was not at the hearing to oppose the evidence or offer her own. This Court has explained that "an award of permanent custody may not be based upon affidavits." *Story v. Story*, 57 N.C. App. 509, 515, 291 S.E.2d 923, 927 (1982) (citation omitted). In *Story*, the trial court based a permanent custody order on the plaintiff's verified complaint and verified answer to the defendant's counterclaim. *Id.* at 514, 291 S.E.2d at 926. We remanded, explaining that "a more reliable form of evidence would have been plaintiff's sworn testimony, subject to cross examination by defendant's attorney." *Id.* at 515, 291 S.E.2d at 927. We concluded that "[t]he trial court erred in failing to hear any testimony in the matter" and that the defendant's failure to respond to discovery, verify his answer, or appear at the custody hearing did not preclude the trial court from "resolv[ing] the issue of [the] plaintiff's fitness to have custody or obviate the need for a hearing . . . on that issue." *Id.* at 516, 291 S.E.2d at 927 (citation omitted).

Here, as in *Story*, the trial court failed to hear any testimony in the matter, and defendant's failure to appear at the custody hearing

did not obviate the need for a hearing on the issue of custody.[2] The trial court abused its discretion by denying defendant's Rule 60(b) motion. A court cannot enter a permanent custody order without hearing testimony, and the trial court in this case should not have relied solely on the allegations in plaintiffs' complaint with respect to Bobby's custody. Accordingly, we reverse the 16 January 2009 order denying defendant's motion for relief pursuant to Rule 60, and we vacate the 2007 custody order. We remand to the district court for a hearing on the issue of custody.

Although the 2007 custody order fails on its own, even without any consideration of the 2003 consent order, we feel compelled to mention the 2003 consent order, as it formed much of the foundation upon which this entire charade of a custody case was constructed. We are very disturbed by the numerous procedural errors in this custody case. Although we have no information in our record about the merits of this custody case and we express no opinion regarding the fitness of defendant as a parent or what custody arrangement would serve the best interests of the child, it is clear that this case has been seriously flawed from the start.

Defendant argues that the 2003 consent order is void because the trial court lacked jurisdiction to enter the order because plaintiffs failed to file a complaint prior to filing the order with the Court. However, defendant has failed to present any issues as to the validity of the 2003 consent order on appeal. Defendant filed a motion pursuant to Rule 60 seeking to set aside the 2007 order on 15 October 2007; this motion makes no mention of the 2003 consent order. The trial court ruled on the defendant's Rule 60 motion on 16 January 2009, and defendant gave notice of appeal from this order on 13 February 2009. However, on 2 February 2009—after the trial court's order as to the Rule 60 motion regarding the 2007 order—the defendant filed a motion pursuant to Rule 60(b)4 seeking to set aside the 2003 consent order as "void as a matter of law." The motion does not

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2. The need for testimony is amply demonstrated by the fact that the 15 March 2007 order includes a finding of fact that "Since March 8, 2006, the minor child has resided in the care, custody and control of Cecil Bohannan, Jr. and Marvilyn Bohannan in North Carolina." However, at the hearing on the motion to intervene on 24 November 2008, Ms. Peek, acting as counsel for both plaintiffs and the Branches, introduced Mr. and Mrs. Branch to the court as those "with whom the child has been residing for well over a year." Mr. Branch then testified that Bobby had been residing with him and his wife since the "end of February, first of March of 2007." Thus, at the time of entry of the 2007 order, Bobby was not actually living with plaintiffs, contrary to the finding in the order.

state any reasons why defendant contends that the 2003 consent order is "void as a matter of law." The trial court never ruled upon the defendant's 2 February 2009 Rule 60 motion. Defendant attempted to schedule a hearing on her Rule 60 motion, as well as other motions she had just filed, after she had given notice of appeal as to the 16 January 2009 order. As a result, on 27 February 2009, counsel for the Branches filed a motion to stay proceedings pursuant to N.C. Gen. Stat. § 1-294. An order allowing the Branches' motion to stay was entered on 6 April 2009.

> "When an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein . . . ." N.C. Gen. Stat. § 1-294 (2009). The general rule has been that a timely notice of appeal removes jurisdiction from the trial court and places it in the appellate court. Pending appeal, the trial judge is generally *functus officio*, subject to two exceptions and one qualification . . . .
>
> The exceptions are that notwithstanding the pendency of an appeal the trial judge retains jurisdiction over the cause (1) during the session in which the judgment appealed from was rendered and (2) for the purpose of settling the case on appeal. The qualification to the general rule is that the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned and thereby regain jurisdiction of the cause.

In re Adoption of K.A.R., ––– N.C. App. –––, –––, 696 S.E.2d 757, 763 (2010) (additional quotations and citations omitted; alterations in original).

Therefore, defendant's arguments regarding the 2003 consent order were never presented to or considered by the trial court, as she failed to raise them until after she had divested the trial court of jurisdiction to do so by the filing of her notice of appeal from the 16 January 2009 order. Neither the exceptions nor the qualification to the general rule that the trial court loses jurisdiction upon notice of appeal applied in this case. Defendant has not appealed from or raised any arguments in regard to the 6 April 2009 order allowing the stay of the action.

Although a motion pursuant to Rule 60(b)(4) was the correct method for defendant to attack the 2003 consent order, her arguments in this appeal are premature. We believe that it is particularly inappropriate for us to make a ruling upon the 2003 consent order where a motion regarding this issue was filed in the trial court but not

heard, and indeed the action was stayed before the motion could be heard. Because of this procedural problem, we have no record upon which to conduct a proper review of the 2003 consent order.

However, as all parties have briefed and argued issues regarding the 2003 consent order, and in the interest of providing guidance to the trial court upon remand and in the hopes of assisting this prolonged matter to a conclusion, we agree that defendant has raised serious issues regarding the district court's lack of subject matter jurisdiction to enter the 2003 consent order. Plaintiffs attempt to present the 2003 consent order as insignificant to the issues before this Court and to assert a legal basis for its entry, but both of these arguments are spurious at best. Plaintiffs admit that they did not file a complaint or issue a summons prior to entry of the 2003 consent order. The order addresses only the issues of custody of the minor child and provision of medical insurance for him by plaintiffs. Plaintiffs seek to justify the entry of the 2003 consent order in the absence of an underlying complaint by arguing that the order was entered "as a Voluntary Support Agreement in accord with N.C.G.S. §110-132 [*sic*] which states inter alia 'that such agreements for periodic payments, when acknowledged . . . filed with, and approved by a judge of the district court at any time, shall have the same force and effect as an order of support entered by that court.' "

It is obvious that N.C. Gen. Stat. § 110-132 is not applicable to the 2003 consent order. The order makes no mention of N.C. Gen. Stat. § 110-132 and includes no findings of fact or conclusions of law which would be required by that statute, which deals with proceedings to establish paternity. The putative father, defendant Murray, was not even a party to the 2003 consent order. In fact, the order includes a finding of fact that, "[a]t this time, no biological father has been identified or named." Plaintiffs base their argument upon a misquoted section of the statute which is taken out of context; the statute actually states that

> [a] written agreement to support the child by periodic payments, which may include provision for reimbursement for medical expenses incident to the pregnancy and the birth of the child, accrued maintenance and reasonable expense of prosecution of the *paternity action*, when acknowledged as provided herein, filed with, and approved by a judge of the district court at any time, shall have the same force and effect as an order of support entered by that court, and shall be enforceable and subject to

> modification in the same manner as is provided by law for orders of the court in such cases.

N.C. Gen. Stat. § 110-132(a) (2009) (emphasis added). The 2003 consent order did not address periodic payments of any sort, did not include the putative father, and, according to plaintiffs' own argument in their brief, was intended only to provide for medical insurance coverage for the child. In sum, the 2003 consent order was not a paternity order, and it was not entered under N.C. Gen. Stat. § 110-132. The 2003 consent order was simply an order that made a "child-custody determination," as defined by N.C. Gen. Stat. § 50A-102(3). *See* N.C. Gen. Stat. § 50A-102(3) (2009) (defining a "child custody determination" as "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or other monetary obligation of an individual."). Although the order mentions that plaintiffs will provide medical insurance for the child, it also grants "temporary joint legal and physical custody" to plaintiffs and defendant.

Section 50A-201 provides "*the exclusive jurisdictional basis for making a child-custody determination by a court of this State.*" N.C. Gen. Stat. § 50A-201(b) (2009) (emphasis added). It provides:

> (a) Except as otherwise provided in G.S. 50A-204, a court of this State has jurisdiction to make an initial child-custody determination only if:
>
> (1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
>
> (2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:
>
> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and

b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

(3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208; or

(4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

N.C. Gen. Stat. § 50A-201(a) (2009).

No complaint was filed in the case file in which the 2003 consent order was entered, nor does the 2003 consent order contain any findings of fact or conclusions of law which would begin to address the requirements of N.C. Gen. Stat. § 50A-201(a). The 2003 consent order itself reveals that North Carolina may not have been the "home state" of the child, as it includes as a finding that the child was born on 30 August 2003 and "has resided in the home of Plaintiffs, with the Defendant, since September 16, 2003[,] [in] Saxapahaw, NC[.]" Section 50A-102(7) defines "home state" as

> the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

N.C. Gen. Stat. § 50A-102(7) (2009). At the time of entry of the 2003 consent order, 14 November 2003, the child was less than six months old. However, the order does not include a finding that the child lived in North Carolina with either plaintiffs or defendant from birth. The time period from birth until 16 September 2003 is conspicuously missing from the findings, but a finding regarding this time period was required in order for the court to determine if North Carolina was the child's home state, as necessary for North Carolina to exercise child custody jurisdiction. Although the trial court was probably unaware of this fact in 2003, we now know that the child in fact did not live in North Carolina from birth; he lived in Nevada from birth until 16

September 2003. In any event, the 2003 consent order made no finding or conclusion that North Carolina was the "home state" of the child.[3]

The parties cannot confer subject matter jurisdiction upon the court by entry of a consent order regarding child custody. In *Foley v. Foley*, this Court addressed the effect of entry of a consent order regarding child custody as follows:

> Defendant argues, and plaintiff concedes, the signing of the Consent Order did not waive any challenge to subject matter jurisdiction. The UCCJEA is a jurisdictional statute, and the jurisdictional requirements of the UCCJEA must be met for a court to have power to adjudicate child custody disputes. *[S]ee* N.C.G.S. §§ 50A-101 to -317 (2001). The PKPA is a federal statute also governing jurisdiction over child custody actions and is designed to bring uniformity to the application of the UCCJEA among the states. *[S]ee* 28 U.S.C.A. § 1738A (2002). Subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel. Accordingly, the trial court erred in ruling the signing of the Consent Order by defendant waived any challenge to the subject matter jurisdiction of the trial court.

156 N.C. App. 409, 411-12, 576 S.E.2d 383, 385 (2003) (additional citations omitted). Therefore, although the 2003 consent order includes a conclusion of law that the district court has jurisdiction over the parties and subject matter of the proceeding, there appears to be no factual basis to support such a conclusion of law.

The 2003 consent order also states that the cause came "on to be heard . . . during a regularly scheduled session of Civil District Court" and "at the call of the calendar for trial, counsel indicated to the court that an Agreement with regard to the issues of child custody had been executed and was ready for entry of judgment[.]" However, plaintiffs acknowledge that there was no "cause" and the case was not heard during any regularly scheduled session of district court. By all accounts, the 2003 consent order, though entered by the district court, appears to be a fiction. Indeed, during oral arguments before this Court, plaintiffs' counsel acknowledged that the 2003 order was

3. Nor did the order address the provisions of the Parental Kidnapping Prevention Act of 1980 (PKPA), as it made no finding that the child had no home state. *See Potter v. Potter*, 131 N.C. App. 1, 6, 505 S.E.2d 147, 150 (1998) ("Accordingly, a trial court may assume significant connection jurisdiction under G.S. § 50A-3(a)(2) in an initial child custody matter only upon proper determination by the court that the child in question has no home state as defined in 28 U.S.C. § 1738A(b)(4) at the time the custody action pending before the trial court was commenced.").

not valid. Thus, although we do not hold the 2003 consent order to be void at this time because the trial court never ruled upon the defendant's Rule 60(b)(4) motion as to that order, we strongly urge the trial court to consider the defendant's arguments as to the 2003 consent order carefully on remand.

Motion to Intervene and Motion for Custody

[2] Defendant argues that the trial court erred by granting plaintiff interveners' motion to intervene and motion for custody. We first note that the Branches did not file a brief before this Court on appeal. The arguments we address are those raised by plaintiffs and by defendant. The Branches filed their original motion to intervene on 13 November 2007, eight months after the district court entered its custody order granting sole legal and physical custody of Bobby to plaintiffs. In their motion, the Branches sought intervention pursuant to Rule 24 of our Rules of Civil Procedure. They alleged that they "have an interest relating to the issue of custody of the minor child who is the subject of the action and their ability to protect that interest would be impaired and impeded unless they are adequately represented in said custody action." The district court later amended the motion to intervene "to contain the allegation that the Branches have a parent-child relationship with the child who is the subject of this action."

The motion also moved the trial court, "pursuant to N.C.G.S. Chapter 50[,] for custody of the minor child," reciting the following reasons:

> (a) the minor child has resided in their physical care since March 2, 2007[,] and they have a continuing on-going relationship with the minor child; (b) upon information and belief, the biological parents of the minor child have neglected and abandoned the minor child, are incapable of providing the proper care and supervision of the minor child, and their conduct has been inconsistent with their constitutionally protected status; and (c) it is in the best interests of the minor child that he be placed in their permanent care, custody and control either solely or jointly with the Plaintiffs in this action.

The trial court granted the Branches' amended motion on 29 January 2009. The trial court found as fact that the Branches "have an alleged parent-child relationship with" Bobby and "have standing pursuant to N.C.G.S. § 50-13.1 and § 50.13.2 to intervene in this action." In the order, the trial court decreed that the Branches' motion to intervene and motion for custody would constitute their initial pleading, and it deemed that the initial pleading was filed on 29 January 2009.

The Branches sought intervention pursuant to Rule 24(a)(2) of our Rules of Civil Procedure. Rule 24(a)(2) provides:

> Intervention of right.—Upon timely application anyone shall be permitted to intervene in an action:
>
> * * *
>
> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C. Gen. Stat. § 1A-1, Rule 24(a)(2) (2009). To satisfy the requirements of Rule 24(a)(2), the "intervening party 'must show that (1) it has a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, and (3) there is inadequate representation of that interest by existing parties." *Harvey Fertilizer & Gas Co. v. Pitt County*, 153 N.C. App. 81, 85-86, 568 S.E.2d 923, 926 (2002) (quoting *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 459, 515 S.E.2d 675, 683 (1999)). We review the trial court's order granting intervention *de novo*. *Id.* at 89, 568 S.E.2d at 928.

"Standing for an individual to bring an action for child custody is governed by N.C.G.S. § 50-13.1(a)[.]" *Yurek v. Shaffer*, ––– N.C. App. –––, –––, 678 S.E.2d 738, 744 (2009). General Statutes section 50-13.1 provides that "[a]ny parent, relative, or other person . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child[.]" N.C. Gen. Stat. § 50-13.1(a) (2009).

> Although N.C.G.S. § 50-13.1(a) broadly grants standing to any parent, relative, or person claiming the right to custody, when such actions are brought by a non-parent to obtain custody to the exclusion of a parent, our appellate courts have also required allegations of some act inconsistent with the parent's constitutionally protected status.

Yurek at –––, 678 S.E.2d at 744 (citations omitted).

In *Ellison v. Ramos*, this Court elaborated on when a third party has standing in a custody dispute with a natural parent. 130 N.C. App. 389, 502 S.E.2d 891 (1998). We held "that a relationship in the nature of a parent and child relationship, even in the absence of a biological relationship, will suffice to support a finding of standing." *Id.* at 394,

502 S.E.2d at 894. However, *Ellison* makes clear that a "parent and child relationship" is a legal conclusion that must be factually supported, *id.*; merely using the phrase "parent and child relationship" is not sufficient to support a finding of standing. In *Ellison*, the child's biological mother was in a persistent vegetative state, and the father, Mr. Ramos, entered into a relationship with the plaintiff, Ms. Ellison. *Id.* at 391, 502 S.E.2d at 892. After Ms. Ellison and Mr. Ramos separated, Mr. Ramos sent the child to live in Puerto Rico with the child's grandparents. *Id.* at 392, 502 S.E.2d at 893. Ms. Ellison brought suit, seeking custody of the child. *Id.* The trial court dismissed her complaint after finding that she lacked standing to proceed. *Id.* We reversed the order of dismissal after finding that Ms. Ellison's complaint alleged sufficient facts to conclude that she and the child had a parent-child relationship. *Id.* at 396, 502 S.E.2d at 895. We based our reversal on the following factual allegations drawn from Ms. Ellison's complaint:

> Ms. Ellison's relevant allegations were that she "is the only mother the minor child has known and [that] she has mothered the child" for the five years she and Mr. Ramos were intimately involved. Further, "after the parties separated, the minor child lived with [Ms. Ellison] and was cared for by [Ms. Ellison] until [Mr. Ramos] removed her from [Ms. Ellison]'s care and took her to Puerto Rico, where he left her with her maternal grandparents." Finally, "during [Ms. Ellison] and [Mr. Ramos]'s relationship, [Ms. Ellison] was the responsible parent in the rearing and caring for the minor child, as she was the adult who took the minor child to her medical appointments, to school, attended teacher conferences, took the minor child for diabetic treatment and counseling, provided in-home medical care and treatment for her diabetes, taught her about caring [for] her diabetes, and bought all the child's necessities, including clothing, school supplies, medical supplies, toys, books, etc."

Id.

Here, the Branches' motion made a single factual allegation to support a conclusion that a parent-child relationship existed between them and Bobby: "the minor child has resided in their physical care since March 2, 2007[,] and they have a continuing on-going relationship with the minor child." The Branches did not actually make any allegation of a "parent-child relationship" in their motion; this allegation was added by amendment after Mr. Branches' testimony, to con-

form the motion to his testimony. The motion includes no facts which would indicate the type of relationship the Branches have to Bobby. Mr. Branch's testimony indicated only that: Bobby had lived with the Branches since 2007, Bobby had bonded with Mr. Branch and his wife, Bobby had "really thrived," and Mr. Branch "love[d] that boy with all [his] heart." We hold that these factual allegations are not sufficient to support a conclusion that a parent-child relationship existed between the Branches and Bobby. Accordingly, the Branches have not made a sufficient showing on this record to support a determination of standing to intervene in the matter, and the trial court erred by holding otherwise.

Even assuming *arguendo* that the Branches would have standing to file a motion to intervene in this custody action, the Branches filed the motion to intervene after entry of the 2007 custody order which granted permanent custody to plaintiffs. Thus, the Branches were requesting to intervene to seek a modification of the 2007 custody order. Modifications of child custody are governed by N.C. Gen. Stat. § 50-13.7.

To modify a child custody or support order, section 50-13.7(a) requires a "motion in the cause and a showing of changed circumstances by either party or anyone interested." N.C. Gen. Stat. § 50-13.7(a) (2009).

> [O]nce the custody of a minor child is judicially determined, that order of the court cannot be modified until it is determined that (1) there has been a substantial change in circumstances affecting the welfare of the child; and (2) a change in custody is in the best interest of the child. [Because] there is a statutory procedure for modifying a custody determination, a party seeking modification of a custody decree must comply with its provisions. There are no exceptions in North Carolina law to the requirement that a change in circumstances be shown before a custody decree may be modified.

Bivens v. Cottle, 120 N.C. App. 467, 469, 462 S.E.2d 829, 831 (1995) (quotations and citations omitted).

The Branches' motion to intervene and motion for custody did not contain any grounds for modification of the 2007 custody order, nor did it allege any change in circumstances affecting the welfare of the child, much less a substantial change in circumstances. The motion also fails to allege why it would be in Bobby's best interest to

change custody. In addition, Mr. Branch's testimony at the motion to intervene hearing demonstrated the opposite of a change of circumstances: He testified that Bobby was living with him and his wife at the time 2007 order was entered and that Bobby continued to live with them.

Dismissal *Ex Mero Motu*

[3] Defendant also argues that we should dismiss this action *ex mero motu* because Nevada has jurisdiction over the custody case, not North Carolina. "When the record clearly shows that subject matter jurisdiction is lacking, the [c]ourt will take notice and dismiss the action *ex mero motu* in order to avoid exceeding its authority." *In re J.T.*, 363 N.C. 1, 3-4, 672 S.E.2d 17, 18 (2009) (quotations and citations omitted). Here, defendant bases her argument on a 2006 Nevada temporary custody order. That order is not in the record on appeal for this case, COA 09-887. However, that order is in the record on appeal for the companion to this case, COA 09-889.

> Ordinarily, a court, in deciding one case, will not take judicial notice of what may appear from its own records in another and distinct case, unless made part of the case under consideration, even though between the same parties or privies and in relation to the same subject matter.
>
> It was held in *Daniel v. Bellamy*, 91 N.C. 78, that in a proceeding against executors for an account that a Probate Court could not take judicial notice of the fact that the probate of the will naming defendants as executors had been revoked in another proceeding in the same court.
>
> This is far from saying that an appellate court may not take judicial notice of, and give effect to its own records in another, but interrelated, proceeding, particularly where the issues and parties are the same, or practically the same, and the interrelated case is specifically referred to in the case on appeal in the case under consideration.

State v. McMilliam, 243 N.C. 775, 777, 92 S.E.2d 205, 207 (1956) (quotations and citations omitted). In *McMilliam*, we took judicial notice of facts included in the record of another pending case involving the same parties:

> The case on appeal specifically states that Judge Fountain's judgment was based upon the evidence in the case of *S. v. James*

> *McMilliam and Bettie Lee McMilliam*, "the companion case to this one." The case of *S. v. James and Bettie Lee McMilliam* was argued before us on the same day as the instant case by the same counsel, and is before us for decision. The evidence in this case, according to the case on appeal, was omitted to avoid repetition, and no doubt to save costs for the appellants. The evidence in *S. v. James and Bettie Lee McMilliam* is before us in that case, and it seems clear that it was the plain intent of the counsel for the defense and the trial solicitor to make the evidence in that case a part of this case. We know of no reason why we should not take judicial notice of, and consider in the instant case the evidence in the interrelated case.

Id. at 777, 92 S.E.2d at 207. *See also West v. G. D. Reddick, Inc.*, 302 N.C. 201, 202, 274 S.E.2d 221, 223 (1981) ("This Court has long recognized that a court may take judicial notice of its own records in another interrelated proceeding where the parties are the same, the issues are the same and the interrelated case is referred to in the case under consideration.") (citations omitted). Accordingly, we take judicial notice of the 2006 orders entered by the district court in Clark County, Nevada, which are included in the record on appeal of COA 09-889. The first order, filed 15 March 2006, placed Bobby in protective custody after finding that "continuation of residence in the home [of defendant] would be contrary to the welfare of the child(ren)." The order recommended that Bobby be released to Cecil Bohannan "pending further proceedings." The order also recommended that "the Clark County Department of Family Services provide for the placement, care and supervision of [Bobby] until further order of this Court." The second order, filed 7 October 2006, followed a telephonic UCCJEA hearing. The Nevada court concluded that it did "not have UCCJA [*sic*] Jurisdiction, and the State of North Carolina has UCCJA [*sic*] Jurisdiction due to a valid Court Order." The "valid court order" mentioned in the Nevada order is the 2003 consent order discussed above.

We cannot disturb an order from another state's district court, even if it is based upon a North Carolina order that we believe may be void. Accordingly, dismissal *ex mero motu* is not appropriate.

Conclusion

In sum: (1) we reverse the 16 January 2009 order denying defendant's Rule 60 motion; (2) we vacate the 2007 custody order because the trial court failed to take any evidence before entering the order; (3) we reverse the 29 January 2009 order granting the Branches'

motion to intervene and motion for custody; and (4) we remand matter 06 CVD 1810 to the district court for a custody hearing not inconsistent with this opinion.

This proceeding has been exceptionally contentious, and we have not addressed the many motions filed in this matter that were not subjects of this appeal. Such contentiousness does not benefit the child. We admonish counsel for all parties and the trial court to take great care to follow the statutory requirements in form and in substance. Bobby's custody has been in dispute for most of his short life, and his life has been changed by these proceedings, although whether his life has been changed for better or worse we cannot say at this point. Regardless, he deserves better than he has received from this proceeding thus far.

Reversed in part; vacated in part; affirmed in part.

Judges BRYANT and STROUD concur.

STATE OF NORTH CAROLINA v. CARLOS ROZELES HERNANDEZ, AKA ADAM GUSMAN, AKA CARLOS R. HERNANDEZ, A/K/A CARLOS ROZALAS HERNANDEZ, DEFENDANT

No. COA10-178

(Filed 21 December 2010)

1. Search and Seizure— Fourth Amendment—detention following traffic stop

The question of whether there was a reasonable suspicion of criminal activity sufficient to justify a further period of detention after a traffic stop was not reached where neither the driver nor the passengers had identification, so that a citation could not be issued, and the issues arising from the initial traffic stop could not be quickly resolved.

2. Constitutional Law— violation of New Jersey Constitution —no suppression in North Carolina

There was no basis for suppression of evidence due to a violation of the New Jersey Constitution (assumed and not decided) in the detention of defendant after a traffic stop in New Jersey

following a crime in North Carolina. The suppression of evidence in North Carolina is authorized only when required by the constitutions of the United States or North Carolina or when the evidence was the result of a substantial violation of Chapter 15A of the North Carolina General Statutes.

3. Appeal and Error— findings not challenged below—not reviewed on appeal

The Court of Appeals declined to review the trial court's findings about the reasons for defendant's detention after a traffic stop where defendant did not challenge the findings at trial but challenged the findings on appeal on the grounds of weight and credibility.

Appeal by Defendant from judgments entered 13 and 19 May 2009 by Judge James M. Webb in Rockingham County Superior Court. Heard in the Court of Appeals 30 August 2010.

Attorney General Roy Cooper, by W. Wallace Finlator, Jr., Assistant Attorney General, for the State.

Greene & Wilson, P.A., by Thomas Reston Wilson, for Defendant-Appellant.

ERVIN, Judge.

Defendant Carlos Hernandez[1] appeals from judgments entered based upon his convictions for assault with a deadly weapon with intent to kill inflicting serious injury, attempted first degree murder, and armed robbery. On appeal, Defendant challenges the trial court's decision to deny his motions to suppress evidence seized during a 3 January 2007 search of a pickup truck in which he was riding in New Jersey. After careful consideration of Defendant's challenges to the trial court's decision in light of the record and the applicable law, we find no error in the proceedings leading to the entry of the trial court's judgments.

I. Factual Background

A. Substantive Facts

On 28 December 2006, Rosa Rodriguez Dominguez and her husband, Santiago Mungary, owned and operated a store in Reidsville,

1. Although Defendant is referred to in the transcript and record documents as Carlos Hernandez, the record reflects that he told law enforcement officers that his name was Adan Guzman-Navarro.

North Carolina, at which they sold, among other things, 14 carat gold jewelry. On the evening of 28 December 2006, four Hispanic men entered the store. After coming into the store, one of them threatened the couple with a pistol. As two of the men held Ms. Rodriguez, she heard her husband struggling with the others and then heard a gunshot. At that point, the other men threatened to shoot Ms. Rodriguez, after which she heard another loud noise and experienced a "very hard hit" to her head. Ms. Rodriguez passed out on the floor, awoke just as the men were leaving, called 911, and reported that her husband, who was severely and permanently disabled by a gunshot wound, had been injured. Subsequently, Ms. Rodriguez discovered that all the jewelry had been stolen from the display case. At trial, Ms. Rodriguez identified Defendant as one of the perpetrators of the robbery.

At approximately 8:00 p.m. on 3 January 2007, New Jersey State Police Trooper Deverron Ramcheran was on patrol on I-295 South, about seventy miles south of New York City and 40 miles north of Philadelphia. Trooper Ramcheran stopped a 1978 pickup truck after observing that it had followed another vehicle too closely and had been making erratic lane changes. According to Trooper Ramcheran, four Hispanic men occupied the truck, with the driver, Jose Arturo Reyes Ocampo, Defendant, and Josue Rodriguez sitting in the front seat and a man named Israel Manuel concealed under a blanket in the truck's bed. At the time that Trooper Ramcheran spoke with the four men, he noted that (1) none of them had a drivers license or other identification; (2) they gave inconsistent descriptions of their itinerary; (3) some of the men stated that the group was driving into various boroughs of New York despite the fact that they were more than an hour's drive from New York and heading south when Trooper Ramcheran stopped them; (4) the driver had "unusual tattoos on his hands" that Trooper Ramcheran associated with criminal gang membership; (5) despite the fact that one or more of the men claimed to be traveling from North Carolina to New York, none of them appeared to have sufficient luggage for such a long trip; and (6) the driver exhibited a nervous and evasive demeanor. As Trooper Ramcheran talked with the occupants of the vehicle, several other officers arrived.

After speaking with the occupants of the truck for about fifteen minutes and while acting consistently with his observations and New Jersey state law, Trooper Ramcheran telephoned his supervisor in order to ask permission to seek the driver's consent to search the truck. Trooper Ramcheran's supervisor authorized him to seek con-

sent to search the truck on the condition that he utilize a Spanish language consent form. Since he did not have a Spanish language consent form in his patrol vehicle, Trooper Ramcheran radioed other officers and requested that one be brought to him.

After another trooper arrived with a Spanish language consent form, Trooper Ramcheran sought and obtained the driver's consent to search the truck. In the course of his search, Trooper Ramcheran found a loaded .380 caliber firearm in the bed of the truck. At that point, Trooper Ramcheran directed the other officers to handcuff all four men. During a subsequent search of Defendant's person, investigating officers found various items of incriminating evidence, including a woman's wallet and jewelry. In addition, two other firearms, including one associated with the Reidsville robbery, and an assortment of jewelry to which price tags were still affixed, were seized from the pickup truck after the discovery of the .380 caliber firearm. The occupants of the truck were arrested for unlawfully possessing firearms and transported to the New Jersey State Police barracks for further processing.

On 10 January 2007, Special Agents Brian Norman and Duane Deaver of the State Bureau of Investigation traveled to New Jersey, where they interviewed Defendant. During the interview, Special Agent Norman posed questions in English, after which Special Agent Deaver would translate the questions into Spanish for Defendant's benefit. After Defendant answered Special Agent Norman's questions in Spanish, Special Agent Deaver provided an English translation of what Defendant said. During the course of this interview, Defendant made an incriminating statement admitting his participation in the 28 December 2006 robbery.

<u>B. Procedural History</u>

On 5 January 2007, a warrant for arrest was issued charging Defendant with assaulting Mr. Mungaray with a deadly weapon with intent to kill inflicting serious injury and with robbing Mr. Mungaray with a dangerous weapon. On 5 February 2007, the Rockingham County Grand Jury returned bills of indictment charging Defendant with assaulting Mr. Mungaray with a deadly weapon with intent to kill inflicting serious injury, robbing Mr. Mungaray with a dangerous weapon, and the attempted first degree murder of Mr. Mungaray. On 11 December 2007, Defendant waived extradition to North Carolina.

On 6 March 2009, Defendant filed a motion to "suppress all evidence obtained as a result of the Defendant's arrest on January 3, 2007, including any statements made to law enforcement officials and the use of any physical evidence seized from the Defendant's person as fruits of an illegal arrest and detention of the Defendant." According to Defendant's suppression motion, although the discovery of a handgun in the truck justified a "pat down" of Defendant, the officers lacked probable cause to search him; the officers lacked probable cause to arrest him for unlawful possession of a firearm; and Trooper Ramcheran had no basis for forming "a reasonable and articulable suspicion that any criminal activity occurring in connection with the Ford pickup truck was related to the Defendant." On 16 March 2009, Defendant filed an addendum to his suppression motion in which he asserted that the search of the truck violated the provisions of the New Jersey Constitution as outlined in *State v. Elder*, 192 N.J. 224, 927 A.2d 1250 (2007). On 4 May 2009, Defendant filed a third suppression motion in which he incorporated his earlier allegations and asserted that the driver of the truck "did not knowingly and freely consent" to the search of the truck; that Defendant had "standing to contest the search of the vehicle;" and that he was effectively in custody as soon as he was "removed from the vehicle and . . . required to sit on the grass beside the vehicle."

On 4 May 2009, the trial court began conducting a hearing concerning Defendant's suppression motions. After the presentation of evidence and arguments of counsel, the trial court entered an order on 6 May 2009 denying Defendant's suppression motion on the basis of oral findings of fact and conclusions of law.[2] After the denial of Defendant's suppression motions, the charges against Defendant came on for trial before the trial court and a jury. On 13 May 2009, the jury returned verdicts finding Defendant guilty of attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and robbery with a dangerous weapon. After determining that Defendant had one prior record point and should be sentenced as a Level II offender, the trial court entered judgments sentencing Defendant to a minimum term of 100 months and a maximum term of 129 months imprisonment in the custody of the North Carolina Department of Correction for assault with a deadly weapon with intent to kill inflicting serious injury; to a concurrent term of a minimum of 77 months and a maximum of 102 months imprisonment

2. The record does not contain a separate written order denying Defendant's suppression motions.

in the custody of the North Carolina Department of Correction for robbery with a dangerous weapon;[3] and to a consecutive term of a minimum of 151 months and a maximum of 191 months imprisonment in the custody of the North Carolina Department of Correction for attempted first degree murder. Defendant noted an appeal to this Court from the trial court's judgments.

II. Legal Analysis

A. Introduction

[1] Defendant's sole challenge to the trial court's judgments is his contention that the trial court erred by denying his pretrial motions to suppress evidence, including incriminating statements, obtained as a result of the stop of the truck in which Defendant was riding. In his brief, Defendant argues that his detention by law enforcement officers violated the provisions of the United States and North Carolina Constitutions prohibiting unreasonable searches and seizures on the grounds that, while Trooper Ramcheran had a valid basis for stopping the truck, the resulting investigative procedures were "unconstitutionally prolonged." We cannot agree with Defendant's contention.

B. Standard of Review

"Our review of a denial of a motion to suppress by the trial court is 'limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Barden*, 356 N.C. 316, 340, 572 S.E.2d 108, 125 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074, 123 S. Ct. 2087 (2003) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). "[T]he trial court's findings of fact are binding when supported by competent evidence, while conclusions of law are 'fully reviewable' by the appellate court." *State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009) (quoting *State v. Brooks*, 337 N.C. 132, 141, 446 S.E.2d 579, 585 (1994)).

> [If a] defendant does not assign error to any of the trial court's findings of fact[,] . . . "they are deemed to be supported by competent evidence and are binding on appeal." We thus review the trial court's order only to determine whether the findings of fact support the [court's] legal conclusion[s.]

3. The trial court initially ordered that Defendant's felonious assault and robbery with a dangerous weapon sentences be served consecutively, but subsequently amended the judgments to provide that these two sentences be served concurrently.

State v. Hudgins, 195 N.C. App. 430, 432, 672 S.E.2d 717, 718 (2009) (quoting *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36, *disc. review denied*, 358 N.C. 240, 594 S.E.2d 199 (2004)). On appeal, Defendant has not challenged the sufficiency of the evidence supporting any of the trial court's findings of fact. As a result, "[b]ecause defendant does not challenge the factual findings in the order, we need only determine whether the trial court's ultimate conclusion, denying defendant's motion to suppress, was supported by the findings of fact." *State v. Milien*, 144 N.C. App. 335, 339, 548 S.E.2d 768, 771 (2001).

C. Standing

"The Fourth Amendment protects individuals 'against unreasonable searches and seizures.' The North Carolina Constitution provides similar protection. N.C. Const. art. I, § 20." *State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645, *cert. denied*, U.S. , 172 L. Ed. 2d 198, 129 S. Ct. 264 (2008) (quoting U.S. Const., amend. IV). "When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. . . . [A] passenger is seized as well and so may challenge the constitutionality of the stop." *Brendlin v. California*, 551 U.S. 249, 251, 168 L. Ed. 2d 132, 136, 127 S. Ct. 2400, 2403 (2007)). As a result, given that he was a passenger in the truck at the time that it was stopped by Trooper Ramcheran, Defendant has standing to challenge the constitutionality of Trooper Ramcheran's seizure and detention of the driver and passengers, including any improper prolongation of that investigatory detention. *State v. Jackson*, ––– N.C. App. –––, –––, 681 S.E.2d 492, 496 (2009) (stating that a passenger may challenge a "detention beyond the scope of the initial seizure").

D. Lawfulness of the Extension of Defendant's Detention

1. Relevant Legal Principles

" '[R]easonable suspicion is the necessary standard for traffic stops.' " *State v. Maready*, 362 N.C. 614, 618, 669 S.E.2d 564, 567 (2008) (quoting *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008)).

> Reasonable suspicion is a "less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." Only "some minimal level of objective justification" is required. This Court has determined that the reasonable suspicion standard requires that "[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences

> from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." Moreover, "[a] court must consider 'the totality of the circumstances' . . . in determining whether a reasonable suspicion" exists.

Barnard, 362 N.C. at 247, 658 S.E.2d at 645 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576, 120 S. Ct. 673, 675-76 (2000), *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10, 109 S. Ct. 1581, 1585 (1989), and *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906, 88 S. Ct. 1868, 1880 (1968)). An officer's "observation of [a] defendant's traffic violation [gives] him the required reasonable suspicion to stop [the] defendant's vehicle." *Styles*, 362 N.C. at 417, 665 S.E.2d at 441; *see also*, *e.g.*, *State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999) (holding that a law enforcement officer had the authority to stop a car after observing it exceed the speed limit). "[T[he officer's subjective motive for the stop is immaterial." *McClendon*, 350 N.C. at 636, 517 S.E.2d at 132. On the other hand, "once it is determined that the initial stop was justified at its inception by a reasonable suspicion of criminal activity, it must further be determined whether the subsequent detention of the defendant following the stop is 'reasonably related in scope to the circumstances which justified the interference in the first place.' " *Milien*, 144 N.C. App. at 340, 548 S.E.2d at 772 (quoting *United States v. Sharpe*, 470 U.S. 675, 682, 84 L. Ed. 2d 605, 613, 105 S. Ct. 1568, 1573 (1985)). As a result, after "the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay." *State v. Falana*, 129 N.C. App. 813, 816, 501 S.E.2d 358, 360 (1998) (citing *Terry*, 392 U.S. at 21-22, 20 L. Ed. 2d at 906, 88 S. Ct. at 1880). Assuming that "[a] law enforcement officer who observes a traffic law violation has probable cause to detain the motorist, . . . the scope of that detention may be expanded where the officer has a reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot." *State v. Hernandez*, 170 N.C. App. 299, 301, 612 S.E.2d 420, 422 (2005) (citing *McClendon*, 350 N.C. at 636, 517 S.E.2d at 132, and *State v. Hamilton*, 125 N.C. App. 396, 399-400, 481 S.E.2d 98, 100, *disc. review denied*, 345 N.C. 757, 485 S.E.2d 302 (1997)).

2. Nature of Defendant's Challenge to Trial Court's Ruling

Although Defendant does not dispute the constitutional validity of Trooper Ramcheran's decision to stop the truck in which he was

riding, he does contend that his "detention was unconstitutionally prolonged" because Trooper Ramcheran lacked the articulable reasonable suspicion necessary to support his detention after the passage of a reasonable period of time following the initial stop. At bottom, Defendant's arguments focus on the interval between the initial stop of the truck and the time at which a Spanish language consent form reached the scene of the investigatory detention. According to Defendant, "[a] Spanish consent to search form did not arrive for approximately an hour" after Trooper Ramcheran stopped the truck, so that he "detained [the occupants of the vehicle] for over approximately an hour, all for purposes of getting Mr. Ocampo's consent to search the Ford." In light of Defendant's references to the delay that resulted from Trooper Ramcheran's efforts to obtain a Spanish language consent form and the fact that Defendant has not identified any other interval underlying his challenge to the trial court's decision, we conclude that the issue Defendant seeks to raise on appeal is the constitutionality of his detention from the time of the initial stop until the time at which Trooper Ramcheran obtained the driver's consent to search the truck.

3. Analysis of Defendant's Contentions

The time of various incidents relating to the investigatory detention in question can be determined by examining a videotape of the stop made by the New Jersey State Police. According to the videotape:

7:56 p.m.: Trooper Ramcheran stopped the truck on the basis of moving violations.

8:15 p.m.: Trooper Ramcheran called his supervisor to discuss the inconsistent stories given by the occupants of the truck and the fact that they lacked identification.

8:18 p.m.: Trooper Ramcheran's supervisor directed him to check the truck's license against a relevant database.

8:20 p.m.: Trooper Ramcheran called the necessary information in to personnel with access to the database.

8:30 p.m.: Trooper Ramcheran reports to his supervisor concerning the information that he received in response to his query.

8:38 p.m.: Trooper Ramcheran's supervisor instructs him to obtain a Spanish language consent form before seeking the driver's consent to search the truck.

8:40 p.m.:	Trooper Ramcheran broadcasts a call for a Spanish language consent form on his State Police radio.
9:00 p.m.:	Another trooper arrives at the scene of the investigatory detention with a Spanish language consent form.
9:08 p.m.:	After reviewing the form with the driver and requesting his consent to search the truck, Trooper Ramcheran receives permission to conduct the proposed search.

As a result, the time period that must be considered in evaluating the merits of Defendant's challenge to the trial court's order is approximately one hour and ten minutes.

In challenging the length of his detention, Defendant "relies primarily on *State v. Myles*, [188 N.C. App. 42, 45, 654 S.E.2d 752, 755, *aff'd* 362 N.C. 344, 661 S.E.2d 732 (2008)] and *State v. Falana*, [129 N.C. App. at 816, 501 S.E.2d at 360]" and argues that they demonstrate the "limited ability of law enforcement [to] prolong[] a stop based [o]n a hunch that lacks articulation." A review of the decisions upon which Defendant relies establishes that they are readily distinguishable from and do not control the outcome of the present case.

In *Falana*, the defendant, who had been stopped for a traffic violation, produced a valid drivers' license and registration. In addition, the investigating officer determined that the defendant was not impaired at the time of the stop. As a result, this Court held that further detention of the defendant was unlawful given the absence of facts tending to show the existence of a reasonable suspicion of criminal activity. Similarly, in *Myles*, after stopping the defendant for a traffic violation, the investigating officer determined that he was not impaired, had a valid license, and was not the subject of any outstanding warrants. After noting that the investigating officer "considered the traffic stop 'completed' because he had 'completed all [his] enforcement action of the traffic stop,' " we held that, "in order to justify [] further detention of defendant, [the officer] must have had defendant's consent or 'grounds which provide a reasonable and articulable suspicion in order to justify further delay.' " *Myles*, 188 N.C. App. at 45, 654 S.E.2d at 755 (quoting *Falana*, 129 N.C. App. at 816, 501 S.E.2d at 360). Thus, both *Myles* and *Falana* involve situations in which the driver and passengers were detained after the original purpose of the initial investigative detention had been addressed

and in which the investigating officer attempted to justify an additional period of detention solely on the basis of the driver's nervousness or uncertainty about travel details, a basis which we held did not suffice to provide a reasonable suspicion that criminal activity was afoot.

In this case, on the other hand, Trooper Ramcheran was unable to quickly complete the initial investigative detention because all four occupants of the truck denied having any identification. In response to questions posed by Defendant's trial counsel about the reason that he did not simply issue a citation to the driver of the vehicle and let the occupants of the truck proceed on their way, Trooper Ramcheran testified:

> [DEFENSE COUNSEL]: . . . But had you . . . written the citation . . ., they would then have been free to leave.
>
> [TROOPER RAMCHERAN]: . . . [I]t would have been impossible because no one in the vehicle had an identification, not even the driver. . . . [T]he fact that the driver had no identification for me to be able to issue him a citation steps it up to a whole different level[.]
>
> [DEFENSE COUNSEL]: You could have issued him the citation and he [could have] walked away.
>
> [TROOPER RAMCHERAN]: Well, sir, there would be no way for me to . . . identify him[.] . . . [U]nder New Jersey law, I have to be able to identify who he is in order to issue him a citation.
>
> [DEFENSE COUNSEL]: So you write the citation and hand it to him[?]
>
> [TROOPER RAMCHERAN]: I couldn't just write a citation for John Doe. . . .

Thus, since neither the driver nor any of the passengers had a driver's license or other form of identification in their possession, Trooper Ramcheran could not quickly resolve the issues arising from the initial traffic stop. Defendant conceded as much at the hearing, telling the trial court that Trooper Ramcheran "stopped [the driver] for a traffic citation" but that "the citations were not written at all until . . . some hours later." As a result of the fact that the independent justification requirement set out in *Falana* does not come into play until "the original purpose of the stop has been addressed" and given that the undisputed evidence in this case establishes that the challenged

delay occurred when Trooper Ramcheran was attempting to address issues arising from the initial stop, we need not reach the question of whether Trooper Ramcheran had a reasonable suspicion of criminal activity sufficient to justify a further period of detention after citing the driver.

Defendant has not argued that the methods employed by the investigating officers during the traffic stop violated his constitutional rights. According to the United States Supreme Court, "[a]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 238, 103 S. Ct. 1319, 1325-26 (1983) (citations omitted). In this case, after all four men denied having any identification, Trooper Ramcheran's supervisor directed him to check the vehicle's license plate with the State Police Regional Operation Intelligence Center and the El Paso Intelligence Center in an effort to obtain additional information about the vehicle and its occupants. On appeal, Defendant does not challenge the reasonableness of running the truck's license through the indicated database as a method of seeking information or argue that the length of time to complete the computer search was unreasonably dilatory. In addition, Defendant does not argue that the fifteen or twenty minutes it took another trooper to drive to the traffic stop with a Spanish language consent form consumed an unreasonable length of time. However, out of an abundance of caution and in light of the lengthy sentence imposed upon the Defendant, we have reviewed the record and conclude that the available evidence demonstrates that the investigating officer had a reasonable suspicion that criminal activity was afoot sufficient to justify detention of Defendant pending further investigation.

The trial court found, among other things, that (1) the driver told Trooper Ramcheran that he did not have a driver's license or vehicle registration; (2) a man in the truck bed was "covered with a blanket"; (3) Trooper Ramcheran saw Defendant hand the driver a North Carolina driver's license belonging to Defendant's brother; (4) when Trooper Ramcheran asked each occupant of the vehicle where they had come from and where they were going, they gave inconsistent answers; (5) Trooper Ramcheran found the information provided by the occupants of the vehicle to be "confusing and inconsistent" since the truck was more than 70 miles from New York City and heading

south when it was stopped despite the fact that certain of the occupants claimed to be headed for the Bronx, Brooklyn, or Manhattan; (6) none of the occupants of the vehicle produced identification documents or a driver's license; (7) the men had only a few gym bags and no luggage despite the fact that at least one of the occupants claimed that the group was traveling from North Carolina to New York; and (8) Trooper Ramcheran observed that the driver had tattoos on both hands, a decorative pattern that was associated with criminal gang activity. In *State v. Sanders*, 112 N.C. App. 477, 481, 435 S.E.2d 842, 845 (1993), this Court held that a law enforcement officer "could reasonably have concluded that defendant was involved in criminal activity" where the "defendant informed [the officer] that he was carrying no identification, did not own the vehicle, and could provide no registration for the car" and the officer "testified that people who are driving stolen cars often provide officers with false names and insist that they have no identification." Thus, assuming that Trooper Ramcheran was required to have a reasonable articulable suspicion that criminal activity was afoot in order to justify detaining Defendant during the slightly more than one hour period between the initial traffic stop and the driver's decision to consent to a search of the truck, we conclude that the surrounding circumstances demonstrated the existence of such a reasonable articulable suspicion.

We have considered, and ultimately rejected, Defendant's other challenges to the trial court's order. Although Defendant argues that the trial court "failed to make any findings of fact or conclusions of law that directly address the issue of whether the duration of the detention was reasonable," we do not believe that it was necessary for the trial court to make findings and conclusions with respect to that issue. As we have already noted, the only basis on which Defendant challenges the duration of the stop is his assertion that Trooper Ramcheran lacked reasonable suspicion to support his detention, a contention that we have already rejected. In addition, an inquiry into the lawfulness of an officer's decision to extend a traffic stop beyond the time needed to check the driver's license and registration and issue a citation only becomes necessary after the officer finishes addressing the issues that stemmed from the initial traffic stop. Although the videotape of the investigatory detention at issue in this case reveals that over an hour elapsed between the time that Trooper Ramcheran stopped the truck and the time at which he discovered a firearm in the truck, the investigating officers were engaged in trying to obtain information about the driver, the truck,

and the passengers throughout this entire period of time. Thus, given that the trial court's ruling must be upheld on other grounds, we need not examine the adequacy of the trial court's findings and conclusions addressing the length of time during which Defendant was detained.

In addition, Defendant argues that the trial court failed to make findings of fact and conclusions of law concerning the extent, if any, to which he was "free to leave" while awaiting the arrival of a Spanish language consent form. However, the State has not argued that Defendant was free to leave, so there is no real dispute about the fact that Defendant was in detention throughout the entire period of time at issue here. As a result, given that the extent to which Defendant was "free to leave" was never in dispute before the trial court, the trial court was not required to make findings of fact and conclusions of law addressing this issue.[4]

[2] Next, Defendant argues that Trooper Ramcheran's decision to ask for consent to search the truck violated the principle of New Jersey state constitutional law enunciated in *State v. Elder*, 192 N.J. 224, 927 A.2d 1250 (2007). N.C. Gen. Stat. § 15A-974 only authorizes the suppression of evidence in the event that "[i]ts exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina" or the evidence was "obtained as a result of a substantial violation of the provisions of" Chapter 15A of the North Carolina General Statutes. As should be obvious, any violation of the principle of New Jersey state constitutional law enunciated in *Elder* would not involve a violation of Chapter 15A of the North Carolina General Statutes. Assuming, without in any way deciding, that Trooper Ramcheran's actions violated the New Jersey Constitution, any such "illegality under . . . state [law] can neither add to nor subtract from its validity" under the federal or North Carolina Constitutions since a "[m]ere violation of a state statute [or constitutional provision] does not infringe the federal Constitution." *Snowden v. Hughes*, 321 U.S. 1, 11, 88 L. Ed. 497, 504, 64 S. Ct. 397, 402 (1944). Thus, this argument provides no basis for the suppression of evidence in a North Carolina court.

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4. Defendant has not argued that Trooper Ramcheran was required to have probable cause to support his continued detention or that Trooper Ramcheran lacked any probable cause necessary to support any search and seizure activities that he conducted. As a result, given the fact that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant," *Viar v. N.C. Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005), we will not reach or address this issue.

[3] Finally, Defendant contends that the decision to detain him was based on the driver's demeanor and on the fact that the occupants provided inconsistent stories about their itineraries. Defendant argues that a "close review" of the videotaped traffic stop reveals that the occupants were confused by the officer's questions and that their statements were "actually . . . consistent." For that reason, Defendant appears to invite us to revisit the trial court's factual determinations on weight and credibility grounds. As discussed above, the trial court's unchallenged findings of fact are conclusively established for purposes of appellate review. In addition, the trial court's factual findings are supported by competent evidence and show that the investigating officers detained the occupants of the truck for a number of reasons in addition to those cited by Defendant. Therefore, we do not find Defendant's final argument persuasive.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court did not err by denying Defendant's suppression motions. As a result, given that Defendant's challenge to the trial court's denial of his suppression motions was the only basis upon which he challenged his convictions and sentences, we hold that Defendant received a fair trial that was free from prejudicial error and that the trial court's judgments should remain undisturbed.

NO ERROR.

Chief Judge MARTIN and Judge STROUD concur.

STATE OF NORTH CAROLINA v. JAVON CAPERS, DEFENDANT

No. COA09-1613

(Filed 21 December 2010)

1. Evidence— use of restraints when arrested—admissible

Plain error review was allowed for the unchallenged admission of testimony that defendant was handcuffed and shackled when he was arrested. Defendant challenged the admission of evidence about the use of restraints prior to trial rather than at trial.

2. Evidence— defendant shackled when arrested—admissible

The trial court did not err by allowing testimony that defendant was handcuffed and shackled when arrested. Such testimony did not have the same effect as a jury seeing defendant in shackles at trial.

3. Evidence— flight—statement of intent—implicit admission of guilt

The trial court did not err by admitting testimony from an officer who transported defendant from New York to North Carolina that defendant told the officer that they should have waited until midnight, when defendant would have been gone. Although defendant argued that this was an empty boast rather than evidence of flight, the jury could reasonably have found that defendant's statement was an implicit admission of guilt and as such was relevant.

4. Evidence— prior incarceration—excluded at defendant's request

The prejudice from defendant's statement to an officer did not outweigh the probative value where defendant told the officer that he should have waited until midnight, when defendant would have been gone, before picking defendant up in New York for transportation to North Carolina. Although defendant argued on appeal that the jurors were not informed that he would have been released at the end of his New York sentence at midnight, defendant had objected to any testimony that he was incarcerated on unrelated charges in New York.

5. Evidence— hearsay—present sense impression—50 minutes after shooting—medical treatment

The trial court did not err in a first-degree murder prosecution by admitting as a present sense impression testimony from the mother of an additional victim that her son had said at the hospital that he had been shot by defendant. The trial court correctly concluded that the testimony was admissible as a present sense impression where the statement was made about 50 minutes after the shooting and the focus of events during that time was on saving the victim's life, thereby reducing the likelihood of deliberate or conscious misrepresentation.

6. Evidence— two-part statement—considered separately

The trial court did not err in a first-degree murder prosecution by excluding the first part of a statement but admitting the second. The trial court concluded that the first portion of the statement lacked credibility because the witness, who was one of the shooting victims, could not have had personal knowledge of the subject of the first portion of the statement.

Appeal by defendant from judgment entered 30 April 2009 by Judge J. Gentry Caudill in Cleveland 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.

Marilyn G. Ozer for defendant-appellant.

GEER, Judge.

Defendant Javon Capers appeals his conviction of first degree murder, contending that the trial court erred in allowing testimony that defendant, when arrested, was handcuffed and shackled. Defendant primarily argues this evidence was admitted in violation of *State v. Tolley*, 290 N.C. 349, 365, 226 S.E.2d 353, 366 (1976) (emphasis added), which provides that "a defendant in a criminal case is entitled to appear *at trial* free from all bonds or shackles except in extraordinary instances." Because *Tolley* does not apply to the situation in which a jury is allowed to hear that a defendant was previously handcuffed and shackled when arrested, we hold that the trial court properly admitted this testimony.

Facts

At trial, the State's evidence tended to show the following. On 26 August 1999, Brandon Wilson borrowed a black Dodge Ram truck from Rodney McCloud in exchange for crack cocaine. Wilson, who admitted he might have smoked marijuana that evening, was driving around Shelby, North Carolina at about 5:30 p.m. when he was flagged down by defendant. Defendant asked for a ride to a friend's house, and Wilson agreed. At defendant's direction, Wilson drove to the Lawndale neighborhood to pick up two men: Kendue Brown, also known as "Bumpy," and Santee Coleman. Defendant sat in front with Wilson, while Bumpy and Coleman sat in the back seat.

Wilson then drove to the Light Oak neighborhood to a liquor house. By the time they arrived in Light Oak, it was dark outside. The other three men got out of the truck and spoke to a few men at the liquor house. Wilson stayed in the truck because he was considered "a Shelby person . . . and Shelby people just didn't go into Light Oak at that time for previous beef." After about 20 minutes, defendant told Wilson he wanted to leave and go to one other place.

After all four men were back in the truck, defendant had Wilson drive to the Holly Oak apartments. Defendant wanted to meet a man named Julian Roseboro, also known as "J." Wilson parked the truck in front of the Holly Oak apartments, and all four men got out. Four other men from Light Oak, including Derrick Goodson, also drove to the Holly Oak apartments in a Mercury Cougar. The Mercury Cougar was parked next to a phone booth near the "J" building.[1]

Wilson went over and stood near the phone booth with a group of people, including the men from the Mercury Cougar and some Holly Oak residents. Defendant went directly to the phone booth and began talking on the phone. Wilson stood drinking liquor with some of the men from the Mercury Cougar, but he got tired of waiting. He asked Bumpy to tell defendant, who was still on the phone, that Wilson was leaving. After defendant did not respond when Bumpy gave him the message, Wilson walked up to defendant who put down the phone and asked Wilson to give him 10 more minutes.

At that time, a gray Jeep pulled up, and Roseboro got out. Roseboro walked toward Wilson and defendant and then stopped. Wilson felt that something was wrong, so he started walking away. Defendant looked back at Roseboro and hung up the phone. Defendant pulled out a .9 millimeter gun and asked Roseboro "where his money was at." Although Roseboro lifted up his shirt to show he was not armed, defendant shot Roseboro who collapsed. Then, defendant walked up to Wilson and said, "[L]et's go." Wilson, defendant, Bumpy, and Coleman all got into the truck.

Defendant told Wilson to turn left and drive toward the lower part of the apartment complex, which was a dead end. Some people had run in that direction. Defendant now had two .9 millimeter guns. As Wilson was driving toward the dead end, defendant opened the truck door, stuck his head and arms out of the truck, and started shooting. Wilson "stomped on the brakes," put the truck in reverse, and backed

1. All of the buildings in the Holly Oak apartments are named alphabetically.

up. As they were going in reverse, Wilson heard "a whole bunch of shots and [the] window shattered." Coleman yelled, "I'm hit, I'm shot."

Merrill Baker was sitting on his porch talking to Goodson, one of the men from the Mercury Cougar, when they heard the sound of a gunshot coming from the other side of the building. Baker said they did not pay any attention to it at first because "[s]omething was always happening out there." Suddenly, a dark colored truck came around the corner, and a man got partially out of the truck. The man, holding a gun in each hand, started shooting and shot Goodson twice. Baker did not recognize the person shooting from the truck.

Wilson turned the truck around, left the complex, and headed toward the highway. Coleman was yelling, and there was a lot of commotion in the truck. When Wilson eventually pulled off of the highway into the parking lot of a store, Coleman asked to be taken to the hospital. Defendant took out his gun, pointed it at Coleman, and said, "Man, just get out." Coleman got out of the truck and fell down. The other three men drove to Gastonia, about 40 minutes away, where Wilson's sister lived. When they arrived, Wilson went into the kitchen and "just paced" while the other two sat outside. Wilson joined them outside, and after a couple of hours, they headed back to Shelby. Wilson dropped defendant and Bumpy off and returned the truck to McCloud. Defendant immediately went to Charlotte to catch a bus to New York.

At approximately 12:50 a.m., Detective Randy Conner of the Shelby Police Department responded to the crime scene at the Holly Oak apartments. When he arrived, he was motioned by bystanders to go to an area near the "J" building where he found Roseboro lying near the phone booth at the end of the building. Roseboro was on his left side, propped up against a vehicle. There was a large amount of blood coming from Roseboro's chest, but he was still breathing.

Officer Danny Halloran located Goodson, who had been shot in the stomach, lying on the ground by an apartment in the "L" building. Goodson was transported to the hospital. Police also found Coleman at the convenience store where he had been left by Wilson. Coleman told officers he had been shot in the knee at Holly Oak, but he did not know who shot him. He also was transported to the hospital. Both Coleman and Goodson survived their injuries although they later died from unrelated causes prior to the trial in this case.

Roseboro died on 3 September 1999 from multi-organ system failure caused by the gunshot wound. The autopsy revealed that he had

a gunshot graze wound to his left wrist and a gunshot wound to his abdomen. The same bullet could have caused both wounds. The bullet traveled from the left-upper side of the abdomen toward the middle of the body and the back and lodged in the spine, just below the level of the belly button. The bullet removed from Roseboro's body was a Federal hollow point .9 millimeter Luger.

Sergeant Craig Earwood collected evidence at the crime scene. Among other items, he found 14 shell casings in the parking lot at both shooting locations, with the majority of them being found in front of the buildings where Goodson was shot. Only two firearms were responsible for the 14 shell casings. Four of the casings were fired from one .9 millimeter firearm, and the other 10 were fired from a second .9 millimeter firearm. Police also found a bullet hole in the truck driven by Wilson that night.

Wilson was subsequently brought in by police for questioning about the incident. At first, Wilson told the officers that he had been in a shootout, and somebody had tried to rob him. Once he learned that the owner of the truck, McCloud, had given a statement to police, Wilson decided to make up a story to "put [himself] far away from it." He then claimed that he had tried to buy some marijuana at Holly Oak that evening, and, while he was standing there, he saw defendant shoot Roseboro. At trial, he admitted signing a statement to that effect, but testified that he "told the truth to the extent that [he was] at Holly Oak Apartments," but he "did not tell the truth about why [he was] there or what [he] did while [he] was there." Wilson gave another statement on 16 August 2005 that matched his subsequent trial testimony.

An arrest warrant charging defendant with first degree murder was issued on 7 September 1999. On 10 August 2001, an application for requisition of defendant from the State of New York was issued. On 31 March 2004, because defendant could not be found for service of the arrest warrant, the State dismissed with leave the first degree murder charge. On 26 August 2005, defendant waived extradition from the State of New York, and on 29 August 2005, the first degree murder charge was reinstated. Defendant was indicted for first degree murder on 10 October 2005.

At trial, William Hall, an inmate incarcerated with defendant, was called by the State. Hall had written a letter to the district attorney's office on 25 September 2007. In the letter, Hall stated that while they

were incarcerated together, defendant told him what happened on the night of the shooting. The letter largely corroborated the version of events given by Wilson at trial. At trial, however, Hall denied that the letter was true. He admitted that he had visited with defendant's attorney before the trial and that, until trial, he had never indicated to any law enforcement officer or to the district attorney's office that the letter was not true. He further explained, however, that he had been incarcerated with Wilson, and Wilson told him that if he wrote a copy of a letter that Wilson gave him and sent it to the district attorney, that would help get Hall's bond reduced.

Delone Haynes and Kevin Morris, who had been in the Mercury Cougar that night, were uncooperative when they were called to testify. Haynes confirmed only that he had been at Light Oak and then traveled to Holly Oak where Wilson drove up in a truck with three other people. He did not remember seeing defendant, but he remembered that Roseboro was shot near the phone booth and that, afterward, Morris was holding him. Morris remembered the night Roseboro was shot, but had "selective memory" as to the details. He did not remember seeing defendant.

Defendant presented no evidence. He was convicted of first degree murder and sentenced to life imprisonment without parole. He timely appealed to this Court.

I

Defendant first contends that the trial court violated his right to due process by allowing Detective Conner to testify that he shackled defendant when he was arrested in New York. Detective Conner testified that after defendant was extradited to North Carolina from New York, he and other officers drove to New York from North Carolina and prepared defendant for transport back to North Carolina. He explained further:

> To prepare Mr. Capers for transport back to Cleveland County, we would have done everything that we normally do. When one officer transfers a suspect or someone over, we always make sure that there's no weapons on that person. Even coming from a jail facility, we do those same things. During this time, I prepared Mr. Capers for transport. In doing that, I placed what's called shackles or leg irons around his ankles. That's to limit the movement from his legs. Also, we used the belly chain. I can't remember the diameter of the chain, but it goes around the waist and then

> there's a fitting that fits through the length of the chain, and then it's a pair of standard handcuffs, goes through that link and secures the hands. What it does is it limits the movement from the hands, from any point. It keeps the hands basically towards the center of the body, to limit movement. And I also searched Mr. Capers to make sure he didn't have any weapons or anything on his person.

Defendant did not object to this testimony.

[1] As an initial matter, the parties dispute whether, in the absence of defendant's objection to this testimony, this Court can review this issue for plain error. The State cites cases holding that a defendant's failure to object to a restraint at trial waives that issue for appellate review. *See*, *e.g.*, *State v. Ash*, 169 N.C. App. 715, 726, 611 S.E.2d 855, 863, *appeal dismissed and disc. review denied*, 360 N.C. 66, 621 S.E.2d 878 (2005). In *State v. Wilds*, 133 N.C. App. 195, 207, 515 S.E.2d 466, 476 (1999), however, this Court applied plain error review to the question whether the trial court erred in admitting a photograph in which the defendant's legs were in shackles. Here, defendant does not challenge the use of restraints at trial (the issue in *Ash*), but rather challenges the admission of evidence about the use of restraints prior to trial (as in *Wilds*). We hold that plain error review applies.

As the Supreme Court has held:

> "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.' "

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513, 103 S. Ct. 381 (1982)).

[2] In arguing that admission of testimony that a defendant was shackled when arrested is constitutionally impermissible, defendant

relies upon the rule set out in *Tolley*, 290 N.C. at 366, 226 S.E.2d at 367 (quoting *Blair v. Commonwealth*, 171 Ky. 319, 188 S.W. 390 (1916)): "[I]n the absence of a showing of necessity therefor, compelling the defendant to stand trial while shackled is inherently prejudicial in that it so infringes upon the presumption of innocence that it 'interfere[s] with a fair and just decision of the question of . . . guilt or innocence.' " *Tolley*, however, dealt with the situation in which the defendant is made to stand trial while wearing shackles. *Tolley* does not address the issue we have here—whether it is constitutionally impermissible to allow the jury to hear testimony that the defendant was shackled when arrested.

In addition to *Tolley*, defendant points to *Wilds*, 133 N.C. App. at 207, 515 S.E.2d at 476, in which the trial court admitted into evidence a photograph of the defendant in shackles when arrested. This Court did not, however, specifically address whether admission of the photograph depicting the defendant in shackles was error, but rather held that, regardless whether any error occurred, the defendant had failed to show sufficient prejudice to establish plain error. *Id.*

In *State v. Montgomery*, 291 N.C. 235, 252, 229 S.E.2d 904, 913-14 (1976), however, the Supreme Court refused to extend *Tolley* to cover the situation in which several jurors momentarily saw the defendant in handcuffs while being taken from the jail to the courthouse. The Court distinguished that case from *Tolley* because the "defendant was never shackled or bound while in the courtroom." 291 N.C. at 250, 229 S.E.2d at 912. The Court concluded: " 'Defendant's right to be free of shackles during trial need not be extended to the right to be free of shackles while being taken back and forth between the courthouse and the jail.' " *Id.* at 251, 229 S.E.2d at 913 (quoting *State v. Jones*, 130 N.J. Super. 596, 599, 328 A.2d 41, 42 (1974)). The Court added:

> This record indicates that some of the jurors may have momentarily viewed defendant in handcuffs while he was being escorted from the separate jail building to the courthouse. It is common knowledge that bail is not obtainable in all capital cases and the officer having custody of a person charged with a serious and violent crime has the authority to handcuff him while escorting him in an open, public area. Indeed, it would seem that when the public safety and welfare is balanced against the due process rights of the individual in this case, such action was not only proper but preferable. Under the circumstances of this case, the trial judge correctly denied defendant's motion for a mistrial.

Id. at 252, 229 S.E.2d at 913-14.

In *State v. Fowler*, 157 N.C. App. 564, 566, 579 S.E.2d 499, 500 (2003), the defendant argued that the rule regarding shackling at trial should also apply when the trial court told the jury that the defendant was in the custody of the Wake County Sheriff's Department when explaining the reason for a delay in the proceeding. On appeal, this Court rejected that argument, reasoning that "the statements by the trial court do not create the same prejudice to the defendant as that raised when a defendant appears in court in shackles or prison garb." *Id.*, 579 S.E.2d at 501.

We believe that, given *Montgomery* and *Fowler*, the Supreme Court's decision in *Tolley* should not be extended to testimony that a defendant was shackled when arrested. If the North Carolina appellate courts have found no error when the jury views a defendant in shackles outside the courtroom or when a trial judge tells a jury that the defendant is in police custody, we do not believe there is any error in allowing the jury to hear that a defendant was handcuffed or shackled when arrested.

Just as the Supreme Court concluded that it is common knowledge that a defendant may not be able to post bail and will be transported to trial in handcuffs, it is also common knowledge that when people are arrested, they are handcuffed. *See State v. Smith*, 278 Kan. 45, 49, 92 P.3d 1096, 1099-1100 (2004) (holding that trial court did not err in admitting photographs of defendant in jail clothing because "most jurors would hardly be shocked to learn that a murder suspect was taken into custody for some period of time, the only information communicated by jail clothing"); *State v. Mullin-Coston*, 115 Wash. App. 679, 693, 64 P.3d 40, 48 (2003) (noting that "although references to custody can certainly carry some prejudice, they do not carry the same suggestive quality of a defendant shackled to his chair during trial" and holding that "[j]urors must be expected to know that a person awaiting trial will often do so in custody"), *aff'd*, 152 Wash. 2d 107, 95 P.3d 321 (2004).

We do not believe that the Supreme Court in *Tolley* intended to bar testimony that a defendant was handcuffed or shackled when arrested. Such testimony, consistent with the common knowledge of jurors, does not have the same effect as a jury observing a defendant in shackles at trial. We, therefore, overrule this argument.

II

[3] Defendant next argues that the trial court erred in admitting the following testimony by Detective Conner:

> Q. After you finished preparing the Defendant for transport, what conversation, if any, transpired between you and the Defendant?
>
> A. Mr. Capers stated that we should have waited until twelve midnight, that we were early. I stated that if we would have waited until twelve midnight that we would have been late, and he said that, yeah, I would have been gone and you would have never saw me again.

Defendant argues that his statement to Detective Conner should have been excluded as either irrelevant or unfairly prejudicial pursuant to Rule 403 of the Rules of Evidence.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401. Although we review a trial court's ruling on the relevance of evidence *de novo*, we give a trial court's relevancy rulings "great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *appeal dismissed and disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241, 113 S. Ct. 321 (1992).

" 'In order to be relevant, . . . evidence need not bear directly on the question in issue if it is helpful to understand the conduct of the parties, their motives, or if it reasonably allows the jury to draw an inference as to a disputed fact.' " *State v. Miller*, 197 N.C. App. 78, 86, 676 S.E.2d 546, 551 (quoting *State v. Roper*, 328 N.C. 337, 356, 402 S.E.2d 600, 611, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232, 112 S. Ct. 280 (1991)), *disc. review denied*, 363 N.C. 586, 683 S.E.2d 216 (2009). " 'The value of the evidence need only be slight.' " *Id.*, 676 S.E.2d at 551-52 (quoting *Roper*, 328 N.C. at 355, 402 S.E.2d at 610).

Defendant acknowledges that evidence of actual flight by a defendant is admissible evidence of guilt. *See State v. Rainey*, 198 N.C. App. 427, 439, 680 S.E.2d 760, 770 (" 'North Carolina has long followed the rule that an accused's flight from a crime shortly after its commission is admissible as evidence of guilt.' " (quoting *State v. Self*, 280 N.C. 665, 672, 187 S.E.2d 93, 97 (1972))), *appeal dismissed*

and disc. review denied, 363 N.C. 661, 686 S.E.2d 903 (2009). Defendant argues, however, that his statement was not relevant since it was "an empty boast by a shackled man" rather than evidence of actual flight.

This argument overlooks the rationale underlying the admission of evidence of flight: "Evidence of flight does not create a presumption of guilt, but is to be considered with other factors in deciding whether the circumstances '*amount to an admission of guilt or reflect a consciousness of guilt.*' " *Id.* (emphasis added) (quoting *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E.2d 697, 698 (1973)). *See also State v. Myers*, 309 N.C. 78, 87, 305 S.E.2d 506, 511 (1983) ("Our research discloses that 'consciousness of guilt' may be established, *inter alia*, by evidence of flight on the part of an accused."). As our Supreme Court has observed, flight is only one form of post-crime evidence considered admissible as showing a consciousness of guilt. *See id.* at 87 & n.2, 305 S.E.2d at 511 & n.2 (noting that evidence of falsehoods, escape, attempted suicide, and attempts to bribe "may also be evidence of implied admissions or consciousness of guilt").

The Supreme Court has also held that "[d]etails concerning a defendant's arrest may be relevant to prove a number of facts, including defendant's knowledge of his own guilt." *State v. Mason*, 337 N.C. 165, 172, 446 S.E.2d 58, 62 (1994). This Court has similarly concluded that a defendant's statements prior to arrest about wanting to avoid returning to prison "could be reasonably viewed as an acknowledgment of guilt" and, therefore, are relevant. *State v. Locklear*, 180 N.C. App. 115, 122, 636 S.E.2d 284, 288 (2006). *See also Straight v. State*, 397 So.2d 903, 908 (Fla.) ("When a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, *or other indications after the fact of a desire to evade prosecution*, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstance." (emphasis added)), *cert. denied*, 454 U.S. 1022, 70 L. Ed. 2d 418, 102 S. Ct. 556 (1981).

In these cases, the focus is on the defendant's state of mind—the evidence suggests a guilty mind and, therefore, is an implied admission by the defendant of his guilt. Defendant's statement in this case has the same effect. A jury could reasonably find that this statement—indicating that defendant would have fled if he had had the opportunity—was an implicit admission of guilt by defendant. As

such, the statement was relevant. *See also State v. Bagley*, 183 N.C. App. 514, 521, 644 S.E.2d 615, 620 (2007) (explaining that "evidence of flight is admissible if offered for the purpose of showing defendant's guilty conscience as circumstantial evidence of guilt of the crime for which he is being tried").

[4] Defendant, however, further argues that any probative value of this evidence was outweighed by its prejudicial effect in violation of Rule 403. "Whether to exclude evidence [under Rule 403] is a decision within the trial court's discretion." *State v. Al-Bayyinah*, 359 N.C. 741, 747, 616 S.E.2d 500, 506 (2005), *cert.denied*, 547 U.S. 1076, 164 L. Ed. 2d 528, 126 S. Ct. 1784 (2006). In *Rainey*, 198 N.C. App. at 433, 680 S.E.2d at 766 (internal citations and quotation marks omitted), this Court explained:

> While all evidence offered against a party involves some prejudicial effect, the fact that evidence is prejudicial does not mean that it is necessarily unfairly prejudicial. The meaning of unfair prejudice in the context of Rule 403 is an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.

Defendant contends the statement in this case was more prejudicial than probative because the jurors were not informed that defendant had just completed his sentence in New York and would have been released at midnight. According to defendant, in the absence of this additional information, the jury must have assumed that defendant was talking about escaping from jail. Defendant ignores the fact, however, that defendant objected to any testimony that he was incarcerated on unrelated charges in New York. Thus, the prejudice cited on appeal was due to defendant's trial strategy. In light of this trial strategy, we cannot hold that the trial court's decision to admit this evidence was an abuse of discretion. *See also State v. Charles*, 92 N.C. App. 430, 435-36, 374 S.E.2d 658, 661 (1988) (holding defendant's statement " 'they are never going to take me in again alive' " relevant as probative of defendant's knowledge of guilt and not unduly prejudicial), *disc. review denied*, 324 N.C. 338, 378 S.E.2d 800 (1989). We, therefore, conclude that the trial court did not err in admitting testimony regarding defendant's statement.

III

[5] Finally, defendant challenges the trial court's admission of testimony by Derrick Goodson's mother, Vickie Hamrick, that Goodson

told her defendant had shot him. Defendant asserts that the testimony constituted inadmissible hearsay and violated his constitutional right to confrontation. Since defendant makes no specific argument and cites no supporting authority as to his confrontation clause contention, we do not address that issue. *See* N.C.R. App. P. 28(b)(6) ("Assignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").[2]

Following voir dire, the trial court found that Goodson arrived at the hospital at 1:13 a.m. after being shot. During transport, he received oxygen and saline through an I.V., but no other medications. Goodson was seen at 1:16 a.m. by an emergency room physician, whose notes (1) indicated that Goodson was oriented in conversation and gave appropriate responses and (2) did not indicate that anything was done that would affect Goodson's ability to think and evaluate.

Hamrick was at work when she learned her son was at the hospital. She went to work at midnight, and when she learned this news, she had been at work for approximately an hour. The drive to the hospital took about 25 minutes. When she arrived, Goodson told Hamrick that he had been shot by "C," a nickname that referred to defendant. Officer Deborah Garris talked to Goodson at approximately 2:02 a.m. in the hospital, and when she was talking to him, Goodson's parents were present.

The trial court concluded that Goodson's statement qualified as a present sense impression under Rule 803(1) of the Rules of Evidence because it "was made at a time when it was separated from the shooting only by the efforts of the EMT personnel, the emergency room, hospital emergency room nurses and doctors, and this on-going effort to save Mr. Goodson's life would therefore qualify as immediately after the shooting . . . ." The trial court, therefore, admitted Hamrick's testimony regarding her son's identification of his shooter.

> A present sense impression, an exception to the rule against hearsay, is defined as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." N.C.R. Evid. 803(1). The parties dispute whether Goodson's statement was made sufficiently near in time to the shooting to fall under this exception.

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2. Although Rule 28 was recently amended, the amendment applies to cases appealed on or after 1 October 2009. Since this case was appealed in May 2009, we analyze this case under the version of Rule 28 applicable at that time.

" '[T]here is no rigid rule about how long is too long to be immediately thereafter.' " *State v. Little*, 191 N.C. App. 655, 664, 664 S.E.2d 432, 438 (quoting *State v. Clark*, 128 N.C. App. 722, 725, 496 S.E.2d 604, 606 (1998)), *disc. review denied*, 362 N.C. 685, 671 S.E.2d 326 (2008). " '[T]he basis of the present sense impression exception is that closeness in time between the event and the declarant's statement reduces the likelihood of deliberate or conscious misrepresentation.' " *Id.* (quoting *State v. Smith*, 152 N.C. App. 29, 36, 566 S.E.2d 793, 798, *cert. denied*, 356 N.C. 311, 571 S.E.2d 208 (2002)).

In this case, the State's evidence was that Goodson was shot just before 12:49 a.m. and was admitted to the hospital at 1:13 a.m. His mother got a call informing her of the shooting at approximately 1:00 a.m. She immediately left work, and the evidence suggests she arrived at the hospital at approximately 1:30 a.m. Once she arrived at the hospital, she went straight to the emergency room, where Goodson made the statement. At that time, Goodson was crying and kept repeating that defendant had shot him. Goodson was at that time with a doctor who had responded to his bedside at 1:40 a.m. This evidence supports a finding that Goodson made his statement approximately 50 minutes after the shooting.[3]

We believe the time period between the shooting and when Goodson made the statement—less than an hour—was sufficiently brief under the circumstances to fall under the present sense impression exception. The focus of events during that gap in time was on saving Goodson's life, thereby reducing the likelihood of deliberate or conscious misrepresentation. *See State v. Cummings*, 326 N.C. 298, 314, 389 S.E.2d 66, 75 (1990) (finding admissible as present sense impression victim's mother's testimony that victim came to mother's house crying and stated that defendant had kicked her out of house, even though statement was made after victim drove from defendant's house in Willow Springs to her mother's house in Raleigh). *Compare State v. Wiggins*, 159 N.C. App. 252, 257, 584 S.E.2d 303, 309 (holding statements not admissible where victim made them when he woke up from surgery, seven hours after shooting), *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).

[6] Defendant also points out that the trial court refused to admit the portion of Goodson's statement to his mother in which Goodson said

3. Hamrick testified that no more than an hour had elapsed from the phone call she received until the time when she spoke with her son.

defendant shot Roseboro. Defendant argues that because the court found that portion of the statement was not credible, the second portion of the statement, in which Goodson told Hamrick that defendant shot him, should also be inadmissible. Defendant misconstrues the reason for the trial court's exclusion of the first portion of the statement. The trial court excluded the first portion not because the court thought it lacked credibility, but because it was obvious that Goodson, who was in a different part of the apartment complex when Roseboro was shot, could not have had personal knowledge of who shot Roseboro. The exclusion of the first portion of the statement has no bearing on the admissibility of the second portion. We, therefore, find no error.

No error.

Judges JACKSON and BEASLEY concur.

JILL C. SHEFFER, Petitioner v. TIMOTHY B. RARDIN, Respondent

No. COA09-1562

(Filed 21 December 2010)

1. Evidence— admissions—judicial—failure to deny allegations—admissions at hearing

The trial court did not err by concluding that an actual partition of land would result in substantial injury to the parties where there was neither evidence nor specific findings of the values of the properties. The trial court's conclusion was supported by respondent's judicial admissions in his failure to deny any of the allegations of the petition and in his admissions in a hearing. The trial court did not abuse its discretion by ordering the sale of the properties.

2. Evidence— judicial admissions—pro se representation

A *pro se* respondent's arguments in a partitioning appeal that his judicial admissions should have been overlooked because he represented himself were overruled.

Appeal by respondent from order entered 1 September 2009 by Judge Alma L. Hinton in Superior Court, Dare County. Heard in the Court of Appeals 12 May 2010.

Vandeventer Black LLP by Norman W. Shearin, for petitioner-appellee.

Robertson, Medlin & Blocker, PLLC by John F. Bloss, for respondent-appellant.[1]

STROUD, Judge.

Timothy B. Rardin ("respondent") appeals from a trial court's order that land co-owned by respondent and Jill C. Sheffer ("petitioner") be sold for partition at a public auction. For the following reasons, we affirm the trial court's order.

On 6 May 2009, petitioner filed a verified "Petition For Partition of Real Property" in Superior Court, Dare County. The petition alleged that petitioner and respondent jointly owned as tenants in common two separate parcels of real estate in Kitty Hawk, North Carolina ("the subject properties"). Petitioner further alleged that "the nature and size of the Property is such that an actual partition thereof cannot be made without injury to the several interested persons[,]" and "[t]he parties have made unequal contributions to the purchase price of the Property and equal payments of the mortgage and expenses from the date of purchase through August 31, 2008 toward maintaining the Property." Petitioner requested an order directing that the subject properties be sold and the proceeds divided between the parties according to their ownership interests.

On 1 June 2009, respondent filed a *pro se* answer to the petition. Respondent's answer did not deny any of the allegations of the petition but instead set forth respondent's contentions as to the parties' relationship and its demise; finances and contributions of the parties; financial equity; "mitigation[,]" which addressed settlement negotiations between the parties; petitioner's real estate, which addressed other separately owned real estate of petitioner; and "other" which addressed the fact that both parties are "real estate licensed[,]" the poor state of the real estate market at the time in Dare County, and the fact that respondent was relying upon equity in the subject properties for his retirement; a request for trial by jury; and his "prayer" that the case be dismissed as "dismissal of this case will cause no harm whatsoever to the Plaintiff, but will avoid irreparable financial harm to me." Respondent summarized his main contention as follows:

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1. In respondent's reply brief filed 6 May 2010, the firm listed below respondent's counsel's signature is "Robertson, Medlin & Bloss, PLLC[.]"

> It has never been an issue that I won't sell (or ever buy her out again). I am prepared and willing to sell when the market strengthens. The house has even been shown at least three (3) different occasions this Spring . . . . Therefore, the issue and underlying reason for the Plaintiff filing this Petition cannot be that I am refusing to sell the house. My issue, as stated several times already, is the critical nature of the timing.

Following a hearing on 1 July 2009, the Clerk of Superior Court, Dare County entered an order on 14 July 2009 finding that respondent had "acknowledged at a hearing in front of the Court that an actual partition of said lands cannot be made without substantial injury to one or both of the parties." The Clerk's order then concluded that "having considered the petition, the answer, and having heard from the parties finds as a fact that an actual partition of said lands described in the Petition cannot be made among the tenants in common without substantial injury to some [or] all of the parties interested[,]" and ordered that "the lands described in the petition be sold for partition at public auction in accordance with the provisions of N.C.G.S. § 46-28, and, if necessary, on such terms and conditions as set forth in other orders of this Court." The Clerk's order then appointed a Commissioner to make the sale. On 21 July 2009, respondent filed a notice of appeal from the Clerk's order to Superior Court, Dare County and posted a bond to stay the courthouse sale of the subject properties. Following a hearing on 31 August 2009, the trial court entered an order on 1 September 2009 upholding the Clerk's order. On 8 September 2009, respondent gave written notice of appeal from the trial court's order.

[1] On appeal, respondent argues that the trial court erred in determining that an actual partition would cause substantial injury to an interested party. In reviewing a trial court's order for partition by sale, we have held that

> the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable de novo. The determination as to whether a partition order and sale should be issued is within the sole province and discretion of the trial judge and such determination will not be disturbed absent some error of law.

Lyons-Hart v. Hart, ––– N.C. App. –––, –––, 695 S.E.2d 818, 821 (2010) (quotation marks, citations and brackets omitted).

In its order, the trial court stated as follows:

> This hearing coming on before the undersigned Judge at the August 31, 2009, term of Dare County Superior Court from an appeal by the Respondent of an Order entered by the Dare County Clerk of Court on 14 July 2009. The Clerk of Court's Order found that an actual partition of said lands described in the Petition could not be made among the tenants in common without substantial injury to some or all of the parties interested, and ordered that the lands described in the petition be sold for partition at public auction in accordance with the provisions of N.C.G.S § 46-28.
>
> After a hearing in open court in which the Petitioner was represented by Robert P. Trivette, and the Respondent was represented by himself, this Court, after reviewing the petition, the answer, the Order of the Clerk, and hearing arguments of the Respondent and the Petitioner's counsel, and finding no issues in dispute from the Clerk's Order for this Court to rule on, Upholds the findings of fact and conclusions of law found by the Clerk of Court in her Order, therefore Upholds said Order entered by the Clerk of Court dated 14 July 2009.

The order of the Clerk of Superior Court which was "upheld" by the trial court provided as follows:

> This proceeding coming on from hearing on July 1, 2009 upon a Petition alleging that the Petitioner and Respondent are tenants in common of the lands described in the Petition; that all the necessary parties are before the Court; that the Petitioner desires a partition thereof, but that an actual partition cannot be made without injury to some or all the parties interested. It further appearing to the Court that the Respondent has been served with summons, and has filed an answer admitting the parties are tenants in common of the lands described in the Petition, and has acknowledged at a hearing in front of the Court that an actual partition of said lands cannot be made without substantial injury to one or both of the parties.

Therefore, the trial court concluded that "no issues [were] in dispute from the Clerk's Order for this Court to rule on" and upheld the findings

of fact, conclusions of law, and order entered by the Clerk on 14 July 2009 that the subject properties be sold for partition at public auction.

Respondent's brief never clearly identifies whether his argument is a challenge to a finding of fact, a conclusion of law, or both. In all fairness, the trial court's order does not differentiate between findings of fact and conclusions of law either. The Clerk's order presents the issue of "substantial injury" as a finding of fact: "The Court having considered the petition, the answer, and having heard from the parties *finds as a fact* that an actual partition of said lands described in the Petition cannot be made among the tenants in common without substantial injury to some or all of the parties interested." (Emphasis added.) The trial court's order upheld the "findings of fact and conclusions of law" as found by the Clerk's order. However, despite the identification, or lack thereof, of a provision of the order as finding of fact or conclusion of law, we must base our consideration upon the proper identification of the issue. Where "findings of fact" should have been "more properly designated conclusions of law[,]" this Court will "treat them as such for the purposes of . . . appeal." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997).

> The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment, *see Plott v. Plott*, 313 N.C. 63, 74, 326 S.E.2d 863, 870 (1985), or the application of legal principles, *see Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657-58 (1982), is more properly classified a conclusion of law. Any determination reached through "logical reasoning from the evidentiary facts" is more properly classified a finding of fact. *Quick*, 305 N.C. at 452, 290 S.E.2d at 657-58 (quoting *Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951)).

Id. N.C. Gen. Stat. § 46-22 sets forth the procedure for a sale in lieu of partitioning a property:

> (a) The court shall order a sale of the property described in the petition, or of any part, only if it finds, by a preponderance of the evidence, that an actual partition of the lands cannot be made without substantial injury to any of the interested parties.
>
> (b) "Substantial injury" means the fair market value of each share in an in-kind partition would be materially less than the share of

> each cotenant in the money equivalent that would be obtained from the sale of the whole, and if an in-kind division would result in material impairment of the cotenant's rights.
>
> (c) The court shall specifically find the facts supporting an order of sale of the property.
>
> (d) The party seeking a sale of the property shall have the burden of proving substantial injury under the provisions of this section.

N.C. Gen. Stat. § 46-22 (2009)[2].

This Court has previously noted that the determination of "substantial injury" is a conclusion of law, not a finding of fact. In *Partin v. Dalton Property Assoc.*, 112 N.C. App. 807, 436 S.E.2d 903 (1993), we explained that

> the trial court concluded as a matter of law that "an actual partition of the subject property cannot be made without substantial injury to the co-tenants." To be sustained, this conclusion must be supported by a finding of fact that an actual partition would result in one of the cotenants receiving a share of the property with a value materially less than the value the cotenant would receive were the property partitioned by sale and that an actual partition would materially impair a cotenant's rights. These findings of fact must be supported by evidence of the value of the property in its unpartitioned state and evidence of what the value of each share of the property would be were an actual partition to take place.

Id. at 812, 436 S.E.2d at 906. Therefore, the provision of the order which the respondent challenges is a conclusion of law.

We will therefore consider respondent's argument as a challenge to the trial court's conclusion of law that actual partition would result in "substantial injury" to the parties. Essentially, respondent argues that the findings of fact do not support the trial court's conclusion of law that an actual partition would result in "substantial injury" to a party because there are no findings of fact as to the "value of the property in its unpartitioned state and *evidence* of what the value of

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2. N.C. Gen. Stat § 46-22 was amended in 2009 but those changes became "effective October 1, 2009, and applie[d] to partition actions filed on or after that date." 2009 N.C. Sess. Laws 512 §§ 2 and 6. However, petitioner filed her petition for partition of the subject properties on 6 May 2009. Therefore, the amendments to N.C. Gen. Stat. § 46-22 are not applicable in the case before us.

each share of the property would be were an actual partition to take place." (Emphasis in original.) Respondent is correct that there was no evidence presented and no specific findings of fact as to the values of the properties. However, respondent's own answer to the petition and his representations at the hearing before the Clerk made such evidence unnecessary. Respondent did not deny any allegations of the petition and he acknowledged before the court that "an actual partition of said lands cannot be made without substantial injury to one or both of the parties." Respondent contends that the trial court's conclusion as to substantial injury "is completely at odds with the position he took in his Answer and in his presentation to the trial court," but this contention is not accurate. In fact, respondent essentially argued before the trial court that either an actual partition of the two properties or a partition by sale would substantially injure him, if the partition were done at that particular time. Respondent objected to the *timing* of partition, but one of the reasons that a partition proceeding may be necessary is that at least one of the co-owners of real property wants to end the joint ownership *now*, while another co-owner does not, for whatever reason. The partition statute has no provision to permit the trial court to delay partition based upon one party's objection to the timing of the partition.

In addition to his failure to deny the allegations of the petition, respondent acknowledged before the trial court that one of the properties is a vacant residential lot and the other property is a lot and house where respondent was living. Respondent himself asserted to the trial court that the two properties were of substantially different values and he did not argue that either property could be actually partitioned. His only objections to selling the properties were the timing and method of the sale. He recounted his efforts to convince petitioner to reach a settlement with him and argued that the trial court should order

> "an even swap, she gets the lot, she gets $121,000 of my equity in it because she owns the lot one hundred percent, I get the house and would also arrange to forgive her almost $125,000 that she currently owes me . . . . [T]his . . . would also satisfy the intent of allowing for a physical partition of the property by my legally, physically, financially and equitably giving her my unencumbered fifty percent of the lot, $121,000 worth, in exchange for a dollar per dollar reduction in her share of the other property, property that she's refused to pay her share of the ongoing expenses for the last twelve months.

Respondent wanted the Superior Court to consider the poor condition of the real estate market in Dare County, his retirement investment intentions, other real estate owned by petitioner in which he had no interest, and other factors which were simply irrelevant under the above noted sections of Chapter 46.[3] Therefore, respondent's argument that the Superior Court erred in its finding that he "has acknowledged at a hearing in front of the Court that an actual partition of said lands cannot be made without substantial injury to one or both of the parties" is without merit.

Petitioner argues that because of the respondent's judicial admission to the Clerk of Court that substantial injury would result from an actual partition, the trial court was correct in upholding the Clerk's order for the subject properties to be sold for partition at public auction. Respondent counters that any admission of "substantial injury" during the hearing before the Clerk of Court was an "extrajudicial or evidentiary admission," which could be "rebutted, denied or explained away" and was not made in a written pleading or stipulation and therefore was not a binding judicial admission.

Our courts have described the distinction between a judicial admission and an evidentiary admission.

> A judicial admission is a formal concession which is made by a party in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute. *See generally* 2 Stansbury's North Carolina Evidence § 166 (Brandis rev. 1973). Such an admission is not evidence, but it, instead, serves to remove the admitted fact from the trial by formally conceding its existence. *E.g.*, *State v. McWilliams*, 277 N.C. 680, 178 S.E.2d 476 (1971).

Outer Banks Contractors, Inc. v. Forbes, 302 N.C. 599, 604, 276 S.E.2d 375, 379 (1981).

> In contrast, an evidential or extrajudicial admission consists of words or other conduct of a party, or of someone for whose conduct the party is in some manner deemed responsible, which is admissible in evidence against such party, but which may be rebutted, denied, or explained away and is in no sense conclu-

3. At the hearing before the Superior Court, respondent argued that pursuant to N.C. Gen. Stat. § 46-3.1 (2009) it would be in the "best interests" of both parties for the trial court to consider his financial situation and the real estate market in fashioning its order.

> sive. Generally, a party's statements, given in a deposition or at trial of the case, are to be treated as evidential admissions rather than as judicial admissions.

Jones v. Durham Anesthesia Assocs., P.A., 185 N.C. App. 504, 509, 648 S.E.2d 531, 535-36 (2007) (citations and quotation marks omitted).

Petitioner herein, citing *Clapp v. Clapp*, 241 N.C. 281, 85 S.E.2d 153 (1954), contends that the trial court did not need to make the findings enumerated by N.C. Gen. Stat. § 46-22(b) and (c) as respondent made a judicial admission by "acknowledg[ing] at a hearing in front of the Court that an actual partition of said lands cannot be made without substantial injury to one or both of the parties." In *Clapp*, this Court considered the effect of a judicial admission in a partition proceeding. *Id.* at 284-85, 85 S.E.2d at 155-56. The petitioner filed a petition for a special proceeding to sell real property from decedent's estate and for partition. *Id.* at 282, 85 S.E.2d at 153-54. The petition alleged that actual partition of the real property could not be made without injury to some or all of the parties, and that a sale for partition was necessary. *Id.* at 282-83, 85 S.E.2d at 154. The respondents answered "admitting that actual partition of the land cannot be made without injury to some or all of the owners thereof[,]" but filed a plea alleging that one of the respondents owned a portion of the subject property "by virtue of an agreement" between the decedent and respondent Vick Clapp. *Id.* at 283, 85 S.E.2d at 154. In a hearing before the Clerk, respondents' counsel stated that respondents did not have any written contract or documentation in support of their claim, but stated they intended to bring suit against the decedent's estate for breach of a contract. *Id.* Accordingly, the Clerk entered judgment appointing a Commissioner and directed sale of all the land described in the petition. *Id.* at 283, 85 S.E.2d at 154-55. On respondents' appeal to the Superior Court, respondents admitted there was no contract between the decedent and respondent Vick Clapp, the Superior Court affirmed the Clerk's order, and respondents appealed to our Supreme Court. *Id.* at 283, 85 S.E.2d at 155. The Court noted that the issue of fact raised by respondents' plea of sole seizin "was eliminated and the necessity for jury trial removed when the [respondents] *conceded by solemn admission*, first made to the Clerk and later reiterated in response to an inquiry of the presiding Judge in term time, that their plea of sole seizin is not supported by any written contract or document to convey or devise the land claimed[,]" and, therefore, amounted to "[a] judicial admission . . . effectively remov[ing] the admitted fact from the field of issuable matters." *Id.* at

284, 85 S.E.2d at 155 (Emphasis added.) The Court then held that in view of this judicial admission, respondents' "claim of sole seizin is within the statute of frauds and for that reason void, the judgment of the Clerk, as approved by the presiding Judge, directing sale of all the land is free of prejudicial or reversible error and will be upheld." *Id.* Given the respondents' admission in their answer and the elimination of their plea of sole seizin, the Court concluded that petitioners "were entitled upon the allegations of the pleadings to sale for partition." *Id.* at 285, 85 S.E.2d at 156. The Court then held that "[t]he judgment below will be treated as having been entered for that purpose, and as so modified will be affirmed." *Id.*

Respondent argues that this case is controlled by *Partin v. Dalton Property Assoc.*, 112 N.C. App. 807, 436 S.E.2d 903 (1993), which reversed an order for partition because it did not contain the required findings of fact to support the trial court's conclusion of law regarding "substantial injury." In *Partin*, the petitioner filed a petition requesting that two properties be sold in lieu of actual partition. *Id.* at 808, 436 S.E.2d at 903-04. The Clerk of Court entered an order that the property be sold, and respondent appealed the Clerk's order to the Superior Court. *Id.* at 809, 436 S.E.2d at 904. "The court adopted the findings of fact of the Clerk of the Superior Court, concluded as a matter of law that by the preponderance of the evidence an actual partition of the property could not be had without substantial injury to the cotenants, and ordered the sale of the property." *Id.* at 809-10, 436 S.E.2d at 905. On appeal, respondent challenged "whether the trial court made sufficient findings of fact to support ordering a partition by sale." *Id.* at 810, 436 S.E.2d at 905. This Court held that

> [t]he trial court failed to make the required findings of fact that actual partition would result in one of the cotenants receiving a share with a value materially less than the value of the share he would receive were the property partitioned by sale and that actual partition would materially impair a cotenant's rights, and there is no evidence in this record which would support such findings of fact. Therefore, the trial court's order must be reversed and the case remanded for a new trial.

Id. at 812, 436 S.E.2d at 906.

Here, as in *Partin*, neither the trial court in its order, or the referenced Clerk's order, made any specific findings regarding whether "the fair market value of each share in an in-kind partition would be

materially less than the share of each cotenant in the money equivalent that would be obtained from the sale of the whole" or specific findings "supporting an order of sale of the property" as required by N.C. Gen. Stat. § 46-22(b) and (c). However, in *Partin*, there was no allegation of a judicial or evidentiary admission as to the relevant facts. Instead, the *Partin* respondent challenged the allegations of the petition and the parties presented conflicting evidence regarding the property's best use, terrain, access to a roadway, and the difficulty and cost of surveying the land. *Id.* at 809, 436 S.E.2d at 904-05. Therefore, *Partin* is distinguished from this case by the respondent's denial of the petitioner's claims and allegations as well as the presentation of conflicting evidence.

This case is much more similar to *Clapp* than to *Partin*. Here, as in *Clapp*, respondent made an "acknowledg[ment]" to the Clerk "that an actual partition of said lands cannot be made without substantial injury to one or both of the parties." In addition, respondent failed to deny any of the allegations of the petition, including the allegation that "the nature and size of the Property is such that an actual partition thereof cannot be made without injury to the several interested persons." Because respondent failed to deny the allegations of the petition, all of the allegations of the petition are deemed admitted. *See Hill v. Hill*, 11 N.C. App. 1, 10, 180 S.E.2d 424, 430 ("Averments in pleadings are admitted when not denied in a responsive pleading, if a responsive pleading is required."), *cert. denied*, 279 N.C. 348, 182 S.E.2d 580 (1971). Just as in *Clapp*, the judicial admissions of the respondent established the factual basis for the partition order's conclusion of law. These admissions "remove[d] the admitted fact from the trial by formally conceding its existence." *Outer Banks Contractors, Inc.*, 302 N.C. at 604, 276 S.E.2d at 379. Accordingly, we hold that the trial court's conclusion of law that the property could not be actually partitioned without substantial injury to a party was supported by the respondent's judicial admissions, and the trial court did not abuse its discretion in ordering the sale of the subject properties. *Lyons-Hart*, ––– N.C. App. at –––, 695 S.E.2d at 821. Respondent's argument is overruled.

[2] Respondent argues next that because he was proceeding *pro se* any admission by him of "substantial injury"—a statutorily defined term—"should not be deemed a repudiation of the absolutely contrary positions that [he] took both before and after the hearing before the Clerk." As noted above, we cannot agree that respondent took a contrary position at any time. In addition, respondent cites no authority

of precedential value in support of his argument that we should overlook his judicial admissions in his answer, before the Clerk of Superior Court, and before the Superior Court because of his *pro se* status. A person who chooses to represent himself is bound by the same rules as one who is represented by counsel; to hold otherwise would be manifestly unfair to the represented party and contrary to established law. Just as the defendant in *State v. Pritchard*, 227 N.C. 168, 41 S.E.2d 287 (1947), respondent "proved to be a poor lawyer and an unwise client. After [judgment], he employed counsel to prosecute an appeal. This has been done with as much skill as the record would permit." *Id.* at 169, 41 S.E.2d at 287. Based upon the record before us, we must overrule respondent's argument that his judicial admissions should be overlooked because he was representing himself and did not understand all of the legal issues involved.

Lastly, respondent argues that petitioner's argument regarding respondent's alleged admissions was not raised before the trial court and therefore was not properly preserved for appellate review. Contrary to respondent's contention, at the 31 August 2009 hearing on this matter, petitioner's counsel did argue to the trial court that respondent admitted at the hearing before the Clerk that actual partition of the subject properties would cause substantial injury to both parties. Accordingly, respondent's argument is overruled.

For the forgoing reasons, we affirm the trial court's order.

AFFIRMED.

Chief Judge MARTIN and Judge HUNTER, JR., Robert N. concur.

IRIS B MUNN, ADMINISTRATRIX OF THE ESTATE OF DEMETRA C.B. MURPHY, DECEASED, PLAINTIFF v. HAYMOUNT REHABILITATION & NURSING CENTER, INC. AND CENTURY CARE OF FAYETTEVILLE, INC., DEFENDANT

No. COA10-105

(Filed 21 December 2010)

1. Arbitration and Mediation— no valid arbitration agreement

The trial court did not err in determining that there was no valid arbitration agreement between the deceased or her estate and defendant. There was no actual or apparent authority for the deceased's mother to act as her agent in signing the arbitration agreement, N.C.G.S. § 90-21.13 was inapplicable, and defendant could not have reasonably relied on any representation that the deceased's mother was her agent. Defendant's public policy argument was also rejected.

2. Estoppel— affirmative defense—not plead at trial level

Defendant's argument that plaintiff was estopped from denying the validity of a contract executed on behalf of the deceased was rejected where defendant did not plead the affirmative defense of estoppel at the trial level.

3. Arbitration and Mediation— ratification of arbitration agreement—not plead at trial level

Defendant's argument that the deceased ratified an arbitration agreement executed by her mother on her behalf was rejected where defendant did not make any allegation of ratification in its pleadings to the trial court.

4. Arbitration and Mediation— unconscionable agreement—issue not addressed

Plaintiff's argument that an arbitration agreement was unconscionable was not addressed as the Court of Appeals determined that plaintiff was not bound by the agreement.

Appeal by defendants from order entered on or about 4 August 2009 by Judge Shannon R. Joseph in Superior Court, Cumberland County. Heard in the Court of Appeals 30 August 2010.

Ferguson, Stein, Chambers, Gresham & Sumter, P.A., by Adam Stein and Anne Duvoisin, for plaintiff-appellee.

Yates, McLamb & Weyher, L.L.P., by Barry S. Cobb, for defendant-appellants.

STROUD, Judge.

Defendants appeal a trial court order denying their amended motion to compel arbitration and granting plaintiff's motion to dismiss defendants' claim for arbitration. As we conclude that there is no valid arbitration agreement between the parties, we affirm.

I. Background

On 20 November 2008, plaintiff filed a complaint against defendants for violation of statutory duties and wrongful death, negligence and wrongful death, and corporate negligence arising out of the medical treatment of Ms. Demetra Murphy at defendants' nursing home facility, Haymount Rehabilitation & Nursing Center, Inc. On 27 January 2009, defendants filed a motion to dismiss, a motion to stay and dismiss, and an answer to plaintiff's complaint. On or about 22 July 2009, defendants filed an amended motion to compel arbitration.

On or about 4 August 2009, the trial court, *inter alia*, denied defendants' amended motion to compel arbitration and granted plaintiff's motion to dismiss defendants' claim for arbitration.[1]

The trial court made the following uncontested findings of fact:

> 2. Plaintiff brings this action in her representative capacity as Administratrix of the Estate of Demetra Murphy for damages stemming from the alleged wrongful death and negligent care by Defendants of Plaintiff's adult daughter, Demetra Murphy ("Murphy"). Plaintiff is not decedent Murphy's heir and will not receive proceeds, if any, from this action. At the time of her death, decedent Murphy was married to Calvin Murphy and had a daughter.
>
> . . . .
>
> 4. Decedent Murphy arrived at the nursing home after having been hospitalized for a lengthy period. She had not recovered sufficiently to be discharged to her family's home. When decedent

1. The record does not contain a motion from plaintiff to dismiss defendants' claim for arbitration, though one was apparently filed.

Murphy was admitted to the nursing home, she was not responsive: she was not able to speak or communicate with anyone. The nursing home did not have any previous experience with decedent Murphy. Decedent Murphy's husband and Plaintiff, along with other family members, went to the nursing home on the day of decedent Murphy's admission to [the] facility. While the unconscious Murphy was moved to a room in the facility, Plaintiff and Mr. Murphy participated in the admission process for Murphy's admission to the facility, including completing paperwork.

5. Mr. Murphy testified that he did not pay attention to the admission process, as he was bothered by the state of the facility. Plaintiff likewise explained that she was troubled by the state of the facility and did not focus on the admission process, but was thinking to herself that she would make efforts to move her daughter to another facility. In response to a query during the admission process about who would sign all the paperwork, Mr. Murphy asked that Plaintiff be the person to make decisions about decedent Murphy's care because his work schedule made him difficult to locate and contact.

6. Defendants seek to compel arbitration based on a paragraph entitled "Mandatory Arbitration" contained in the "Admission Agreement" signed on 17 June 2004 by Plaintiff when Plaintiff's adult daughter (decedent Murphy) was admitted to a nursing home operated by Defendants. The Admission Agreement recites that it is "by and between Century Care of Fayetteville and Demetra Murphy (Resident) or Iris Munn (Responsible Party)."

7. The arbitration section in the Admission Agreement requires all matters "[e]xcept for Facility's effort to collect monies due from Resident and Facility's option to discharge Resident for such failure" to be arbitrated in accordance with "the Alternative Dispute Resolution Service Rules of Procedure for Arbitration of the American Health Lawyers Association . . . , and not be a lawsuit or resort to court process . . . ." The arbitration section provides that its terms "inure to the benefit of and bind the parties, their successors and assigns, including the agents, employees and servants of the Facility, and all persons whose claims are derived through or on behalf of the Resident."

8. In the only full-sentence text of the six-page Admission Agreement that is underlined, the arbitration section specifies that agreeing to its terms means giving up the right to a jury trial:

> The parties understand and agree that by entering this Agreement they are giving up and waiving their constitutional right to have any claim decided in a court of law before a judge and a jury.
>
> . . . .
>
> 10. Plaintiff, signing the agreement on the signature line for the "Responsible Party," did not ask any questions about the arbitration provision in the Admission Agreement before signing it.
>
> . . . .
>
> 12. Decedent Murphy did not sign the Admission Agreement that contained the arbitration provision.
>
> . . . .
>
> 15. When Plaintiff signed the Admission Agreement as the "Responsible Party," she had no power of attorney and was not guardian of her daughter, decedent Murphy.
>
> . . . .
>
> 17. Plaintiff was not authorized by her status as the adult decedent's mother to agree to the arbitration provision.
>
> . . . .
>
> 27. The facility did not seek, request, or require proof of legal authority for one to act on behalf of a patient during the admission process. In particular, . . . the facility employee . . . confirmed at her deposition that she generally did not require power of attorney or guardianship documentation to establish legal authority to sign admission documents when the patient was not able to act on his or [sic] own behalf. Rather, generally in conducting the admission process, the facility employee would go through the process with either the next-of-kin to the patient or whoever had acted on behalf of the patient at the hospital, even if not kin to the patient.

(Emphasis in original.) (Footnote omitted.) Based on these and other findings, the trial court determined that there was not a valid arbitration agreement between the estate of Ms. Murphy and defendants. Defendants appeal.

II. Interlocutory Appeal

We first note that "[a]n order denying defendants' motion to compel arbitration is not a final judgment and is interlocutory. However, an order denying arbitration is immediately appealable because it involves a substantial right, the right to arbitrate claims, which might be lost if appeal is delayed." *Raper v. Oliver House, LLC*, 180 N.C. App. 414, 418-19, 637 S.E.2d 551, 554 (2006) (citations and quotation marks omitted).

III. Standard of Review

> Whether a dispute is subject to arbitration is an issue for judicial determination. Our review of the trial court's determination is de novo. Pursuant to this standard of review, the trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary. Accordingly, upon appellate review, we must determine whether there is evidence in the record supporting the trial court's findings of fact and if so, whether these findings of fact in turn support the conclusion that there was no agreement to arbitrate.

Harbour Point v. DJF Enters., ––– N.C. App. –––, –––, 688 S.E.2d 47, 50 (citations, quotation marks, and brackets omitted), *disc. review denied*, ––– N.C. –––, 698 S.E.2d 397, *appeal dismissed and cert. denied*, ––– N.C. App. –––, 697 S.E.2d 439 (2010).

IV. Arbitration

[1] Defendants argue that the trial court erred in determining there was no valid arbitration agreement. The admission document signed by Ms. Munn included provisions regarding various matters in addition to the disputed arbitration provision; the vast majority of the provisions involve financial responsibility and payment for the services provided at or by the nursing home. The admission document also contained provisions regarding general "housekeeping" matters such as visiting hours and laundry options. Ms. Munn's personal financial responsibility for payment for Ms. Murphy's care, as the "responsible party," is not an issue in this case, and we note that Ms. Munn did not need any legal authority from Ms. Murphy or on her behalf to agree to be personally liable for payment of Ms. Murphy's care. Furthermore, we note that the admission document does not specifically address consent for health care for Ms. Murphy, although Ms. Munn's author-

ity to consent to health care for Ms. Murphy is not an issue in this case either. However, Ms. Munn would be required to have some form of legal authority to enter into an arbitration agreement on behalf of Ms. Murphy or her estate.

The first question which we must consider is whether there was a valid arbitration agreement between Ms. Murphy or her estate and defendants.

> A two-part analysis must be employed by the court when determining whether a dispute is subject to arbitration: (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement.
>
> The law of contracts governs the issue of whether there exists an agreement to arbitrate. Accordingly, the party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes.

Id. at –––, 688 S.E.2d at 50 (citations and quotation marks omitted).

A. Agency

Defendants first contend that "the trial court improperly determined that Iris Munn was not the actual or apparent agent" of Ms. Murphy. (Original in all caps.)

> A principal is liable upon a contract duly made by its agent with a third person in three instances: when the agent acts within the scope of his or her actual authority; when a contract, although unauthorized, has been ratified; or when the agent acts within the scope of his or her apparent authority, unless the third person has notice that the agent is exceeding actual authority.

First Union Nat'l Bank v. Brown, 166 N.C. App. 519, 527, 603 S.E.2d 808, 815 (2004) (citation omitted).

> Two essentials are present in a principal-agent relationship: (1) Authority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent. Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.
>
> An agency can be proved generally, by any fact or circumstance with which the alleged principal can be connected and

> having a legitimate tendency to establish that the person in question was his agent for the performance of the act in controversy[.]

Colony Assocs. v. Fred L. Clapp & Co., 60 N.C. App. 634, 637-38, 300 S.E.2d 37, 39 (1983) (citations and quotation marks omitted).

1. Actual Authority

Defendants argue that Ms. Munn was Ms. Murphy's actual agent. "[I]n establishing the existence of an actual agency relationship, the evidence must show that a principal *actually consents* to an agent acting on its behalf." *Phillips v. Rest. Mgmt. of Carolina, L.P.*, 146 N.C. App. 203, 217, 552 S.E.2d 686, 695 (2001) (emphasis added), *disc. review denied*, 355 N.C. 214, 560 S.E.2d 132 (2002). "Actual authority may be implied from the words and conduct of the parties and the facts and circumstances attending the transaction in question." *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 830, 534 S.E.2d 653, 655 (2000). Defendants direct our attention to specific facts as evidence that Ms. Munn was Ms. Murphy's actual agent:

> In the case at bar, the conduct of the principal Ms. Murphy both before and after her comatose state and of her agent Ms. Munn indicate an agency relationship.
>
> In December of 2003, Ms. Murphy voluntarily committed herself for psychiatric care, and at the time of that commitment she conveyed to healthcare providers that her mother was her next of kin and primary contact. In the Complaint, Plaintiff also alleges that Ms. Murphy was alert for communicating with her caregivers and family for some period prior to her death, . . . and yet she never asked to change any of the decisions made by her mother regarding her healthcare up to that point. These facts establish Ms. Murphy's intention to allow her mother to make healthcare decisions for her, including contracting for healthcare services.

Despite the defendants' contentions as to the facts, the trial court's factual findings are fully supported by the evidence. The fact that Ms. Murphy identified "her mother [as] her next of kin and primary contact" and that in periods when she could communicate, Ms. Murphy "never asked to change any of the decisions made by her mother" does not demonstrate that Ms. Munn had actual authority as Ms. Murphy's agent. Neither Ms. Murphy's "words and actions" nor the "facts and circumstances[,]" *Harris* at 830, 534 S.E.2d at 655, establish that Ms. Murphy "actually consent[ed] to . . . Ms. Munn acting on [her] behalf." *Phillips* at 217, 552 S.E.2d at 695. We conclude

that the trial court did not err in concluding that there was not an actual agency relationship between Ms. Munn and Ms. Murphy.

2. Apparent Authority

Defendants also contend that Ms. Munn was Ms. Murphy's apparent agent.

> Apparent authority is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses. Under the doctrine of apparent authority, a principal's liability in any particular case must be determined by what authority the third person in the exercise of reasonable care was justified in believing that the principal had, under the circumstances, conferred upon his agent.

Heath v. Craighill, Rendleman, Ingle & Blythe, 97 N.C. App. 236, 242, 388 S.E.2d 178, 182 (citations and quotation marks omitted), *disc. review denied*, 327 N.C. 428, 395 S.E.2d 678 (1990). "The scope of an agent's apparent authority is determined not by the agent's own representations but by the manifestations of authority which the principal accords to him." *McGarity v. Craighill, Rendleman, Ingle & Blythe, P.A.*, 83 N.C. App. 106, 109, 349 S.E.2d 311, 313 (1986), *disc. review denied*, 319 N.C. 105, 353 S.E.2d 112 (1987).

Defendants first direct our attention to *Raper v. Oliver House, LLC*, 180 N.C. App. 414, 637 S.E.2d 551 (2006). However, in *Raper* there was no issue that the signor of the arbitration agreement was the decedent's agent as "[t]he trial court entered an uncontested finding of fact that plaintiff held decedent's power of attorney." *Id.* at 422, 637 S.E.2d at 556. This Court went on to state that

> [i]t is well established that a contract is enforceable against a party who signs the contract. Plaintiff signed the Agreement as the Responsible Party and as decedent's attorney-in-fact. The Agreement and its arbitration clause is enforceable and provides an arbitral forum to resolve all claims or disputes arising under the parties' contract.

Id. We conclude that *Raper* is inapposite to the current case as agency was not an issue in that case. See *id.*

Turning to the facts which defendants argue show apparent authority:

> Ms. Munn repeatedly held herself out over the course of her daughter's admission as the party responsible for signing off on forms, including surgical consent forms, for her daughter's care.

. . . .

> Ms. Murphy was not in a condition where she could sign for herself, and Mr. Murphy deferred to Ms. Munn as having authority to sign the paperwork. Ms. Munn signed her own name and indicated she was Ms. Murphy's authorized representative, and there is no credible evidence in the record that she qualified or limited her authority in any way. The staff at Century Care would call Ms. Munn for authority to give treatment to Ms. Murphy and Ms. Munn would authorize treatment to be given to her daughter, including surgical authorizations at the local hospital. . . . Further, Century Care had no prior relationship with Ms. Murphy that would put it on notice if Ms. Munn lacked or exceeded the authority given by her daughter.

All of the evidence indicated that Ms. Munn was consulted about and made decisions regarding her daughter's medical treatment, but it does not indicate that Ms. Munn was authorized as or acted as if she were authorized to be Ms. Murphy's general agent in matters such as arbitration agreements. Defendants also argue that "*Mr.* Murphy deferred to Ms. Munn as having authority to sign the paperwork[;]" defendants do not argue that Ms. Murphy made any manifestation of Ms. Munn's authority at the time of the signing of the paperwork as at that time she was "not responsive" and unable "to speak or communicate." (emphasis added.) We again note that "[t]he scope of an agent's apparent authority is determined not by the agent's own representations but by the manifestations of authority which the principal accords to h[er]." *McGarity* at 109, 349 S.E.2d at 313. Defendants have not demonstrated that the trial court's factual findings were not supported by the evidence nor that the trial court erred in its conclusion that Ms. Munn did not have apparent authority to enter into an arbitration agreement on Ms. Murphy's behalf.

Defendants end their argument regarding apparent authority with case law regarding "providing medical care to incompetent patients[.]" However, consent for medical care for another person who is unable to consent is a completely different issue than being an agent who has the authority to enter into a contract such as an arbitration agreement. Ms. Munn's authority to consent to medical care for Ms. Murphy is not an issue in this case. We agree with the trial court's conclusion that Ms. Munn was not the apparent agent of Ms. Murphy.

3. N.C. Gen. Stat. § 90-21.13

Defendants also contend that N.C. Gen. Stat. § 90-21.13 gave Ms. Munn the authority to consent to an arbitration agreement on behalf of Ms. Murphy. Even assuming that plaintiff is incorrect in arguing that defendants did not properly preserve this issue for appeal, the portion of N.C. Gen. Stat. § 90-21.13(c) upon which defendants' argument relies did not become effective until 2007; Ms. Murphy died in 2005. *See* N.C. Gen. Stat. § 90-21.13 (2005), (2007). Furthermore, the 2005 version of N.C. Gen. Stat. § 90- 21.13 is inapplicable to arbitration agreements. The statute is entitled "[i]nformed consent to *health care treatment or procedure*" and the statutory language addresses consent for health care but does not mention authority to enter into contractual arrangements such as an arbitration agreement. *See* N.C. Gen. Stat. § 90-21.13 (2005) (emphasis added). Defendants have not presented any authority or argument that arbitration is a form of "health care treatment or procedure" or that arbitration is a necessary corollary to any "health care treatment or procedure." *Id.* The fact that an arbitration provision was included within an admission agreement which dealt almost entirely with financial responsibility for payment for "health care treatment or procedure[s]" in no way transforms the provisions of the agreement regarding arbitration into consent for "health care treatment or procedure[s]." *Id.*

4. Reliance

Defendants also argue that they reasonably relied on Ms. Munn's representations that she was Ms. Murphy's agent. However, the only "representation" defendants direct our attention to is Ms. Munn's signing of the documents. The fact that Ms. Munn signed documents for the admission and treatment of Ms. Murphy in no way indicates she was Ms. Murphy's agent, as it does not indicate any manifestation of authority by Ms. Murphy. As noted above, "[a]gency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Colony Assocs.* at 637-38, 300 S.E.2d at 39. Ms. Murphy never manifested any form of consent which indicated that Ms. Munn was acting as her agent. *See id.* We agree with the trial court that defendants could not have reasonably relied on any representation that Ms. Munn was Ms. Murphy's agent.

5. Other Defenses

We need not address defendants' next argument regarding other defenses plaintiff might raise as defendants concede that this argu-

ment is based upon "this Court find[ing] that Judge Joseph's conclusions about actual or apparent agency are not supported by competent evidence," and we have not so determined.

6. Public Policy

Defendants finally argue that "[h]olding that signature by a 'responsible party' is not legally binding in an admission agreement will force nursing homes to require legal guardianship or power of attorney signatures for each and every admission."[2] The fallacy in defendants' argument is its failure to recognize the various components of the admission document. The primary focus of the admission document was to secure payment for the services rendered to Ms. Murphy. Neither this Court nor the trial court below has concluded that "a 'responsible party['s]' signature is not legally binding in an admission agreement" as to the matters within the scope of the responsible party's authority. A nursing home may obtain consent to health care under N.C. Gen. Stat. 90-21.13 from an appropriate person as designated by the statute when the patient is unable to make or communicate her own decisions, and a nursing home can have a "responsible party" contract to be financially responsible for payment for services provided to a patient without any sort of authorization by the patient. We conclude only that a "responsible party" must have some form of legal authority to enter into an arbitration agreement on behalf of the patient for the arbitration agreement to be binding upon the patient. There is no undue burden on families or medical facilities from our recognition of the long-standing tenets of the laws of agency and contract which require some form of legal authority, which could include agency, guardianship or power of attorney, for one person to contract away the right of another person to seek legal redress in our court system. This decision in no way impairs a "responsible party's" ability to contract for needed medical services or payment for those services. This argument is overruled.

B. Estoppel

[2] Defendants next contend that Ms. Murphy's "estate is estopped from denying the validity of the contract executed on Ms. Murphy's

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2. Defendants' reference to Ms. Munn as "responsible party" is correct, as the admission document identifies her as such. We note that the terminology of "responsible party" as used in the admission document generally is identifying a signator other than the "resident" as the party who will be financially responsible for payment for services rendered to the "resident." There is no indication in the record before us that Ms. Munn challenged her own personal liability under the admission document, although the issue of her personal liability for payment is not before us in this case.

behalf." (Original in all caps.) However, defendants did not plead the affirmative defense of estoppel; accordingly, defendants may not argue this issue on appeal. *See King v. Owen*, 166 N.C. App. 246, 249-50, 601 S.E.2d 326, 328 (2004) ("As part of its argument under its first assignment of error, Chicago Title argues that plaintiffs are equitably estopped from denying their agreement to the arbitration provision. North Carolina Rules of Civil Procedure, Rule 8(c) requires that certain affirmative defenses, including estoppel and waiver, must be set forth affirmatively in a party's pleading. In its answer, Chicago Title pled eight separate defenses to plaintiffs' complaint, including laches and failure to mitigate damages. Neither estoppel nor waiver were pled as defenses by Chicago Title in this matter. The record before this Court is devoid of any indication that equitable estoppel was raised by Chicago Title before the trial court. Chicago Title cannot swap horses between courts in order to obtain a better mount on appeal.")

C. Ratification

[3] Defendants also contend that Ms. Murphy "ratified the arbitration agreement executed by her mother on her behalf by her actions and inaction after she came out of her coma-like state." (Original in all caps.) Again, defendants failed to make any allegation of ratification in its pleadings to the trial court, and therefore we will not consider this issue. *See Robinson v. Powell*, 348 N.C. 562, 566-67, 500 S.E.2d 714, 717 (1998) ("Ratification is an affirmative defense which must be affirmatively pled. Failure to raise an affirmative defense in the pleadings generally results in a waiver thereof. . . . . Defendants not having pled the affirmative defense of ratification in either his answer or his motion for summary judgment, the issue of ratification was not before the trial court. In fact, the Court of Appeals *sua sponte* raised the issue on appeal. Defendants' failure to assert ratification as an affirmative defense bars that issue being raised by him, or by the Court of Appeals, on appeal.")

D. Unconscionability

[4] Lastly, defendants contend that "plaintiff cannot establish procedural or substantial unconscionability of the arbitration agreement." (Original in all caps.) As we have concluded that Ms. Munn had no authority to act as the agent of Ms. Murphy when she signed the arbitration agreement, Ms. Murphy's estate is not bound by the agreement. Accordingly, we need not address any arguments by Ms.

Murphy as to unconscionability of the agreement or plaintiff's opposing arguments.

V. Conclusion

We conclude that the trial court's findings of fact are fully supported by the evidence and its conclusions of law based upon these findings are correct. Therefore, we affirm the order of the trial court denying defendants' motion to compel arbitration and granting plaintiff's motion to dismiss defendants' claim for arbitration.

AFFIRMED.

Chief Judge MARTIN and Judge ERVIN concur.

AMY JAVORSKY, EMPLOYEE, PLAINTIFF v. NEW HANOVER REGIONAL MEDICAL CENTER, EMPLOYER, SELF-INSURED (ALLIED CLAIMS ADMINISTRATION, INC., SERVICING AGENT), DEFENDANT

No. COA10-454

(Filed 21 December 2010)

1. Workers' Compensation— neck injury—findings—medical treatment required—supported by evidence

The Industrial Commission did not err in a workers' compensation case by finding and concluding that plaintiff required medical treatment for her neck injury and that her employer, a hospital, was financially responsible. There was medical testimony that took the case out of the realm of conjecture and remote possibility and provided sufficient, competent evidence of a proximate causal relation to support the Commission's findings and subsequent conclusion.

2. Workers' Compensation— neck injury—microsurgery—treating physicians—two hundred miles apart

The Industrial Commission did not err in a workers' compensation case by appointing treating physicians located 200 miles apart where there were unchallenged findings that less invasive microsurgery was a reasonable option. Given the practical considerations of follow-up visits to the provider of the microsurgery,

the Commission did not abuse its discretion by ordering defendant to pay for plaintiff's reasonable medical treatment as well as attendant travel expenses.

3. Workers' Compensation— findings—current status—evidence at hearing

There was no error or prejudice in a workers' compensation hearing where the Industrial Commission made findings about the current status of plaintiff and of the patient safety manager for defendant employer. Those findings were based on competent evidence received as of the date of the hearing.

4. Workers' Compensation— attorney fees—stubborn litigiousness

The Industrial Commission did not abuse its discretion in a workers' compensation case by ordering defendant to pay attorney fees to plaintiff's attorney where defendant's denials of plaintiff's claim evidenced stubborn, unfounded litigiousness.

Appeal by defendant from Opinion and Award entered 13 January 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 October 2010.

Poisson, Poisson & Bower, PLLC, by E. Stewart Poisson, for plaintiff-appellee.

Hedrick, Garner, Kincheloe & Garofalo, L.L.P., by Kari A. Lee and Justin D. Robertson, for defendant-appellant.

BRYANT, Judge.

Because there is competent evidence of a proximate causal relation between the tasks performed during the course of employment and the injury sustained, the Industrial Commission's finding of fact as to the existence of such a relation is upheld despite evidence to the contrary. For the reasons stated herein, we affirm the Opinion and Award of the North Carolina Industrial Commission.

The evidence presented to the North Carolina Industrial Commission (the Commission) tends to indicate the following. Plaintiff Amy Javorsky (Javorsky) was employed as a registered nurse by defendant New Hanover Regional Medical Center (New Hanover Regional) in the step-down intensive care unit. The step-

down unit receives patients on their way to and from intensive care and from the emergency department. Javorsky testified that most of the patients in the step-down unit are "total-care" patients: among other duties, nurses are required to reposition the patients every two to three hours; get patients out of bed; and ambulate them. In repositioning a patient, nurses often move the patient with the use of a "draw sheet" that allows the nurses to slide or roll the patient in the patient bed. Moving a patient between a bed and a chair, nurses have the option of performing a "total body lift," by sliding a blanket under the patient and lifting the blanket.

On 18 June 2007, Javorsky was working with a patient from a nursing home. The patient was "small, frail, about 120 pounds . . . ." Because of the patient's small size, Javorsky and one other nurse's assistant performed a total body lift to move her from her bed to a chair. Javorsky testified before a deputy commissioner that as soon as she put the patient in the chair, "[she] felt something immediately . . . . [l]ike possibly pulled muscles" along her neck and right shoulder. Javorsky continued to work but, later in the day, felt a burning sensation in her neck. After her shift, Javorsky went home. When she reached for something on a top shelf in her kitchen, she felt pain like "a sharp knife in [her] neck." Javorsky had previously pulled a muscle in the same area, and after taking muscle relaxers and Ibuprofen, the pain had gone away. For her current pain, she followed the same course of treatment. On 21 June, Javorsky returned to work as scheduled. However, the pain in her neck was still present and had gotten progressively worse. On the morning of 25 June 2007, Javorsky reported the injury to Employee Health and filed a Report of Employee Occupational Injury or Illness. She was placed on restrictive duty and referred to Dr. Alan A. Tamadon, a physiatrist. In the interim, Javorsky began to experience numbness in her right thumb. Dr. Tamadon ordered that she undergo an MRI and referred her to Coastal Neurosurgical. Javorsky was seen on 18 September 2007.

Physician's assistant Christopher Steyskal (Steyskal) performed a complete examination of Javorsky and found the results consistent with her complaint of neck and right shoulder pain occurring while transferring a patient from a bed to a chair. Steyskal reported Javorsky as suffering from "a small disc herniation . . . at C4-5 with some left-sided severe compromise." "At C5-6 there was a large paracentral to the right disc herniation filling the foramen on the right. There was also some foraminal narrowing on the left at [the level of C5-6]." Steyskal testified that a disc herniation at C5-6 was

compressing the C6 nerve root, which resulted in symptoms that radiated down her arm into her hand. Javorsky was given the option of fusing the vertebra in her neck at two levels, C4-C5 and C5-C6, or receiving shots and physical therapy. Steyskal also informed Javorsky of a procedure called "micro endoscopic diskectomy" (MED), performed by Dr. Timothy Adamson, a neurosurgeon practicing in Charlotte. The procedure was less invasive and required less recovery time than a fusion. Thereafter, Dr. Adamson determined that Javorsky was a candidate for the procedure. Javorsky elected the MED.

After the MED, Javorsky testified that she still felt some of the burning sensation in her right shoulder blade, and her neck was weak, but she did not have the pain that she once had. Javorsky returned to work but did not perform total lifts anymore. She was afraid to do too much.

On 17 August 2007, New Hanover Regional filed a Form 19, Employer's Report of Employee's Injury or Occupational Disease to the Industrial Commission. On 19 September 2007, Javorsky spoke with New Hanover Regional adjuster Sheri Teeter via phone. Teeter asked Javorsky how she was injured and investigated the claim by reviewing the Form 19 accident report and medical records. A week later, Teeter asked that Javorsky make a recorded statement. Javorsky refused. On 26 September 2007, Javorsky filed a Form 18, Notice of Accident to Employer. On 28 September 2007, New Hanover Regional filed a Form 61, Denial of Workers' Compensation Claim, and indicated that Javorsky had not described a specific traumatic incident or an injury by accident, had not experienced pain while performing her job, and had refused to give a recorded statement. Javorsky filed a Form 33, Request that Claim be Assigned for Hearing.

On 28 March 2008, the matter came before Deputy Commissioner Kim Ledford. On 4 June 2009, the Deputy Commissioner filed an Opinion and Award ordering that New Hanover Regional pay for all reasonably necessary medical treatment provided for Javorsky's neck injury occurring on 18 June 2007, including treatment rendered and recommended by Dr. Adamson and Coastal Neurosurgery. Dr. Adamson and Coastal Neurosurgery were appointed as authorized treating physicians. Javorsky was granted temporary total disability benefits for the period 22 October 2007 through 11 November 2007, and Javorsky's attorney fees were to be deducted from the sum paid. Javorsky and New Hanover Regional appealed to the Full Commission (the Commission).

The Commission heard the matter on 16 November 2009 and, in an Opinion and Award entered 13 January 2010, adopted, in large part, the Opinion and Award of the Deputy Commissioner but also ordered New Hanover Regional to pay for medical treatment necessary for Javorsky's left shoulder and to pay her attorney a fee of $3,700.00. New Hanover Regional appeals.

On appeal, New Hanover Regional presents the following issues: Did the Commission err in concluding that, as a consequence of her neck injury, (I) New Hanover Regional shall pay for medical treatment for Javorsky's left shoulder; and (II) medical treatment from two physicians located more than 200 miles apart is reasonable or necessary. Did the Commission err in (III) making findings of fact as to the current status of individuals involved in the matter and (IV) awarding Javorsky attorney fees.

Standard of Review

"Under the Workers' Compensation Act, '[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Richardson v. Maxim Healthcare/Allegis Group*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). "[Our Supreme] Court has explained that the Commission's findings of fact 'are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary.' " *Hassell v. Onslow County Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008) (citation omitted). "This Court's standard for reviewing an appeal from the full Commission is limited to determining 'whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law.' " *Rhodes v. Price Bros., Inc.*, 175 N.C. App. 219, 220, 622 S.E.2d 710, 712 (2005) (quoting *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000)).

I

[1] New Hanover Regional argues that the Commission erred in finding and concluding that as a result of Javorsky's neck injury she required medical treatment for her left shoulder and that the hospital was financially responsible. We disagree.

> In cases involving "complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an

> expert can give competent opinion evidence as to the cause of the injury." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980)). . . . The evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation." *Gilmore v. Hoke Cty. Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942) (discussing the standard for compensability when a work-related accident results in death).

Holley v. ACTS, Inc., 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003).

Here, the Commission made the following conclusion.

> 2. As a consequence of her neck injury, [Javorsky] needed medical treatment, including the treatment and surgery performed by Dr. Adamson, as well as treatment for her left shoulder, and [New Hanover Regional is] responsible for the same.

The Commission also made the following pertinent findings of fact.

> 21. Dr. Adamson testified to his opinion to a reasonable degree of medical certainty more probably than not that the June 18, 2007 lifting event and the C5-C6 disc herniation were causally linked. He also testified that the fact that [Javorsky] had no neck pain reported in a November 2006 visit to Employee Health provided even more evidence to support his opinion, as did the fact that he did not visualize any calcification or spur formation at C5-C6, which means that the herniation was a fairly recent process. This also correlated with her complaints, his physical findings and his objective findings on the MRI, and these findings all reaffirmed each other.
>
> . . .
>
> 27. In regard to [Javorsky's] left shoulder pain, Dr. Adamson testified that [Javorsky's] history on the onset of pain in her left shoulder correlated with her work related C5-C6 disc herniations. Thus, the Full Commission finds that the evidence supports a causal connection between the specific incident of June 18, 2007 and [Javorsky's] left-sided pain.

In his deposition, Dr. Timothy Adamson gave the following testimony:

A. . . . The description [Javorsky] has filled in graphically draw ing onto the—the little caricature of a body shows that she had the pins and needles and burning sensations down from the top of the right shoulder down into the right hand and out the thumb.

Q. And how about that little X that she has there by the left shoulder blade? Did she discuss that at all with you?

A. No, but that's an incredibly common site for pain to show up in anybody who is having a cervical disc problem.

Q. And why is that?

A. It's a—It's a referred pain site. It's kind of like why people with heart attacks will have left arm pain or gallbladder attacks will have right shoulder pain. It's just—It's the inside edge of the shoulder blade below the affected compressed nerve and it's probably present 80 percent of the time.

Q. And so based on that being your experience with the prevalence being about 80 percent in patients that have the referred pain down the arm what is your opinion as to whether or not to a reasonable degree of medical certainty more probably than not that is related to the disc herniation that you observed at C5-6?

A. I believe it is related to that.

We hold that Dr. Adamson's medical testimony, that Javorsky's left shoulder pain is causally related to her compensable neck injury, takes the case out of the realm of conjecture and remote possibility and provides sufficient, competent evidence of a proximate causal relation to support the Commission's findings of fact and subsequent conclusion of law. Accordingly, New Hanover Regional's argument is overruled.

II

[2] Next, New Hanover Regional argues that the Commission erred in appointing Dr. Adamson and Coastal Neurosurgery as Javorsky's authorized treating physicians. New Hanover Regional argues that because the physicians are located 200 miles apart and New Hanover Regional is responsible for travel expenses and lodging, along with treatment, such an appointment is an abuse of discretion. We disagree.

Our Supreme Court has stated that "an injured employee has the right to procure, even in the absence of an emergency, a physician of [her] own choosing, subject to the approval of the Commission." *Deskins v. Ithaca Indus., Inc.*, 131 N.C. App. 826, 831, 509 S.E.2d 232, 235 (1998) (citing *Schofield v. Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980)). "[T]he approval of a physician . . . lies within the discretion of the Commission." *Franklin v. Broyhill Furniture Indus.*, 123 N.C. App. 200, 207, 472 S.E.2d 382, 387 (1996); *see also* N.C. Gen. Stat. § 97-25 (2009) ("an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission.").[1] "An abuse of discretion results only where a decision is manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *Goforth v. K-Mart Corp.*, 167 N.C. App. 618, 624, 605 S.E.2d 709, 713 (2004) (citations omitted).

Here, the Commission made the following conclusion:

> 2. As a consequence of her neck injury, [Javorsky] needed medical treatment, including the treatment and surgery performed by Dr. Adamson, as well as treatment for her left shoulder, and [New Hanover Regional is] responsible for payment of the same.

In its award, the Commission stated

> 1. [New Hanover Regional] shall pay for all reasonably necessary medical treatment provided for [Javorsky's] neck injury of June 18, 2007, including the treatment rendered today by Dr. Adamson and Coastal Neurosurgery, and additional cost including [Javorsky's] lodging and mileage for her surgery. . . .
>
> 2. [New Hanover Regional] shall pay for any treatment recommended by Dr. Adamson, to include a return visit to Dr. Adamson, and further treatment recommended by Coastal Neurosurgery . . . .
>
> . . .

1. New Hanover Regional specifically cites *Little v. Penn Ventilator Co.*, 317 N.C. 206, 345 S.E.2d 204 (1986), for the proposition that N.C.G.S. § 97-25 "requires defendants to pay for future medical treatment as long as they [the treatments] are reasonably required to (1) effect a cure or (2) give relief." However, we note that this language from a former version of § 97-25 was deleted by our legislature in a 1991 amendment of the statute. *See Franklin*, 123 N.C. App. at 207, 472 S.E.2d at 387.

5. Coastal Neurosurgery and Dr. Adamson are hereby appointed as [Javorsky's] authorized treating physicians.

We note that the Commission made several unchallenged findings of fact which support its conclusion of law number 2 and subsequent award.

12. [Javorsky] saw Physician's Assistant Christopher Steyskal at Coastal Neurosurgical on September 18, 2007, and he recommended an anterior cervical discectomy and fusion at C4-C5 and C5-C6. P.A. Steyskal later opined that the microendoscopic discectomy ("MED") at C5-C6 was a reasonable option versus the more invasive procedure he had recommended.

. . .

18. Dr. Adamson determined that [Javorsky] was a candidate for less invasive surgery through her history, a physical examination and his review of her imaging studies. . . .

. . .

24. The surgery performed by Dr. Adamson was helpful to [Javorsky] in relieving pain.

Given that Dr. Adamson performed the MED on Javorsky, but is located approximately 200 miles away from Javorsky's more immediate medical care provider, Coastal Neurosurgery, and acknowledging the practical considerations of making follow-up medical visits to review Javorsky's progress, we hold the Commission did not abuse its discretion in ordering New Hanover Regional to pay for Javorsky's reasonable medical treatment as well as attendant travel expenses. Accordingly, New Hanover Regional's argument is overruled.

III

[3] Next, New Hanover Regional argues that the Commission erred in making findings of fact regarding the current status of Javorsky and Susan Ramsey despite a lack of new evidence before the Commission and a record that had not changed since the matter was heard before a deputy commissioner.

New Hanover Regional argues that there is no competent evidence to support the Commission's finding that "Susan Ramsey . . . is currently the patient safety manager for [New Hanover Regional]" and that "[Javorsky] continues to experience weakness in her neck at

times and left shoulder blade pain . . . ." However, as these findings were based on competent evidence received as of the date of the hearing, New Hanover Regional fails to show error or prejudice from these findings of fact. Accordingly, this argument is overruled.

IV

[4] Last, New Hanover Regional argues that the Commission erred by ordering it to pay attorney fees in the amount of $3,700.00 to Javorsky's attorney, pursuant to N.C. Gen. Stat. § 97-88.1. We disagree.

Under North Carolina General Statutes, section 97-88.1, "[i]f the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." N.C. Gen. Stat. § 97-88.1 (2009).

> The purpose of this section is to prevent "stubborn, unfounded litigiousness which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees." *Beam v. Floyd's Creek Baptist Church*, 99 N.C. App. 767, 768, 394 S.E.2d 191, 192 (1990) (citations omitted). In such cases, the Commission is empowered to award: the whole cost of the proceedings including [reasonable attorney's fees].

Troutman v. White & Simpson, Inc., 121 N.C. App. 48, 54, 464 S.E.2d 481, 485 (1995). "The decision of whether to make such an award, and the amount of the award, is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion." *Id.* at 54-55, 464 S.E.2d at 486 (citing *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 394, 298 S.E.2d 681, 683 (1983); N.C. Gen. Stat. § 97-90 (1991)).

New Hanover Regional denied Javorsky's claim that her injury sustained 18 June 2007 was compensable. The Commission found that the New Hanover Regional adjuster's investigation of Javorsky's claim was comprised of reviewing the Form 19 accident report and medical records; however, she failed to interview the witness listed on the accident report. In denying her claim, New Hanover Regional indicated that Javorsky "had not described a specific traumatic incident or an injury by accident, that she did not experience pain while performing her job duties and that she had refused to give a recorded statement. [New Hanover Regional] also took the position that [Javorsky] had not timely reported her injury." With the exception of

Javorsky's refusal to give a recorded statement, there was competent evidence before the Deputy Commissioner and the Full Commission that even after plaintiff reported her injury by accident and even after medical experts testified that her injuries were causally related to the work place injury, New Hanover Regional continued to deny the claim as compensable. We believe such actions are inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees and such actions evidence stubborn, unfounded litigiousness. Therefore, we hold that the Commission did not abuse its discretion in awarding Javorsky $3,700.00 under N.C. Gen. Stat. § 97-88.1, and accordingly, New Hanover Regional's argument is overruled.

Affirmed.

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

STATE OF NORTH CAROLINA v. CHARLES BENJAMIN PATERSON, DEFENDANT

NO. COA10-446

(Filed 21 December 2010)

1. Constitutional Law— waiver of counsel—waiver not ineffective

Defendant's contention that his waiver of counsel was ineffective was rejected. Even though defendant's waiver form was incomplete, his waiver of counsel was not rendered invalid on this ground. Furthermore, defendant was not prejudiced by the fact that the trial judge apprised defendant of the charges against him and the potential punishments after the form was executed.

2. Constitutional Law— waiver of counsel—adequate inquiry by trial court

Defendant's argument that the trial court did not conduct adequate inquiry into his waiver of counsel was rejected where colloquies that occurred at the calendar call and prior to trial were sufficient to satisfy N.C.G.S. § 15A-1242.

3. Constitutional Law— consequences of self-representation— no inquiry into defendant's ability to represent himself

Defendant's argument that the trial court subjected him to inconsistent treatment during his trial on speeding and driving while impaired charges was without merit. N.C.G.S. § 15A-1242 required the trial court to determine whether defendant appreciated the consequences of representing himself prior to permitting him to represent himself, not whether defendant had the ability to represent himself as well as an attorney would be able to represent him.

Appeal by defendant from judgments entered 20 January 2010 by Judge Richard L. Doughton in Forsyth County Superior Court. Heard in the Court of Appeals 13 October 2010.

Attorney General Roy Cooper, by Assistant Attorney General Jess D. Mekeel, for the State.

Richard Croutharmel for defendant-appellant.

HUNTER, Robert C., Judge.

Charles Benjamin Paterson ("defendant") appeals from his convictions of speeding and driving while impaired. Defendant argues that his waiver of counsel was invalid because his waiver of counsel form was incomplete and the trial court erred in failing to conduct an adequate inquiry pursuant to N.C. Gen. Stat. § 15A-1242 (2009). After careful review, we find no error.

Background

Defendant was charged in February 2008 with speeding at 59 miles per hour in a 35 mile per hour zone and driving while impaired. In December 2008, defendant was found guilty of both charges at a bench trial in Forsyth County District Court. Defendant appealed to superior court for a trial *de novo*.

The case was initially called for trial in the Forsyth County Superior Court criminal session on 19 January 2010, with the Honorable Judge Richard L. Doughton presiding. At that time, defendant informed the trial court that he had fired his attorney, Billy Craig ("Craig"), on the day prior, that he had fired his previous attorney, James Quander ("Quander"), and that he wanted to represent himself at trial. Because neither attorney had submitted a motion to withdraw, Judge Doughton decided to wait until both attorneys were pres-

ent before making any further determinations. Once both attorneys were present, Judge Doughton allowed Quander to withdraw and Craig, who had never entered an appearance on behalf of defendant, was released from any further obligations in the case.

Judge Doughton then discussed with defendant his right to counsel as follows:

> THE COURT: Now, Mr. Paterson, I need to go over with you the right to have a lawyer.
>
> [DEFENDANT]: Yes, sir.
>
> THE COURT: In North Carolina, every person that appears in criminal Superior Court is entitled to be represented by a lawyer if they want to be represented by a lawyer. Your first right is you have a right to hire anybody you want. Secondly, if you can't afford to hire your own lawyer and you request a court-appointed lawyer, then I'm going to ask you to fill out an affidavit of indigency, which is nothing but a statement that— it's going to show your assets, liabilities, debts, and income. Once you fill that out, I'll review it and determine whether you're financially able to hire your own lawyer or not. But I assure you, if you request a court-appointed lawyer and you can't afford one, one will be appointed for you. Thirdly, you don't have to be represented by a lawyer if you don't want to be represented by a lawyer. You can represent yourself. If you choose to do that, then I'm going to ask you to sign a waiver of your right to attorney, which is nothing but a written paper that says that "I'm going to represent myself. I don't want a lawyer."
>
> [DEFENDANT]: Yes, sir.
>
> THE COURT: Now, do you understand those rights?
>
> [DEFENDANT]: Yes, [y]our Honor.
>
> THE COURT: What do you want to do about a lawyer?
>
> [DEFENDANT]: I'm going to represent myself.
>
> THE COURT: All right. Have him sign a waiver and be sworn to it.

Defendant then signed a "Waiver of Counsel" form, which states:

> As the undersigned party in this action, I freely and voluntarily declare that I have been fully informed of the charges against me, the nature of and the statutory punishment for each such charge,

and the nature of the proceedings against me; that I have been advised of my right to have counsel assigned to assist me and my right to have the assistance of counsel in defending against these charges or in handling these proceedings, and that I fully understand and appreciate the consequences of my decision to waive the right to assigned counsel and the right to assistance of counsel.

The form then prompts the defendant to select one of the following two options:

1. I waive my right to assigned counsel and that I, hereby, expressly waive that right.

2. I waive my right to all assistance of counsel which includes} my right to assigned counsel and my right to the assistance of counsel. In all respects, I desire to appear in my own behalf, which I understand I have the right to do.

Defendant did not make a selection; however, he signed the waiver form. It is undisputed that during the calendar call Judge Doughton did not discuss with defendant the charges he faced and the permissible punishments if convicted.

After defendant signed the form, Judge Doughton asked him if he would be ready to proceed to trial that week and defendant responded, "I can be if that's what you need to do. I'd like to have a little bit more time than that, but—[.]" Judge Doughton noted that it had been two years since defendant was initially charged and defendant agreed to proceed to trial within an hour's notice. Defendant's trial took place the next day, 20 January 2010. Prior to the start of trial, the following discussion took place:

THE COURT: All right. We have two charges in this case, Mr. Paterson. Mr. Paterson, you said yesterday after I advised you of your right to counsel that you decided you wanted to represent yourself in these cases. Is that correct?

[DEFENDANT]: Yes, sir.

THE COURT: Now, you understand that one charge is—looks like it's 59 in a 35, which is more than 15 miles above the posted speed limit and more than 55 miles an hour.

[DEFENDANT]: Yes, sir.

THE COURT: You're charged with that speed, and that would be—I believe it's a Class 2 misdemeanor, and you would be exposed to as much as 60 days in that case. You understand that?

[DEFENDANT]: Yes, sir.

THE COURT: You further understand that in the other case you're charged with driving while impaired, which is a misdemeanor that you can get up to two years in. You understand that?

[DEFENDANT]: Yes, sir.

THE COURT: And even understanding that, you still want to go ahead and represent yourself. Is that correct?

[DEFENDANT]: Well, to tell you the truth, I'd rather have a lawyer, but I can't afford one and I really don't want to impose upon the state to supply—

THE COURT: Well, that's your choice, as I told you yesterday.

[DEFENDANT]: Yes, sir.

THE COURT: Is that what you want to do?

[DEFENDANT]: I feel like I— I don't know. Could I apply for an attorney?

THE COURT: Well, I asked you yesterday, and you didn't apply.

[DEFENDANT]: I know that. Well, No. Your Honor, I'll go ahead and we'll try it.

THE COURT: Is that what you want to do? I mean, I'm telling you.

[DEFENDANT]: Yes, sir.

THE COURT: If that's what you want to do, we're going to go ahead and do it that way.

[DEFENDANT]: We'll go ahead and do it that way.

THE COURT: That's what you want to do, then[?]

[DEFENDANT]: Yes, sir.

THE COURT: All right. Are you ready to go ahead—now, you'll be treated just like somebody with a lawyer. You understand that.

[DEFENDANT]: Yes, sir.

At trial, Corporal Scott Lichtenhan ("Corporal Lichtenhan") of the Winston-Salem Police Department testified that he was sitting in his patrol car on Country Club Road on 3 February 2008, and, at approximately 11:00 p.m., he saw a Chevrolet pickup truck traveling at an estimated speed of 60 miles per hour. Corporal Lichtenhan turned on his radar device, which showed that the vehicle was moving at a speed of 59 miles per hour. Corporal Lichtenhan activated his blue lights and the truck pulled over in a shopping center parking lot. Defendant was alone in the driver's seat of the vehicle. When Corporal Lichtenhan asked defendant for his driver's license, he smelled a strong odor of alcohol so he called for backup. Corporal Lichtenhan then asked defendant to get out of the vehicle and perform a field sobriety test. Defendant failed the finger-to-nose test by missing the tip of his nose with either hand and touching his upper lip. Defendant next failed to properly perform the one-legged stand test and stated, " '[y]ou got me on that one.' " During the heel-to-toe walk test, defendant could not touch his heels to his toes and walked with his feet separated. According to Corporal Lichtenhan, another officer gave defendant an "Alkasensor" test, which required defendant to blow into a handheld device. The test was positive for alcohol consumption. Defendant was arrested and taken to the Forsyth County jail where he refused to take an "Intoxilyzer test."

Defendant testified that on the night of 3 February 2008 he drank four beers at a bar and that after taking a sip from a fifth beer he left to take another person home who had been drinking heavily. Defendant claimed that he was running out of gas and put his car in neutral as he drove down the hill past Corporal Lichtenhan. Defendant stated that he tapped his brakes after noticing that he was traveling at 45 miles per hour. Defendant testified that his ability to perform the tests on 3 February 2008 was impaired because he had previously broken an ankle and a wrist and had arthritis. On cross-examination defendant was able to touch his nose for the jury but claimed that it was more difficult to do this on the side of the road.

Defendant was convicted by a jury of both charges. Judge Doughton sentenced defendant to 60 days imprisonment for the speeding conviction and an additional 60 days imprisonment for the driving while impaired conviction, but suspended both sentences and placed defendant on 12 months of supervised probation. Defendant gave notice of appeal in open court.

Discussion

Defendant argues on appeal that: (1) his waiver of counsel form was invalid; (2) the trial court failed to perform the proper inquiry pursuant to N.C. Gen. Stat. § 15A-1242; and (3) the trial subjected defendant to inconsistent treatment at trial.

"In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation . . . and to have counsel for defense[.]" N.C. Const. art. I, § 23. Nevertheless, a criminal defendant is entitled "to handle his own case without interference by, or the assistance of, counsel . . . ." *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972). "Before allowing a defendant to waive in-court representation . . . the trial court must insure that constitutional and statutory standards are satisfied." *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992).

> First, waiver of the right to counsel and election to proceed *pro se* must be expressed clearly and unequivocally. Given the fundamental nature of the right to counsel, we ought not to indulge in the presumption that it has been waived by anything less than an express indication of such an intention. By requiring an unequivocal election to proceed *pro se*, courts can avoid confusion and prevent gamesmanship by savvy defendants sowing the seeds for claims of ineffective assistance of counsel.
>
> Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court, to satisfy constitutional standards, must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel. In order to determine whether the waiver meets that standard, the trial court must conduct a thorough inquiry.

Id. at 673-74, 417 S.E.2d at 475-76 (internal citations and quotation marks omitted). Our Supreme Court has determined that N.C. Gen. Stat. § 15A-1242 "fully satisfies the constitutional requirement that waiver of counsel must be knowing and voluntary". *State v. Gerald*, 304 N.C. 511, 519, 284 S.E.2d 312, 317 (1981). N.C. Gen. Stat. § 15A-1242 states:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

(1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;

(2) Understands and appreciate the consequences of this decision; and

(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

North Carolina has not set out any specific requirements for how the statutory inquiry must be carried out. *State v. Carter*, 338 N.C. 569, 583, 451 S.E.2d 157, 164 (1994). What is required is that "the statutorily required information [be] communicated in such a manner that defendant's decision to represent himself is knowing and voluntary." *Id.*

A.

[1] First, defendant contends that his waiver of counsel was ineffective because the appropriate box was not checked on the waiver of counsel form and because the form was executed prior to his being advised of the nature of the charges against him and the range of permissible punishments.

While a defendant may complete a waiver of counsel form, doing so is not mandatory. *State v. Heatwole*, 344 N.C. 1, 18, 473 S.E.2d 310, 317 (1996). In *Heatwole*, the defendant argued that the trial court erred in denying his motion to set aside his guilty plea because the court had not required the defendant to sign a written waiver of counsel form. *Id.* at 17, 473 S.E.2d at 318. Our Supreme Court held that even though there was not a signed waiver the trial court conducted an adequate inquiry under N.C. Gen. Stat. § 15A-1242 and that defendant knowingly and intelligently waived the assistance of counsel. *Id.* at 18-19, 473 S.E.2d at 318. Although *Heatwole* did not explicitly address written waivers which are not completely filled out, such as the waiver in the present case, our Supreme Court held in *State v. Fulp*, 355 N.C. 171, 177, 558 S.E.2d 156, 160 (2002), that "any deficiency in a written waiver can be overcome by other evidence showing that defendant 'knowingly, intelligently, and voluntarily' waived counsel." In holding that the defendant waived his right to counsel, the Court in *Fulp* stated:

> Furthermore, we note that although the waiver of counsel form was not completely filled out, defendant did in fact sign the

> form. This, combined with defendant's testimony in which he stated multiple times that he did not wish to have an attorney represent him, and the fact that defendant signed a transcript of plea in 1993 acknowledging that he understood his rights, the charges against him, and that he was pleading guilty to a felony, provides added evidence that defendant "knowingly, intelligently, and voluntarily" waived counsel.

Id. at 180, 558 S.E.2d at 161. *Heatwole* and *Fulp* stand for the proposition that a waiver of counsel form is not required, and, if a form is filled out but is deficient, the deficiency will not render the waiver invalid so long as the defendant's waiver was given knowingly, intelligently, and voluntarily. Consequently, we hold that even though defendant's waiver form was incomplete, his waiver of counsel is not rendered invalid on this ground.

We further hold that defendant's waiver of counsel was not rendered invalid because the trial court did not, prior to defendant signing the waiver form, go over the charges against him and the potential punishments associated with those charges. The trial court did discuss the charges and potential punishments with defendant the following day and defendant confirmed his desire to represent himself in open court. Although the waiver form requires the trial judge to certify that he has apprised the defendant of the charges against him and the potential punishments, given the fact that this form is not mandatory, we see no prejudice so long as the trial court does, in fact, provide that information in accordance with the statute and the defendant subsequently asserts his right to represent himself. Defendant in this case provided an oral waiver of counsel prior to trial, after the trial court fully informed him of the charges and potential punishments. Defendant focuses on inadequacies in the written waiver, but the real issue to be decided is whether the trial court adequately performed the statutory inquiry and defendant knowingly and intelligently waived counsel. *See State v. Hyatt*, 132 N.C. App. 697, 703, 513 S.E.2d 90, 94 (1999) (acknowledging that "our Supreme Court has considered a written waiver as something in addition to the requirements of [N.C. Gen. Stat. §] 15A-1242, not as an alternative to it"); *State v. Warren*, 82 N.C. App. 84, 88, 345 S.E.2d 437, 440 (1986) (holding that written waiver and verbal statements by defendant were sufficient evidence that statutory inquiry was completed).

B.

[2] In addition to his argument that the written waiver form was invalid, defendant argues that the trial court did not conduct an adequate inquiry pursuant to N.C. Gen. Stat. § 15A-1242. We disagree.

As stated *supra*, neither our statutes nor our courts have set out a mandatory formula for complying with N.C. Gen. Stat. § 15A-1242. Defendant relies on *State v. Moore*, 362 N.C. 319, 327-28, 661 S.E.2d 722, 727 (2008), where our Supreme Court provided a list of 14 questions that may suffice as a thorough inquiry. Defendant argues that the trial court did not ask any of those questions, and, therefore, the inquiry was not sufficient. Defendant's reliance on *Moore* is misplaced. The *Moore* Court clearly stated that while "these specific questions are in no way required to satisfy the statute, they do illustrate the sort of 'thorough inquiry' envisioned by the General Assembly when this statute was enacted and could provide useful guidance for trial courts . . . ." *Id.* at 328, 661 S.E.2d at 727.

Although Judge Doughton did not ask any of the questions listed in *Moore*, we hold that the colloquies that occurred at the calendar call and prior to trial were sufficient to satisfy N.C. Gen. Stat. § 15A-1242. Judge Doughton explicitly informed defendant of his right to counsel and the process one must undertake in order to secure a court-appointed attorney. Defendant acknowledged that he understood his rights after Judge Doughton asked him repeatedly whether he understood his rights and whether he was sure that he wanted to forego his right to counsel. Judge Doughton informed defendant of the charges against him and the potential punishments. Furthermore, Judge Doughton explained to defendant that he would be treated the same at trial regardless of whether he had an attorney. We hold that the trial court's colloquies at the calendar call and before trial, coupled with defendant's repeated assertion that he wished to represent himself, demonstrates that defendant clearly and unequivocally expressed his desire to proceed *pro se* and that such expression was made knowingly, intelligently, and voluntarily.

C.

[3] Defendant alleges that the trial court subjected him to inconsistent treatment during trial. Defendant references times during the trial when the trial court admitted documents into evidence but did not ask defendant if he wanted to make a motion. In violation of N.C. R. App. P. 28(b)(6), defendant does not cite any authority to support

his claim that his behavior at trial is evidence that he did not understand the consequences of representing himself. Defendant's failure to understand trial procedure or the rules of evidence are not determinative as to whether defendant appreciated the consequences of his decision prior to signing the waiver. N.C. Gen. Stat. § 15A-1242 requires the trial court to determine whether a defendant appreciates the consequences of representing himself prior to permitting him to represent himself, not whether defendant has the ability to represent himself as well as an attorney would be able to represent him. Defendant's argument is without merit.

Conclusion

Based on the foregoing, we hold that the trial court conducted the proper inquiry pursuant to N.C. Gen. Stat. § 15A-1242, and, therefore, we find no error.

No Error.

Judges CALABRIA and GEER concur.

MECKLENBURG COUNTY, Plaintiff v. SIMPLY FASHION STORES, LTD., Defendant

No. COA09-1625

(Filed 21 December 2010)

1. Appeal and Error— interlocutory order—substantial right —damages in condemnation

An appeal from an interlocutory order in a condemnation case affected a substantial right and was heard where the order involved the length of a lease and the construction of the lease by the county, which were crucial to determining compensation.

2. Appeal and Error— standard of review—condemnation—interpretation of lease

An appeal in a condemnation case concerned interpretation of a lease between the parties and the standard of review was *de novo*.

3. Landlord and Tenant— lease—extension agreement—void for uncertainty

The trial court did not err in a condemnation case by determining that defendant had no right to extend its lease for a second term. Even though the extension agreement of the original lease would have been valid and enforceable, a modification was void for uncertainty because it provided that the lease would be renewed on "such terms as may be agreed on." There was no merit to the argument that the actions of the parties should govern.

4. Landlord and Tenant— condemnation—termination clause in existing lease—applicable

The trial court did not err in a condemnation action by determining that the county had the right to terminate a lease pursuant to a contractual termination clause where defendant argued that the termination clause applied only to the original landlord, not the county; that it applied only during the initial term of the lease; and that it did not apply due to laches and equity.

5. Eminent Domain— scope of project rule—applicable to value of property—not to lease provision

The scope of the project rule applies to determine the use for which the property is valued, not to strike a provision which defendant negotiated, agreed to, and signed.

Appeal by defendant from order entered 22 June 2009 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 August 2010.

Ruff, Bond, Cobb, Wade & Bethune, LLP, by Robert S. Adden, Jr., for plaintiff-appellee.

The Odom Firm, PLLC, by Thomas L. Odom, Jr. and David W. Murray, for defendant-appellant.

JACKSON, Judge.

Defendant Simply Fashion Stores, Ltd. ("Simply Fashion") appeals the trial court's 22 June 2009 order that determined nine legal issues within a condemnation suit by Mecklenburg County ("the county"). For the reasons stated herein, we affirm.

On 8 December 2000, Simply Fashion entered into a lease agreement ("original lease") with Freedom Mall Partners ("FMP") for a period of five years with an option to extend the lease for up to two additional periods of five years each. This original lease included a termination clause, which read, in pertinent part: "In the event the mall is sold and the new owner intends to Convert the Mall to a non-retail use, after July 31, 2001, the Landlord has the option to terminate the Lease by Giving the Tenant one-hundred twenty (120) days written notice of such termination" ("termination clause" or "section 4.01").

On 14 November 2001, FMP and Simply Fashion agreed to a modification of the original lease ("Modification I"). By this Modification I, Simply Fashion relocated to a larger space within the mall and agreed to an increased rent. The agreement modified the tenancy period as follows: "The term shall be Two (2) years commencing from the possession date." Modification I also changed the option for extending the lease, providing that "Extension Term(s): Shall be negotiable." Modification I provided that "[a]ll other terms and conditions of the Lease (except as modified herein) shall remain in full force and effect."

On 14 July 2003, FMP and Simply Fashion entered into a second modification of the original lease ("Modification II"). By this Modification II, the parties agreed to a rent increase and to extend the lease term for two years beginning 1 December 2003 and ending 30 November 2005. Modification II provided that all other conditions "shall remain in full force and effect . . . ."

On 29 January 2004, the county bought the Freedom Mall property and became the successor-in-interest to the leasehold agreements held by FMP.

In a letter dated 27 July 2005 ("lease extension letter"), Simply Fashion notified the county that it was "exercising [its] option to renew per the lease agreement . . . ." The county signed and returned the letter indicating its agreement to an extended lease term beginning 1 December 2005 and ending 30 November 2010.

On 29 January 2008, the county sent a letter to Simply Fashion indicating its intent to convert the entire mall property into offices for use by the county government. The letter requested Simply Fashion to terminate its lease voluntarily. On 18 March 2008, the county's attorney sent a letter to Simply Fashion with an offer of

$21,813.00 if it agreed to an early termination of the lease. Simply Fashion rejected the early termination offer. Due to a copying error making part of the original lease illegible, the county was unaware of the early termination clause contained in the original lease at the time the county made the payment offer.

On 12 May 2008, the county filed suit to condemn Simply Fashion's leasehold interest in the Freedom Mall property. On 22 June 2009, the trial court made findings of fact and conclusions of law as to issues other than just compensation. The trial court concluded, *inter alia*, that (1) the county had the right to terminate the lease with only 120 days' notice pursuant to section 4.01 of the original lease; (2) Simply Fashion did not have an option to extend the lease five additional years; (3) the doctrines of laches, waiver, estoppel, and unclean hands did not prevent the county from asserting a right to terminate nor did they allow Simply Fashion a right to extend the lease; (4) the jury would be allowed to consider the effect of the termination clause when determining just compensation; and (5) as of 12 May 2008, Simply Fashion had thirty months remaining on its leasehold. Simply Fashion appeals.

[1] Initially, we note that, although this appeal is interlocutory, it affects a substantial right and therefore, is properly before us.

An order is interlocutory when it does not dispose of the entire case but instead, leaves outstanding issues for further action at the trial level. *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (citing *Johnson v. Roberson*, 171 N.C. 194, 88 S.E. 231 (1916)), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Ordinarily, when an order is interlocutory, it is not immediately appealable. *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, we will review the trial court's order if it "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment." *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381 (citations omitted); *see also* N.C. Gen. Stat. § 1-277(a) (2007) ("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[.]").

"[T]his Court has held on multiple occasions that orders under N.C. Gen. Stat. § 40A-47 [determination of issues other than damages in condemnation proceedings] are immediately appealable as affecting a substantial right." *City of Winston-Salem v. Slate*, 185 N.C. App. 33, 37, 647 S.E.2d 643, 646 (2007) (citing *Piedmont Triad Reg'l Water*

Auth. v. Unger, 154 N.C. App. 589, 591, 572 S.E.2d 832, 834 (2002), *disc. rev. denied*, 357 N.C. 165, 580 S.E.2d 695 (2003)).

Here, the order does not dispose of the entire case, as the issue of damages remains outstanding. However, as argued by Simply Fashion, the issues on appeal "directly involve vital preliminary issues of the length of Simply Fashion's leasehold interest and the construction of the lease taken by the [c]ounty which is crucial in determining constitutionally mandated just compensation." Therefore, consistent with our case law, we hold that the trial court's order—which determines issues other than damages in a condemnation proceeding—affects a substantial right, and we review the merits of Simply Fashion's appeal.

[2] "It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (citing *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 84 N.C. App. 27, 37, 351 S.E.2d 786, 792 (1987)). "Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*." *Id.* (internal citations omitted). Issues of contract interpretation are matters of law. *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000) (citing *Davison v. Duke University*, 282 N.C. 676, 712, 194 S.E.2d 761, 783 (1973)).

Because the questions which we confront concern interpretation of the lease between the parties and are, therefore, matters of law, we review them *de novo*.

[3] Simply Fashion first argues that the trial court erred in determining that Simply Fashion had no right to extend its lease for the second term. We disagree.

Our Supreme Court has held that, when the rental rate for a lease renewal is left to be negotiated at a future time, such a covenant is not enforceable. *Idol v. Little*, 100 N.C. App. 442, 445, 396 S.E.2d 632, 634 (1990) (citing *Young v. Sweet*, 266 N.C. 623, 625, 146 S.E.2d 669, 671 (1966)). In addition,

> "[a] covenant to let the premises to the lessee at the expiration of the term without mentioning any price for which they are to be let, or to renew the lease upon such terms as may be agreed on, in neither case amounts to a covenant for renewal, but is altogether void for uncertainty."

Young v. Sweet, 266 N.C. 623, 625, 146 S.E.2d 669, 671 (1966) (quoting *Realty Co. v. Logan*, 216 N.C. 26, 28, 3 S.E.2d 280, 281 (1939)). In contrast,

> an optional renewal provision in a lease which is silent on the amount of rent due upon renewal of the lease and which does not provide that the renewal rent will be set by the parties' future agreement is valid and enforceable, and the amount of rent due upon renewal is impliedly the amount of rent due under the original lease.

Idol, 100 N.C. App. at 445, 396 S.E.2d at 634.

In the case *sub judice*, the original lease provided for extensions of "TWO (2) ADDITIONAL PERIOD(S) OF FIVE (5) YEARS EACH[.]" However, when the parties entered into Modification I, they agreed that the terms of the extensions "[s]hall be negotiable." Even though the extension provision of the original lease would have been "valid and enforceable" because it was "silent on the amount of rent due upon renewal of the lease[,]" *id.*, Modification I replaced that provision with an agreement "to renew the lease upon such terms as may be agreed on," which "is altogether void for uncertainty[,]" *Young*, 266 N.C. at 625, 146 S.E.2d at 671 (citation omitted). Therefore, the trial court properly concluded that Simply Fashion did not have the right to a second extension.

As part of this argument, Simply Fashion contends that the parties' conduct prior to the date of the filing of the condemnation proceeding demonstrates that they both believed that Simply Fashion had the right to extend through 2015. However—as found by the trial court—in a letter sent to Simply Fashion on 18 March 2008, the county's attorney "contradicted the express terms of the lease documents" by writing that "[t]he Simply Fashion lease terminates November 30, 2010, and there is one five-year option remaining thereafter." This Court has held that "in cases where the language used is clear and unambiguous, construction is a matter of law for the court. In those cases, the court's only duty is to determine the legal effect of the language used and to enforce the agreement as written." *Computer Sales International v. Forsyth Memorial Hospital*, 112

N.C. App. 633, 634-35, 436 S.E.2d 263, 264-65 (1993) (internal citations omitted), *disc. rev. denied*, 335 N.C. 768, 442 S.E.2d 513 (1994). Accordingly, the plain and unambiguous language of the lease documents controls, and Simply Fashion's argument that the actions of the parties should govern is without merit.

[4] Second, Simply Fashion contends that the trial court erred in determining that the county had the right to terminate the lease pursuant to the contractual termination clause, because section 4.01 applies only to the original landlord, FMP; section 4.01 applies only during the initial term of the lease and not during extensions; and equitable doctrines operate to prevent section 4.01 from being considered in calculating just compensation. We disagree.

As noted *supra*, "in cases where the language used is clear and unambiguous, construction is a matter of law for the court. In those cases, the court's only duty is to determine the legal effect of the language used and to enforce the agreement as written." *Id.* (internal citations omitted).

Section 4.01 of the original lease provides:

> The Initial Term of the Lease shall commence on the Lease Commencement Date and shall continue for the number of Lease Years stated on the Face Page, unless sooner terminated in accordance with the terms hereof or extended as provided hereafter. In the event the mall is sold and the new owner intends to Convert the Mall to a non-retail use, after July 31, 2001, the Landlord has the option to terminate the Lease by Giving the Tenant one-hundred twenty (120) days written notice of such termination.

According to Simply Fashion, the term "Landlord[,]" as used in section 4.01, describes only FMP and not the county, as FMP's successor-in-interest. However, other portions of the original lease contradict this interpretation. In section 25.06, the original lease provides:

> This Lease and all terms, conditions and covenants herein contained, shall, subject to the provisions as to assignment, apply to and bind the parties hereto and their respective heirs, administrators, executors, successors, and assigns.

In addition, "landlord" is used in other portions of the original lease to refer to both FMP and any successors-in-interest. For example, section 18.02 provides that "[i]f the Tenant is in default . . . , then Landlord . . . shall have the following rights: (1) To terminate this

Lease upon (10) days' written notice to Tenant[.]" Furthermore, section 4.01 would be meaningless if only FMP could exercise it—the provision only becomes effective "[i]n the event the mall is sold" and at that point, FMP would no longer be a party to the contract and would no longer have any rights over the tenant, including the right of termination. Therefore, the term "Landlord" in section 4.01 is applicable to the county, as FMP's successor-in-interest.

Section 4.01 also applies to the extension terms as well as the initial term of the original lease. Even though section 4.01 is entitled "Initial Term[,]" section 25.05 specifically provides that "[t]he captions or titles used throughout this Lease are for reference and convenience only and shall in no way define, limit or describe the scope or intent of this lease." The second sentence of section 4.01 does not refer to the "initial term" and the only time limitation included in it is that the clause is not effective until "after July 31, 2001[.]" Accordingly, no temporal constraints prevent the county from exercising the termination clause provided in section 4.01.

Finally, equitable doctrines do not prevent the consideration of section 4.01 when a jury determines Simply Fashion's just compensation. The doctrine of laches does not apply, because Simply Fashion has neither alleged nor demonstrated that it was injured or disadvantaged by the county's failure to exercise its rights pursuant to the termination clause. *See MMR Holdings, LLC v. City of Charlotte*, 148 N.C. App. 208, 209-10, 558 S.E.2d 197, 198 (2001) (noting that one element of the defense of laches is that "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[.]").

The doctrine of waiver also does not apply in the instant case. "There can be no waiver unless so intended by one party, and so understood by the other, or one party has so acted as to mislead the other." *Baysdon v. Insurance Co.*, 259 N.C. 181, 188, 130 S.E.2d 311, 317 (1963) (citing *Manufacturing Co. v. Lefkowitz*, 204 N.C. 449, 453, 168 S.E. 517, 519 (1933)). Here, the county, in its letters to Simply Fashion, did not communicate an intent to waive any rights to terminate nor did it make any reference to the termination clause whatsoever. Furthermore, Simply Fashion could not have been misled by the county's conduct, because according to Simply Fashion's interpretation of the original lease, the county never possessed a right to exercise the termination clause. Simply Fashion could not have understood the county to waive a right when it did not acknowledge that such a right existed.

Similarly, estoppel does not prevent section 4.01 from factoring into a just compensation determination. Among the other elements of estoppel, the party asserting the defense of estoppel must have "relied upon the conduct of the party sought to be estopped *to his prejudice*." *Hensell v. Winslow*, 106 N.C. App. 285, 291, 416 S.E.2d 426, 430, *disc. rev. denied*, 332 N.C. 344, 421 S.E.2d 148 (1992) (emphasis added) (citation omitted). As noted *supra*, Simply Fashion has not shown that it relied upon any representation by the county to Simply Fashion's prejudice. Simply Fashion does not assert that it has taken any action based upon its belief that the county had chosen not to exercise a provision of the lease that Simply Fashion never considered it able to exercise. Accordingly, neither estoppel nor any other asserted equitable doctrine operates to exclude the termination clause from a calculation of the just compensation due Simply Fashion.

[5] Simply Fashion also attempts to use the "scope of the project" rule to argue that section 4.01 should not be considered when determining the amount of just compensation. This is a misinterpretation of the scope of the project rule.

Our legislature set forth the scope of the project rule in North Carolina General Statutes, section 40A-65(a):

> The value of the property taken, or of the entire tract if there is a partial taking, does not include an increase or decrease in value before the date of valuation that is caused by (i) the proposed improvement or project for which the property is taken; (ii) the reasonable likelihood that the property would be acquired for that improvement or project; or (iii) the condemnation proceeding in which the property is taken.

N.C. Gen. Stat. § 40A-65(a) (2007). This rule prevents the valuation of the property for just compensation purposes from being influenced by the effects of the condemnation itself. *See Raleigh-Durham Airport Authority v. King*, 75 N.C. App. 57, 62, 330 S.E.2d 622, 625 (1985) ("Since a property-owner cannot capitalize under the statute on any increase in the property's value due to the reasonable likelihood that it will be acquired, the condemnor likewise cannot take advantage of any resulting decrease in the property due to the threat of condemnation.").

Simply Fashion argues that, because the termination clause is not triggered except in the event that the "new owner"—here, the

county—intends to use the space for a non-retail purpose and because the scope of the project rule prevents the condemnor's future use of the property from affecting the amount of just compensation, the termination clause in section 4.01 cannot be considered in valuing the property here. We hold, as did the trial court, that the scope of the project rule applies to the current set of facts. Nonetheless, this rule operates to require that the property be valued as retail space rather than government office space, which is the use intended by the county. Simply Fashion's attempt to extend the application of this rule to strike a provision from a contract—that it negotiated, to which it agreed, and which it signed—is beyond the parameters of the scope of the project rule. Accordingly, the county had the right to terminate the lease pursuant to section 4.01, and Simply Fashion's arguments to the contrary are without merit.

Because Simply Fashion bases its third argument—that the trial court erred in ordering that its findings of fact and conclusions of law are binding upon the parties—upon its first two issues and because—as discussed *supra*—Simply Fashion does not have the right to a second extension and the county had the right to terminate the lease pursuant to the termination clause, Simply Fashion's third argument is overruled.

For the reasons stated, we hold that the trial court did not err in finding that Simply Fashion did not have a right to a second extension, that the county had the right to exercise the termination clause, and that the findings of fact and conclusions of law are binding upon the parties.

Affirmed.

Judges GEER and BEASLEY concur.

L'TANYA MOORE, Plaintiff v. OLUSOGA MILES ONAFOWORA, Defendant

No. COA10-376

(Filed 21 December 2010)

1. Child Custody and Support— child support obligation—use of records from prior year—no abuse of discretion

The trial court did not abuse its discretion in using defendant's average monthly income reflected in the most complete records from 2007 to determine his 2009 income for purposes of setting his child support obligation where defendant submitted incomplete financial records from 2008 and 2009.

2. Child Custody and Support— sole custody to plaintiff—no abuse of discretion

The trial court did not abuse its discretion in a child custody matter by awarding sole custody of the child to plaintiff where the trial court's decision was fully supported by the record.

Appeal by defendant from orders entered 13 July 2009 and 26 August 2009 by Judge Donnie Hoover in Mecklenburg County District Court. Heard in the Court of Appeals 26 October 2010.

James A. Warren for plaintiff-appellee.

Horack, Talley, Pharr & Lowndes, P.A., by Kary C. Watson and Lauren M. Vaughn, for defendant-appellant.

BRYANT, Judge.

Because defendant submitted incomplete financial records for 2008 and 2009 and the most complete records for 2007, we cannot say the trial court abused its discretion in using the 2007 records to aid in determining defendant's income in 2009. Accordingly, we affirm the trial court's determination of defendant's child support obligation.

Procedural History

On 26 April 2007, plaintiff-mother L'Tanya Moore (Moore) filed a complaint for child custody and child support for minor child M. Onafowora, born 31 December 2000, as well as counsel fees. On 27 June 2007, after finding that Moore and defendant Olusoga Miles Onafowora (Onafowora) were the parents of the minor child, District Court Judge Norman T. Owens entered an order for temporary

custody and temporary child support. The trial court noted Onafowora's failure to appear and produce documentation and found that

> instead of coming to court, [Onafowora] on the morning of [the hearing] picked up the minor child at day care after [Moore] had dropped the child off and apparently took the minor child to Durham, North Carolina where he has arbitrarily decided and informed [Moore] that the child will spend the next two (2) weeks.

In support of its temporary order, the trial court found that the minor child has resided almost exclusively with Moore, and that Moore earned a gross monthly income of $1,512.29 and incurred a monthly health insurance premium attributable to the minor child of $228.48. Further, Onafowora did not provide the court with any documentation of his income, as set out in his subpoena, did not respond to the Request for Production of Documentation, and did not comply with the local rules concerning the filing of an Affidavit of Financial Standing. The court concluded that it was in the best interest of the minor child that Moore be awarded the minor child's care, custody, and control.

On 12 July 2007, Onafowora made a motion to set aside the order and stay its enforcement and, on 7 August 2007, made a motion to dismiss the custody action and change the venue of the child support action. In an order filed 26 October 2007, the trial court denied Onafowora's motions. On 23 January 2008, Onaforowa filed a motion to establish visitation. On 8 December 2008, the trial court entered a memorandum of judgment/order in which Onaforowa was granted visitation every other weekend and every Wednesday. In the interim, on 30 July 2008, Onafowora submitted an affidavit of income information to the trial court indicating that his average monthly gross income in 2008 was $3,587.82.

On 2 February 2009, the matter came before District Court Judge Donnie Hoover for a hearing on child custody, visitation, child support, and child support arrearage. On 13 July 2009, the trial court entered an order in which it found that, in 2007, Moore earned a gross income of $3,719.58[1] per month; in 2008, $3,927.67 per month; and at the time of the hearing, Moore earned a gross income of $5,260.12 per month. On behalf of the minor child, Moore incurred insurance pre-

1. The trial court found that Moore's Affidavit of Financial Standing, relied upon in the order for Temporary Child Custody and Temporary Child Support, incorrectly reflected Moore's monthly gross income due to a mistake by her attorney.

miums of $186.46 per month and a work related child care cost of $262.50. Taking into account bank deposits from sources other than Onafowora's employer, the court found that Onafowora's gross income per month was $11,667.60 in 2007; $11,791.10 in 2008; and at the time of the hearing, $11,967.61 per month. Based on these new figures, the trial court recalculated Onafowora's child support obligation and determined that, from May 2007 to May 2009, he was in arrears $14,353.80. Onafowora was ordered to make child support payments in the amount of $1,293.79 and payments on his arrearage in the amount of $106.21 for a total monthly payment amount of $1,400.00.

Regarding custody and visitation, the trial court found that "[Moore] has been and remains the primary parent of the minor child, being the parent who has consistently seen to the emotional, physical, and financial needs of the minor child." Accordingly, the trial court concluded that it was in the best interests of the minor child that her care, custody, and control be vested with Moore and that the minor child have visitation with Onafowora.

On 26 August 2009, the trial court entered an order requiring Onafowora to pay Moore's counsel fees in the amount of $20,000.00. Onafowora appeals.

On appeal, Onafowora raises two issues: Did the trial court err in (I) setting his child support obligation and (II) awarding Moore sole custody of the minor child. For the reasons set forth below, we affirm the trial court's decision.

I

[1] Onafowora first argues that the trial court erred in setting his child support obligation by erroneously imputing current income to him based on bank statements from previous years. We disagree. "When determining a child support award, a trial judge has a high level of discretion, not only in setting the amount of the award, but also in establishing an appropriate remedy." *State ex rel. Williams v. Williams*, 179 N.C. App. 838, 839, 635 S.E.2d 495, 496 (2006) (citing *Taylor v. Taylor*, 128 N.C. App. 180, 182, 493 S.E.2d 819, 820 (1997)). "Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Mason v. Erwin*, 157 N.C. App. 284, 287, 579 S.E.2d 120, 122 (2003) (citing *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002)).

> [A]bsent a clear abuse of discretion, a judge's determination of what is a proper amount of child support will not be disturbed on appeal. . . . A judge is subject to reversal for abuse of discretion only upon a showing by the litigant that the challenged actions are manifestly unsupported by reason.

Bowers v. Bowers, 141 N.C. App. 729, 731, 541 S.E.2d 508, 509 (2001) (quoting *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985)) (internal quotations omitted).

Under North Carolina General Statutes, section 50-13.4,

> (c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c) (2009). "When determining a parent's child support obligation . . . a court must determine each parent's gross income. A parent's child support obligation should be based on the parent's 'actual income at the time the order is made.' " *Head v. Mosier*, 197 N.C. App. 328, 335, 677 S.E.2d 191, 197 (2009) (citing *Hodges v. Hodges*, 147 N.C. App. 478, 483, 556 S.E.2d 7, 10 (2001)).

> Capacity to earn, however, may be the basis of an award if it is based upon a proper finding that the husband is deliberately depressing his income or indulging himself in excessive spending because of a disregard of his marital obligation to provide reasonable support for his wife and children.

Hartsell v. Hartsell, 189 N.C. App. 65, 77, 657 S.E.2d 724, 731 (2008) (citing *Beall v. Beall*, 290 N.C. 669, 674, 228 S.E.2d 407, 410 (1976)). "Our Supreme Court has held that 'earning capacity' to determine child support can only be used where there are findings, based on competent evidence, to support a conclusion that the supporting spouse or parent is deliberately suppressing his or her income to avoid family responsibilities." *Bowers v. Bowers*, 141 N.C. App. 729, 732, 541 S.E.2d 508, 510 (2001) (citations omitted). "Thus, 'a showing of bad faith income depression by the parent is a mandatory prerequisite for imputing income to that parent.' " *Hartsell*, 189 N.C. App. at 77, 657 S.E.2d at 731 (quoting *Sharpe v. Nobles*, 127 N.C. App. 705, 706, 493 S.E.2d 288, 289 (1997)). Where there is no finding of bad faith, the law of imputation is inapplicable. *See Diehl v. Diehl*, 177

N.C. App. 642, 650, 630 S.E.2d 25, 30 (2006) (citing *Burnett v. Wheeler*, 128 N.C. App. 174, 177, 493 S.E.2d 804, 806 (1997) (holding that, when determining a defendant's total gross income, considering the defendant's income from all available sources does not amount to imputing income)).

In *Burnett*, Mr. Wheeler contended that the trial court erred by imputing to him income of $77,000.00 despite evidence that his actual income was $29,000.00 per year. 128 N.C. App. at 176-77, 493 S.E.2d at 806. This Court acknowledged that "a person's capacity to earn income may be the basis of an award only if there is a finding that the party deliberately depressed his income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for the child." *Id.* at 177, 493 S.E.2d at 806. However, this Court reasoned that Mr. Wheeler mischaracterized the trial court's order: the trial court did not impute income. Rather, the court considered all of Mr. Wheeler's available income sources, such as: his retirement accounts, which totaled $722,384.00; his stock investments valued at $60,000.00; and land valued at $74,000.00. *Id.* We held that, in using all of Mr. Wheeler's available sources of income to arrive at his annual gross income, the trial court did not abuse its discretion. *Id.*

Here, in his 2008 response to Moore's discovery questions, Onafowora stated that the only car he owned was a 1996 Volvo but the car was sold in 2006. However, at the hearing for child custody and support, Onafowora testified that he owned a 2008 Mercedes S550 purchased in the fourth quarter of 2007. In addition, the court received evidence of a 21 August 2007 general warranty deed and a deed of trust with promissory note showing Onaforowa purchased a lot in Reflections Point, Belmont, North Carolina in the amount of $806,125.00. Onafowora had failed to include this property transaction in the response to the discovery request concerning Onafowora's assets. As to his income, Onafowora testified that he ran an event-planning business in 2007, and evidence was produced that he deposited $75,371.76 from that business into his personal checking accounts during that year.

The trial court found that Onafowora was employed by Trinity Partners and in 2007 had a gross income from that employer of $4,116.66 per month; in 2008, $4,240.16; and, at the time of the hearing, $4,416.67 per month. In addition, the trial court found that Onaforowa "had a side business producing parties at which patrons pay an entrance fee and there is entertainment." In unchallenged finding of fact 12 and in finding of fact 13 the trial court stated the following:

12. . . . The most complete records provided by defendant were those for 2007. For eight months in 2007 [Onafowora] deposited into his Wachovia account number ending in . . . 6767 $38,631.51 in addition to his net income from Trinity Partners and not including bank transfers, overdraft charges, or refunds. He deposited into his Wachovia account number ending in . . . 0975 for that eight month period $21,776.00. This is a total of $60,407.51 in gross income to the defendant for the first eight months of 2007 over and above his gross monthly income from his employment with Trinity Partners, an average of $7,550.94 per month.

13. The court finds that the defendant has gross monthly income in addition to that he receives from his employment with Trinity Partners in the amount of $7,550.94. His total gross monthly income from all sources for 2007 averaged $11,667.60. His total gross monthly income for 2008 averaged $11,791.10. His total gross monthly income for 2009 averaged $11,967.61. The court finds the defendant's current gross monthly income to be $11,967.61.

While the trial court did not make a finding of deliberate suppression of income, it did properly consider Onaforowa's income from all available sources. Given Onafowora's incomplete financial records in 2008 and 2009, we cannot say, under the circumstances of this case, that the trial court abused its discretion in using Onafowora's average monthly income reflected in the most complete records from 2007, to determine his 2009 income for purposes of setting his child support obligation. *See Burnett*, 128 N.C. App. 174, 493 S.E.2d 804. Accordingly, Onafowora's argument is overruled.

II

[2] Next, Onafowora argues that the trial court erred and abused it discretion in awarding sole custody of the minor child to Moore. We disagree.

"In child custody cases, the trial court is vested with broad discretion." *Shipman v. Shipman*, 155 N.C. App. 523, 527, 573 S.E.2d 755, 758 (2002) (citing *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 97 (2000)). "The decision of the trial court as to child custody 'should not be upset on appeal absent a clear showing of abuse of discretion.' " *Evans v. Evans*, 169 N.C. App. 358, 610 S.E.2d 264, 267 (2005) (quoting *Browning*, 136 N.C. App. at 423, 524 S.E.2d at 97).

> In a child custody case, the trial court's findings of fact are binding on this Court if they are supported by competent evidence. *See Sain v. Sain*, 134 N.C. App. 460, 464, 517 S.E.2d 921, 925 (1999). "However, the findings of fact and conclusions of law must be sufficient for this Court to determine whether the judgment is adequately supported by competent evidence." *Cantrell v. Wishon*, 141 N.C. App. 340, 342, 540 S.E.2d 804, 805 (2000); *see Buckingham v. Buckingham*, 134 N.C. App. 82, 88-89, 516 S.E.2d 869, 874, *review denied*, 351 N.C. 100, 540 S.E.2d 353 (1999). "Generally, on appeal from a case heard without a jury, the 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).

Davis v. McMillian, 152 N.C. App. 53, 58, 567 S.E.2d 159, 162 (2002).

Onafowora challenges the following findings of fact:

> 23. . . . Although [Onafowora] did take care of [the minor child] some while [Moore] was in school, [Moore] was the primary parent of the minor child following the child's birth.
>
> . . .
>
> 47. [The minor child] suffers from asthma. [Onafowora] is not adequately versed in the minor child's medications or medical problems. The court finds that he is not adequately prepared to deal with an asthma attack if the minor child has one.
>
> . . .
>
> 49. At one point the minor child needed surgery. [Moore] informed [Onafowora] that the minor child was going to have the surgery. [Onafowora] demanded that they get a second opinion. However, although he had an opportunity to do so and although he continued to complain about the child not having a second opinion, he never actually sought a second opinion.

At the custody hearing, Moore testified that, after the minor child was born, she lived with Moore for approximately a year and a half: she bathed the child, fed her, and met her physical and emotional needs. Onafowora visited the child two-to-three times a week. Each visit lasted 30 to 45 minutes, and Onafowora never took the child away from Moore's residence. Further, Moore also testified that she did not tell Onafowora to stay away from the residence or not to visit.

After the birth of the minor child, Onafowora purchased diapers and infant formula but rejected any request to provide more, such as help with daycare expenses. Moore's daycare provider, Mary Hemphill, testified that she cared for the minor child between three months and twenty-three months of age and, over the course of those months, Onafowora came to the daycare less the five times.

Moore also testified to the minor child's medical needs: the minor child has "nasal problems." When asked what prescriptions the child was on, Moore listed Tamiflu, Orafil, Advair, and Retinol "for her allergies." Onafowora could not name those medications when asked, and Moore testified that, when she discussed the medications with Onafowora, she did not "feel like he paid attention . . . ." As to the contention that Onaforowa demanded a second opinion regarding the minor child's surgery, Moore testified as follows:

> Q. Ms. Kelling asked [Onafowora] yesterday about a second opinion. Did Mr. Onafowora ask you to get a second opinion prior to your daughter's surgery?
>
> A. No, Mr. Onafowora said, "I need to research about this surgery." So, I let him go and do this research. I checked with him in a few days, asked him if he'd done his research, he said, No. He said he still had questions for the doctor. I provided him the doctor's name as well as the doctor's phone number. I followed up with him on several occasions asking had he spoke to the doctor, and each time it was, no; another time it was, "I left a message. He hasn't called me back." Two days later I said, "You still haven't heard from the doctor?" "No." I said, "I find that strange because at least the doctor's nurse would have called you back by now." So I don't believe he was trying to get his questions answered.

Onafowora also contested the following finding:

> 36. [Onafowora's] increased participation with the minor child, while good, seems to have arisen out of his desire to have his way over the income tax return [sic] and child support. . . . [Moore] has been and remains the primary parent of the minor child, being the parent who has consistently seen to the emotional, physical, and financial needs of the minor child.

At the hearing, Moore presented a verbatim transcript of recorded conversations between herself and Onafowora regarding a $1,500.00 tax refund, in which Onafowora indicates Moore should be thankful

to him for helping her receive the refund. In addition, Moore related a conversation in which Onafowora raised the question "[w]hy do I have to give you money to take care of our—my daughter." These actions indicate a reluctance by Onafowora to accept responsibility for the needs of the child, including financial responsibility. After a review of the record, we hold there is sufficient evidence to support the trial court's findings of fact. Moreover, we hold the trial court's findings support the following conclusions:

3. [Moore] is a fit, suitable and proper person to have the care, custody, and control of the minor child who is the subject of this action . . . .

4. [Onafowora] is a fit, suitable and proper person to have reasonable visitation with the minor child . . . .

5. It is in the best interest of the minor child that her care, custody, and control be vested with [Moore].

As the trial court's decision is fully supported by the record, there is no abuse of discretion. Accordingly, Onafowora's argument is overruled.

Affirmed.

Judges STEELMAN and ERVIN concur.

J.M. PARKER & SONS, INC., Plaintiff v. WILLIAM BARBER, INC., WILLIAM BARBER, Individually, and WILLIAM BARBER, INC. CUSTOM HOME BUILDER, Defendants

No. COA10-333

(Filed 21 December 2010)

1. Process and Service— requests for admissions—address listed in answer—service on new address known to counsel

The trial court did not err by finding that plaintiff's requests for admissions were properly served where plaintiff's counsel served the requests at defense counsel's new address rather than the address on the answer and the requests for admissions were in the file when it was turned over to substitute counsel. The Court of Appeals declined to establish a rule that plaintiff must

rely on the last listed address on a responsive filing rather than the last known address.

2. Discovery— admissions—failure to answer requests—motion to amend denied—discretion of court

The trial court did not abuse its discretion by denying defendants' N.C.G.S. § 1A-1, Rule 36(b) motion for amendment or withdrawal of admissions created by a failure to respond to plaintiffs' requests for admissions. Although defendants argued that their case may have been neglected by their original counsel and that plaintiff would not have been prejudiced by granting their motion, the trial court was given discretion to make a reasoned decision and did so here.

3. Discovery— requests for admissions—not answered—admissions binding

The trial court did not err by granting summary judgment for plaintiff on a claim for goods sold and delivered where defendants did not respond to requests for admissions and were bound by the resulting admissions. No assertion in an affidavit could overcome the conclusive effect of those admissions.

4. Discovery— requests for admissions—not answered—motion to set aside—credibility of affiant

The trial court did not impermissibly determine the credibility of a witness in an order denying defendants' Rule 36 motion to amend or withdraw admissions. There is no precedent barring the trial court from considering the credibility of affiants when making a discretionary ruling.

5. Interest— prejudgment interest—agreement between parties

The trial court did not err in an action to recover payment for goods sold and delivered by awarding prejudgment interest at the rate of eighteen percent based on an agreement between the parties to which defendants had judicially admitted.

Appeal by defendants from order entered 25 November 2009 and order dated 28 December 2009 by Judge William F. Fairley in Brunswick County District Court. Heard in the Court of Appeals 13 October 2010.

Richard F. Green for plaintiff-appellee.

Marshall, Williams & Gorham, L.L.P., by John L. Coble and Matthew B. Davis, for defendants-appellants.

BRYANT, Judge.

Where the trial court's findings of fact in a bench trial are supported by competent evidence, they will be affirmed, even if there is contrary evidence in the record. Where a trial court's denial of a motion for withdrawal or amendment of admissions under Rule 36 of the North Carolina Rules of Civil Procedure was the result of a reasoned decision, there was no abuse of discretion. In making such a discretionary decision, the trial court is free to consider the credibility of an affiant. Further, when facts are admitted pursuant to Rule 36, these facts are sufficient to support a grant of summary judgment. Finally, where parties have agreed to an applicable interest rate greater than eight percent in the event of late payments or past due accounts, the trial court does not err in awarding the specified rate of interest.

Facts

This case arises from the attempt by plaintiff J.M. Parker & Sons, Inc., to recover the principal amount of $71,662.79 for goods sold and delivered to defendants. On 15 November 2005, plaintiff filed a complaint against defendant William Barber, Inc., and William Barber, individually. An amended complaint, filed 13 February 2006, named "William Barber, Inc. Custom Home Builder" as an additional defendant. On 13 March 2006, defendants' counsel filed an answer admitting in part and denying in part plaintiff's allegations and asserting "mistake" as a defense. The answer listed defendants' counsel's address in Calabash, North Carolina. No other action or filing in the case by either party occurred until 26 April 2007, when plaintiff mailed the first of two sets of requests for admissions to defendants' counsel at an address in Shallotte, not to the Calabash address listed on defendants' 13 March 2006 answer. Defendants never responded. On 22 May 2008, plaintiff filed for partial summary judgment, relying on the unanswered requests for admissions. Plaintiff mailed a copy of this motion to defendants' counsel at the Shallotte address. On 10 December 2008, plaintiff moved for full summary judgment, again mailing a copy of the motion to defendants at the Shallotte address. On 11 September 2009, plaintiff served notice of motion on defendants, noticing a hearing calendared for 16 November 2009. The 11

September 2009 notice was mailed to defendants' counsel at the Shallotte address, to defendant's registered agent at a different Shallotte address and to defendants William Barber, Inc., and William Barber, individually, at addresses in Little River. At this point, defendants' counsel notified defendants that he was no longer practicing law and suggested they obtain substitute counsel. By motion dated 6 November 2009, defendants, through substitute counsel, moved the trial court to allow them to respond to plaintiff's requests for admissions, asserting that they had never received the requests mailed to the Shallotte address and that plaintiff would not be prejudiced by same.

On 16 November 2009, the trial court heard plaintiff's motion for summary judgment and defendants' motion for permission to respond to plaintiff's requests for admissions. The trial court then denied defendants' motion by order entered 25 November 2009, and by order dated 28 December 2009, the trial court granted summary judgment to plaintiff on all claims. From the November and December 2009 orders, defendants appeal.

On appeal, defendants presents five arguments: that the trial court (I) erred in finding plaintiff's requests for admissions were properly served; (II) abused its discretion in denying defendants' motion for permission to respond to plaintiff's requests for admissions; (III) erred in granting summary judgment to plaintiff because genuine issues of material fact existed; (IV) impermissibly determined the credibility of a witness; and (V) awarded interest at an impermissible rate.

Standards of Review

On appeal from a bench trial, our standard of review is "whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary." *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (citation omitted), *disc. review denied*, 354 N.C. 365, 556 S.E.2d 577 (2001). We review a trial court's decision to allow a motion for withdrawal or amendment of admissions under Rule 36 for abuse of discretion. *Eury v. North Carolina Employment Sec. Comm'n*, 115 N.C. App. 590, 603, 446 S.E.2d 383, 391, *disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994). We review a trial court's grant of summary judgment de novo. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

I

[1] Defendants argue that the trial court erred in finding plaintiff's requests for admissions were properly served. We disagree.

Rule 5 of the North Carolina Rules of Civil Procedure governs service and filing of pleadings and other papers. N.C. Gen. Stat. § 1A-1, Rule 5 (2009). Under Rule 5, with regard to a request for admissions, "service upon the attorney or upon a party may also be made by delivering a copy to the party or by mailing it to the party at the party's last known address or, if no address is known, by filing it with the clerk of court." N.C.G.S. § 1A-1, Rule 5(b). "Adequacy of notice is a question of law." *Barnett v. King*, 134 N.C. App. 348, 350, 517 S.E.2d 397, 399 (1999). In *Barnett*, we held that

> [w]here a defendant, especially one acting *pro se*, provides a mailing address in a document filed in response to a complaint and serves a copy of that filing on opposing counsel, he or she should be able to rely on receiving later service at that address; by the same token, opposing counsel (or a *pro se* party) *may* also rely on that address for service of all subsequent process and other communications until a new address is furnished.

Id. at 351, 517 S.E.2d at 400 (emphasis added).

Defendants contend that *Barnett* is dispositive of this case, arguing that case stands for the proposition that, "where a defendant lists a mailing address in a responsive pleading filed with the court, that address is the defendant's service address for Rule 5 purposes and continues as such until the defendant provides notice of a new address." We believe this is a misreading of *Barnett*, and of the logic and intent behind that decision. In *Barnett*, the plaintiff served her complaint on the defendant at a Pinebluff street address. *Id.* Subsequently, the *pro se* defendant filed a responsive pleading which listed a post office box address. *Id.* Thereafter, the plaintiff mailed notice of a hearing on a motion for default to the defendant's Pinebluff street address, but the following day mailed a motion to the defendant's post office box address. *Id.* Thus, the plaintiff was aware of a new, correct address for the defendant, and used it for some mailings, but continued to use an older address for other mailings. "Nevertheless, [the] plaintiff contend[ed] that as of [the service of notice of the hearing], approximately four months after defendant filed his statement, [the] defendant's Pinebluff street address was his 'last known address.' " *Id. Barnett* stands for the proposition that one

party may not serve a second party at its previous address once the second party provides an updated address in a more recent court filing. This is not the factual situation presented in the case before us.

Here, plaintiff acknowledges that the Calabash address for defendants' attorney appeared on defendants' answer filed 13 March 2006. More than a year later, in April 2007, plaintiff served its first request for admissions at the Shallotte address instead. At the motions hearing, plaintiff's trial counsel explained that he was personally aware that defendants' counsel had moved his law offices from Calabash to Shallotte shortly after the answer was filed, a contention not disputed by defendants' substitute counsel or any document in the record on appeal. At the hearing, substitute counsel admitted that plaintiff's first set of requests for admissions had been received by original counsel, although substitute counsel was not aware of whether the second set of requests for admissions or the motions for summary judgment were received by defendants' original counsel. Thus, the facts before the trial court tended to show that defendants' counsel had moved and changed addresses, plaintiff's counsel was aware of this fact and located defense counsel's new address, plaintiff's counsel served the requests for admissions at the new address, and defense counsel actually received the requests for admissions.

Thus, unlike *Barnett*, where the plaintiff was made aware of a new address for the defendant and in fact used it for some mailings, but then ignored it to use an older, out-of-date address, here, plaintiff's counsel was made aware that defendant's old address was no longer correct and undertook efforts to determine a new, accurate address. Defendants' original counsel received the mailing, as the first set of requests for admissions was in defendants' file when it was turned over to substitute counsel. Defendants would have us establish a rule that plaintiffs must rely on the last *listed* address on a responsive filing, as opposed to the last *known* address, despite the passage of a long period of time and knowledge that the address was no longer correct, and excuse a party's failure to respond to requests for admissions that were in fact received by its counsel of record. We decline to do either and affirm the trial court's ruling that the requests for admissions were properly served. This argument is overruled.

II

[2] Defendants next argue the trial court abused its discretion in denying defendants' Rule 36(b) motion. We disagree.

Where one party fails to timely respond to another's request for admissions, the facts in question are deemed to be judicially admitted under Rule 36 of the North Carolina Rules of Civil Procedure. *Town of Chapel Hill v. Burchette*, 100 N.C. App. 157, 162, 394 S.E.2d 698, 701 (1990); *see also* N.C. Gen. Stat. § 1A-1, Rule 36(a) (2009) ("The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney . . . ."). Rule 36 "means precisely what it says [i.e.,] [i]n order to avoid having requests for admissions deemed admitted, a party must respond within the period of the rule if there is any objection whatsoever to the request." *Burchette*, 100 N.C. App. at 162, 394 S.E.2d at 701 (internal quotation marks and citation omitted). Failure to do so means that the facts in question are judicially established. *Id.* Subsection (b) provides, in pertinent part:

> (b) Effect of admission.—*Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.* Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

N.C.G.S. § 1A-1, Rule 36 (emphasis added).

Thus, under Rule 36(b), a trial court has discretion to allow a motion for withdrawal or amendment of such admissions. *Eury*, 115 N.C. App. at 603, 446 S.E.2d at 391. We have held that "in the exercise of that discretion [the trial court is] not required to consider whether the withdrawal of the admissions would prejudice [a party] in maintaining its action." *Interstate Highway Express v. S & S Enterprises, Inc.*, 93 N.C. App. 765, 769, 379 S.E.2d 85, 87 (1989).

Defendants contend that the trial court abused its discretion by ignoring the fact that defendants' case may have been neglected by their original trial counsel. However, defendants' substitute counsel fully informed the trial court of the alleged actions and inactions of their original trial counsel. Defendants also assert that plaintiff would not have been prejudiced by the allowance of their motion because

the longevity of the case, which the trial court mentioned in its denial of the motion, was the result of plaintiff's actions. However, neither of defendant's contentions, even if true, would demonstrate that the trial court's decision was "manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980). The trial court is not required to allow amendment or withdrawal under Rule 36 where the other party is not prejudiced, nor must the trial court weigh evidence or arguments in any particular way. The trial court was given discretion to make a reasoned decision and here, after hearing the arguments of the parties, it did so. Defendants are unable to cite any case where an analogous trial court decision under Rule 36 has been reversed as an abuse of discretion, and we are likewise unable to find one. Defendants' arguments on this issue are overruled.

III

[3] Defendants next argue that the trial court erred in granting summary judgment to plaintiff. We disagree.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). Thus, "[o]n appeal of a trial court's allowance of a motion for summary judgment, we consider whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). "Evidence presented by the parties is viewed in the light most favorable to the non-movant." *Id.* (citation omitted).

Here, defendants' 13 March 2005 answer to plaintiff's amended complaint specifically denies the allegations in the amended complaint stating that defendant William Barber, Inc., is a South Carolina corporation doing business in Brunswick County, North Carolina. However, the two requests for admissions, to which defendants failed to respond assert that defendants bought and received certain goods from plaintiff and then failed to pay for them. The requests for admissions further state that there were no defenses available to defendants in the action. Because defendants failed to timely respond to these requests, the statements they contain were "conclusively established" pursuant Rule 36 as discussed above in section II.

"Facts that are admitted under Rule 36(b) are sufficient to support a grant of summary judgment." *Goins v. Puleo*, 350 N.C. 277, 280, 512 S.E.2d 748, 750 (1999) (citing *Rhoads v. Bryant*, 56 N.C. App. 635, 637, 289 S.E.2d 637, 639, *disc. review denied*, 306 N.C. 386, 294 S.E.2d 211 (1982)). A judicial admission "is not evidence, but it, instead, serves to remove the admitted fact from the trial by formally conceding its existence." *Eury*, 115 N.C. App. at 599, 446 S.E.2d at 389. In *Rhoads*, we held that a "[p]laintiff's affidavit opposing summary judgment does not overcome the conclusive effect of her previous admissions, and, therefore, no issue of fact is raised by [any assertions therein]." 56 N.C. App. at 637-38, 289 S.E.2d at 639. Similarly, here, defendants are bound by their Rule 36 admissions, and no assertions in defendant William Barber's affidavit can overcome the conclusive effect of defendants' previous Rule 36 admissions. Therefore, defendants cannot raise an issue of fact which would support denial of summary judgment to plaintiff. Defendants' argument is overruled.

IV

[4] Defendants also argue the trial court impermissibly determined the credibility of a witness. We disagree.

In the trial court's 25 November 2009 order denying defendants' Rule 36 motion, it made the following finding:

> 5. That the Answer filed for the defendants specifically admits that materials were sold by the plaintiff during the time alleged in the complaint to the defendant William Barber, Inc. Custom Home Builder on the open account alleged in the complaint but the same matter is denied in the affidavit of William Barber filed in support of defendants' motion to be allowed to file answer to the Requests for Admission and that this conflict raises grave doubts about the credibility of the affiant, William Barber, particularly as to those assertions contained in paragraphs 2 and 4 of his affidavit which the Court finds lack credibility[.]

Defendants argue that the trial court erred in passing on Defendant William Barber's credibility, citing *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 655, 268 S.E.2d 190, 193-94 (1980) ("[I]f there is any question as to the credibility of affiants in a *summary judgment motion* or if there is a question which can be resolved only by the weight of the evidence, summary judgment should be denied.") (emphasis added). However, *Lease-Afex, Inc.* is inapposite, as the trial court's finding quoted above and challenged by defendants'

comes from its order denying defendants' Rule 36 motion, not from the 28 December 2009 order granting summary judgment to plaintiff. As discussed above in section II, the trial court's Rule 36 decision was discretionary, and it was bound only to make a non-arbitrary and reasoned decision. Finding 5 is part of the trial court's explanation for denying defendants' Rule 36 motion, i.e., explaining the reasoning behind its decision. We know of no case in this State barring a trial court from considering the credibility of affiants when making a *discretionary* ruling. In contrast, defendants point to nothing in the trial court's order granting summary judgment that suggests it considered or passed on any witness's credibility in making that ruling. Indeed, given defendants' judicial admissions to every relevant fact in the case, there were no issues of fact and, thus, there was no need for anyone's credibility to be evaluated in the ruling on summary judgment. This argument is overruled.

V

[5] Defendant argues that the trial court erred in awarding interest at an impermissible rate. We disagree.

"The legal rate of interest shall be eight percent (8%) per annum for such time as interest may accrue, and no more." N.C. Gen. Stat. § 24-1 (2009). "Interest is to be assessed at the legal rate of 8 percent, [citing N.C.G.S. § 24-1], unless the parties have provided otherwise by agreement, in which event the agreement shall prevail." *Barrett Kays & Assocs. v. Colonial Bldg. Co.*, 129 N.C. App. 525, 529, 500 S.E.2d 108, 112 (1998) (citation omitted). Here, the trial court awarded plaintiff prejudgment interest at an annual rate of eighteen percent from 26 October 2005; post-judgment interest was awarded at the legal rate thereafter. This award of eighteen percent was based on the agreement between the parties, an agreement which defendants have judicially admitted under Rule 36. This argument is without merit.

Affirmed.

Judges STEELMAN and ERVIN concur.

RAYMOND BILL HARTMAN, PETITIONER v. MICHAEL ROBERTSON, COMMISSIONER OF MOTOR VEHICLES, NORTH CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT

No. COA10-636

(Filed 21 December 2010)

1. Motor Vehicles— implied-consent offense—refusal of chemical test—license revocation proper

The trial court did not err in affirming respondent's order upholding the revocation of petitioner's driver's license for refusing to submit to a chemical test. The propriety of the police officers' initial traffic stop of defendant was not within the statutorily-prescribed purview of a license revocation hearing, the evidence supported the challenged findings of fact, and the findings of fact supported the conclusion of law that police officers had reasonable grounds to believe that petitioner had committed an implied-consent offense.

2. Search and Seizure— traffic stop—implied-consent offense —motion to suppress evidence—not subject to exclusionary rule

The Court of Appeals rejected petitioner's argument that evidence gathered subsequent to his stop for a suspected implied-consent offense should have been suppressed because the traffic stop was illegal. Even if the officers lacked reasonable and articulable suspicion to stop petitioner, the evidence that resulted from the stop was not subject to the exclusionary rule.

Appeal by petitioner from order entered 11 February 2010 by Judge W. David Lee in Iredell County Superior Court. Heard in the Court of Appeals 3 November 2010.

Homesley, Goodman & Wingo, PLLC, by Ronnie D. Crisco, Jr., for petitioner-appellant.

Attorney General Roy A. Copper, III, by Assistant Attorneys General Christopher W. Brooks and William P. Hart, Jr., for the State, respondent-appellee.

JACKSON, Judge.

Raymond Bill Hartman ("petitioner") appeals an order entered 11 February 2010 affirming the revocation of his driver's license pur-

suant to North Carolina General Statutes, section 20-16.2(e). For the reasons set forth below, we affirm.

On 24 April 2009, Mooresville Police Dispatch received an anonymous call reporting that a driver of a silver Mercedes Benz ("the Mercedes") was driving erratically near a Citgo gas station off Williamson Road and possibly was intoxicated. Officers Richard Kratz ("Officer Kratz") and Darren Furr ("Officer Furr") (collectively "the officers") responded to the call and proceeded toward the Citgo gas station parking lot. As the officers were entering the parking lot, the dispatch told the officers that the anonymous tipster, who still was on the phone line, said that the Mercedes was leaving the gas station parking lot. Officer Kratz saw a silver Mercedes Benz that matched the caller's description; the Mercedes exited the parking lot, and the officers followed it.

As the Mercedes approached a red traffic signal to turn right onto Alcove Road, Officer Kratz observed it cross over the stop line and partially enter the intersection prior to stopping completely. The Mercedes then turned right onto Alcove Road, and the officers followed it down that road. Officer Kratz estimated the speed of the Mercedes at approximately sixty-five miles per hour in a forty-five miles per hour zone and initiated a traffic stop. Petitioner was the driver of the Mercedes. Officer Furr first approached petitioner and asked him for his license and registration. He then asked if petitioner had been drinking. Petitioner responded that he had had two beers and was on his way home. Officer Furr asked petitioner to step out of the car and approach the rear of the car where Officer Kratz was standing. Officer Kratz noticed that petitioner was "very unsteady" on his feet, "had glassy eyes," and had "a strong odor" of alcohol on his breath. As Officer Furr ran a diagnostic on petitioner's license, Officer Kratz asked petitioner to submit to two field sobriety tests. Petitioner failed the field sobriety tests, and the officers arrested petitioner for driving while impaired. When he arrived at the Mooresville Police Department, petitioner refused to submit to a chemical analysis.

In a letter dated 8 March 2009, the North Carolina Division of Motor Vehicles ("respondent") notified petitioner that, pursuant to North Carolina General Statutes, section 20-16.2, petitioner's license would be suspended for one year for refusing to submit to a chemical test. Petitioner requested a hearing to contest the revocation, and on 16 November 2009, respondent entered an order upholding the revocation. On 25 November 2009, petitioner filed a petition for *de novo*

hearing. On 11 February 2010, the superior court affirmed the revocation. Petitioner appeals.

[1] Petitioner first argues that Officer Kratz did not have reasonable and articulable suspicion to initiate a traffic stop of the Mercedes on 24 April 2009. We disagree.

"On appeal to this Court, the trial court's Findings of Fact are conclusive if supported by competent evidence, even though there may be evidence to the contrary. We review whether the trial court's Findings of Fact support its conclusions of law *de novo*." *Steinkrause v. Tatum*, 201 N.C. App. 289, 291-92, 689 S.E.2d 379, 381 (2009) (internal citations omitted), *aff'd*, 364 N.C. 419, 700 S.E.2d 222 (2010) (per curiam). "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 v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted).

North Carolina General Statutes, section 20-16.2(a) provides that "[a]ny 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." N.C. Gen. Stat. § 20-16.2(a) (2007). If the person charged refuses to submit to a chemical analysis, his or her license will be revoked for twelve months. N.C. Gen. Stat. § 20-16.2(d) (2007). However, the person charged may request a hearing before the DMV to contest the revocation. *Id.* If the revocation is sustained following the hearing, the person charged has the right to file a petition in the superior court whereupon "[t]he superior court review shall be limited to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license." N.C. Gen. Stat. § 20-16.2(e) (2007).

North Carolina General Statutes, section 20-16.2(d) provides that the hearing before the DMV with respect to a revocation of a license

> *shall be limited* to consideration of whether:
>
> (1) The person was charged with an implied-consent offense . . . ;
>
> (2) A law enforcement officer had reasonable grounds to believe that the person had committed an implied-consent offense . . . ;
>
> (3) The implied-consent offense charged involved death or critical injury to another person, if this allegation is in the affidavit;

(4) The person was notified of the person's rights as required by subsection (a); and

(5) The person willfully refused to submit to a chemical analysis.

N.C. Gen. Stat. § 20-16.2(d) (2007) (emphasis added).

"In [the license revocation] context, the term 'reasonable grounds' is treated the same as 'probable cause.' " *Rock v. Hiatt*, 103 N.C. App. 578, 584, 406 S.E.2d 638, 642 (1991) (citing *State v. Eubanks*, 283 N.C. 556, 196 S.E.2d 706, *reh'g denied*, 285 N.C. 597 (1973); *State v. Adkerson*, 90 N.C. App. 333, 368 S.E.2d 434 (1988)). "[P]robable cause exists if the facts and circumstances at that moment and within the arresting officer's knowledge and of which the officer had reasonably trustworthy information are such that a prudent man would believe that the [suspect] had committed or was committing a crime." *Id.* (citing *State v. Eubanks*, 283 N.C. 556, 559, 196 S.E.2d 706, 708, *reh'g denied*, 285 N.C. 597 (1973)) (second alteration in original).

Here, defendant challenges the officers' reasonable and articulable suspicion for initiating a traffic stop. However, reasonable and articulable suspicion for the initial stop is not an issue to be reviewed pursuant to North Carolina General Statutes, section 20-16.2. According to section 20-16.2, the only inquiry with respect to the law enforcement officer is the requirement that he "ha[ve] reasonable grounds to believe that the person had committed an implied-consent offense[.]" N.C. Gen. Stat. § 20-16.2(d)(2) (2007).

Defendant's contention is similar to the defendant's argument in *Quick v. N.C. Division of Motor Vehicles*, 125 N.C. App. 123, 479 S.E.2d 226, *disc. rev. denied*, 345 N.C. 643, 483 S.E.2d 711 (1997). In *Quick*, the petitioner argued that, because his arrest was illegal, his subsequent willful refusal to submit to a chemical analysis could not be the basis for the revocation of his license pursuant to section 20-16.2(d). *Id.* at 125, 479 S.E.2d at 227. In that case, we held that even if the arrest had been illegal,

> because petitioner was "charged with an implied-consent offense" after driving on a "highway or public vehicular area" and because [the officer] had "reasonable grounds to believe [the petitioner] ha[d] committed the implied-consent offense," N.C.G.S. § 20-16.2(a), the trial court correctly affirmed the revocation of the petitioner's license on the basis of his refusal to take the chemical analysis.

Id. (third alteration in original). We further held that " '[t]he question of the legality of [petitioner's] arrest . . . [is] simply not relevant to any issue presented in' the hearing to determine whether his license was properly revoked." *Id.* at 126, 479 S.E.2d at 228 (quoting *In re Gardner*, 39 N.C. App. 567, 574, 251 S.E.2d 723, 727 (1979)) (ellipsis and third alteration in original). "[The] administration of the breathalyzer test . . . hinges solely upon the . . . law-enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of intoxicating liquor." *In re Gardner*, 39 N.C. App. 567, 573, 251 S.E.2d 723, 727 (1979) (quoting *State v. Eubanks*, 283 N.C. 556, 561, 196 S.E.2d 706, 709, *reh'g denied*, 285 N.C. 597 (1973)) (internal quotation marks omitted) (second ellipsis in original). Accordingly, the propriety of the initial stop is not within the statutorily-prescribed purview of a license revocation hearing.

Furthermore, pursuant to our standard of review, the hearing officer's findings are supported by the evidence and his conclusions are supported by the findings. Petitioner challenges only two findings of fact: "6. The Petitioner stopped past the intersection midway into it then turned right onto Alcove Road" and "7. Officer Kratz followed the Petitioner and estimated the Petitioner's speed to be 65/45mph zone at the time of the initial a [sic] stop." However, competent evidence supports these findings. Officer Kratz testified that petitioner "stopped with the vehicle in the intersection. It actually crossed the stop bar angled to the right in the intersection." Officer Kratz also testified that he "followed the vehicle, caught up to it[,] estimated speed was approximately 65mph, that's a 45mph zone." Officer Kratz's testimony is competent evidence that supports both of the challenged findings.

Petitioner also challenges the hearing officer's second conclusion of law, which reads, "A law enforcement officer, Richard Kratz and Officer Darren Furr had reasonable grounds to believe that the Petitioner had committed an implied-consent offense." This conclusion is supported by the findings of fact. The hearing officer made the following relevant findings of fact, none of which are disputed by petitioner:

> 3. Officer Kratz came into contact with the Petitioner on April 24, 2009 at 07:30PM when he and Officer Darren Furr, Field Training Officer, received a call from Dispatch indicating someone in a silver Mercedes Benz near exit 33 and Williamson Road near a Citgo Gas Station displaying erratic driving and possibly intoxicated.

> 4. Officer Kratz proceeded to the area and observed the Petitioner exiting a Citgo Gas Station PVA driving a silver Mercedes Benz.
>
> . . . .
>
> 9. Officer Furr asked the Petitioner if he had consumed any alcohol; the Petitioner answered "yes, I drank two beers and was on [my] way home."
>
> 10. Officer Furr asked the Petitioner to step out of the vehicle.
>
> 11. The Petitioner got out of the vehicle and was unsteady on his feet; had glassy eyes; and a strong odor of alcohol emitting from his breath.
>
> 12. The Petitioner did not advise of any disabilities or injuries upon request to perform Field Sobriety Tests.
>
> 13. Officer Kratz demonstrated and explained and then asked the Petitioner to perform these Field Sobriety Tests on a smooth level asphalt surface: Walk-and-Turn/Failed; One-Leg Stand/Failed; no Alco-Sensor was done.

We hold that these findings of fact support the conclusion of law that "[a] law enforcement officer, Richard Kratz and Officer Darren Furr had reasonable grounds to believe that the Petitioner had committed an implied-consent offense." Accordingly, we affirm the superior court's order, which affirmed the revocation of petitioner's license.

[2] Petitioner's second argument is that, because the traffic stop was illegal, the evidence gathered subsequent to the stop should have been suppressed. We disagree.

" 'We review questions of law *de novo*.' " *Davis v. N.C. Dep't of Crime Control & Pub. Safety*, 151 N.C. App. 513, 516, 565 S.E.2d 716, 719 (2002) (quoting *Staton v. Brame*, 136 N.C. App. 170, 174, 523 S.E.2d 424, 427 (1999)).

"The Fourth Amendment [to] the United States Constitution secures the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .' " *In re Freeman*, 109 N.C. App. 100, 103, 426 S.E.2d 100, 101 (1993) (quoting U.S. Const. amend. IV). Article I, section 20 of our North Carolina Constitution provides the same protections as the federal Fourth Amendment. *In re Murray*, 136 N.C. App. 648, 652, 525 S.E.2d 496, 500 (2000) (citing *State v. Hendricks*, 43 N.C. App. 245, 251-52, 258 S.E.2d 872, 877 (1979), *disc. rev. denied*, 299 N.C. 123, 262 S.E.2d 6 (1980)).

"Separate and apart from the question of whether a party's Fourth Amendment rights have been violated is the question of whether a violation requires the exclusion, in any civil or criminal proceeding, of evidence obtained as a result of the violation." *In re Freeman*, 109 N.C. App. at 103, 426 S.E.2d at 101 (citing *Illinois v. Gates*, 462 U.S. 213, 223, 76 L. Ed. 2d 527, 538-39, *reh'g denied*, 463 U.S. 1237, 77 L. Ed. 2d 1453 (1983)). According to our Supreme Court, "[i]n deciding whether the exclusionary rule should be applied . . . , we must keep in mind its purpose." *State v. Lombardo*, 306 N.C. 594, 599, 295 S.E.2d 399, 403 (1982). "Its purpose is 'not to redress the injury' " but " 'to deter future unlawful police conduct' by removing the incentive to disregard the fourth amendment." *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 347, 38 L. Ed. 2d 561, 571 (1974)). "The deterrent effect of the exclusionary rule is based on the assumption that a police officer realizes that his duty is to conduct searches and seizures only in a manner that will help secure a *conviction*." *Id.* Our Supreme Court then declined to extend the exclusionary rule to probation revocation hearings. *Id.*

When this Court previously has applied our precedent in this area, it noted that evidence in a license revocation hearing similarly is not subject to the exclusionary rule. *Quick*, 125 N.C. App. at 127 n.3, 479 S.E.2d at 228-29 (declining to apply the exclusionary rule in a license revocation hearing because "[t]he United States Supreme Court has held that the exclusionary rule does not apply in the context of civil proceedings, *United States v. Janis*, 428 U.S. 433, 459-60, 49 L. Ed. 2d 1046, 1064 (1976), and our own Supreme Court has held that a license revocation proceeding is civil in nature. *State v. Oliver*, 343 N.C. 202, 207, 470 S.E.2d 16, 20 (1996)."). Accordingly, whether or not the officers in the case *sub judice* had reasonable and articulable suspicion to stop petitioner, the evidence that resulted from the stop is not subject to the exclusionary rule. Therefore, petitioner's second argument must fail.

Affirmed.

Judges HUNTER and ELMORE concur.

STATE OF NORTH CAROLINA v. JAMES DONOVAN FORD, DEFENDANT

No. COA10-470

(Filed 21 December 2010)

Search and Seizure— traffic stop—inoperable tag light—reasonable suspicion

The trial court properly denied defendant's motion to suppress evidence of drugs and a firearm found after a traffic stop where defendant was stopped at night for having an inoperable tag light. The trial court's finding that the officers saw an on-going equipment violation supported the trial court's conclusion that the officers had reasonable suspicion to stop defendant's vehicle.

Appeal by defendant from judgment entered 25 January 2010 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 November 2010.

Attorney General Roy Cooper, by Assistant Attorney General Jay L. Osborne, for the State.

Mercedes O. Chut for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant James Donovan Ford appeals from the denial of his motion to suppress evidence seized during a traffic stop. Defendant contends that the police officers that stopped him lacked reasonable suspicion to conduct the stop, and thus the evidence seized was the product of an unconstitutional search and should have been suppressed. We conclude, based on the totality of the circumstances, that the officers had reasonable suspicion to believe that defendant committed a traffic violation supporting the traffic stop. The trial court, therefore, properly denied defendant's motion to suppress.

Facts

Officers Lance Fusco and Shane Strayer, with the Charlotte-Mecklenburg Police Department, were patrolling the Eastway area of Charlotte in a marked patrol car during the evening of 15 October 2008. Around 10:00 p.m. that night, the officers saw a gray Chrysler 300 sedan driving in the neighborhood, but did not notice anything unusual about the car. Later that evening, the officers saw the same car "circling around" in the neighborhood and "made a mental note of

it." At approximately 1:45 a.m. on 16 October 2008, they saw the car for the third time, going down Belmont Ave. toward Davidson St. The officers got within 50 feet behind the car to "run the tag[]" to identify the registered owner, but the car's license plate did not "appear to be lit" and they "had to get really close to read the tag." Officer Fusco, who was driving the patrol car, turned off the car's headlights to "verify that [they] couldn't read the tag." After determining that they "couldn't read the tag . . . at fifty feet," Officer Fusco turned on his blue lights and siren and stopped the gray Chrysler 300, which was driven by defendant.[1] Defendant was cited for failing to maintain a properly functioning tag light.

During the stop, defendant's car was searched and, as a result of what was found during the search, defendant was charged with possession of a firearm by a felon, carrying a concealed weapon, maintaining a vehicle for controlled substances, possession with intent to manufacture, sell, or deliver a controlled substance, possession with intent to sell or deliver cocaine, possession of marijuana, possession of drug paraphernalia, and having attained habitual felon status. Defendant filed a motion to suppress the evidence obtained as a result of the search, contending that the officers lacked reasonable suspicion to conduct the traffic stop. The trial court conducted a suppression hearing on 2 September 2009, at which both the State and defendant presented evidence. At the conclusion of the hearing, the trial court entered an order from the bench, concluding that the officers had "reasonable articulable suspicion to stop the vehicle" and denying defendant's motion to suppress. Defendant subsequently pled guilty to possession of a firearm by a felon and having attained habitual felon status in exchange for the State's dismissing the remainder of the charges. The trial court consolidated the two charges to which defendant pled guilty and sentenced defendant to a presumptive-range sentence of 110 to 141 months imprisonment. Defendant timely appealed to this Court.

Discussion

Defendant's only argument on appeal is that the trial court erred in denying his motion to suppress. In reviewing the denial of a motion to suppress, the appellate court determines whether the trial court's findings of fact are supported by competent evidence and whether those findings, in turn, support the court's conclusions of law. *State*

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1. The Chrysler 300 was a rental car rented for the period 7-16 October 2008 by someone other than defendant from Triangle Rent-A-Car.

v. Cooke, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). The court's findings of fact are binding on appeal if they are supported by competent evidence, even if the evidence is conflicting. *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001). The court's conclusions of law determining whether an officer had reasonable suspicion is reviewed de novo. *State v. Kincaid*, 147 N.C. App. 94, 97, 555 S.E.2d 294, 297 (2001).

The Fourth Amendment protects individuals "against unreasonable searches and seizures." U.S. Const. amend. IV. Pertinent here, "a traffic stop is valid under the Fourth Amendment if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring." *United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995). Reasonable suspicion requires that "[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by [the officer's] experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906 (1968)).

Reasonable suspicion is a less demanding standard than probable cause, *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645, *cert. denied*, U.S., 172 L. Ed. 2d 198 (2008), and only requires a "minimal level of objective justification, something more than an 'unparticularized suspicion or hunch[,]' " *State v. Steen*, 352 N.C. 227, 239, 536 S.E.2d 1, 8 (2000) (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). "A court must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion" exists. *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (quoting *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981)).

With respect to whether Officers Fusco and Strayer had reasonable suspicion to stop defendant's vehicle on 16 October 2008, the trial court found that: "normal evening and atmospheric conditions" existed at the time the officers pulled behind defendant's vehicle and attempted to read the vehicle's license plate; when Officer Fusco "pulled behind this Chrysler vehicle and turned off the lights on his marked patrol car," there was "either no tail light or a tail light that was not functioning sufficiently [so] that the numbers or numerals on the Chrysler tag were not visible within the statutory requirement set forth in 20-129, subsection (d)"; and that "the officer[s] did ticket the

defendant for the alleged violation" of N.C. Gen. Stat. § 20-129(d) (2009). Based on these findings, the court concluded that Officers Fusco and Strayer had "reasonable suspicion to stop this vehicle."

The stop of defendant's vehicle was premised on his alleged violation of N.C. Gen. Stat. § 20-129(d), which provides, in pertinent part, that every motor vehicle is required to have "[o]ne rear lamp or a separate lamp . . . so constructed and placed that the number plate carried on the rear of [the] vehicle shall under [normal atmospheric] conditions be illuminated by a white light as to be read from a distance of 50 feet to the rear of such vehicle."

Defendant contends that there is insufficient evidence to support the trial court's finding that the rear lamp on defendant's vehicle was either not functioning or not functioning properly to illuminate the license plate so that it could be read from 50 feet. Both Officer Fusco and Officer Strayer testified that they pulled within 50 feet of the rear of defendant's vehicle around 1:45 a.m. and were unable to read defendant's license plate, despite having the patrol car's headlights on. Officer Fusco explained that he then turned off the patrol car's headlights to "verify" his suspicion that the "tag light [wa]s out[.]" Believing that defendant's vehicle's "tag light" was inoperable, the officer's initiated a traffic stop and cited defendant for failing to maintain a properly functioning tag light. This evidence is sufficient to support the trial court's finding that defendant's vehicle's tag light was not functioning properly, in violation of N.C. Gen. Stat. § 20-129(d). *See Draper v. Reynolds*, 369 F.3d 1270, 1275-76 (11th Cir. 2004) (finding sufficient evidence of equipment violation justifying stop where, "[u]nder Georgia law, a tag must be illuminated with a white light so that it is legible from fifty feet to the rear" and sheriff's deputy "testified that he stopped [defendant] because he observed that [defendant]'s tag light was out").

Defendant nevertheless points to the testimony of Tom Myrick, the operations manager for Triangle Rent-A-Car, who stated that the company's inspection records indicated that "everything was fine with the vehicle" when it was rented on 7 October 2009 and when it was returned on 16 October 2009 and that the company had "no records of a burned out taillight on the . . . car[.]" On cross-examination, however, Mr. Myrick testified that although part of the company's inspection process is to inspect each rental car's tag light, its "inspectors [do not] get fifty feet away from the vehicle and inspect the tag light[.]" Mr. Myrick, moreover, indicated that when defense

counsel wrote the company a letter asking for any records indicating whether the vehicle had any problems with burnt-out taillights, he searched the company's records, but did not actually inspect the car.

Contrary to defendant's contention, Mr. Myrick's testimony—that the car was generally "fine" before and after the rental period during which the stop occurred and that the car did not have a documented history of burnt-out taillights—fails to directly controvert Officer Fusco's and Officer Strayer's testimony that defendant's vehicle's tag was not sufficiently illuminated to be legible from 50 feet away on the night of the stop. *See id.* ("At his deposition, [defendant] testified that he picked up his truck at the wrecker yard between eleven a.m. and noon the next day and that his tag light was working. That the tag light was working to an unknown extent during daylight does not directly contradict [the officer]'s position that the registration plate was not clearly legible from fifty feet away on the night of the stop . . . ."); *State v. Taylor*, 694 A.2d 907, 910 (Me. 1997) ("Although [defendant] testified that the light was illuminated when he checked it after leaving the police station, Officer Green testified that he observed from seventy-five feet away that the light was defective. Officer Green's testimony about whether the light was illuminated while [defendant] operated his car is not directly controverted and supports an articulable and reasonable suspicion that a traffic violation was occurring.").

The trial court's finding that Officers Fusco and Strayer observed an on-going equipment violation—the failure to maintain a properly illuminated registration tag—supports the court's conclusion that the officers had reasonable suspicion to stop defendant's vehicle. *See, e.g., United States v. Fox*, 393 F.3d 52, 59 (1st Cir. 2004) (holding that "there was justification for stopping [defendant's] vehicle" where officer "encountered a vehicle that appeared to be without a working plate light"), *vacated on other grounds*, 545 U.S. 1125, 162 L. Ed. 2d 864 (2005); *United States v. Alexander*, 589 F. Supp. 2d 777, 783 (E.D. Tex. 2008) (holding absence of functional tag light on rear of defendant's vehicle justified initial traffic stop under Texas law); *Smith v. State*, 687 So.2d 875, 878 (Fla. Ct. App. 1997) (finding stop "reasonable" where officers "believe[d] that [defendant]'s car had a dim tag light"); *Hampton v. State*, 287 Ga. App. 896, 898, 652 S.E.2d 915, 917 (2007) (holding traffic stop was justified "based on the officer's observance of a traffic violation, the nonfunctioning tag light"); *People v. Sullivan*, 7 Ill. App. 3d 417, 420-21, 287 N.E.2d 513, 515-16 (1972) (holding stop was "proper" where Illinois law required "rear registra-

tion plate [to] be so lighted that it is clearly legible from a distance of fifty feet to the rear" and arresting officers testified that "license plate light was out"); *Walker v. State*, 527 N.E.2d 706, 708 (Ind. 1988) (holding stop of vehicle was justified where license plate was not properly illuminated), *cert. denied*, 493 U.S. 856, 107 L. Ed. 2d 118 (1989); *People v. Nelson*, 266 A.D.2d 730, 732, 698 N.Y.S.2d 797, 799 (N.Y. App. Div. 1999) ("Having observed a traffic infraction—the unlighted rear license plate—[the officer] was justified in stopping defendant's vehicle."); *State v. Cullers*, 119 Ohio App. 3d 355, 358, 695 N.E.2d 314, 316 (1997) (concluding traffic stop was constitutional "[b]ecause Officer Kraft observed violations of the traffic code with respect to illumination of the rear license plate on [defendant]'s vehicle"); *State v. England*, 19 S.W.3d 762, 766 (Tenn. 2000) (agreeing with "lower courts' conclusion that the initial stop of [defendant]'s pick-up truck was a legal stop, based upon his violation of the license plate light law"); *State v. Allen*, 138 Wash. App. 463, 470-471, 157 P.3d 893, 898 (Wash. Ct. App. 2007) ("Here, [officer] had a reasonable articulable basis to stop the vehicle for a traffic infraction, the non-working license plate light.").

Defendant devotes a significant portion of his brief to his argument that the traffic stop, ostensibly based on the equipment violation, was a pretext for the officers to search the vehicle as they observed it "circling around" for several hours in a high crime neighborhood. Defendant's pretext argument was rejected by the United States Supreme Court in *Whren v. United States*, 517 U.S. 806, 813, 135 L. Ed. 2d 89, 98 (1996), where the Court held that "the constitutional reasonableness of traffic stops [does not] depend[] on the actual motivations of the individual officers involved." *Accord State v. Barnard*, 362 N.C. 244, 248, 658 S.E.2d 643, 645-46 (2008) ("The constitutionality of a traffic stop depends on the objective facts, not the officer's subjective motivation."). The trial court, therefore, properly denied defendant's motion to suppress.

Affirmed.

Judges CALABRIA and ELMORE concur.

AFRIKA S. ROBERTS, BY AND THROUGH HER GUARDIAN AD LITEM, FRANKIE J. PERRY, PLAINTIFF v. ADVENTURE HOLDINGS, LLC, AND, 3311 CAPITAL BOULEVARD, LLC, D/B/A ADVENTURE LANDING, DEFENDANTS

No. COA10-589

(Filed 21 December 2010)

1. Appeal and Error— interlocutory order—improper venue—denial of motion to dismiss—substantial right

The Court of Appeals addressed the merits of an appeal from an interlocutory order denying a motion to dismiss for improper venue where defendants alleged that the county indicated in the complaint was improper.

2. Venue— residence of guardian ad litem—not alone sufficient

A guardian *ad litem's* residence, standing alone, was not sufficient to establish venue.

3. Venue— motion to dismiss—treated as motion to transfer

A motion to dismiss for improper venue was treated as a motion to transfer venue and, as venue was improper, the trial court should have transferred the case.

Appeal by defendants from order entered 4 February 2009 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 28 October 2010.

Pulley, Watson, King & Lischer, P.A., by Guy W. Crabtree, for plaintiff-appellee.

Ross & Van Sickle, PLLC, by R. Matthew Van Sickle and C. Thomas Ross, for defendants-appellants.

JACKSON, Judge.

Adventure Holdings, LLC, ("Adventure") and 3311 Capital Boulevard, LLC, ("Capital") (collectively "defendants") appeal the trial court's 4 February 2009 order denying their motion to dismiss based upon improper venue. For the reasons stated herein, we affirm in part and remand.

Adventure is a foreign limited liability company with its principal office in Jacksonville, Florida. Capital is a North Carolina limited liability company with its principal office in Raleigh, North Carolina. Defendants own and operate the amusement park known as Adventure Landing, located on Capital Boulevard in Raleigh.

On 10 June 2006, the minor child Afrika Roberts ("Roberts") visited Adventure Landing with her family. During her visit, Roberts, who was nine years old at the time, was injured in a go-kart accident. As a result of the incident, all of the toes on Roberts's left foot were amputated. Roberts and her family reside in Virginia.

On 24 November 2009, Roberts, through her guardian *ad litem* ("GAL") Frankie J. Perry, filed a complaint against defendants, alleging that Roberts's injuries "were a direct and proximate result of the negligent and careless conduct of [d]efendants" and their agents. On 10 December 2009, defendants filed their answer along with motions to dismiss pursuant to Rules 12(b)(3), 12(b)(6), and 12(b)(7) of our Rules of Civil Procedure. On 4 February 2009, the trial court denied defendants' motions to dismiss as to all three Rules. Defendants appeal the trial court's order only with respect to Rule 12(b)(3).

Defendants first contend that the trial court erred in denying their motion to dismiss based upon improper venue. In the alternative, defendants' second argument is that the case *sub judice* should have been transferred to Wake County. We agree with defendants that Durham County is not the proper venue for this action, and we think that transfer of venue, rather than dismissal, is the appropriate remedy.

[1] Initially, we note that defendants' appeal 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 (citing *Johnson v. Roberson*, 171 N.C. 194, 88 S.E. 231 (1916)), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). We previously have held

> that ordinarily an order denying a change of venue is deemed interlocutory and is not subject to immediate appeal. *See Frink v. Batten*, 184 N.C. App. 725, 727, 646 S.E.2d 809, 811 (2007) ("the order denying the motion to change venue is an interlocutory order"). However, because the grant or denial of venue established by statute is deemed a substantial right, it is immediately appealable. *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980) (citations omitted).

Odom v. Clark, 192 N.C. App. 190, 195, 668 S.E.2d 33, 36 (2008). Furthermore, we have explained that "[t]he denial of a motion for change of venue, though interlocutory, affects a substantial right and is immediately appealable where the county designated in the complaint is not proper." *Caldwell v. Smith*, 203 N.C. App. 725, 727, 692 S.E.2d 483, 484 (2010) (citations omitted). Therefore, because defendants have alleged that the county indicated in the complaint is improper, we address the merits of defendants' appeal.

[2] North Carolina General Statutes, section 1-82 provides that an

> action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement, or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the State, then the action may be tried in any county which the plaintiff designates in his summons and complaint, subject to the power of the court to change the place of trial, in the cases provided by statute[.]

N.C. Gen. Stat. § 1-82 (2007).[1] According to North Carolina General Statutes, section 1-83,

> 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.

N.C. Gen. Stat. § 1-83 (2007). "The provision in N.C.G.S. § 1-83 that the court 'may change' the place of trial when the county designated is not the proper one has been interpreted to mean 'must change.' " *Miller v. Miller*, 38 N.C. App. 95, 97, 247 S.E.2d 278, 279 (1978) (citations omitted).

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1. This statute applies in cases, such as the case *sub judice*, that are not covered by the specific provisions listed in North Carolina General Statutes, sections 1-76 through 1-81.1.

North Carolina courts have not addressed the specific issue of whether or not the residence of a GAL is sufficient to confer venue. Roberts cites *Lawson v. Langley* for the proposition that, "[i]n actions brought by fiduciaries, the personal residence of the fiduciary controls" with respect to venue. 211 N.C. 526, 530, 191 S.E. 229, 232 (1937). However, because our courts have not addressed this issue explicitly, defendants point us to a South Carolina case, which distinguished a GAL from other types of guardians and then dismissed the action based upon improper venue. *Blackwell v. Vance Trucking Company*, 139 F.Supp. 103 (1956). We explore the parties' arguments in turn.

In *Lawson*, our Supreme Court addressed whether or not a "plaintiff, guardian of an incompetent, [has] the right to maintain and try the action in the county of his personal residence[.]" 211 N.C. at 528, 191 S.E. at 231. The *Lawson* Court recited several statutes in effect at the time and quoted a civil procedure treatise. It then held that, because the treatise "says the personal residence of the fiduciary controls in actions brought by fiduciaries" and because a statute expressly provided that "[e]very guardian shall take possession, for the use of the ward, of all his estate, and may bring all necessary actions therefor[,]" "[t]he guardian can select the forum, as there is no statute to the contrary." *Id.* at 530, 191 S.E. at 232 (citations omitted).

Roberts argues that so long as a GAL is considered a fiduciary, *Lawson* controls. However, Roberts overlooks the significant differences between a general guardian, such as the plaintiff in *Lawson*, and a GAL, as we have in the instant case. A general guardian is responsible for the entirety of one's person and/or estate and maintains such responsibility beyond the context of the courtroom. A general guardian is one "who has general care and control of the ward's person and estate." Black's Law Dictionary 774 (9th ed. 2009). In contrast, a GAL is "appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party." *Id.* "*Ad litem*" is a Latin phrase that means "[f]or the purposes of the suit[.]" *Id.* at 49.

In one of our juvenile cases, we discussed the limited role of a GAL who had been appointed based upon the parents' suspected diminished capacity. *See In re L.B.*, 187 N.C. App. 326, 653 S.E.2d 240 (2007), *aff'd*, 362 N.C. 507, 666 S.E.2d 751 (2008) (per curiam). We noted that the more expansive role of a general guardian is " 'to *replace* the individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capac-

ity to make such decisions.' " *Id.* at 329, 653 S.E.2d at 242 (quoting N.C. Gen. Stat. § 35A-1201(a)(3) (2005)) (emphasis in original). "In contrast, a GAL's authority is more limited." *Id.* In fact, "the language of the General Assembly is clear that the GAL's role is limited to one of assistance, not one of substitution." *Id.* Even though *In re L.B.* involved a GAL's representation of a parent with suspected diminished capacity, its comments are instructive.

Because North Carolina courts have not addressed this precise issue, defendants cite *Blackwell*, *supra*. In *Blackwell*, a minor had been injured in an automobile accident. 139 F.Supp. at 104-05. The minor resided in New York, the defendant resided in North Carolina, and the accident occurred in South Carolina. *Id.* The minor's GAL instituted the action in South Carolina, where he was a citizen and resident. *Id.* at 105. Because the defendant had filed a motion to dismiss based upon improper venue, the question presented was whether or not venue could be based solely upon the GAL's state of residence. *Id.* In holding that it could not, the *Blackwell* court explained that

> a guardian *ad litem* is something quite different [than a general guardian]. He is appointed for the mere temporary duty of protecting the legal rights of an infant in a particular suit and his duties and his office end with that suit. He is not a party in interest in the suit, no property comes into his hands, and he has no powers nor duties either prior to the institution of the suit or after its termination.

Id. at 106-07. Again, some distinctions exist between *Blackwell* and the case *sub judice*. Nonetheless, the *Blackwell* court's emphasis on the role of a GAL—as opposed to that of a general guardian of one's person and/or estate—and its effect on whether the GAL's residence may be used to establish venue is applicable to the facts before us. Based upon our own precedent, in addition to the persuasive reasoning of *Blackwell*, we now hold that a GAL's county of residence is insufficient, standing alone, to establish venue.

Here, all real parties in interest are located either out-of-state or in Wake County. Roberts resides in Virginia with her parents. Adventure's principal office is in Jacksonville, Florida. Capital's principal office is in Wake County. Adventure Landing—the site of the incident at issue—also is located in Wake County. Nevertheless, Roberts's GAL filed the complaint initiating this action in Durham County. Because the residence of the GAL is the only conceivable

connection to Durham County and because we hold that the GAL's residence, standing alone, is insufficient to establish venue, we conclude that Durham County is an improper venue for the instant action.

[3] Even though Durham County is not the proper venue for Roberts's action, we still must decide whether dismissal or transfer of venue is the appropriate remedy. We have held that "venue is not jurisdictional, but is only ground for removal to the proper county upon a timely objection made in the proper manner." *Miller*, 38 N.C. App. at 97, 247 S.E.2d at 279 (citations omitted). Our Supreme Court has explained that

> [a plaintiff] is not entitled to an abatement of this action, even though it be conceded it was instituted in the wrong county. It has been repeatedly held that our statutes relating to venue are not jurisdictional, and that if an action is instituted in the wrong county it should be removed to the proper county, and not dismissed, if the motion for removal is made in apt time, otherwise the question of venue will be waived. G.S. 1-83; *Davis v. Davis*, 179 N.C. 185, 102 S.E. 270; *Roberts v. Moore*, 185 N.C. 254, 116 S.E. 728; *Bohannon v. Wachovia Bank & Trust Co.*, 210 N.C. 679, 188 S.E. 390; *Shaffer v. Bank*, 201 N.C. 415, 160 S.E. 481; *Calcagno v. Overby*, 217 N.C. 323, 7 S.E. 2d 557; *Wynne v. Conrad*, 220 N.C. 355, 17 S.E. 2d 514.

Wiggins v. Trust Co., 232 N.C. 391, 393-94, 61 S.E.2d 72, 73 (1950).

In a similar case in which a motion to dismiss, rather than a motion to transfer venue, was presented to the trial court, our Supreme Court held that the trial court in that case "correctly treated defendant's motion to dismiss as a motion for a change of venue. . . . In the motion defendant had pointed out that Sampson County was the proper venue." *Coats v. Hospital*, 264 N.C. 332, 334, 141 S.E.2d 490, 492 (1965) (citing *Cloman v. Staton*, 78 N.C. 235, 237 (1878)). In addition, we have held that " '[t]he trial court has no discretion in ordering a change of venue if demand is properly made and it appears that the action has been brought in the wrong county.' " *Baldwin v. Wilkie*, 179 N.C. App. 567, 569, 635 S.E.2d 431, 432 (2006) (quoting *Swift and Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 495, 216 S.E.2d 464, 465 (1975)), *disc. rev. denied*, 361 N.C. 353, 645 S.E.2d 764 (2007).

In the case *sub judice*, defendants' motion to dismiss based upon improper venue reads,

> Plaintiff's Complaint should be dismissed pursuant to N.C.R.Civ.P. 12(b)(3), since the face of the Complaint discloses that this matter is in the improper venue. None of the parties reside in Durham County and, pursuant to N.C.G.S. § 1-82, since [d]efendant 3311 Capital Boulevard, LLC, resides in Wake County, which is also the sites [sic] of the incident giving rise to this action, Wake County is the proper venue for this case.

Even though they did not request a transfer of the case to the proper venue, our precedent requires that the motion be treated as such. Accordingly, we hold that, rather than dismissing Roberts's case, the trial court should have transferred it from Durham County, an improper venue, to Wake County, the proper venue.

We affirm the trial court's denial of defendants' motion to dismiss based upon improper venue. However, because Durham County is not the proper venue for the case *sub judice*, we remand to the trial court for entry of an order transferring the case to Wake County.

Affirmed in part; Remanded.

Judges ELMORE and THIGPEN concur.

TIMOTHY G. McCORKLE, Plaintiff v. NORTH POINT CHRYSLER JEEP, INC., Defendant and Third-Party Plaintiff v. LANDMARK BUILDERS OF THE TRIAD, INC., and C.W. ROBEY PAINT CO., INC., Third-Party Defendants

No. COA10-378

(Filed 21 December 2010)

Negligence— duty of reasonable care—owner of construction site—shifted to contractor—hidden dangers

The trial court did not err in granting summary judgment in favor of defendant in a negligence action. The duty of reasonable care, initially borne by defendant as owner and possessor of the construction site premises, had been shifted away from defendant at the time of plaintiff's accident such that defendant was not required to inspect the construction site for hidden dangers.

Appeal by Plaintiff from order entered 9 February 2010 by Judge Edwin G. Wilson in Guilford County Superior Court. Heard in the Court of Appeals 26 October 2010.

Ward Black Law, by S. Camille Payton, for Plaintiff.

Hill Evans Jordan & Beatty, PLLC, by Benjamin D. Ridings, for Defendant.

STEPHENS, Judge.

Facts

In April 2006, Defendant North Point Chrysler Jeep, Inc., a car dealership in Winston-Salem, North Carolina, entered into a contract with Third-Party Defendant Landmark Builder of the Triad, Inc. ("Landmark"), whereby Landmark would serve as general contractor for construction of a new building on Defendant's property. The new building was to be connected to the dealership's existing service bay, which remained in use during the construction and was separated from the construction area by a temporary wall. Pursuant to the contract terms, Landmark was entirely responsible for the new building's construction, including job site safety and the supervision of any subcontractors needed to carry out the construction project.

In its role as general contractor, Landmark hired Third-Party Defendant C.W. Robey Painting & Decorating Co., Inc. ("Robey")[1] as a painting subcontractor; Plaintiff was employed by Robey as a painter and worked on the dealership construction project.

According to Plaintiff's deposition, in early January 2007, soon after Plaintiff began working on the dealership project, Plaintiff was walking down a stairway in the newly constructed building when a handrail broke; Plaintiff stumbled and twisted his back. The broken handrail that caused Plaintiff's injury was installed by the fabricator who supplied the handrail to Landmark. In discovery, Landmark stated that the railing was temporary and was supported by a temporary brace welded to the handrail.

On 25 February 2009, Plaintiff filed a complaint in Guilford County Superior Court, alleging that Defendant was negligent in failing to keep the construction site "in reasonably safe condition."

1. In the contract between Landmark and Robey, Robey's full name is "C.W. Robey Painting & Decorating Co., Inc." However, in the caption of Judge Wilson's order, as well as in the captions for nearly all other filings in the action, Robey's name is "C.W. Robey Paint Co., Inc."

Defendant filed its answer in May 2009, and, in June 2009, filed a third-party complaint against both Landmark and Robey.

Following discovery, Defendant filed its 13 January 2010 motion for summary judgment on Plaintiff's claim. On 9 February 2010, Judge Wilson granted Defendant's motion and dismissed Plaintiff's claim against Defendant with prejudice. Plaintiff filed his notice of appeal on 18 February 2010.

Discussion

In a negligence action, to survive a motion for summary judgment, plaintiff must establish a *prima facie* case by showing: "(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." *Pike v. D.A. Fiore Constr. Servs., Inc.*, ––– N.C. App. –––, –––, 689 S.E.2d 535, 537 9) (internal quotation marks omitted), *disc. review denied, dismissed as moot*, 363 N.C. 855, 694 S.E.2d 390 (2010). The determinative issue in this appeal is whether Defendant breached a duty owed to Plaintiff.

In his complaint, Plaintiff does not seek to hold Defendant vicariously liable for any breach by Landmark or Robey. Rather, Plaintiff seeks to hold Defendant liable for its own negligence in allegedly breaching its duty of reasonable care, which Plaintiff asserts that Defendant owed to Plaintiff based on Defendant's status as a landowner and Plaintiff's status as a lawful visitor.

It is well settled in North Carolina that an independent contractor and his employees who go upon the premises of an owner, at the owner's request, are lawful visitors and are owed a duty of due care. *Langley v. R.J. Reynolds Tobacco Co.*, 92 N.C. App. 327, 329, 374 S.E.2d 443, 445 (1988) (citing *Spivey v. Wilcox Co.*, 264 N.C. 387, 141 S.E.2d 808 (1965)), *disc. review denied*, 324 N.C. 433, 379 S.E.2d 241 (1989). Further, a subcontractor is considered a lawful visitor, and thus is owed the duty of reasonable care, with respect to both a general contractor and the landowner. *Id.* (noting that "both the general contractor and the owner of the premises owe to the subcontractor and its employees the duty of ordinary care").

The duty of due care includes " 'the obligation to exercise ordinary care to furnish reasonable protection against the consequences of *hidden dangers* known, or which ought to be known, to the pro-

prietor and not to the contractor or his servants.' " *Wellmon v. Hickory Constr. Co.*, 88 N.C. App. 76, 80, 362 S.E.2d 591, 593 (1987) (emphasis in original) (quoting *Deaton v. Bd. of Trustees of Elon College*, 226 N.C. 433, 438, 38 S.E.2d 561, 564-65 (1946)), *disc. review denied*, 322 N.C. 115, 367 S.E.2d 921 (1988). This duty also requires a landowner, as well as a general contractor, to make a reasonable inspection to ascertain the existence of hidden dangers. *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 161, 516 S.E.2d 643, 645-46 (citing *Williams v. Stores Co.*, 209 N.C. 591, 596, 184 S.E. 496, 499 (1936)), *cert. denied*, 351 N.C. 107, 541 S.E.2d 148 (1999).[2]

While Plaintiff argues that Defendant, as a landowner, owed to Plaintiff the duty of reasonable care, which includes the duty to make a reasonable inspection of the construction site, Defendant responds that its duty as landowner did not extend to the *work* undertaken by independent contractors such that Defendant had no duty to inspect the construction site. In support of this argument, Defendant cites *Cook v. Morrison*, 105 N.C. App. 509, 413 S.E.2d 922 (1992), for its holding that "[the] general rules on the tort liability of owners and occupiers of land to [independent contractors] . . . do not apply to the actual work undertaken by independent contractors and their employees." *Id.* at 515, 413 S.E.2d at 926.

In *Cook*, plaintiff-executrix sued defendant-landowner for the wrongful death of plaintiff's husband, an independent contractor with respect to defendant who was killed on defendant's land while working in a trench that collapsed. *Id.* at 512, 413 S.E.2d at 924. Regarding plaintiff's allegation of defendant's negligence based on the theory of breach of duty to an invitee, this Court held that an owner or occupier of land who hires an independent contractor is not required to take reasonable precautions against "dangers which may be incident to the work undertaken by the independent contractor." *Id.* at 515, 413 S.E.2d at 926 (citing 62 Am. Jur. 2d *Premises Liability* § 457 (1990)). Accordingly, whether the duty of reasonable care applies depends on whether or not the danger at issue may be categorized as "incident to the work undertaken" by the independent contractor.[3] *Id.*

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2. We note that these cases were decided prior to *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998), *reh'g denied*, 350 N.C. 108, 533 S.E.2d 467 (1999), and applied the now-defunct tripartite visitor distinction. However, because independent contractors, as invitees/lawful visitors, are afforded the same standard of care post-*Nelson* as they were pre-*Nelson*, *i.e.*, ordinary care, we conclude that the explications of the standard of care from these cases are still relevant.

3. *Cook* holds that this exception will not apply to work undertaken by an independent contractor that is "inherently dangerous." Although the "inherently dangerous"

In determining whether the "incident to the work undertaken" exception should apply in this case, it is helpful to understand the reason and purpose for creating and applying such an exception. This caveat that liability of owners and occupiers of land does not extend to the actual work undertaken by independent contractors and their employees has been recognized and accepted by numerous other jurisdictions, as well as by scholars. *See Jones v. Chevron U.S.A., Inc.*, 718 P.2d 890, 894 (Wyo. 1986) (holding that although generally an independent contractor is an invitee of a premises owner, "[a]n owner is not obligated to protect the employees of an independent contractor from hazards which are incidental to, or part of, the very work the contractor was hired to perform"); *Dawson v. Bunker Hill Plaza Assocs.*, 289 N.J. Super. 309, 317-18, 673 A.2d 847, 851 (App. Div. 1996) (noting that although, "[a]s a general rule, a landowner has a non-delegable duty to use reasonable care to protect invitees against known or reasonably discoverable dangers[,] . . . an owner is not responsible for harm which occurs to an employee as a result of the very work which the employee was hired to perform"); *Smart v. Chrysler Corp.*, 991 S.W.2d 737, 743 (Mo. Ct. App. 1999) (noting the exception to the rule that "[a]n employee of an independent contractor who has permission to use a landowner's premises is [] an invitee" that is created when a landowner "relinquishes possession and control of the premises to an independent contractor during a period of construction"); *see also* 13 Am. Jur. 2d *Building and Construction Contracts* § 136 (2010).

The oft-stated reason for the exception is that if a landowner relinquishes control and possession of property to a contractor, the duty of care, and the concomitant liability for breach of that duty, are also relinquished and should shift to the independent contractor who is exercising control and possession.[4] *Jones*, 718 P.2d at 895 (citing an

analysis may apply to premises liability, *Cook*'s application of this analysis is paraphrased from *Brown v. Texas Co.*, 237 N.C. 738, 741, 76 S.E.2d 45, 46-47 (1953), which is a case dealing with master-servant liability and the independent contractor exception, and not with premises liability. Regardless, painting and construction are not inherently dangerous; thus, the analysis is irrelevant here. *See Woodson v. Rowland*, 329 N.C. 330, 353, 407 S.E.2d 222, 235 (1991) ("[T]his Court has held as a matter of law that certain activities resulting in injury are not inherently dangerous. These activities include . . . building construction. *Vogh v. F.C. Geer Co.*, 171 N.C. 672, 88 S.E. 874.").

4. The reason for the exception has also been stated in terms of assumption of the risk. *See Wolczak v. Nat'l Elec. Prod. Corp.*, 66 N.J. Super. 64, 75-76, 168 A.2d 412, 417 (App. Div. 1961); *but see Jones*, 718 P.2d 890, 895 ("But the assumption-of-risk rationale does not apply very well when a contractor's employee, rather than the contractor, is injured. . . . He [(the contractor's employee)] does not voluntarily assume the risks of the job site.")

owner's "lack of control over the job site" as the reason for the exception); 13 Am. Jur. 2d *Building and Construction Contracts* § 136 ("When a landowner relinquishes the possession and control of the premises to an independent contractor during the period of construction, the independent contractor rather than the landowner, is the possessor of the land and the duty to use reasonable and ordinary care to prevent injury shifts to the independent contractor."). However, the reasoning for the exception, and thus the exception itself, extends only as far as the independent contractor, and not the landowner, is in control of the hazard or danger. *Jones*, 718 P.2d at 894 ("Because the exception is based on the owner's delegation of control to the contractor, it should not apply when the owner maintains control over the hazard that causes the harm."); *Smart*, 991 S.W.2d at 743 (noting that "the duty will not shift to the independent contractor if the landowner controls either the physical activities of the employees of the independent contractor or the details of the manner in which the work is done").

In this case, Defendant contracted with Landmark so that possession and control of the construction site were vested solely with Landmark. Under the terms of the contract, Landmark was to "supervise and direct the [w]ork, using [Landmark's] best skill and attention." Landmark was "solely responsible for and [had] control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the [w]ork under the Contract[.]" Landmark was further charged with responsibility for "inspection of portions of [w]ork already performed to determine that such portions are in proper condition to receive subsequent [w]ork."

With respect to safety, Landmark was responsible "for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the [c]ontract." Further, Landmark was to "take reasonable precautions for safety of, and [] provide reasonable protection to prevent damage, injury or loss to" "employees . . . and other persons who may be affected thereby" and to "the [w]ork and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of [Landmark] or [Landmark's] [s]ubcontractors or [s]ub-subcontractors[.]"

Based on the foregoing, it is clear that, contractually, Landmark was in control of the construction site. Further, the only evidence presented by Plaintiff to indicate that Defendant actually exercised

any control over the construction was in Plaintiff's affidavit, in which Plaintiff stated that, at sometime before the accident, he observed a person, who was reportedly an executive of Defendant, on the stairway on which Plaintiff was injured. However, the mere fact that an employee of Defendant visited or toured the construction site is insufficient to show that Defendant retained any control of the construction site. Accordingly, we conclude that Defendant was not in possession and control of the construction site such that it would be improvident to impose the duty of reasonable care and inspection on Defendant. Were we to impose this duty on Defendant based on nothing more than Defendant's status as passive owner of the premises, regardless of Defendant's possession or control of the property, we would impose upon all landowners—from those who endeavor to have built a swingset, to those who endeavor to have built a skyscraper—the duty to make a reasonable inspection for hidden dangers on a construction site at all stages in the construction process, even where the landowner has contracted with a party possessed of superior knowledge, experience, and skill, as here. For obvious reasons, we decline to impose such a duty.

Accordingly, we hold that the duty of reasonable care, initially borne by Defendant as owner and possessor of the construction site premises, had been shifted away from Defendant at the time of Plaintiff's accident such that Defendant was not required to inspect the construction site for hidden dangers. We thus conclude that Defendant did not owe a duty of reasonable care to Plaintiff and that summary judgment was properly entered for Defendant.

The judgment of the trial court is

AFFIRMED.

Chief Judge MARTIN and Judge STROUD concur.

BARRIS v. TOWN OF LONG BEACH

[208 N.C. App. 718 (2010)]

THEODORE D. BARRIS AND WIFE, CAROL P. BARRIS, PLAINTIFFS v. TOWN OF LONG BEACH, A FORMER NORTH CAROLINA MUNICIPAL CORPORATION AND BODY POLITIC, NOW KNOWN AND REFERRED TO AS, TOWN OF OAK ISLAND, A NORTH CAROLINA MUNICIPAL CORPORATION AND BODY POLITIC, AND SUCCESSOR IN INTEREST TO THE FORMER TOWN OF LONG BEACH; TOWN OF OAK ISLAND, A NORTH CAROLINA MUNICIPAL CORPORATION AND BODY POLITIC; AND THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA09-333

(Filed 21 December 2010)

1. Jurisdiction— subject matter jurisdiction—land use permit—governed by administrative law

The trial court erred by exercising jurisdiction over the town of Oak Island's second application for a Coastal Area Management Act permit to develop land upon which plaintiffs had a non-exclusive easement. The application should have first been reviewed by the Department of Natural Resources.

2. Pleadings— sanctions—other papers

The trial court erred in sanctioning the town of Oak Island in connection with the town's submission of a second site plan for the development of land upon which plaintiffs had a non-exclusive easement. The site plan did not constitute "other papers" pursuant to N.C.G.S. § 1A-1, Rule 11(a).

Appeal by defendants from an order entered 23 October 2008 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 30 September 2009.

Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., for plaintiffs-appellees.

Crossley McIntosh Collier Hanley & Edes, PLLC, by Brian E. Edes and Justin K. Humphries, for defendants-appellants.

JACKSON, Judge.

The town of Oak Island, North Carolina ("Town") appeals the 23 October 2008 order enjoining it from developing the end of a public street, imposing a monetary sanction, and awarding attorney's fees. For the reasons stated herein, we reverse and remand.

Theodore D. Barris and Carol P. Barris ("appellees") are residents of Oak Island, North Carolina, and owners of a non-exclusive ease-

ment for purposes of ingress, egress, and regress. Appellees' property is located adjacent to and abuts the western boundary of West Yacht Drive and the northern right of way line of Oak Island Drive, the dead end of which the Town has attempted to regulate and develop.

As a result of the Town's attempts to improve this area, on 28 May 2002, appellees asserted multiple causes of action against the Town, including declaratory and injunctive relief and damages to appellees' easement rights. Appellees filed an amended complaint on or about 21 April 2003. On or about 13 August 2003, the Town answered appellees' amended complaint, denying many of appellees' allegations and asserting numerous defenses.

On 12 November 2003, following a hearing on the parties' competing motions for summary judgment, Judge Gregory A. Weeks awarded partial summary judgment in favor of appellees. This order ("first order") affirmed appellees' easement rights and ordered the Town to remove the park-like area at the street's end.

On or about 12 December 2003, the Town gave a notice of appeal of the first order. However, on or about 18 November 2004, Judge Ola M. Lewis entered an order holding, *inter alia*, that the Town's appeal be dismissed with prejudice. The Town then removed the park as was required by the first order.

On or about 28 February 2005, the Town filed an application with the North Carolina Department of Natural Resources ("DENR") for a Coastal Area Management Act ("CAMA") permit to build certain structures within appellees' easement. The Town's CAMA application included the Town's proposed site plan of development ("first site plan") to be constructed within areas of appellees' easement.

On 14 March 2005, appellees filed an objection to the permit application in opposition to the Town's first site plan, arguing, *inter alia*, that the plan was precluded by previous court orders as well as that it violated appellees' easement rights. On or about 6 April 2005, DENR denied the Town's application for a CAMA permit for its first site plan. The Town then filed a motion to modify Judge Weeks's order and appeal the DENR decision. On 21 September 2005, Judge Weeks denied the Town's motion.

During the 7 November 2005 civil superior court session for Brunswick County, the parties conducted a jury trial on the question, "What amount is the plaintiff entitled to recover for the wrongful obstruction and interference with the plaintiff's right of access onto

West Oak Island Drive?" On 10 November 2005, the jury returned a verdict of $36,501.00.

Following post-trial motions filed by both parties, on 5 December 2005, Judge John W. Smith entered the following rulings: (1) judgment against the Town in the amount of $36,501.00 together with interest thereon from 1 October 1996 until fully paid; (2) order denying the Town's motions pursuant to Rule 50; and (3) order for taxing of costs and attorney's fees against the Town.

On 30 December 2005, the Town filed a notice of appeal with this Court. On 26 June 2006, it filed a petition for writ of *certiorari*. On 23 January 2006, the Town's petition was dismissed without prejudice to re-file after the record on appeal was filed. Then, on 31 July 2006, Judge Lewis dismissed the Town's appeal with prejudice. This order awarded appellees attorney's fees and costs and expenses and imposed sanctions against the Town pursuant to, *inter alia*, North Carolina General Statutes, section 1A-1, Rule 11. The Town filed a third appeal with the Court of Appeals on 29 August 2006 but subsequently filed a voluntary dismissal with prejudice on 6 February 2007.

On or about 15 August 2008, the Town again applied for a CAMA permit to construct a proposed site plan of development ("second site plan"). On 8 September 2008, appellees filed their objection to the permit application in opposition to the Town's second site plan, contending that the plan was a replica of the Town's first site plan, and thus, was in violation of the previous seven orders and appellees' easement rights. On 16 September 2008, appellees filed a motion to enforce prior orders of the court and a motion for sanctions, attorney's fees, costs, and/or expenses to further oppose the Town's second site plan.

On 23 October 2008, Judge Lewis granted appellees' motion. This order rejected the Town's second site plan, enjoined the Town from pursuing the second site plan, imposed a monetary sanction on the Town in the amount of $2,000.00, and awarded appellees their attorney's fees and costs and expenses totaling $10,468.58. According to this order, "[d]efendant Town's position . . . is barred by the principles of *res judicata*, collateral estoppel, judicial estoppel, and/or the law of the case doctrine[.]" From this ruling, the Town appeals.

First, we note that the Town possesses certain authority with respect to regulation of the public streets. According to North Carolina General Statutes, section 160A-174(a), "A city may by ordi-

nance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens . . . ." N.C. Gen. Stat. § 160A-174(a) (2007). Furthermore, North Carolina General Statutes, section 160A-296(a) provides that "[a] city shall have general authority and control over all public streets[.]" N.C. Gen. Stat. § 160A-296(a) (2007). Finally, North Carolina General Statutes, section 160A-300 provides that "[a] city may by ordinance prohibit, regulate, divert, control, and limit pedestrian or vehicular traffic upon the public streets, sidewalks, alleys, and bridges of the city." N.C. Gen. Stat. § 160A-300 (2007).

Further, appellees' easement is non-exclusive. Although the Town cannot develop the street end as a park, it still retains its statutory authority to regulate the public right of way.

[1] The Town's second argument, which we address first, is that the trial court erred by exercising jurisdiction over a permit issue properly governed by administrative law. We agree.

North Carolina General Statutes, section 113A-123(a), which specifically addresses how a party may challenge the issuance of a CAMA permit, provides:

> Any person directly affected by any final decision or order of the Commission under this Part may appeal such decision or order to the superior court of the county where the land or any part thereof is located, pursuant to the provisions of Chapter 150B of the General Statutes. Pending final disposition of any appeal, no action shall be taken which would be unlawful in the absence of a permit issued under this Part.

N.C. Gen. Stat. § 113A-123(a) (2007). "It is well-established that 'where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts.' " *Justice for Animals, Inc. v. Robeson Cty.*, 164 N.C. App. 366, 369, 595 S.E.2d 773, 775 (2004) (quoting *Presnell v. Pell*, 298 N.C. 715, cting a statute that provides that a certain commission or agency should review the issue, the legislature expresses the opinion that such group, due to its specialized knowledge and authority, should examine the situation first. *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979). Only after such an agency has reviewed the factual background and formulated a decision should the courts then be permitted to review the process and conflict between the parties. *Id.* at 721-22, 260 S.E.2d at 615.

We agree that the trial court erred in applying *res judicata*, collateral estoppel, judicial estoppel, and law of the case doctrine, because it does not possess the expertise in determining whether or not the issues presented by the Town's second site plan were identical to those the trial court previously had examined. The statute specifically demonstrates a preference for administrative agencies that possess specific knowledge in their fields of expertise addressing these types of issues initially. Therefore, the trial court committed error in exercising authority over an issue that should have been examined first by DENR. Thus, appellees did not follow the proper protocol in challenging the Town's CAMA permit application and as a result, failed to exhaust their administrative remedies. Only after appellees comply with the statute's required steps and DENR conducts an investigation may this Court review the matter. Therefore, we hold that the trial court erred by reviewing the issue of the second site plan prior to the completion of the DENR administrative process.

[2] The Town also argues that the trial court erred in requiring sanctions from the Town. We agree.

The trial court's decision to award sanctions pursuant to North Carolina General Statutes, section 1A-1, Rule 11(a) is an issue for *de novo* review. *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). When conducting *de novo* review, the 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." *Id.* Statutes that award attorney's fees to the prevailing party are in derogation of the common law and as a result, must be strictly construed. *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 257, 400 S.E.2d 435, 437 (1991) (citations omitted). "[W]hen deciding whether to grant a motion under N.C.G.S. § 6-21.5[,] the trial court may consider evidence developed after the pleadings have been filed." *Id.* at 258, 400 S.E.2d at 438 (citations omitted) (emphasis removed). Furthermore, the trial court must "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." *Id.*

North Carolina General Statutes, section 1A-1, Rule 11(a) provides that it applies to "[e]very pleading, motion, and other paper of a party [.]" N.C. Gen. Stat. § 1A-1, Rule 11(a) (2007). It further provides that

> [t]he signature of an attorney or party constitutes a certificate by him that . . . [the pleading] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Id.

The Town's second site plan does not constitute "other papers" pursuant to this statute. Moreover, because the Town's second site plan may or may not be materially different than its first site plan, depending on DENR's expert determination, this case arguably still contained a justiciable issue. Therefore, the trial court erred in sanctioning the Town, and we remand to the trial court for action consistent with this decision.

Accordingly, we hold that this controversy first should be reviewed by DENR. Because we hold that the trial court erred by failing to require appellees to exhaust their administrative remedies, we do not address the Town's remaining arguments.

Reversed and remanded.

Judges McGEE and STEELMAN concur.

STATE OF NORTH CAROLINA v. BRYAN CROWDER, DEFENDANT

No. COA09-1364

(Filed 21 December 2010)

Probation and Parole— insufficient evidence of violation—no written notice of conditions—revocation erroneous

The trial court erred by revoking defendant's probation where the State presented no evidence that defendant "resided" in a household with a minor child and defendant was never provided written notice of the two remaining conditions of his probation which were listed on the probation violation report.

Appeal by defendant from judgment and order entered 13 July 2009 by Judge C. Philip Ginn in Avery County Superior Court. Heard in the Court of Appeals 19 August 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Ted R. Williams, for the State.

Don Willey for defendant-appellant.

GEER, Judge.

Defendant Bryan Crowder appeals from the trial court's revocation of his probation. Defendant was accused of violating a special condition of probation included in the written judgments, namely that he "[n]ot reside in a household with any minor child," along with two conditions not contained in the written judgments. Because defendant was never provided written notice of the latter two conditions, and the State presented no evidence as to the former, we hold that the trial court erred in concluding that defendant violated his probation.

Facts

On 10 March 2008, defendant pled guilty to three counts of indecent liberties with a minor. On 26 March 2008, the trial court sentenced him to an active sentence on one count. On the remaining two counts, the trial court imposed two consecutive presumptive-range sentences of 19 to 23 months imprisonment, suspended those sentences, and placed defendant on supervised probation for 36 months. Because defendant's offenses involved the sexual abuse of a minor, the special conditions of his probation included a condition that he was "[n]ot to reside in a household with any minor child." The conditions of probation recorded in the two written judgments do not otherwise prohibit defendant from having contact with minors other than the victim of the offenses.

On 19 May 2009, defendant's probation officer, Brandi Renfro, issued two probation violation reports against defendant, each alleging the same violation of his probationary sentence. The report stated that defendant willfully violated:

1. Sex Offender Special Condition Number

   THE PROBATIONER IS ORDERED TO NOT RESIDE IN A HOUSEHOLD WITH A MINOR CHILD. HE IS ALSO ORDERED TO "NOT SOCAILIZE [sic] OR COMMUNICATE WITH INDIVIDUALS UNDER THE AGE OF 18 IN WORK OR SOCIAL

> ACTIVITIES UNLESS ACCOMPANIED BY A RESPONSIBLE ADULT WHO IS AWARE OF THE ABUSIVE PATTERNS AND IS APPROVED IN WRITING BY THE SUPERVISING OFFICER", AS WELL AS "NOT BE ALONE WITH ANY MINOR CHILD BELOW THE AGE OF 18 YEARS OF AGE [sic] UNLESS APPROVED BY HIS SUPERVISING OFFICER IN WRITING." ON 05/19/2009 THE PROBATIONER WAS FOUND TO HAVE A MINOR CHILD AT HIS RESIDENCE WITHOUT THE PERMISSION OF THE OFFICER OR THE COURT.

The trial court conducted a probation violation hearing on 9 July 2009. The State's evidence showed that on 19 May 2009, a probation officer arrived at defendant's home to conduct a curfew check and saw a juvenile leaving defendant's camper. The juvenile was the daughter of defendant's fiancée and was not the victim of defendant's prior offenses. The probation officer testified:

> The situation that happened on the 19th day of May when the surveillance officer went to the residence, he pulled up at the residence. The young child came out of the camper and the Defendant was also located inside the camper. It is in fact Your Honor a camper. We are not talking about some 2500 square foot home, it is a mobile camper. They were inside the residence, and they were inside that residence together. The Defendant cannot have that child there in his residence. It is a condition of his probation in black and white.

She added: "He knows he can't have that child in that residence and that is exactly where [the child] was." Defendant, however, introduced into evidence a letter from his fiancée's mother in which she stated that the child resided in the maternal grandmother's home.

The trial court asked the probation officer if defendant's "probationary judgment [was] altered in some way by the probation office other than what Judge Baker said to where he would be permitted to have somebody there if you all approved it?" The probation officer testified that the written judgments imposing probation had not been altered. According to the probation officer, other than the alleged violation, defendant substantially complied with the conditions of his probation, including attending sex offender treatment.

Defendant contended that he was never alone unsupervised with the child and argued that the child did not "reside" there, as prohibited by his probation. The trial court responded, "That is usually a

fairly narrow constriction [sic] of that requirement [counsel]. He is not supposed to have any children anywhere around him."

The trial court found that defendant had willfully violated the conditions of his probation as alleged in the violation report. The trial court then revoked defendant's probation and activated one term of 19 to 23 months imprisonment in case 07 CRS 745, but modified defendant's other term of probation in case 07 CRS 50590 to begin after he is released from prison. Defendant timely appealed to this Court.

Discussion

On appeal, defendant argues that the trial court abused its discretion in revoking his probation because the State failed to present evidence that he violated a valid condition of his probation. Probation "is an act of grace by the State to one convicted of a crime. [Thus], a proceeding to revoke probation is not bound by strict rules of evidence and an alleged violation of a probationary condition need not be proven beyond a reasonable doubt." *State v. Hill*, 132 N.C. App. 209, 211, 510 S.E.2d 413, 414 (1999) (internal citation and internal quotation marks omitted). "All that is required is that the evidence be sufficient to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation." *State v. White*, 129 N.C. App. 52, 58, 496 S.E.2d 842, 846 (1998), *disc. review improvidently allowed in part and aff'd in part per curiam*, 350 N.C. 302, 512 S.E.2d 424 (1999). "Any violation of a valid condition of probation is sufficient to revoke defendant's probation." *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987). A finding of a violation of probation, "if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion." *State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008).

The violation reports in this case alleged that defendant violated three conditions of his probation: (1) "not reside in a household with a minor child"; (2) not socialize or communicate with minors unless accompanied by an adult who has been approved by a probation officer in writing; and (3) not be alone with a minor unless a probation officer gives approval in writing. The first condition, included in defendant's written judgments, is required by statute as a mandatory special condition of probation for sex offenders. *See* N.C. Gen. Stat. § 15A-1343(b2)(4) (2009).

Under N.C. Gen. Stat. § 15A-1343(b2)(4), a sex offender, while on probation, may "[n]ot reside in a household with any minor child if the offense [of which he was convicted] is one in which there is evidence of sexual abuse of a minor." In announcing its decision to revoke defendant's probation, the trial court, in this case, explained its view that "reside," as used in the statute, means that defendant "is not supposed to have any children anywhere around him." Based on the probation officer's testimony at trial, she appeared to share the same interpretation of "reside."

This interpretation of "reside" as used in N.C. Gen. Stat. § 15A-1343(b2)(4) is contrary to *State v. Strickland*, 169 N.C. App. 193, 609 S.E.2d 253 (2005). In *Strickland*, the defendant challenged the constitutionality of N.C. Gen. Stat. § 15A-1343(b2)(4), arguing that the statute was constitutionally overbroad and that it violated his constitutional right to the care and custody of his child without due process. 169 N.C. App. at 195, 609 S.E.2d at 254. This Court upheld the constitutionality of the statute based on the fact that the defendant "was not prohibited by the contested condition from seeing his child. The contested condition of probation did not prevent defendant from visiting his child in the home where his wife and child were residing. The condition simply prevented him from also residing in that home for the probationary period." *Id.* at 196-97, 609 S.E.2d at 255.

Thus, in *Strickland* this Court construed the word "reside" much more narrowly than the trial court did in this case in order to ensure the constitutionality of the probation condition. *Strickland* establishes that the condition is not violated simply when a defendant sees or visits with a child. Contrary to the trial court's determination, the condition did not prevent defendant from having a child "anywhere around him."

Here, we need not specifically decide how long a child must be in a residence with a defendant to constitute "residing" within the meaning of N.C. Gen. Stat. § 15A-1343(b2)(4). The State did not present any evidence and did not argue at the trial level that defendant was doing anything more than visiting with his fiancée's child, which *Strickland* holds is not sufficient to establish a violation of N.C. Gen. Stat. § 15A-1343(b2)(4). The only evidence in the record regarding the child's residence, while not dispositive, is the letter from the child's maternal grandmother stating that the child lived with her. Although the State argues on appeal that the evidence implies "that since the minor in question was the child of the defendant's fiancé [sic], the

minor's presence was not merely sporadic," the record contains no evidence that the child did more than visit defendant on one occasion. Accordingly, the record does not contain evidence supporting a finding that defendant violated the special condition of probation set out in N.C. Gen. Stat. § 15A-1343(b2)(4).

With respect to the two remaining conditions listed in the probation violation report, although they are set out in quotation marks in the report, neither the record on appeal nor the transcript indicates the source—or any support—for those conditions, which were not included in defendant's written judgments. In addition, at the probation hearing, the probation officer testified that the conditions of probation set forth in the written judgment had not been modified. At most, it appears that defendant's probation officer may have orally spoken with defendant about being around his fiancée's children. The State does not argue otherwise.

It is well established that "[a] defendant released on supervised probation must be given a written statement explicitly setting forth the conditions on which he is being released. If any modification of the terms of that probation is subsequently made, he must be given a written statement setting forth the modifications." N.C. Gen. Stat. § 15A-1343(c). "Oral notice to defendant of his conditions of probation is not a satisfactory substitute for the written statement required by statute." *State v. Lambert*, 146 N.C. App. 360, 369, 553 S.E.2d 71, 78 (2001) (finding invalid and vacating special condition of probation that was imposed orally at trial but not provided to defendant in a written statement), *appeal dismissed and disc. review denied*, 355 N.C. 289, 561 S.E.2d 271 (2002).

As there is no evidence, in this case, that defendant was provided with written notice of the second and third conditions listed in his violation report, those conditions were not valid conditions of defendant's probation. Consequently, defendant's probation could not be revoked for socializing or communicating with a minor or being alone with a minor, as set out in the probation violation report.

In sum, N.C. Gen. Stat. § 15A-1343(b2)(4) was the only valid condition of probation that the State contended defendant violated. Since no evidence was presented that tended to show that defendant violated this condition, the trial court erred in concluding that defendant violated a valid condition of his probation. We, therefore, vacate the judgment revoking defendant's probation in case 07 CRS 745 and the order modifying defendant's probation in case 07 CRS 50590.

Vacated.

Judges JACKSON and BEASLEY concur.

STATE OF NORTH CAROLINA v. KENDRICK WILKINS, DEFENDANT

No. COA10-634

(Filed 21 December 2010)

Drugs— marijuana—intent to sell or deliver—evidence not sufficient—simple possession as lesser-included offense

A conviction and sentence for felonious possession of marijuana with intent to sell or deliver were vacated and the case remanded for entry of judgment for simple possession where defendant was found with 1.89 grams of marijuana in three small plastic bags and $1,264 in cash. The amount of marijuana alone was not sufficient for intent to sell or deliver; the packaging was just as likely to indicate a consumer as a dealer; and the presence of cash alone was not sufficient to raise the inference of dealing. The charge of simple possession is a lesser-included offense of possession with intent to sell or distribute.

Appeal by defendant from judgment entered 13 January 2010 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 3 November 2010.

Attorney General Roy Cooper, by Assistant Attorney General Charles G. Whitehead, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.

HUNTER, Robert C., Judge.

Kendrick Wilkins ("defendant") appeals from a judgment entered after a jury found him guilty of felonious possession of marijuana with intent to sell or deliver ("PWISD"). Defendant argues that the trial court erred in denying his motion to dismiss the charge. After careful review, we vacate defendant's sentence and remand for resentencing upon a conviction of possession of a controlled substance.

Background

The evidence at trial tended to establish the following facts: On 17 January 2008, defendant was driving a brown Ford Crown Victoria along Raleigh Road in Rocky Mount, North Carolina. Defendant was driving to his mother's house after purchasing cigars at a convenience store. Defendant passed by Rocky Mount Police Officer T.J. Bunt ("Officer Bunt"), who recognized the Crown Victoria as the car typically driven by Rico Battle ("Battle"). Officer Bunt knew that there were several outstanding warrants for Battle so he activated his blue lights and pulled over the Crown Victoria. When Officer Bunt approached the car, he noticed that defendant was the only occupant of the car and that he was wearing a hat and sunglasses. Officer Bunt testified that when he knocked on the driver's side window, defendant "kind of turned . . . away" and "refused to open" the window or the car door. Officer Bunt then opened the driver's side door, and, upon being asked his name, defendant identified himself as Kendrick Wilkins. Officer Bunt knew that there were outstanding warrants for defendant, and after confirming the existence of the warrants, Officer Bunt arrested defendant.

Upon searching defendant subsequent to the arrest, Officer Bunt discovered a small plastic bag inside of defendant's pocket, which contained three smaller bags. Each of the three bags were "tied off" at the top and contained a substance Officer Bunt believed to be marijuana. The substance was later weighed and determined to be 1.89 grams of marijuana. Defendant testified that he purchased the marijuana for personal use and that typically marijuana can be bought in "nickel" or "dime" bags for $5.00 to $10.00 each.

During the pat down, Officer Bunt also found $1,264.00 in cash separated into 60 $20.00 bills, one $10.00 bill, nine $5.00 bills, and nine $1.00 bills. At trial, defendant testified that approximately $1,000.00 of the cash recovered was for a cash bond that his mother gave to him and the remaining $264.00 was from a check he had cashed. Defendant testified that he was carrying cash because he was "on the run" and if he were arrested the bail bondsman would not accept a check. Defendant was charged with PWISD.

At trial, the jury was instructed on PWISD and misdemeanor possession of marijuana. The jury found defendant guilty of PWISD. Defendant was determined to be a record level III for sentencing purposes and the trial court sentenced defendant to a suspended

sentence of 6 to 8 months imprisonment. Defendant was placed on 36 months of supervised probation. Defendant timely appealed to this Court.

Discussion

Defendant's sole argument on appeal is that the trial court erred in denying his motion to dismiss the PWISD charge. We agree.

It is well established that a trial court properly denies a defendant's motion to dismiss if it finds that the State presented substantial evidence of each essential element of the offense charged and that the defendant was the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255 (2002)."Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). "[E]vidence is deemed less than substantial if it raises no more than mere suspicion or conjecture as to the defendant's guilt." *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139-40 (2002). "If the trial court determines that a *reasonable* inference of the defendant's guilt *may* be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence." *State v. Tisdale*, 153 N.C. App. 294, 297, 569 S.E.2d 680, 682 (2002).

Defendant was charged with PWISD pursuant to N.C. Gen. Stat. § 90-95(a)(1) (2009). "While intent [to sell or deliver] may be shown by direct evidence, it is often proven by circumstantial evidence from which it may be inferred." *State v. Nettles*, 170 N.C. App. 100, 105, 612 S.E.2d 172, 175-76, *disc. review denied*, 359 N.C. 640, 617 S.E.2d 286 (2005). "[T]he intent to sell or [deliver] may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia." *Id.* at 106, 612 S.E.2d at 176. "Although 'quantity of the controlled substance alone may suffice to support the inference of an intent to transfer, sell, or deliver,' it must be a substantial amount." *Id.* at 105, 612 S.E.2d at 176 (quoting *State v. Morgan*, 329 N.C. 654, 659-60, 406 S.E.2d 833, 835-36 (1991)).

In the present case, only 1.89 grams of marijuana was found on defendant's person, which alone is insufficient to prove that defendant had the intent to sell or deliver. *See State v. Wiggins*, 33 N.C. App. 291, 294-95, 235 S.E.2d 265, 268 (holding that the finding of less than a half pound of marijuana alone was not sufficient to withstand a motion to dismiss), *cert. denied*, 293 N.C. 592, 241 S.E.2d 513 (1977).

Accordingly, we must examine the other evidence presented in the light most favorable to the State.

The State points to the fact that the marijuana seized from defendant was separated into three smaller packages. Officer Bunt testified that marijuana is typically sold "in bags in different sizes." Based on his training and experience, Officer Bunt believed that each bag of marijuana found in defendant's pocket would sell for between $5.00 and $10.00 each. "The method of packaging a controlled substance, as well as the amount of the substance, may constitute evidence from which a jury can infer an intent to distribute." *State v. Williams*, 71 N.C. App. 136, 139, 321 S.E.2d 561, 564 (1984) (holding that the trial court did not err in denying defendant's motion to dismiss where "[t]he evidence at trial showed that the [27.6 grams of] marijuana . . . was packaged in seventeen separate, small brown envelopes known in street terminology as 'nickel or dime bags' "); *see also In re I.R.T.*, 184 N.C. App. 579, 589, 647 S.E.2d 129, 137 (2007) ("Cases in which packaging has been a factor have tended to involve drugs divided into smaller quantities and packaged separately."); *State v. McNeil*, 165 N.C. App. 777, 783, 600 S.E.2d 31, 35 (2004) (finding an intent to sell or deliver where defendant possessed 5.5 grams of cocaine separated into 22 individually wrapped pieces), *aff'd*, 359 N.C. 800, 617 S.E.2d 271 (2005); *State v. Carr*, 122 N.C. App. 369, 373, 470 S.E.2d 70, 73 (1996) (holding that there was sufficient evidence of intent to sell or deliver where the defendant was in possession of one large cocaine rock and eight smaller rocks). The State has not pointed to a case, nor have we found one, where the division of such a small amount of a controlled substance constituted sufficient evidence to survive a motion to dismiss. Moreover, the 1.89 grams was divided into only three separate bags. While small bags may typically be used to package marijuana, it is just as likely that defendant was a consumer who purchased the drugs in that particular packaging from a dealer. Consequently, we hold that the separation of 1.89 grams of marijuana into three small packages, worth a total of approximately $30.00, does not raise an inference that defendant intended to sell or deliver the marijuana.

In addition to the packaging, we must also consider the fact that defendant was carrying $1,264.00 in cash. *Nettles*, 170 N.C. App. at 105, 612 S.E.2d at 175-76. "However, unexplained cash is only one factor that can help support the intent element." *I.R.T.*, 184 N.C. App. at 589, 647 S.E.2d at 137. Upon viewing the evidence of the packaging and the cash "cumulatively," we hold that the evidence is insufficient

to support the felony charge. *Id.* Had defendant possessed more than 1.89 grams of marijuana, or had there been additional circumstances to consider, we may have reached a different conclusion; however, given the fact that neither the amount of marijuana nor the packaging raises an inference that defendant intended to sell the drugs, the presence of the cash as the only additional factor is insufficient to raise the inference. *See id.* ("[T]he presence of cash, alone, is insufficient to infer an intent to sell or distribute.").

The present case is similar to *Nettles* where this Court held that possession of a small amount of crack cocaine along with $411.00 and a safety pen, which is typically used to clean a crack pipe, was insufficient to support a charge of possession with intent to sell or deliver. 170 N.C. App. at 107, 612 S.E.2d at 176-77. This Court held that "[v]iewed in the light most favorable to the State, the evidence tends to indicate defendant was a drug user, not a drug seller." *Id.* We believe the totality of the circumstances in this case compels the same conclusion. Defendant possessed a very small amount of marijuana that was packaged in three small bags and he had $1,264.00 in cash on his person. The evidence in this case, viewed in the light most favorable to the State, indicates that defendant was a drug user, not a drug seller.

"The charge of simple possession, however, is a lesser included offense of possession with intent to sell or distribute." *I.R.T.*, 184 N.C. App. at 589, 647 S.E.2d at 137. " 'When [the trier of fact] finds the facts necessary to constitute one offense, it also inescapably finds the facts necessary to constitute all lesser-included offenses of that offense.' " *State v. Turner*, 168 N.C. App. 152, 159, 607 S.E.2d 19, 24 (2005) (quoting *State v. Squires*, 357 N.C. 529, 536, 591 S.E.2d 837, 842 (2003), *cert. denied*, 124 S. Ct. 2818, 159 L. Ed. 2d 252 (2004)). Consequently, when the jury found defendant guilty of possession with intent to sell or deliver, it necessarily found him guilty of simple possession of a controlled substance. *Id.* Consequently, we vacate defendant's sentence and remand for entry of a judgment "as upon a verdict of guilty of simple possession of marijuana." *State v. Gooch*, 307 N.C. 253, 258, 297 S.E.2d 599, 602 (1982).

Vacated and Remanded.

Judges ELMORE and JACKSON concur.

STATE OF NORTH CAROLINA v. CHRIS ALAN JONES

No. COA10-475

(Filed 21 December 2010)

1. Constitutional Law— right to confrontation—chemical analysis report—non-testifying analyst—lay opinion testimony—erroneously admitted

The trial court committed plain error in a possession of cocaine with intent to sell or deliver case by admitting into evidence a chemical analysis report prepared by an analyst who did not testify at trial and a police officer's testimony about the report. The trial court also committed plain error by admitting into evidence the police officer's testimony that the substance he found in defendant's jacket was cocaine.

2. Drugs— possession of cocaine with intent to sell or deliver—erroneously admitted report—sufficient evidence

The trial court did not err in denying defendant's motion to dismiss the charge of possession of cocaine with intent to sell or deliver. The trial court must consider all evidence actually admitted when ruling on a motion to dismiss, even though the chemical analysis report which provided chemical evidence that the substance found in defendant's jacket was cocaine was erroneously admitted.

Appeal by defendant from judgments entered 7 January 2010 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 October 2010.

Roy Cooper, Attorney General, by Joseph E. Elder, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Charlesena Elliott Walker, Assistant Appellate Defender, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was indicted upon charges of possession of cocaine with intent to sell or deliver, assault on a government official, and having attained habitual felon status. Defendant pled not guilty.

The evidence at trial tended to show that on 28 May 2008, Officer Greg Tucker of the Charlotte-Mecklenburg County Police Department

(CMPD) was attempting to serve a warrant on defendant. When Officer Tucker approached, defendant ran away. Officer Tucker chased defendant and a scuffle between the two ensued. Defendant threw punches with his left hand, keeping his right hand in his jacket pocket. During the scuffle, defendant's jacket came off. Once defendant was subdued and handcuffed, he was taken to the police vehicle. After defendant was secured in the vehicle, Officer Tucker retrieved defendant's jacket and found a substance which he identified as cocaine in the right jacket pocket.

At trial, Officer Tucker testified, without objection, that he was able to identify the substance. He detailed for the jury that he had four years of experience and training in identifying illegal substances while working at CMPD. Officer Tucker also testified, without objection, that the 22 rocks of cocaine were packaged individually, which, in his experience, was typical for drugs meant for individual sale.

The trial court also admitted, without objection, a chemical analysis report written by CMPD crime lab technician Anne Charlesworth. Ms. Charlesworth's report detailed the chemical analysis she did on the substance and her conclusion that the substance was cocaine. She did not testify at trial.

Defendant did not offer any evidence. The jury found him guilty of possession of cocaine with intent to sell or deliver and assault upon a government official. In a subsequent separate proceeding, the jury also found that defendant had attained the status of an habitual felon. Defendant was sentenced to 130 to 165 months' imprisonment. He appeals.

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[1] On appeal, defendant contends the trial court committed plain error when it admitted Charlesworth's report into evidence and allowed Officer Tucker to testify as to the results of Charlesworth's chemical analysis, and permitted Officer Tucker to testify that the substance he found in defendant's jacket was cocaine. We agree and conclude defendant is entitled to a new trial.

Defendant challenges the admission of the chemical analysis report that was prepared by Anne Charlesworth and testified about by Officer Tucker at trial on the basis that his Sixth Amendment Confrontation Clause rights were violated. The report summarized testing done by Ms. Charlesworth and concluded that the substance found in defendant's jacket was cocaine. Ms. Charlesworth did not testify at trial.

Defendant did not object to Officer Tucker's testimony or the admission of Ms. Charlesworth's report; therefore, our review is limited to a determination of whether the admission of this evidence amounted to "plain error." "Plain error" has been defined as including error so grave as to deny a fundamental right of the defendant so that, absent the error, the jury would have reached a different result. *State v. Robinson*, 330 N.C. 1, 22, 409 S.E.2d 288, 300 (1991).

The Confrontation Clause prohibits testimonial statements from an unavailable witness being presented at trial without the defendant having an opportunity to cross-examine the witness prior to trial. *Crawford v. Washington*, 541 U.S. 36, 50-52, 158 L. Ed. 2d 177, 187 (2004). It is clear that Ms. Charlesworth's report was testimonial in nature. *See Melendez-Diaz v. Massachusetts*, ––– U.S. –––, –––, 174 L. Ed. 2d 314, 321-22 (2009) (holding that reports of chemical analyses were testimonial in nature, and subject to the Confrontation Clause requirements). There was no evidence that defendant had an opportunity to cross-examine Ms. Charlesworth. Therefore, admitting the report and permitting Officer Tucker to testify to its contents violated defend-ant's Confrontation Clause rights.

"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." N.C. Gen. Stat. § 15A-1443(b) (2009).

Defendant was charged with possession of cocaine with intent to sell or deliver. This charge requires that the State prove beyond a reasonable doubt that the substance found in defendant's jacket was in fact cocaine. *See* N.C. Gen. Stat. § 90-95(a)(1) (2009). The only other evidence presented at trial identifying the substance as cocaine was the testimony of Officer Tucker. At trial, Officer Tucker testified that he checked the pocket of defendant's jacket and found "twenty two individual rocks of crack cocaine."

Visual identification, even by a trained police officer such as Officer Tucker with four years of experience, is not enough to identify beyond a reasonable doubt a substance chemically defined by our legislature. *State v. Ward*, 364 N.C. 133, 142-43, 694 S.E.2d 738, 743-44 (2010); *State v. Williams*, 10-58-1 (N.C. App. Dec. 7, 2010) (holding that lay witness testimony, regardless of credentials and experience, is insufficient to prove the identity of a controlled substance); *State v. Nabors*, ––– N.C. App. –––, –––, 700 S.E.2d 153, 158 (2010) (holding

that lay opinion based on physical appearance is not enough to identify crack-cocaine); *State v. Meadows*, ––– N.C. App. –––, –––, 687 S.E.2d 305, 309 (holding that controlled substances defined by their chemical composition can only be identified through chemical analysis and not through visual inspection), *disc. review denied*, 364 N.C. 245, 669 S.E.2d 640 (2010).

Officer Tucker did not conduct any chemical analysis on the substance retrieved from defendant's pocket. His testimony that the substance was crack cocaine was based solely on visual observation, and was not sufficient to meet the State's burden of proving the substance was cocaine. Therefore, the improper admission of and testimony about the Charlesworth report was not harmless. Defendant is entitled to a new trial.

[2] Defendant also contends the trial court erred in denying his motion to dismiss. On a motion to dismiss, the question for the trial court is whether there is substantial evidence of each element of the offense charged and that defendant was the person who committed the offense. *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. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). Defendant argues that the State did not meet its burden to present substantial evidence of all the elements of possession with intent to sell or deliver, because the admission of and testimony about the Charlesworth report was admitted in error, and Officer Tucker's testimony standing alone was not sufficient to prove the chemical make-up of the substance.

When ruling on a motion to dismiss, the trial court is to consider "all of the evidence actually admitted, whether competent or incompetent." *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991). "[T]he fact that some of the evidence was erroneously admitted by the trial court is not a sufficient basis for granting a motion to dismiss." *State v. Jones*, 342 N.C. 523, 540, 467 S.E.2d 12, 23 (1996); *see also State v. Morton*, 166 N.C. App. 477, 482, 601 S.E.2d 873, 876 (2004) (holding that erroneously admitted evidence may be considered when ruling on a motion to dismiss). The Charlesworth report, even though erroneously admitted, did provide chemical evidence that the substance found in defendant's jacket was cocaine, thus providing substantial evidence, for the purpose of defendant's motion, that the substance possessed was indeed cocaine.

Defendant also claims the motion to dismiss should have been granted because the State produced no evidence that he intended to sell or deliver the cocaine. However, Officer Tucker testified that the packaging of the substance was indicative that it was being held for sale and, therefore, there was circumstantial evidence of an intent to sell. *See State v. Carr*, 122 N.C. App. 369, 373, 470 S.E.2d 70, 73 (1996) (holding that the manner a controlled substance is packaged may be considered in establishing intent to sell and deliver).

Because we have determined that defendant is entitled to a new trial for the reasons stated above, we do not reach his remaining arguments by which he contends his trial counsel rendered ineffective assistance of counsel.

New Trial.

Judges STEPHENS and STROUD concur.

APPENDICES

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ELECTION OF STATE BAR COUNCILORS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING FEE DISPUTES

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING NON-COMPLIANCE WITH MEMBERSHIP OBLIGATIONS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING IOLTA

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CERTIFICATION OF PARALEGALS

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ELECTION OF STATE BAR COUNCILORS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 26, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the election of State Bar councilors, as particularly set forth in 27 N.C.A.C. 1A, Section .0800, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0800, Election and Appointment of State Bar Councilors

.0804 Procedures Governing Elections by Mail

(a) Judicial district bars may adopt bylaws permitting elections by mail, in accordance with procedures approved by the N.C. State Bar Council and as set out in this section.

....

(f) Only original ballots will be accepted. No photocopied or faxed ballots will be accepted. ~~Voting by computer or electronic mail will not be permitted.~~

.0805 Procedures Governing Elections by Electronic Vote

(a) Judicial district bars may adopt bylaws permitting elections by electronic vote in accordance with procedures approved by the N.C. State Bar Council and as set out in this section.

(b) Only active members of the judicial district bar may participate in elections conducted by electronic vote.

(c) In districts which permit elections by electronic vote, the notice sent to members referred to in Rule .0802(e) of this subchapter shall advise that the election will be held by electronic vote and shall identify how and to whom nominations may be made before the election. The notice shall explain when the ballot will be available, how to access the ballot, and the method for voting online. The notice shall also list locations where computers will be available for active members to access the online ballot in the event they do not have personal online access.

(d) Write-in candidates shall be permitted and the instructions shall so state.

(e) Online balloting procedures must ensure that only one vote is cast per active member of the judicial district bar and that all members have access to a ballot.

~~.0805~~ .0806 Vacancies

[rule is unchanged]

~~.0806~~ .0807 Bylaws Providing for Geographical Rotation or Division of Representation

[rule is unchanged]

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 26, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of August, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 23rd day of August, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as pro-

vided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 23rd day of August, 2012.

s/Jackson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 20, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability of attorneys, as particularly set forth in 27 N.C.A.C. 1B, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, .0100 Discipline and Disability of Attorneys

.0105 Chairperson of the Grievance Committee: Powers and Duties

(a) The chairperson of the Grievance Committee will have the power and duty

(1) ….;

~~(16) in his or her discretion, to refer grievances primarily attrutable to unsound law office management to a program of law office management training approved by the State Barand to so notify the complainant;~~

~~(17) except in cases involving possible misappropriation of entrusted funds, criminal conduct, dishonesty, fraud, misrepresentation, or deceit, or other cases deemed inappropriate by the chair, in his or her discretion to refer lawyers who are found during random auditing or otherwise to be significantly out of compliance with the Rules of Professional Conduct to a trust accounting supervisory program administered by the State Bar on terms and conditions approved by the council.~~

[Re-numbering remaining paragraphs.]

(b) **….**

.0106 Grievance Committee: Powers and Duties

The Grievance Committee will have the power and duty…

(1) ….

(13) in its discretion to refer grievances primarily attributable to the respondent's failure to employ sound trust accounting techniques to the trust account supervisory program in accordance with Rule .0112(k) of this subchapter.

.0112 Investigations: Initial Determination; Notice and Response; Committee Referrals

(a) Investigative Authority

…

(i) Referral to Law Office Management Training –

(1) If~~,~~ at any time before ~~prior to~~ a finding of probable cause, ~~the chair of~~ the Grievance Committee~~, upon the recommendation of the counsel or of the Grievance Committee,~~ determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound law office management techniques and procedures, the ~~chair~~ committee may ~~, with the respondent's consent, refer the case to a program of~~ offer the respondent an opportunity to voluntarily participate in a law office management training program approved by the State Bar before the committee considers discipline.

If the respondent accepts the committee's offer to participate in the program, ~~T~~the respondent will then be required to complete a course of training in law office management prescribed by the chair which may include a comprehensive site audit of the respondent's records and procedures as well as attendance at continuing legal education seminars. If the respondent does not accept the committee's offer, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(2) Completion of Law Office Management Training Program–If the respondent successfully completes the law office management training program, ~~T~~the ~~Grievance~~ ~~C~~committee may consider the respondent's successful completion of the law office management training program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the respondent fails to successfully complete the ~~program of~~ law office management training program as agreed, the grievance will be returned to the com-

mittee's agenda for consideration of imposition of discipline ~~at the Grievance Committee's next quarterly meeting~~. The requirement that a respondent complete law office management training pursuant to this rule shall be in addition to the respondent's obligation to satisfy the minimum continuing legal education requirements contained in 27 N.C.A.C. 1D .1517.

(j) Referral to Lawyer Assistance Program

(1) If~~,~~ at any time before ~~prior to~~ a finding of probable cause~~,~~ the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's substance abuse or mental health problem, the committee may offer the respondent an opportunity to voluntarily participate in a rehabilitation program under the supervision of the Lawyer Assistance Program Board before the committee considers discipline.

If the respondent accepts the committee's offer to participate in a rehabilitation program, the respondent must provide the committee with a written acknowledgement of the referral on a form approved by the chair. The acknowledgement of the referral must include the respondent's waiver of any right of confidentiality that might otherwise exist to permit the Lawyer Assistance Program to provide the committee with the information necessary for the committee to determine whether the respondent is in compliance with the rehabilitation program. If the respondent does not accept the committee's offer, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(2) Completion of Rehabilitation Program—If the respondent successfully completes the rehabilitation program, the ~~Grievance Committee~~ committee may consider successful completion of the program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the respondent fails to complete the rehabilitation program or fails to cooperate with the Lawyer Assistance Program Board, the Lawyer Assistance Program will report that failure to the counsel and the grievance will be returned to ~~included on~~ the ~~Grievance Committee's~~ committee's agenda for consideration of imposition of discipline ~~at the Grievance Committee's next quarterly meeting~~.

(k) Referral to Trust Account~~ing~~ Supervisory Program—

(1) If, at any time before a finding of probable cause, the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound trust accounting techniques, the committee may offer the respondent an opportunity to voluntarily participate in the State Bar's trust account supervisory program for up to two years before the committee considers discipline. ~~The chair of the Grievance Committee, in his or her sole discretion, may refer a lawyer whose trust account record keeping is found, during random auditing or otherwise, to be significantly out of compliance with the Rules of Professional Conduct into a supervisory program for two years.~~

If the respondent accepts the committee's offer to participate in the supervisory program, ~~During the lawyer's two-year participation in the program,~~ the ~~lawyer~~ respondent must fully cooperate with the Trust Account Compliance Counsel and must provide to the Office of Counsel quarterly proof of compliance with all provisions of Rule 1.15 of the Rules of Professional Conduct. Such proof shall be in a form satisfactory to the Office of Counsel. If the respondent does not accept the committee's offer, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(2) Completion of Trust Account Supervisory Program—If ~~a lawyer~~ the respondent ~~agrees to enter the supervisory program, timely complies with all rules of the program, and~~ successfully completes the program, the ~~Grievance Committee will not open a grievance file on the issue of the lawyer's pre-referral noncompliance with trust account record keeping rules~~ committee may consider successful completion of the program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the ~~lawyer~~ respondent does not fully cooperate with the Trust Account Compliance Counsel and/or ~~does not agree to enter the program or agrees to enter the program but~~ does not successfully complete ~~it~~ the program, the grievance will be returned to the ~~Grievance Committee's~~ committee's agenda for consideration of imposition of discipline. ~~a grievance file will be opened and the disciplinary process will proceed.~~

(3) The ~~chair of the Grievance Committee~~ committee will not refer to the program any case involving possible misappropriation of entrusted funds, criminal conduct, dishonesty, fraud, misrepresentation, or deceit, or any other case the ~~chair~~ committee deems inappropriate for referral. The committee will not refer to the program any respondent who has not cooperated fully and timely with the committee's investigation. If the Office of Counsel or the ~~Grievance Committee~~ committee discovers evidence that a ~~lawyer~~ respondent who is participating in the program may have misappropriated entrusted funds, engaged in criminal conduct, or engaged in conduct involving dishonesty, fraud, misrepresentation, or deceit, the chair will terminate the ~~lawyer's~~ respondent's participation in the program and the disciplinary process will proceed. ~~will instruct the Office of Counsel to open a grievance file.~~ Referral to the Trust Accounting Supervisory Program is not a defense to allegations that a lawyer misappropriated entrusted funds, engaged in criminal conduct, or engaged in conduct involving dishonesty, fraud, misrepresentation, or deceit, and it does not immunize a lawyer from the disciplinary consequences of such conduct.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 20, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of August, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 23rd day of August, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 23rd day of August, 2012.

s/Jackson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING FEE DISPUTES

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 20, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning fee disputes, as particularly set forth in 27 N.C.A.C. 1D, Section .0700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0700, Procedures for Fee Dispute Resolution

.0702 Jurisdiction

(a) The [committee] has jurisdiction over a disagreement arising out of a client-lawyer relationship concerning the fees and expenses charged or incurred for legal services provided by a lawyer licensed to practice law in North Carolina.

(b) The committee does not have jurisdiction over the following:

(1) a dispute concerning fees or expenses established by a court, federal or state administrative agency, or federal or state official, or private arbitrator or arbitration panel;

(2) ....

(3) a dispute over fees or expenses that are or were the subject of litigation or arbitration unless

(i) a court, arbitrator, or arbitration panel directs the matter to the State Bar for resolution ~~mediation~~, or

(ii) both parties to the dispute agree to dismiss the litigation or arbitration without prejudice and pursue resolution through the State Bar's Fee Dispute Resolution program ~~mediation~~;

(4) ....

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 20, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of August, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 23rd day of August, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 23rd day of August, 2012.

s/Jackson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING NON-COMPLIANCE WITH MEMBERSHIP OBLIGATIONS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 26, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning non-compliance with membership obligations, as particularly set forth in 27 N.C.A.C. 1D, Section .0900 and Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

.0903 Suspension for Failure to Fulfill Obligations of Membership

(a) Procedure for Enforcement of Obligations of Membership

....

(b) Notice

Whenever it appears that a member has failed to comply, in a timely fashion, with an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute, the secretary shall prepare a written notice directing the member to show cause, in writing, within 30 days of the date of service of the notice why he or she should not be suspended from the practice of law.

(c) Service of the Notice

The notice shall be served on the member by mailing a copy thereof by registered or certified mail or designated delivery service (such as Federal Express or UPS), return receipt requested, to the last known address of the member ~~according to~~ contained in the records of the North Carolina State Bar or such later address as may be known to the person ~~effecting the~~ attempting service. ~~Notice~~ Service of the notice may also be accomplished by (i) personal service by a State Bar investigator or by any ~~other~~ person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process, or (ii) email

sent to the email address of the member contained in the records of the North Carolina State Bar if the member sends an email from that same email address to the State Bar acknowledging such service.

(d) Entry of Order of Suspension upon Failure to Respond to Notice to Show Cause.

Whenever a member fails to ~~respond~~ show cause in writing within 30 days of the service of the notice to show cause upon the member, and it appears that the member has failed to comply with an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute, the council may enter an order suspending the member from the practice of law. The order shall be effective 30 days after proof of service on the member. The order shall be served on the member by mailing a copy thereof by registered or certified mail or designated delivery service, return receipt requested, to the last-known address of the member ~~according to~~ contained in the records of the North Carolina State Bar or such later address as may be known to the person ~~effecting the~~ attempting service. ~~Notice~~ Service of the order may also be accomplished by (i) personal service by a State Bar investigator or by any ~~other~~ person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process, or (ii) email sent to the email address of the member contained in the records of the North Carolina State Bar if the member sends an email from that same email address to the State Bar acknowledging such service. A member who cannot, with due diligence, be served by registered or certified mail, designated delivery service, personal service, or email shall be deemed served by the mailing of a copy of the order to the member's last known address contained in the records of the North Carolina State Bar.

....

.1523 Noncompliance

(a) Failure to Comply with Rules May Result in Suspension

....

(b) Notice of Failure to Comply

The board shall notify a member who appears to have failed to meet the requirements of these rules that the member will be suspended from the practice of law in this state, unless the member shows good cause in writing why the suspension should not be made or the mem-

ber shows in writing that he or she has complied with the requirements within the 30-day period after service of the notice. Notice shall be served on the member by mailing a copy thereof by registered or certified mail or designated delivery service (such as Federal Express or UPS), return receipt requested, to the last-known address of the member according to the records of the North Carolina State Bar or such later address as may be known to the person ~~effecting the~~ attempting service. ~~Notice~~ Service of the notice may also be ~~served~~ accomplished by (i) personal service by a State Bar investigator or by any ~~other~~ person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process, or (ii) email sent to the email address of the member contained in the records of the North Carolina State Bar if the member sends an email from that same email address to the State Bar acknowledging such service.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 26, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of August, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 23rd day of August, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as

provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 23rd day of August, 2012.

s/Jackson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING IOLTA

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 20, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning IOLTA, as particularly set forth in 27 N.C.A.C. 1D, Section .1300, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1300, Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts (IOLTA)

.1316 IOLTA Accounts

(a) IOLTA Account Defined.

....

(b) Eligible Banks. Lawyers may maintain one or more IOLTA Account(s) only at banks and savings and loan associations chartered under North Carolina or federal law, as required by Rule 1.15 of the Rules of Professional Conduct, that offer and maintain IOLTA Accounts that comply with the requirements set forth in this subchapter (Eligible Banks). Settlement agents shall maintain any IOLTA Account as defined by N.C.G.S. 45A-9 and paragraph (a) above only at an Eligible Bank; however, a settlement agent that is not a lawyer may maintain an IOLTA Account at any bank that is insured by the Federal Deposit Insurance Corporation and has a certificate of authority to transact business from the North Carolina Secretary of State, provided the bank is approved by NC IOLTA. The determination of whether a bank is eligible shall be made by NC IOLTA, which shall maintain (i) a list of participating Eligible Banks available to all members of the State Bar and to all settlement agents, and (ii) a list of banks approved for non-lawyer settlement agent IOLTA Accounts available to non-lawyer settlement agents. A bank that fails to meet the requirements of this subchapter shall be subject only to termination of its eligible or approved status by NC IOLTA. A violation of this rule shall not be the basis for civil liability.

(c) ....

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 20, 2012.

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Sarah Parker, Chief Justice

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This the 23rd day of August, 2012.

s/Jackson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 20, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Section .1600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1600, Regulations Governing the Administration of the Continuing Legal Education Program

.1605 Computation of Credit

(a) Computation Formula

....

(d) Teaching Law Courses

(1) Law School Courses. If a member is not a full-time teacher at a law school in North Carolina who is eligible for the exemption in Rule .1517(b) of this subchapter, the member may earn CLE credit for teaching ~~courses~~ a course or a class in a quarter or semester-long course at an ABA accredited law school. A member may also earn CLE credit by teaching ~~courses~~ a course or a class at a law school licensed by the Board of Governors of the University of North Carolina, provided the law school is actively seeking accreditation from the ABA. If ABA accreditation is not obtained by a law school so licensed within three years of the commencement of classes, CLE credit will no longer be granted for teaching courses at the school.

(2) Graduate School Courses. Effective January 1, 2012, a member may earn CLE credit by teaching a course on substantive law or a class on substantive law in a quarter or semester-long course at a graduate school of an accredited university.

~~(2)~~ (3) Courses at Paralegal Schools or Programs. Effective January 1, 2006, a member may earn CLE credit by teaching a paralegal or

substantive law ~~courses~~ course or a class in a quarter or semester-long course at an approved paralegal school or program.

~~(3)~~ (4) Credit Hours. Credit for teaching ~~courses~~ activities described in Rule .1605(d)(1) ~~and (2)~~ – (3) above may be earned without regard to whether the course is taught online or in a classroom. Credit will be calculated according to the following formula:

(A) Teaching a Course. 3.5 Hours of CLE credit for every quarter hour of credit assigned to the course by the educational institution, or 5.0 Hours of CLE credit for every semester hour of credit assigned to the course by the educational institution. (For example: a 3-semester hour course will qualify for 15 hours of CLE credit).

(B) Teaching a Class. 1.0 Hour of CLE credit for every 50-60 minutes of teaching.

~~(4)~~ (5) Other Requirements. ....

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 20, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of August, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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This the 23rd day of August, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

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This the 23rd day of August, 2012.

s/Jackson , J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 26, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .1700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1700, The Plan of Legal Specialization

.1720 Minimum Standards for Certification of Specialists

(a) To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum standards, and meet any other standards established by the board for the particular area of specialty.

(1) …

(2) The applicant must make a satisfactory showing <u>according to objective and verifiable standards</u>, as determined by the board after advice from the appropriate specialty committee, of substantial involvement in the specialty during the five <u>calendar</u> years immediately preceding <u>the calendar year of</u> ~~his or her~~ application ~~according to objective and verifiable standards~~. Such substantial involvement shall be defined as to each specialty from a consideration of its nature, complexity, and differences from other fields and from consideration of the kind and extent of effort and experience necessary to demonstrate competence in that specialty. It is a measurement of actual experience within the particular specialty according to any of several standards. It may be measured by the time spent on legal work within the areas of the specialty, the number or type of matters handled within a certain period of time, or any combination of these or other appropriate factors.…

(3) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of continuing legal education in the spe-

cialty accredited by the board for the specialty, the minimum being an average of 12 hours of credit for continuing legal education, or its equivalent, for each of the three calendar years immediately preceding application….

(4) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of qualification in the specialty through peer review. ~~by providing,~~ The applicant must provide, as references, the names of at least ~~five~~ ten lawyers, all of whom are licensed and currently in good standing to practice law in this state, or in any state, or judges, who are familiar with the competence and qualification of the applicant as a specialist. None of the references may be persons related to the applicant or, at the time of application, a partner of or otherwise associated with the applicant in the practice of law. The applicant by his or her application consents to confidential inquiry by the board or appropriate disciplinary body and other persons regarding the ~~applicants~~ applicant's competence and qualifications to be certified as a specialist. An applicant must receive a minimum of five favorable peer reviews to be considered by the board for compliance with this standard.

(5) ….

(b) ….

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 26, 2012.

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s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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This the 23rd day of August, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 23rd day of August, 2012.

s/Jackson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CERTIFICATION OF PARALEGALS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 26, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals

.0123 Inactive Status Upon Demonstration of Hardship

(a) Inactive Status

The board shall transfer a certified paralegal to inactive status upon receipt of a petition, on a form approved by the board, demonstrating hardship as defined in paragraph (b) of this rule and upon payment of any fees owed to the board at the time of the petition unless waived by the board.

(1) The period of inactive status shall be one year from the deignated renewal date.

(2) On or before the expiration of inactive status, a paralegal on inactive status must file a petition for (continued) inactive status or seek reinstatement to active status by filing a renewal application pursuant to Rule .0120 of this subchapter. Failure to petition for continued inactive status or renewal shall result in lapse of certification.

(3) A paralegal may be inactive for not more than a total of five consecutive years.

(4) During a period of inactive status, a paralegal is not required to pay the renewal fee or to complete continuing legal education.

(5) During a period of inactive status, a paralegal shall not be entitled to represent that he or she is a North Carolina cer-

tified paralegal or to use any of the designations set forth in Rule .0117(4) of this subchapter.

(b) Hardship

The following conditions shall qualify as hardship justifying a transfer to inactive status:

(1) Financial inability to pay the annual renewal fee and to pay for continuing legal education courses due to unemployment or underemployment of the paralegal for a period of three months or more;

(2) Disability or serious illness for a period of three months or more;

(3) Active military service; and

(4) Transfer of the paralegal's active duty military spouse to a location outside of North Carolina.

(c) Reinstatement before Expiration of Inactive Status

To be reinstated as a certified paralegal, the paralegal must petition the board for reinstatement by filing a renewal application prior to the expiration of the inactive status period and must pay the annual renewal fee. If the paralegal was inactive for a period of two consecutive calendar years or more during the year prior to the filing of the petition, the paralegal must complete 12 hours of credit in board-approved continuing paralegal education, or its equivalent. Of the 12 hours, at least 2 hours shall be devoted to the areas of professional responsibility or professionalism, or any combination thereof.

(d) Certification after Expiration of Inactive Status Period

If the inactive status period expires before the paralegal petitions for reinstatement, certification shall lapse, and the paralegal cannot again be certified unless the paralegal qualifies upon application made as if for initial certification.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments

to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 26, 2012.

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s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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This the 23rd day of August, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 23rd day of August, 2012.

s/Jackson, J.
For the Court

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules of Professional Conduct of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 20, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rules of Professional Conduct, Rule 1.15, Safekeeping Property

Rule 1.15-1, Definitions

(a) ….

(d) "Demand deposit" denotes any account from which deposited funds can be withdrawn at any time without notice to the depository institution.

[Re-lettering remaining paragraphs.]

Rule 1.15-2, General Rules

(a) ….

(k) Bank Directive.

Every lawyer maintaining a trust account or fiduciary account with demand deposit at a bank or other financial institution shall file with the bank or other financial institution a written directive requiring the bank or other financial institution to report to the executive director of the North Carolina State Bar when an instrument drawn on the account is presented for payment against insufficient funds. No trust account or fiduciary account shall be maintained in a bank or other financial institution that does not agree to make such reports.

(l)….

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules of Professional Conduct were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 20, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of August, 2012.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules of Professional Conduct as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 23rd day of August, 2012.

s/Sarah Parker
Sarah Parker, Chief Justice

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This the 23rd day of August, 2012.

s/Jackson, J.
For the Court

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Receipt of investment checks—relationship with plaintiff—summary judgment inappropriate—The trial court erred by concluding that there was no genuine issue of material fact as to whether Spreti (a deceased third-party) was acting as plaintiff's agent for the receipt of redemption checks in an action arising from investments made by plaintiff (who resided in Germany) through Spreti in North Carolina. The various claims and cross-claims primarily turned on the issue of Spreti's agency relationship with plaintiff, but a single inference could not be drawn from the evidence and summary judgment was inappropriate. **Leiber v. Arboretum Joint Venture, LLC, 336.**

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Appealability—interlocutory order—partial summary judgment—certification—possibility of inconsistent verdicts—An opinion and order granting a partial summary judgment affected a substantial right and was immediately appealable where it did not dispose of plaintiff's claims against all parties, but was final as to one party and the trial court certified it for appellate review. Whether the trial court had jurisdiction because the certification was entered following the appeal was immaterial because plaintiff was deprived of a substantial right in that plaintiff was subjected to the possibility of inconsistent verdicts. **Leiber v. Arboretum Joint Venture, LLC, 336.**

Appellate rules violations—single-spaced brief—no sanctions—Although plaintiffs' brief was typed using single spacing in direct violation of N.C. R. App. P. 26(g)(1), the Court of Appeals chose not to impose sanctions because the violation was not a substantial failure or a gross violation that impaired the court's task of review or frustrated the adversarial process. **Edwards v. Hill, 178.**

Constitutional question—not reached—case resolved on other grounds— The Court of Appeals did not reach the issue of whether N.C.G.S. § 14-50.25 is constitutionally invalid. The Court will not decide a constitutional question when the disposition of the case may be resolved on other grounds. **State v. Dubose, 406.**

Findings not challenged below—not reviewed on appeal—The Court of Appeals declined to review the trial court's findings about the reasons for defendant's detention after a traffic stop where defendant did not challenge the findings at trial but challenged the findings on appeal on the grounds of weight and credibility. **State v. Hernandez, 591.**

Interlocutory order—improper venue—denial of motion to dismiss—substantial right—The Court of Appeals addressed the merits of an appeal from an interlocutory order denying a motion to dismiss for improper venue where defendants alleged that the county indicated in the complaint was improper. **Roberts v. Adventure Holdings, LLC, 705.**

Interlocutory order—no certification—no substantial right—Defendant wife's appeal in a divorce case was dismissed as being from an interlocutory order. The order was not properly certified under N.C.G.S. § 1A-1, Rule 54(b) and it did not affect a substantial right. **Johnson v. Johnson, 118.**

Interlocutory order—substantial right—Although an appeal from the dismissal of a legal malpractice case may have been from an interlocutory order since the record contained no indication that defendants' counterclaim for legal fees was resolved, a substantial right would have been affected in the absence of

APPEAL AND ERROR—Continued

an immediate appeal. Further, since no party appealed from a trial judge's order or suggested that it lacked jurisdiction to enter the order, that order returning the case to another trial judge stood and was binding on appeal. **Cohen v. McLawhorn, 492.**

Interlocutory order—substantial right—damages in condemnation—An appeal from an interlocutory order in a condemnation case affected a substantial right and was heard where the order involved the length of a lease and the construction of the lease by the county, which were crucial to determining compensation. **Mecklenburg Cnty. v. Simply Fashion Stores, LTD., 664.**

Interpretation of complaint—not addressed below—The Court of Appeals did not address the issue of whether a complaint sufficiently set forth a claim of breach of the implied warranty of habitability where that theory of relief was not addressed by defendants or the trial court. **Domingue v. Nehemiah II, Inc., 429.**

Partial summary judgment—interlocutory—avoidance of piecemeal litigation—An order granting partial summary judgment on rescission of a separation agreement affected a substantial right and was not dismissed as interlocutory where plaintiff sought rescission of the agreement and equitable distribution. Dismissal of the appeal would have created piecemeal litigation. **Honeycutt v. Honeycutt, 70.**

Preservation of issues—anticipatory corroboration—no motion to strike—Defendant did not preserve for appellate review the admission of what one officer said to another about defendant's shoe size where the testimony was admitted as anticipatory corroboration and defendant did not move to strike when it became clear that the testimony was not corroborative. **State v. Potts, 451.**

Preservation of issues—failure to argue—Issues related to the trial court's rulings that were not specifically addressed in defendant's brief or for which no reason or argument were made were deemed abandoned under N.C. R. App. P. 28(b)(6). **Williams v. Am. Eagle Airlines, Inc., 250.**

Preservation of issues—failure to cross-appeal—Although plaintiff contended in his brief in a workers' compensation case that he was entitled to temporary total disability benefits until he returned to a suitable employment position, he failed to properly preserve this issue by cross-appealing. **McLeod v. Wal-Mart Stores, Inc., 555.**

Preservation of issues—failure to raise at trial—Although plaintiff contended that the trial court erred by dismissing a legal malpractice action based on defendant's violation of the local rules when calendaring this case for trial, plaintiff failed to preserve this issue by raising it at trial as required by N.C. R. App. P. 10(b)(1). **Cohen v. McLawhorn, 492.**

Preservation of issues—failure to renew motion to dismiss—Defendant's argument that the trial court erred by denying his motion to dismiss the charges against him was not reviewed. Defendant failed to renew his motion at the close of all evidence and, therefore, waived appellate review of this issue. **State v. Blackmon, 397.**

Preservation of issues—motion to dismiss converted to motion for summary judgment—failure to request continuance or additional time to pro-

APPEAL AND ERROR—Continued

duce evidence—waiver—The trial court did not err in a gross negligence, spoliation of evidence, and common law obstruction case by converting defendants' motion to dismiss plaintiff's complaint under N.C.G.S. § 1A-1, Rule 12(b)(6) to a motion for summary judgment under N.C.G.S. § 1A-1, Rule 56. Having failed to request a continuance or additional time to produce evidence and having participated in the hearing on the motion for summary judgment without objection or request for continuance, plaintiff waived the right to argue this issue on appeal. **Blackburn v. Carbone, 519.**

Preservation of issues—objection not renewed—Defendant did not preserve for appellate review the question of whether the trial court erred by admitting into his cocaine prosecution testimony that he was identified through a computer program that included people arrested in Mecklenburg County. The prosecutor withdrew the question after defendant objected, but asked it again without objection. **State v. Potts, 451.**

Record—settlement order not included—no prejudice—appeal not dismissed—The absence of an order settling the record on appeal in a domestic case was a technical violation which did not result in dismissal of the appeal where the record otherwise contained that which should have been included and did not contain that which should have been excluded. Neither appellate review nor the adversarial process was impaired. **Honeycutt v. Honeycutt, 70.**

Record on appeal—sovereign immunity waiver—insurance policy not included—An appeal was dismissed where the issue involved sovereign immunity for a deputy sheriff and the record did not include the County's insurance policy and an exclusion that would in effect have retracted the waiver of sovereign immunity. **Smith v. Heath, 467.**

Standard of review—condemnation—interpretation of lease—An appeal in a condemnation case concerned interpretation of a lease between the parties and the standard of review was *de novo*. **Mecklenburg Cnty. v. Simply Fashion Stores, LTD., 664.**

Standard of review—denial of motion to suppress—no findings or conclusions—The appropriate standard of appellate review for the denial of a motion to suppress where the trial court did not make findings of fact and conclusions of law was whether the trial court provided the rationale for its ruling from the bench and whether there was a material conflict in the evidence presented at the suppression hearing. If both criteria are met, then the findings are implied and shall be binding on appeal if supported by competent evidence. If either is not met, then the failure to make findings and conclusions is fatal. **State v. Baker, 376.**

ARBITRATION AND MEDIATION

No valid arbitration agreement—The trial court did not err in determining that there was no valid arbitration agreement between the deceased or her estate and defendant. There was no actual or apparent authority for the deceased's mother to act as her agent in signing the arbitration agreement, N.C.G.S. § 90-21.13 was inapplicable, and defendant could not have reasonably relied on any representation that the deceased's mother was her agent. Defendant's public policy argument was also rejected. **Munn v. Haymount Rehab. & Nursing Ctr., 632.**

ARBITRATION AND MEDIATION—Continued

Ratification of arbitration agreement—not plead at trial level—Defendant's argument that the deceased ratified an arbitration agreement executed by her mother on her behalf was rejected where defendant did not make any allegation of ratification in its pleadings to the trial court. **Munn v. Haymount Rehab. & Nursing Ctr., 632.**

Unconscionable agreement—issue not addressed—Plaintiff's argument that an arbitration agreement was unconscionable was not addressed as the Court of Appeals determined that plaintiff was not bound by the agreement. **Munn v. Haymount Rehab. & Nursing Ctr., 632.**

BANKS AND BANKING

Investment proceeds—investor's agency issue—determined before cross-claim between banks—Genuine issues of material fact existed in one bank's cross-claim against another in an action arising from investment proceeds not received by the investor where the first bank's warranty defense would only become active if plaintiff's conversion claim against the banks was successful, and that claim depended upon an unsettled agency issue. **Leiber v. Arboretum Joint Venture, LLC, 336.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Breaking and entering motor vehicle—insufficient evidence of intent to commit larceny—A *de novo* review revealed that the trial court erred when it entered judgment on the charge of breaking and entering a motor vehicle. There was insufficient evidence to establish defendant's intent to commit larceny based upon the State's failure to show that defendant intended to permanently deprive the owner of property. **State v. Chillo, 541.**

Larceny breaking and entering—inconsistent verdicts—not mutually exclusive—The trial court did not err in denying defendant's motion for judgment notwithstanding the verdict based on his contention that the jury verdicts were logically inconsistent. Based on *Mumford*, 364 N.C. 394, defendant's conviction of larceny after breaking and entering was merely inconsistent with the trial court's declaration of a mistrial on the felonious breaking and entering charge because the jury was deadlocked, but was not mutually exclusive. **State v. Blackmon, 397.**

Sufficiency of evidence—insufficient evidence of predicate felony—The trial court erred in denying defendant's motion to dismiss the charge of felony entering based upon insufficient evidence. The predicate felony for defendant's conviction of felony entering was attempted robbery and the trial court erred in denying defendant's motion to dismiss the charge of attempted robbery with a firearm based on insufficient evidence. **State v. Johnson, 443.**

Sufficiency of evidence—motion to dismiss properly denied—The trial court did not err by denying defendant's motion to dismiss the charge of breaking or entering into a motor vehicle. The State presented substantial evidence that defendant broke and entered into a pickup truck which was worth more than $1000 with the intent to steal it. **State v. Clark, 388.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Permanency planning order—cessation of reunification efforts—sufficiency of findings of fact—The trial court did not err in its permanency planning order by concluding that further reunification efforts between respondent mother and the minor child were not required on the grounds that it would be inconsistent with the minor child's health, safety, and need for a safe, permanent home within a reasonable period of time. **In re T.R.M., 160.**

CHILD CUSTODY AND SUPPORT

Child support obligation—use of records from prior year—no abuse of discretion—The trial court did not abuse its discretion in using defendant's average monthly income reflected in the most complete records from 2007 to determine his 2009 income for purposes of setting his child support obligation where defendant submitted incomplete financial records from 2008 and 2009. **Moore v. Onafowora, 674.**

Motion to intervene—wrongfully granted—The trial court erred in granting plaintiff-intervenors' motion to intervene in a child custody action because they failed to make a sufficient showing to support a determination of standing in the matter. Moreover, even if plaintiff-intervenors had standing, their motion did not contain grounds for modification of the custody order nor did it allege any changes in circumstances affecting the welfare of the child. **Bohannan v. McManaway, 572.**

Motion to set aside custody order—abuse of discretion—motion to set aside consent order—The trial court abused its discretion by denying defendant's Rule 60(b) motion to set aside a child custody order where the trial court failed to hear any testimony in the matter. Defendant's failure to appear at the custody hearing did not obviate the need for a hearing on the issue of custody. Furthermore, the Court of Appeals strongly urged the trial court to consider on remand defendant's arguments concerning the validity of a previously entered consent order. **Bohannan v. McManaway, 572.**

Sole custody to plaintiff—no abuse of discretion—The trial court did not abuse its discretion in a child custody matter by awarding sole custody of the child to plaintiff where the trial court's decision was fully supported by the record. **Moore v. Onafowora, 674.**

Uniform Interstate Family Support Act—child support arrears—vested support payments—The trial court's order directing defendant to pay $2,966.00 in child support arrears under a Michigan judgment did not comply with the Uniform Interstate Family Support Act. As $4,860.00 in monthly support payments had accrued under the Michigan judgment and vested under Michigan law, the trial court was not free, consistent with full faith and credit, to find any other figure as defendant's debt under the Michigan judgment. **State ex rel. Benford v. Bryant, 165.**

CIVIL PROCEDURE

Motion to dismiss under Rule 41(b) granted—failure to prosecute—legal malpractice claim—The trial court did not abuse its discretion by dismissing plaintiff's legal malpractice action under N.C.G.S. § 1A-1, Rule 41(b) for failure to prosecute. The trial court appropriately considered the three factors in *Wilder*, 146 N.C. App. 574. Given plaintiff's failure to take any action to prosecute this

CIVIL PROCEDURE—Continued

case, his disregard of a properly noticed and calendared trial, the prejudice to defendants of having the allegations pending with no ability to disprove them, and the fact that plaintiff had previously disregarded a mediation order and an official calendar, the trial court's decision to dismiss was not unreasonable. **Cohen v. McLawhorn, 492.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Motion to suppress statement to law enforcement—voluntariness—The trial court did not err in a second-degree murder case by failing to suppress defendant's statement to law enforcement even though defendant contended he was under the influence of cocaine and unable to sufficiently understand what he was saying or doing. Defendant's statements were his free and voluntary acts, no promises were made to defendant, and he was not coerced in any way. Defendant was knowledgeable of his circumstances and cognizant of the meaning of his words at all times during which he was interrogated. **State v. Hunter, 506.**

CONSPIRACY

Assault with deadly weapon with intent to kill inflicting serious injury—motion to dismiss—sufficiency of evidence—A *de novo* review revealed the trial court did not err by failing to dismiss the charge of conspiracy to commit assault with a deadly weapon with intent to kill inflicting serious injury. The acts viewed collectively showed that the men formed an implied agreement, however impulsively, to assault the victim. **State v. Sanders, 142.**

CONSTITUTIONAL LAW

Confrontation Clause—non-capital sentencing—jury determination required to increase sentence—The Confrontation Clause of the Sixth Amendment applies to all sentencing proceedings, both capital and non-capital, where a jury determines a fact that would increase the defendant's sentence beyond the statutory maximum. *State v. Sings*, 182 N.C. App. 162, involved defendant's stipulation to aggravating factors and was limited to its facts. **State v. Hurt, 1.**

Consequences of self-representation—no inquiry into defendant's ability to represent himself—Defendant's argument that the trial court subjected him to inconsistent treatment during his trial on speeding and driving while impaired charges was without merit. N.C.G.S. § 15A-1242 required the trial court to determine whether defendant appreciated the consequences of representing himself prior to permitting him to represent himself, not whether defendant had the ability to represent himself as well as an attorney would be able to represent him. **State v. Paterson, 654.**

Effective assistance of counsel—Strickland test—Defense counsel's failure to renew his motion to dismiss the charges of felonious breaking and entering and larceny after breaking and entering at the close of all evidence did not constitute ineffective assistance of counsel. As the State presented sufficient evidence that defendant was the perpetrator of the offenses and that defendant obtained possession of the property dishonestly, a second motion to dismiss would not have altered the result in this case and defendant could not satisfy the second prong of the test set forth in *Strickland*, 466 U.S. 668. **State v. Blackmon, 397.**

CONSTITUTIONAL LAW—Continued

Forensic analysts—summaries of reports of others—The Confrontation Clause was violated where two SBI forensic analysts merely summarized the results of absent analysts. **State v. Hurt, 1.**

Right to confrontation—chemical analysis report—non-testifying analyst—lay opinion testimony—erroneously admitted—The trial court committed plain error in a possession of cocaine with intent to sell or deliver case by admitting into evidence a chemical analysis report prepared by an analyst who did not testify at trial and a police officer's testimony about the report. The trial court also committed plain error by admitting into evidence the police officer's testimony that the substance he found in defendant's jacket was cocaine. **State v. Jones, 734.**

Right to confrontation—lab results—A defendant's Sixth Amendment right to confrontation was violated where lab results were presented by a forensic chemist who did not herself perform the tests on which her testimony was based, nor was she present when those tests were performed. Cross-examination was important to expose, among other things, the care or lack of care with which a chemist conducted tests. **State v. Williams, 422.**

Right to remain silent—deposition—sanctions in civil case—The trial court did not violate defendant's Fifth Amendment rights in a wrongful death case by imposing sanctions based on defendant's failure to answer questions at his deposition. Defendant's assertion of rights was prejudicial to the due process rights of plaintiff because it served to impede plaintiff's ability to obtain accurate discovery about the nature of defendant's affirmative defenses. **Lovendahl v. Wicker, 193.**

Violation of New Jersey Constitution—no suppression in North Carolina—There was no basis for suppression of evidence due to a violation of the New Jersey Constitution (assumed and not decided) in the detention of defendant after a traffic stop in New Jersey following a crime in North Carolina. The suppression of evidence in North Carolina is authorized only when required by the constitutions of the United States or North Carolina or when the evidence was the result of a substantial violation of Chapter 15A of the North Carolina General Statutes. **State v. Hernandez, 591.**

Waiver of counsel—adequate inquiry by trial court—Defendant's argument that the trial court did not conduct adequate inquiry into his waiver of counsel was rejected where colloquies that occurred at the calendar call and prior to trial were sufficient to satisfy N.C.G.S. § 15A-1242. **State v. Paterson, 654.**

Waiver of counsel—waiver not ineffective—Defendant's contention that his waiver of counsel was ineffective was rejected. Even though defendant's waiver form was incomplete, his waiver of counsel was not rendered invalid on this ground. Furthermore, defendant was not prejudiced by the fact that the trial judge apprised defendant of the charges against him and the potential punishments after the form was executed. **State v. Paterson, 654.**

CONSTRUCTION CLAIMS

Subsequent owner—claim sufficiently stated—The trial court erred by granting defendants' motion to dismiss a claim of negligent home construction under N.C.G.S. § 1A-1, Rule 12 (b)(6) where plaintiff was a subsequent owner of the home. Controlling precedent does not require a showing of statutory violations or defects materially affecting structural integrity for a subsequent builder to maintain an action. **Domingue v. Nehemiah II, Inc., 429.**

CONTRACTS

Home construction—subsequent owner—claim sufficiently stated—Plaintiff's allegations of breach of contract in the construction of a house were sufficient to survive a motion to dismiss under N.C.G.S. § 1A-1, Rule 12 (b)(6) where plaintiff was a subsequent purchaser who asserted that he was the successor-in-interest to any claims under the original owner's contracts to build the house and to correct construction defects. The record was not clear as to whether plaintiff was, in fact, an assignee of any possible claims the original owners may have had. **Domingue v. Nehemiah II, Inc., 429.**

CONVERSION

Imposter defense—issue of fact as to agency—addressed before defense—In a claim involving forged investment redemption agreements, the genuine issues of material fact as to agency and authority to receive the instrument should have been addressed before the imposter defense, and the trial court correctly denied a motion for summary judgment based on that defense. **Leiber v. Arboretum Joint Venture, LLC, 336.**

Investment checks—not received personally—issue of fact on agency—summary judgment denied—The trial court correctly denied a motion for summary judgment by defendant banks on a conversion claim arising from investment checks that were not received by plaintiff personally where there was a genuine issue of material fact as to the existence of an agency relationship between plaintiff and the person who received the checks. **Leiber v. Arboretum Joint Venture, LLC, 336.**

Warranties of presentment—not a shield against conversion—Warranties of presentment did not eliminate genuine issues of material fact from a conversion claim arising from investment redemption checks that were not received by plaintiff. **Leiber v. Arboretum Joint Venture, LLC, 336.**

CRIMINAL LAW

Denial of motion to suppress—material conflict in evidence—definition—For purposes of N.C.G.S. § 15A-977(f) (which requires findings and conclusions after the denial of a motion to suppress), a material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter is likely to be affected. **State v. Baker, 376.**

Denial of motion to suppress—material conflict of evidence—defendant's freedom to leave—There was a material conflict in the evidence presented at a suppression hearing where defendant's evidence that he did not feel free to leave controverted the State's evidence in a manner that affected the outcome of the matter to be decided. The trial court was therefore required to make findings and conclusions and its failure to do so was fatal to the validity of its denial of defendant's motion to dismiss. **State v. Baker, 376.**

Felony entering—discharging firearm into an occupied dwelling—not mutually exclusive offenses—occurred in succession—The trial court did not err in entering judgments for both felony entering and discharging a firearm into an occupied dwelling inflicting serious bodily injury because the two offenses were not mutually exclusive but rather were offenses that occurred in succession. **State v. Johnson, 443.**

CRIMINAL LAW—Continued

Motion for mistrial—prosecutor's improper argument not prejudicial—trial court admonition—The trial court did not err in a second-degree murder case by failing to declare a mistrial or failing to instruct the jury to disregard the prosecutor's comments during his closing argument. The prosecutor's characterization of defendant's comments as falsehoods, while improper, did not reach the level of prejudicial error which so infected the trial with unfairness as to make the resulting conviction a denial of due process. Further, the trial court's admonition to the prosecutor neutralized the improper statements. **State v. Hunter, 506.**

DECLARATORY JUDGMENTS

Security interests in real property—plaintiffs not bound by lien judgments—The trial court did not err in denying defendants' motion to dismiss and motion for judgment on the pleadings in a declaratory judgment action concerning security interests in certain real property. As plaintiffs were not parties to defendant Bunn's or Mangum's actions to enforce their materialmen's liens, and therefore were not bound by the lien judgments, plaintiffs were free to bring subsequent actions to have the priority of their security interests determined. **Lawyers Title Ins. Corp. v. Zogreo, LLC, 88.**

DISCOVERY

Admissions—failure to answer requests—motion to amend denied—discretion of court—The trial court did not abuse its discretion by denying defendants' N.C.G.S. § 1A-1, Rule 36(b) motion for amendment or withdrawal of admissions created by a failure to respond to plaintiffs' requests for admissions. Although defendants argued that their case may have been neglected by their original counsel and that plaintiff would not have been prejudiced by granting their motion, the trial court was given discretion to make a reasoned decision and did so here. **J.M. Parker & Sons, Inc. v. William Barber, Inc, 682.**

Requests for admissions—not answered—admissions binding—The trial court did not err by granting summary judgment for plaintiff on a claim for goods sold and delivered where defendants did not respond to requests for admissions and were bound by the resulting admissions. No assertion in an affidavit could overcome the conclusive effect of those admissions. **J.M. Parker & Sons, Inc. v. William Barber, Inc, 682.**

Requests for admissions—not answered—motion to set aside—credibility of affiant—The trial court did not impermissibly determine the credibility of a witness in an order denying defendants' Rule 36 motion to amend or withdraw admissions. There is no precedent barring the trial court from considering the credibility of affiants when making a discretionary ruling. **J.M. Parker & Sons, Inc. v. William Barber, Inc, 682.**

Violations—asserting Fifth Amendment privileges in civil case—Rule 37 sanctions—The trial court did not err in a wrongful death case by imposing sanctions under N.C.G.S. § 1A-1, Rule 37 including striking defendant's affirmative defenses for failure to comply with discovery. Violation of an order compelling discovery that results from a motion for a protective order may be the basis for sanctions under Rule 37(b). Further, the trial court previously warned that there would be consequences if defendant elected to claim his privileges under the Fifth Amendment in this civil action. **Lovendahl v. Wicker, 193.**

DIVORCE

Separation agreement—ratification—The trial court correctly granted summary judgment for defendant on a claim to rescind a separation agreement where there was no issue of fact that plaintiff ratified the agreement with full knowledge that the benefits she received were pursuant to the agreement and that her acceptance of benefits was not under duress or any other wrongdoing. **Honeycutt v. Honeycutt, 70.**

DRUGS

Marijuana—intent to sell or deliver—evidence not sufficient—simple possession as lesser-included offense—A conviction and sentence for felonious possession of marijuana with intent to sell or deliver were vacated and the case remanded for entry of judgment for simple possession where defendant was found with 1.89 grams of marijuana in three small plastic bags and $1,264 in cash. The amount of marijuana alone was not sufficient for intent to sell or deliver; the packaging was just as likely to indicate a consumer as a dealer; and the presence of cash alone was not sufficient to raise the inference of dealing. The charge of simple possession is a lesser-included offense of possession with intent to sell or distribute. **State v. Wilkins, 729.**

Possession of cocaine with intent to sell or deliver—erroneously admitted report—sufficient evidence—The trial court did not err in denying defendant's motion to dismiss the charge of possession of cocaine with intent to sell or deliver. The trial court must consider all evidence actually admitted when ruling on a motion to dismiss, even though the chemical analysis report which provided chemical evidence that the substance found in defendant's jacket was cocaine was erroneously admitted. **State v. Jones, 734.**

Trafficking by sale or delivery in more than four grams and less than fourteen grams—motion to dismiss—sufficiency of evidence—chemical analysis of pills—The trial court did not err by denying defendant's motion to dismiss at the close of all evidence the charge of trafficking by sale or delivery in more than four grams and less than fourteen grams of dihydrocodeinone. Even assuming *arguendo* that defendant had properly preserved his argument that the State was required to test a sufficient number of pills to reach the minimum weight threshold for a trafficking offense, a chemical analysis test of a portion of the pills, coupled with a visual inspection of the remaining pills for consistency, was sufficient to support the conviction. **State v. Dobbs, 272.**

EMINENT DOMAIN

Scope of project rule—applicable to value of property—not to lease provision—The scope of the project rule applies to determine the use for which the property is valued, not to strike a provision which defendant negotiated, agreed to, and signed. **Mecklenburg Cnty. v. Simply Fashion Stores, LTD., 664.**

ESTOPPEL

Affirmative defense—not plead at trial level—Defendant's argument that plaintiff was estopped from denying the validity of a contract executed on behalf of the deceased was rejected where defendant did not plead the affirmative defense of estoppel at the trial level. **Munn v. Haymount Rehab. & Nursing Ctr., 632.**

ESTOPPEL—Continued

Equitable estoppel—motion to dismiss denied—no abuse of discretion— The trial court did not abuse its discretion by denying plaintiff's motion for a continuance in a negligence case, thereby denying plaintiff the opportunity to develop competent evidence concerning his equitable estoppel claim, where the Court of Appeals determined that plaintiff's equitable estoppel claim was meritless. **Kimball v. Vernik, 462.**

EVIDENCE

Account of victim's statements—corroboration—beyond trial testimony— Admitting the testimony of a step-grandmother relating statements made by a five-year-old sexual abuse victim about what was done to her was not plain error where the prior statements served to corroborate the child's trial testimony. Prior statements that went beyond the child's trial testimony affected only the weight of the evidence. **State v. Treadway, 286.**

Account of victim's statements—non-hearsay purpose—initiation of investigation—There was no plain error in a prosecution for first-degree sexual offense against a five-year-old child in the admission of a step-grandmother's testimony relating the things the child had said that defendant had done. The testimony was offered for the non-hearsay purpose of explaining the grandmother's subsequent actions and why investigative action was originally taken. Additionally, these prior statements served to corroborate the victim's trial testimony. **State v. Treadway, 286.**

Defendant shackled when arrested—admissible—The trial court did not err by allowing testimony that defendant was handcuffed and shackled when arrested. Such testimony did not have the same effect as a jury seeing defendant in shackles at trial. **State v. Capers, 605.**

Expert testimony—blood alcohol concentration—odor analysis not sufficiently reliable method—The trial court erred by allowing the State's expert witness to give his opinion of defendant's blood alcohol concentration (BAC) at the time of the accident. The witness's odor analysis was not a sufficiently reliable method of proof, and there was a reasonable possibility that a different result would have been reached at trial absent this testimony for the charges of driving while impaired, reckless driving, second-degree murder, and assault with a deadly weapon inflicting serious injury. However, the error was not prejudicial to defendant on the charges of driving while license revoked (DWLR) and felony hit and run. DWLR was remanded for resentencing because it was consolidated with the reckless driving charge. **State v. Davis, 26.**

Expert testimony—opinion of child's credibility—There was no plain error in a prosecution for first-degree sexual offense against a child where an expert clinical social worker testified without objection that she had diagnosed the victim as being sexually abused. The testimony amounted to an improper opinion about the victim's credibility since there was no physical evidence of abuse; however, it was not plain error because the testimony was followed by properly admitted testimony that the victim exhibited behavior that was consistent with children who have been sexually abused. The challenged testimony was thus not based only on the victim's disclosures. **State v. Treadway, 286.**

EVIDENCE—Continued

Expert testimony—within scope of expertise—admissible—The trial court did not err by allowing plaintiff's expert to testify about the operation of the brakes of the tractor-trailer involved in an automobile accident. The testimony was within the scope of the expert's expertise and was therefore admissible. **Rabon v. Hopkins, 351.**

Expert witness—testimony—sufficiently reliable methods of proof—The trial court did not abuse its discretion or commit plain error in a first-degree murder case by qualifying a special agent as an expert witness without specifying the area in which he would be allowed to offer an expert opinion, nor did the witness's testimony constitute speculation as to whether defendant's gun fired the bullet that killed the victim. The testimony was based upon sufficiently reliable methods of proof in the area of bullet identification. **State v. Crandell, 227.**

Flight—statement of intent—implicit admission of guilt—The trial court did not err by admitting testimony from an officer who transported defendant from New York to North Carolina that defendant told the officer that they should have waited until midnight, when defendant would have been gone. Although defendant argued that this was an empty boast rather than evidence of flight, the jury could reasonably have found that defendant's statement was an implicit admission of guilt and as such was relevant. **State v. Capers, 605.**

Hearsay—elicited on cross-examination—There was no plain error in a prosecution for first-degree sexual offense against a five-year-old child in the admission of testimony from a child mental health expert that defendant's son from a previous marriage had said that he had seen defendant on top of the victim at night doing "sex things." Defendant elicited the testimony on cross-examination. **State v. Treadway, 286.**

Hearsay—present sense impression—50 minutes after shooting—medical treatment—The trial court did not err in a first-degree murder prosecution by admitting as a present sense impression testimony from the mother of an additional victim that her son had said at the hospital that he had been shot by defendant. The trial court correctly concluded that the testimony was admissible as a present sense impression where the statement was made about 50 minutes after the shooting and the focus of events during that time was on saving the victim's life, thereby reducing the likelihood of deliberate or conscious misrepresentation. **State v. Capers, 605.**

Judicial admissions—failure to deny allegations—admissions at hearing— The trial court did not err by concluding that an actual partition of land would result in substantial injury to the parties where there was neither evidence nor specific findings of the values of the properties. The trial court's conclusion was supported by respondent's judicial admissions in his failure to deny any of the allegations of the petition and in his admissions in a hearing. The trial court did not abuse its discretion by ordering the sale of the properties. **Sheffer v. Rardin, 620.**

Judicial admissions—pro se representation—A *pro se* respondent's arguments in a partitioning appeal that his judicial admissions should have been overlooked because he represented himself were overruled. **Sheffer v. Rardin, 620.**

Jury instructions—spoliation of evidence—excessive speed—proper— The trial court did not err by denying defendants' motion for new trial in a negli-

EVIDENCE—Continued

gence case as the trial court's jury instructions on spoliation of evidence and excessive speed were proper. **Rabon v. Hopkins, 351.**

Photographs—decomposed body—illustrative purposes—The trial court did not abuse its discretion in a first-degree murder prosecution by admitting evidence about decomposition of the victim's body. The photographs were used to illustrate the testimony of the officers who unearthed the body and of the pathologist who conducted the autopsy. The wounds the victim suffered were circumstantial evidence of defendant's premeditation and deliberation. **State v. Bedford, 414.**

Prior crimes or bad acts—DWI convictions—temporal remoteness—The trial court committed prejudicial error by admitting defendant's 1989 and 1990 convictions for driving while impaired (DWI). In light of the sixteen-year gap between her older convictions and her more recent one, defendant's eighteen and nineteen-year-old convictions, combined with her sole conviction for DWI occurring in 2006, did not constitute part of a clear and consistent pattern of criminality. **State v. Davis, 26.**

Prior incarceration—excluded at defendant's request—The prejudice from defendant's statement to an officer did not outweigh the probative value where defendant told the officer that he should have waited until midnight, when defendant would have been gone, before picking defendant up in New York for transportation to North Carolina. Although defendant argued on appeal that the jurors were not informed that he would have been released at the end of his New York sentence at midnight, defendant had objected to any testimony that he was incarcerated on unrelated charges in New York. **State v. Capers, 605.**

Testimony—lay opinion—calibers of projectiles—The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion *in limine* to exclude a detective's testimony that a bullet removed from the victim was a .40 caliber projectile. The testimony regarding the calibers of the projectiles retrieved from the crime scene was based upon the detective's own personal experience and observations relating to various calibers of weapons, and was admissible as a lay opinion under N.C.G.S. § 8C-1, Rule 701. **State v. Crandell, 227.**

Two-part statement—considered separately—The trial court did not err in a first-degree murder prosecution by excluding the first part of a statement but admitting the second. The trial court concluded that the first portion of the statement lacked credibility because the witness, who was one of the shooting victims, could not have had personal knowledge of the subject of the first portion of the statement. **State v. Capers, 605.**

Use of restraints when arrested—admissible—Plain error review was allowed for the unchallenged admission of testimony that defendant was handcuffed and shackled when he was arrested. Defendant challenged the admission of evidence about the use of restraints prior to trial rather than at trial. **State v. Capers, 605.**

FIREARMS AND OTHER WEAPONS

Conspiracy to discharge a firearm into occupied property—sufficient evidence—The trial court did not err by denying defendant's motion to dismiss the

FIREARMS AND OTHER WEAPONS—Continued

charge of conspiracy to discharge a firearm into occupied property. The State presented substantial evidence of an agreement for defendant to discharge a firearm at an individual standing in front of the doors to an occupied gymnasium and there was a substantial likelihood that the bullets would enter or strike the building. **State v. Dubose, 406.**

HIGHWAYS AND STREETS

Cartway—business with existing access—The trial court correctly granted summary judgment for respondents in a cartway proceeding where petitioners operated a small unincorporated pallet business on the property and contended that the access they had was not adequate for their business or for future growth. Although the definition of industrial plant in the context of a cartway proceeding does not exclude petitioners' small business, cartway petitioners are not entitled to ideal access. **Richards v. Jolley, 436.**

HOMICIDE

First-degree murder—instruction—premeditation and deliberation—The trial court did not err or commit plain error by instructing the jury on first-degree murder by premeditation and deliberation. There was sufficient evidence presented to submit this instruction to the jury. **State v. Crandell, 227.**

First-degree murder—motion to dismiss—sufficiency of evidence—malice—perpetrator—The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder. The evidence was sufficient to support the element of malice and for a jury to conclude that defendant was the perpetrator of the crime. **State v. Hunter, 506.**

First-degree murder—motion to dismiss—sufficiency of evidence—transferred intent—The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder. The State introduced substantial circumstantial evidence that defendant fired the shot that killed the victim and that defendant acted with malice, premeditation, and deliberation under the doctrine of transferred intent. **State v. Crandell, 227.**

Second-degree murder—instruction—intent—The trial court did not err or commit plain error by its instruction to the jury concerning the definition of intent in regard to the charge of second-degree murder. The trial court gave the pattern jury instruction three times, followed the third instruction with the definition of the word "intent" applied within the context of the instruction, repeated the instruction on malice, and then explained the meaning of "intent." **State v. Davis, 26.**

Second-degree murder instruction refused—evidence of premeditation and deliberation—not negated—The trial court properly refused to instruct on second-degree murder in a first-degree murder prosecution where the State presented evidence supporting premeditation and deliberation and defendant did not present evidence to negate the State's showing. Voicemail messages supported only an inference of drug impairment and passion but not anger or emotion strong enough to disturb defendant's ability to reason. **State v. Bedford, 414.**

INDICTMENT AND INFORMATION

Indictment—breaking or entering into a motor vehicle with the intent to commit larceny of the same vehicle—no fatal defect—The trial court did not lack subject matter jurisdiction to try defendant for breaking or entering into a motor vehicle because defendant's indictment on that charge was not fatally defective. An indictment charging a defendant with breaking or entering into a motor vehicle with the intent to commit larceny of the same motor vehicle contains no fatal defect, so long as the remaining elements of the offense are also charged in the indictment. **State v. Clark, 388.**

Short form indictment—first-degree murder—The short form indictment used to charge defendant with first-degree murder was constitutional. **State v. Crandell, 227.**

Sufficiency of indictment—legal entity capable of owning property—trusts—A *de novo* review revealed that the trial court did not err when it entered judgment on the charge of breaking and entering a motor vehicle even though defendant contended the underlying indictment was fatally defective. The language of the indictment indicated that the victim was a trust, and a trust is a legal entity capable of owning property. **State v. Chillo, 541.**

INJUNCTIONS

Preliminary injunction—foreclosure sale—upset bid period expired—mootness—A *de novo* review revealed that the trial court did not err by denying plaintiff's application seeking to have a foreclosure sale enjoined on the grounds that the hearing was not timely scheduled as required by N.C.G.S. § 45-21.34. The application was moot because the applicant was required to seek and obtain the requested injunction before the point at which the upset bid period expired. Further, the amount of the foreclosure sale did not appear inadequate or inequitable. **Goad v. Chase Home Fin., LLC, 259.**

INSURANCE

Automobiles—uninsured motorist coverage—underinsured motorist coverage—notice of coverage available—The trial court did not err in granting plaintiff insurance company's motion for summary judgment and denying defendant's motion for summary judgment in a case involving uninsured motorist (UM) and underinsured motorist (UIM) coverage. The mailing of the selection/rejection form by plaintiff established that there was not a total failure to inform defendant or decedent that up to $1,000,000.00 in UM/UIM coverage was available. **Nationwide Prop. & Cas. Ins., Co. v. Martinson, 104.**

Builder's risk policy—agency—reporting irregularities—The trial court did not err by granting summary judgment in favor of defendants in plaintiffs' suit to recover $87,000 under a builder's risk insurance policy. By its express terms, the insurance on the property was dependent upon plaintiffs' payment of premiums and submission of reporting forms. Plaintiffs' reporting irregularities abrogated the coverage under the policy. **Gore v. Assurance Co. of Am., 239.**

Builder's risk policy—failure to comply with reporting provisions—not a waiver—A *de novo* review revealed the trial court did not err by granting summary judgment in favor of defendants in plaintiffs' suit to recover $87,000 under a builder's risk insurance policy. An insurer's acceptance of reports or premium payments following an insured's failure to comply with the reporting provisions,

INSURANCE—Continued

specified as conditions of coverage, did not constitute a waiver of the condition. Plaintiffs breached the conditions of the policy such that no coverage existed under the policy. **Gore v. Assurance Co. of Am., 239.**

Builder's risk policy—material misrepresentation—The trial court did not err by granting summary judgment in favor of defendants in plaintiffs' suit to recover $87,000 under a builder's risk insurance policy. A material misrepresentation by an insured may prevent recovery under the policy. Plaintiffs' reporting of a property as a new start in August 2006, and then again in August 2007, at a time when the construction had been complete for nearly one year, constituted a willful and material misrepresentation by plaintiffs. **Gore v. Assurance Co. of Am., 239.**

Builder's risk policy—notice of cancellation not applicable to breach of conditions of coverage—Although plaintiffs contended the trial court erred by granting summary judgment in favor of defendants in plaintiffs' suit to recover $87,000 under a builder's risk insurance policy based on a failure to mail or deliver a notice of cancellation of the policy at least fifteen days before the proposed effective date of cancellation, plaintiffs' reliance on the notice provisions of N.C.G.S. § 58-41-15(b) was misplaced. The statute imposed an obligation of notice only with respect to cancellation and had no application with respect to a breach of the conditions of coverage. **Gore v. Assurance Co. of Am., 239.**

Duty to defend, indemnify, or cover—summary judgment proper—The trial court did not err in granting summary judgment in favor of plaintiff because there were no genuine issues of material fact as to whether defendant Auto-Owners Insurance Company had a duty under the insurance policy at issue to defend, indemnify, or cover defendant Cothran for the claims or judgments arising from plaintiff's lawsuit. **Bissette v. Auto-Owners Ins. Co., 321.**

Failure to cooperate—coverage not voided—Defendant Cothran's failure to cooperate in his defense in an action resulting from an automobile accident did not void any coverage that defendant Auto-Owners Insurance Company was required to provide Cothran under the insurance policy at issue. Auto-Owners failed to show that Cothran's non-compliance was prejudicial. **Bissette v. Auto-Owners Ins. Co., 321.**

INTEREST

Prejudgment interest—agreement between parties—The trial court did not err in an action to recover payment for goods sold and delivered by awarding prejudgment interest at the rate of eighteen percent based on an agreement between the parties to which defendants had judicially admitted. **J.M. Parker & Sons, Inc. v. William Barber, Inc, 682.**

JURISDICTION

Standing—taxpayers—challenge to tax incentives—The trial court erred in concluding that plaintiff Haugh lacked standing to bring suit for alleged violations of the North Carolina Constitution based on tax incentives granted by defendant Durham County to defendant Nitronex Corporation. Haugh averred in the complaint that he is a citizen, resident and taxpayer in Durham County and that he pays various types of taxes to Durham County government, including sales taxes. The trial court did not err in concluding that plaintiff Capps lacked

JURISDICTION—Continued

standing because his argument that he had been injuriously affected by the diminution of Nitronex's contribution toward Wake County's tax base as a result of Durham County's incentives failed. **Haugh v. Cnty. of Durham, 304.**

Subject matter jurisdiction—breach of employment contract—tortious interference with contract—Railway Labor Act—The trial court lacked subject matter jurisdiction over plaintiff's claims for breach of employment contract and tortious interference with contract because those claims were preempted by the Railway Labor Act. **Williams v. Am. Eagle Airlines, Inc., 250.**

Subject matter jurisdiction—land use permit—governed by administrative law—The trial court erred by exercising jurisdiction over the town of Oak Island's second application for a Coastal Area Management Act permit to develop land upon which plaintiffs had a non-exclusive easement. The application should have first been reviewed by the Department of Natural Resources. **Barris v. Town of Long Beach, 718.**

Subject matter jurisdiction—notice of appeal not timely—The North Carolina Property Tax Commission (Commission) lacked subject matter jurisdiction to consider taxpayer's appeal from the decisions of the Wilkes County Board of Equalization and Review regarding the valuation of taxpayer's property because taxpayer did not file timely notice of appeal to the Commission. **In re Appeal of La. Pac. Corp., 457.**

Subject matter jurisdiction—order from another state—The trial court did not err by failing to dismiss a child custody action *ex mero motu*. The Nevada district court concluded that North Carolina had jurisdiction, and the Court of Appeals cannot disturb an order from another state's district court, even if it is based on an order from this State that may be void. **Bohannan v. McManaway, 572.**

LANDLORD AND TENANT

Condemnation—termination clause in existing lease—applicable—The trial court did not err in a condemnation action by determining that the county had the right to terminate a lease pursuant to a contractual termination clause where defendant argued that the termination clause applied only to the original landlord, not the county; that it applied only during the initial term of the lease; and that it did not apply due to laches and equity. **Mecklenburg Cnty. v. Simply Fashion Stores, LTD., 664.**

Lease—extension agreement—void for uncertainty—The trial court did not err in a condemnation case by determining that defendant had no right to extend its lease for a second term. Even though the extension agreement of the original lease would have been valid and enforceable, a modification was void for uncertainty because it provided that the lease would be renewed on "such terms as may be agreed on." There was no merit to the argument that the actions of the parties should govern. **Mecklenburg Cnty. v. Simply Fashion Stores, LTD., 664.**

LARCENY

Sufficiency of evidence—motion to dismiss properly denied—The trial court did not err by denying defendant's motion to dismiss the charge of attempted

LARCENY—Continued

nonfelonious larceny as the State presented substantial evidence of all the elements of the offense. **State v. Clark, 388.**

LIENS

Security interests in real property—date of first furnishing—no issue of material fact—The trial court did not err in granting partial summary judgment in favor of plaintiffs in a declaratory judgment action concerning security interests in certain real property because no genuine issues of material fact existed with respect to plaintiffs' claims for declaratory relief, including the date of first furnishing. **Lawyers Title Ins. Corp. v. Zogreo, LLC, 88.**

Security interests in real property—lien enforcement action—not determinative of date of first furnishing—Even if defendant Bunn's and Mangum's lien enforcement actions were "actions *in rem*," the resulting lien judgments did not establish the date of first furnishing upon which the Bunn and Mangum judgments were based as against plaintiffs. **Lawyers Title Ins. Corp. v. Zogreo, LLC, 88.**

Security interests in real property—not impermissible collateral attack against lien judgments—Plaintiffs' civil action to determine security interests in certain real property did not represent an impermissible collateral attack against valid lien judgments held by defendants Bunn and Mangum because plaintiffs did not seek "nullification" of the Bunn and Mangum judgments, and plaintiffs might have been entitled to the relief requested without those judgments being declared void as between the parties to the lien enforcement actions. **Lawyers Title Ins. Corp. v. Zogreo, LLC, 88.**

MOTOR VEHICLES

Driving while impaired—length of detention—In a case dealing with the length of time a driving while impaired defendant was detained and the denial of defendant's motion to dismiss the charge, the trial court's finding that defendant's roommate was determined not to fulfill the statutory requirements of being a sober, responsible adult was supported by the evidence. Furthermore, the court's conclusion that no substantial violation of defendant's rights had occurred was supported by the evidence. **State v. Daniel, 364.**

Driving while impaired—reckless driving—second-degree murder—assault with deadly weapon inflicting serious injury—motion to dismiss—sufficiency of evidence—blood alcohol concentration—impairment—The trial court did not err by denying defendant's motion to dismiss several of the charges against her including second-degree murder, assault with a deadly weapon inflicting serious injury, driving while impaired, and reckless driving. The State was required to prove either defendant's blood alcohol concentration (BAC) at a relevant time after driving or that defendant was impaired. The State expert's testimony that defendant's BAC was 0.18 was sufficient to survive a motion to dismiss these charges. However, as the admission of the witness's odor test testimony was prejudicial, defendant was granted a new trial. **State v. Davis, 26.**

Implied-consent offense—refusal of chemical test—license revocation proper—The trial court did not err in affirming respondent's order upholding the revocation of petitioner's driver's license for refusing to submit to a chemical

MOTOR VEHICLES—Continued

test. The propriety of the police officers' initial traffic stop of defendant was not within the statutorily prescribed purview of a license revocation hearing, the evidence supported the challenged findings of fact, and the findings of fact supported the conclusion of law that police officers had reasonable grounds to believe that petitioner had committed an implied consent offense. **Hartman v. Robertson, 692.**

NEGLIGENCE

Contributory negligence—motion to preclude evidence properly granted— The trial court did not err by granting plaintiff's motion to preclude defendants from offering evidence of plaintiff's contributory negligence as the trial court did not abuse its discretion in denying defendants' motion for leave to amend their answer to include contributory negligence as an affirmative defense. Because plaintiff's contributory negligence was not at issue in the case, any probative value of evidence of plaintiff's conduct was outweighed by the danger of such evidence confusing the jury. **Rabon v. Hopkins, 351.**

Duty of reasonable care—owner of construction site—shifted to contractor—hidden dangers—The trial court did not err in granting summary judgment in favor of defendant in a negligence action. The duty of reasonable care, initially borne by defendant as owner and possessor of the construction site premises, had been shifted away from defendant at the time of plaintiff's accident such that defendant was not required to inspect the construction site for hidden dangers. **McCorkle v. N. Point Chrysler Jeep, Inc., 711.**

Judgment notwithstanding verdict—sufficient evidence—motion properly denied—The trial court did not err by denying defendants' motion for judgment notwithstanding the verdict in a negligence action arising out of a vehicular accident. Even if plaintiff had failed to offer sufficient evidence that defendant Hopkins failed to properly connect an air line which controlled the brakes on her tractor trailer, there was sufficient evidence that defendant Hopkins failed to take the appropriate steps to avoid a collision following the onset of that emergency situation. **Rabon v. Hopkins, 351.**

Military service—action against airman—limitations tolled—The trial court did not err by denying defendant's motion on the pleadings in an automobile accident case where defendant, an Air Force reservist on active duty, had raised the statute of limitations. The federal Servicemembers' Civil Relief Act provides for the tolling of the statute of limitations by and against members of the military. **Beaver v. Fountain, 174.**

OBSTRUCTION OF JUSTICE

Failed to show intentional acts for purpose of disrupting or obstructing—summary judgment properly granted—A *de novo* review revealed that the trial court did not err by granting summary judgment in favor of defendants with respect to a common law obstruction of justice claim. In the absence of a properly served subpoena or other process or a judicial decree requiring his presence, defendant doctor had no duty to appear and testify at the trial of plaintiff's automobile accident case. Further, plaintiff failed to allege or forecast any specific facts tending to show defendant intentionally created an erroneous medical report and then failed to correct it for the purpose of disrupting or obstructing plaintiff's automobile accident case. **Blackburn v. Carbone, 519.**

PLEADINGS

Leave to amend answer properly denied—undue delay—no abuse of discretion—The trial court did not abuse its discretion in denying defendants' motion for leave to amend their answer to a negligence action to include the affirmative defense of contributory negligence where defendants failed to offer any sufficient explanation for the nine month delay in seeking to amend their answer. **Rabon v. Hopkins, 351.**

Sanctions—other papers—The trial court erred in sanctioning the town of Oak Island in connection with the town's submission of a second site plan for the development of land upon which plaintiffs had a non-exclusive easement. The site plan did not constitute "other papers" pursuant to N.C.G.S. § 1A-1, Rule 11(a). **Barris v. Town of Long Beach, 718.**

Striking affirmative defenses—consideration of alternative sanctions—The trial court did not abuse its discretion in a wrongful death case by allegedly failing to consider alternative sanctions before striking defendant's affirmative defenses. Although defendant contended that he offered to answer certain questions at the deposition, he failed to show that he ever committed to answering the questions relevant to plaintiff's response to his contributory negligence defense or that he committed to a specific time frame for answering them. Further, the trial court expressly considered staying the proceedings and found it to be an inadequate option. **Lovendahl v. Wicker, 193.**

POSSESSION OF STOLEN PROPERTY

Lesser-included offense—unauthorized use of motor vehicle—Defendant's convictions for possession of stolen goods, obtaining habitual felon status, and driving while license revoked were reversed or remanded where defendant's request for an instruction on the lesser-included offense of unauthorized use of a motor vehicle was erroneously denied. All of the essential elements of unauthorized use of a motor vehicle are essential elements of possession of stolen goods and the evidence at trial contradicted two of the elements of possession of stolen goods. The State did not meet its burden of showing that the error was harmless. **State v. Nickerson, 136.**

PREMISES LIABILITY

Store's duty to protect customers from third parties—acts of fleeing shoplifter—not foreseeable—The trial court correctly granted summary judgment for defendant Lowe's Foods on a negligence claim by a bystander in the parking lot who was injured when Regina Jones fled after being discovered shoplifting. It was not foreseeable that Jones would exit the store after the loss prevention officer revealed his identity, enter a vehicle parked 20 feet from the entrance, speed through the parking lot, turn left down the traffic aisle where plaintiff was standing, and strike plaintiff. **Betts v. Jones, 169.**

PROBATION AND PAROLE

Insufficient evidence of violation—no written notice of conditions—revocation erroneous—The trial court erred by revoking defendant's probation where the State presented no evidence that defendant "resided" in a household with a minor child and defendant was never provided written notice of the two remaining conditions of his probation which were listed on the probation violation report. **State v. Crowder, 723.**

PROCESS AND SERVICE

Requests for admissions—service on new address known to counsel—The trial court did not err by finding that plaintiff's requests for admissions were properly served where plaintiff's counsel served the requests at defense counsel's new address rather than the address in the answer and the requests for admissions were in the file when it was turned over to substitute counsel. The Court of Appeals declined to establish a rule that plaintiff must rely on the last listed address on a responsive filing rather than the last known address. **J.M. Parker & Sons, Inc. v. William Barber, Inc., 682.**

Service of process—purposeful avoidance—alias and pluries summons—Plaintiff's argument that the trial court erred by dismissing his complaint because defendant purposefully and knowingly avoided service of process and because defendant's insurance company may have assisted him in avoiding service was overruled. There was no evidence in the record to substantiate plaintiff's baseless allegations and it was plaintiff's own failure to timely sue out his alias and pluries summons, and not defendant's alleged avoidance of service, that caused plaintiff's action to be barred by the statute of limitations. **Kimball v. Vernik, 462.**

ROBBERY

Sufficiency of evidence—intent to commit a taking—The trial court erred in denying defendant's motion to dismiss the charge of attempted robbery with a firearm because there was insufficient evidence from which an intent to commit a taking could be inferred. **State v. Johnson, 443.**

SATELLITE-BASED MONITORING

Clerical error—basis of order—remanded—An order that defendant enroll in lifetime satellite-based monitoring was remanded for correction of a clerical error in the selection of the offense supporting the finding that defendant was guilty of a reportable conviction, and for consideration of whether defendant was a sexually violent predator, a recidivist, or whether his conviction involved the abuse of a minor, as well as whether defendant required the highest possible level of supervision and monitoring. **State v. Treadway, 286.**

SEARCH AND SEIZURE

Fourth Amendment—detention following traffic stop—The question of whether there was a reasonable suspicion of criminal activity sufficient to justify a further period of detention after a traffic stop was not reached where neither the driver nor the passengers had identification, so that a citation could not be issued, and the issues arising from the initial traffic stop could not be quickly resolved. **State v. Hernandez, 591.**

Search incident to arrest—carrying concealed weapon—The trial court erred by partially granting defendant's motion to suppress contraband found during the search of his truck after defendant was arrested for carrying a concealed weapon. A search incident to arrest for evidence related to the charge of carrying a concealed weapon was within the allowable scope of *Arizona v. Gant*, 556 U.S. 332. **State v. Foy, 562.**

Traffic stop—implied-consent offense—motion to suppress evidence—not subject to exclusionary rule—The Court of Appeals rejected petitioner's argument that evidence gathered subsequent to his stop for a suspected implied-

SEARCH AND SEIZURE—Continued

consent offense should have been suppressed because the traffic stop was illegal. Even if the officers lacked reasonable and articulable suspicion to stop petitioner, the evidence that resulted from the stop was not subject to the exclusionary rule. **Hartman v. Robertson, 692.**

Traffic stop—inoperable tag light—reasonable suspicion—The trial court properly denied defendant's motion to suppress evidence of drugs and a firearm found after a traffic stop where defendant was stopped at night for having an inoperable tag light. The trial court's finding that the officers saw an on-going equipment violation supported the trial court's conclusion that the officers had reasonable suspicion to stop defendant's vehicle. **State v. Ford, 699.**

Validity of warrant—incorrect address—The trial court did not err in a second-degree murder case by denying defendant's motion to suppress evidence obtained during the search of the victim's residence based on an alleged invalid search warrant. Standing alone, an incorrect address on a search warrant did not invalidate the warrant where other designations were sufficient to establish with reasonable certainty the premises, vehicles, or persons to be searched, and a description or designation of the items constituting the object of the search and authorized to be seized. **State v. Hunter, 506.**

SENTENCING

Aggravating factors—criminal street gang activity—finding made outside of defendant's presence—The trial court erred by finding in each of two judgments that the offenses of discharging a firearm on educational property and conspiracy to discharge a firearm into occupied property involved criminal street gang activity pursuant to N.C.G.S. § 14-50.25 as the findings were made outside of defendant's presence and without giving him an opportunity to be heard. **State v. Dubose, 406.**

Aggravating factors—knowingly created great risk of death to more than one person with hazardous device or weapon—The trial court did not err by submitting the aggravating factor to the jury that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person even though defendant was already charged with assault with a deadly weapon inflicting serious injury (AWDWISI). AWDWISI only required that a defendant use a deadly weapon and did not require the proof necessary for the aggravating factor. **State v. Davis, 26.**

Aggravating factors—offense especially heinous, atrocious, or cruel—The trial court did not err in a second-degree murder case by instructing the jury on the aggravating factor that the offense committed was especially heinous, atrocious, or cruel. A reasonable juror could determine from the evidence presented that defendant's fatal assault upon his seventy-two-year-old grandmother, whom he stabbed with a knife, struck in the head with a clothes iron, strangled with a power cord from the iron, and impaled with a golf club shaft eight inches into her back and chest, was especially heinous, atrocious, and cruel. **State v. Hunter, 506.**

Felony classification—clerical error—The trial court erroneously classified defendant's conviction for sale and delivery of a Schedule III controlled substance as a Class G felony rather than a Class H felony. This offense was remanded for correction of the clerical error. **State v. Dobbs, 272.**

SENTENCING—Continued

Habitual felon conviction—argument overruled—Defendant's argument that the trial court erred by sentencing defendant as an habitual felon was overruled. Defendant's argument was premised upon his challenge to his breaking or entering into a motor vehicle conviction, which was rejected by the Court of Appeals. **State v. Clark, 338.**

SEXUAL OFFENSES

First-degree—instructions—specific acts not specified—The trial court was not required in a prosecution for first-degree sexual offense against a child to instruct the jury that the State had to prove the specific act alleged in the indictment. **State v. Treadway, 286.**

First-degree—two counts—instructions—There was no error in a prosecution for two counts of first-degree sexual offense where defendant alleged that the court did not properly instruct the jury that the two counts referred to two victims. The court properly instructed the jury, the jury was given verdict sheets that separated the charges, and the jury found defendant guilty of one and not guilty of the other. **State v. Treadway, 286.**

STATUTES OF LIMITATION AND REPOSE

Zoning ordinance amendment—failure to give proper notice—The trial court did not err in a zoning ordinance amendment case by granting defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) based on expiration of the two-month statute of limitations under N.C.G.S. § 160A-364.1. Even if defendant failed to properly notify plaintiff under Chapter 160A, plaintiffs' complaint was filed more than two years following defendant's adoption of the ordinances. **Templeton v. Town of Boone, 50.**

TAXATION

Authority to tax—Public Purpose Clauses—not violated—bound by prior precedent—The trial court did not err in granting summary judgment in favor of defendants with respect to alleged violations of the Public Purpose Clauses of the North Carolina Constitution. Incentives parallel to those at issue had already been held to comport to the Public Purpose Clauses of our State Constitution in view of the test articulated in *Madison Cablevision*, 325 N.C. 634, and the Court of Appeals was bound by that precedent. **Haugh v. Cnty. of Durham, 304.**

Tax incentives—not exclusive emoluments—The trial court properly granted summary judgment in favor of defendants with respect to purported violations of Article I, section 32 of the North Carolina Constitution. Pursuant to the Court of Appeals' previous holdings in *Peacock*, 139 N.C. App. 487, and *Blinson*, 186 N.C. App. 328, and in view of its holding that challenged incentives offered by defendant Durham County to defendant Nitronex were for a public purpose, the incentives at issue necessarily were not exclusive emoluments. **Haugh v. Cnty. of Durham, 304.**

Tax incentives—political question doctrine—action not barred—The trial court did not err in concluding that the propriety of tax incentives similar to those at issue had already been judicially established and that any further review of Durham County's decision as to whether to offer the incentives or the amount thereof was barred by the political question doctrine. **Haugh v. Cnty. of Durham, 304.**

TERMINATION OF PARENTAL RIGHTS

Failure to verify petition—no jurisdiction—The trial court's order terminating respondent mother's parental rights was vacated because the petition was not verified as required by N.C.G.S. § 7B-1104. Thus, the trial court never obtained jurisdiction over the action, and the termination order was void. **In re T.R.M., 160.**

Grounds—lacked ability or willingness to establish safe home—The trial court did not abuse its discretion by terminating respondent mother's parental rights based on the best interests of the minor child. Clear and convincing evidence was presented to support the findings of fact under N.C.G.S. § 7B-1111(a)(9) that respondent lacked the ability or willingness to establish a safe home. **In re D.J.E.L., 154.**

Grounds—willful failure to pay reasonable portion of cost of child's care—willfully left child in foster care for over twelve months—The trial court did not err by terminating respondent father's parental rights to his minor daughter. Respondent did not challenge the trial court's conclusion that he willfully failed to pay a reasonable portion of the cost of the child's care. Further, the findings were sufficient to support the conclusion that respondent willfully left the child in foster care for over twelve months and had not made reasonable progress to correct the conditions which led to the child's removal from the home. **In re D.H.H., 549.**

Guardian ad litem for parent—required to be at termination hearing—The trial court erred by terminating respondent mother's parental rights because it allowed her guardian *ad litem* (GAL) to withdraw at the beginning of the termination hearing. Since the GAL was appointed in accordance with N.C.G.S. § 7B-602 and N.C.G.S. § 1A-1, Rule 17, it was the duty of the GAL to act as a guardian of procedural due process for that parent, and to assist in explaining and executing her rights. Even in the absence of respondent, the GAL was still required to remain and represent respondent to the fullest extent feasible during the hearing. The order was remanded for a new hearing. **In re A.S.Y., 530.**

Uniform Child Custody Jurisdiction and Enforcement Act—modification of custody order—no subject matter jurisdiction—The trial court lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act to terminate respondent's parental rights. The order for termination modified an existing custody order entered by a Pennsylvania court and although the trial court satisfied the "home state" requirement, Pennsylvania had not lost continuing jurisdiction, Pennsylvania had not determined that North Carolina was a more convenient forum, and respondent continued to reside in Pennsylvania. **In re K.U.-S.G., 128.**

TRESPASS

Easements—parol evidence—parties' intentions—The trial court did not err by denying plaintiffs' claim for trespass and ruling that defendants had an easement over the pertinent portion of plaintiffs' property. The deeds, together with parol evidence emanating from both extrinsic documents and the circumstances surrounding the conveyances, created a material issue of fact regarding the parties' intentions which was appropriate for resolution by the trial court. **Edwards v. Hill, 178.**

TRUSTS

Foreclosure proceeding—attorney fees—audit of expenses in final report—reasonableness determination improper for superior court or clerk of court—The trial court erred by affirming a clerk of court's order disapproving a trustee's final report after a foreclosure proceeding, based on the amount of attorney fees. Neither the superior court nor the clerk of court had authority to make determinations of reasonableness of expenses when auditing the trustee's final report. Under N.C.G.S. § 45-21-33, the clerk was merely authorized to determine whether the entries in the report reflected the actual receipts and disbursements made by the trustee. An aggrieved party may challenge the trustee's actions in a separate action focused on the propriety of the trustee's actions instead of by motion filed at the time of the audit. **In re Foreclosure of Vogler Realty, Inc., 212.**

VENUE

Motion to dismiss—treated as motion to transfer—A motion to dismiss for improper venue was treated as a motion to transfer venue and, as venue was improper, the trial court should have transferred the case. **Roberts v. Adventure Holdings, LLC, 705.**

Residence of guardian ad litem—not alone sufficient—A guardian *ad litem's* residence, standing alone, was not sufficient to establish venue. **Roberts v. Adventure Holdings, LLC, 705.**

WILLS

Intestate succession—legitimation—statutory requirements—The trial court did not err in affirming the clerk of court's order determining that neither petitioner was a legitimate heir to decedent's estate. Although the evidence tended to show that decedent informally acknowledged paternity of both petitioners, that acknowledgment did not fulfill the statutory requirements for legitimation under N.C.G.S. § 29-19(b)(1). Petitioners failed to show compliance with any of the four forms of legitimation necessary for illegitimate children to inherit from or through their putative fathers. **In re Williams, 148.**

WORKERS' COMPENSATION

Attorney fees—stubborn litigiousness—The Industrial Commission did not abuse its discretion in a workers' compensation case by ordering defendant to pay attorney fees to plaintiff's attorney where defendant's denials of plaintiff's claim evidenced stubborn, unfounded litigiousness. **Javorsky v. New Hanover Reg'l Med. Ctr., 644.**

Burden of proof—occupational disease—sufficient exposure to cause symptoms—The Industrial Commission did not err in a workers' compensation case by allegedly utilizing an incorrect legal standard to determine whether the evidence concerning exposure to toxic or pathogenic substances sufficed to meet plaintiffs' burden of proof. Contrary to plaintiffs' assertion, the Commission did not require plaintiffs to prove the exact level of harmful chemicals to which they were exposed rather than simply requiring them to prove sufficient exposure to cause their symptoms. **Huffman v. Moore Cnty., 471.**

Compliance with prior mandate—findings of fact—The Industrial Commission did not err in a workers' compensation case by allegedly failing to comply

WORKERS' COMPENSATION—Continued

with the Court of Appeals mandate in *Huffman II*. The Commission complied with the mandate by revising its findings of fact to avoid the noted deficiencies. **Huffman v. Moore Cnty., 471.**

Findings—current status—evidence at hearing—There was no error or prejudice in a workers' compensation hearing where the Industrial Commission made findings about the current status of plaintiff and of the patient safety manager for defendant employer. Those findings were based on competent evidence received as of the date of the hearing. **Javorsky v. New Hanover Reg'l Med. Ctr., 644.**

Findings of fact—evidentiary support—test results—The Industrial Commission did not err in a workers' compensation case by its findings of fact. Plaintiffs' challenge to the evidentiary support for the findings was an attack upon the relevance of the environmental testing results rather than an attack upon the accuracy of the Commission's description of the test results. It was the Commission's job to weigh the credibility of the evidence. **Huffman v. Moore Cnty., 471.**

Injury by accident—unreliable testimony—The Industrial Commission did not err by denying plaintiff's claim for workers' compensation benefits. Competent evidence in the record supported the Commission's finding that plaintiff's testimony regarding a bus accident was inconsistent with the greater weight of the evidence. Further, plaintiff's medical causation testimony did not establish a compensable injury because it was based upon this unreliable testimony. **Garner v. Capital Area Transit, 266.**

Neck injury—findings—medical treatment required—supported by evidence—The Industrial Commission did not err in a workers' compensation case by finding and concluding that plaintiff required medical treatment for her neck injury and that her employer, a hospital, was financially responsible. There was medical testimony that took the case out of the realm of conjecture and remote possibility and provided sufficient, competent evidence of a proximate causal relation to support the Commission's findings and subsequent conclusion. **Javorsky v. New Hanover Reg'l Med. Ctr., 644.**

Neck injury—microsurgery—treating physicians—two hundred miles apart—The Industrial Commission did not err in a workers' compensation case by appointing treating physicians located 200 miles apart where there were unchallenged findings that less invasive microsurgery was a reasonable option. Given the practical considerations of follow-up visits to the provider of the microsurgery, the Commission did not abuse its discretion by ordering defendant to pay for plaintiff's reasonable medical treatment as well as attendant travel expenses. **Javorsky v. New Hanover Reg'l Med. Ctr., 644.**

Occupational disease—expert witnesses—qualifications—credibility—The Industrial Commission did not err in a workers' compensation case by relying on the expert testimony of two doctors that plaintiffs did not suffer from a compensable occupational disease. Both doctors were qualified as experts under N.C.G.S. § 8C-1, Rule 702 based upon their knowledge, skill, experience, training, or education. Further, it was the Commission's job to weigh the credibility of the evidence. **Huffman v. Moore Cnty., 471.**

WORKERS' COMPENSATION—Continued

Parsons presumption—additional medical treatment—directly related to compensable injury—The Industrial Commission did not err in a workers' compensation case by concluding that defendants had not rebutted the *Parsons* presumption that additional medical treatment was directly related to the compensable injury. A doctor's statements as to "some correlation" did not satisfy defendants' burden of showing that the medical treatment was not directly related to the compensable injury. **McLeod v. Wal-Mart Stores, Inc., 555.**

Suitable work—physical limitations—The Industrial Commission did not err in a workers' compensation case by concluding that a floor crew/maintenance associate position was unsuitable for plaintiff based on his physical limitations. **McLeod v. Wal-Mart Stores, Inc., 555.**

ZONING

Standing to challenge ordinance amendment—motion to dismiss granted—A *de novo* review revealed that the trial court did not err in a zoning ordinance amendment case by granting defendant's motion to dismiss plaintiffs' complaint for lack of standing. Plaintiff Templeton did not have standing to bring a constitutional or statutory claim against defendant, and plaintiff Bird failed to allege facts sufficient to have standing to bring constitutional claims or a statutory claim against defendant to challenge the Steep Slope Ordinance. However, plaintiff Bird did have standing to bring a statutory challenge against the Viewshed Protection Ordinance. **Templeton v. Town of Boone, 50.**