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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

MARCO PETERS PLAINTIFF v. LISA PENNINGTON DEFENDANT

No. COA10-91

(Filed 1 March 2011)

1. Appeal and Error— interlocutory orders and appeals—merged into final order—timely appeal

The Court of Appeals had jurisdiction over a custody case where the trial court's 6 March order did not determine all of the issues, those issues were determined by an order on 20 May, and defendant's appeal on 6 June was timely. The original order became part of a final order on 20 May.

2. Child Custody and Support— custody—best interests analysis—change of circumstances not found

The trial court in a child custody case correctly proceeded directly to the best-interests analysis without finding a substantial change in circumstances where a prior consent order dealt with narrow matters and did not incorporate the separation agreement. It was not necessary to decide whether the consent order could constitute a final custody order since its issues were not at the crux of the appeal.

3. Child Custody and Support— damage to child—ultimate conclusion—supported by findings

There were ample unchallenged findings of fact in a child custody dispute to support the trial court's ultimate factual conclusion that defendant caused physical and psychological damage to her child.

4. Child Custody and Support— mental or emotional harm to child—expert testimony not required

District court judges have the training and experience to make causal decisions regarding child custody and expert testimony is not required to determine the cause of mental or emotional harm to the children. The trial court's conclusion here was supported by the findings and evidence, except the finding that DSS substantiated allegations of abuse. The evidence indicated that DSS substantiated neglect but not abuse.

5. Child Custody and Support— allocation of physical and legal custody—medical decision making—no error

The trial court did not abuse its discretion in a child custody case by allocating to plaintiff permanent sole physical and legal custody with the exception of temporary custody related to medical decision making, which was shared. The portion of the order indicating that the medical decision-making provision could be modified if plaintiff demonstrated responsibility would require a substantial change in circumstances, as would a similar provision on visitation.

6. Child Visitation— visitation restricted—clear, cogent, and convincing standard—not required

The trial court was not required to apply the clear, cogent and convincing evidentiary standard when restricting defendant's visitation with her children in a custody case because the court did not prohibit all visitation or contact.

7. Child Visitation— therapeutic visitation—controlled by therapists

The trial court did not err by authorizing therapeutic visitation between defendant and her children to be controlled by therapists. This arrangement did not present the problems inherent in custodian-controlled visitation because neutral decision makers, who were in the best position to evaluate the mental condition of defendant and the children, had the authority to craft the details of an elastic treatment and visitation program.

8. Child Custody and Support— mother required to accept court's conclusion—belief rather than behavior

The trial court abused its discretion in a child custody case by requiring defendant to accept as true the court's conclusion that she harmed her children. This requirement mandates that

defendant and the therapist attain a standard based upon defendant's beliefs rather than her behavior.

9. Child Custody and Support— uninsured therapy costs—support rather than costs

The trial court did not err in a child custody case by taxing defendant with the children's uninsured therapy costs as "equitable" costs. Uninsured therapy expenses are not taxable costs but are awarded pursuant to the court's ability to structure child support.

10. Attorney Fees— child custody—court's observation of attorney

The trial court did not err in its award of attorney fees in a child custody case where the court had ample opportunity to observe the attorney whose fees were questioned and to judge her reputation for diligence and competence.

11. Attorney Fees— child custody—factors

The award of attorney fees in a child custody case was supported by the complexity of the case, the difficulty of litigation-related issues, and the results obtained.

12. Attorney Fees— payment on a schedule—interest

The trial court did not abuse its discretion when awarding attorney fees in a child custody case by requiring payment on a schedule since defendant was free to satisfy the judgment early. However, the portion of the order imposing interest was vacated.

13. Costs— child custody—litigation expenses

The portions of an award of costs other than attorney fees in a child custody case were remanded for a hearing on how those costs were incurred and whether they are authorized by statute.

14. Pleadings— sanctions—inadequate inquiry into allegations

The trial court correctly decided to sanction an attorney in a child custody case where the attorney either did not make an adequate inquiry into factual allegations or did not reasonably believe that the allegations were well-grounded in fact.

Appeals by Defendant and her trial counsel, Erica N. Burns, from five orders of the Mecklenburg District Court, Judge Rebecca T. Tin presiding: the first a 6 March 2009 order addressing permanent child custody; the second a 6 March 2009 summary order provided to the Charlotte Mecklenburg School System Legal Department; the third

entered 14 April 2009 awarding a preliminary injunction; the fourth entered 20 May 2009 awarding permanent child support and attorney's fees; and the fifth entered 29 May 2009 denying Defendant's motion for a stay, a new trial, and to recuse Judge Tin, and also imposing sanctions against Ms. Burns. Heard in the Court of Appeals 14 September 2010.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for Appellant Lisa Pennington.

James McElroy & Diehl, by Preston O. Odom, III, Jonathan D. Feit, and Sarah M. Brady, for Appellee Marco Peters.

Erica N. Burns, pro se Appellant.

HUNTER, JR., Robert N., Judge.

Defendant Lisa Pennington ("Dr. Pennington") appeals a series of rulings by the district court awarding primary custody, child support, injunctive relief, and attorney's fees to her former husband, and the children's father, Plaintiff Marco Peters ("Dr. Peters"). These orders severely restricted Dr. Pennington's visitation rights with the children pending further court review. They also imposed support obligations, taxed costs, and taxed attorney's fees. Erica N. Burns, Dr. Pennington's trial counsel, appeals Rule 11 sanctions imposed against her individually, which were awarded by the court for filing post-hearing motions to stay the aforesaid orders, seeking a new trial, and seeking the recusal of the presiding judge. We affirm the district court in part, vacate in part, and remand for further proceedings.

I. Factual and Procedural Background

Dr. Lisa Pennington, a child psychologist, and Dr. Marco Peters, a chiropractor, were married in 1997. They had two sons, Dennis and Frank, who were eight and ten, respectively, when the Court heard this case.[1] After the parties separated in 2005, they entered into a separation agreement in which they agreed to share joint physical and legal custody of the children. Two months later, Dr. Peters filed a complaint seeking absolute divorce, which was awarded in February of 2006. The divorce decree did not incorporate the separation agreement.

After the separation, the parties appear to have cooperated with each other regarding the joint custody of their children for approxi-

1. Pseudonyms conceal the identities of the juveniles involved in this case.

mately two years. A disagreement arose between the parents pertaining to medical care and educational issues. The parties mediated the dispute on 19 June 2007, resulting in a 31 July 2007 consent order. The consent order addressed three issues: medical care for Dennis's asthma, routine bedtimes for the children, and preparation for school. The consent order also contained a non-disparagement clause that prevented either party from making or allowing others to make disparaging comments about each other in the presence of the children.

The consent order acknowledged the parties' separation agreement in several places, including finding of fact 8:

> [P]ursuant to the parties' agreement, they are exercising joint legal and physical custody of their minor children, and they have practiced this in accordance with the schedule worked out between them. The parties acknowledge that joint legal custody means advising the other party of all medications and treatment prescribed or given to the minor children from any source, including homeopathic and Chinese herbal medicine.

On 26 September 2007, Dr. Pennington filed her first motion for permanent custody and child support. She alleged Dr. Peters neglected to attend to the children's schoolwork, allowed them to bathe with other children living in his home, failed to deliver them to soccer practice, failed to administer medications to the children according to the consent order, and was late in making his required contributions for the children's support (specifically, his duty to pay for health insurance and uninsured health costs). On 1 November 2007, Dr. Peters denied these allegations and moved for dismissal. A mediated settlement conference conducted on 18 January 2008 did not resolve the dispute.

On 1 February 2008, Dr. Pennington filed a second motion to restrict Dr. Peter's visitation rights. She based her motion on allegations that Dr. Peters and his fiancée sexually and physically abused the children. On 1 February 2008 and 4 February 2008, based on this second motion, two *ex parte* orders were entered: the first temporarily suspending Dr. Peters' visitation rights until a hearing could be held and the second appointing M. Timothy Porterfield as guardian *ad litem*. On 11 February 2008, Dr. Peters denied the allegations, asked the trial court to appoint a guardian *ad litem*, and requested the restoration of his custodial rights.

A hearing was held on Dr. Pennington's second motion on 18 February 2008 before Judge Christy Mann. The resulting order

restricted Dr. Peter's visitation to supervised visitation to be administered by the children's paternal grandparents, ordered the Mecklenburg County Department of Social Services (DSS) to conduct a child medical evaluation, ordered joint access to school and medical records, specified administration of asthma medication, and required cooperation with the guardian *ad litem* per N.C. Gen. Stat. § 7B-601(c). The order also contained the following restrictions with regard to the "communications regarding these proceedings":

> 6 b). Neither mother nor father shall discuss with the children these, or any other, legal proceedings nor the legal case in anyway. If a child brings the subject up on his own, the parent (both mother, Lisa Pennington or father, Marco Peters) shall say, ". . . those are subjects to be discussed with Mr. Porterfield . . ." and simply change the subject . . . .
>
> 6 c). Neither mother nor father shall discuss with the children the sexual allegation in any way . . . .

On 28 March 2008, Dr. Pennington filed a third motion with the court to restrict and clarify the role of the guardian *ad litem* in the proceedings and require that he make "evidence based decisions." Dr. Pennington based this motion on alleged conversations with the minor children about "inappropriate" communications or touching of the children during Dr. Peters' supervised visitations and her subsequent report of these conversations to the DSS supervisor and the guardian *ad litem*. Dr. Pennington requested that the children have the expertise of a child psychologist rather than or in addition to the guardian *ad litem* to discuss the alleged abuse or inappropriate behavior of Dr. Peters. The motion also alleged that, prior to the entry of the order of 28 February 2008, Dr. Pennington had supplied the children with a therapist, Michael Tanis, but had terminated the therapy after the 28 February 2008 order was entered. Although Dr. Peters contends this motion was denied by the court in April, the record does not appear to contain an order to that effect.

On 22 July 2008, Dr. Peters filed a motion for temporary and full custody and to show cause why Dr. Pennington should not be held in contempt for violation of Judge Mann's 28 February 2008 order, which, among other things, prohibited the parties from discussing the subject matter of the litigation with the children. The motion also sought child support, attorney's fees, and a limitation on Dr. Pennington's visitation rights. The factual predicate for his motion was that Dr. Pennington's allegations had been investigated by appro-

priate authorities (including DSS, the Charlotte-Mecklenburg County Police Department, and the court sanctioned therapist) and found to lack credibility or factual support. Dr. Peters' motion contended Dr. Pennington's allegations of abuse coincide with his deepening involvement with his new fiancée. Furthermore, Dr. Peters alleged Dr. Pennington's conduct clearly violated Judge Mann's order not to discuss or have others discuss the events of sexual abuse with the children. Dr. Peters alleged Dr. Pennington's conduct in making unfounded allegations and discussing them with the children was injurious to the children and resulted in fecal incontinence, suicidal ideations, marked change in behavior, withdrawal from family members, and emotional distress. On 23 July 2008, DSS opened an investigation of Dr. Pennington based upon the father's allegations. On 25 July 2008, Dr. Peters' request for a temporary injunction was granted in part—Dr. Pennington was restrained from filing any additional complaints without the consent of the guardian *ad litem* and all records were to be given to the guardian *ad litem*.

A hearing on the motion was set for the week of 8 August 2008. Before the hearing, the parties received a written report from Dr. Pugh-Lilly (the DSS and guardian *ad litem* selected therapist for the child evaluation). In addition, Dr. Pennington presented her own extensive affidavit, together with supporting affidavits from Dr. Viola Vaughan-Eden and Dr. Seth Goldstein criticizing the professional work of Dr. Pugh-Lilly's examination of the children. There is no order in the record derived from this hearing. Dr. Peters changed counsel, and the case was eventually set for a two-week, complex domestic trial beginning on 2 February 2009. Ms. Burns, a member of the Pennsylvania Bar, was admitted *pro hac vice* to serve as an additional member of Dr. Pennington's trial counsel.

Due to complaints filed by the parties, investigations were conducted that paralleled these legal proceedings. The Charlotte-Mecklenburg County Police Department and DSS investigated Dr. Pennington's allegations of abuse, determined they were unfounded, and closed the case. Following the report of Dr. Pugh-Lilly, DSS substantiated claims of neglect against Dr. Pennington.

Judge Rebecca T. Tin presided over a three-week trial, which commenced on 2 February 2009. Over twenty-four witnesses testified, including the parties, relatives and friends, school officials, law enforcement officers, DSS personnel, the boys' former and current therapists, and several expert witnesses. There were two central

issues: (1) whether Dr. Peters abused his sons and (2) whether Dr. Pennington's actions in connection with her allegations of abuse were abusive and caused damage to the children. The trial court concluded Dr. Pennington's allegations of sexual and physical abuse arose from Dr. Peters' and his fiancée's hygiene practices. Both children are uncircumcised and the father had shown the boys how to wash themselves. The younger child needed help cleaning himself after defecating. Dr. Peters' fiancée, who is of Japanese descent, had a custom of cleaning the boys' ears with an ear pick. The boys' reports of these events to their mother were cryptic, and she and her "live-in friend" made rash inferences arising from the boys' reports during a scuffle the boys had when playing. After the trial, the trial court announced a verbal order from the bench on 19 February 2009; the court entered a written version of the order on 6 March 2009.

The court classified the following findings as "conclusions of law":

1. Plaintiff/Father has never physically or sexually abused the minor children.

. . . .

3. Defendant/Mother has inflicted serious emotional, psychological, and physical damage on the minor children as a result of her false belief that Plaintiff/Father has abused them.

4. Defendant/Mother has quizzed, coerced, pressured, and directed the minor children in an effort to use their voices to tell false stories of sexual abuse by Plaintiff/Father.

5. While Defendant/Mother may have come to believe the false allegations of abuse, she overlooked the well-being of the minor children in trying to prove the allegations to be true at whatever cost.

6. Defendant/Mother, along with Mr. David Delac, has manipulated, whether intentionally or not, the minor children's recollections and memories, instilling in them false images of being sexually abused by their father.

7. Defendant/Mother's abuse of her children has been persistent and ongoing since January of 2008, despite Court Orders that she cease and desist from talking to her children about the allegations.

8. The minor children have deteriorated considerably to due Defendant/Mother's abuse.

> 9. The minor children face an imminent threat of harm if they are in Defendant/Mother's presence without supervision.

The trial court made the following conclusions of law regarding custody:

> 2. With the exception of medical decision-making, Plaintiff/Father is a fit and proper person to exercise the permanent sole physical and legal custody of the minor children. The custody order, as set forth below, is in the best interests and welfare of the minor children.
>
> . . . .
>
> 10. Defendant/Mother is not a fit nor proper person to exercise custody or unsupervised visitation with the minor children.
>
> . . . .
>
> 17. The temporary legal custody of the children with respect to medical decision making only shall be shared between the parties.

The 6 March 2009 order awarded "permanent sole physical and legal custody" to Dr. Peters. Dr. Pennington was permitted "therapeutic visitation" if Dr. Pennington's therapist and two of the boys' therapists "believe such therapeutic sessions are appropriate." The order forbids any further visitation by Dr. Pennington.

The order required both Dr. Pennington and the children to undergo therapy:

> 5. Defendant/Mother shall obtain mental health treatment by a provider who shall read this Order in full, shall commit to wholeheartedly accepting that the findings contained herein constitute the reality of Frank and Dennis's lives and Defendant/Mother's role in fabricating sex abuse allegations, even though she may have genuine belief that such events occurred, and shall work towards Defendant/Mother's rehabilitation in acknowledging that Plaintiff/Father has not sexually abused the minor children and in taking responsibility for the damage she has caused to her sons. Defendant/Mother's therapy may include any other areas that the provider identifies.
>
> . . . .
>
> 7. The minor children shall continue in therapy with Dr. Curran and Ms. Duncan, who shall read this order in its entirety and commit

> to accepting it wholeheartedly as the facts constituting the false allegations of sexual abuse with respect to Frank and Dennis. Dr. Curran and Ms. Duncan shall determine what type of therapy the minor children need in light of these findings.

The order requires Dr. Pennington to waive confidentiality to her therapeutic records if she is seeking unsupervised visitation. The order also stated the boys' therapists "should" work with Dr. Pennington's therapist to arrange "reunification therapy" when they determine it is appropriate.

The order indicates how the trial court intends to reevaluate visitation in the future:

> 11. The Court hopes to work toward supervised visitation for Defendant/Mother as soon as it is recommended by the GAL and the therapists. The goal, if possible, would include Plaintiff/Father as a supervisor and visits at Plaintiff/Father's home, so that the minor children see that Defendant/Mother believes Plaintiff/|Father and Plaintiff/Father's home is safe. This order, in regards to Defendant/Mother's contact with the minor children, is temporary in nature and will be reviewed and modified by the Court based upon Defendant/Mother's progress in therapy. . . .
>
> . . . .
>
> 13. On or before March 6, 2009, the Court shall conduct a hearing or conference to ensure therapeutic arrangements are in place and to consider a plan for supervised visitation when advisable by the GAL and the therapists.
>
> 14. Review hearings regarding Defendant/Mother's contact with the children should be scheduled every three to four months, unless the GAL requests an earlier hearing. At these hearings, the Court will review Defendant/Mother's therapeutic progress individually and her therapeutic progress in reunification therapeutic sessions with the minor children.
>
> 15. Defendant/Mother's future ability to obtain unsupervised visitation with the minor children will be based upon documented and transformative progress on the part of Defendant/Mother, testified to by multiple witnesses, including the children's therapists, Defendant/Mother's court-appointed therapist, Plaintiff/Father, Ms. Pam Pitser, and any other witnesses with direct knowledge of Defendant/Mother's interactions with the children in supervised situations, direct knowledge of the children's progress, or direct

> knowledge of discussions with Defendant/Mother regarding her changed perspective. Transformative progress by Defendant/Mother can also be documented through testimony of Defendant/Mother's family members, who Defendant/Mother must convince of the wrongness of her path in forcing the children to bear false witness against Plaintiff/Father. The children cannot visit unsupervised with Defendant/Mother in the presence of Defendant/Mother's extended family members if those family members still have a belief that Plaintiff/Father is sexually abusing the minor children. It may be that unsupervised visitation is never reached; this remains in the Court's sole discretion.

The trial court also ordered Dr. Pennington to pay all uninsured therapy costs incurred on behalf of the children due to her "role in creating this crisis." The order described this portion of the order as a separate equitable remedy.

Following the entry of this order, Dr. Peters sought a temporary restraining order, which the trial court granted on 16 March 2009. The order prevented Dr. Pennington's family members from visiting the children in the neighborhood and in school or communicating with them. This order was extended until the matter was subsequently set for hearing. In the interim period, Dr. Pennington's mother, father, and sister all filed motions to dismiss in part based on lack of jurisdiction. On 14 April 2009, the trial court granted a preliminary injunctive order prohibiting Dr. Pennington's relatives from contacting the children.

On 8 March 2009, Ms. Burns served a motion to stay enforcement of the court's order pending appeal as well as motions for a new trial under Rule 59 and a motion to recuse Judge Tin from further proceedings in this matter. Ms. Burns filed the motion on 8 March 2009, but local counsel for Dr. Pennington did not sign the motion. Dr. Pennington's local counsel was allowed to withdraw from representation by a 6 April 2009 court order.

Following this motion, Dr. Peters, the guardian *ad litem*, and the court *sua sponte* all filed responses seeking Rule 11 sanctions including attorney's fees. At the core of Ms. Burns' motions were allegations that the trial court refused to hear all the evidence Dr. Pennington sought to put before the court and that the court had reached its conclusions adverse to Dr. Pennington's position before the close of evidence. Subsequently, the court ruled from the bench and entered a written order on 29 May 2009 denying the motions for stay, new trial, and recusal. The court also sanctioned Ms. Burns under Rule 11 by

ordering her to pay $7750 in attorney's fees to opposing counsel, $1820 in attorney's fees to the guardian *ad litem*, and $875 for costs incurred by the court in dealing with these motions.

II. Jurisdiction

[1] The trial court's 6 March 2009 permanent custody order did not determine all the issues presented by Dr. Peters' 22 July 2008 motion for immediate temporary custody, full permanent custody, child support, and attorney's fees and costs. All remaining issues presented by the parties' initial permanent custody motions were determined 20 May 2009 when the trial court entered its order addressing permanent child support, attorney's fees, and costs. The original custody order became part of a final order at this time. Therefore, Dr. Pennington's notice of appeal from both of the 6 March 2009 orders, which was filed 6 June 2009, was timely. *See* N.C. R. App. P. 3(c)(1) ("In civil actions and special proceedings, a party must file and serve a notice of appeal . . . within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure . . . ."); *N.C. Dep't of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 710 (1999) (holding a party is not required to appeal an interlocutory order in order to preserve the right to appeal when that order becomes final). Dr. Pennington gave timely notice of appeal as to the other orders as well. Ms. Burns also gave timely notice of appeal.

Appeal lies of right directly to this Court from final orders of a district court. N.C. Gen. Stat. § 7A-27(c) (2009). Therefore, we have jurisdiction over Dr. Pennington's and Ms. Burns' appeals.

III. Analysis

A. Dr. Pennington's Child Custody Appeal

We review the 6 March 2009 permanent custody order under the standard three prong test for appellate review of orders resulting from a custody bench trial: we ascertain (1) whether the challenged findings of fact are supported by substantial evidence; (2) whether the trial court's findings of fact support its conclusions of law; and (3) whether the trial court abused its discretion in fashioning the custody and visitation order.

1. Standard of Review

In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if

there is sufficient evidence to support contrary findings. *E.g.*, *Everette v. Collins*, 176 N.C. App. 168, 170, 625 S.E.2d 796, 798 (2006). "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). Unchallenged findings of fact are binding on appeal. *See, e.g.*, *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("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."). The trial court's conclusions of law must be supported by adequate findings of fact. *Witherow v. Witherow*, 99 N.C. App. 61, 63, 392 S.E.2d 627, 629 (1990). Whether a district court has utilized the proper custody modification standard is a question of law we review *de novo*. *See, e.g.*, *Simmons v. Arriola*, 160 N.C. App. 671, 674-76, 586 S.E.2d 809, 811-12 (2003) (according no deference to the trial court's modification standard determinations). "Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette*, 176 N.C. App. at 171, 625 S.E.2d at 798.

2. Whether the trial court utilized the proper legal framework

[2] Dr. Pennington argues the entire 6 March 2009 custody order must be vacated because the trial court failed to determine whether there had been a substantial change in circumstances affecting the welfare of the children since the 31 July 2007 consent order. She contends the 31 July 2007 consent order incorporated the parties' separation agreement, and therefore, the court was required to conclude there had been a substantial change in circumstances before modifying the joint custody provisions contained in the separation agreement. We disagree.

If a child custody or visitation order is permanent, a court may not modify that order unless it finds there has been a substantial change in circumstances affecting the welfare of the child. *E.g.*, *Arriola*, 160 N.C. App. at 674, 586 S.E.2d at 811. If the court concludes there has been a substantial change in circumstances, it may modify the order if the alteration is in the best interests of the child. *E.g.*, *Evans v. Evans*, 138 N.C. App. 135, 139, 530 S.E.2d 576, 578-79 (2000). If a prior order is temporary, the trial court can proceed directly to the best-interests analysis. *Arriola*, 160 N.C. App. at 674, 586 S.E.2d at 811. The trial court's designation of an order as temporary or permanent does not control. *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000). "[A]n order is temporary if either (1) it is entered without prejudice to either party[;] (2) it states a clear and

specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues." *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003). If theorder does not meet any of these criteria, it is permanent. *See id.*

A custody agreement is a contract—but if a court order incorporates the custody agreement, modification requires a showing of changed circumstances. *See Tyndall v. Tyndall*, 80 N.C. App. 722, 723, 343 S.E.2d 284, 284 (1986) (stating this principle in the context of child support). A domestic agreement remains modifiable by traditional contract principles unless a party submits it to the court for approval or if a court order specifically incorporates the separation agreement. *See Jones v. Jones*, 144 N.C. App. 595, 601, 548 S.E.2d 565, 569 (2001) (stating this proposition in the context of an alimony case). The consent order in this case recognizes the existence of the separation agreement and indicates the agreement gives the parties "joint physical and legal custody," but the consent order does not incorporate or approve the separation agreement. We conclude the separation agreement never became part of the consent order.

The consent order dealt with several narrow matters: medical issues, bed times, schoolwork, and the requirement that neither parent make or permit others to make disparaging comments about the other parent in front of the children. We need not decide whether the consent order could constitute a final custody order with respect to these issues since the modification of bed times, schoolwork agreements, and the requirement that neither party make disparaging comments about the other is not the crux of Dr. Pennington's appeal. Her argument on appeal relates to the trial court's decision to award full custody to Dr. Peters in other areas. She does not argue the trial court improperly modified the terms of their medical decision-making consent agreement. In fact, the final order expands Dr. Pennington's ability to overrule Dr. Peters' medical decisions. Thus, the three-prong temporary-permanent analysis is irrelevant here because the consent order did not address the core issues that are the subject of this appeal. In other words, the 6 March 2007 order determining custody did not modify the consent order, and the trial court correctly proceeded to the best-interests analysis, insofar as this appeal is concerned.

Dr. Pennington's argument is further undermined by her litigation posture at trial. She made the following representation in her 26 September 2007 motion for child custody: "There have been no prior

custody proceedings concerning these minor children in the Courts of this jurisdiction or the Courts of any other jurisdiction." "[T]he law does not permit parties to swap horses between courts in order to get a better mount . . . ." *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934).[2]

3. Whether the trial court's findings are supported by substantial evidence

[3] Dr. Pennington argues there was no evidentiary support for the trial court's causation finding that she "inflicted serious emotional, psychological, and physical damage on the minor children as a result of her false belief that Plaintiff/Father has abused them." Generally, "any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations omitted). On the other hand, "[a]ny determination reached through 'logical reasoning from the evidentiary facts' is more properly classified a finding of fact." *Id.* (quoting *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657-58 (1982)). The trial court's conclusion that Dr. Pennington inflicted physical and emotional harm falls into the latter category even though it is listed as a "conclusion of law." Therefore, we review the "conclusion of law" as we would a finding of fact. *See, e.g.*, *Crowley v. Crowley*, ––– N.C. App. –––, –––, 691 S.E.2d 727, 734 (2010) (treating the trial court's "finding of fact" as a "conclusion of law"). Causation is a factual inquiry. *Bjornsson v. Mize*, 75 N.C. App. 289, 292, 330 S.E.2d 520, 523 (1985). A causation finding can rely on other factual findings for support. There are ample unchallenged findings of fact that support the trial court's ultimate factual conclusion that Dr. Pennington caused physical and psychological damage to her children.

For example, with respect to physical damage, the trial court found that Dennis had developed encopresis over the course of the year before the custody order was entered.[3] The trial court also found that, since the onset of supervised visitation following the sexual allegations against Dr. Peters, Dennis began soiling his pants during nearly every supervised visit.

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2. Dr. Peters argued Dr. Pennington failed to allege a substantial change in circumstances. Nevertheless, the trial court resolved this matter by adopting Dr. Pennington's position.

3. Encropesis is "[t]he involuntary discharge of feces." J.E. Schmidt, 2 *Attorney's Dictionary of Medicine and Word Finder*, E-89 (2009).

The trial court's findings of fact likewise support the trial court's finding that Dr. Pennington caused mental and emotional harm to her children. The court found Dr. Pennington "quizzed, coerced, pressured, and directed" her children to tell false stories of sexual abuse. The trial court also found Dr. Pennington and her "live-in-friend," Mr. Delac, "manipulated, whether intentionally or not, the minor children's recollections and memories, instilling in them false images of being sexually abused by their father." Based on Dr. Curran's testimony, the trial court found Frank was permeated with feelings of guilt because he believed he was unable to protect his brother from sexual abuse.

While Dr. Pennington's brief lists numerous assignments of error that correspond to findings of fact in the heading of her argument section, this is insufficient to challenge findings of fact on appeal. A party abandons a factual assignment of error when she fails to argue specifically in her brief that the contested finding of fact was unsupported by the evidence. *See In re P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 404-05 (2005) (concluding respondent had abandoned factual assignments of error when she "failed to specifically argue in her brief that they were unsupported by evidence"). We have nevertheless reviewed the findings that support the trial court's ultimate mental and physical harm causation finding and conclude they are supported by substantial evidence. Consequently, they are binding on appeal.

[4] Dr. Pennington contends a fact finder cannot determine the cause of mental or emotional harm absent expert testimony regarding causation. We have never held this to be the case, and we decline to do so here. While expert testimony on causation might assist the trier of fact, it is not required to show causation. A domestic trial court judge hears numerous child custody cases every month. They have practical experience and training in human behavior that qualifies them to make causal decisions regarding child custody. They have the ability to select such facts from evidence to form a chronological chain of acts preceding an effect or event that they determine brought about the effect or event. We conclude there are ample adequately supported factual findings that support the trial court's conclusion that Dr. Pennington's actions have caused her children mental and emotional harm.

While we leave the trial court's causation finding undisturbed, we vacate finding of fact 30 insofar as it indicates DSS substantiated allegations that Dr. Pennington abused her children. Plaintiff's trial exhibit 28 plainly indicates DSS substantiated neglect, but did not

substantiate abuse. The portion of finding of fact 30 indicating DSS substantiated neglect remains undisturbed on remand.

4. Whether the trial court's findings of fact support its conclusions of law

[5] Dr. Pennington next takes issue with the trial court's allocation of legal custody. The trial court awarded Dr. Peters "permanent sole physical and legal custody" with the "exception of temporary legal custody related to medical decision-making." The parties are required to share "temporary legal custody of the children with respect to medical decision[-]making." The order indicates the trial court split legal custody in this fashion because the court found Dr. Peters was not "fit and proper" to exercise sole medical decision-making authority. The trial court provided a detailed framework to which the parties are required to adhere until they "jointly agree to a different procedure or approach." The order also states that the medical decision-making portion of the order is "temporary in nature and will be reviewed and modified by the Court based upon Plaintiff/Father's demonstration that he is responsible enough to oversee medical decisions on behalf of the minor children." Dr. Pennington argues the trial court's findings and conclusions do not support the allocation of permanent legal custody. She also contends the medical decision-making carve-out allows Dr. Peters to impermissibly modify the custody order without demonstrating a substantial change in circumstances.

In a dispute between natural parents, child custody is awarded based on the best interests of the child. *Everette*, 176 N.C. App. at 173, 625 S.E.2d at 799. Legal custody refers "generally to the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare." *Diehl v. Diehl*, 177 N.C. App. 642, 646, 630 S.E.2d 25, 27 (2006); *accord* 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 13.2b, at 13-16 (5th ed. 2002). Our trial courts have wide latitude in distributing decision-making authority between the parties based on the specifics of a case. *See Diehl*, 177 N.C. App. at 647, 630 S.E.2d at 28. However, a trial court's findings of fact must support the court's exercise of this discretion. *Id.*

The findings of fact discussed *supra* support the award of permanent legal custody. The trial court did not abuse its discretion by vesting nearly all long-term decision-making in Dr. Peters based on its findings regarding Dr. Pennington's behavior towards the children. Based on the best interests of the children, the trial court appropriately

divided medical decision-making to account for Dr. Peters' inability to make responsible medical decisions.

Dr. Pennington contends this case is analogous to *Diehl v. Diehl*, where we held the trial court's factual findings were insufficient to deprive a father of all legal custody. *Id.* at 647-48, 630 S.E.2d at 29. There, the trial court's findings reflected the parties' inability to communicate effectively, the father's general uncooperativeness, and the fact that the father had exercised sporadic visitation, among other things. *Id.* at 647, 630 S.E.2d at 28. In concluding these findings were insufficient to restrict the father's legal custody, the Court noted these findings primarily addressed the trial court's rationale for restricting *physical* custody. In this case, on the other hand, the trial court's findings regarding Dr. Pennington's conduct bear on her fitness to exercise physical *and legal* custody.

We also disagree with Dr. Pennington's argument that we must vacate the order because it impermissibly allows Dr. Peters to modify a permanent order without showing there has been a substantial change in circumstances. A custody order cannot be partially permanent and partially temporary. *See Smith v. Barbour*, 195 N.C. App. 244, 250, 671 S.E.2d 578, 583 (2009) (refusing to adopt a litigant's position that an order could be partially permanent and partially temporary). While the custody order in this case states it is temporary in several respects, a trial court's characterization of an order as temporary or permanent is not binding on this Court. *Id.* at 249, 671 S.E.2d at 582.

Under the three-prong temporary-permanent test,[4] the order is permanent. Clearly, the order was not entered without prejudice to either party. Nothing in the order definitively sets a specific reconvening time beyond the date the order was entered.[5] The subsequent order ruling on costs, among other things, determined finally all substantive issues presented by the parties' pleadings. That the medical decision-making portion of the order can be modified if Dr. Peters demonstrates to the trial court he is responsible enough to make medical decisions, indicates a substantial change in circumstances *is*

4. As we explain *supra*, an order is temporary if "either (1) it is entered without prejudice to either party[;] (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues." *Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677.

5. The order states that the court would conduct an additional visitation hearing on or before 6 March 2009. The order was announced in court on 19 February 2009, but entered on 6 March 2009. Therefore, the order did not set an additional specific date to readdress "temporary issues."

required. The order also states it is temporary in nature with respect to visitation and will be "modified by the Court based upon Defendant/Mother's progress in therapy." It appears here, too, a substantial change in circumstances is required. Dr. Pennington's argument therefore fails.

[6] Dr. Pennington next argues the trial court impermissibly restricted her visitation with the children. The trial court found Dr. Pennington "is not a fit nor proper person to exercise custody or unsupervised visitation with the minor children." The custody restricts her visitation as follows: "Pending further Orders of this Court, Defendant/Mother shall have no visitation with the minor children, except for therapeutic visitation with the children, if Defendant/Mother's therapist, as well as Dr. Curran and Ms. Duncan believe such therapeutic sessions are appropriate."

First, Dr. Pennington contends the order, "in effect, terminated" her right to visitation and any contact with her children. Therefore, she claims, the trial court was required and failed to apply the "clear, cogent, and convincing" evidentiary standard when finding Dr. Pennington unfit based on our decision in *Moore v. Moore*, 160 N.C. App. 569, 587 S.E.2d 74 (2003). Before a trial court may deny a parent "the right of reasonable visitation," the court is required to find that (1) the parent denied visitation is unfit to visit the child or (2) visitation is not in the best interests of the child. N.C. Gen. Stat. § 50-13.5(i) (2009). In *Moore*, this Court stated that the prohibition of *all* contact with a natural parent's child was analogous to a termination of parental rights. *Moore*, 160 N.C. App. at 573, 587 S.E.2d at 76. The Court reasoned that, in order to sustain a "total prohibition of visitation or contact" based on the unfitness prong of N.C. Gen. Stat. § 50-13.5(i), the trial court must find unfitness based on the clear, cogent, and convincing evidentiary standard that is applicable in termination of parental rights cases. *Id.* at 573-74, 587 S.E.2d at 76-77.

The trial court's order in this case plainly does not prohibit all visitation or contact because therapeutic visitation is permitted. Therefore, the trial court was not required to employ a heightened evidentiary standard. Accordingly, we also reject Dr. Pennington's argument that the court was required and failed to find Dr. Pennington unfit to exercise supervised visitation because the order clearly permits some form of supervised visitation.

[7] Dr. Pennington also maintains the trial court abandoned its duty to determine visitation by allowing medical professionals to discon-

tinue therapeutic visitation—the only form of visitation available to Dr. Pennington after the trial court entered its order. The custody order stated that it was in the best interests of the children to allow supervised visitation in the presence of the physician. The award of visitation rights is a judicial function. *In re Custody of Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971). And as a general rule, a trial court should hesitate in delegating decision-making authority. A custody order may not award exclusive control over the terms of visitation to the custodian. *Brewington v. Serrato*, 77 N.C. App. 726, 733, 336 S.E.2d 444, 449 (1985) (citing *In re Custody of Stancil*, 10 N.C. App. at 552, 179 S.E.2d at 849). For example, we have held that a trial court abdicated its role by allowing visitation "at such times as the parties may agree" because this allowed the custodian to deny all visitation by withholding his consent. *Id.* While our case law recognizes that some decision-making authority may be ceded to the parties with respect to visitation, it also reveals that an order is less likely to be sustained as judicially-imposed structure decreases and the decision-making party's unfettered discretion increases. *Compare In re Custody of Stancil* 10 N.C. App. at 552, 179 S.E.2d at 849 ("To give the custodian of the child authority to decide when, where and under what circumstances a parent may visit his or her child could result in a complete denial of the right and in any event would be delegating a judicial function to the custodian."), *with Woncik v. Woncik*, 82 N.C. App. 244, 250-51, 346 S.E.2d 277, 280-81 (1986) (upholding a custody order that required the custodian to "terminate" visitation under certain circumstances and initiate a hearing where the trial court would determine whether visitation should be terminated going forward).

Here, the trial court gave Dr. Pennington's and the boys' *therapists* control over the only type of supervised visitation available to Dr. Pennington. Because a neutral third party is vested with authority to control therapeutic visitation, the visitation arrangement does not present the problems inherent in custodian-controlled visitation. We approved a similar visitation scheme in *Cox v. Cox*, 133 N.C. App. 221, 515 S.E.2d 61 (1999). In *Cox*, a physician was required to supervise the defendant's visitation with her children. *Id.* at 230, 515 S.E.2d at 67. The order stated the physician could "suspend or terminate counseling, treatment, and supervised visitation if he determine[d] that the defendant [was] not progressing nor working honestly toward improvement." *Id.* at 230, 515 S.E.2d at 67-68. The physician was required to notify the trial court if he terminated counseling. *Id.* at 230, 515 S.E.2d at 68.

This Court concluded the physician "did not have the authority to end [the] defendant's visitation rights but did have the authority to terminate [the] defendant's counseling and treatment which included supervised visitation with the minor children." *Id.* at 230, 515 S.E.2d at 68. Considering the only form of visitation available to the *Cox* defendant was supervised visitation with the medical professionals, it appears *Cox* authorizes the authority bestowed on the physicians in this case. We conclude that, under the circumstances, the trial court did not err by vesting neutral decision makers, who are in the best position to evaluate the mental condition of Dr. Pennington and the children, with the authority to craft the details of an elastic treatment and visitation program for all three individuals.

5. Whether the trial court abused its discretion

[8] After careful review, we conclude the trial court abused its discretion when fashioning Dr. Pennington's therapy. Dr. Pennington is required by the 6 March 2009 order to acknowledge that Dr. Peters did not sexually abuse their children and accept as true the trial court's conclusion that she harmed her children. Thus, Dr. Pennington must force herself to believe that she implanted false images of sexual abuse in her children. Presumably, she must prove to a medical professional or counselor that she genuinely believes the trial court findings were correct before being certified as rehabilitated, which may be a prerequisite to obtaining significant visitation or any level of custody in the future.[6] We hold this is an unwarranted imposition under these facts. Our objection to this requirement is that it mandates Dr. Pennington and the therapist attain a standard based upon Dr. Pennington's beliefs rather than her behavior. It would have been appropriate to require Dr. Pennington to demonstrate to the court that she would not engage in any behavior that suggests to the children that they were sexually abused. We believe this is best achieved through non-disparagement requirements and prohibitions on discussing these matters with the children, which are enforceable through the contempt powers of the trial court, including incarceration. It was an abuse of discretion to require Dr. Pennington to change her beliefs and prove to a counselor that such a change has in fact occurred. We therefore vacate paragraph 5 of the decretal portion of the 6 March 2009 order ("Decree 5") and remand the order to the trial court to enter a new order based upon Dr. Pennington's and her

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6. The order does not explicitly condition visitation and future custody on "rehabilitation," but the order suggests this is the case.

agents' ability to comply with existing court orders and demonstrate behavior that prevents harm to her children.

However, we note that Dr. Pennington's conduct placed the trial court in a difficult position. The court specifically ordered the parties not to disparage one another or to discuss the case with the children. It found, based on competent evidence, that Dr. Pennington willfully ignored these rulings, which were designed to protect the integrity of the judicial process and to protect the children from harm. The trial court likely concluded non-disparagement requirements and other tools would have been of little future value as a restraint on Dr. Pennington. The court's skepticism was justified, not only by Dr. Pennington's actions in taking the children to therapy with Dr. Tanis before a guardian *ad litem* was appointed, but also by her affidavits in which she documented her conversations with the children about the specific topics the court had restrained her from discussing with the children.

Nevertheless, we hold it was error to require Dr. Pennington prove to her therapists that her beliefs about the factual underpinnings of the case had changed. While the trial court properly vested authority in medical professionals to determine when supervised visitation was appropriate, the court went too far in dictating the specifics of the therapists' work. Dr. Pennington's actual behavior—and not her subjective beliefs over what occurred in the case—should have been the critical focus for evaluating when visitation was appropriate.

B. Costs and Fees

[9] Dr. Pennington makes several arguments concerning the imposition of attorney's fees and various costs. First, she contends the trial court improperly assessed "equitable" costs against her in the form of the children's uninsured therapy costs. As part of the initial custody order, the court required Dr. Pennington to pay all uninsured therapy costs incurred on behalf of the children. The order described this portion of the order as a separate equitable remedy.

Dr. Pennington maintains this was error because, as this Court has previously stated, our courts cannot tax costs against a party on equitable grounds. *Cail v. Cerwin*, 185 N.C. App. 176, 186, 648 S.E.2d 510, 517 (2007). This argument lacks merit because it misconstrues the meaning of the term "costs." Our decisions rejecting the equitable imposition of costs refer to "taxable costs," *see*, *e.g*, *id.*, a term of art

that refers to "litigation-related expense[s] that the prevailing party is entitled to as a part of the court's award." *Black's Law Dictionary* 372 (8th ed. 2004). Uninsured therapy expenses are not taxable costs. Rather, they are awarded pursuant to a district court's ability to structure child support. Consequently, the trial court's order does not conflict with our decisions rejecting equitable awards of litigation-related costs. Dr. Pennington's argument therefore fails.

[10] Paragraph 8 of the decretal portion of the 20 May 2009 costs order ("Decree 8") requires Dr. Pennington to pay the law firm employed by Dr. Peters $266,657.50. The order states that $224,195.50 is derived from legal fees and $42,461.50 is derived from "expert consultation, testimony, and travel and other litigation-related expenses." Obviously, the trial court made an arithmetic error and awarded an additional $0.50, which we address below. The amount due accrues interest at a rate of six percent per annum. Dr. Pennington argues the attorney's fees awarded were unreasonable and unnecessary. The reasonableness and necessity of attorney's fees is reviewed for abuse of discretion. *See Hudson v. Hudson*, 299 N.C. 465, 473, 263 S.E.2d 719, 724 (1980).

Specifically, Dr. Pennington contends the evidence and findings do not support the award of fees charged by Sarah Brady, a member of Dr. Peters' trial counsel team. She claims there is no evidence in the record supporting the trial court's finding that Ms. Brady "has a reputation for diligence and competence as an attorney" and her hourly rate of $200.00 "is more than reasonable relative to attorneys of comparable experience and skill in the family bar." However, the trial court had ample opportunity to observe Ms. Brady at trial, which was sufficient to determine the reasonableness of her fee in comparison to attorneys of comparable experience and skill. *See Dyer v. State*, 331 N.C. 374, 378, 416 S.E.2d 1, 3 (1992) (stating that observing an attorney during trial was sufficient to judge the attorney's skill and the difficulty of the case); *cf. Simpson v. Simpson*, COA09-1131, 2011 WL 135539, at *6 (N.C. Ct. App. Jan. 18, 2011) ("[A] district court, considering a motion for attorneys' fees under N.C. Gen. Stat. § 50-13.6, is permitted, although not required, to take judicial notice of the customary hourly rates of local attorneys performing the same services and having the same experience."). We also believe the trial court had ample evidence to judge her reputation for diligence and competence.

[11] Dr. Pennington further contends the evidence and findings do not support the award of fees paid to Charles Porter and eleven other

attorneys that worked on this case. The trial court found that all legal fees Dr. Peters incurred were reasonable and necessary. The court also found that attorneys other than Jonathan Feit (also counsel for Dr. Peters) and Ms. Brady worked on this case. Based on its knowledge of these attorneys and a review of the fees, the trial court concluded their rates were reasonable in light of fees charged by similar attorneys in Mecklenburg County. Mr. Feit submitted detailed attorney's fees affidavits, which provided evidence of his associates' work product. *See Wiggins v. Bright*, 198 N.C. App. 692, 697, 679 S.E.2d 874, 877 (2009) (fee affidavit sufficient to support detailed findings in support of award). We believe the complexity of this case, the difficulty of litigation-related issues confronted by the attorneys, and the results obtained, among other things, support the trial court's findings. *See United Laboratories*, *Inc. v. Kuykendall*, 335 N.C. 183, 195, 437 S.E.2d 374, 381-82 (1993) (listing these and other factors as appropriate matters for a court to consider when awarding attorney's fees).

[12] Dr. Pennington's next argument with respect to costs is that the trial court fashioned an impermissible payment schedule and improperly ordered interest to accrue at a rate of six percent per annum. We fail to see how the trial court erred by requiring payment according to a set schedule. It does *not* "indenture[]" Dr. Pennington to Dr. Peters' counsel "for a minimum of [thirty] years" as she contends. She is free to satisfy the judgment in less than thirty years. The payment schedule creates an appropriate and necessary mechanism to ensure payment. The trial court did not abuse its discretion in this respect.

However, "interest on costs is expressly disallowed by statute." *City of Charlotte v. McNeely*, 281 N.C. 684, 696, 190 S.E.2d 179, 188 (1972). Therefore, we vacate the portion of the trial court's order contained in "Decree 8" imposing interest on costs. However, the portion of Decree 8 that sets the amount of attorney's fees to be paid by Dr. Pennington, remains undisturbed.

[13] Next, Dr. Pennington argues the trial court lacked statutory authority to tax the following costs: $3039.00 in copying fees, $60.11 in mileage reimbursements, $14.98 in long-distance telephone calls, $105.39 in postage fees, $168.25 in computerized research fees, and $19,253.00 in fees paid to an expert who Dr. Pennington claims was not subpoenaed and who did not testify at trial. The issue of what may be taxed as costs previously led to a split of authority in this Court. *See*, *e.g.*, James Edwin Griffin, III, Comment, *Murky Water: What Really Is Taxed as Court Costs in North Carolina?*, 32

Campbell L. Rev. 127 (2009) (explaining a split of authority exists in this Court, arguing for the "explicitly delineated approach," and imploring our Supreme Court to resolve the problem). There are two lines of cases: (1) the "reasonable and necessary" approach—which permits courts to determine what types of costs may be awarded—and (2) the "explicitly delineated" approach—which holds that N.C. Gen. Stat. § 7A-305 limits the types of costs that can be awarded. *Id.* at 130-31. Applying these lines of cases was problematic, particularly because the reasonable and necessary approach conflicted with Supreme Court precedent. *See McNeely*, 281 N.C. at 691, 190 S.E.2d at 185 ("The simple but definitive statement of the rule is: 'Costs, in this state, are entirely creatures of legislation, and without this they do not exist.' " (quoting *Clerk's Office v. Commissioners*, 121 N.C. 29, 30, 27 S.E. 1003, 1003 (1897))).

Fortunately, the General Assembly's 2007 amendment to N.C. Gen. Stat. § 6-20 resolved the dispute in favor of the explicitly delineated approach. The statute formerly stated that "[i]n other actions, costs may be allowed or not, in the discretion of the court, unless otherwise provided by law." Act of July 3, 2007, ch. 212, sec. 2, § 6-20, 2007 N.C. Sess. Laws 339, 339. The statute now reads as follows:

> In actions where allowance of costs is not otherwise provided by the General Statutes, costs may be allowed in the discretion of the court. Costs awarded by the court are subject to the limitations on assessable or recoverable costs set forth in G.S. 7A-305(d), unless specifically provided for otherwise in the General Statutes.

N.C. Gen. Stat. § 6-20 (2009). Section 7A-305(d), in turn, states that the expenses contained in subsection (d) "are complete and exclusive and constitute a limit on the trial court's discretion to tax costs pursuant to G.S. 6-20." N.C. Gen. Stat. § 7A-305(d) (2009). When read together, it is clear that costs require statutory authorization and that section 7A-305 or any other statute may authorize costs. Whether a trial court has properly interpreted the statutory framework applicable to costs is a question of law reviewed *de novo* on appeal. *See Jarrell v. Charlotte-Mecklenburg Hosp. Auth.*, —– N.C. App. —–, —–, 698 S.E.2d 190, 191 (2010). The reasonableness and necessity of costs is reviewed for abuse of discretion. *See id.*

If a category of costs is set forth in section 7A-305(d), " 'the trial court *is required to assess the item as costs.*' " *Springs v. City of Charlotte*, COA09-839, 2011 WL 135645, at *9 (N.C. Ct. App. Jan. 18,

2011) (quoting *Priest v. Safety-Kleen Sys., Inc.*, 191 N.C. App. 341, 343, 663 S.E.2d 351, 353 (2008)). Subsection (d)(11) therefore requires a trial court to assess as costs expert fees for time spent testifying at trial. *Id.* However, a trial court may tax expert witness fees as costs only when that witness is under subpoena. *Jarrell*, ––– N.C. App. at –––, 698 S.E.2d at 193. In sum, before a trial court may assess expert witness testimony fees as costs, the testimony must be (1) reasonable, (2) necessary, and (3) given while under subpoena.

In its discretion, a trial court has the authority to award costs for a subpoenaed witness' time attending, but not testifying, at trial under N.C. Gen. Stat. 7A-314(d), as well as transportation costs under N.C. Gen. Stat. 7A-314(b). *Springs*, 2011 WL 135645, at *9 (citing N.C. Gen. Stat. § 7A-314(d); N.C. Gen. Stat. § 7A-314(b)). A trial court may not, however, assess as costs expert witness fees for preparation time. *Id.*

Our review of the record indicates $42,461.50 of the total costs amount the trial court ordered Dr. Pennington to pay to Dr. Peters' counsel can be attributed to costs other than attorney's fees. The trial court's order pertaining to costs lacks findings as to how these costs were incurred. Therefore, we vacate the portion of Decree 8 insofar as it awards $42,461.50 in litigation costs other than attorney's fees and remand for a hearing to determine how these litigation costs were incurred and whether they are authorized by statute. On remand, the trial court shall account for the additional $0.50.

C. Sanctions

[14] Ms. Burns, counsel for Dr. Pennington during the trial below, appeals the trial court's 29 May 2009 order imposing Rule 11 sanctions against her.

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

Turner v. Duke Univ., 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). As in other cases where the trial court is responsible for making findings of fact, "[t]he trial court's findings of fact are conclusive on appeal if supported by competent evidence, even when the record includes other evidence that might support contrary findings." *Static Control Components, Inc. v. Vogler*, 152 N.C. App. 599, 603, 568 S.E.2d 305, 308 (2002). If the trial court correctly determines Rule 11 sanctions are appropriate, we review the specific sanctions imposed under an abuse of discretion standard. *Id.*

Rule 11 of the North Carolina Rules of Civil Procedure provides:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it 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. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

N.C. R. Civ. P. Rule 11(a).

"There are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose." *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365 (1994). A violation of any part of the rule mandates sanctions. *Id.* In this case, the trial court concluded Ms. Burns violated all three. When determining factual sufficiency, a court must determine "(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact." *McClerin v. R-M Indus., Inc.*, 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995).

The trial court concluded the following factual allegations made by Ms. Burns in her post-trial motions had no factual support: (1) Dr. Pennington's counsel objected numerous times and stated, "the Court

needed to hear all of the evidence"; (2) on 17 February 2009, the trial court stated, before Dr. Pennington's direct testimony was complete, that "there was no further evidence that would impact the Court's decision one way or the other"; (3) on 18 February 2009, the trial court made a similar statement (again before Dr. Pennington's testimony was completed) at an in-chambers conference that Ms. Burns did not attend; (4) the trial court prevented one of Dr. Pennington's expert witnesses, Dr. Newberger, from being cross examined, requiring the court to strike the expert's direct testimony; (5) the trial court prevented several other witnesses from testifying; and (6) there was no fact or testimony that provided support for the restriction on Dr. Pennington's contact with her children or for the finding that Dr. Pennington instilled false images of abuse in her children. The trial court also found Ms. Burns cited cases lacking a common nucleus of operative fact to the matter at bar.

There are several misstatements of fact that justify the imposition of sanctions. On appeal, Ms. Burns states she remembers her co-counsel objecting at trial. She contends she was merely paraphrasing her co-counsel's objection when she claimed in her motion that objections were made on the basis that "the Court needed to hear all of the evidence." However, Ms. Burns concedes she cannot locate any such objection in the record. Her brief is vague as to whether she examined the transcript before or after filing her motion.

Both contingencies are unacceptable. If she discovered there was no objection in the record before filing the motion, the most reasonable interpretation is that she misrepresented the record. If there was any doubt as to the contents of the trial transcript, Ms. Burns should have indicated this was the case in her motion or otherwise brought it to the trial court's attention. Failing to examine the transcript before accusing the trial judge of bias, among other allegations, is equally dubious. She attempts to justify this oversight by explaining she sent her motion to Dr. Pennington "to ensure its accuracy." This is insufficient to remedy the problem under these facts—a lawyer should satisfy herself as to the contents of the record, rather than relying on her client.

Furthermore, we note that local counsel, Mr. Pollard, did not sign the motion and withdrew from representation before the hearing on the matters addressed by the motion. At oral argument, Ms. Burns indicated Mr. Pollard did not sign the document because she did not have the opportunity to confer with him. She also indicated there

might be a possibility he would have refused to do so because of a fee dispute with Dr. Pennington. But considering the gravity of the document, it would have been advisable to confer directly with her co-counsel on this matter. In sum, we conclude Ms. Burns either failed to make an adequate inquiry in these factual allegations or did not reasonably believe the allegations were well-grounded in fact. Consequently, we decline to address whether the trial court was justified in imposing sanctions on the other grounds described in the order.

We hold the trial court correctly decided to sanction Ms. Burns and that the specific sanction imposed did not constitute an abuse of discretion.[7]

IV. Conclusion

We vacate Decree 5 of the 6 March 2009 custody order. On remand, the trial court shall reform the therapeutic requirements placed on Dr. Pennington in accordance with this opinion. We vacate finding of fact 30 of the 6 March 2009 order insofar as it indicates DSS substantiated allegations that Dr. Pennington abused her children. The portion of finding of fact 30 indicating DSS substantiated neglect remains undisturbed on remand. We vacate Decree 8 of the 20 May 2009 costs order insofar as it awards $42,461.50 in non-attorney's-fees costs. On remand, the trial court shall make additional findings of fact regarding these costs and determine whether they are authorized by statute. We vacate the portion of the 20 May 2009 order requiring Dr. Pennington to pay interest on attorney's fees and other costs. On remand, the trial court shall account for the additional $0.50 erroneously added to the total costs award. We affirm the 29 May 2009 order imposing Rule 11 sanctions.

Affirmed in part, vacated in part, and remanded.

Judges HUNTER, Robert C., and WALKER concur.

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7. We note, however, that it would have been preferable if the GAL had refrained from filing for Rule 11 sanctions. In hotly contested matters such as this one, it is critical that the GAL remain as neutral as possible. With the trial court and counsel for Dr. Peters moving for sanctions, it was unnecessary for the GAL to file his own motion.

STATE OF NORTH CAROLINA v. BRIAN KEITH BANKS

No. COA09-1150

(Filed 1 March 2011)

1. Homicide— first-degree murder—sufficient evidence

The trial court did not err in failing to dismiss a first-degree murder charge against defendant as there was sufficient evidence of all the elements of the crime, including that defendant was the perpetrator.

2. Appeal and Error— preservation of issues—constitutional errors—not raised at trial

Defendant's argument that he was denied his right to a fair trial guaranteed by the Fifth Amendment to the United States Constitution and Article I of the North Carolina Constitution by the admission of a witness's testimony was not properly before the Court of Appeals and was not addressed. Because defendant did not raise this constitutional issue at trial, he failed to preserve it for appellate review.

3. Evidence— prior inconsistent statement—impeachment —no abuse of discretion

The trial court did not abuse its discretion pursuant to N.C. Rules of Evidence 403 and 607 in allowing the State to impeach a witness with her pretrial statement. The witness admitted to having written the statement and testified that she could not remember making certain parts of the statement. Moreover, even if the trial court erred in allowing the State to impeach Harrin using her prior statement, defendant failed to demonstrate prejudice from the error.

4. Evidence— hearsay—exception—no prejudicial error

The trial court did not commit prejudicial error by allowing detectives to testify concerning the contents of a witness's prior statement. Detective Downing's testimony was admissible to explain the subsequent conduct of the person to whom the statement was made. Furthermore, although Detective Weaver's testimony was inadmissable hearsay, defendant failed to show that there was a reasonable possibility that, had the error not been made, a different result would have been reached at trial.

5. Constitutional Law— right to fair trial—objections sustained—no prejudice

Defendant's argument that his constitutional right to a fair trial was denied by the prosecutor's cross-examination of defendant using a witness's pretrial statement was overruled. Because defendant's objections to all three questions were sustained, he could not demonstrate prejudice arising from these questions.

6. Evidence— prior statement—cross-examination—evidence previously introduced—no prejudicial error

The trial court did not commit prejudicial error in allowing the prosecutor to cross-examine defendant's mother regarding the prior statement made by a witness. Because the evidence was already before the jury, even if the trial court had erred in overruling defendant's objection, no prejudice existed.

7. Pretrial proceedings— denial of motion to continue—no error

The trial court did not improperly deny defendant's motions to continue his first-degree murder trial. Based on the facts, defendant was not entitled to a presumption of prejudice under *State v. Rogers*, 352 N.C. 119. Moreover, defendant failed to show that he suffered prejudice as a result of the denial.

8. Constitutional Law— effective assistance of counsel—no prejudicial error

Defendant's argument that he was denied effective assistance of counsel in a first-degree murder trial was overruled. Defendant failed to show that any error of counsel was prejudicial to his defense so as to deprive defendant of a fair trial.

Appeal by defendant from judgment imposing a sentence of life imprisonment without the possibility of parole entered by Judge Mark E. Powell on 23 February 2009 in Buncombe County Superior Court. Heard in the Court of Appeals 24 February 2010.

Roy Cooper, Attorney General, by Special Deputy Attorney General Jonathan Babb, for the State.

Parish, Cooke & Condlin, by James R. Parish, for the defendant-appellant.

STEELMAN, Judge.

Where the State produced substantial circumstantial evidence supporting each essential element of the offense and that defendant committed the offense, the trial court did not err in denying defendant's motion to dismiss based upon the sufficiency of the evidence. Constitutional issues, which are not raised at trial, will not be considered for the first time on appeal. A party may impeach its own witness where the witness admitted making a prior handwritten statement and testified that she could not remember making certain parts of the statement. The jury is presumed to follow the trial court's instructions on its consideration of evidence. The use of another's statement to explain the subsequent conduct of a person is an exception to the hearsay rule. Defendant cannot show prejudice where substantially the same evidence was properly admitted through another witness. Defendant cannot show prejudice on appeal where his objections were sustained by the trial court. Where any asserted prejudice is at best highly speculative, defendant cannot meet his burden of showing a constitutional violation resulting from the denial of his motion to continue. Where defendant's assertions of ineffective assistance of counsel are based upon the failure of counsel to object to the introduction of evidence and the same evidence was introduced through another witness, and not challenged on appeal, defendant cannot show prejudice arising out of his counsel's conduct.

I. Factual and Procedural Background

On the afternoon of 3 December 2007, Keith Holloway ("Holloway") went to the residence of Jody Bordeaux and Jimmy Jackson on Hanover Street in Asheville. Between 4:30 and 4:45, Holloway was observed getting into a black Volkswagen Jetta with tinted windows. At approximately 5:45 p.m., Jim Jones was driving down Pearson Bridge Road in Buncombe County and saw two individuals on the side of the road. One was "kind of hunkered down or almost laying on the left-hand side of the road," and the second was crossing the road headed from the left side to the right. Mr. Jones noticed a dark sedan on the side of the road. Around 6:00 p.m., Donald Ramsey (Ramsey), was driving on Pearson Bridge Road with his wife and a friend when he noticed two individuals standing on the right side of the road. After passing them and as he was turning at the next intersection, he heard five gunshots, and one of his passengers said, "[t]hey've shot him and he's running down the road." Ramsey immediately turned his car around and called 911. He found "[Holloway] was slumped, but he was still sitting on the roadway, and as I walked up to him he fell all the way backwards."

An autopsy of Holloway revealed that he had four gunshot wounds to his arm and chest region, and a single gunshot wound to the head. Two .32 caliber bullets were recovered from Holloway's body. Dr. Donald Jason (Dr. Jason), a forensic pathologist, performed the autopsy and testified that the cause of death was the gunshot wound to the head.

Between 6:00 p.m. and 6:30 p.m., defendant arrived at the home of his brother, Jeff Banks. Brittany Jones (Jones) was at the residence when defendant arrived. Jones was Holloway's girlfriend and knew defendant through her aunt, Renee Harrin (Harrin). Harrin was the long-time girlfriend of Jeff Banks. Approximately one month prior to Holloway's murder, Jones and Holloway were suspended from school for having sex in a stairway at school. During the course of the murder investigation, Jones was interviewed several times, and she stated that defendant repeatedly got angry anytime he saw her talking to Holloway. A few weeks prior to Holloway's murder, defendant told Jones that "he was going to kill Holloway and make his mother stand over his grave and cry." She also noticed that the day after defendant made this statement, she saw a picture of a tombstone with the inscription "R.I.P. Keith" on defendant's MySpace internet page.

On 4 December 2007, Detectives Weaver (Det. Weaver) and Downing (Det. Downing) interviewed defendant regarding Holloway's murder. In the interview, defendant acknowledged that he drove a black Volkswagen Jetta, and that he and Holloway had argued over Jones. Defendant stated that he and Holloway were "cool" and "everything was taken care of." Defendant also admitted that he had posted some material about Holloway on his MySpace page, including the tombstone. After the interview, the investigation's review of defendant's MySpace page revealed several messages containing explicit threats of violence directed towards Holloway following the suspension of Jones and Holloway from school. The threatening messages included, "[t]his mother f_ _ _ _ _ f _ _ _ _ _ my girl [Jones] at school. He's dead" and "he [Holloway] better hope it was good, because that will be the last piece of p_ _ _ _ he gets."

On 5 December 2007, Det. Downing interviewed Harrin and she wrote out and signed the following statement:

> I got a phone call from Brian [defendant] about 5:45 pm on Mon. 12-3-07. He wanted to know when I was coming home and I told him in about 1 hour. So when I got home Brian was really upset—shaking and crying. I had ask [sic] him what was wrong

> and he said his nerves were bothering him and the medication he was taking was making him flip out. Then he told me he couldn't believe he did it and I said did what and he said I shoot [sic] Keith [Holloway] in the back of the head and then I shoot [sic] a couple more times toward his back. Then he started crying again and told me he thought Keith was dead. He told me he threw the gun over in some bushes or leaves where Keith's body was found and the Coat he was wearing he threw it in a trashcan at a car wash and I don't no [sic] what he did with his shirt he had on.

Det. Downing briefly halted the interview and relayed the information regarding the location of the murder weapon to his supervisor, Sergeant Welborn. Based upon this information, the murder weapon was located near where Holloway had been shot. The murder weapon was a Smith & Wesson .32 caliber long revolver which contained six spent cartridge casings. A search of defendant's room produced a gun case, multiple live rounds, and four (4) spent .32 caliber casings. Another live .32 caliber round was recovered from the front-door pocket of defendant's car.

The firearm and the six (6) spent casings, the four (4) spent casings recovered from defendant's room and the two (2) .32 caliber bullets recovered from Holloway's body during the autopsy, were submitted to Special Agent Shane Greene of the State Bureau of Investigation ("SBI") for forensic examination. His examination revealed that the spent casings recovered from the cylinder of the revolver, from defendant's room, and the slugs recovered from Holloway's body were all fired from the .32 caliber revolver found at the murder scene.

On 6 December 2007, defendant was arrested and charged with the first-degree murder of Holloway.

Defendant was tried non-capitally. The jury found defendant guilty of first-degree murder on 23 February 2009. Defendant was sentenced to life imprisonment without possibility of parole and ordered to pay restitution in the amount of $10,897.04.

Defendant appeals.

II. Defendant's Motion to Dismiss

[1] In his first argument, defendant contends that the trial court erred in failing to dismiss the first-degree murder charge based upon insufficiency of the evidence. We disagree.

A. Standard of Review

Since defendant offered evidence following the denial of his motion to dismiss at the close of the State's evidence, we only review his motion to dismiss made at the close of all the evidence. *State v. Bruce*, 315 N.C. 273, 280, 337 S.E.2d 510, 515 (1985). "[I]n ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the crime and whether the defendant is the perpetrator of that crime." *State v. Ford*, 194 N.C. App. 468, 472-73, 669 S.E.2d 832, 836 (2008) (quoting *State v. Everette*, 361 N.C. 646, 651, 652 S.E.2d 241, 244 (2007)). On appellate review, this Court "must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382-83 (1988) (citing *State v. Williams*, 319 N.C. 73, 79, 352 S.E.2d 428, 432 (1987)). "If there is substantial evidence-whether direct, circumstantial, or both-to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Locklear*, 322 N.C. at 358, 368 S.E.2d at 383 (citation omitted). Further, "[t]he defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971). "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)).

B. Defendant as Perpetrator of Holloway's Murder

Defendant contends that the State failed to produce substantial evidence that he was the perpetrator of Holloway's murder. Defendant cites us to the case of *State v. Cutler*, 271 N.C. 379, 156 S.E.2d 679 (1967), where the State's evidence was deemed to be insufficient because there was no physical evidence tying defendant to the murder scene. Defendant also cites the cases of *State v. White* and *State v. Myers (and Coleman)*, where the evidence produced by the State aroused a strong suspicion as to defendant's guilt, but was not sufficient to show that defendant was the perpetrator because it merely established that defendant had the opportunity to commit the murder. *State v. White*, 293 N.C. 91, 97, 235 S.E.2d 55, 59 (1977); *State v. Myers (and Coleman)*, 181 N.C. App. 310, 315, 639 S.E.2d 1, 4-5 (2007) (*quoting State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983)).

The instant case is distinguishable from the cases cited by defendant, and is more similar to the case of *State v. Ledford*, 315 N.C. 599, 340 S.E.2d 309 (1986). In *Ledford* the State produced evidence that the sole of defendant's boot matched a shoe print at the murder scene and cigarette butts taken from defendant's home were the same brand as those found at the murder scene. *Id.* at 611-13, 340 S.E.2d at 317-18. Our Supreme Court held that the State's evidence was sufficient to allow the reasonable inference that defendant was in fact the perpetrator of the murder. *Id.* at 613-14, 340 S.E.2d at 318-19.

Most murder cases are proved through circumstantial evidence. In the instant case, the State produced sufficient circumstantial evidence to support a reasonable inference that defendant was the perpetrator of Holloway's murder. "Circumstantial evidence and direct evidence are subject to the same test for sufficiency, and the law does not distinguish between the weight given to direct and circumstantial evidence." *State v. Berry*, 356 N.C. 490, 500, 573 S.E.2d 132, 141 (2002) (citations omitted), *supersedeas denied*, *mandamus denied*, *cert. denied*, 358 N.C. 236, 594 S.E.2d 188 (2004). The State presented evidence that defendant was jealous of Holloway's relationship with Jones and made numerous threats of violence toward Holloway. The murder weapon was found in the brush off of Pearson Bridge Road where Holloway was murdered. Four (4) spent casings found in defendant's bedroom were fired from the murder weapon. In addition, defendant had the opportunity to commit the murder. Defendant drove a black Volkswagen Jetta. Holloway was seen getting into a black Jetta with tinted windows around 4:30 or 4:45 p.m. on the day he was murdered. A red polyester fiber consistent with Holloway's jacket was recovered from defendant's Jetta. In the light most favorable to the State, we hold that this evidence rises above mere speculation that defendant was the perpetrator of the murder and was sufficient to withstand the defendant's motion to dismiss the charge of first-degree murder at the close of all the evidence.

This argument is without merit.

III. Statement of Renee Harrin

[2] In his second, third, fourth, and fifth arguments defendant contends that the trial court erred by allowing the State to examine Harrin concerning her pre-trial statement. Defendant argues that he was denied his right to a fair trial guaranteed by the Fifth Amendment to the United States Constitution and Article I of the North Carolina Constitution. We disagree.

A. Alleged Constitutional Violations

Initially, we examine whether defendant's constitutional arguments were preserved for appellate review.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1) (2010); *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (*quoting State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982)) ("[A] constitutional question which is not raised and passed upon in the trial court will not . . . be considered on appeal").

At trial, defendant's objections to Harrin's testimony were based entirely upon the case of *State v. Hunt*, 324 N.C. 343, 378 S.E.2d 754 (1989). That decision analyzed the admission of prior statements of a witness, who subsequently recanted the statements under Rule 607 of the North Carolina Rules of Evidence. *Id.* The Supreme Court granted a new trial based upon analysis from federal court cases under Rules 401 and 403 of the North Carolina Rules of Evidence. *Id.* The Supreme Court clearly stated that its prejudice analysis was performed pursuant to N.C. Gen. Stat. § 15A-1443(a), dealing with non-constitutional error, rather than N.C. Gen. Stat. § 15A-1443(b), which deals with constitutional error. *Id.* at 354, 378 S.E.2d at 760. There was no discussion of federal or state constitutional issues. Since defendant's objections to Harrin's testimony at trial were not based upon constitutional grounds, his constitutional arguments may not be raised for the first time on appeal. *State v. Allen*, 360 N.C. 297, 313, 626 S.E.2d 271, 284 (2006) (citation omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). Our review of Harrin's testimony is limited to defend-ant's evidentiary arguments.

B. Standard of Review of Evidentiary Rulings under Rule 403 and Rule 607 of the North Carolina Rules of Evidence

[3] Our review of the trial court's decision to admit or exclude evidence pursuant to N.C. R. Evid. 403 is for abuse of discretion. *Hunt*, 324 N.C. at 353, 378 S.E.2d at 760. Rulings by the trial court concerning whether a party may attack the credibility of its own witness are reviewed for an abuse of discretion. *State v. Covington*, 315 N.C. 352, 338 S.E.2d 310 (1986).

Similarly, our standard of review for rulings made by the trial court pursuant to Rule 607 of the North Carolina Rules of Evidence is abuse of discretion. *State v. Covington*, 315 N.C. 352, 356-57, 338 S.E.2d 310, 314 (1986); *see also State v. Middleton*, No. COA09-64, 2009 N.C. App. LEXIS 1252 (N.C. Ct. App. Aug. 4 2009).

"Abuse of discretion occurs where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133 (1993) (citing *State v. Phipps*, 331 N.C. 427, 453, 418 S.E.2d 178, 191-92 (1992)), *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993).

C. Renee Harrin's Testimony

On the morning of 17 February 2009, prior to being called to testify for the State, Harrin met with the prosecutor at approximately 9:00 a.m. During that meeting, Harrin acknowledged talking with officers and recalled writing out and signing a statement regarding the events of 3 December 2007. Harrin asserted that the officers pressured her, threatened to charge her as an accessory to the murder, and take her children to the Department of Social Services. Harrin told the prosecutor that she did not remember certain things in the statement and "[could] not say if Brian said any of it." Specifically, she "could not remember whether Brian said he shot Keith in the head or shot him a couple more times" or "whether Brian told her he threw the gun in the bushes and she may have heard it from someone else." Following this interview, the prosecutor delivered a typed copy of his notes of the conversation with Harrin to defense counsel at 9:30 a.m. on 17 February 2009.

At 2:04 p.m. on 17 February 2009, the State called Harrin to testify. Defendant immediately objected pursuant to *State v. Hunt*, 324 N.C. 343, 378 S.E.2d 754. Harrin testified, without objection, that on 3 December 2007, she was out Christmas shopping, and that defendant was at her residence when she returned. Defendant was upset. She spoke with him in one of the bedrooms. On 5 December 2007, Harrin spoke to police concerning the events of 3 December 2007 and acknowledged writing out a statement which she signed. Harrin was shown a copy of her statement. She denied that it refreshed her recollection. Over objection, she testified that she heard that the gun "was throwed in the bushes," but could not recall who told her. Harrin could not recall her conversation with defendant on 3 December 2007, but admitted that she had spoken with no one but defendant

and police about the gun. The prosecutor asked Harrin about a number of items contained in the statement. Harrin testified that she could not recall what she told officers.

At 2:37 p.m. the jury was excused from the courtroom, at the request of the prosecutor, after the court sustained several of defendant's objections. The State argued that since Harrin admitted that she had spoken with defendant on 3 December 2007 and acknowledged that she had written out the statement in her own handwriting that the State was entitled to introduce the statement pursuant to Rule 803(5) (recorded recollection), and that the State was entitled to cross-examine her concerning her statement pursuant to Rule 607 (impeachment of witness).

On *voir dire*, the State attempted to lay a foundation for the admission of the statement under Rule 803(5). The trial court ruled that the State had not laid a proper foundation and sustained defendant's objection to the admission of the statement. Thereafter, the prosecutor questioned Harrin before the jury concerning some of the matters contained in her handwritten statement. As to each of these questions either the trial court sustained the objection, or Harrin testified "I can't remember." Harrin's handwritten statement (State's Exhibit 7) was never received into evidence.

D. State's Use of Statement to Impeach Harrin

In his second argument, Defendant contends that the trial court erred by allowing the State to impeach Harrin using her prior statement. We disagree.

"Under certain circumstances a witness may be impeached by proof of prior conduct or statements which are inconsistent with the witness's testimony." *State v. Whitley*, 311 N.C. 656, 663, 319 S.E.2d 584, 589 (1984) (citation omitted). Under N.C.R. Evid. 607, these prior inconsistent statements are admissible for the purpose of shedding light on a witness's credibility. *Id.*; N.C. Gen. Stat. § 8C-1, Rule 607 (2009). "[A] prior inconsistent statement may not be used to impeach a witness if the questions concern matters which are only collateral to the central issues." *State v. Najewicz*, 112 N.C. App. 280, 288-89, 436 S.E.2d 132, 137-38 (1993) (citation omitted) (noting that "once a witness *denies* having made a prior inconsistent statement . . . the prior statement concerns only a *collateral matter*, *i.e.*, whether the statement was ever made."), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 130 (1994).

Defendant relies upon *State v. Hunt*, 324 N.C. 343, 378 S.E.2d 754, to support his argument that the impeachment of Harrin was "a subterfuge to get evidence before the jury which would otherwise be inadmissible" and unfairly prejudice defendant. In *Hunt*, our Supreme Court held "that once a witness denies having made a prior statement, the State may not impeach that denial by introducing evidence of the prior statement." *State v. Wilson*, 135 N.C. App. 504, 507, 521 S.E.2d 263, 264-65 (1999); *State v. Minter*, 111 N.C. App. 40, 48-49, 432 S.E.2d 146, 151 (1993), *cert. denied*, 335 N.C. 241, 439 S.E.2d 158 (1993).

The instant case is distinguishable from *Hunt*. Harrin testified that she wrote and signed the statement given to Det. Downing on 5 December 2007, whereas the witness in *Hunt* denied "any memory of uttering the transcribed words or of signing the paper upon which they had been written." *Hunt*, 324 N.C. at 345, 378 S.E.2d at 755.

"Where the witness admits having made the prior statement, impeachment by that statement has been held to be permissible." *State v. Riccard*, 142 N.C. App. 298, 303, 542 S.E.2d 320, 323 (2001), *cert. denied*, 353 N.C. 530, 549 S.E.2d 864 (2001). In *Riccard*, two witnesses testified as to the events leading up to the robbery and assault of the victim. *Id.* at 304, 542 S.E.2d at 323. Both witnesses admitted making prior statements to the police discussing these events and implicated defendant; both testified that parts of their prior statements were inaccurate, and one testified that he did not remember making certain parts of his previous statement. *Id.* A witness may be impeached with a prior statement where the witness admitted making the prior statement and then testified that he could not remember making certain parts of the prior statement. *Id.* at 303-304, 542 S.E.2d at 323.

Harrin recalled writing out and signing a statement for Det. Downing on 5 December 2007, but testified that she did not "remember some things in the statement and cannot say if Brian said any of it." Following her testimony, the court instructed the jury as follows: "Members of the jury, remember the questions aren't evidence. It's what the witness says in response to the questions that's evidence."

"A prior inconsistent statement is admissible to contradict a witness's testimony, although it may not be considered as substantive evidence." *State v. Martinez*, 149 N.C. App. 553, 558, 561 S.E.2d 528, 531 (2002) (citation omitted). The trial court's instruction made it clear to the jury that the prosecutor's questions were not evidence to

be considered by the jury. This left as evidence from Harrin's testimony a string of answers of "I don't remember." The jury is presumed to follow the instructions of the trial court. *State v. Watts*, 357 N.C. 366, 375, 584 S.E.2d 740, 747 (2003), *cert. denied*, 541 U.S. 944, 158 L. Ed. 2d 370 (2004).

Even assuming *arguendo* that the trial court erred in allowing the State to impeach Harrin using her prior statement, defendant failed to demonstrate prejudice from the error. N.C. Gen. Stat. § 15A-1443(a) (2009) requires that in order to establish reversible error, a defendant must show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. . . ." We hold that based upon other admissible evidence, including that of Det. Downing and Special Agent Greene, discussed below, that defendant cannot meet this burden. N.C. Gen. Stat. § 15A-1443(a).

This argument is without merit.

IV. Testimony of Detectives Downing and Weaver

[4] In defendant's third and fourth arguments, he contends that the trial court erred in allowing Detectives Downing and Weaver to testify concerning the contents of Harrin's prior statement. Defendant argues that the trial court allowed the State to introduce inadmissible hearsay evidence of Harrin through the testimony of the two detectives. We disagree.

A. Testimony of Detective Downing

Det. Downing testified that he interviewed Harrin commencing at 12:40 p.m. on 5 December 2007. He denied making any threats to Harrin. After identifying Harrin's statement, he was asked "without saying what she told you, did she respond when you asked her if she knew what had happened to the gun?" Over the objection of defendant, Det. Downing testified that "she did." Based upon her response, Det. Downing immediately contacted his supervisor, Sergeant Welborn, and the gun was found before the interview with Harrin was concluded.

B. Analysis of Detective Downing's Testimony

" 'Hearsay' is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2009). Under N.C. Gen. Stat. § 8C-1, Rule 802 (2009) hearsay state-

ments are inadmissible as evidence; however, the same hearsay statements are admissible if they fall within certain recognized exceptions. N.C. Gen. Stat. § 8C-1, Rules 803 and 804 (2009). Our Supreme Court "has held that the statements of one person to another are admissible to explain the subsequent conduct of the person to whom the statement was made." *State v. Maynard*, 311 N.C. 1, 16, 316 S.E.2d 197, 205 (1984) (citing *State v. Tate*, 307 N.C. 242, 297 S.E.2d 581 (1982)), *cert. denie*d, 469 U.S. 963, 83 L. Ed. 2d 299 (1984).

In the instant case, Det. Downing testified that Harrin was asked about "what had happened to the gun." The objected to portion of Det. Downing's testimony falls within the rationale of *Maynard* to explain the subsequent conduct of Det. Downing and other members of the Asheville Police Department. The trial court did not abuse its discretion in overruling defendant's objection to Det. Downing's testimony.

C. Testimony of Detective Weaver

Det. Forrest Weaver testified over objection that the following information was gleaned from the Harrin interview:

> that the firearm was thrown by Mr. Banks just below where Keith's—the crime scene where Keith was actually shot. There's a little pull-off on the right-hand side, and the information from that interview was that the gun was thrown somewhere from that vehicle right in that general area.

On cross-examination, Det. Weaver was asked:

> Q The information you received that caused you to look for the gun and other materials came exclusively from Brittany Jones, her aunt and her mother; isn't that true?
>
> A The information from [sic] the gun came from the aunt, not Brittany.

D. Analysis of Weaver Testimony

Nothing in the record indicates that Det. Weaver was present during the interview of Harrin by Det. Downing. Defendant is correct that the objected to testimony was hearsay. The State contends that since defendant later cross-examined Det. Weaver concerning this testimony, that the benefit of the objection was lost, citing *State v. Reed*, 153 N.C. App. 462, 466, 570 S.E.2d 116, 119 (2002), *disc. review denied*, 356 N.C. 622, 575 S.E.2d 521 (2002). This is incorrect. In *Reed*,

defendant failed to object when the same evidence was subsequently offered, resulting in waiver of the prior objection on appeal. *Id.* In the instant case, defendant cross-examined Det. Weaver concerning the prior objected to testimony.

This did not result in a waiver of the prior objection on appeal. "The rule does not mean that the adverse party may not, on cross-examination, explain the evidence, or destroy its probative value, or even contradict it with other evidence upon peril of losing the benefit of his exception." *State v. Lee*, 189 N.C. App. 474, 478, 658 S.E.2d 294, 298 (2008) (quoting *State v. Van Landingham*, 283 N.C. 589, 603, 197 S.E.2d 539, 548 (1973)), *disc. review denied*, 362 N.C. 477, 667 S.E.2d 230 (2008). In this case, counsel was attempting to show that the information concerning the location of the gun could have come from sources other than Harrin. This cross-examination did not result in a waiver of his prior objection.

It was thus error for the trial court to admit this hearsay testimony. However, we must now consider whether its admission was prejudicial. Under N.C. Gen. Stat. § 15A-1443(a) (non-constitutional error), the burden rests upon defendant to demonstrate that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. . . ." (2009). This burden the defendant cannot meet. Even though Det. Weaver's testimony contained more extensive details as to where the murder weapon was found, its import is no different than the admissible testimony of Det. Downing. As a result of the interview of Harrin, police returned to the murder scene and located the murder weapon. Since Det. Downing's testimony was admissible, there was no prejudicial error in the admission of Weaver's testimony.

V. Cross-Examination of Defendant

[5] In defendant's fifth argument, he contends that his constitutional right to a fair trial was denied by the prosecutor's cross-examination of defendant using Harrin's pre-trial statement. Defendant points to three questions asked during cross-examination, which he contends are "too inflammatory and prejudicial to the defendant to have not unfairly prejudiced the defendant." We disagree.

It is a well settled principle that one may not suffer prejudice where his objections are sustained. *State v. Call*, 349 N.C. 382, 413, 508 S.E.2d 496, 515 (1998). "No prejudice exists, for when the trial court sustains an objection to a question the jury is put on notice that

it is not to consider that question." *State v. Roache*, 358 N.C. 243, 296, 595 S.E.2d 381, 415 (2004) (citing *State v. Carter*, 342 N.C. 312, 324, 464 S.E.2d 272, 280 (1995), *cert. denied*, 517 U.S. 1225, 134 L. Ed. 2d 957 (1996)).

The record reflects that during cross-examination the trial court sustained defendant's objections to each of the questions now complained of, and that defendant did not provide an answer to any of the questions. Immediately following these three questions the trial court instructed the jury as follows: "[m]embers of the jury, the prosecution can ask the witness questions, but that exhibit is not in evidence and you're not to consider that exhibit. You haven't seen it." Because defendant's objections to all three questions were sustained, he cannot demonstrate prejudice arising from these questions.

This argument is without merit.

VI. Cross-examination of Defendant's Mother

[6] In his sixth argument, defendant contends that the trial court erred by allowing the prosecutor to cross-examine defendant's mother regarding the prior statement of Harrin, citing *State v. Williams*, 322 N.C. 452, 368 S.E.2d 624 (1988). We disagree.

Our Supreme Court has held that a party is not prejudiced by the admission of evidence that was in substance already before the jury from previous testimony. *State v. Garner*, 330 N.C. 273, 286, 410 S.E.2d 861, 868 (1991); *State v. Faucette*, 326 N.C. 676, 687, 392 S.E.2d 71, 77 (1990) (quoting *State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986)) (noting that "the erroneous admission of . . . evidence, is not always so prejudicial as to require a new trial.").

On cross-examination, the prosecutor asked Mrs. Banks if she had seen Harrin's statement and she testified that she had not. Over objection, Mrs. Banks also stated that she did not know the murder weapon was found while detectives were speaking to Harrin. While Harrin's unsworn statement was not in evidence, Det. Weaver and Det. Downing previously testified that the murder weapon was found during the interview with Harrin. The substance of Mrs. Banks testimony concerning whether the murder weapon was found during the interview with Harrin had been previously introduced. Because this evidence was already before the jury, even if the trial court erred in overruling defendant's objection, no prejudice would exist. N.C. Gen. Stat. § 15A-1443(a).

This argument is without merit.

VII. Motion to Continue

[7] In his eighth argument, defendant contends that the trial court improperly denied his motions to continue the trial in this case. Defendant further contends that the denial of his motions to continue deprived him of his constitutional rights of due process and effective assistance of counsel. We disagree.

"Ordinarily, a motion for a continuance is a matter within the sound discretion of the trial court, and the court's ruling on the motion is not subject to review absent a showing of abuse of discretion." *State v. Mitchell*, 194 N.C. App. 705, 708, 671 S.E.2d 340, 342 (2009) (citing *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981)). However, where "a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal." *State v. Smith*, 310 N.C. 108, 112, 310 S.E.2d 320, 323 (1984) (citing *State v. Baldwin*, 276 N.C. 690, 698, 174 S.E.2d 526, 531 (1970)).

"[T]he denial of a motion to continue . . . is sufficient grounds for the granting of a new trial only when the defendant is able to show that the denial was erroneous and that he suffered prejudice as a result of the error." *State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 675 (2000); *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982).

> To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense. To demonstrate that the time allowed was inadequate, the defendant must show how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion.

State v. Williams, 355 N.C. 501, 540-41, 565 S.E.2d 609, 632 (2002) (internal citations and quotations omitted), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003). An accused must be afforded "a reasonable time to investigate, prepare and present his defense." *State v. Tunstall*, 334 N.C. 320, 328, 432 S.E.2d 331, 336 (1993) (citation omitted). "[A] reasonable length of time for defense preparation must be determined upon the facts of each case." *Searles* at 154, 282 S.E.2d at 433 (citations omitted). "While a defendant ordinarily bears the burden of showing ineffective assistance of counsel, prejudice is presumed 'without inquiry into the actual conduct of the trial' when

'the likelihood that any lawyer, even a fully competent one, could provide effective assistance' is remote." *Tunstall*, 334 N.C. at 329, 432 S.E.2d at 336 (quoting *United States v. Cronic*, 466 U.S. 648, 659-60, 80 L. Ed. 2d 657, 668 (1984)).

C. Analysis

There were a series of motions to continue made by defendant in this case beginning in August 2008 and continuing throughout the trial of this matter. On appeal, defendant's argument focuses on only one aspect of these motions, and we limit our discussion to that issue. We note that the motions at issue in this case were specifically based upon constitutional grounds before the trial court.

On 15 September 2008, certain shell casings, identified as Q10 through Q15 were submitted by the Asheville Police Department to the SBI laboratory for analysis. On 14 October 2008, Special Agent Shane Greene prepared a report stating that these shell casings had been fired from the murder weapon. It appears from the record that this report was provided to defendant in 2008. On 11 February 2009 defendant made a motion for *Brady* and *Kyles* material, which included a request for the entire SBI case file pertaining to the firearms examination and identification, including bench notes, copies of testing, and new testing data. This information was provided to defendant on 11 February 2009. Defendant's motion to continue at trial and his argument on appeal are based upon the fact that he did not previously realize that items Q10 through Q15 were shell casings found by police on a dresser in defendant's room. Because defendant did not realize the source of the shell casings until the eve of trial, he was unable to procure independent testing of these shell casings and the murder weapon.

The motion to continue was initially heard by the trial court on the morning of 16 February 2009. The motion was denied, with the express proviso that "at the end of the State's evidence you may ask for additional time for whatever other review you consider to be appropriate" should sufficient time not be afforded to evaluate the materials during the presentation of the State's case. On 19 February 2009, defendant renewed his motion to continue subsequent to the testimony of Special Agent Greene. The motion was again denied by the trial court, with specific findings that all "reports and submissions requests were provided to the defense" and that there was no violation of the discovery statutes or bad faith on the part of the State. The trial court further stated that "if you have a time line and an expert

available, I can consider giving you time to have an examination done. . . .” At no time thereafter did defendant make any request for a recess of the trial to complete forensic testing on items Q10 through Q15 and the murder weapon.

Defendant argues that under the rationale of *State v. Rogers*, that we should presume prejudice without inquiry into the actual conduct of the trial court because under the circumstances it was unlikely that even a fully competent attorney could have provided effective assistance. 352 N.C. at 125, 529 S.E.2d at 675 (citing *Cronic*, 466 U.S. at 659-60, 80 L. Ed. 2d at 668 and *Tunstall*, 334 N.C. at 329, 432 S.E.2d at 336).

We hold that *Rogers* is distinguishable from the instant case. In *Rogers*, defendant was charged with capital murder. 352 N.C. 119, 529 S.E.2d 671. His counsel was replaced thirty-four days prior to trial. *Id.* Previous counsel had failed to interview many of the witnesses. *Id.* The trial court denied newly appointed counsels’ motion to continue. *Id.* The Supreme court held that “[i]t is unreasonable to expect that any attorney, no matter his or her level of experience, could be adequately prepared to conduct a bifurcated capital trial for a case as complex and involving as many witnesses as the instant case.” *Id.* at 125, 529 S.E.2d at 675-76.

In the instant case, defendant’s court-appointed counsel was allowed to withdraw on 14 July 2008, and defendant was thereafter represented by retained counsel. His motion to continue on 7 August 2008 was granted, and the trial date rescheduled from 8 September 2008 to 16 February 2009. Special Agent Greene’s report was delivered to defendant in 2008. The additional discovery requests were not filed until 3 February 2009, followed by the *Brady* and *Kyles* motions on 11 February 2009. The trial court afforded the defendant an opportunity to have the forensic examination conducted during the trial. Apparently, defendant declined to do so. Based upon these facts, we hold that defendant is not entitled to a presumption of prejudice under the rationale of *Rogers.*

Since the motion to continue was based upon constitutional allegations, we review it as a question of law, fully reviewable on appeal. *Smith*, 310 N.C. at 112, 310 S.E.2d at 323. Under this review, defendant still has the burden of demonstrating that he suffered prejudice as a result of any alleged error. *Rogers*, 352 N.C. at 124, 529 S.E.2d at 675. We are unable to discern that defendant has made such a showing. His argument is that had he been given additional time to

procure an independent forensic examination of items Q10 through Q15 and the murder weapon, such an analysis *might* have shown that the casings found in defendant's bedroom were not fired by the murder weapon. While we acknowledge that the expert testimony linking these shell casings to the murder weapon was a vital piece of evidence in the State's case, we decline to hold that defendant has made a showing of prejudice based upon the mere possibility that an independent test *might* be contrary to the results of the SBI laboratory.

This argument is without merit.

VIII. Ineffective Assistance of Counsel Claims

[8] In his seventh argument, defendant contends that the trial court erred in allowing the prosecutor to examine defendant's father concerning an incident where a car was shot up with an AK-47 assault riffle during cross-examination of defendant's father and mother. In his ninth and tenth arguments, defendant contends that he was denied effective assistance of counsel because counsel failed to object to questions by the prosecutor concerning a car being shot up with an AK-47. We disagree.

Argument seven is addressed to the conduct of the trial court in allowing the prosecutor to cross-examine defendant's father concerning the incident involving the AK-47 and the nature of the trial court's limiting instruction to the jury. However, the entire argument made by defendant focuses on ineffective assistance of counsel. We do not consider the issues raised in the seventh argument except to the extent that they are implicated in our analysis of defendant's ineffective assistance of counsel claims, as set forth below.

A. Standard of Review of Ineffective Assistance of Counsel Claims

The Sixth Amendment to the United States Constitution guarantees defendant the right to counsel, which has been interpreted to afford defendants the right to effective assistance of counsel. U.S. Const. Amend. VI.; *McMann v. Richardson*, 397 U.S. 759, 771, 25 L. Ed. 2d 763, 773 (1970). Assistance of counsel is ineffective if counsel fails to provide representation meeting an "objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). The United States Supreme Court has enunciated a two-part test for determining whether a defendant

received ineffective assistance of counsel. Under the *Strickland* test, for assistance of counsel to be ineffective:

> 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, at 687, 80 L. Ed. 2d at 693. This test was adopted by the North Carolina Supreme Court in *State v. Braswell*, 312 N.C. at 562, 324 S.E.2d at 248. "The first element requires a showing that counsel made serious errors; and the latter requires a showing that, even if counsel made an unreasonable error, 'there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings.' " *Id.* at 563, 324 S.E.2d at 248; *see State v. Pate*, 187 N.C. App. 442, 448-49, 653 S.E.2d 212, 217 (2007) ("A 'reasonable possibility' of a different result at trial is a much lower standard than that a different result 'probably' would have been reached at trial. . . .").

When counsel's performance is subjected to judicial scrutiny on appellate review, this Court must be highly deferential and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694; *State v. Mason*, 337 N.C. 165, 178, 446 S.E.2d 58, 65 (1994). Defendant may rebut this presumption by specifically identifying those acts or omissions that are not "the result of reasonable professional judgment" and the court determining, "in light of all the circumstances, the identified acts were outside the wide range of professionally competent assistance." *Strickland* 466 U.S. at 690, 80 L. Ed. 2d at 695.

B. Mrs. Banks's Testimony

Mrs. Banks, mother of defendant, testified as a defense witness. On direct examination she denied knowledge of a rifle bought by defendant from Leicester Pawn prior to 3 December 2007. She went on to characterize defendant as a "great" son, a caring person who did not like to hurt the feelings of others, and never cursed.

On cross-examination, the prosecutor asked Mrs. Banks whether defendant used an AK-47 to shoot up the vehicle of Walema Bell. Her answer was that witnesses said two black boys did it, but that defendant pled guilty.

C. Mr. Banks's Testimony

Mr. Banks, father of the defendant, testified as a defense witness. On direct examination, Mr. Banks testified that he had never heard defendant threaten anybody. On cross-examination, the prosecutor asked if defendant had threatened Walema Bell prior to shooting up her car. Mr. Banks denied ever seeing the AK-47 purchased at Leicester Pawn Shop by defendant. He then clarified that the car was not Walema Bell's, but her mother's, and was at the mother's house when it was shot up.

D. Defendant's Testimony

Subsequent to the testimony of his parents, defendant testified in his own defense. On cross-examination, the prosecutor questioned defendant about certain postings to his MySpace Internet page:

Q Someone's talking about putting guns—or rounds in someone else's property?

A Yes, sir. And no one's house was ever fired into.

Q But someone's car was?

A Unoccupied car. Twenty-nine founds [sic] was fired into an unoccupied car. It was misdemeanor charges.

Q Twenty-nine rounds of what?

A AK-47.

Q And after you shot twenty-nine rounds into her car, what did you do after that?

A It was me and two other black males in the car.[1] I had left the scene and we went out to a grocery store out towards Weaverville—I think that was where it was towards—and we went to the grocery store, and my brother, Jeff Banks, had called me on the phone that they were looking for me. I'd left the AK-47 in the car and the two black males [sic]. My brother picked me up and drove me to the police station. The detec-

1. All evidence in the case indicates the defendant was white, not black.

tive said to work with them and he'd work with me. So I come in and worked with him and I made bond. I was charged with two misdemeanors.

Q Who was driving the car?

A I was driving the car.

E. Analysis

Under the second prong of the *Strickland* test, defendant must show that any error of counsel was prejudicial to his defense so as to deprive defendant of a fair trial. 466 U.S. at 687, 80 L. Ed. 2d at 693. On appeal, defendant only asserts that counsel's performance was deficient in not objecting to the prosecutor's cross-examination of his mother and father concerning the shooting into the Bell vehicle with the AK-47. However, defendant does not assert that his counsel was ineffective in not objecting to the prosecutor's examination of the defendant himself concerning the incident. We note that the cross-examination of defendant on this incident was far more extensive than that of his parents.

Defendant cannot show prejudice where the same evidence was received into evidence, without objection, and no error is assigned to its adjudication on appeal. *See State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979) (citations omitted) ("It is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character.").

Further, even assuming *arguendo* that these three arguments were properly presented on appeal, we cannot say that their admission by the trial court was error, or that this evidence was so highly prejudicial that its admission would have resulted in a different verdict in this case.

IV. Conclusion

We conclude that defendant received a fair trial in this case, free from prejudicial error.

These arguments are without merit.

NO PREJUDICIAL ERROR.

Judges BRYANT and BEASLEY concur.

STATE OF NORTH CAROLINA v. ERNEST JAWERN WRIGHT

No. COA10-854

(Filed 1 March 2011)

1. Evidence— testimony—results of blood tests—no misrepresentation of results—no error

The trial court did not commit error or plain error in a multiple assault case by admitting a State Bureau of Investigation (SBI) agent's testimony or a prosecutor's comments regarding the results of SBI Crime Laboratory blood tests. Neither the agent's testimony nor the prosecutor's comments misrepresented the results of the tests.

2. Constitutional Law— State testing of material evidence—evidence made available to defendant for testing—denial of motion to continue—no error

Defendant's argument that he was entitled to a new trial because the State Bureau of Investigation Crime Lab refused to test material evidence in violation of the Sixth and Fourteenth Amendments was overruled. Police do not have a constitutional duty to perform any particular tests on crime scene evidence and the evidence at issue was made available to defendant for independent testing. The trial court did not err by denying defendant's motion to continue to test the evidence where defendant had six months to prepare for trial and to obtain independent testing, but waited until the morning trial was scheduled to begin to file his motion.

3. Evidence— bad character—no abuse of discretion—no plain error

The trial court did not err in an assault case by admitting evidence of defendant's bad character. Where the evidence was objected to at trial, there was no abuse of discretion in the trial court's admitting the testimony for corroborative purposes only. Furthermore, even assuming *arguendo* that the trial court erred in admitting the testimony that was not objected to at trial, defendant failed to show that a different result probably would have been reached absent the error.

4. Evidence— hearsay—no plain error

The trial court did not commit plain error in an assault case by admitting hearsay evidence which the prosecutor subsequently argued in closing argument. Defendant failed to show that a different result probably would have been reached had the evidence not been admitted.

5. Assault— secret assault—insufficient evidence—motion to dismiss improperly denied

The trial court erred in denying defendant's motion to dismiss the charge of secret assault where there was insufficient evidence that the assault was committed in a secret manner.

6. Assault— lesser-included offenses not submitted—no error

The trial court did not commit plain error in a multiple assault case by failing to submit lesser-included offenses to the jury. Evidence of defendant's intent to kill was sufficient to support the assault with a deadly weapon with intent to kill inflicting serious injury charge and evidence of the victim's serious injury was sufficient to support the assault with a deadly weapon inflicting serious injury charge.

7. Sentencing— out-of-state convictions—no evidence of substantial similarity—erroneous assignment of points

The trial court erred in an assault case in its classification and assignment of points to two out-of-state convictions. The State did not produce any evidence that defendant's two prior out-of-state convictions were substantially similar to any North Carolina offenses, and the trial court did not make any substantial similarity conclusions.

8. Appeal and Error—preservation of issues—constitutional issue—not raised at trial

Defendant's argument that at least one of his four convictions in a multiple assault case must be arrested because entry of judgment on all four violated due process was dismissed. Defendant failed to raise the constitutional issue at trial and, thus, failed to preserve the issue for appellate review.

Appeal by defendant from judgments entered 11 November 2009 by Judge James F. Ammons, Jr., in Bladen County Superior Court. Heard in the Court of Appeals 24 January 2010.

Roy Cooper, Attorney General, by Robert C. Montgomery, Special Deputy Attorney General, for the State.

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

THIGPEN, Judge.

Defendant Ernest Wright appeals from six convictions arising from the assault of Steven Locklear and Demetrius Jacobs in Ms. Jacobs' mobile home. Four principal issues are presented on appeal: (1) whether there is sufficient evidence to support the secret manner element for the charge of secret assault of Mr. Locklear; (2) whether the trial court's classification and assignment of points to two out-of-state convictions violated N. C. Gen. Stat. § 15A-1340.14(e); (3) whether SBI Agent Jodie West overstated, and the State misrepresented, the results of the SBI Crime Lab blood tests; and (4) whether the trial court erred by admitting the State's bad character evidence and argument against Defendant. Defendant also contends the trial court erred by denying his motion to continue, admitting inadmissible evidence, and failing to submit lesser included offenses to the jury.

Since we find there is insufficient evidence to support the secret manner element of secret assault, we vacate Defendant's conviction for secret assault of Mr. Locklear. Additionally, we remand for resentencing because the State failed to demonstrate the substantial similarity of Defendant's out-of-state convictions to North Carolina crimes, and the trial court failed to make a substantial similarity determination. For all other issues, we find no error.

At trial, the State's evidence tended to show that in the early morning hours of 28 December 2005, Ms. Jacobs and her boyfriend, Mr. Locklear, were assaulted inside Ms. Jacobs' rented mobile home. The mobile home was located in the rear of Eddie Pittman's property in Bladen County, and Ms. Jacobs began renting it from Mr. Pittman in September 2005. After Ms. Jacobs and her children moved into the mobile home, Mr. Pittman developed a romantic interest in Ms. Jacobs. Ms. Jacobs, however, did not reciprocate Mr. Pittman's romantic interest, and she began a romantic relationship with Mr. Locklear in November 2005. Mr. Locklear subsequently moved in with Ms. Jacobs. Mr. Pittman did not like Mr. Locklear living with Ms. Jacobs. Mr. Pittman began harassing Ms. Jacobs with letters and phone calls about Mr. Locklear, asked Ms. Jacobs to put Mr. Locklear out, turned off the water to the mobile home, started eviction pro-

ceedings against Ms. Jacobs, and had Mr. Locklear arrested for trespassing. Ms. Jacobs and Mr. Locklear decided to move out on 31 December 2005.

On the night of 27 December 2005, Ms. Jacobs and Mr. Locklear went to sleep in the bedroom of the mobile home at about 12:30 a.m. The only light on in the home was a Christmas tree in the living room. Ms. Jacobs testified she awoke in the middle of the night when she felt a "hit" on her shoulder and another "hit" on her knee. She screamed and looked up to see someone standing in the doorway of the bedroom with a bat or pipe in his hand. Mr. Locklear testified he heard Ms. Jacobs scream, looked to see someone standing in the doorway, jumped on him, and hit him with a chair. Ms. Jacobs testified Mr. Locklear lunged from the bed toward the man and "pushed him into the kitchen area[,]" where the men began fighting. Ms. Jacobs saw the attacker repeatedly hit Mr. Locklear with the pipe and continue to hit Mr. Locklear on the head after he had collapsed to the floor. Ms. Jacobs grabbed her cell phone and ran out of the trailer to call 911. The assailant ran out of the trailer after Ms. Jacobs and ran toward Mr. Pittman's house. Ms. Jacobs returned to the trailer to find Mr. Locklear covered in blood and "a gray hood with the eyes cut out and the mouth cut out" laying on the floor.

As a result of the 28 December 2005 assault, the right side of Mr. Locklear's skull was crushed and doctors had to insert a steel plate on the right side of his head; he had fractured ribs and an injury to his lung; he lost all of his teeth, except for two on the top; he suffers from seizures and severe headaches; and he receives disability benefits from the government. Ms. Jacobs suffered contusions and several bruises to her knee and had to use crutches for about a week and a half.

Sheriff Deputy Michael Burney testified he received a call at 2:15 a.m. and drove to Ms. Jacobs' mobile home, where investigators seized a cut window screen and a piece of pipe on the ground in the backyard about 25 and 50 feet, respectively, outside the trailer, a gray knit toboggan inside the trailer, and a broken window pane in the spare bedroom. Officers searched, but did not find any trace evidence or fingerprints inside the trailer or footprints inside or outside the trailer.

At the hospital on 28 December 2005, Detective Larry Guyton interviewed Ms. Jacobs and Mr. Locklear. Ms. Jacobs told Detective Guyton about the problems she and Mr. Locklear had been having with Mr. Pittman. Although Ms. Jacobs stated she could not see the attacker's face or otherwise identify him, she told Detective Guyton

that she was sure the attacker was Mr. Pittman. Mr. Locklear also told Detective Guyton that Mr. Pittman was the assailant.

On 6 December 2006, co-defendant Jason Todd pled guilty to several felonies related to the assault on Ms. Jacobs and Mr. Locklear. Mr. Todd testified at Defendant's trial that around 9:00 p.m. on 27 December 2005, Defendant came to Mr. Todd's house driving a Toyota car and asked Mr. Todd to come with him because he was "going to f—–- a mother f------ up". After stopping at Defendant's home to play video games for about one hour and a half, Defendant stated he was ready to go and grabbed a toboggan off the kitchen table. Mr. Todd testified Defendant was wearing "a gray fleece pull over shirt . . . like a sweat shirt type deal," "a dark pair of pants," and "some kind of stocking on his head." Mr. Todd and Defendant then got back into the Toyota, and Defendant directed Mr. Todd to drive to Purnell McLean Road. Defendant pointed to a trailer and told Mr. Todd that was the house where the people stayed. Mr. Todd testified Defendant directed him to park on a nearby dirt road. Defendant got out of the car with a piece of pipe and some white gloves and walked away. An hour later, Defendant returned to the car for a screwdriver and walked away again.

Mr. Todd stated that about an hour after Defendant left the car the second time, he heard "banging noises" and a woman screaming for help. Forty-five seconds later Defendant got back in the car covered in blood and told Mr. Todd he had hit two people. Mr. Todd drove to Defendant's house where he collected Defendant's pants and fleece and Defendant told Mr. Todd to get rid of the clothes. As Defendant's wife drove Mr. Todd home, Mr. Todd threw the clothes out the car window onto the side of the road about one half mile from Defendant's house.

Detective Guyton recovered Defendant's fleece pull-over and pants from the side of the road where Mr. Todd had thrown them. Officers also searched Defendant's house, car, and telephone records, but did not find any incriminating evidence, blood, bloody clothing, or a call between Defendant and Mr. Pittman. Officers did find hair on the toboggan hat, and submitted the clothes and toboggan to the SBI Crime Lab for forensic testing.

At trial, forensic serologist Jodie West testified he received the pants, fleece, and toboggan in the SBI Crime Lab and applied the phenolphthalein blood test to them. Mr. West explained the phenolphthalein test is "a[n]indicator test, which means a positive

result of this test would give us an indication that blood could be present." Mr. West testified the pants, fleece pull-over, and toboggan all tested positive. On cross-examination, Mr. West further explained the phenolphthalein test:

> Q. That test for the presence of blood?
>
> A. It test[s] for the chemical indications for the presence of blood.
>
> Q. Is there anything that could make that test give a false positive?
>
> A. There are certain plant materials that may give a positive reaction. There is also a couple of commercially produced chemicals that may give a positive reaction. But in my training and experience I have never found these plant materials to give a positive reaction.

Cuttings from the areas that tested positive during the phenolphthalein tests were forwarded to the DNA unit for further testing.

Special Agent Sharon Hinton, a DNA forensic biologist in the SBI Crime Lab, extracted DNA from Defendant, Mr. Todd, Mr. Pittman, and Mr. Locklear, and from the cuttings of the fleece pull-over, pants, and toboggan worn by the assailant. Agent Hinton testified she found DNA predominantly from Mr. Locklear, with a smaller amount from Defendant, on the cutting from the outside of the toboggan. On the cutting from the nose and mouth area inside the toboggan, she found DNA predominantly from Defendant, with a smaller amount from Mr. Locklear. No DNA from Mr. Todd or Mr. Pittman was found on the toboggan. Agent Hinton did not find DNA on the fleece sweatshirt and was unable to conclusively identify the donor from the partial DNA profile on the pants.

At trial, the jury found Defendant guilty of first-degree burglary, assault with a deadly weapon inflicting serious injury of Ms. Jacobs, assault with a deadly weapon with intent to kill inflicting serious injury of Mr. Locklear, secret assault of Mr. Locklear, attempted first-degree murder of Mr. Locklear, and conspiracy to commit felony of assault inflicting serious bodily injury of Mr. Locklear. The trial court imposed consecutive sentences and sentenced Defendant to a minimum of 693 months and a maximum of 880 months imprisonment.

On appeal, Defendant argues (I) Agent West overstated and the State misrepresented the results of the SBI Crime Lab blood tests; (II) the SBI Crime Lab refused to test material evidence and the trial court erred by denying Defendant's motion to continue; (III) the trial

court erroneously admitted the State's bad character evidence and argument; (IV) the trial court erred by admitting the State's inadmissible hearsay evidence and argument; (V) there is insufficient evidence that the assault on Mr. Locklear was committed in a secret manner; (VI) the secret assault indictment does not allege an essential element of secret assault and the trial court lacked jurisdiction; (VII) the trial court erred by failing to submit lesser included offenses to the jury for secret assault, assault with a deadly weapon with intent to kill inflicting serious injury of Mr. Locklear, and assault with a deadly weapon inflicting serious injury of Ms. Jacobs; (VIII) the trial court's classification and assignment of points to two out-of-state convictions violated N.C. Gen. Stat. § 15A-1340.14(e); and (IX) entry of judgment for four convictions for the assault of Mr. Locklear violates due process and *State v. Fulcher*.

I.

[1] Defendant first argues he is entitled to a new trial because Agent West overstated and the prosecutor misrepresented the results of the SBI Crime Lab phenolphthalein blood tests. We disagree.

Defendant did not object to Agent West's testimony or the prosecutor's closing statement at trial and now asserts plain error. *See* N.C. R. App. P. 10(a)(4). "Under the plain error standard of review, defendant has the burden of showing: (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Fraley*, ––– N.C. App. –––, –––, 688 S.E.2d 778, 785 (citations and quotation marks omitted), *disc. rev. denied*, 364 N.C. 243, 698 S.E.2d 660 (2010).

Defendant contends Agent West's testimony was inadmissible and improper because Agent West stated Defendant's clothes tested positive for blood, rather than stating that a positive phenolphthalein test result means "chemical indications for the presence of blood." This argument has no merit.

Toward the beginning of his testimony, Agent West explained that "a positive result of this [phenolphthalein] test would give us an indication that blood could be present." On cross-examination, Agent West further explained that the phenolphthalein test "test[s] for the chemical indications for the presence of blood." He then noted that there are "certain plant materials that may give a positive reaction. There is also a couple of commercially produced chemicals that may

give a positive reaction." Based on the record, we conclude Defendant has failed to show either error or plain error.

Defendant also argues he is entitled to a new trial because the prosecutor misrepresented the results of the SBI Crime Lab phenolphthalein blood tests. During closing argument, the prosecutor stated: "What do we know about these clothes? Jodi West tells you that he tested the clothes and they tested positive for blood. They test positive for blood." Because Agent West previously testified about the results and limitations of the phenolphthalein test, we find Defendant has also failed to show error or plain error.

II.

[2] Defendant next argues he is entitled to a new trial because the SBI Crime Lab refused to test material evidence and because the trial court denied Defendant's motion to continue to test the evidence in violation of the Sixth and Fourteenth Amendments. We disagree.

Although criminal defendants have a right to "inspect, examine, and test any physical evidence or sample" contained in the State's file, N.C. Gen. Stat. § 15A-903(a)(1) (2009), "police do not have a constitutional duty to perform any particular tests on crime scene evidence or to use a particular investigatory tool[.]" *State v. Taylor*, 362 N.C. 514, 525, 669 S.E.2d 239, 253 (2008) (quotation marks and citation omitted), *cert. denied*, ––– U.S. –––, 175 L. Ed. 2d 84, 130 S. Ct. 129 (2009).

Defendant contends he is entitled to a new trial because the SBI Crime Lab refused to test four hair and fiber lifts taken from the toboggan.

Here, Lieutenant Larry Guyton examined the toboggan at the police station and found hairs and fibers. He took four lifts using adhesive evidence tape and submitted the lifts to the SBI for testing. Detective Jeff Singletary testified the SBI would not examine both DNA and hair lifts from the toboggan because "[i]f you have DNA, it's better. And they didn't see any sense in examining the hair." Defendant does not argue the prosecutor failed to make the lifts available to him for testing. In fact, the prosecutor noted that one of Defendant's previous attorneys made a motion for independent testing of the toboggan and received the results of the testing. Because police do not have a constitutional duty to perform particular tests on crime scene evidence, *Taylor*, 362 N.C. at 525, 669 S.E.2d at 253, we find no error.

Defendant also contends the trial court erred by denying his motion to continue to test the lifts in violation of the Sixth and Fourteenth Amendments.

"We review a trial court's resolution of a motion to continue for abuse of discretion." *State v. Morgan*, 359 N.C. 131, 143, 604 S.E.2d 886, 894 (2004) (citation omitted). However, "when a motion raises a constitutional issue, the trial court's action upon it involves a question of law which is fully reviewable[.]" *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982). "The denial of a motion to continue, even when the motion raises a constitutional issue, is grounds for a new trial only upon a showing by the defendant that the denial was erroneous and also that his case was prejudiced as a result of the error." *Id.* In determining whether a trial court erred in denying a motion to continue, we have considered the following factors:

> (1) the diligence of the defendant in preparing for trial and requesting the continuance, (2) the detail and effort with which the defendant communicates to the court the expected evidence or testimony, (3) the materiality of the expected evidence to the defendant's case, and (4) the gravity of the harm defendant might suffer as a result of a denial of the continuance.

State v. Barlowe, 157 N.C. App. 249, 254, 578 S.E.2d 660, 663 (2003) (citations omitted).

In the instant case, Defendant's attorney filed a motion to continue on 26 October 2009, the day Defendant's trial was scheduled to begin. The motion stated that Defendant's attorney was appointed in March 2009 and had diligently prepared the matter for trial but needed a continuance to test four hairs/fibers removed from the toboggan. Defendant's attorney explained that he didn't discover the hairs until the day before, as he prepared for trial. In response to Defendant's motion to continue, the prosecutor stated the toboggan had been DNA tested and Defendant's and Mr. Locklear's DNA were found on the toboggan, with Defendant's DNA as the predominate profile on the inside and Mr. Locklear's DNA the predominate profile on the outside. The prosecutor also explained that three of Defendant's previous attorneys had reviewed all of the evidence, one attorney made a motion for independent testing of the toboggan but later withdrew the motion, and another attorney made a motion for independent testing of the toboggan and had it tested. Defense counsel did not refute these statements.

Based on the record, we find that the trial court did not err by denying Defendant's motion to continue to test the lifts. Defendant had six months to prepare for trial and to obtain independent testing, but waited until the morning trial was scheduled to begin to file his motion, in violation of N.C. Gen. Stat. § 15A-952(c) which states:

> Unless otherwise provided, the motions listed in subsection (b) must be made at or before the time of arraignment if a written request is filed for arraignment and if arraignment is held prior to the session of court for which the trial is calendared. If arraignment is to be held at the session for which trial is calendared, the motions must be filed on or before five o'clock P.M. on the Wednesday prior to the session when trial of the case begins.
>
> If a written request for arraignment is not filed, then any motion listed in subsection (b) of this section must be filed not later than 21 days from the date of the return of the bill of indictment as a true bill.

Defendant's failure to file the motion to continue within the required time period constitutes a waiver of the motion. N.C. Gen. Stat. § 15A-952(e); *see also Branch*, 306 N.C. at 104, 291 S.E.2d at 656 ("This rule requiring the defendant to make a showing of abuse by the trial court in denying his motion for a continuance should be applied with even greater vigor in cases such as this in which the defendant has waived his right to make a motion to continue by failing to file the motion within the time prescribed by G.S. 15A-952."). Furthermore, because the toboggan had already been DNA tested by the State, the lifts were not the only physical evidence taken from the toboggan. *Compare Barlowe*, 157 N.C. App. at 257, 578 S.E.2d at 665 (holding the trial court erred by denying the motion to continue to evaluate blood spatter analysis and present contradictory evidence when "blood spatter evidence was critical to the State's case against defendant because it was the only physical evidence potentially placing her at the scene"). Accordingly, we find the trial court did not abuse its discretion by denying Defendant's motion to continue.

III.

[3] Defendant next argues he is entitled to a new trial because the trial court erred by admitting the State's bad character evidence and argument. Specifically, Defendant challenges the testimony of Detective Guyton regarding a breaking and entering at a local farm, and the testimony of John Phillips and Kevin White, who were both inmates with Defendant in the Bladen County Jail. We disagree.

Defendant challenges twelve statements from the above witnesses. At trial, however, he objected only to Detective Guyton's testimony. Under N.C. Gen. Stat. § 8C-1, Rule 403 (2009), relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. "Whether or not to exclude evidence under Rule 403 of the Rules of Evidence is a matter within the sound discretion of the trial court and its decision will not be disturbed on appeal absent a showing of an abuse of discretion." *State v. Lawson*, 194 N.C. App. 267, 276, 669 S.E.2d 768, 774 (2008) (citation omitted), *disc. rev. denied*, 363 N.C. 378, 679 S.E.2d 837 (2009). "The trial court's ruling should not be overturned on appeal unless the ruling was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (quotation marks and citation omitted). Where a defendant has failed to object, he "has the burden of showing that the error constituted plain error, that is, (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997) (citations omitted).

In the present case, defense counsel objected to Detective Guyton's testimony about a breaking and entering at a local farm. During *voir dire*, the prosecutor explained Detective Guyton's testimony would corroborate Mr. Phillip's testimony that Defendant told him about breaking into a farm with Mr. Todd. The trial court limited Detective Guyton's testimony to the occurrence of the breaking and entering. Based on the record, we cannot conclude the trial court's ruling regarding Detective Guyton's testimony was "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *Lawson*, 194 N.C. App. at 276, 669 S.E.2d at 774. Thus, we find no abuse of discretion.

Defendant also challenges the following statements made by Mr. Phillips and Mr. White: Defendant had killed two people in New York; killed his first wife; had been convicted of murder in New York; done jail and prison time; broke and entered a local farm in January 2006; stole and fenced property from the break-in; beat, assaulted, and bullied other inmates in jail; threatened to harm jail inmates and their relatives; smuggled marijuana into jail; "broke out" of jail; "escaped" from jail, and was "pretty good at the ability to kill." Assuming *arguendo* that the trial court erred in admitting Mr. Phillips' and Mr. White's testimony, we conclude Defendant has failed to show plain error. The evidence against Defendant was substantial. Mr. Todd

testified in detail about the assaults against Mr. Locklear and Ms. Jacobs; Agent Hinton testified that Defendant's DNA was on the toboggan; Mr. West testified to the positive results of the phenolphthalein test of Defendant's clothes; and Mr. Phillips and Mr. White testified that Defendant told them about the assault on Mr. Locklear and Ms. Jacobs. Under these circumstances a different result probably would not have been reached absent Mr. Phillips' and Mr. White's statements, nor did the statements deprive Defendant of a fair trial.

IV.

[4] Defendant next contends he is entitled to a new trial in all cases because the trial court erroneously admitted Timothy Outlaw's hearsay evidence about what Mr. Pittman told him in December 2005 and the prosecutor subsequently argued that evidence in closing argument. We disagree.

Where, as in this case, the defendant has failed to object, he "has the burden of showing that the error constituted plain error, that is, (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *Bishop*, 346 N.C. at 385, 488 S.E.2d at 779.

Here, Mr. Outlaw testified he knew both Mr. Pittman and Defendant. He then stated as follows:

> Q. Eddie Pittman approached you wanting to meet Ernest Wright?
>
> A. Yes, sir.
>
> Q. Did Eddie Pittman tell you why he wanted to meet Ernest Wright?
>
> A. Yes, sir.
>
> COURT: Is Mr. Pittman going to testify?
>
> MR. BOLLINGER: Judge, we wouldn't be offering it for corroborative purposes at this point. That decision has not been made yet. We would not be offering it for the truth of the matter asserted, but to explain subsequent actions of this particular witness.
>
> COURT: The witness may answer the question. Ladies and gentlemen, you may consider his answer only for the purpose of corroborating the testimony which is going to be given to you by

the witness, Eddie Pittman. Any portion of this statement that does not tend to corroborate his testimony at this trial, you will disregard that portion of the statement completely and not consider it any way in reaching a verdict. You may not consider the responses of this witness as substantive evidence.

Q. Did Mr. Pittman indicate to you why he wanted to meet Ernest Wright?

A. Yes, sir.

Q. What did he tell you?

A. He wanted a guy, I didn't know his name, scared off from his girlfriend is what he told me.

Q. Did he tell you where those individuals lived that he wanted scared off?

A. Yes, sir. The lady rented a trailer from him.

Defendant's attorney did not object to Mr. Outlaw's testimony regarding his conversation with Mr. Pittman and did not request the limiting instruction from the trial court.

At the close of all the evidence, Defendant's attorney noted that Mr. Pittman did not testify and Mr. Outlaw's statement as to what Mr. Pittman told him about why he wanted to hire Defendant was introduced solely for corroboration. Therefore, Defendant's attorney asked the Court to instruct the State not to use that evidence in their closing argument. The trial court sustained the objection, allowing the prosecution to say Mr. Outlaw introduced Mr. Pittman to Defendant, but not why they were introduced. In closing argument, the prosecution stated: "DNA tells you that you can believe Timmy Outlaw when he comes in here, I was the one that introduced Eddie Pittman to Ernest Wright because he wanted to have some people scared off." Defendant did not object.

Based on the record, we find Defendant has failed to show plain error. Contrary to Defendant's argument, there was other evidence that Mr. Pittman hired Defendant to assault Ms. Jacobs and Mr. Locklear. Mr. Todd testified Defendant told him that he was supposed to be paid $500, but couldn't get any money because they locked Mr. Pittman up. Mr. Outlaw testified Defendant told him "I need to get in touch with [Mr. Pittman]. I need the rest of my money. . . . I done a job and I don't know if the boy is going to live." Accordingly, we cannot

conclude that a different result probably would have been reached absent Mr. Outlaw's statement about why Mr. Pittman wanted to meet Defendant or the prosecutor's statement in closing argument. Nor can we conclude that the statements deprived Defendant of a fair trial.

V.

[5] Defendant next argues his conviction for secret assault on Mr. Locklear must be vacated because there is insufficient evidence that the assault was committed in a secret manner. We agree.

At the close of the State's evidence, Defendant's attorney made a motion to dismiss the secret assault charge because the State failed to show a secret assault. The trial court denied the motion. "The motion to dismiss must be allowed unless there is substantial evidence of each element of the crime charged. . . . Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. McDowell*, 329 N.C. 363, 389, 407 S.E.2d 200, 214-15 (1991) (quotation marks and citations omitted).

Defendant was indicted for secret assault under N.C. Gen. Stat. § 14-31:

> If any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, with intent to kill such other person, notwithstanding the person so assaulted may have been conscious of the presence of his adversary, he shall be punished as a Class E felon.

"Under this statute, the State must prove that the defendant (1) acted in a secret manner, (2) with malice, (3) perpetrated an assault and battery, (4) with a deadly weapon, and (5) with intent to kill." *State v. Green*, 101 N.C. App. 317, 321, 399 S.E.2d 376, 378 (1991) (citing *State v. Hill*, 287 N.C. 207, 216-17, 214 S.E.2d 67, 74 (1975)). "[T]he purpose of the secret assault statute is to provide for the protection of society in cases of assault from ambush[.]" *State v. Joyner*, 329 N.C. 211, 217, 404 S.E.2d 653, 657 (1991).

We recently summarized North Carolina law on the element of secret manner:

> The body of case law that addresses the secret manner element of malicious secret assault reinforces that, if the victim is unaware of the defendant's presence, then the assault is a secret

> one, because if one's presence is unknown, then his purpose to assault necessarily also is unknown. If a defendant's presence is known but the purpose underlying the assault is not, our courts have held that that also satisfies the secret manner element. . . . [R]egardless of whether the victim is aware of the defendant's presence, he cannot know of the defendant's purpose to assault him in order for the assault to be committed in a secret manner.
>
> We previously have noted that in the context of an assault case, lying in wait or secret manner is nothing more or less than taking the victim by surprise. Although concealment is not a necessary element it is clear from this Court's prior decisions that some sort of ambush and surprise of the victim are required. Even a moment's deliberate pause before assaulting one unaware of the impending assault and consequently without opportunity to defend himself satisfies the definition. *Important considerations for the secret manner element center on the suddenness of the attack and the inability of the victim to defend himself.*

State v. Holcombe, ––– N.C. App. –––, –––, 691 S.E.2d 740, 744 (2010) (quotation marks and internal citations omitted) (emphasis added). We also outlined similarities in many of the cases in which the secret manner or lying in wait element was challenged and the State's evidence found sufficient:

> For most of the victims, their first awareness of potential danger occurred simultaneously with the assaults themselves. Also, most of the defendants were concealed and waiting for their victims prior to the victims' arrival at the scene. Finally, each defendant took some deliberate action to disguise either his presence or his purpose from the victim. *All of these factors indicate that the victims were taken by surprise and were unable to defend themselves from the assaults.*

Id. at –––, 691 S.E.2d at 745 (emphasis added).

Here, Mr. Locklear testified he heard a loud, thunderous noise, heard Ms. Jacobs scream, and looked up to see someone standing in the bedroom doorway. The only light in the house was from the Christmas tree in the living room. Mr. Locklear did not know who was standing in the doorway and could not see his face because it was covered. Mr. Locklear stated he jumped on the man and hit him with a chair, but did not remember anything else. Similarly, Ms. Jacobs testified Mr. Locklear lunged from the bed toward the man and "pushed him into the kitchen area[,]" where the men began fighting.

The evidence shows Mr. Locklear was aware of Defendant's presence and purpose before the assault began. *See id.* at ––, 691 S.E.2d at 745-46 (vacating defendant's conviction for malicious secret assault where the victims "were aware of both the presence and the purpose of defendants in time to defend themselves by escaping and prior to any assault"). Mr. Locklear awoke to a loud noise and Ms. Jacobs' scream and saw Defendant standing in the doorway of the bedroom with his face covered. At this point, Mr. Locklear was aware of the potential danger. *Compare id.* at ––, 691 S.E.2d at 744 ("For most of the victims, their first awareness of potential danger occurred simultaneously with the assaults themselves."); *Green*, 101 N.C. App. at 321, 399 S.E.2d at 379 (finding sufficient evidence of secret manner where the victim observed defendant running into the woods, but did not know what defendant was doing or why defendant wanted to shoot him).

Although Defendant concealed his face and broke into the trailer in the middle of the night, Mr. Locklear was able to defend himself by jumping on and attacking Defendant before Defendant assaulted him. *See Holcombe*, –– N.C. App. at ––, 691 S.E.2d at 744 ("Important considerations for the secret manner element center on the suddenness of the attack and the inability of the victim to defend himself.") (citations omitted); *compare State v. Leroux*, 326 N.C. 368, 377, 390 S.E.2d 314, 321 (1990) (concluding the evidence was sufficient to convince a rational jury beyond a reasonable doubt that defendant was guilty of lying in wait where defendant was "sneaking around the dark golf course and, with a suddenness which deprived Officer Smith of all opportunity to defend himself, fired upon and killed the officer"). Because the State did not produce substantial evidence as to the element of secret manner, we find the trial court erred by denying Defendant's motion to dismiss. Accordingly, we vacate Defendant's conviction for secret assault of Mr. Locklear.[1]

VI.

[6] Defendant next contends he is entitled to a new trial because the trial court erred by failing to submit lesser included offenses to the jury. Specifically, Defendant argues the trial court failed to submit (1)

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1. Because we vacate Defendant's conviction for secret assault of Mr. Locklear, we will not address Defendant's arguments that the secret assault conviction must be vacated because the indictment does not allege the essential element of battery or that he is entitled to a new trial for secret assault because the trial court erred by failing to submit two lesser included offenses to the jury.

the lesser included offense of assault with a deadly weapon inflicting serious injury for the charge of assault with a deadly weapon with intent to kill inflicting serious injury of Mr. Locklear; and (2) the lesser included offense of assault with a deadly weapon for the charge of assault with a deadly weapon inflicting serious injury of Ms. Jacobs. We disagree.

Since Defendant failed to object to the jury charge or any omission thereto, our review is limited to plain error. *State v. Odom*, 307 N.C 655, 660, 300 S.E.2d 375, 378 (1983). "To constitute plain error, defendant bears the burden of convincing the appellate court that absent the error, the jury probably would have reached a different verdict." *State v. Cromartie*, 177 N.C. App. 73, 76, 627 S.E.2d 677, 679 (citing *Odom*, 307 N.C. at 661, 300 S.E.2d at 379), *disc. rev. denied*, 360 N.C. 539, 634 S.E.2d 538 (2006). Where the evidence is sufficient to support the offense submitted to the jury, it is not plain error for the trial court to refuse to submit a lesser charge. *See State v. Riley*, 159 N.C. App. 546, 554, 583 S.E.2d 379, 385 (2003) ("All of the evidence tends to show that defendant shot at the crowd with the intent to kill, and therefore it was not plain error for the trial court to refuse to submit the charge of misdemeanor assault with a deadly weapon to the jury.").

A.

Defendant first contends he is entitled to a new trial for assault with a deadly weapon with intent to kill inflicting serious injury of Mr. Locklear because the trial court failed to submit the lesser included offense of assault with a deadly weapon inflicting serious injury to the jury. We disagree.

"The only difference in what the State must prove for the offense of assault with a deadly weapon inflicting serious injury and assault with a deadly weapon with intent to kill inflicting serious injury is the element of intent to kill." *Cromartie*, 177 N.C. App. at 76, 627 S.E.2d at 680 (citing *State v. Grigsby*, 351 N.C. 454, 526 S.E.2d 460 (2000)). "The defendant's intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." *Id.* (citations omitted).

Here, the evidence establishes that Defendant broke into Ms. Jacobs' trailer in the middle of the night and used an iron pipe to beat Mr. Locklear, who was unarmed, naked, and had just woken up. Defendant hit Mr. Locklear three or four times with the pipe while he was on the floor on all fours and hit him in the head two more times

after Mr. Locklear had collapsed. Where the defendant repeatedly hits the victim with a metal pipe, *State v. Hensley*, 91 N.C. App. 282, 284, 371 S.E.2d 498, 499 (1988) (noting that defendant repeatedly beat the victim "with a metal walking cane, a weapon clearly capable from our observation of inflicting a lethal wound when used as a club") (citation omitted), *disc. rev. denied*, 323 N.C. 627, 374 S.E.2d 595 (1988), this constitutes evidence from which intent to kill may be inferred. Moreover, Defendant repeatedly hit Mr. Locklear in his head, a sensitive and critical area of the body. This also demonstrates an intent to kill since "an assailant must be held to intend the natural consequences of his deliberate act." *Cromartie*, 177 N.C. App. at 77, 627 S.E.2d at 680 (citation omitted) (inferring an intent to kill when the defendant shot the victim in the torso "where the majority of his major organs are located"). Based on the record, we conclude that Defendant has failed to demonstrate plain error.

B.

Defendant next contends he is entitled to a new trial for assault with a deadly weapon inflicting serious injury of Ms. Jacobs because the trial court failed to submit the lesser included offense of assault with a deadly weapon to the jury. We disagree.

"[O]ur Supreme Court has stated that the term 'serious injury' under N.C. Gen. Stat. § 14-32(a) means a physical or bodily injury which results from an assault with a deadly weapon, determined according to the facts of each case." *State v. Crisp*, 126 N.C. App. 30, 36, 483 S.E.2d 462, 466 (citations omitted), *disc. rev. denied*, 346 N.C. 284, 487 S.E.2d 559 (1997). "Generally, whether a serious injury has been inflicted depends upon the facts of each case and is generally for the jury to decide under appropriate instructions. Pertinent factors for jury consideration include hospitalization, pain, blood loss, and time lost at work." *State v. Uvalle*, 151 N.C. App. 446, 454, 565 S.E.2d 727, 732 (2002) (citations omitted), *disc. rev. denied*, 356 N.C. 692, 579 S.E.2d 95 (2003).

In the instant case, the evidence establishes that after Defendant broke into the trailer, he hit Ms. Jacobs, most likely with the iron pipe, on her shoulder and on her knee as she lay in the bed. Ms. Jacobs testified the hits injured her, "but when you are in such shock and scared I was able to run to the neighbor's house." After calling 911, Ms. Jacobs stated that she realized she could hardly walk and was limping badly. Ms. Jacobs was taken to the hospital where she received treatment for and x-rays of her knee. Ms. Jacobs testified to

having "contusions and several bruises [on her knee] where I could not walk for about a week and a half. I had to use crutches for about a week and a half." She also stated her knee still hurt at the time of trial, especially on cold or rainy days.

We have previously held a similar knee injury constitutes sufficient evidence of serious injury as required to support a conviction for assault with a deadly weapon inflicting serious injury. *See State v. Tice*, 191 N.C. App. 506, 510, 664 S.E.2d 368, 371 (2008) (finding sufficient evidence to show the victim sustained a serious injury where the victim went to the hospital, took pain medication for two weeks, walked with a limp for one to two weeks, and did not fully heal for approximately one month after being shot in the knee).

Our review of the whole record fails to convince us that absent the alleged error, the jury probably would have reached a different verdict. Therefore, Defendant has not carried his burdenof showing plain error.

VII.

[7] Defendant next contends he is entitled to a new sentencing hearing because the trial court erred in its classification and assignment of points to two out-of-state convictions. Specifically, Defendant argues the State did not produce any evidence that his 1980 Connecticut conviction for robbery in the third degree and his 1985 New York conviction for attempted murder in the second degree were substantially similar to any North Carolina offenses, and the trial court did not make any substantial similarity conclusions. We agree.

"The trial court's assignment of a prior record level is a conclusion of law which we review *de novo*." *State v. Goodwin*, 190 N.C. App. 570, 576, 661 S.E.2d 46, 50 (2008) (citation omitted). With regard to prior record level points allocation for an out-of-state conviction, our legislature has enacted the following:

> If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e) (2009). A defendant may stipulate that he or she "has been convicted of a particular out-of-state offense

and that this offense is either a felony or a misdemeanor under the law of that jurisdiction." *State v. Bohler*, 198 N.C. App. 631, 637-38, 681 S.E.2d 801, 806 (2009), *disc. rev. denied*, ––– N.C. –––, 691 S.E.2d 414 (2010). However,

> the question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court, and stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate.

State v. Moore, 188 N.C. App. 416, 426, 656 S.E.2d 287, 293 (2008) (quoting *State v. Palmateer*, 179 N.C. App. 579, 581, 634 S.E.2d 592, 593 (2006)).

Here, at the sentencing hearing, the prosecutor submitted a prior record level worksheet listing five of Defendant's prior convictions, including a 1980 Connecticut conviction for robbery in the third degree, listed as a Class G offense, and a 1985 New York conviction for attempted murder in the second degree, listed as a Class C offense. Defendant stipulated to his previous convictions, indicating that the convictions were valid and that he had received them. Following Defendant's stipulation, the prosecutor introduced sentencing exhibits, including: (1) exhibit 2A, a certified letter from the State of Connecticut Office of the Clerk, showing Defendant was convicted of the Connecticut crime of "robbery 3rd degree" pursuant to Ct. Gen. Stat. § 53a-136; (2) exhibit 3A, Commitment to the State Department of Corrections, showing Defendant was convicted of the New York crime of "Attempted Murder 2nd Degree"; and (3) exhibits 2B and 3B, records of Defendant's fingerprints from the Connecticut and New York police departments. Based on the prosecutor's prior record level worksheet and exhibits, and Defendant's stipulation, the trial court treated the 1980 Connecticut conviction as a Class G felony, treated the 1985 New York conviction as a Class C felony, and assigned 4 and 6 prior record points, respectively. The trial court concluded Defendant had 15 prior points, placing him at prior record level V for sentencing purposes. The trial court, however, did not make a substantial similarity conclusion.

Determining whether an out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving the comparison of the elements of the out-of-state offense to those of the North Carolina offense. *State v. Fortney*, –––, N.C. App. –––, –––, 687 S.E.2d 518, 525 (2010). In the instant case, the State provided

evidence that Defendant was convicted of "robbery 3rd degree" under Ct. Gen. Stat. § 53a-136, but did not provide evidence of the New York statute under which Defendant was convicted. Furthermore, the State neither provided copies of the applicable Connecticut and New York statutes, nor provided a comparison of their provisions to the criminal laws of North Carolina. *See State v. Morgan*, 164 N.C. App. 298, 309, 595 S.E.2d 804, 812 (2004) (remanded for resentencing where the State presented a copy of the 2002 New Jersey homicide statute, but presented no evidence that the 2002 New Jersey homicide statute was unchanged from the 1987 version under which defendant was convicted); *compare State v. Rich*, 130 N.C. App. 113, 117, 502 S.E.2d 49, 52 (holding that copies of New Jersey and New York statutes and a comparison of their provisions to the criminal laws of North Carolina were sufficient to prove by a preponderance of the evidence that defendant's convictions in those states were substantially similar to North Carolina crimes for purposes of section 15A-1340.14(e)), *disc. review denied*, 349 N.C. 237, 516 S.E.2d 605 (1998). Finally, the trial court did not analyze or determine whether the out-of-state convictions were substantially similar to North Carolina offenses. *See Fortney*, ––– N.C. App. at –––, 687 S.E.2d at 525 (holding that the trial court erred by failing to determine whether defendant's New York assault conviction was substantially similar to a North Carolina offense, but did not err in treating defendant's Virginia conviction as a Class G felony where it made "the finding of the statute being similar in Virginia and North Carolina").

Since the State failed to demonstrate the substantial similarity of Defendant's out-of-state convictions to North Carolina crimes and since the trial court failed to determine whether the out-of-state convictions were substantially similar to North Carolina offenses, we must remand for resentencing.

VIII.

[8] Defendant lastly argues at least one of his four convictions related to the assault of Mr. Locklear must be arrested because entry of judgment on all four violates due process and *State v. Fulcher*.

Defendant failed to raise a constitutional question at trial regarding his four convictions related to the assault of Mr. Locklear. Accordingly, Defendant failed to preserve this issue for appellate review. *State v. Anderson*, 355 N.C. 136, 140, 558 S.E.2d 87, 91 (2002) ("[D]efendant did not assert at trial any constitutional basis in support of his request for the instruction. Thus, he has waived appellate

review of his constitutional challenges to the court's ruling."), *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) ("[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal."). Additionally, we vacate Defendant's conviction for secret assault of Mr. Locklear. Thus, we will not address this argument.

In sum, we vacate Defendant's conviction for secret assault of Mr. Locklear and remand for resentencing.

Vacated in part and remanded for resentencing.

Chief Judge MARTIN and Judge McGEE concur.

STATE OF NORTH CAROLINA v. DAVID ORDIS LAWRENCE

No. COA10-348

(Filed 1 March 2011)

1. Kidnapping— attempted—overt act—lying in wait

The trial court did not err by not dismissing two charges of attempted kidnapping where defendant was never in the presence of the intended victim. There was evidence of intent and preparation and, assuming that those acts were not more than preparations, defendant's hiding in the woods behind the victim's house and waiting for her to come home, and fleeing only upon the arrival of law enforcement and armed neighbors, was an act beyond mere preparation and thus overt.

2. Kidnapping— attempted—restraint—beyond that inherent in robbery

The evidence of attempted kidnapping was sufficient to survive defendant's motion to dismiss on the issue of whether the restraint he intended to use was inherent in the intended robbery. Defendant's plans were not only to intercept the victim outside her house and force her back into the house, but also to bind her hands and threaten to douse her with gasoline if she did not cooperate. These were additional acts that would have exposed the victim to greater danger than that inherent in the armed robbery and that were also the kind of danger and abuse the kidnapping statute was designed to prevent.

3. Appeal and Error— preservation of issues—objection at trial—not different from argument on appeal

Defendant preserved for appeal the question of whether the trial court should have dismissed one of two conspiracy charges where defendant moved at trial to dismiss all charges, including both conspiracy charges. Although the State contended that this was a different argument from that argued at trial, defendant argued on appeal that there was evidence of only one agreement.

4. Conspiracy— attempted robberies—one rather than two conspiracies

There was evidence of only one conspiracy rather than two, and one of two convictions was vacated, where the time intervals, participants, objective, and number of meetings indicated only one conspiracy.

5. Robbery— attempted—lying-in-wait—beyond mere preparation

The trial court did not err by denying defendant's motions to dismiss two counts of attempted armed robbery where defendant was never in the presence of the intended victim. The evidence established defendant's intent, preparations, and two instances of lying-in-wait, which went beyond mere preparation and were thus overt acts.

6. Burglary and Unlawful Breaking or Entering— attempted—no entrance onto property—evidence sufficient

There was sufficient evidence of attempted breaking and entering to survive a motion to dismiss even though defendant and his coconspirators did not enter the intended victim's property. The evidence showed that defendant had the specific intent to break and enter in that defendant was to be the "muscle" when the group intercepted the intended victim outside her home, forced her inside, and robbed her.

7. Criminal Law— flight—evidence sufficient

The trial court did not err by instructing the jury on flight where the evidence, viewed in the light most favorable to the State, was sufficient to support the theory that defendant fled the scene to avoid apprehension.

8. Burglary and Unlawful Breaking and Entering— attempted —instructions—omitted portion subsequently included

There was no plain error in an instruction on attempted felonious breaking and entering where the trial court initially omitted the part of the instruction concerning an overt act, but later included the missing portion of the instruction and repeated it for the second count of the offense.

9. Robbery— instruction—use of weapon—plain error

There was plain error when instructing the jury on conspiracy to commit robbery with a dangerous weapon where the court did not instruct the jury that the charge included the use of a weapon to threaten or endanger the life of the victim, rather than merely a taking through the use of a firearm.

Appeal by Defendant from judgments entered on 27 October 2008 by Judge Douglas B. Sasser in Hoke County Superior Court. Heard in the Court of Appeals 28 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General M. Lynne Weaver, for the State.

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

HUNTER, JR., Robert N., Judge.

David Ordis Lawrence ("Defendant") appeals from a jury verdict finding him guilty of two counts of attempted robbery with a dangerous weapon, two counts of attempted kidnapping, two counts of attempted breaking and entering, and two counts of conspiracy to commit robbery with a dangerous weapon. On appeal, Defendant argues the trial court erred in denying Defendant's motion to dismiss for insufficient evidence as to all charges except one charge of conspiracy to commit robbery with a dangerous weapon. Defendant also contends the trial court erred by instructing the jury on the law of flight as the instruction was not supported by the evidence. After careful review, we find no error in part; reverse and remand in part; grant a new trial in part; and remand for a new sentencing hearing.

I. Factual and Procedural Background

The State's evidence tended to establish the following events. In late August 2008 in Orlando, Florida, Marlita Williams approached a

couple of her friends about joining her in a robbery of a purported drug dealer who lived in North Carolina. When the two friends, Travis McQueen and his wife, expressed interest in the plan, Marlita told Travis that he could bring one man to assist in the robbery; Travis recruited his friend Bernard King. A few days later, Williams, the McQueens, and King traveled to Fayetteville, North Carolina and began preparations for the robbery.

Two members of the group stole several zip ties from a hardware store, with which they could bind their victim to prevent escape, and stole a car from the hardware store's parking lot for use during the robbery. After casing the homes of several potential victims, the group focused their attention on Ms. Charlise Curtis. Williams believed that a suspected drug dealer, Glenn Artis, was living with Ms. Curtis and her son and would have a significant amount of cash to steal. In order to determine what Ms. Curtis looked like and where she lived, the group stalked Ms. Curtis, observing her at her workplace and following her home to Raeford, North Carolina. They returned to Ms. Curtis' home later that evening, but drove away when neighbors became suspicious of their activities.

Having settled on Ms. Curtis as their target, the group paid a visit to Defendant to recruit him to participate in the robbery. Accepting the offer, Defendant said he was "ready to go" and brandished a semi-automatic pistol from his pocket. Williams instructed the group on their duties for the robbery: King was to be the driver and lookout, while McQueen and Defendant were to be the "muscle" of the plan who would enter the home and rob the victims. Later, Williams borrowed a pistol from a family member so that both McQueen and Defendant would be armed.

On the morning of 29 August 2008, the plan was to intercept Ms. Curtis as she was leaving her home to take her son to school, then to force her back into her home and to rob her. That morning, two men in the group prepared the get-away vehicle by replacing the license plate with a stolen plate and placing a gas can in the car. Later, they filled the gas can with gasoline with which they intended to douse the victim and threaten to set her on fire if she refused to cooperate. King, McQueen, and Defendant drove to the victim's neighborhood where Defendant and McQueen exited the car with their guns and hid in the woods near Ms. Curtis' home. King parked the car near the entrance of Ms. Curtis' driveway and slumped down in the front seat. Suspicious of this activity, two neighbors called 9-1-1. Shortly there-

after, an officer from the sheriff's office arrived on scene and pulled up behind King's car. When the officer activated his lights, King sped away, but then jumped from the car and fled on foot. As the officer gave chase, King ran into the woods to hide, where he saw Defendant and Travis McQueen. King testified that the officer then began his pursuit of Defendant and McQueen as they stashed their guns under some leaves and fled from their hiding place in the woods—" 'cause they see what's going on now.' "

Later that afternoon, Williams, King, McQueen and his wife regrouped without Defendant and discussed whether to rob a different dealer or attempt to rob Ms. Curtis a second time. Despite the attention they drew from the neighbors and the sheriff's office, the group decided they would attempt to rob Ms. Curtis at her home again. In preparation for the second attempt, the group replaced their get-away car by stealing a truck from a mall parking lot, purchased two jump suits and masks, and two prepaid cell phones. King and McQueen returned to the woods near Ms. Curtis' home and retrieved their guns—again prompting the neighbors to call the sheriff's office.

On 30 August 2008, King, the McQueens, and Williams began looking for Defendant to execute their second attempt to rob Ms. Curtis. The group, without Defendant present, discussed robbing a different drug dealer and drove by a potential victim's home to survey the area; ultimately, they resumed the plan to rob Ms. Curtis. That evening, the group picked up Defendant and waited in a parking lot for Ms. Curtis to leave work. Upon receiving word that Ms. Curtis was on her way home, King drove Defendant and his accomplices to her neighborhood. Travis McQueen and Defendant exited the vehicle and hid in the woods close to Ms. Curtis' home while King drove to a nearby gas station to wait. Defendant and McQueen were observed by Ms. Curtis' neighbor, Robert Murray, who called 9-1-1, grabbed his pistol, and walked to Ms. Curtis' yard to investigate.

Murray proceeded to walk towards Ms. Curtis' backyard with his gun, asked Defendant and McQueen what they were doing, and both men fled. Murray alerted another neighbor that Defendant and McQueen were headed in his direction. This second neighbor stopped the two men at gun-point, but both fled again into the woods. While King was waiting in the get-away vehicle at the gas station, a police officer pulled up behind him and King sped away. After a brief chase, King crashed the vehicle and he was arrested. King cooperated with the police, providing details of the plan to rob Ms. Curtis and offered to help locate Defendant.

On 3 September 2008, the police arrested Travis McQueen and his wife, Twanda McQueen. Ms. McQueen cooperated with the police investigation and took the police to Defendant's residence. The police subsequently made numerous attempts to find Defendant and on 30 October 2008 contacted the United States Marshals Service for assistance in finding Defendant. On 8 January 2009, U.S. Marshals arrested Defendant in Lee County, Mississippi.

Defendant was indicted by a Hoke County Grand Jury on 27 October 2008 with two counts of attempted robbery with a dangerous weapon, two counts of attempted kidnapping, two counts of attempted breaking and entering, and two counts of conspiracy to commit robbery with a dangerous weapon. Defendant was tried before Judge Douglas B. Sasser in Hoke County Superior Court beginning on 27 October 2009. At the close of the State's evidence, Defendant made a motion to dismiss all charges for insufficient evidence, which the trial court denied. Defendant renewed his motion to dismiss after formally declining to testify; this motion was also denied. The jury returned guilty verdicts as to all eight charges on 3 November 2009. On 4 November 2009, Defendant was sentenced to consecutive sentences for the attempted robbery charges and the conspiracy to commit robbery with a dangerous weapon with the sentences for attempted breaking and entering to run concurrently; the trial court arrested judgment for both attempted kidnapping charges. Defendant gave oral 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 defendant's being the perpetrator of such offense." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citations omitted). 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

A. Attempted Kidnapping

[1] In his first and second arguments on appeal, Defendant contends that the trial court erred in failing to dismiss the two charges of attempted kidnapping for insufficient evidence. Defendant argues the State's evidence on these charges was insufficient to show (1) an attempt to kidnap—because he was never in the presence of the intended victim—and (2) an intent to use force beyond that which is necessary for armed robbery and thus sufficient to constitute the separate crime of kidnapping. We find both arguments to be without merit.

To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense and that the defendant is the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* at 597, 573 S.E.2d at 869. When reviewing the sufficiency of the evidence, "[t]he trial court must consider such evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Patterson*, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994). " '[I]f there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.' " *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (citation omitted).

The elements of the offense of an attempt to commit a crime are (1) "the intent to commit the substantive offense," and (2) "an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense." *Smith*, 300 N.C. at 79, 265 S.E.2d at 169-70 (citations omitted). The North Carolina General Statutes define kidnapping as the unlawful confinement, restraint, or

removal from one place to another, of a person over the age of 16, without consent, "if such confinement, restraint or removal is for the purpose of . . . . Facilitating the commission of any felony . . . . [or] Doing serious bodily harm to or terrorizing the person so confined, restrained or removed . . . ." N.C. Gen. Stat. § 14-39(a), (a)(2)-(3) (2009); *State v. Pigott*, 331 N.C. 199, 208-09, 415 S.E.2d 555, 560-61 (1992).

On appeal, Defendant first argues that because he was never in the presence of his intended victim, Ms. Curtis, he never began the act of kidnapping, and thus, he never attempted to kidnap Ms. Curtis. Defendant suggests that an overt act sufficient to support a charge of attempted kidnapping would, at a minimum, require Defendant to have been in the presence of his intended victim. We find no support for this proposition. The case law of our state provides that an overt act must be an act beyond mere preparation—that is, the act must " 'stand either as the first or some subsequent step in the direct movement towards the commission of the offense after the preparations are made.' " *State v. Addor*, 183 N.C. 687, 689, 110 S.E. 650, 651 (1922) (citation omitted).

The record on appeal reveals that Defendant's intent was to intercept Ms. Curtis at gunpoint, force her into her home, bind her with zip ties, threaten to burn her with gasoline, and steal any money and drugs in the residence. The record is replete with details of the preparations made by Defendant and his coconspirators: stealing get-away cars, and acquiring cell phones, jump suits, masks, zip ties, gasoline, and guns in order to affect the robbery and kidnapping. Assuming *arguendo* that these acts were no more than mere preparations, Defendant subsequently hid in the woods behind the home of his intended victim, waiting for her to appear, fleeing only upon the arrival of law enforcement and armed neighbors. We conclude this act of lying-in-wait was an act "beyond mere preparation" and thus an overt act for the purposes of the attempted crimes. Consequently, there was substantial evidence to support the charges of attempted kidnapping and it was not error for the trial to deny Defendant's motion to dismiss.

[2] Defendant also argues that the State's evidence was insufficient to survive his motion to dismiss the charges of attempted kidnapping because the restraint he intended to use on his victim was inherent to the intended robbery and thus not a separate and distinct crime under the holdings of *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978), and *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981). In *Fulcher*, our

Supreme Court recognized that because some crimes, such as armed robbery, cannot be committed without restraining the victim (by force, fraud or threat), the restraint required to support a conviction for kidnapping under N.C. Gen. Stat. § 14-39 must be restraint that was not merely incidental to the other felony. 294 N.C. at 523, 243 S.E.2d at 351. If, for example, a jury were able to convict a defendant for robbery and kidnaping based on a single act of restraint, that defendant would be subject to double jeopardy. *Id.* "[T]here is no constitutional barrier," however, "to the conviction of a defendant for kidnapping, by restraining his victim, and also of another felony to facilitate which such restraint was committed, provided the restraint, which constitutes the kidnapping is a separate, complete act, independent of and apart from the other felony." *Id.* at 524, 243 S.E.2d at 352.

Under this reasoning, the *Fulcher* Court found that where the defendant in that case subdued his victims by threatening them with a knife, then bound their hands with tape, and forced them to perform oral sex, the defendant had committed two separate crimes: kidnapping and a crime against nature. *Id.* The crime of kidnapping was completed upon securing submission of his victims by threat of the knife in order to commit the felony crime against nature. *Id.* ("The restraint . . . was separate and apart from, and not an inherent incident of, the commission upon her of the crime against nature, though closely related thereto in time."); *see Pigott*, 331 N.C. at 210, 415 S.E.2d at 561 (holding the restraint necessary for armed robbery was complete upon threatening the victim with a gun, while the defendant's additional action of binding the victim's hands and feet exposed the victim to greater danger and supported a separate charge for kidnapping).

The Supreme Court applied the holding of *Fulcher* in *State v. Irwin*, further clarifying that the analysis should be whether the actions by the defendant alleged to constitute kidnapping exposed the victim to greater danger than that which is inherent in the underlying felony, or exposed the victim to the kind of danger or abuse the kidnapping statute was intended to prevent. *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446. The defendant in *Irwin* robbed a drug store and forced an employee, at knifepoint, from the front of the store to the prescription counter in the back of the store in order to steal prescription drugs. This movement of the victim was a "mere technical asportation," an integral part of the attempted robbery and would not support a kidnapping conviction. *Id.*

Defendant cites *State v. Ripley*, 360 N.C. 333, 334, 626 S.E.2d 289, 290 (2006), in which, during the robbery of a motel, the defendant

forced motel patrons to lie on the floor of the motel lobby. Several individuals entering the motel saw the robbery in progress and turned to leave. *Id.* The defendant ordered these individuals, at gunpoint, to enter the lobby and lie on the floor with the other victims. *Id.* at 334-35, 626 S.E.2d at 290. The Supreme Court found this movement from outside of the motel to inside the lobby to be a "mere technical asportation" and not a kidnapping. *Id.*

Defendant also cites this Court's holding in *State v. Raynor*, 128 N.C. App. 244, 495 S.E.2d 176 (1998), for support of his argument that *removal* coupled with *restraint* of a robbery victim does not support a separate charge for kidnapping. Contrary to Defendant's assertion, the *Raynor* Court concluded the defendant's actions in that case *did* support a charge for kidnapping separate from the charge of armed robbery. 128 N.C. App. at 250, 495 S.E.2d at 180. Judge Timmons-Goodson (now Associate Justice Timmons-Goodson) concluded that "more than a 'mere technical asportation' occurred" when the defendant restrained his victim at gunpoint at the front door of the victim's home and removed him to his bedroom to take money from his wallet; and when the defendant removed the victim from the bedroom to the kitchen where he attempted to tie up the victim. *Id.* The restraint used by the defendant was more than was necessary for the armed robbery. *Id.*

While we agree with Defendant's statement of the case law of *Irwin* and *Ripley*, we cannot agree with his application of the law to the facts of this case. Defendant insists that the force he intended to use on Ms. Curtis was merely the force necessary for the intended robbery and indistinguishable from the facts presented in *Irwin* and *Ripley*. Testimony elicited at trial, however, established that Defendant's plans on 29 and 30 August 2008 were not only to intercept Ms. Curtis outside of her home and force her back into the house at gunpoint, but also to bind her hands with zip ties so that she could not move, and threaten to douse her with gasoline if she would not cooperate. These additional acts of restraint by force and by threat provided substantial evidence that Defendant's intended actions would have not only exposed Ms. Curtis "to greater danger than that inherent in the armed robbery itself," but also "subjected [her] to the kind of danger and abuse the kidnapping statute was designed to prevent." *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446. Therefore, we conclude the trial court did not err in failing to dismiss the two attempted kidnapping charges.

B. Conspiracy to Commit Robbery with a Dangerous Weapon

In his third issue on appeal, Defendant claims the trial court erred in failing to dismiss, due to insufficient evidence, one of two charges of conspiracy to commit robbery with a dangerous weapon. The State indicted Defendant with two counts of conspiracy to commit robbery with a dangerous weapon against Ms. Curtis on 29 August 2008 and again on 30 August 2008. Defendant asserts that the State's evidence was sufficient to allege only one conspiracy for the armed robbery of Ms. Curtis; having failed to achieve the objective of the conspiracy on the first attempt, Defendant and his accomplices returned the next day to continue their efforts. Therefore, Defendant argues, the constitutional protections from double jeopardy bar the State from charging him with multiple indictments for this single conspiracy. *See State v. Griffin*, 112 N.C. App. 838, 840, 437 S.E.2d 390, 392 (1993). We agree.

[3] Before we reach Defendant's argument, we first address the State's argument that Defendant failed to preserve this issue for appeal. At trial, Defendant moved to dismiss all charges including both charges of conspiracy. On appeal, Defendant argues the trial court should have dismissed only one of the two charges of conspiracy. The State contends this is a different argument than Defendant presented at trial and thus Defendant failed to preserve the issue for appeal. N.C. R. App. P. 10(a)(1) (2011) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.") Furthermore, because Defendant did not request we review the alleged error for plain error, the State contends, the issue is not properly before this Court pursuant to Rule 10(a)(4) of our Rules of Appellate Procedure. We disagree.

The record reveals that Defendant first moved to dismiss all charges at the close of the State's evidence: "[Defendant's counsel]: Your Honor, it would be our motion at this time to dismiss at the close of the State's evidence. It would be our position that given the light—even in the light most favorable to the State that they have failed to carry their burden, Your Honor." (T. p. 784.) The trial court denied this motion. Defendant then renewed his motion to dismiss after formally declining to testify; this motion was also denied. Thus, the record shows Defendant moved to dismiss all charges on the grounds that "the State . . . failed to carry their burden."

On appeal, Defendant contends there was insufficient evidence to support two counts of conspiracy, because the State, "having elected to charge separate conspiracies, must prove not only the existence of at least two agreements but also that they were separate." *State v. Rozier*, 69 N.C. App. 38, 53, 316 S.E.2d 893, 902, *cert. denied*, 312 N.C. 88, 321 S.E.2d 907 (1984). Defendant argues that two conspiracy convictions cannot stand where there is evidence of only one agreement—or that the State "failed to carry their burden." Therefore, we conclude Defendant preserved this issue for appellate review.

[4] 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). The commission of a criminal conspiracy is complete upon the formation of the agreement to achieve its objective, but it is a continuing offense and may continue over an extended period of time, even a number of years, so long as efforts to pursue the objective continue. *See State v. Brewer*, 258 N.C. 533, 543, 129 S.E.2d 262, 270, *appeal dismissed*, 375 U.S. 9 (1963). Multiple agreements or overt acts which arise from a single agreement do not permit prosecution for multiple conspiracies. *Id.* Where the State charges a defendant with separate conspiracies, the State must prove "not only the existence of at least two agreements but also that they were separate." *Rozier*, 69 N.C. App. at 53, 316 S.E.2d at 902. As there is no bright-line test for whether multiple conspiracies exist in a given case, "the essential question is the nature of the agreement or agreements . . . but factors such as time intervals, participants, objectives, and number of meetings all must be considered." *Id.* at 52, 316 S.E.2d at 902.

In the present case, the *Rozier* factors—time intervals, participants, objectives, and number of meetings—lead us to conclude there was one conspiracy. It is undisputed that the objective on each attempt was the same, to rob Ms. Curtis, and the participants involved in each attempt were the same. The time interval between the two attempts was approximately 36 hours. Additionally, Defendant's coconspirator testified that on the second attempt the group did not agree to a new plan: "The next day rolls around, so we [sic] trying to look for [Defendant] . . . . 'cause we [sic] trying to go for this same plan again, trying to do the same thing again." Testimony also revealed that while Defendant's coconspirators considered robbing a different victim, they did so as a back-up plan in case the robbery of Ms. Curtis was unsuccessful. The State contends, how-

ever, that because Defendant's coconspirators met on the night of and the day after the first attempt, acquired additional materials to use during the execution of their plan, made slight modifications on how to execute their plan, and briefly considered robbing a different victim, the coconspirators had abandoned their first conspiracy and formed a second conspiracy.

The State cites this Court's decision of *State v. Roberts*, 176 N.C. App. 159, 625 S.E.2d 846 (2006), as their sole authority for this argument. The State's reliance on this case is misplaced. In *Roberts*, this Court upheld the defendant's conviction for two separate conspiracies where the defendant agreed to participate in two robberies involving the same coconspirators, committed on two consecutive days, but committed against two distinct and unspecified victims. *Id.* at 161, 167, 625 S.E.2d at 848, 852. The present case is distinguishable as Defendant's agreement, on the first and the second attempt, was to rob the same individual, Charlise Curtis. We are persuaded the evidence presented supports only a single conspiracy for the robbery of Ms. Curtis with a dangerous weapon and the trial court erred in denying Defendant's motion to dismiss as to one of the two charges of conspiracy.

As in *Rozier*, the trial court in the present case did not permit the jury to find a single conspiracy based on the State's two indictments. The jury, however, found Defendant guilty on both counts of conspiracy, "which is tantamount in this case to finding [him] guilty of the single larger conspiracy presented by the evidence." *Rozier*, 69 N.C. App. at 54, 316 S.E.2d at 903. The State presented evidence that the conspiracy began on 29 August 2008 and continued through 30 August 2008. The indictment in 08 CRS 52088 alleged that Defendant entered into a conspiracy to commit robbery with a dangerous weapon on 29 August 2008, while the indictment in 08 CRS 52092 alleged that a conspiracy was formed on 30 August 2008. Thus, as in *Rozier*, "the earlier of the conspiracy convictions should stand." *Id.* The trial court erred in denying Defendant's motion to dismiss the indictment for the 30 August 2008 conspiracy. Accordingly, we reverse Defendant's conviction on 08 CRS 52092; there was no error in denying Defendant's motion to dismiss for 08 CRS 52088.

C. Attempted Robbery with a Dangerous Weapon

[5] Defendant's next two issues on appeal are that the trial court erred in failing to dismiss, due to insufficient evidence, both charges of attempted robbery with a dangerous weapon. Defendant contends

that the evidence was insufficient to show that his actions amounted to an attempt as he was never in the presence of the intended victim. We disagree.

A person commits the felony of attempted robbery with a dangerous weapon "when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result." *State v. Allison*, 319 N.C. 92, 96 352 S.E.2d 420, 423 (1987) (citing *Irwin*, 304 N.C. 93, 282 S.E.2d 439).

A conviction for an attempted crime requires the intent to commit the underlying offense and an overt act which goes beyond "mere preparation" but does not amount to the completed offense. *Smith*, 300 N.C. at 79, 265 S.E.2d at 169-70. Additionally, an overt act is one that " 'stand[s] either as the first or some subsequent step in the direct movement towards the commission of the offense after the preparations are made.' " *Addor*, 183 N.C. at 689, 110 S.E. at 651 (citation omitted).

We conclude the evidence was sufficient to support Defendant's conviction for attempted robbery. The testimony elicited from Defendant's coconspirator established that Defendant's intent was to intercept Ms. Curtis at gunpoint, force her into her home, bind her with zip ties, threaten to burn her with gasoline, and steal any money and drugs in the residence. Additionally, we discuss above the preparations Defendant and his coconspirators made to ensure the success of their plan: stealing get-away cars, and acquiring cell phones, jump suits, masks, zip ties, gasoline, and guns. Assuming *arguendo* that these acts were mere preparation, Defendant subsequently hid in the woods behind the home of his intended victim, waited for her to appear, and fled only upon the arrival of law enforcement and an armed neighbor. We conclude these acts of lying-in-wait, on both 29 and 30 August 2008, were acts "beyond mere preparation" and thus overt acts for the purposes of the attempted crimes. Consequently, there was substantial evidence to support the charges of attempted robbery with a dangerous weapon and it was not error for the trial court to deny Defendant's motion to dismiss.

D. Attempted Breaking and Entering

[6] Defendant's sixth and seventh issues on appeal allege the trial court erred in failing to dismiss, due to insufficient evidence, both charges of attempted breaking and entering. Specifically, Defendant

contends the evidence failed to show he and his coconspirators entered the property at Ms. Curtis' residence and thus they could not have *attempted* to enter her residence. We disagree.

Under North Carolina law, the felony of breaking and entering requires "(1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *State v. Williams*, 330 N.C. 579, 585, 411 S.E.2d 814, 818 (1992); N.C. Gen. Stat. § 14-54(a) (2009). As stated above, the charge of attempting a crime requires the showing of an overt act performed with the specific intent to commit the underlying crime. *Smith*, 300 N.C. at 79, 265 S.E.2d at 169-70.

The evidence produced at trial tended to show that Defendant had the specific intent of breaking and entering the home of Ms. Curtis for the purpose of committing an armed robbery. Defendant's coconspirator testified that Defendant's role in the conspiracy was to be the "muscle." On both attempts, 29 and 30 August 2008, the plan was to intercept Ms. Curtis outside of her home, force her back inside, and rob her once she was restrained inside the home. If necessary, Defendant was to kick in the door of the home to gain entry. Thus, there was substantial evidence to support each element of both attempted breaking and entering indictments and the trial court did not err by dismissing Defendant's motion to dismiss.

E. Jury Instruction on the Law of Flight

[7] Defendant next argues that the trial court erred by instructing the jury on the law of flight as the evidence was insufficient to warrant the instruction. We disagree.

On appeal, a trial court's decisions regarding jury instructions are reviewed *de novo*. *State v. Jenkins*, ––– N.C. App. –––, –––, 688 S.E.2d 101, 105, *disc. review denied*, 364 N.C. 245, 698 S.E.2d 665 (2010). When a jury is charged with an instruction that is not supported by the evidence, a new trial is warranted. *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995). "So long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977). Regardless of the reason for the flight, "[t]he relevant inquiry is whether the evidence shows that defendant left the scene of the crime and took steps to avoid apprehension." *State v. Grooms*, 353 N.C. 50, 80, 540 S.E.2d 713, 732 (2000), *cert. denied*, 534 U.S. 838 (2001). Furthermore, our Supreme Court has recognized that, gener-

ally, “testimony of a law enforcement officer to the effect that he searched for the accused without success after the commission of the crime” is competent evidence of flight. *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E.2d 697, 699 (1973).

Defendant argues that the State’s only evidence of his involvement in the crimes charged is that two of his alleged coconspirators testified to his involvement; the testimony by Detective Kivett of the Hoke County Sheriff’s Department that after the crimes occurred he searched for Defendant in the community, but was not able to locate him; and that Defendant was arrested in Mississippi four months after the crimes occurred in North Carolina. Defendant’s summary of the State’s evidence is incomplete.

Bernard King testified that during the first robbery attempt on 29 August 2008, Defendant and Travis McQueen fled from a deputy sheriff as he approached Defendant hiding in the woods behind Ms. Curtis’ home—“ ‘cause they see what’s going on now.” During the second attempt, on 30 August 2008, an armed neighbor confronted the two men as they waited behind the Curtis residence. As the neighbor held the two men at gunpoint and called 9-1-1, the men fled. Additionally, a detective with the Hoke County Sheriff’s Department testified that upon learning of Defendant’s name and address, he canvassed the neighborhood informing residents that he was looking for Defendant. On 8 January 2009, Defendant was arrested by U.S. Marshals in Lee County, Mississippi. We conclude this evidence, viewed in the light most favorable to the State, was sufficient to support the theory that Defendant fled the scene in order to avoid apprehension by law enforcement officers. Accordingly, the trial court did not err by instructing the jury on the law of flight.

F. Jury Instruction on Attempted Felonious Breaking and Entering

[8] In his next argument on appeal, Defendant contends the trial court committed plain error by incorrectly instructing the jury on attempted felony breaking and entering. Specifically, Defendant contends that, upon instructing the jury on the elements of attempt, the trial court failed to instruct the jury that it must find beyond a reasonable doubt that Defendant committed an overt act designed to bring about the intended crime but fell short of doing so. As a result of this error, Defendant insists he was prejudiced, warranting a new trial. We disagree.

We review a trial court's jury instruction

> contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed . . . . The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by [the] instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, *it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.*

State v. Blizzard, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (emphasis added) (internal citations and quotation marks omitted). Furthermore, Defendant concedes that he made no objection at trial to the trial court's jury instruction on attempted felonious breaking and entering. He thereby waived his right to object on appeal under our Rules of Appellate Procedure. N.C. R. App. P. 10(b)(1) (2011). Defendant, however, requests this Court to examine the issue for plain error. N.C. R. App. P. 10(c)(4) (2011). " '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. Jones*, ––– N.C. App. –––, –––, ––– S.E.2d –––, –––, No. 10-475, slip op. at 3 (Dec. 21, 2010) (citation omitted), *temporary stay allowed*, ––– N.C. –––, ––– S.E.2d –––, 2011 N.C. LEXIS 6 (Jan. 10, 2011)

A review of the record reveals that the trial court did, initially, omit part of the instruction for an attempted crime. The trial court stated that for the jury to find Defendant guilty of attempted breaking and entering, "the State must prove two things beyond a reasonable doubt. First, that the defendant intended to commit felony breaking or entering." The trial court then recited the four elements of felonious breaking or entering, omitting the instruction for the second element of attempt, that of an overt act performed by the defendant and designed to complete the intended crime. *See* N.C.P.I. Crim. 201.10 (2009) ("And Second, that at the time the defendant had this intent, he performed an act which was calculated and designed to bring about (*name crime*). . . .").

Before completing the jury instruction, however, the trial court stated:

> If you find from the evidence, beyond a reasonable doubt, that on or about the alleged date, the defendant, acting either by himself or acting together with other persons, intended to commit felony breaking and/or entering *and performed an act or acts which were designed to bring this about but which fell short of the completed offense*, and which, in the ordinary and likely course of things, would have resulted in the breaking and entering had he not been stopped or prevented from completing this apparent course of action, it would be your duty to return a verdict of guilty or attempted felony breaking and entering. If you do not so find or have a reasonable doubt *as to one or both of these things*, it would be your duty to return a verdict of not guilty.

(Emphasis added.) These instructions were repeated for the second count of felonious breaking and entering.

Despite the initial omission in the instruction, the trial court instructed the jury on the necessity of finding both intent to commit the crime and performance of an overt act designed to bring about its commission. Thus, reviewing the jury instructions as a whole, we conclude that Defendant has failed to meet his burden of proving not only that there was an error in the instruction, but also that the error was likely to have mislead the jury. Defendant's argument is without merit.

G. Jury Instruction on Conspiracy to Commit Robbery with a Dangerous Weapon

[9] In Defendant's final argument on appeal, he contends the trial court committed plain error when instructing the jury on conspiracy to commit robbery with a dangerous weapon by failing to properly state all of the elements of the crime. We agree.

When instructing the jury on the two counts of conspiring to commit robbery with a dangerous weapon, the trial court first properly provided the elements of conspiracy. The trial court then began to recite the four elements of robbery with a dangerous weapon, but abruptly stopped and summarized the elements of the crime, stating:

> Again, I remind you that as to robbery with a dangerous weapon, the State must prove four things—well, strike that. Robbery with a firearm is—Well, hold just one second, folks.
>
> For robbery with a dangerous weapon, you have to find for that offense that there was robbery with another person *while using a firearm* to commit that offense.

(Emphasis added.) The trial court repeated the instruction for the second charge of conspiracy to commit robbery with a dangerous weapon, summarizing the elements of armed robbery: "And, again, that would be taking personal property from the person or presence of another person *while using or in the possession of a firearm.*" (Emphasis added.)

During jury deliberations, the jury requested clarification on these instructions. When reinstructing the jury, the trial court twice again stated that robbery with a dangerous weapon was "the taking of personal property from or in the presence of another person *while through the use of a firearm.*" (Emphasis added.) Under North Carolina law, armed robbery requires more than mere possession of a weapon during the commission of the crime; the defendant must also use the weapon to threaten or endanger the life of the victim. *State v. Gibbons*, 303 N.C. 484, 491, 279 S.E.2d 574, 578 (1981). While we review a jury instruction "contextually and in its entirety," and the trial court properly explained this element in its instruction to the jury on the separate charges of attempted robbery with a firearm, we are not persuaded this is sufficient to correct the omission from the instruction on conspiracy to commit robbery with a dangerous weapon. *Blizzard*, 169 N.C. App. at 296-97, 610 S.E.2d at 253. That the jury broke from deliberations to request clarification on this instruction is persuasive evidence that the trial court's instruction mislead the jury in regards to the State's burden of proof. *Id.* ("[I]t must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.") Moreover, upon re-instruction, the trial court repeated its erroneous instruction. Consequently, we conclude the trial court's failure to properly instruct the jury was plain error.

IV. Conclusion

We find no error as to the trial court's dismissal of Defendant's motion to dismiss the charges for attempted kidnapping, attempted robbery with a dangerous weapon, and attempted breaking and entering. We find no error by the trial court for its instruction to the jury on the law of flight. Additionally, we find that any error made by the trial court in its instruction to the jury on attempted felonious breaking and entering did not amount to plain error. We conclude, however, that the State's evidence was sufficient to support only one of the two charges against Defendant for conspiracy to commit robbery with a dangerous weapon; the trial court erred in denying Defendant's motion to dismiss the charge in case number 08 CRS 052092 and we

reverse the conviction. Furthermore, we conclude the trial court committed plain error in failing to properly instruct the jury on the elements of conspiracy to commit robbery with a dangerous weapon; Defendant is granted a new trial with respect to the remaining charge of conspiracy to commit robbery with a dangerous weapon in case number 08 CRS 52088. Defendant is also granted a new sentencing hearing for the two attempted breaking and entering convictions as Defendant's sentences for these convictions were to be served concurrently with the two sentences for the conspiracy to commit robbery convictions.

No error in part; reversed and remanded in part; new trial in part; and remanded for new sentencing hearing.

Judges McGEE and BEASLEY concur.

CAPE HATTERAS ELECTRIC MEMBERSHIP CORPORATION, PLAINTIFF v. KENNETH R. LAY, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, DEFENDANT

No. COA10-271

(Filed 1 March 2011)

1. Taxation— sale of electricity—legislative act—exemption from taxes

The trial court did not err in a case concerning taxes levied on plaintiff's sale of electricity by concluding that the special legislative act at issue was ambiguous, and, therefore, that the legislative intent must be ascertained. Furthermore, the trial court did not err in its determination that the clear legislative intent of the act was for plaintiff to maintain its tax-favored public agency status and to be exempt from paying franchise tax.

2. Taxation— sale of electricity—indirect taxation—unsupported conclusions—irrelevant

In a case involving taxes levied on plaintiff's sale of electricity, the findings of fact did not support the conclusions of law that defendant was not able to tax plaintiff indirectly by taxing plaintiff's third-party supplier. Nevertheless, the conclusions of law had no

impact on the trial court's ultimate decree that plaintiff was not subject to sales or franchise taxes and that defendant must refund such taxes paid since 2000.

3. Taxation— sale of electricity—exemption from taxes—credit to customers not required

Where the trial court correctly concluded that plaintiff was exempt from paying certain taxes on its sale of electricity, plaintiff did not have to demonstrate that it had credited its customers prior to receiving the ordered refund. Based on the clear and specific language of former N.C.G.S. § 105-267, the judgment entered shall be collected as in other cases and N.C.G.S. § 105-164.11 did not control this case.

4. Taxation— sale of electricity—exemption from taxes—interest on entire judgment

In a case involving taxes levied on plaintiff's sale of electricity, plaintiff was entitled to interest on the entire judgment at the legal rate pursuant to N.C.G.S. § 105-267.

Appeal by defendant from judgment entered 24 November 2009 by Judge Jerry R. Tillett in Dare County Superior Court. Heard in the Court of Appeals 14 September 2010.

Vandeventer Black LLP, by Norman W. Shearin and David P. Ferrell, for plaintiff-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Terence D. Friedman, for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Kenneth R. Lay, Secretary of the North Carolina Department of Revenue ("NCDOR") appeals from a judgment entered 24 November 2009. After careful review, we affirm.

Background

Plaintiff Cape Hatteras Electric Membership Corporation ("CHEMC") was originally incorporated on 30 March 1945 under former N.C. Gen. Stat. § 117-19 for the purpose of providing low cost electric service on a non-profit basis to consumers on Hatteras Island, North Carolina. N.C. Gen. Stat. § 117-19 was enacted in 1935 and declared all electric membership corporations ("EMCs") to be public agencies. The statute stated:

> Whenever an electric membership corporation is formed in the manner herein provided, the same shall be, and is hereby declared to be a public agency, and shall have within its limits for which it was formed the same rights as any other political subdivision of the State, and all property owned by said corporation and used exclusively for the purpose of said corporation shall be held in the same manner and subject to the same taxes and assessments as property owned by any county or municipality of the State so long as said property is owned by said electric membership corporation and is used for the purpose for which the corporation was formed.

N.C. Gen. Stat. § 117-19. Pursuant to this statute, CHEMC and Ocracoke Electric Membership Corporation ("Ocracoke EMC") were deemed to be public agencies and were not required to pay any taxes on the sale of electricity.

The evidence at the bench trial in this matter tended to show that in the early 1960's, disputes arose between EMCs and investor owned utilities ("IOUs") regarding the provision of electric service to previously unserved territories. In the mid-1960's, EMCs and IOUs began petitioning the General Assembly to pass legislation favorable to their respective positions. After the 1964 election, Governor-elect Dan K. Moore asked representatives of the EMCs and IOUs to reach a compromise. The result was a compromise which involved the assignment of service territories to EMCs and IOUs and the loss of public agency status for EMCs. However, CHEMC and Ocracoke EMC were in a unique position because they had no competitors and the IOUs were not interested in servicing Hatteras or Ocracoke islands.

On 9 March 1965, four bills were introduced in both the House and Senate by the chairs of the House and Senate Public Utilities Committees. These bills constituted the so called "Territorial Act". House Bill 255/Senate Bill 95 proposed to end the public agency status of EMCs; House Bill 256/Senate Bill 96 declared the telephone cooperatives to be public agencies; House Bill 257/Senate Bill 97 declared Ocracoke EMC to be a public agency; and House Bill 258/Senate Bill 98 declared CHEMC to be a public agency.

On 20 April 1965, N.C. Gen. Stat. § 117-19 was amended by House Bill 255, to state that henceforth "no [EMC] . . . shall be a public agency; nor shall any such corporation be, or have the rights of, a political subdivision of the State." However, the General Assembly, in accordance with the respective House and Senate bills, enacted session laws that declared CHEMC, Ocracoke EMC, and the telephone

cooperatives to be public agencies. As it relates to this case, House Bill 258/Senate Bill 98 was codified on 28 April 1965 as a Session Law entitled: "An Act To Declare Cape Hatteras Electric Membership Corporation To Be A Public Agency And Provide That It Shall Be Exempt From Certain Taxation" ("the Special Act"). As a result of the amended statute and enacted session laws, all EMCs, except CHEMC and Ocracoke EMC, no longer had public agency status and were required to pay franchise tax on revenue generated from the sale of electricity.

On 6 July 1984, the General Assembly enacted Chapter 1097 of the 1984 Session Laws, which split the franchise tax levied on EMCs into franchise and sales taxes. Sales tax was only levied on sellers of electricity who were previously required to pay franchise tax. Since CHEMC was not previously required to pay franchise tax it was not required to pay sales tax. Following a sales tax audit, in a letter dated 4 April 1990, NCDOR acknowledged that CHEMC was not required to pay sales tax due to its status as a public agency.

From 1965 to 2000, CHEMC was never required to pay franchise or sales taxes. On 24 February 2000, the Sales and Use Tax Division of NCDOR sent a letter to CHEMC stating that as of 1 March 2000, CHEMC would be required to pay sales tax on its sale of electricity as set out in N.C. Gen. Stat. § 105-164.4(4a). In a 22 May 2000 follow-up letter, NCDOR stated that CHEMC was required to pay sales tax because of an amendment made to N.C. Gen. Stat. § 105-164.3(25) during the 1999 Session of the General Assembly, which expanded the definition of utility to include "a business entity or municipality that sells electric power[.]" The letter went on to state NCDOR's position that the changes to G.S. 105-164.3(25) were designed to treat all sellers of electricity alike for sales and use tax purposes, and the only specific exemption provided was for a municipality whose only wholesale supplier of electric power is a federal agency[.]" [1] On 22 June 2000, NCDOR informed CHEMC that it would also have to pay franchise tax in addition to sales tax. NCDOR concluded that the Special Act only granted CHEMC a property tax exemption. CHEMC has paid franchise and sales taxes since 2000 under protest.[2]

1. It does not appear that NCDOR argued before the trial court that the 1999 amendment to N.C. Gen. Stat. § 105-164.3(25) served as the basis for its change in position with regard to taxation of CHEMC nor does NCDOR make that argument on appeal. The definition of utility was removed entirely from N.C. Gen. Stat. § 105-164.3 by Session Law 2001-430, effective 1 January 2002.

2. According to the record, Ocracoke EMC has merged with Tideland Electric Membership Corporation. It does not appear that Ocracoke EMC was ever subjected to franchise or sales taxes prior to the merger.

On 17 November 2000, CHEMC filed a complaint pursuant to N.C. Gen. Stat. § 105-267 (2000) demanding a refund of sales tax paid since 28 July 2000 and asking the trial court to hold that "[CHEMC] is not subject to or liable for sales and franchise taxes[.]" On 23 April 2003, CHEMC amended its complaint to seek a refund for franchise tax paid since 1 January 2001. On 6 August 2007, a bench trial was conducted in Dare County Superior Court before Judge Jerry R. Tillett. Additional arguments were heard on 1 June 2009 and 29 October 2009. On 24 November 2009, Judge Tillett entered judgment in favor of CHEMC, determining that CHEMC was not subject to franchise or sales taxes and ordering NCDOR to refund CHEMC the principal amount of taxes paid in the amount of $7,295,773.65 plus interest. NCDOR was required to pay all costs of the action. NCDOR timely appealed to this Court.

Standard of Review

"It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." Shear v. Stevens Building Co., 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). 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." Id. The trial court's conclusions of law are reviewable de novo. Id.

Discussion

I.

[1] As a preliminary matter, the franchise tax at issue was in existence in 1965 when the Special Act was passed; however, the sales tax statute was not enacted until 1984. Accordingly, we first address the effect of the Special Act as it relates to the franchise tax and then we will address the implication of the enactment of the sales tax statute.

NCDOR argued before the trial court, and argues now on appeal, that there is no ambiguity in the Special Act and the plain language of the statute does not exempt CHEMC from paying franchise and sales taxes; however, if there is an ambiguity in the Special Act, then rules of statutory construction require that such ambiguity be resolved in NCDOR's favor. CHEMC argues that the Special Act is ambiguous because it does not define "public agency," and, therefore, the Court must discern the legislative intent of the Special Act. CHEMC con-

tends that the clear legislative intent was to give CHEMC tax exempt status. The trial court concluded as a matter of law:

> 8. The Special Act is ambiguous and therefore the Court must construe it to ascertain the intent of the legislature.
>
> 9. Alternatively, the language of the Special Act is clear and unambiguous but a clearly expressed legislative intent requires judicial interpretation. Uncertainty as to the meaning of the Special Act arises from the fact that giving a literal interpretation to the words thereof would lead to unreasonable, unjust, impracticable, or absurd consequences by the General Assembly.
>
> . . . .
>
> 22. [T]he Special Act continues the tax-favored public agency status for CHEMC that all EMCs enjoyed under former N.C. Gen. Stat. § 117-19.
>
> 23. The Special Act exempts CHEMC from sales and franchise taxes on its sale of electricity to its members.

Accordingly, we must first ascertain whether the Special Act is ambiguous on its face. "A long-standing rule of statutory construction declares that a facially clear and unambiguous statute requires no interpretation." Taylor v. City of Lenoir, 129 N.C. App. 174, 179, 497 S.E.2d 715, 719 (1998). The Special Act states:

> Sec[]. 1. Cape Hatteras Electric Membership Corporation, heretofore created and now existing under and by virtue of the provisions of Chapter 117 of the General Statutes of North Carolina, being presently engaged in supplying electric service to the inhabitants of Hatteras Island under circumstances peculiar to the island in that it is a sparsely settled area which is isolated from the mainland of the State of North Carolina and is without available electric service from any other source, necessitating exceptionally costly, small-scale generation of electric energy upon the island for distribution thereon, is hereby declared to be a public agency for the performance for its members of the services which the charter heretofore granted to such corporation authorizes and empowers it to perform.
>
> Sec. 2. Cape Hatteras Electric Membership Corporation shall have the powers enumerated in the charter heretofore granted to it together with all other powers of any electric membership cor-

> poration created under and by virtue of the provisions of Chapter 117 of the General Statutes of North Carolina.
>
> Sec. 3. All property owned by Cape Hatteras Electric Membership Corporation and used exclusively for the purpose of said corporation shall be held in the same manner and subject to the same taxes and assessments as property owned by any county or municipality of the State so long as said property is owned by said Cape Hatteras Electric Membership Corporation and is held and used by it solely for the furnishing of electric energy to consumers on Hatteras Island and Ocracoke Island.
>
> Sec. 4. The provisions of this Act shall not affect the validity of any existing law or of any law that may hereafter be enacted which imposes or levies any tax, or which provides procedure with respect to taxation, and if any provision of this Act shall be deemed by a court of competent jurisdiction, in any action pending before such court, to affect adversely the constitutionality of any such law, or any part thereof, such court shall direct that the Cape Hatteras Electric Membership Corporation be made a party to such action and that it be afforded due opportunity to be heard upon such question, and if, upon hearing, the court concludes that such provision of this Act, if valid and in effect, would affect adversely the constitutionality of such other law, this entire Act shall be null and void and of no effect and the court shall so declare and adjudge.

(Emphasis added).

The clear language of the Special Act sets out that CHEMC is a public agency and the reason for that classification—the limited availability of electricity for the Hatteras Island residents and the costly endeavor of supplying electricity to the island. Although the legislature clearly sought to grant CHEMC some special consideration as a public agency in section one, the Special Act does not define public agency. NCDOR has not pointed out the relevance of public agency status other than to set out a verbatim recitation of the language of the Special Act, which states that the public agency is formed for the performance for its members of the services which the charter heretofore granted to such corporation authorizes and empowers it to perform." Id. This description of CHEMC's duty to act in accordance with its charter does not relay the import of public agency status. Section three states how property owned by CHEMC

will be taxed, but that does not resolve the question of what privileges were conferred on CHEMC due to its public agency status.

Because of the facial ambiguity in the Special Act, we must seek to ascertain the legislative intent behind the Special Act's grant of public agency status to CHEMC.

> The principal goal of statutory construction is to accomplish the legislative intent. The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish. If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so.

Lenox, Inc. v. Tolson, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (internal citations and quotation marks omitted). To ascertain legislative intent, the "courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish." Taylor, 129 N.C. App. at 177, 497 S.E.2d at 718 (quoting State ex rel. Utilities Commission v. Public Staff, 309 N.C. 195, 210, 306 S.E.2d 435, 444 (1983)).“ 'Other indicia considered by th[e] Court in determining legislative intent are the legislative history of an act and the circumstances surrounding its adoption[.]' " County of Lenoir v. Moore, 114 N.C. App. 110, 115, 441 S.E.2d 589, 592 (1994) (quoting In Re Banks, 295 N.C. 236, 239-40, 244 S.E.2d 386, 389 (1978)), aff'd, 340 N.C. 104, 455 S.E.2d 158 (1995).

> Special canons of statutory construction apply when the term under consideration is one concerning taxation. When the meaning of a term providing for taxation is ambiguous, it is construed against the state and in favor of the taxpayer unless a contrary legislative intent appears. But when the statute provides for an exemption from taxation a contrary rule applies and any ambiguities are resolved in favor of taxation. The underlying premise when interpreting taxing statutes is: Taxation is the rule; exemption the exception. In all tax cases, the construction placed upon the statute by the Commissioner of Revenue, although not binding, will be given due consideration by a reviewing court. Despite these special rules, our primary task in interpreting a tax statute, as with all other statutes, is to ascertain and adhere to the intent of the Legislature. The cardinal principle of statutory construction is that the intent of the Legislature is controlling.

Matter of North Carolina Inheritance Taxes, 303 N.C. 102, 106, 277 S.E.2d 403, 407 (1981) (internal citations and quotation marks omitted) (emphasis added). CHEMC argues that an examination of the legislative intent behind the Special Act reveals that public agency status was conferred upon CHEMC in 1965 to maintain the status quo. We agree.

First, a comparison of former N.C. Gen. Stat. § 117-19 and the Special Act is revealing. CHEMC was organized pursuant to former N.C. Gen. Stat. § 117-19, which stated that all EMCs were public agencies. In 1965, N.C. Gen. Stat. § 117-19 was amended and declared that EMCs were no longer public agencies; however the Special Act carved out an exception for CHEMC and Ocracoke EMC and maintained their public agency status, presumably for the reasons set out in section one. Additionally, former N.C. Gen. Stat. § 117-19 contained the following language: "[A]ll property owned by said corporation and used exclusively for the purpose of said corporation shall be held in the same manner and subject to the same taxes and assessments as property owned by any county or municipality of the State." The same language appears in section three of the Special Act. NCDOR argues that the Special Act, via the language of section three, only exempts CHEMC from ad valorem property taxes. It is true that section three mirrors the language of Article V section 2(3) of the North Carolina Constitution, which states: "Property belonging to the State, counties, and municipal corporations shall be exempt from taxation." Our Supreme Court has determined that this language only pertains to ad valorem property taxes. Sykes v. Clayton, 274 N.C. 398, 405-06, 163 S.E.2d 775, 780-81 (1968) (interpreting Article V of the North Carolina Constitution then in effect, which contained identical language to Article V section 2(3)). It is clear and undisputed that former N.C. Gen. Stat. § 117-19, which contained the same language as section three of the Special Act, intended to exempt CHEMC from ad valorem property taxes.[3] However, former N.C. Gen. Stat. § 117-19 also declared EMCs to be public agencies and that term was interpreted to mean that they did not have to pay franchise tax. The Special Act declares CHEMC to be a public agency. In sum, an examination of the language of former N.C. Gen. Stat. § 117-19 and the Special Act leads us to determine that the legislature intended for CHEMC to remain a public agency and thus be exempt from franchise

3. We note that the legislature may have seen a need to specifically include section three pertaining to ad valorem property tax because property tax is a local tax imposed by municipalities and counties as opposed to the state imposed franchise tax.

tax as it had been in the past, not merely exempt from ad valorem property tax.

Second, viewing the Territorial Act as a whole reveals the legislature's intent.

> When multiple statutes address a single matter or subject, they must be construed together, in pari materia, to determine the legislature's intent. Statutes in pari materia must be harmonized, to give effect, if possible, to all provisions without destroying the meaning of the statutes involved. Stated another way, statutes relating to the same subject or having the same general purpose, are to be read together, as constituting one law . . . such that equal dignity and importance will be given to each.

Taylor, 129 N.C. App. at 178, 497 S.E.2d at 719 (internal citations and quotation marks omitted). While the amendment to N.C. Gen. Stat. § 117-19 ended public agency status for EMCs, the Special Act restored that public agency status to CHEMC, Ocracoke EMC, and the telephone cooperatives. The obvious intent was to maintain the status quo for these particular entities due to their unique circumstances. NCDOR points out that the Special Act was enacted eight days after the amendment to N.C. Gen. Stat. § 117-19. The Special Act states that "[t]he provisions of this Act shall not affect the validity of any existing law . . . ." NCDOR argues that the Special Act could not, therefore, affect the validity of amended N.C. Gen. Stat. § 117-19, which was already in effect and ended public agency status for EMCs. NCDOR's logic would render at least that portion of the Special Act a nullity, an absurd result that we do not believe the legislature intended. Comr. of Insurance v. Automobile Rate Office, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978) "(In construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results.").

Third, the very name of the Special Act sets out its purpose, "To Declare Cape Hatteras Electric Membership Corporation To Be A Public Agency And Provide That It Shall Be Exempt From Certain Taxation[.] " " ' [W]hen the meaning of an act is at all doubtful, ' " the title should be examined because it serves as " 'a legislative declaration of the tenor and object of the Act.' " Sykes v. Clayton, 274 N.C. 398, 406, 163 S.E.2d 775, 781 (1968) (quoting State v. Woolard, 119 N.C. 779, 780, 25 S.E. 719, 719 (1896)). Given the title of the Act, it is

only logical to surmise that the legislature intended for CHEMC to continue to have public agency status and, therefore, continue to be excluded from certain taxation, namely, franchise and ad valorem taxes. When read in para materia with other bills contained in the Territorial Act, it becomes clear that CHEMC was to retain the same tax exempt status it enjoyed prior to the 1965 Amendment to N.C. Gen. Stat. § 117-19. NCDOR argues that had the legislature intended to exempt CHEMC from all taxes, it would have explicitly set that out in the Special Act. NCDOR ignores the fact that CHEMC was not excluded from all taxation. Prior to and after 1965, CHEMC was required to pay sales tax on their retail purchases of tangible property. CHEMC was exempt from paying franchise and ad valorem property taxes pursuant to former N.C. Gen. Stat. § 117-19 and subsequently the Special Act.

Fourth, "[o]rdinarily, the interpretation given to the provisions of our tax statutes by the Commissioner of Revenue will be held to be prima facie correct and such interpretation will be given due and careful consideration by this Court." In re Vanderbilt University, 252 N.C. 743, 747, 114 S.E.2d 655, 658 (1960); N.C. Gen. Stat. § 105-264 (2009). Moreover,

> [t]he construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration, especially if such construction has been made by the highest officers in the executive department of the Government or has been observed and acted upon for many years; and such construction should not be disregarded or overturned unless it is clearly erroneous.

Gill v. Commissioners, 160 N.C. 144, 153, 76 S.E. 203, 208 (1912) (emphasis added). NCDOR argues that we should give deference to its current interpretation of the Special Act, which would require us to ignore the original interpretation that was acquiesced in over a long period of time. Petty v. Owen, 140 N.C. App. 494, 500, 537 S.E.2d 216, 220 (2000) ("[A]n administrative interpretation of a statute, acquiesced in over a long period of time, is properly considered in the construction of the statute by the courts."). Although the interpretation by the Secretary is prima facie correct, in conducting statutory interpretation we must consider the fact that NCDOR's 1965 interpretation of the Special Act was made within the same historical context, and, most likely, with a better understanding of its purpose and implications. Consequently, we give greater weight to that interpretation than the reversal of position in 2000, 35 years later.

Finally,

> [t]he legislature is presumed to act with full knowledge of prior and existing law. When the legislature chooses not to amend a statutory provision that has been interpreted in a specific way, we assume it is satisfied with the administrative interpretation. Nevertheless, it is ultimately the duty of courts to construe administrative statutes; courts cannot defer that responsibility to the agency charged with administering those statutes.

Wells v. Consol. Judicial Ret. Sys. of N.C., 354 N.C. 313, 319, 553 S.E.2d 877, 881 (2001). NCDOR claims that the legislature has known since 2000 that CHEMC is now required to pay franchise tax and has not taken steps to clarify the Special Act. However, the converse of this argument is also true—that the legislature enacted the Special Act in 1965 and was presumably satisfied with NCDOR's interpretation from 1965 to 2000. While NCDOR points to changes in the law that occurred between 1965 and 2000, it is unable to cite a single statutory provision that can be inferred to end public agency status for CHEMC.[4]

In sum, we hold that the trial court did not err in its conclusion of law that the Special Act is ambiguous, and, therefore, the legislative intent must be ascertained. Furthermore, the trial court did not err in its determination that the legislative intent is clear and that the legislature intended for CHEMC to maintain its tax-favored public agency status. Consequently, CHEMC is exempt from paying franchise tax.

Next, we consider whether CHEMC must pay sales tax, which it has paid under protest since 2000. Pursuant to N.C. Gen. Stat. § 105-164.4 (a)(4a) (2009), sales tax is currently levied on the "gross receipts derived from sales of electricity." According to the statute, "[a] person who sells electricity is considered a retailer . . . . Id. A person is defined for tax purposes as, inter alia, a corporation or unit of government." N.C. Gen. Stat. § 105-228.90(b)(5) (2009). NCDOR taxes all electricity retailers based on these statutes and argues that CHEMC fits into the definition of an electricity retailer and should be taxed accordingly. We agree that these statutes standing alone would serve as a basis for imposing sales tax on CHEMC; however, we hold that the Special Act exempts CHEMC from sales tax. Our primary rationale for this holding is the fact that sales tax

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4. The legislature is free to amend the statutes and remove public agency status from CHEMC at any time.

was only levied on those entities that were already subject to the franchise tax, and, in essence, did not increase the tax burden. In other words, the addition of sales tax did not serve to raise additional revenue for the State. Patrick Herman, a tax partner with Vandeventer Black, LLP, who serves as general counsel for CHEMC, stated in his affidavit that sales tax "enable[d] individuals to deduct the sales taxes on their federal income tax returns. There was no effect on the amount of tax ultimately paid by the consumer." On 23 January 1985, Eric Gooch, Director of the Sales and Use Tax Division of NCDOR, issued a memorandum in which he explained that CHEMC was not liable for collecting and remitting sales tax due to its public agency status. NCDOR followed this interpretation from 1985 to 2000. On 4 April 1990, NCDOR performed a tax audit of CHEMC and affirmed in writing that CHEMC was not subject to sales tax. Again, NCDOR's interpretation acquiesced in over a long period of time is indicative of legislative intent. Owen, 140 N.C. App. at 500, 537 S.E.2d at 220. As the language of the Special Act indicates, the legislature sought to give CHEMC tax-favored status because of the exceptionally costly, small-scale generation of electric energy" in which it was, and still is, engaged. The legislature clearly intended for CHEMC to be a public agency exempt from burdensome taxation. Allowing NCDOR to impose sales tax, which was only levied on those who already paid franchise tax, would be contrary to the clearly expressed legislative intent behind the Special Act. Because CHEMC is a public agency, it is exempt from paying franchise and sales taxes. Consequently, the trial court did not err in so holding.[5] In sum, NCDOR seeks to impose franchise and sales taxes by reversing a 35-year-long interpretation of the Special Act. NCDOR asks this Court to give deference to its current interpretation and simply ignore the clear legislative intent. We decline to do so and hold that the language of the Special Act, its relation to other bills in the Territorial Act, and the title of the Special Act, along with NCDOR's interpretation of the Act from 1965 to 2000 and the legislature's presumed approval of that interpretation establishes the intent of the Special Act—to confer public agency status on CHEMC and exempt it from paying certain

5. NCDOR points to several pieces of evidence considered by the trial court, such as newspaper clippings and the affidavit of a former legislator, and argues that this evidence should not have been considered as evidence of legislative intent. NCDOR does not argue that any particular finding of fact is erroneous. Assuming, *arguendo*, that this evidence should have been excluded, the remaining evidence was sufficient to establish legislative intent and support the trial court's findings of fact and conclusions of law.

taxation, including franchise tax and subsequently sales tax.[6] Due to our holding on this issue, we need not reach the arguments concerning estoppel.

II.

[2] NCDOR argues on appeal that even if the Special Act exempts CHEMC from paying sales and franchise taxes, it can still enforce the taxes against CHEMC's third-party electricity supplier. The trial court concluded as a matter of law that NCDOR "cannot lawfully levy and collect said taxes from CHEMC, directly or indirectly." (Emphasis added). Additionally, the court concluded that "DOR is not empowered to levy and collect sales and franchise taxes from CHEMC indirectly by imposing said taxes on its supplier of wholesale power such that the cost of purchased power includes sales or franchise taxes." NCDOR claims that these conclusions of law are erroneous and that it is permitted to tax CHEMC's third-party electricity supplier.

Although the trial court concluded as a matter of law that NCDOR is not able to tax CHEMC indirectly by taxing CHEMC's third-party supplier, it did not prohibit NCDOR from doing so in its final decree nor did the trial court issue a separate injunction. The trial court made no findings of fact to support these conclusions of law and the parties have not cited any evidence in the record pertaining directly to this issue.[7] Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each . . . link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto. Coble v. Coble, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980); N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2009) ("In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.").

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6. We note that had we agreed with NCDOR that the Special Act is unambiguous, we would still have reached the same result given the overwhelming evidence of legislative intent that can not be ignored

7. NCDOR references the testimony of one of CHEMC 's expert witnesses who described the manner in which CHEMC receives electricity from a third-party supplier; however, this testimony does not pertain to the legal issue of whether or not NCDOR is able to tax the third-party supplier.

Here, there are no findings of fact to support conclusion of law 33 or that portion of conclusion of law 32 which states that NCDOR is not permitted to tax CHEMC indirectly. "A bare conclusion unaccompanied by the supporting grounds for that conclusion does not comply with G.S. 1A-1, Rule 52(a)(1)." Appalachian Poster Adver. Co. v. Harrington, 89 N.C. App. 476, 480, 366 S.E.2d 705, 707 (1988). Moreover, there appears to be no evidence upon which findings could have been made.[8] Not only were there no findings and no evidence presented on this issue, the trial court did not state the legal rationale for entering these particular conclusions of law.

Consequently, we hold that these conclusions of law were not supported by the findings of fact or the evidence of record.[9] Nevertheless, these two conclusions of law have no impact on the ultimate outcome of this case. The trial court decreed, and we affirm, that CHEMC is not subject to sales or franchise taxes and NCDOR must refund such taxes paid since 2000. See Starco, Inc. v. AMG Bonding & Ins. Serv., Inc., 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996) ("[T]o obtain relief on appeal, an appellant must not only show error, . . . appellant must also show that the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action.").[10]

III.

[3] NCDOR argues that if the Special Act exempts CHEMC from paying sales tax, CHEMC cannot obtain a refund for sales tax pursuant to the judgment without first proving it has refunded or credited the tax to its customers. NCDOR cites N.C. Gen. Stat. § 105-164.11(a) (2009), which states in relevant part: "When tax is collected for any period on exempt or nontaxable sales, the tax erroneously collected shall be remitted to the Secretary and no refund shall be made to a taxpayer

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8. We note that while CHEMC requested in its complaint "such further relief that [the trial court] deems appropriate[,]" CHEMC did not request that the trial court bar NCDOR from taxing its third-party supplier. The complaint and the evidence presented at the bench trial pertained to the implications of the Special Act and whether NCDOR could tax CHEMC *directly*.

9. To be clear, we are not determining whether NCDOR may tax CHEMC indirectly by taxing CHEMC's third-party supplier; rather, we are merely holding that the findings of fact do not support the trial court s conclusions of law. As stated *supra*, NCDOR may not tax CHEMC directly.

10. Since these conclusions of law have no affect on the ultimate disposition of this case, we see no need to remand this case to the trial court for modification of the order.

unless the purchaser has received credit for or has been refunded the amount of tax erroneously charged."

Plaintiff brought this action pursuant to N.C. Gen. Stat. § 105-267,[11] which stated in pertinent part:

> The suit may be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides at any time within three years after the expiration of the 90-day period allowed for making the refund. If upon the trial it is determined that all or part of the tax was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the judgment shall be collected as in other cases. The amount of taxes for which judgment is rendered in such an action shall be refunded by the State.

(Emphasis added).

N.C. Gen. Stat. § 105-267 specifically pertains to collecting a judgment pursuant to court order where the court has determined that "the tax was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive . . . ." The trial court determined that NCDOR was unauthorized to collect taxes from CHEMC because it is exempt from taxation due to the Special Act. N.C. Gen. Stat. § 105-164.11 pertains to "excessive and erroneous" collections and refers to the collection of "exempt or nontaxable sales." While it is arguable that N.C. Gen. Stat. § 105-164.11 applies since the tax collected was "exempt," we hold that the more specific terms of N.C. Gen. Stat. § 105-267 apply, and, therefore, the judgment shall be collected as in other cases."

> "Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, according to the authorities on the question, unless it appears that the legislature intended to make the general act controlling[.]"

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11. N.C. Gen. Stat § 105-267 was repealed by Session Laws 2007-491, effective 1 January 2008. Session Law 2007-491 instituted a new procedure by which a taxpayer may seek a refund of taxes paid. *See* N.C. Gen. Stat. § 105-241.7 (2009), *et seq.*

McIntyre v. McIntyre, 341 N.C. 629, 631, 461 S.E.2d 745, 747 (1995) (quoting Food Stores v. Board of Alcoholic Control, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966)).

In sum, based on the clear and specific language of former N.C. Gen. Stat. § 105-267, we hold that the judgment entered "shall be collected as in other cases" and N.C. Gen. Stat. § 105-164.11 does not control in this case.[12] Consequently, CHEMC does not have to demonstrate that it has credited its customers prior to receiving the ordered refund.[13]

IV.

[4] Finally, NCDOR argues that the trial court incorrectly calculated the interest in its judgment. The trial court ordered NCDOR to pay interest at the legal rate for the entire period at issue, pre-judgment and post-judgment. CHEMC filed its complaint in 2000. As stated supra, at that time, N.C. Gen. Stat. § 105-267 allowed a taxpayer to bring a direct action against NCDOR in superior court, and, if the taxpayer prevailed, the statute required that the judgment be rendered therefor, with interest[.]"

N.C. Gen. Stat. § 105-241.21(a) (2009), which was enacted by Session Law 2007-491 and became effective 1 January 2008, provides that "[t]he interest rate set by the Secretary applies to interest that accrues on overpayments and assessments of tax." N.C. Gen. Stat. § 105-241.21(c)(2) states that "interest on an overpayment of a tax that is not included in subdivision (1) of this subsection accrues from a date that is 90 days after the date the tax was paid." NCDOR argues that N.C. Gen. Stat. § 105-241.21(a) and (c)(2) apply in this case since N.C. Gen. Stat. § 105-267 was repealed effective 1 January 2008, prior to the entry of judgment.[14] Specifically, NCDOR claims that the trial court "should have awarded interest against the Department: at the legal rate . . . but only from the dates of CHEMC's pre-2008 payments until January 1, 2008; and at the Secretary's rate . . . for all such . . . payments from January 1, 2008 to the present and for all post-2008 payments."

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12. This holding is limited to cases brought pursuant to N.C. Gen. Stat. § 105-267.

13. CHEMC has explicitly represented to this Court that it will refund its customers once it is reimbursed by NCDOR in accordance with the judgment.

14. NCDOR references N.C. Gen. Stat. § 105-241.21(b)(2), which does not exist. Its argument clearly pertains to subsection (c)(2).

We hold that N.C. Gen. Stat. § 105-241.21(a) and (c)(2) are inapplicable in this case. CHEMC brought this action under then existing N.C. Gen. Stat. § 105-267, which provided for interest at the legal rate where the judgment rendered was pursuant to a determination that the tax levied was invalid.[15] N.C. Gen. Stat. § 105-267 controls, not N.C. Gen. Stat. § 105-241.21(a) and (c)(2), which were enacted after this action was instituted in the trial court. See Wilson v. Anderson, 232 N.C. 212, 219, 59 S.E.2d 836, 842 (1950) ("Statutes are presumed to operate prospectively only."); Powell v. Haywood County, 15 N.C. App. 109, 111, 189 S.E.2d 785, 787 (1972) ("The tax assessment involved in this case was for the year 1970; therefore, the applicable statutes are those in existence prior to the extensive revision of Chapter 105 by the 1971 General Assembly.").[16] We recognize that Section 47 of Session Law 2007-491 states that "[t]he procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act." CHEMC's requested refund was not pending before NCDOR on 1 January 2008. This matter was before the superior court pursuant to N.C. Gen. Stat. § 105-267. Consequently, we hold that the legal rate of interest applies to the entire judgment and the Secretary's rate does not apply to taxes paid by CHEMC after 1 January 2008 as NCDOR contends.[17]

Conclusion

Based on the foregoing, we hold that the trial court did not err in holding that the Special Act was ambiguous and that the legislative

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15. NCDOR does not argue that this "interest" is anything other than the "legal rate" of interest. "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).

16. NCDOR does not argue that the interest calculated by the trial court for the period prior to 1 January 2008 was erroneous. The trial court applied the legal rate of interest beginning 1 April 2000. Still, we note that N.C. Gen. Stat. § 105-267 requires that the taxpayer wait 90 days after paying a tax under protest to bring an action in the superior court; however, the statute does not abate interest during that period. Former N.C. Gen. Stat. § 105-266(b) (2000) stated that overpayment of taxes to be refunded with interest "accrues from a date 90 days after the date the tax was originally paid by the taxpayer until the refund is paid[,]" but subsection (e) states that N.C. Gen. Stat. § 105-266 "does not apply to interest required under G.S. 105-267." Accordingly, the trial court correctly applied interest to the entire sum paid by CHEMC beginning 1 April 2000.

17. Again, this holding is limited to cases brought pursuant to N.C. Gen. Stat. § 105-267.

intent clearly establishes that CHEMC is a public agency with tax-favored status thereby excluding it from franchise and sales taxes. We further hold that the trial court erred in entering conclusion of law number 33 and a portion of conclusion of law number 32; however, neither error affects the outcome of this case. Additionally, we hold that pursuant to N.C. Gen. Stat. § 105-267 CHEMC is entitled to interest at the legal rate and need not refund its customers prior to satisfaction of the judgment.

Affirmed.

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

STATE OF NORTH CAROLINA v. ROY LEE ELKINS

No. COA10-916

(Filed 1 March 2011)

1. Robbery— common law robbery—element of fear—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss a common law robbery charge for insufficient evidence of violence or fear where defendant went into a convenience store and told the cashier he needed $100; defendant hid his arm under his jacket in a manner suggesting that he had a gun; the clerk testified that he knew that defendant was serious because of defendant's eyes; and the clerk gave defendant the money because he was afraid.

2. Evidence— convenience store cashier—belief that defendant had gun—first-hand observation

A convenience store cashier's testimony that he believed that defendant was holding a gun under his jacket was rationally based on his firsthand observation of defendant and was more than mere speculation or conjecture. The trial court did not abuse its discretion by admitting the testimony in defendant's robbery prosecution.

3. Evidence— leading question—not plain error

There was no plain error in a common law robbery prosecution where the prosecutor was allowed to ask the victim a leading

question concerning the element of fear. There was sufficient evidence to support the element of fear or violence without the testimony elicited by the leading question.

4. Evidence— hearsay—offered to explain subsequent action —other evidence of guilt

There was no plain error in a common law robbery prosecution where the trial court admitted alleged hearsay testimony from a detective about a jacket that defendant suddenly stopped wearing and about taking defendant to the hospital. These statements were offered to explain the detective's subsequent actions rather than as proof of the matter asserted and were not hearsay; even so, there was other evidence incriminating defendant, including his own written confession.

5. Evidence— hearsay—offered to explain subsequent actions— no plain error

There was no plain error in a common law robbery prosecution where the trial court admitted a detective's testimony about a hospital employee's statements. The testimony was admitted to explain the detective's subsequent actions; however, assuming that it was hearsay, there was sufficient uncontested evidence to convict defendant.

6. Evidence— unauthenticated surveillance photographs— other evidence of guilt

There was no plain error in admitting hospital surveillance photographs into evidence where the photographs were not properly authenticated but there was plenary uncontested evidence incriminating defendant.

7. Evidence— officer's opinion of guilt—no prejudice

There was no plain error in a common law robbery prosecution from the trial court's erroneous admission of a detective's testimony that he was "building a solid case." The statement was an opinion of the ultimate issue of defendant's guilt, but the other evidence incriminating defendant was such that there was no prejudice.

8. Damages and Remedies— restitution—evidence not sufficient

A restitution order in a common law robbery case supported only by the unsworn statement of the prosecutor was vacated.

Appeal by Defendant from judgment entered 4 December 2009 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 10 January 2011.

Roy Cooper, Attorney General, by Steven A. Armstrong, Assistant Attorney General, for the State.

William B. Gibson, for defendant-appellant.

THIGPEN, Judge.

Roy Lee Elkins ("Defendant") appeals from judgment entered 4 December 2009 sentencing him to 107 to 138 months incarceration consistent with the jury's guilty verdict of common law robbery and Defendant's plea of guilty of having attained the status of an habitual felon. We find no error.

The evidence of record tends to show that on 28 January 2009 Defendant entered a Hot Spot convenience store in Asheville, North Carolina. The store cashier, William McHone ("McHone"), saw Defendant go to the restroom and remain there while McHone continued talking with a friend at the front of the store. When McHone's friend left the store, Defendant exited the restroom and approached McHone at the cash register. Defendant said, "I need a hundred dollars," after which McHone laughed, saying "[Yeah], I do, too." Defendant then said, for a second time, "I need a hundred dollars," and McHone "looked at his eyes and . . . knew he was serious." McHone also noticed that Defendant was "hiding his arm" under his jacket, and McHone thought Defendant "had a gun." McHone then opened the cash register and "laid the till down on the counter[,]" allowing Defendant to take the cash. Defendant took the cash from the cash register and left the store.

Defendant was videotaped by the Hot Spot surveillance camera as he approached the cash register, made statements to McHone consistent with McHone's testimony, took money from the cash register, and left the store. Defendant also made a written statement to the police saying the following: "My girlfriend and I are living out of her car. She's been real sick. That night, it was really cold and we didn't have any money. I was afraid she was going to die so I went there and I took that money. I shouldn't have done it, I know."

On 20 February 2009, Defendant was indicted on counts of common law robbery and having attained the status of an habitual felon.

Defendant was tried during the 30 November 2009 session of the Superior Criminal Court of Buncombe County. A jury found Defendant guilty of common law robbery, and Defendant pled guilty to having attained the status of an habitual felon. The court entered judgment on 4 December 2009 sentencing him to 107 to 138 months incarceration consistent with the jury's guilty verdict and Defendant's plea, and ordering restitution in the amount of $59.00. From this judgment, Defendant appeals. We find no prejudicial error in part and vacate in part.

I: Sufficiency of the Evidence

[1] In Defendant's first argument on appeal, Defendant challenges the trial court's refusal to grant his motion to dismiss predicated on the alleged absence of sufficient evidence that Defendant took money from McHone by means of violence or fear.

When reviewing a challenge to the denial of a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines "whether the State presented 'substantial evidence' in support of each element of the charged offense." *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005) (quotation omitted). " 'Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion.' " *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (quoting *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005)). "In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence." *Id.* Additionally, a "substantial evidence inquiry examines the sufficiency of the evidence presented but not its weight," which remains a matter for the jury. *McNeil*, 359 N.C. at 804, 617 S.E.2d at 274. Thus, "[i]f there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Id.*

The elements of common-law robbery are "the felonious, nonconsensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622, 103 S. Ct. 474 (1982) (citation omitted). "The force element required for common law robbery requires violence or fear 'sufficient to compel the victim to part with his property' " or " 'to

prevent resistance to the taking.' " *State v. Williams*, —– N.C. App. —–, —–, 689 S.E.2d 412, 424 (2009) (quoting *State v. Sipes*, 233 N.C. 633, 635, 65 S.E.2d 127, 128 (1951), *State v. Sawyer*, 224 N.C. 61, 65, 29 S.E.2d 34, 37 (1944)). "[I]t is not necessary to prove both violence and putting in fear—proof of either is sufficient." *Sawyer*, 224 N.C. at 65, 29 S.E.2d at 37.

The element of force, which requires proof of a taking either by violence or putting the victim in fear, may be "actual or constructive." *Sipes*, 233 N.C. at 635, 65 S.E.2d at 128. " 'Constructive force' includes all demonstrations of force, menaces, and other means by which the person robbed is put in fear sufficient to suspend the free exercise of his will or prevent him from resisting the taking." *Id.*

> No matter how slight the cause creating the fear may be or by what other circumstances the taking may be accomplished, if the transaction is attended with such circumstances of terror, such threatening by word or gesture, as in common experience are likely to create an apprehension of danger and induce a man to part with his property for the sake of his person, the victim is put in fear.

Sawyer, 224 N.C. at 65, 29 S.E.2d at 37. The Supreme Court has also noted "that the word 'fear' . . . in the definition of common-law robbery is not confined to fear of death[,]" and "the use or threatened use of a firearm or other dangerous weapon is not an essential of common-law robbery." *State v. Moore*, 279 N.C. 455, 458, 183 S.E.2d 546, 547-48 (1971).

In the case *sub judice*, McHone testified at trial with regard to the common law robbery element of violence or fear, stating that a man came into the convenience store and walked "toward the restroom." McHone "just went on with [his] work and started talking . . . to a friend of mine." When McHone's friend left the store, "the guy [came] out of the restroom and [walked] up to me," demanding, " 'I need a hundred dollars[.]' " At first, McHone "started laughing" because McHone "thought he was joking." However, the man again demanded, " 'I . . . need a hundred dollars.' " This time, McHone "looked at his eyes and . . . I knew he was serious." When asked specifically, "What about his eyes?" McHone responded, "They looked evil looking. . . . [I]t was just like he meant it[;] [y]ou know how you get mad and angry at somebody and you mean something[,] . . . [y]our eyes can tell the story." McHone also noticed that the man "had [his hand] under his jacket[,]" and McHone "thought he . . . might have had a gun or some-

thing[.]" McHone repeated, "I thought that he had a gun under his jacket" because "he was hiding his arm." "I knew he was trying to rob me," McHone said. The man "[h]ad his arm under [the] jacket there[,] [and] . . . I thought it was a gun." After the man's second demand for one-hundred dollars, McHone "went to the cash register[,]" "opened it up[,]" and "laid the till down on the counter [to] let him get the money[.]" McHone said he took the money and left the store. When specifically asked, "based on your fear that he may have . . . a gun, is that when you gave him the money?" McHone answered, "That's right. That's right."

Defendant argues that *State v. Parker*, 322 N.C. 559, 369 S.E.2d 596 (1988), is binding authority. We disagree. In *Parker*, the evidence surrounding the alleged common law robbery tended to show the victim was abducted at gunpoint and forced into the back seat of the defendant's car. *Id.*, 322 N.C. at 561, 369 S.E.2d at 597. When the defendant asked "if [the victim] had any money or valuables[,] [s]he told him she had only a watch on a chain around her neck[,]" which the defendant took. *Id.*, 322 N.C. at 561, 369 S.E.2d at 597-98. The defendant then returned the victim to her dormitory, at which point the victim testified "she talked to her assailant in an attempt to keep him calm."

> She told the defendant that the watch he had taken was a gift from her mother and that she would get money from her dormitory room and give it to him in exchange for the watch. They returned to the campus where the victim went to her room, got some money and returned to the parking lot. The defendant drove up beside the victim; she leaned into the car window and handed him the money in exchange for her watch. He then drove away.

Id., 322 N.C. at 561, 369 S.E.2d at 598. The Court concluded there was insufficient evidence of the element of violence or fear, reasoning:

> All of the evidence unequivocally tended to show that the victim was not induced to part with her money as a result of violence or fear. To the contrary, she clearly testified that no weapon was in sight and she was not afraid at the time she left the defendant in his car and went to her dormitory room to get her money. Neither was there any evidence that violence or fear induced her to give her money to the defendant when she returned.

Id., 322 N.C. at 566-67, 369 S.E.2d at 601. *Parker* is distinguishable from this case in several ways. At the time the victim in *Parker* gave

the defendant her money, there was no weapon in sight, and the victim in *Parker* "testified . . . she was not afraid" when she left the defendant's car. In the case *sub judice*, McHone testified that Defendant was "hiding his arm" under his jacket, and McHone thought Defendant "had a gun." Moreover, McHone's testimony indicates he gave Defendant the money from the cash register because "[Defendant] may have . . . a gun[.]"

We find the opinion, *State v. White*, 142 N.C. App. 201, 542 S.E.2d 265 (2001), instructive here. In *White*, the Court concluded there was sufficient evidence of the element of violence or fear when the defendant handed a threatening note to the convenience store clerks implying the defendant had a gun, even though "none of the victims saw a firearm in defendant's possession." *Id.*, 142 N.C. App. at 205, 542 S.E.2d at 268. In the case *sub judice*, the manner in which Defendant kept his arm under his jacket implied Defendant was hiding a weapon; congruently, McHone believed Defendant had a gun under his jacket. We see no material difference between (1) the defendant in *White* indicating he had a weapon by passing a note, and (2) Defendant in this case indicating he had a weapon by hiding his arm under his jacket in a manner suggesting he had a gun. Furthermore, McHone indicates he gave Defendant the money from the cash register because he thought "[Defendant] may have . . . a gun[.]" *See Williams*, ––– N.C. App. at –––, 689 S.E.2d at 424 (stating that "[t]he force element required for common law robbery requires violence or fear sufficient to compel the victim to part with his property [or] . . . to prevent resistance to the taking"). Lastly, even though the evidence here tends to show that McHone believed Defendant had a gun, we reiterate that this belief was not necessary to establish the force element of common law robbery: "[T]hreatened use of a firearm or other dangerous weapon is not an essential of common-law robbery." *Moore*, 279 N.C. at 458, 183 S.E.2d at 548.

Based on this Court's opinion in *White*, 142 N.C. App. 201, 542 S.E.2d 265, and its application to the facts of this case, we believe that McHone's testimony, which indicated that (1) Defendant hid his arm underneath his jacket in a manner suggesting that Defendant had a gun; (2) McHone knew Defendant was "serious" because his eyes were "evil looking"; (3) and that McHone was afraid and therefore gave Defendant the money from the cash register, is sufficient evidence to support the element of violence or fear. We conclude that this argument on appeal is without merit.

II: Speculative Testimony

[2] In Defendant's second argument on appeal, he contends the court abused its discretion in allowing testimony that constituted mere speculation. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 602 (2009), states, in pertinent part, the following: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter[.]" Accordantly, "[t]estimony that is mere speculation is inadmissible." *State v. Garcell*, 363 N.C. 10, 36, 678 S.E.2d 618, 635 (2009).

Pursuant to N.C. Gen. Stat. § 8C-1, Rule 701 (2009), "a lay witness may testify as to his or her opinion, provided the opinion is rationally based upon his or her perception and is helpful to the jury's understanding of the testimony" or the determination of a fact in issue. *State v. Anthony*, 354 N.C. 372, 411, 555 S.E.2d 557, 583 (2001), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791, 122 S. Ct. 2605 (2002). "[P]ersonal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception." *State v. Wright*, 151 N.C. App. 493, 495, 566 S.E.2d 151, 153 (2002) (quotation omitted). In certain cases, "statements, while reflecting either poor memory or indistinct perception, are nonetheless competent and admissible because they were rationally based on the firsthand observation of the witness, rather than mere speculation or conjecture." *State v. Davis*, 77 N.C. App. 68, 73, 334 S.E.2d 509, 512 (1985) (citing *State v. Joyner*, 301 N.C. 18, 24, 269 S.E.2d 125, 129 (1980)).

"The standard of review for this Court assessing evidentiary rulings is abuse of discretion." *State v. Boston*, 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004) (citing *State v. Meekins*, 326 N.C. 689, 696, 392 S.E.2d 346, 350 (1990)).

In this case, McHone gave the following testimony:

A: . . . I thought that he had a gun under his jacket, is the reason why he was hiding his arm.

Defense Counsel: Objection. Speculation.

The Court: Overruled. . . .

A: And that's the reason why I went over to the cash register and opened the cash register and laid the till down on the counter because I knew he was trying to rob me, you know. Had his

> arm under jacket there. I mean, I thought it was a gun. I—like you say, it's speculation but I don't know.

We find *Davis*, 77 N.C. App. 68, 334 S.E.2d 509 instructive here. In *Davis*, this Court stated that an "indistinct perception," may be "competent and admissible" if that perception is "rationally based on the firsthand observation of the witness, rather than mere speculation or conjecture." *Id.*, 77 N.C. App. at 73, 334 S.E.2d at 512. In *Davis*, the following testimony of an eye-witness was alleged by the defendant to be speculation:

> When asked by the State where she saw the defendant go upon his arrival at the motel, she answered, "I would say what looks like room fifty-one." . . . The witness, as a resident of Room 41, had earlier testified she knew where Room 51 was in reference to her own room.

Id., 77 N.C. App. at 72, 334 S.E.2d at 512. The Court held that "[b]ased on her observations, her response was properly admitted as a 'natural and instinctive inference' or 'instantaneous conclusions . . . derived from observation of a variety of facts presented to the senses at one and the same time.' " *Id.*, 77 N.C. App. at 72, 334 S.E.2d at 512 (quoting *Joyner*, 301 N.C. at 23, 269 S.E.2d at 129). The Court in *Davis* further examined the following testimony by the same eye-witness: "[W]hen asked whether defendant entered Room 51" the eye-witness stated, "I presume because I heard . . . [and] [s]aw him . . . shut the door or whatever." *Id.*, 77 N.C. App. at 73, 334 S.E.2d at 512. The Court in *Davis* concluded that "[t]hese statements, while reflecting either poor memory or indistinct perception, are nonetheless competent and admissible because they were rationally based on the firsthand observation of the witness, rather than mere speculation or conjecture." *Id.*

Here, based on McHone's observation of Defendant, McHone believed Defendant had a gun because Defendant was "hiding his arm" under his jacket. We believe that McHone's perception, although indistinct, because McHone did not know with certainty that Defendant had a gun, was nonetheless rationally based on McHone's firsthand observation of Defendant and is more than mere speculation or conjecture. For the foregoing reasons, we conclude the evidence in question was admissible, and that the trial court did not err, and certainly did not abuse its discretion, by allowing McHone's testimony that he believed Defendant had a gun under his jacket.

III: Leading Questions

[3] In Defendant's third argument on appeal, he contends the court committed plain error in allowing testimony that was derived from leading questions by the prosecutor. We disagree.

Rule 10(a)(4) of the North Carolina Rules of Appellate Procedure governs this Court's review of matters employing the plain error standard: "In criminal cases, an issue that was not preserved by objection noted at trial . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error."[1]

Plain error analysis applies to evidentiary matters and jury instructions. *State v. Cummings*, 361 N.C. 438, 469, 648 S.E.2d 788, 807 (2007), *cert. denied*, 552 U.S. 1319, 128 S. Ct. 1888, 170 L. Ed. 2d 760 (2008). "A reversal for plain error is only appropriate in the most exceptional cases." *State v. Raines*, 362 N.C. 1, 16, 653 S.E.2d 126, 136 (2007), *cert. denied*, ––– U.S. –––, 174 L. Ed. 2d 601, 129 S. Ct. 2857 (quotation omitted). "The plain error rule is critical in the context of admitting physical evidence or testimony without an objection because the trial court is not expected to second-guess a party's trial strategy[;] [t]he possibility always exists that a party intentionally declines to object for some strategic reason." *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634, *cert. denied*, ––– U.S. –––, 175 L. Ed. 2d 362, 130 S. Ct. 510 (2009) (citing *State v. Black*, 308 N.C. 736, 740, 303 S.E.2d 804, 806 (1983)). To show plain error, the " 'defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result,' " *State v. Allen*, 360 N.C. 297, 310, 626 S.E.2d 271, 282, *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116, 127 S. Ct. 164 (2006) (quoting *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602, *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382, 124 S. Ct. 475 (2003)); or we must be convinced that any error was so "fundamental" that it caused "a miscarriage of justice." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quotation omitted).

N.C. Gen. Stat. § 8C-1, Rule 611(c) (2009), provides, in pertinent part, that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony."

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1. Primarily, we note that Defendant did not object at trial to the admission of the evidence admitted through alleged leading questions. Therefore, plain error review is appropriate.

On appeal, Defendant specifically challenges the admission of the following evidence, even though Defendant failed to lodge an objection at trial:

Q: And based on your fear that he may have—that he may have a gun, is that when you gave him the money?

A: That's right. That's right.

The essence of Defendant's argument is, assuming this Court concluded there was sufficient evidence to support the violence or fear element of common law robbery, the sufficiency of the evidence must necessarily hinge on the foregoing leading question and inadmissible elicited response from McHone. We find Defendant's argument unpersuasive due to other evidence of record tending to satisfy the violence or fear element of common law robbery.

In the case *sub judice*, McHone believed Defendant threatened him by gesture; more specifically, McHone believed Defendant hid his arm underneath his jacket to conceal a gun. Moreover, McHone said Defendant was "serious" and his eyes were "evil looking." The evidence also shows that McHone did, in fact, part with the money from Hot Spot's cash register after Defendant twice demanded one-hundred dollars while ostensibly concealing a gun. *See Williams*, ––– N.C. App. at –––, 689 S.E.2d at 424 (stating that "[t]he force element required for common law robbery requires violence or fear sufficient to compel the victim to part with his property [or] . . . to prevent resistance to the taking"). We believe the foregoing evidence was sufficient evidence to support the element of violence and fear without the testimony elicited by the above leading question containing the word "fear." For that reason, any error the trial court may have made by allowing the admission of the leading question does not amount to plain error, as the trial was not prejudiced. This assignment of error is overruled.

IV: Plain Error

In Defendant's next argument on appeal, he contends that the admission of a series of evidence and testimony during the examination of Detective Janice Hawkins ("Hawkins"), including (1) alleged hearsay testimony by Hawkins regarding statements by Andy Edwards ("Edwards") and a hospital employee, (2) photographs allegedly admitted without authentication or identification, and (3) Hawkins' testimony that she "felt like [she] was building a solid case," constituted plain error.

Defendant did not object at trial to the admission of this evidence. Therefore, these errors will be reviewed applying the plain error standard. As we have previously stated, to show plain error, " 'defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result,' " *Allen*, 360 N.C. at 310, 626 S.E.2d at 282, or we must be convinced that any error was so "fundamental" that it caused "a miscarriage of justice." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

A: Hearsay

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial, or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2009). "[O]ut-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Call*, 349 N.C. 382, 409, 508 S.E.2d 496, 513 (1998). "[S]tatements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002) (citation omitted).

i: Andy Edwards

[4] Defendant first challenges the following testimony given by Hawkins regarding statements made by Edwards in the course of Hawkins' investigation:

> And [Edwards] said that . . . Roy always wore that jacket and then at one—one night, you know, he just decided not to wear that jacket any more and he asked to borrow one of Andy's jackets. He said he had not worn that jacket any more. It was right around the time he thought he'd seen the news. I said okay. He also said that . . . he thought that Roy had come down to Asheville during that time because his girlfriend was sick. And so Andy told me that Roy took his girlfriend down to Asheville to the hospital and then he—and they came back a day or so later and it was all in this time that it was on the news. He just knew it was Roy because all that seemed to fit for Mr. Edwards in his mind.

We believe the foregoing statements were not offered to prove the truth of the matter asserted, but rather to explain Hawkins' subsequent actions. *Gainey*, 355 N.C. at 87, 558 S.E.2d at 473 (holding that "statements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed").

After Hawkins spoke with Edwards, Hawkins asked for and received Defendant's jacket as evidence; Hawkins also subsequently went to the hospital in Asheville for the purpose of obtaining a surveillance video as further evidence in this case. The statement explains the subsequent conduct of Hawkins after speaking with Edwards. Accordingly, this testimony was proper nonhearsay evidence, and the trial court did not err in admitting it.

Assuming *arguendo* the foregoing evidence did constitute hearsay, the error of its admission would not have reached the level of plain error, as other evidence incriminating Defendant, including evidence of a surveillance video from Hot Spot and Defendant's own written statement of confession, was plenary.

ii: Hospital Employee

[5] Defendant also challenges the admission of an alleged hearsay statement by Hawkins, who stated that a hospital employee "indicated . . . they did see this person (Defendant) on video." Again, we believe this statement was not offered to prove the truth of the matter asserted, but rather to explain Hawkins' subsequent actions. *Gainey*, 355 N.C. at 87, 558 S.E.2d at 473. The statement was offered to show why Hawkins obtained a search warrant to procure the hospital surveillance video as evidence. Accordingly, this testimony was proper nonhearsay evidence, and the trial court did not err in admitting it. Again, assuming *arguendo* the foregoing statement was inadmissible hearsay, the uncontested and plenary evidence incriminating Defendant was sufficient to convict Defendant, such that the admission of this statement did not amount to plain error.

B: Photograph Authentication

[6] In his next argument on appeal, Defendant contends the trial court erred in allowing the State to introduce three photographs, which were part of the hospital surveillance video, because the photographs were not properly authenticated.

N.C. Gen. Stat. § 8-97 (2009), provides that "[a]ny party may introduce a photograph, video tape, motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements[;] [t]his section does not prohibit a party from introducing a photograph or other pictorial representation solely for the purpose of illustrating the testimony of a witness." The proper foundation for a videotape may be shown by:

> (1) testimony that the motion picture or videotape fairly and accurately illustrates the events filmed (illustrative purposes); (2) "proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape . . ."; (3) testimony that "the photographs introduced at trial were the same as those [the witness] had inspected immediately after processing," (substantive purposes); or (4) "testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area 'photographed.' "

State v. Smith, 152 N.C. App. 29, 38, 566 S.E.2d 793, 800, *cert. denied*, 356 N.C. 311, 571 S.E.2d 208 (2002) (quoting *State v. Cannon*, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608-09 (1988), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990)).

Here, the trial court allowed the admission of the photographs derived from a hospital surveillance video into evidence without objection from Defendant. In fact, the court specifically asked counsel for defense if there was "any objection," to which counsel responded, "No, Your Honor." However, a review of the transcript shows the photographs were not authenticated by any mechanism of proper foundation provided in *Smith*, 152 N.C. App. 29, 566 S.E.2d 793. Hawkins did not testify that the photographs accurately portrayed what she had observed, because Hawkins did not observe Defendant in the hospital at the time the surveillance video captured images of Defendant. Hawkins subsequently obtained and viewed the hospital surveillance videos in the course of her investigation of Defendant as a suspect. Therefore, Hawkins was unqualified to testify that the photographs accurately portrayed Defendant in the hospital, such that the photographs were properly authenticated for illustrative purposes: Hawkins had made no such observation. *Compare*, *State v. Alston*, 91 N.C. App. 707, 713, 373 S.E.2d 306, 311 (1988) (holding that because "[t]he officer clearly indicated that the photographs accurately portrayed what he had observed[,] . . . the photographs were properly authenticated for illustrative purposes"); *State v. Gaither*, 161 N.C. App. 96, 102-03, 587 S.E.2d 505, 509 (2003), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004) (holding a videotape properly authenticated for illustrative purposes when "a television news crew [recorded] . . . the K-9 unit search for the weapon" and the videotape "illustrat[ed] the testimony of the K-9 officer"). We agree with Defendant that the photographs were not properly authenticated. This conclusion notwithstanding, the plenary uncontested evidence incriminating Defendant, including the Hot Spot surveillance video,

the testimony of McHone, and Defendant's own statement of confession, was such that the admission of these three photographs depicting Defendant in a hospital were not prejudicial to Defendant's trial. Therefore, the trial court did not commit plain error in admitting the photographs into evidence.

C: Opinion Testimony

[7] Defendant next contends that a statement by Hawkins on direct examination constituted an inadmissible opinion by a lay witness in violation of N.C. Gen. Stat. § 8C-1, Rule 701 (2009), and "invaded the province of the jury."

Rule 701 provides the following: "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." However, N.C. Gen. Stat. § 8C-1, Rule 704 (2009), provides that "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

Rule 704 "does allow admission of lay opinion evidence onultimate issues, but to qualify for admission the opinion must be helpful to the jury." *Mobley v. Hill*, 80 N.C. App. 79, 86, 341 S.E.2d 46, 50 (1986) (citing N.C. Gen. Stat. § 8C-1, Rule 701). " '[M]eaningless assertions which amount to little more than choosing up sides' are properly excludable as lacking helpfulness under the Rules." *Hill*, 80 N.C. App. at 86, 341 S.E.2d at 50. Furthermore, "while opinion testimony may embrace an ultimate issue, the opinion *may not* be phrased using a legal term of art carrying a specific legal meaning not readily apparent to the witness." *State v. Najewicz*, 112 N.C. App. 280, 293, 436 S.E.2d 132, 140 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 130 (1994) (citing *State v. Rose*, 327 N.C. 599, 602-04, 398 S.E.2d 314, 315-17 (1990)).

In our analysis of this case, we must first ask whether the statement at issue was inadmissible pursuant to Rule 701 and Rule 704. If it was error to allow the statement's admission, we must then determine whether that error constituted plain error. Defendant argues that the following testimony was impermissible lay opinion testimony:

Q: . . . Now Detective Hawkins, after you received this information from the hospital, what were your next steps? Were you building a case at this point?

A: I felt like I was building a solid case. Mr. Elkins was, indeed, the offender in this case.

We find the opinion in *State v. Carrillo*, 164 N.C. App. 204, 595 S.E.2d 219 (2004), *appeal dismissed*, *disc. review denied*, 359 N.C. 283, 610 S.E.2d 710 (2005), instructive here. In *Carrillo*, a policeman gave testimony regarding his opinion of the defendant's guilt, which was elicited by counsel for defense, and to which the defendant did not object. Specifically, the policeman responded to the question of whether the defendant might have been an "unwilling participant in the transfer of drugs," by saying, "No, because you're talking about $28,000.00 street value worth of cocaine. . . . I think your client knew what was in that package." *Id.*, 164 N.C. App. at 209, 595 S.E.2d at 223. Moreover, in the same case, a U.S. Customs Agent gave testimony regarding his opinion of the defendant's guilt by explaining, "[the] defendant dropped his head, stared at the ground, and 'would not answer' when asked . . . who had provided him with a fictitious Social Security Card[,]" and because of his reaction, "I think he realized he had been caught." *Id.*, 164 N.C. App. at 209-10, 595 S.E.2d at 223. He reiterated that "[m]y opinion is that he realized he was caught and that he couldn't bluff or lie his way out of it." *Id.*, 164 N.C. App. at 210, 595 S.E.2d at 223.

The Court in *Carrillo* concluded "that the trial court erred in allowing the officers to offer their opinions of whether defendant was guilty." *Id.*, 164 N.C. App. at 210, 595 S.E.2d at 223 (citing *State v. Fleming*, 350 N.C. 109, 126, 512 S.E.2d 720, 732, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274, 120 S. Ct. 351 (1999)). However, the Court further concluded that "[a]lthough it was error to allow the law enforcement officers to provide their opinions regarding defendant's guilt, defendant has failed to show that without this testimony the jury would have reached a different verdict." *Id.*, 164 N.C. App. at 211, 595 S.E.2d at 224. Therefore, the error did not constitute plain error.

While we note that Rule 704 "does allow admission of lay opinion evidence on ultimate issues," *Hill*, 80 N.C. App. at 86, 341 S.E.2d at 50 (1986), Rule 701 requires that, "to qualify for admission[,] the opinion [evidence] must be helpful to the jury." *Id.* (citing N.C. Gen. Stat. § 8C-1, Rule 701). Here, we do not believe that the statement, "I felt like I was building a solid case[;] Mr. Elkins was, indeed, the offender

in this case," is helpful, pursuant to Rule 701, to the "determination of a fact in issue." Rather, the foregoing statement is solely and simply an opinion of the ultimate issue of Defendant's guilt, and as such, the statement's admission was error.

However, given that Defendant did not object to the admission of the testimony at trial, and because Defendant's failure to object necessitates that we review for plain error, we cannot conclude that "absent the error, the jury probably would have reached a different result,' " *Allen*, 360 N.C. at 310, 626 S.E.2d at 282, or that the error was so "fundamental" that it caused "a miscarriage of justice." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. The plenary evidence incriminating Defendant, including the surveillance video from the convenience store, McHone's testimony, and Defendant's own statement of confession, was such that the admission of Hawkins' statement did not prejudice Defendant's trial. *See Carrillo*, 164 N.C. App. at 211, 595 S.E.2d at 224. Therefore, even though the admission of the statement was error, we conclude it was not plain error.[2]

V: Restitution

[8] In Defendant's final argument on appeal, he contends that the $59.00 restitution order was not supported by the evidence addused at trial or at sentencing. We agree.

Primarily, we note that Defendant did not object to the restitution order at trial. In *State v. Shelton*, 167 N.C. App. 225, 605 S.E.2d 228 (2004), this Court reasoned that "[w]hile defendant did not specifically object to the trial court's entry of an award of restitution, this issue is deemed preserved for appellate review under N.C. Gen. Stat. § 15A-1446(d)(18)." *Id.*, 167 N.C. App. at 233, 605 S.E.2d at 233 (citing *State v. Reynolds*, 161 N.C. App. 144, 149, 587 S.E.2d 456, 460 (2003)).

"[T]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." *Id.* (citing *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995)).

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2. Defendant also cites *Taylor v. Kentucky*, 436 U.S. 478, 56 L. Ed. 2d 468, 98 S.Ct. 1930 (1978), *State v. White*, 331 N.C. 604, 419 S.E.2d 557 (1992), and *State v. Canady*, 355 N.C. 242, 559 S.E.2d 762 (2002), for the proposition that the cumulative effect of the potentially damaging and erroneous admissions of evidence violated Defendant's due process and deprived Defendant of a fair trial. This concern was not raised at the trial, and therefore we must apply the prejudice standard as we have done in the corpus of the opinion. *See State v. Elam*, 302 N.C. 157, 160-61, 273 S.E.2d 661, 664 (1981) (stating that the Court will not review constitutional questions "not raised or passed upon in the trial court").

"The unsworn statement of the prosecutor is insufficient to support the amount of restitution ordered." *Id.* (citing *State v. Buchanan*, 108 N.C. App. 338, 423 S.E.2d 819 (1992)). However, "[i]ssues at a sentencing hearing may be established by stipulation of counsel if that stipulation is definite and certain." *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010) (quotation omitted).

Here, the prosecutor made the following unsworn statement: "We do have a—in regards to the common law robbery, we have the restitution to the Hot Spot in the amount of $59." No other evidence was presented during sentencing with regard to restitution. Defendant did not object to the foregoing amount of restitution; however, neither is there any evidence of record that Defendant stipulated to the foregoing amount. Essentially, the sole evidence supporting the restitution order of $59.00 is the unsworn statement of the prosecutor. This alone is insufficient to support the amount of restitution ordered. *See Shelton*, 167 N.C. App. at 233, 605 S.E.2d at 233 (stating that "[an] unsworn statement of the prosecutor is insufficient to support the amount of restitution ordered").

For the foregoing reasons, we conclude that Defendant had a fair trial, free from prejudicial error, with the exception of the restitution recommended. Consequently, the portion of the judgment recommending restitution in the amount of $59.00 is vacated.

NO ERROR, in part, VACATED, in part.

Chief Judge MARTIN and Judge ROBERT C. HUNTER concur.

STATE OF NORTH CAROLINA v. MECO TARNELL WIGGINS

No. COA10-450

(Filed 1 March 2011)

1. Firearms and Other Weapons— possession by felon—guns obtained and possessed simultaneously—single possession conviction

The trial court erred by denying defendant's motion to dismiss two of three counts of possession of a firearm by a convicted felon where defendant obtained and possessed simultaneously two firearms used during the murder of one victim and assaults upon two other victims. N.C.G.S. § 14-415.1(a) does not authorize multiple convictions of and sentences for possession of a firearm by a convicted felon predicated on evidence that the defendant simultaneously obtained and possessed one or more firearms which he used during the commission of multiple substantive criminal offenses.

2. Homicide— jury instructions—first-degree murder—lesser-included offense—second-degree murder—no plain error

The trial court did not commit plain error in a first-degree murder trial by failing to submit the issue of defendant's guilt of the lesser-included offense of second-degree murder to the jury. The evidence concerning defendant's behavior immediately prior to the shooting of the victim clearly supported a finding of premeditation and deliberation and did not support an inference that defendant formed the intent to kill the victim at the same time that he shot him.

Appeal by defendant from judgments entered 17 September 2009 by Judge Kenneth F. Crow in Lenoir County Superior Court. Heard in the Court of Appeals 13 October 2010.

Attorney General Roy Cooper, by Steven M. Arbogast, Special Deputy Attorney General, for the State.

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

ERVIN, Judge.

Defendant Meco Tarnell Wiggins appeals from judgments sentencing him to life imprisonment without the possibility of parole based upon

his conviction for first-degree murder in connection with the death of James Walls; a term of sixteen to twenty months imprisonment based on his conviction for possession of a firearm by a convicted felon at the time of Mr. Walls' murder; a term of thirty-four to fifty months imprisonment based upon his conviction for assaulting Ray-Shawna Waters with a deadly weapon inflicting serious injury; to a term of sixteen to twenty months imprisonment based upon his conviction for possession of a firearm by a convicted felon at the time of the assault on Ms. Waters; a term of 116 to 149 months imprisonment for assaulting Shannon Hinton with a deadly weapon with the intent to kill inflicting serious injury; and a term of sixteen to twenty months imprisonment based upon his conviction for possession of a firearm by a convicted felon at the time of the assault on Mr. Hinton, with all sentences to be served consecutively in the custody of the North Carolina Department of Correction. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that (1), as far as his convictions for homicide and the two assaults are concerned, Defendant received a fair trial that was free from prejudicial error and is not entitled to relief on appeal and (2), as far as his convictions for possession of a firearm by a felon are concerned, the evidence supports a finding that Defendant committed only one, rather than three, firearm possession offenses, so that two of his three firearm possession convictions should be overturned.

I. Factual Background

A. Substantive Facts

The charges against Defendant arise from three shootings that occurred in Kinston, North Carolina, between approximately 2:00 a.m. and 4:00 a.m. on 4 September 2006. The victim in the first of these three assaults was Shannon Hinton, a casual acquaintance of Defendant's. At a time when Mr. Hinton and Defendant were in front of an apartment located at 812 Williams Street, Mr. Hinton's friend, Treyvon,[1] approached, handed Defendant two firearms, and walked away. Mr. Hinton was not alarmed by this development, since he was accustomed to being in the presence of armed individuals and since he had not had any prior conflict or argument with Defendant.

After a brief conversation, Defendant asked Mr. Hinton for a cigarette. As Mr. Hinton honored Defendant's request, Defendant

1. Mr. Hinton testified that he did not know Treyvon's last name.

"pulled out a gun . . . fired and shot [Mr. Hinton,] then pulled out another gun and was shooting [Mr. Hinton] with both guns." Defendant shot Mr. Hinton multiple times, injuring his wrist, thigh, and genitals before "walk[ing] up the street."

At 1:55 a.m., Lenoir County emergency services received a 911 call reporting that a shooting had occurred at 812 Williams Street. As a result of that call and the subsequent response, Mr. Hinton was taken to a local hospital and then airlifted to Pitt Memorial Hospital in Greenville, North Carolina, where he received medical treatment for a week and a half. At 812 Williams Street, investigating officers found four .380 caliber shells and a 9 millimeter shell, which they turned over to the State Bureau of Investigation for testing.

The second assault occurred at a Jamaican restaurant on Queen Street. Ray-Shawna Waters was at the restaurant with friends when Defendant entered, carrying a twenty dollar bill. A friend of Ms. Waters' named Jatrice Hardaway "snatched the [twenty dollar bill] out of his hand and said, 'Meco, you going to let me have it?' " After mistakenly concluding that Ms. Waters had taken his money, Defendant quarreled with Ms. Waters for several minutes before lifting his shirt and "pull[ing] out two guns." At that point, Defendant called Ms. Waters a "b_ch" and shot her "with the [gun] in his right hand." Following the shooting, Defendant picked up the bag of food he had ordered from the restaurant and walked out.

At 3:37 a.m., Lenoir County emergency services received a 911 call reporting the shooting of Ms. Waters. After initially being treated at Lenoir Memorial Hospital, Ms. Waters was transferred to Pitt Memorial Hospital, where she was treated for a severe fracture to her left femur that necessitated surgery and required a significant recovery period. Investigating officers found two .380 caliber shells at the scene and gave them to the State Bureau of Investigation for testing.

The third shooting occurred on East Washington Street just before 4:00 a.m. Rodney Hill and a friend, James Walls, were sitting on the steps of a house when Defendant approached. Mr. Hill had known Defendant for "at least ten years" and greeted him with a hug. After the two began talking, Defendant mentioned that there had been a shooting at the Jamaican restaurant. In the course of their conversation, Mr. Hill heard Defendant tell Mr. Walls, who was standing nearby, that "[y]ou better give my boy another five dollars," a statement which Mr. Hill interpreted as a reference to an earlier offer by the mother of one of Defendant's friends to sell Mr. Walls a wrist

watch. In addition, Mr. Hill heard Defendant say "I make my money off hits." At that point, Defendant asked Mr. Hill for a cigarette. As Mr. Hill handed him a cigarette, Defendant "slid back in the alley" and "tried to give [Mr. Hill] the cigarette back." As he did so, Mr. Hill saw Defendant pull out two guns and start shooting, causing Mr. Walls to fall to the ground while saying that he had been hit. Defendant left the area following the shooting of Mr. Walls.

At 3:57 a.m., Lenoir County emergency services received a 911 report relating to the shooting of Mr. Walls. Mr. Walls was taken to the hospital, where he died several hours later. Dr. Joseph Pestaner, a regional medical examiner, determined that Mr. Walls' death resulted from injuries to his heart and lungs stemming from a gunshot wound to his back. At the scene of the shooting, investigating officers found a 9 millimeter shell, which was delivered to the State Bureau of Investigation for testing.

The three shootings occurred within a few minutes' drive of each other. The shell casings found at the scenes of the three shootings were tested by State Bureau of Investigation firearms examiner Beth Starosta-Desmond, who was allowed to testify as an expert in forensic firearms investigation. Special Agent Starosta-Desmond testified that, in her expert opinion, the 9 millimeter shell casings found at the Williams Street and East Washington Street crime scenes were fired from the same firearm and the .380 caliber shells found at the Williams Street and Queen Street crime scenes were fired from the same firearm. Thus, the shells found at the three locations in question were all fired from one or the other of the same two firearms.

B. Procedural History

Warrants for arrest charging Defendant with assaulting Ms. Waters with a deadly weapon with the intent to kill inflicting serious injury and with the first degree murder of Mr. Walls were issued on 4 September 2006 and 6 September 2006, respectively. On 9 January 2008, the Lenoir County grand jury returned bills of indictment charging Defendant with the first degree murder of Mr. Walls and assaulting Ms. Waters with a deadly weapon with the intent to kill inflicting serious injury. On 29 September 2008, the Lenoir County grand jury returned three indictments charging Defendant with possession of a firearm by a convicted felon, with each charge associated with one of the three assaults that Defendant allegedly committed. On 14 July 2009, the Lenoir County grand jury returned a superseding indictment charging

Defendant with assaulting Mr. Hinton with a deadly weapon with the intent to kill inflicting serious injury.[2]

The cases against Defendant came on for trial before the trial court and a jury at the 14 September 2009 criminal session of the Lenoir County Superior Court. On 17 September 2009, the jury returned verdicts convicting Defendant of the first degree murder of Mr. Walls, assaulting Mr. Hinton with a deadly weapon with intent to kill inflicting serious injury, assaulting Ms. Waters with a deadly weapon inflicting serious injury, and three counts of possession of a firearm by a convicted felon. At the ensuing sentencing hearing, the trial court found that Defendant had accumulated six prior record points and should be sentenced as a Level III offender and that Defendant should be imprisoned in the custody of the North Carolina Department of Correction for a term of life imprisonment without the possibility of parole for the first degree murder of Mr. Walls, for a term of sixteen to twenty months imprisonment for possession of a firearm by a convicted felon at the time of the murder of Mr. Walls, to a term of thirty-four to fifty months imprisonment for assaulting Ms. Waters with a deadly weapon inflicting serious injury, to a term of sixteen to twenty months imprisonment for possession of a firearm by a convicted felon at the time of the assault on Ms. Waters, to a term of 116 to 149 months imprisonment for assaulting Mr. Hinton with a deadly weapon with intent to kill inflicting serious injury, and to a term of sixteen to twenty months imprisonment for possession of a firearm by a convicted felon at the time of the assault on Mr. Hinton, all to be served consecutively. Defendant noted an appeal to this Court from the trial court's judgments.

II. Legal Analysis

A. Possession of a Firearm by a Convicted Felon

[1] First, Defendant argues that the trial court erred by denying his motion to dismiss two of the three counts of possession of a firearm by a convicted felon on the grounds that the record only supports one, rather than three, firearm possession convictions. After carefully reviewing the record evidence and the applicable law, we conclude that Defendant's argument has merit.

N.C. Gen. Stat. § 14-415.1(a) (2009) provides, in pertinent part, that "[i]t shall be unlawful for any person who has been convicted of

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2. The record does not include the original indictment charging Defendant with this offense.

a felony to purchase, own, possess, or have in his custody, care, or control any firearm." "Thus, the State need only prove two elements to establish the crime of possession of a firearm by a felon: (1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Wood*, 185 N.C. App. 227, 235, 647 S.E.2d 679, 686, *disc. review denied*, 361 N.C. 703, 655 S.E.2d 402 (2007). Although Defendant does not challenge the sufficiency of the evidence to show that, during the early morning of 4 September 2006, he possessed two firearms after having previously been convicted of a felony, he contends that, given the undisputed evidence tending to show that he obtained and possessed the two firearms used during the murder of Mr. Walls and the assaults upon Mr. Hinton and Ms. Waters simultaneously, he can lawfully be convicted of only one charge of possession of a firearm by a convicted felon rather than three.

At bottom, the issue before the Court in this case hinges upon the meaning of the relevant statutory language rather than upon the import of the evidence received at trial, which is essentially undisputed. In other words, in order to adequately address Defendant's contention, we have to determine whether the statutory expression "purchase, own, possess, or have in his custody, care, or control" as used in N.C. Gen. Stat. § 14-415.1(a) allows multiple convictions and sentences for possessing the same simultaneously-acquired firearms because they were used to commit multiple substantive offenses during the same transaction or series of transactions. Thus, the issue that Defendant has presented for our consideration is essentially one of statutory construction.

"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)). "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). "In construing a criminal statute, the presumption is against multiple punishments in the absence of a contrary intent." *State v. Boykin*, 78 N.C. App. 572, 576-77, 337 S.E.2d 678, 681 (1985). Similarly, "[t]he rule of lenity 'forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention." *Id.*, 78 N.C. App. at 577, 337 S.E.2d at 681. Since the literal language of N.C. Gen. Stat. § 14-415.1 does not explicitly address the extent to which a convicted felon can be separately convicted and sentenced

for felonious possession of a firearm each time he or she uses that weapon to commit a separate substantive offense, we must resolve this issue using general principles of statutory construction such as those cited above.

A few years ago, this Court held that:

> a review of the applicable firearms statute shows no indication that the North Carolina Legislature intended for N.C. Gen. Stat. §14-415.1(a) to impose multiple penalties for a defendant's simultaneous possession of multiple firearms. . . . [W]e hold that defendant should be convicted and sentenced only once for possession of a firearm by a felon based on his simultaneous possession of both firearms.

State v. Garris, 191 N.C. App. 276, 285, 663 S.E.2d 340, 348, *disc. rev. denied*, 362 N.C. 684, 670 S.E.2d 907 (2008). *See also State v. Whitaker*, ––– N.C. App. –––, –––, 689 S.E.2d 395, 405-06 (2009), *aff'd*, 364 N.C. 404, 700 S.E.2d 215 (2010) (reversing ten of eleven convictions for possession of a firearm by a convicted felon where defendant possessed all eleven firearms simultaneously). As a result, the holding of *Garris* is that simultaneous possession of two firearms suffices to support only a single conviction for possession of a firearm by a convicted felon rather than multiple convictions. This case, however, involves a slightly different factual scenario than the one at issue in *Garris*, since the convictions at issue in *Garris* stemmed from the defendant's simultaneous possession of multiple firearms, while the convictions at issue here stem from Defendant's use of firearms that he simultaneously obtained and used while committing three substantive offenses over a period of approximately two hours. However, we believe the same logic utilized in *Garris* is clearly applicable to this case, leading us to conclude that, since simultaneous possession of more than one firearm supports only one conviction for possession of a firearm by a convicted felon, the fact that Defendant may have fired those weapons, which were obtained and possessed simultaneously, on more than one occasion during the commission of several substantive crimes does not support multiple possession-based convictions and sentences.

In Garris, we stated that:

> The United States Supreme Court holds that ambiguity in the statute should be resolved in favor of lenity, and doubt must be resolved against turning a single transaction into multiple offenses.

Garris, 191 N.C. App. at 283-84, 663 S.E.2d at 347 (citing *Bell v. United States*, 349 U.S. 81, 83-84, 99 L. Ed. 905, 910-11, 75 S. Ct. 620, 622 (1955). As we have already noted, the literal language of N.C. Gen. Stat. § 14-415.1 does not address the extent to which multiple convictions and sentences are appropriate under circumstances such as those at issue here. Given the absence of any indication in the relevant statutory language that the usual presumption against multiple punishments does not apply in cases such as this one, we conclude that the rule of lenity is applicable in situations such as the one we have before us in this case and that, after applying the rule of lenity to the facts disclosed in the present record, we are compelled to conclude that N.C. Gen. Stat. § 14-415.1(a) does not authorize multiple convictions of and sentences for possession of a firearm by a convicted felon predicated on evidence that the defendant simultaneously obtained and possessed one or more firearms, which he used during the commission of multiple substantive criminal offenses. Any other result would be tantamount to presuming that the General Assembly intended to authorize multiple punishments in such instances despite the absence of any language supporting such a result.

Although the State argues that *Garris* holds that "N.C. Gen. Stat. § 14-415.1(a) does not intend to impose multiple penalties for a defendant's simultaneous possession of multiple firearms resulting from a single incident or occurrence," we are not persuaded by the logic upon which the State relies. A careful review of our opinion in *Garris* indicates that we said nothing on that occasion concerning the appropriateness of separate possession-based liability stemming from incidents, occurrences, or other crimes involving the use of such simultaneously-possessed firearms. Simply put, nothing in *Garris* in any way suggests that the extent to which a defendant uses a firearm to commit substantive offenses in any way supports a separate conviction and sentence for unlawful firearm possession arising from each occasion on which a convicted felon uses a firearm to commit another substantive offense. Taken to its logical extreme, the reasoning upon which the State relies would convert N.C. Gen. Stat. § 14-415.1(a) into a device for enhancing each sentence imposed upon a convicted felon who committed multiple substantive offenses using a firearm based solely on unlawful weapon possession, a result which finds no support in the relevant statutory language. As a result, we do not believe that *Garris* in any way supports a determination that Defendant was properly convicted of and sentenced for separate possession-based offenses in this case.

In addition, none of the cases cited in the State's brief construing various federal firearms possession statutes provide any support for a decision to uphold Defendant's multiple possession-based convictions and sentences given the facts of this case. For example, in *United States v. Bullock*, 615 F.2d 1082, 1083, 1086 (5th Cir. 1980), *cert. denied*, 449 U.S. 957, 66 L. Ed. 2d 223, 101 S. Ct. 367 (1980), the Fifth Circuit held that a defendant could be separately convicted and sentenced for possessing "several firearms" that he took "from a cabinet" in his residence and a .357 magnum pistol that "he took from under the seat of [his] truck" "[d]uring [a] trip back to [a] shopping center" given that the relevant statutory provision "allows the government to treat each of several firearms not simultaneously received or possessed as separate units of prosecution." Similarly, in *United States v. Mullins*, 698 F.2d 686, 687-88 (4th Cir. 1983), *cert. denied*, 460 U.S. 1073, 75 L. Ed. 2d 952, 103 S. Ct. 1531 (1983), the Fourth Circuit upheld separate convictions and sentences for unlawful firearm possession given that the evidence supported an inference that one weapon "was used principally to provide armed protection . . . at the Axton establishment, while [the other weapon] was used to provide armed protection . . . in [the] principal establishment" on the theory that the record showed a "disparate course of dealing with the two weapons." Neither *Bullock* nor *Mullins* addresses the issue of whether a defendant can be convicted of multiple possession-based offenses in the event that simultaneously-acquired firearms are used to commit a series of substantive offenses over a relatively limited period of time; instead, those decisions focus on the issue of whether the defendant obtained the weapons in question separately and stored them at different locations. Using essentially the same logic, the Sixth Circuit held in *U.S. v. Adams*, 214 F.3d 724, 726-27, 728 (6th Cir. 2000), that separate convictions and sentences were appropriate as the result of the defendants' possession of a Ruger 9 millimeter handgun found on 12 September 1996 "at the right rear tire" of a vehicle obtained in a 3 September 1996 carjacking, a Bryco 9 millimeter handgun used during the course of a 5 September 1996 robbery at the time of the defendants' 25 September 1996 arrest, and a .380 Smith and Wesson handgun found "at the spot where [one of the defendants] had jumped out of the pickup truck" on 7 September 1997 following their escape from custody on the grounds that each firearm "was discovered by the police on separate occasions and in different places." Once again, the use of the firearms in question to commit different crimes does not appear to have factored into the Sixth Circuit's analysis in *Adams*. *See also*: *United States v. Gibson*,

808 F.2d 1011, 1012 (3rd Cir. 1987) (holding that separate convictions and sentences for unlawful firearms possession were appropriate when the defendant possessed two shotguns on 13 July 1982 and a semi-automatic pistol on 28 July 1982 since "courts have uniformly upheld multiple prosecution[s]" in cases involving firearms that "had been acquired or received at different times"); *United States v. Filipponio*, 702 F.2d 664, 665 (7th Cir. 1983) (holding that a defendant could be separately convicted and sentenced for possessing a Colt firearm on 8 July 1981 and a Beretta firearm on 10 July 1981 given the absence of "evidence or argument that [the defendant possessed both firearms" at the same time). As a result, although the relevant federal decisions clearly hold that the possession of multiple firearms at different times constitutes more than one offense, *U.S. v. Dunford*, 148 F.3d 385, 390 (4th Cir. 1998), none of the federal decisions upon which the State relies hold that the use of simultaneously-acquired firearms to commit a series of shootings supports a separate possession-based conviction and sentence associated with the commission of each substantive offense.

The conclusion that we believe to be appropriate is also consistent with established North Carolina law, which provides that the use of a single firearm or, for that matter, multiple firearms possessed simultaneously, may support multiple homicide, robbery, or assault charges arising from the use of that firearm. For example, a defendant may properly be convicted of separate counts of armed robbery in the event that he or she uses a firearm to rob several different people. *State v. Johnson*, 23 N.C. App. 52, 56, 208 S.E.2d 206, 209, *cert. denied*, 286 N.C. 339, 210 S.E.2d 59 (1974) (stating that "defendants threatened the use of force on separate victims and took property from each of them . . . . The armed robbery of each person is a separate and distinct offense, for which defendants may be prosecuted and punished."). In essence, a defendant who uses one or more firearms to commit multiple substantive offenses during the course of the same transaction or series of transactions may be separately convicted and sentenced for each of those substantive offenses. Thus, the sanction to be imposed upon Defendant as a result of his decision to commit multiple felonies using a firearm stems from the fact that he committed multiple substantive offenses rather than from the fact that he unlawfully possessed a firearm at the time that each substantive offense was committed.

As a result, we conclude that Defendant's possession of a firearm during the sequence of events that included the murder of Mr. Walls

and the assaults upon Mr. Hinton and Ms. Waters constituted a single possessory offense rather than three separate possessory offenses. The extent to which Defendant is guilty of single or multiple offenses hinges upon the extent to which the weapons in question were acquired and possessed at different times. The undisputed evidence presented at trial clearly establishes that the weapons at issue here came into Defendant's possession simultaneously and were utilized over the course of a two hour period within a relatively limited part of Kinston in connection with the commission of a series of similar offenses. In light of that set of facts, we conclude that the trial court properly entered judgment against Defendant based upon his conviction for possession of a firearm by a convicted felon in File No. 08 CRS 2527. However, we also conclude that the two possession-based judgments entered by the trial court in File Nos. 08 CRS 2525 and 2526 should be reversed and that, since the trial court imposed consecutive sentences in all three possession-based cases, this case should be remanded to the Lenoir County Superior Court for the entry of new judgments that are not inconsistent with our holding concerning this issue.

B. Failure to Instruct on Second Degree Murder

[2] Secondly, Defendant argues that the trial court committed plain error by failing to submit the issue of his guilt of the lesser included offense of second degree murder to the jury in the case in which he was convicted of murdering Mr. Walls. According to Defendant, the evidence contained in the record developed at trial revealed the existence of a legitimate dispute as to whether Defendant acted with premeditation and deliberation at the time that he shot Mr. Walls. Defendant's arguments to this effect lack merit.

"Where, under the bill of indictment, it is permissible to convict defendant of a lesser degree of the crime charged, and there is evidence to support a milder verdict, defendant is entitled to have the different permissible verdicts arising on the evidence presented to the jury under proper instructions . . . . This principle applies, however, only in those cases where there is evidence of guilt of the lesser degree. If all the evidence tends to show that the crime charged in the indictment was committed, and there is no evidence tending to show commission of a crime of less degree, the principle does not apply and the court correctly refuses to charge on the unsupported lesser degree." *State v. Wrenn*, 279 N.C. 676, 681, 185 S.E.2d 129, 132 (1971)

(citing *State v. Smith*, 201 N.C. 494, 160 S.E. 577 (1931), and *State v. Duboise*, 279 N.C. 73, 181 S.E.2d 393 (1971) (other citations omitted).

Although Defendant argues that the record evidence would have permitted a jury to determine that he was only guilty of second degree murder in connection with the shooting of Mr. Walls, "[d]efense counsel did not request an instruction from the trial court on the lesser included offense of second-degree murder, therefore we review this error under a plain error analysis." *State v. Bass*, 190 N.C. App. 339, 345, 660 S.E.2d 123, 127 (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)), *cert. denied and appeal dismissed*, 362 N.C. 683, 670 S.E.2d 566 (2008).

> [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 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."

Odom, 307 N.C. at 660, 300 S.E.2d at 378 (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)). Therefore, "[t]o prevail under a plain error analysis, a defendant must establish not only that the trial court committed error, but that absent the error, the jury probably would have reached a different result." *State v. Jones*, 137 N.C. App. 221, 226, 527 S.E.2d 700, 704 (citing *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993)), *disc. review denied and appeal dismissed*, 352 N.C. 153, 544 S.E.2d 235 (2000).

"The well-established rule for submission of second-degree murder as a lesser-included offense of first-degree murder is:

> "If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is no evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder." The evidence must be sufficient to allow a rational jury to find the defendant guilty of the lesser offense and to acquit him of the greater.

State v. Locklear, 363 N.C. 438, 454-55, 681 S.E.2d 293, 306 (2009) (quoting *State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 203-04, 344 S.E.2d 775, 781-82 (1986), and citing *State v. Conaway*, 339 N.C. 487, 514, 453 S.E.2d 824, 841 (quoting *Beck v. Alabama*, 447 U.S. 625, 635, 65 L. Ed. 2d 392, 401, 100 S. Ct. 2382, 2388 (1980)), *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153, 116 S. Ct. 223 (1995)).

"The elements of first-degree murder are: (1) the unlawful killing, (2) of another human being, (3) with malice, and (4) with premeditation and deliberation. *See* N.C. [Gen. Stat]. § 14-17 (1999)." *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (citing *State v. Watson*, 338 N.C. 168, 176, 449 S.E.2d 694, 699 (1994), *cert. denied*, 514 U.S. 1071, 131 L. Ed. 2d 569, 115 S. Ct. 1708 (1995), *overruled in part on other grounds by State v. Richardson*, 341 N .C. 585, 461 S.E.2d 724 (1995), and *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991)). "We note that the difference between murder in the first degree and murder in the second degree is that premeditation and deliberation are essential elements of only murder in the first degree." *State v. Griffin*, 308 N.C. 303, 313, 302 S.E.2d 447, 455 (1983) (citing *State v. Meadows*, 272 N.C. 327, 331, 158 S.E.2d 638, 641 (1968)). On appeal, Defendant does not deny that the State presented sufficient evidence to support the submission of the issue of his guilt of first degree murder to the jury. Instead, he argues that the record evidence would have permitted the jury to find him guilty of second degree murder based on a lack of premeditation and deliberation.

"Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. Deliberation means an intent to kill, carried out 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. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826, 835-36 (1994) (citing *State v. Myers*, 299 N.C. 671, 263 S.E.2d 768 (1980), and *State v. Hamlet*, 312 N.C. 162, 321 S.E.2d 837 (1984)). "Premeditation and deliberation can be inferred from many circumstances, some of which include:

> "(1) absence of provocation on the part of deceased, (2) the statements and conduct 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. Leazer, 353 N.C. 234, 238, 539 S.E.2d 922, 925 (2000) (quoting *State v. Sierra*, 335 N.C. 753, 758, 440 S.E.2d 791, 794 (1994)).

In arguing that the trial court should have instructed the jury to consider the issue of his guilt of second degree murder, Defendant cites *State v. Barrett*, 142 N.C. 565, 54 S.E. 856 (1906), and *State v. Dowden*, 118 N.C. 1145, 24 S.E. 722 (1896), for the proposition that, "[i]f the killing took place simultaneously with the formation of the intent to kill, there would be no premeditation." *State v. Evans*, 198 N.C. 82, 84, 150 S.E. 678, 679 (1929) (citing *State v. Steele*, 190 N.C. 506, 130 S.E. 308 (1925)). According to Defendant:

> [T]he killing was not particularly cruel or brutal; no effort was made to conceal the crime beforehand and the firearms appear to have been on the defendant's person prior to the killing. James Walls was shot only once. There was no obvious provocation but, in the light most favorable to the State, the facts tend to show the decision to shoot was simultaneous with the shooting. The State's evidence failed to reveal any prior planning and in examining the factors previously discussed, the State's evidence supporting premeditation and deliberation is not substantial.

We are unable, however, to agree with Defendant's assertion that "the facts tend to show the decision to shoot was simultaneous with the shooting." On the contrary, the undisputed evidence tends to show that Defendant approached Mr. Hill and Mr. Walls in a friendly manner, hugged Mr. Hill, and engaged in casual conversation with the two men. A few minutes later, Defendant scolded Mr. Walls for not paying "his boy" an additional five dollars and remarked that he "made his money off hits." After asking Mr. Hill for a cigarette, Defendant tried to return it and "slid back in the alley" before opening fire on Mr. Walls and killing him. The record contains no evidence tending to show any provocation of Defendant by Mr. Walls or the existence of any prior conflict between the two men. In addition, Defendant used the same ruse, asking for a cigarette, for the purpose of distracting both Mr. Hinton and Mr. Hill prior to shooting Mr. Hinton and Mr. Walls. The evidence concerning Defendant's behavior immediately

prior to the shooting of Mr. Walls clearly suffices to support a finding of premeditation and deliberation and does not support an inference that Defendant formed the intent to kill Mr. Walls at the same time that he shot him. As a result, this aspect of Defendant's challenge to the trial court's judgment lacks merit.

III. Conclusion

Thus, for the reasons set forth above, we conclude that there was no error in the proceedings leading to Defendant's convictions for first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, assault with a deadly weapon inflicting serious injury, and one count of possession of a firearm by a convicted felon. We also conclude, however, that the trial court erred by submitting more than one charge of possession of a firearm by a convicted felon to the jury and entering judgment against Defendant based upon those multiple convictions. As a result, we reverse two of Defendant's convictions for felonious possession of a firearm by a convicted felon and remand this case to the Lenoir County Superior Court for the entry of new judgments that are not inconsistent with this opinion.

NO ERROR IN PART, REVERSED AND REMANDED IN PART.

Judges BRYANT and STEELMAN concur.

STATE OF NORTH CAROLINA v. ERICK THOMAS EATON, DEFENDANT

No. COA09-1586

(Filed 1 March 2011)

1. Search and Seizure— baggie with pills abandoned alongside road—no expectation of privacy

The trial court did not err in a narcotics prosecution by denying defendant's motion to exclude a bag of pills which defendant discarded before complying with an officer's request to return to his patrol car. Defendant was not seized when he discarded the baggie containing the pills beside a public road, and he no longer had a reasonable expectation of privacy in the abandoned property.

2. Appeal and Error—preservation of issues—sentencing

Defendant's appeal of the issue of whether he was properly sentenced as an habitual offender for trafficking in opium was cognizable even though he did not object at trial.

3. Sentencing— habitual felon—mandatory drug sentencing

The trial court did not err by sentencing defendant as an habitual felon after a trafficking in opium conviction where defendant argued that habitual felon status did not apply to increase the mandatory trafficking sentence under Structured Sentencing. A drug trafficker who is not an habitual felon would be subject to enhanced sentencing under N.C.G.S. § 90-95(h)(4), while a drug trafficker who has also attained habitual felon status would be subject to even more enhanced sentencing pursuant to N.C.G.S. § 14-7.6.

4. Evidence— racial slurs addressed to officers—not prejudicial

Any error in allowing the introduction of evidence that defendant addressed the arresting officers with racial slurs was not prejudicial given the overwhelming evidence of guilt.

5. Sentencing— class of offense—clerical error

An error in characterizing defendant's offense as a Class H felony rather than a Class I felony was clerical only and did not prejudice defendant where he was sentenced as a Class C felon pursuant to the Habitual Felon Act.

Appeal by defendant from an order entered 10 August 2009 and from judgment entered on or about 14 July 2009 by Judge W. Erwin Spainhour in Superior Court, Rowan County. Heard in the Court of Appeals 9 June 2010.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General J. Allen Jernigan, for the State.

Sofie W. Hosford, for defendant-appellant.

STROUD, Judge.

Erick Thomas Eaton ("defendant") appeals from the trial court's denial of his motion to suppress and from his conviction for trafficking in dihydrocodeinone by possession and possession of dihydrocodeinone with intent to sell or deliver, and attaining the status of habitual felon. For the following reasons, we affirm the trial court's order and judgment and remand for correction of a clerical error.

I. Background

On 2 February 2009, defendant was indicted on one count of trafficking "4 grams or more but less than 14 grams of opium or opiate or a preparation of opium or opiate, or a salt, compound, derivative of opium," specifically dihydrocodeinone by possession, pursuant to N.C. Gen. Stat. § 90-95(h)(4) and attaining the status of habitual felon. On 6 July 2009, a superseding indictment was issued against defendant, indicting him for one count of possession with intent to sell and/or deliver "(8.3) grams or twenty (20) dosage units of Dihydrocodeinone, commonly known as Hydrocodone an opiate[,]" pursuant to N.C. Gen. Stat. § 90-95(a). On 9 July 2009, defendant filed a motion to suppress certain evidence obtained by police following a stop of defendant on 9 December 2008. Before defendant's trial on these charges, the trial court conducted a hearing on defendant's motion on 13 July 2009. Following this hearing, the trial court denied defendant's motion to suppress and filed a written order on 10 August 2009. Immediately following this hearing, defendant was tried on the above charges. At the close of the State's presentation of evidence, defense counsel made a motion to dismiss and to consider defendant's *pro se* motion to dismiss for lack of subject matter jurisdiction. The trial court denied both of these motions. Defendant offered no evidence at trial. The defendant renewed his motion to dismiss at the close of all evidence and the trial court also denied this motion.

On 14 July 2009, a jury found defendant guilty of both charges. The trial then proceeded to the habitual felon phase. The State presented three of defendant's prior felony convictions, including (1) a 1990 conviction for larceny from the person, (2) a 1996 conviction for possession with intent to sell and/or deliver cocaine, and (3) a 2008 conviction for possession with intent to sell or deliver marijuana, and copies of those conviction records were submitted to the jury. The jury then found defendant guilty of attaining the status of habitual felon. The trial court consolidated the convictions and sentenced defendant to a term of 133 to 169 months imprisonment. Defendant filed written notice of appeal on 14 July 2009.

II. Motion to Suppress

[1] Defendant first contends that the trial court erred when it denied defendant's motion to suppress.

> It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's

findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. In addition, findings of fact to which defendant failed to assign error are binding on appeal. Once this Court concludes that the trial court's findings of fact are supported by the evidence, then this Court's next task is to determine whether the trial court's conclusions of law are supported by the findings. The trial court's conclusions of law are reviewed *de novo* and must be legally correct.

State v. Campbell, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724, (citations, brackets and quotation marks omitted), *appeal dismissed*, 362 N.C. 364, 664 S.E.2d 311 (2008). Here, defendant "failed to assign error" to the trial court's findings of fact in the order denying his motion to suppress. *See id.* Instead, the only assignment of error related to denial of defendant's motion to suppress is directed to the trial court's conclusion of law that the officers had reasonable suspicion of criminal activity to stop and detain defendant. Therefore, the trial court's findings of fact are binding on appeal. *See id.*

The trial court's unchallenged findings of fact are as follows:

1. On 9 December 2008 Officer Adam Bouk, a Salisbury police office[r] with six years experience, was operating a marked Salisbury police cruiser and was in uniform. At 10:00 o'clock P.M. Officer Bouk was on routine patrol near the intersection of North Shaver Street and East Cemetery Street within the city limits of Salisbury, North Carolina. He had been familiar with the neighborhood for almost six years, and he knew it to be an area where illegal drugs were often sold, used and maintained. Within the preceding several months at least five different search warrants concerning drug offenses were executed in the immediate area of the intersection. The weather was cold and it had been raining.

2. As Officer Bouk approached the intersection he observed five people standing in the middle of the intersection. Thinking this was suspicious, he turned on his blue lights and the five people disbursed [sic]-all in different directions. The officer asked them to come back and stand in front of his police car. All but the defendant complied. The defendant continued walking away in an easterly direction along East Cemetery Street. The officer said, "Hey, come back to the car." The defendant began to turn around and face Officer Bouk whereupon the officer saw a white object come out of the left hand of the defendant and fall to the ground. The defendant then walked back to the officer's car. Officer Bouk

> retrieved the object which turned out to be a plastic bag containing a large number of pills and white powder residue. The plastic bag was dry. The defendant was placed in handcuffs because of what the officer found in the plastic bag.
>
> 3. No physical force was applied to the defendant until he was placed in handcuffs. The defendant was untouched at the time he discarded the plastic bag containing the pills and the white powder residue.

Based on these findings, the trial court concluded that, "under the totality of the circumstances of this matter, [officers] had reasonable, articulable suspicion in a high crime and illegal drug area, to turn on their blue lights and ask the five people standing in the middle of the intersection on a cold, rainy night to come to the front of his police car after they scattered." The trial court also concluded that "[t]his cases is remarkably similar to California v. Hodari D., 499 U.S. 621 (1991) upon which this court relies in this Order [as] . . . the plastic bag containing the pills and powder was not the fruit of a 'seizure' of his person with the meaning of the Fourth Amendment." The court further concluded that "[a] seizure of the defendant had not occurred when the defendant discarded the plastic bag containing the pills and the white powder residue, and the defendant had not yielded to a show of authority at that time."

On appeal, defendant contends that, looking to the totality of the circumstances, "there were not reasonable grounds to detain [defendant] and the trial court erred in concluding that officers had reasonable suspicion that criminal activity was afoot[.]" Defendant argues that "[t]he fact that this incident occurred in a drug area did not supply reasonable suspicion to stop and detain [defendant]" and defendant did not flee from police but merely ignored Officer Bouk's request and walked away from them.

In *California v. Hodari D*, 499 U.S. 621, 113 L. Ed. 2d 690 (1991), officers were patrolling late one evening in a high crime area. *Id.* at 622, 113 L..Ed. 2d at 695. As they rounded a corner in their patrol vehicle, "they saw four or five youths huddled around a small red car parked at the curb. When the youths saw the officers' car approaching they apparently panicked, and took flight." *Id.* at 622-23, 113 L. Ed. 2d at 695. The defendant was one of those youths and he ran through an alley. *Id.* Officers chased defendant and, upon seeing the officer in pursuit of him, the defendant "tossed away what appeared to be a small rock" and was subsequently tackled and handcuffed by that

officer. *Id.* The officer retrieved the item discarded by the defendant and it was determined to be crack cocaine. *Id.* The defendant moved to suppress this evidence and the trial court denied that motion; the California Court of Appeals reversed, holding that the defendant "had been 'seized' when he saw [the officer] running towards him, that this seizure was unreasonable under the Fourth Amendment, and that the evidence of cocaine had to be suppressed as the fruit of that illegal seizure[;]" the California State Supreme Court denied review; and the United States Supreme Court granted the State's petition for writ of certiorari. *Id.* On appeal, the defendant argued that "the drugs were the fruit of that seizure and the evidence concerning them was properly excluded. If not, the drugs were abandoned by [the defendant] and lawfully recovered by the police, and the evidence should have been admitted." *Id.* at 624, 113 L. Ed. 2d at 695-96. The Court stated the general rule that "the Fourth Amendment's protection against 'unreasonable . . . seizures' includes seizure of the person" but noted that

> [t]he word "seizure" readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. ("She seized the purse-snatcher, but he broke out of her grasp.") It does not remotely apply, however, to the prospect of a policeman yelling "Stop, in the name of the law!" at a fleeing form that continues to flee. That is no seizure. . . . An arrest requires either physical force (as described above) or, where that is absent, *submission* to the assertion of authority.

Id. at 626, 113 L. Ed. 2d at 696-97. The Court went on to hold that the defendant was not seized within the meaning of the Fourth Amendment when he discarded the cocaine because he had failed to comply with the officer's "show of authority" at the time. *Id.* at 628-29, 113 L. Ed. 2d at 699. The Court further determined that "[t]he cocaine abandoned while he was running was in this case not the fruit of a seizure" and "reverse[d] the decision of the California Court of Appeal[.]" *Id.* at 629, 113 L. Ed. 2d at 699.

Here, the facts before us are similar to those in *Hodari D.* The trial court's findings show that Officer Bouk was patrolling at night in "an area where illegal drugs were often sold, used and maintained." While on patrol, Officer Bouk "observed five people standing in the middle of the intersection" and "turned on his blue lights[.]" As the officers approached them, "the five people disbursed [sic]-all in different directions." In a show of authority, "[t]he officer asked them

to come back and stand in front of his police car." All of the others complied, but defendant who "continued walking away in an easterly direction along East Cemetery Street." Officer Bouk again asked defendant to "come back to the car." Defendant stopped and, like the defendant in *Hodari D.*, turned and discarded the plastic baggie before complying with the officer's "show of authority" by submitting to the officer's request and returning to the patrol vehicle. *See id.* at 628-29, 113 L. Ed. 2d at 699. Therefore, defendant was not seized when he discarded the plastic baggie containing the pills.

As defendant contends that the evidence was unlawfully seized, we must determine whether Officer Bouk's recovery of the plastic baggie was reasonable within the limits of the Fourth Amendment. We have stated that "[t]he fourth amendment protects against governmental intrusion into areas in which the citizen has a reasonable expectation of privacy." *State v. Baker*, 65 N.C. App. 430, 438-39, 310 S.E.2d 101, 109 (1983) (citing *Katz v. U.S.*, 389 U.S. 347, 19 L. Ed. 2d 576 (1967)), *cert. denied*, 312 N.C. 85, 321 S.E.2d 900 (1984). The protection of the Fourth Amendment against unreasonable searches and seizures does not extend to abandoned property. *State v. Cromartie*, 55 N.C. App. 221, 225, 284 S.E.2d 728, 730 (1981). "When one abandons property, '[t]here can be nothing unlawful in the Government's appropriation of such abandoned property.' " *Id.* (quoting *Abel v. United States*, 362 U.S. 217, 241, 698, 4 L. Ed. 2d 668, 687 (1960)). In order to determine whether a person has abandoned property for the purposes of the law of search and seizure it must be shown that the defendant "had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." *Id.* at 223, 284 S.E.2d at 730 (citation and quotation marks omitted). "Where the presence of the police is lawful and the discard occurs in a public place where the defendant cannot reasonably have any continued expectancy of privacy in the discarded property, the property will be deemed abandoned for purposes of search and seizure." *Id.* at 224, 284 S.E.2d at 730 (citation, brackets, and quotation marks omitted). Here, the trial court's findings show that defendant discarded the plastic baggie beside a public road. Therefore, we hold that defendant abandoned the plastic baggie as he no longer retained a reasonable expectation of privacy by discarding it "in a public place[.]" *See id.* As defendant had not been seized at the time he discarded the plastic baggie and the plastic baggie was abandoned property, Officer Bouk's recovery of the plastic

baggie did not violate defendant's Fourth Amendment rights. *See California*, 499 U.S. at 626, 113 L. Ed. 2d at 697. Accordingly, we hold that the trial court's findings support its conclusion of law and affirm the denial of defendant's motion to suppress.

III. Habitual Felon Conviction

[2] Defendant next contends that the trial court erred in sentencing defendant as a habitual felon on the charge of trafficking in opium by possession on the grounds that the structured-sentencing statute does not apply to drug trafficking offenses. Defendant argues that because N.C. Gen. Stat. § 90-95(h)(4)(a) prescribes a mandatory sentence for trafficking convictions, the status of habitual felon cannot be used to increase a defendant's punishment for a drug trafficking offense.

The record shows that defense counsel made no specific objection as to the trial court's sentencing defendant as an habitual felon. N.C.R. App. P. 10(b)(1) provides that, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context" and "obtain a ruling upon the party's request, objection or motion." Thus, an appellant is generally not entitled to appellate review of issues that were not raised before the trial court. However, a criminal defendant may mount an appellate challenge to the validity of his sentence despite the absence of an objection to the trial court's sentencing decision in the court below, pursuant to N.C. Gen. Stat. § 15A-1446(d) (2009), which provides that:

> Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division. . . .
>
> (18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.

"[N.C. Gen. Stat. § 15A-1446](d)(18) . . . does not conflict with any specific provision in our appellate rules and operates as a 'rule or law' under Rule 10(a)(1), which permits review of [the sentencing issue raised by defendant.]" *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010). Since the issue that defendant seeks to raise on

appeal relates to the lawfulness of the sentence that was imposed upon him for trafficking in opium, it is exactly the sort of issue that is cognizable on appeal despite the absence of an objection in the trial court pursuant to N.C. Gen. Stat. § 15A-1446(d)(18). Therefore, defendant's issue is properly preserved for appellate review.

[3] Moving to the substance of defendant's argument that individuals convicted of drug trafficking offenses are not subject to enhanced sentencing as habitual felons pursuant to N.C. Gen. Stat. § 14-7.6, we note that defendant relies primarily on the mandatory language of N.C. Gen. Stat. § 90-95(h)(4)(a) (2009), which provides that:

> Notwithstanding any other provision of law, . . . [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 . . . shall be guilty of a felony . . . known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved . . . [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)[.]

In defendant's view, the mandatory nature of this language precluded the trial court from sentencing him as a Class C felon based on his habitual felon status. We believe, however, that defendant's argument rests on a misapprehension of the nature and intent of North Carolina's criminal sentencing statutes.

The statutes governing the sentencing of convicted criminal defendants almost universally employ mandatory language directing that a person convicted of a particular offense "shall be punished" as a Class "X" felon or providing that specific terms of imprisonment are authorized for particular offenses and prior record levels. In addition, N.C. Gen. Stat. § 14-7.6 (2009), which governs sentencing of habitual felons, provides, in pertinent part, that:

> When an habitual felon as defined in this Article commits any felony under the laws of the State of North Carolina, the felon must, upon conviction or plea of guilty under indictment as provided in this Article (except where the felon has been sentenced as a Class A, B1, or B2 felon) be sentenced as a Class C felon. . . .

The explicit directive contained in N.C. Gen. Stat. § 14-7.6 to the effect that a defendant found to have attained habitual felon status

"must" be sentenced as an habitual felon is arguably even more mandatory than the language found in N.C. Gen. Stat. § 90-95(h)(4) upon which defendant relies. Finally, N.C. Gen. Stat. § 14-7.6 contains specific exceptions applicable to defendants convicted of Class A, B1 or B2 felonies, making it completely clear that the General Assembly expressly considered the issue of which offenses would be exempted from the enhanced sentencing provisions of this statute and which would not. Needless to say, there is no language in N.C. Gen. Stat. § 14-7.6 excluding individuals convicted of drug trafficking offenses from North Carolina's system for sentencing habitual felons. As a result, the consistent use of mandatory language throughout the sentencing statutes in effect in North Carolina precludes acceptance of defendant's argument, which elevates the importance of the mandatory language contained in N.C. Gen. Stat. § 90-95(h)(4) over the mandatory language found in other sentencing statutes, including N.C. Gen. Stat. § 14-7.6.

In *State v. Parks*, 146 N.C. App. 568, 572, 553 S.E.2d 695, 697 (2001), *appeal dismissed and disc. review denied*, 355 N.C. 220, 560 S.E.2d 355 (2002), *cert. denied*, 537 U.S. 832, 154 L. Ed. 2d 49 (2002), the defendant argued that he could not properly be sentenced as an habitual felon because "the Structured Sentencing Act impliedly repeals the Habitual Felon Act." This Court rejected the defendant's argument, stating that:

> We believe that the two Acts are different, but not conflicting. The Acts reveal that the General Assembly intended to enhance punishments for both types of repeat offenders, but by different means. Structured sentencing applies to all persons committing misdemeanors or felonies, as a mechanism for determining sentences based on the seriousness of the crime and the extent of the defendant's previous record. . . . The Habitual Felon Act elevates the convicted person's status within Structured Sentencing so that the person is eligible for longer minimum and maximum sentences.

Id. at 572, 553 S.E.2d at 697-98. We conclude that the same reasoning applies in the context of a defendant convicted of drug trafficking and subject to enhanced sentencing as an habitual felon: the two statutes complement each other and address different means of enhancing punishment. In essence, under the interpretation of the relevant statutory provisions that we believe to be appropriate, a drug trafficker who is not an habitual felon would be subject to enhanced sentencing pursuant to N.C. Gen. Stat. § 90-95(h)(4), while a drug

trafficker who has also attained habitual felon status would be subject to even more enhanced sentencing pursuant to N.C. Gen. Stat. § 14-7.6. A contrary holding could lead to the absurd result that a defendant convicted of simple possession of a controlled substance and of having attained the status of an habitual felon could receive a significantly longer sentence than an habitual felon convicted of drug trafficking on the basis of an act involving the same controlled substance. Furthermore, as a matter of public policy, it is reasonable to assume that the legislature intended to further enhance the sentences of drug traffickers who are also habitual felons rather than ignoring their habitual felon status for sentencing purposes. Therefore, we do not believe that defendant's challenge to the trial court's decision to sentence him as an habitual felon in the case in which he was convicted of trafficking in opium has merit and conclude that the challenged sentencing decision should be left undisturbed.

IV. Admission of Defendant's Statements to Police

[4] Lastly, defendant argues that the trial court erred in allowing the State to offer evidence that defendant addressed the arresting officers with racial slurs. Defendant contends that these statements were not relevant and should have been excluded. However, in the alternative, defendant contends that even if they were relevant, they should have been excluded because they were highly prejudicial as to sway the jury.

At trial, Officer Bouk testified to substantially the same facts as he had at the hearing on the motion to suppress, as described in the trial court's findings of fact above. Over defense counsel's objection, Officer Bouk was allowed to also testify that after defendant was arrested and placed in the back of the patrol vehicle, he became "very belligerent and irate" and "used racial slurs to both me and my partner." Officer Bouk testified that defendant spoke these racial slurs to the officers from the time that he was first placed in the back of the patrol vehicle until they got to the police department. When they took defendant out of the handcuffs, he stopped speaking these slurs to the officers. However, when defendant was again placed in handcuffs, he again spoke racial slurs to both officers "through the magistrate's office into the jail process." The trial court admitted into evidence and the jury viewed a video from the video camera inside Officer Bouk's patrol vehicle which showed the incident in which defendant was arrested on 7 July 2009.

Our Supreme Court has stated that "[a] trial court's ruling on an evidentiary point will be presumed to be correct unless the com-

plaining party can demonstrate that the particular ruling was in fact incorrect." *State v. Herring*, 322 N.C. 733, 749, 370 S.E.2d 363, 373 (1988) (citation omitted). "Even if the complaining party can show that the trial court erred in its ruling, relief ordinarily will not be granted absent a showing of prejudice." *Id.* In order to establish prejudice, the defendant must show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial" and "[t]he burden of showing such prejudice under this subsection is upon the defendant." N.C. Gen. Stat. § 15A-1443(a)(2009).

Even assuming *arguendo* that admission of Officer Bouk's statements regarding defendant's racial slurs was in error, we hold that they were not prejudicial given the overwhelming evidence of defendant's guilt. Here, defendant was found guilty of possession of dihydrocodeinone with intent to sell or deliver "(8.3) grams or twenty (20) dosage units of Dihydrocodeinone, commonly known as Hydrocodone an opiate[,]" pursuant to N.C. Gen. Stat. § 90-95(a), and trafficking "4 grams or more but less than 14 grams of opium or opiate or a preparation of opium or opiate, or a salt, compound, derivative of opium," specifically dihydrocodeinone by possession, pursuant to N.C. Gen. Stat. § 90-95(h)(4). N.C. Gen. Stat. § 90-95(a)(1) (2009) states that "it is unlawful for any person: . . . . [t]o manufacture, sell or deliver, or possess with intent to manufacturer, sell or deliver, a controlled substance[.]" "An accused has possession of a controlled substance within the meaning of N.C.G.S. Sec. 90-95(a)(1) when he has both the power and the intent to control its disposition or use." *State v. Fletcher*, 92 N.C. App. 50, 56, 373 S.E.2d 681, 685 (1988) (citation and quotation marks omitted). "The jury could reasonably infer an intent to distribute from the amount of the substance found, the manner in which it was packaged and the presence of other packaging materials." *State v. Baxter*, 285 N.C. 735, 738, 208 S.E.2d 696, 698 (1974). As noted above, N.C. Gen. Stat. § 90-95(h)(4) states that

> (4) Any 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 which felony shall be known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved:
>
> > a. Is 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. § 90-91(d)(4), lists as one of the "Schedule III controlled substances[,]" "[a]ny material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof unless specifically exempted or listed in another schedule: . . . . 4. Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts." N.C. Gen. Stat. § 90-90(1)(a), which lists "Schedule II controlled substances[,]" states that "Hydrocodone" is an "[o]pium and opiate, [or] [a] salt, compound, derivative, or preparation of opium and opiate[.]"

Officer Bouk observed defendant toss the plastic baggie that contained the pills from a distance of 20 feet. Officer Bouk testified that although it was nighttime, the area was illuminated by his headlights, blue lights, and streetlights. Officer Bouk immediately retrieved the plastic baggie from the ground and noted that although it had been raining, the plastic baggie was dry. Elizabeth Reagan, a special agent forensic chemist with the North Carolina State Bureau of Investigation, testified that after chemical analysis, she determined that the plastic baggie that Officer Bouk recovered at the scene contained 19 and one-half dihydrocodeinone tablets, trade name Vicodin or Lortab, weighing 8.3 grams. In the following exchange with defense counsel, Special Agent Reagan explained that dihydrocodeinone, which is a Schedule III substance, is a form of hydrocodone, which is a schedule II substance:

> [Agent Reagan]: In general, the scheduling is mainly used in the court system for sentencing and penalties. In the scope of my analysis, there's no difference between Schedule 2 and 3 in terms of identification.
>
> [Defense counsel]: Is there an opiate or hydrocodone that's included in Schedule 2?
>
> A: There is a hydrocodone that is in Schedule 2, but it is not one that we see. Anything that is mixed with another—in this instance it was mixed with acetaminophen. That preparation is what makes it a Schedule 3.

Q: Mixed with acetaminophen makes it a Schedule 3?

A: Any-any mixture would be Schedule 3. In this instance, it was mixed with acetaminophen.

Q: And Lortab?

A: I don't know that this was that brand name, but Lortab is hydrocodone.

Q: Or Vicodin?

A: Yes. Any-any type of hydrocodone.

Accordingly, the substance found in defendant possession was a Schedule III substance, dihydrocodeinone, which is a form of hydrocodone listed in N.C. Gen. Stat. 90-90(1)(a) as an "[o]pium and opiate, [or] any salt, compound, derivative, or preparation of opium and opiate," satisfying the evidentiary requirements of N.C. Gen. Stat. § 90-95(a) and N.C. Gen. Stat. § 90-95(h)(4)[1]. As there was overwhelming evidence of defendant's guilt, the exclusion of evidence regarding defendant's racial slurs to the officers would not have caused "a different result" at trial. *See* N.C. Gen. Stat. § 15A-1443(a). Accordingly, defendant's argument is overruled.

V. Clerical error

[5] Although it is not raised by either party, we note a clerical error in the judgment. As stated above, dihydrocodeinone is a Schedule III controlled substance. *See* N.C. Gen. Stat. § 90-91(d)(4). The judgment entered against defendant states that possession with intent to sell or deliver a Schedule III controlled substance is a Class H felony. N.C. Gen. Stat. § 90-95(a)(1) makes it unlawful to possess a controlled substance with the intent to sell or deliver. However, N.C. Gen. Stat. § 90-95(b)(2) provides that violation of N.C. Gen. Stat. § 90-95(a)(1) with respect to "[a] controlled substance classified in Schedule III, IV, V, or VI shall be punished as a Class I felon[y], except that the sale of a controlled substance classified in Schedule III, IV, V, or VI shall be punished as a Class H felon[y]." The indictment, verdict, and judgment all charge defendant with possession with intent to sell or deliver, which is a Class I felony, not sale only, which is a Class H felony. As a result, the offense in question was not properly characterized as a Class H felony but should have been characterized as a Class I felony.

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1. N.C. Gen. Stat. 90-90(2) also lists "Dihydrocodeine" as a schedule II substance. However, this substance is not at issue in this case.

However, since defendant was actually sentenced as a Class C felon pursuant to the Habitual Felon Act, the error in the judgment did not prejudice defendant in any way and constitutes, at most, a correctable clerical error. *State v. McCormick*, ––– N.C. App. –––, –––, 693 S.E.2d 195, 200 (2010) (holding that the inclusion of an incorrect case number on the judgment was a mere clerical error that the trial court should correct on remand). Accordingly, we remand for correction of the clerical error in the judgment which identifies the offense of possession with intent to sell or deliver as a Class H felony; this should be identified as a Class I felony.

VI. Conclusion

For the foregoing reasons, we affirm the trial court's denial of defendant's motion to suppress and judgment and remand for correction of the clerical error.

AFFIRM TRIAL COURT'S ORDER AND JUDGMENT; REMAND FOR CORRECTION OF THE CLERICAL ERROR.

Judges McGEE and ERVIN concur.

STATE OF NORTH CAROLINA v. GERALD L. CARTER, Defendant

No. COA10-648

(Filed 1 March 2011)

1. Witnesses— four-year-old child—competent

The trial court did not abuse its discretion in an indecent liberties prosecution by finding that a four-year-old child was competent to testify where defendant argued that the witness had not responded or gave seemingly contradictory answers to some questions. While contradictions and nonresponsive answers may have been appropriate for cross-examination or jury argument, it did not alter the witness's competence.

2. Indecent Liberties— purpose of sexual gratification—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss a charge of taking indecent liberties where defendant

argued that there was no evidence that he committed any act for the purpose of sexual gratification. The evidence presented by the State established a reasonable inference of defendant's guilt.

3. Evidence— objection after question answered—no motion to strike answer—other testimony

The defendant in an indecent liberties prosecution waived his objection to a question about where the victim had been touched by defendant when the victim had not yet identified defendant as the man by whom she was touched. Defendant objected only after the question was answered and made no motion to strike, nor did he object to similar questions.

4. Evidence— invited error—cross-examination question—answer repeated by counsel

There was no plain error in an indecent liberties prosecution where defense counsel on cross-examination elicited an answer that "something must have happened" and then repeated the testimony and invited the witness to give her opinion again.

5. Constitutional Law— effective assistance of counsel—not moving to strike statement by witness

Defendant's counsel was not ineffective in an indecent liberties prosecution when he did not move to strike a statement by a witness that "something must have happened."

6. Indictment and Information— indecent liberties—immoral, improper, indecent act not specifically identified

Although an indecent liberties defendant argued that his indictment did not specifically allege which of his acts was the immoral, improper and indecent liberty, the indictment used the language of the statute and the State was not required to allege an evidentiary basis for the charged offense. Nor did the instruction vary from the indictment.

7. Grand Juries— information presented to grand jury—variance from instruction

There was not a fatal variance in an indecent liberties prosecution between the specific act identified in the jury instruction and the evidence defendant speculated was presented to the grand jury.

Appeal by defendant from judgments entered 13 August 2009 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 1 December 2010.

Roy Cooper, Attorney General, by Jennie Wilhelm Hauser, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, by Barbara S. Blackman, Assistant Appellate Defender, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Gerald L. Carter was charged in true bills of indictment, in which B.R. was alleged to have been the victim, with first-degree statutory sexual offense with a child under the age of thirteen years, first-degree statutory rape of a child under the age of thirteen years, and taking indecent liberties with a child. The offenses were alleged to have occurred between 18 February 2008 and 27 February 2008. Defendant was also charged in true bills of indictment, in which H.S. was alleged to have been the victim, with first-degree statutory sexual offense with a child under the age of thirteen years and taking indecent liberties with a child. The offenses were alleged to have occurred between 1 November 2007 and 28 February 2008. The charge of first-degree statutory sexual offense with H.S. was dismissed at the close of all the evidence. A jury found defendant guilty of taking indecent liberties with each of the alleged victims, and not guilty of the remaining charges. He appeals from judgments entered upon the jury's verdicts.

The evidence at trial tended to show that defendant lived with his mother, Gladys Carter. Beginning in October 2004, Ms. Carter provided child care in her home for B.R., and, at some time thereafter, for B.R.'s younger cousin, H.S. At the time of the events giving rise to the charges in these cases, B.R. was approximately four-and-a-half years old and H.S. was approximately two-and-a-half years old.

B.R.

On the evening of 27 February 2008, B.R. reported to her mother and grandmother that defendant had touched her in her private area and "sticks his tail in my butt." Upon further questioning by her grandmother, B.R. reported that "[h]e sticks his tail in my nonny," the word by which she referred to her vagina.

The following day, B.R. was seen at the pediatric clinic where she had been a patient since infancy. She was examined by Dr. Amy Suttle, a pediatrician who has received specialized training in evaluating child sexual maltreatment. Dr. Suttle found that B.R.'s outer labia and inner labia were "red and swollen." Four days later, B.R. returned to Dr. Suttle's office, where she said to Dr. Suttle, without hesitation, "Gerry sticked his tail in my butt where I go. He put his tail in my nonny, too. He did it." She told Dr. Suttle that she was alone with defendant in his room when he touched her, and that she and defendant "were watching some ugly pictures, some girls on the bed . . . [and t]hose boys putting their tails in their butt." B.R. also told Dr. Suttle that another time, "outside in the forest," defendant "stuck his tail right up here" and "pointed to her crotch area." B.R. was also interviewed by Nydia Rolon, a forensic interviewer, on 13 March 2008, and repeated to her that defendant had touched her and "had put his tail in her nonny."

B.R. testified at the trial. At the time of her testimony, she was six years old. She testified that "Gerry stick his tail in my butt and he stuck his finger in my nonny and he made me lick his tail." B.R. said that "[i]t hurted" and that she told him to "quit" but that he did not. When asked what a "nonny" is, B.R. pointed to her genital area and said, "It's the part where ladies don't show." B.R. said that a "tail" is "the things that boys keep in their pants." B.R. said defendant told her to "stick his tail in [her] mouth," and pointed to other places on her body where defendant put his "tail." B.R. testified that she saw "[s]ome white stuff" come out of defendant's "tail" when he "was moving it up and down." B.R. also testified that defendant "made [her] move [his tail] up and down and then he made [her] put [her] lips on it, and then he—he put his tail in [her] mouth and he said shake—put your feet onto the tail, and then started moving it up and down." B.R. said defendant showed her pictures on the computer of boys "sticked their tails in [a girl's] butt." B.R. also testified that defendant showed her a picture of "this girl who had her feet on this boy's tail and she had her mouth on it and going up and down" and said the girl's "feet were slashing" the boy's "tail." B.R. then testified that "he did the same thing that the girl did. He did all those pictures [to B.R.]" She also said that defendant had "real" swords and nunchucks on the walls of his room, and said that she "was scared of the swords" because "they were sharp." When a search warrant was executed at defendant's residence, the officers found Samurai swords and nunchucks hanging along the walls of defendant's bedroom.

H.S.

When H.S.'s mother learned of the allegations made by B.R., she did not question H.S. but stopped taking her to Ms. Carter's house for daycare. A few days later, however, H.S. became ill and her mother attempted to use a rectal thermometer to take H.S.'s temperature. H.S. began kicking and screaming, "Don't hurt me. That's what he did." H.S. said it had happened at Ms. Carter's house. H.S. testified at the trial that, when she had been at Ms. Carter's house, she had been touched. When asked by the prosecutor if she could point to "where [she] got touched," H.S. stepped down from the witness stand, stood in front of the prosecutor's table, and pointed to her genital area for the jury and then again for the judge. H.S.'s grandmother testified that H.S. had told her, more than a year after the alleged date of the offense, that "Gerry" had touched her "privates." In addition, when interviewed by Kimberly F. Madden, a child therapist and forensic interviewer, H.S. talked about how she had hurt her knee in the waiting room, which prompted Ms. Madden to ask H.S. "if any other part of her body ha[d] been hurt or ha[d] gotten hurt." H.S. began "gesturing" and "pointing to her genital area" and "said that Gerry had hurt her." H.S. also said that "Gerry had hurt her with his hands." Ms. Madden then gave H.S. anatomically detailed dolls and said that H.S. "pulled down the anatomically detailed female child's pants down [sic] and pointed at the genital area." When Ms. Madden asked, "what did Gerry hurt you with?," H.S. "undid the doll's pants and exposed the penis and said . . . that Gerry has this." H.S. then picked up the male doll and "bent the hands toward the penis."

I.

[1] Defendant first contends the trial court abused its discretion by determining that four-year-old H.S. was competent to testify at trial. Defendant asserts that H.S. should have been found incompetent because she was two-and-a-half years old at the time of the "alleged incident," she was crying when she entered the courtroom and when she took the stand, and, during *voir dire*, she only stated her name "after much prodding" and did not answer when asked her cousin's name or whether she had a cousin.

"There is no age below which one is incompetent as a matter of law to testify." *State v. Cooke*, 278 N.C. 288, 290, 179 S.E.2d 365, 367 (1971); *State v. Turner*, 268 N.C. 225, 230, 150 S.E.2d 406, 410 (1966). "The test of competency is the capacity of the proposed witness to

understand and to relate under the obligation of an oath facts which will assist the jury in determining the truth with respect to the ultimate facts which it will be called upon to decide." *Cooke*, 278 N.C. at 290, 179 S.E.2d at 367; *see Turner*, 268 N.C. at 230, 150 S.E.2d at 410; *see also* N.C. Gen. Stat. § 8C-1, Rule 601(b) (2009) ("A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth."). "Competency is to be determined at the time the witness is called to testify and rests mainly, if not entirely, in the sound discretion of the trial judge in the light of his examination and observation of the particular witness." *Cooke*, 278 N.C. at 290, 179 S.E.2d at 367; *see also State v. McNeely*, 314 N.C. 451, 457, 333 S.E.2d 738, 742 (1985) (stating that the trial judge's "presence at the *voir dire* hearing allowed him to listen to the child's responses and to observe her demeanor first hand"). "A ruling committed to a trial court's discretion may be upset only when it is shown that it could not have been the result of a reasoned decision." *McNeely*, 314 N.C. at 453, 333 S.E.2d at 740.

In the present case, after considering H.S.'s *voir dire* testimony, the court made the following findings:

> One, the witness is four years of age; two the witness was able to answer the following questions asked by the District Attorney. Was the District Attorney Santa Claus, would that be a truth or a lie. The witness answered a lie. If I ask you—the District Attorney further asked, if I was on fire would that be the truth or a lie, the witness answered lie. The District Attorney—the witness then said that people who lie get in trouble. The witness then replied that she would tell the truth in court. The witness was able to demonstrate her age by holding up four fingers when the District Attorney asked her age.
>
> The Court finds that the District Attorney—that the witness is reticent, her voice is very faltering and weak and she appears to be very shy about her testimony, but that she has demonstrated the rudimentary elements of qualifying for being competent as a witness, and that is demonstrating and understanding the difference between truth and fiction and demonstrating an ability to discern the importance of telling the truth. Therefore, the Court will find her competent to testify at this time.

> Now, the Court further finds that the child is testifying from the lap of her mother. The Court further finds that when the questioning initially began, that the mother, as parents of four-year-old children are wont to do when they understand that a child knows the answer to a question but will not answer it, was nodding her head affirmatively to at least two questions. These questions were not the questions asked concerning her competence to testify, but were earlier introductory questions.
>
> The Court again cautions Mother that if Mother, by signal, gesture or by words, gives any type of clue to the child as to an answer, the Court will disqualify the child as a witness and rule her testimony inadmissible.

Defendant concedes that H.S. demonstrated her ability to distinguish between truthful statements and lies, that H.S. said that people who tell lies "get in trouble," and that H.S. promised to tell the truth. Although defendant directs our attention to some questions asked during *voir dire* to which H.S. was non-responsive or gave seemingly contradictory answers, our Supreme Court has recognized that "somewhat vague and self-contradictory" answers given during *voir dire* by a child "might be expected of a little child of such tender years," and do not require a determination that a witness is incompetent to testify. *See McNeely*, 314 N.C. at 457-58, 333 S.E.2d at 742.

Defendant further asserts that H.S. was similarly non-responsive and gave contradictory responses to some of the questions asked when she testified in front of the jury, and suggests that this demonstrated H.S.'s inability to "relate facts" and established that the court should have found H.S. was incompetent to testify. While the contradictions and nonresponsiveness to which defendant refers "may have been an appropriate subject for cross examination or a jury argument, it in no way alters [H.S.'s] competence as a witness." *See State v. Higginbottom*, 312 N.C. 760, 766, 324 S.E.2d 834, 839 (1985), *superceded on other grounds by statute as recognized in State v. Green*, 348 N.C. 588, 605-09, 502 S.E.2d 819, 829-31 (1998). Accordingly, defendant has failed to show that the trial court abused its discretion by determining that H.S. was competent to testify at trial.

II.

[2] Defendant next contends the trial court erred by denying his motion to dismiss the charge of taking indecent liberties with H.S. We find no error.

"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). "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." *Id.* at 99, 261 S.E.2d at 117. "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." *Id.* "The test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both." *Id.* "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." *Id.* (omission in original) (internal quotation marks omitted). "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." *Id.* (internal quotation marks omitted).

"The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom . . . ." *Id.* "The defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982). "[C]ontradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion." *Powell*, 299 N.C. at 99, 261 S.E.2d at 117.

"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." *Id.* at 98, 261 S.E.2d at 117. "This is true even though the suspicion so aroused by the evidence is strong." *Id.*

N.C.G.S. § 14-202.1(a)(1) provides that a person is guilty of taking indecent liberties with a child if,

> being 16 years of age or more and at least five years older than the child in question, he . . . [w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child of

> either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire . . . .

N.C. Gen. Stat. § 14-202.1(a)(1) (2009); *see State v. Rhodes*, 321 N.C. 102, 104-05, 361 S.E.2d 578, 580 (1987). Here, defendant does not dispute that there was sufficient evidence to establish that, on the date of the charged offense, his age and H.S.'s age satisfied the age elements of N.C.G.S. § 14-202.1(a)(1). Defendant also concedes that "H.S. answered 'yes' when asked if she was touched at [Ms. Carter's]," and further admits that H.S. pointed to her genital area when she was asked at trial where she had been touched when she was at Ms. Carter's house. He also acknowledges that substantive evidence was presented through the testimony of H.S.'s mother that H.S. screamed, "Don't hurt me[; t]hat's what he did," when she attempted to take H.S.'s temperature with a rectal thermometer, and that H.S. said she was at Ms. Carter's house when this happened. H.S.'s mother also testified that she and her husband found H.S. alone with defendant on different occasions when they picked H.S. up from Ms. Carter's house. The testimony of H.S.'s grandmother and Kimberly Madden was corroborative of H.S.'s testimony.

Defendant suggests there was no evidence that he committed any act "conducted for the purpose of sexual gratification." Nevertheless, "a defendant's purpose in committing the act in an indecent liberties case is seldom provable by direct evidence and must ordinarily be proven by inference." *State v. Creech*, 128 N.C. App. 592, 598, 495 S.E.2d 752, 756 (internal quotation marks omitted), *disc. review denied*, 348 N.C. 285, 501 S.E.2d 921 (1998); *see also Rhodes*, 321 N.C. at 105, 361 S.E.2d at 580 ("The fifth element [of N.C.G.S. § 14-202.1(a)(1)], that the action was for the purpose of arousing or gratifying sexual desire, may be inferred from the evidence of the defendant's actions[, and is] . . . sufficient evidence to withstand a motion to dismiss the charge of taking indecent liberties with a child."). Viewing the evidence in the light most favorable to the State, we are not persuaded by defendant's suggestion that the evidence presented "did no more than" "literally convey[] that a man inserted a rectal thermometer" into H.S. Testimony from H.S. and from her mother indicated that H.S. reported being touched in her genital and rectal area at Ms. Carter's house by a male, and H.S.'s mother testified that she had found H.S. alone with defendant on several occasions at Ms. Carter's house. Further, even though "[t]he uncorroborated testimony of a victim is sufficient to convict a defendant under N.C.G.S. 14-202.1 if his or her testimony suffices to establish all of the ele-

ments of the offense," *see State v. Craven*, 312 N.C. 580, 590, 324 S.E.2d 599, 605 (1985), the corroborative testimony from H.S.'s grandmother and Ms. Madden offered by the State—in which H.S. said defendant was the person who had touched her in her genital area and "hurt" her—added further weight and credibility to H.S.'s testimony. *See State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 573 (1986) ("In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony."); *see also id.* at 469, 349 S.E.2d at 573-74 (disapproving of earlier cases holding that prior statements, "to the extent that they indicate that additional or 'new' information[] contained in the witness's prior statement but not referred to in his trial testimony, may never be admitted as corroborative evidence"). We conclude that the evidence presented by the State was not merely "sufficient only to raise a suspicion or conjecture," *see Powell*, 299 N.C. at 98, 261 S.E.2d at 117, but established a reasonable inference of defendant's guilt of the crime of taking indecent liberties with H.S. Accordingly, the trial court did not err by denying defendant's motion to dismiss this charge.

III.

[3] Defendant next contends the trial court erred by overruling defendant's objection to the question, "[H.S.], can you point to where Gerry touched you?," because defendant argues that H.S. had not identified him as the man who touched her at Ms. Carter's house at that time she was asked the question by the prosecutor. Nevertheless, defendant did not lodge his objection to the question until after H.S. had already responded, and made no motion to strike her answer. Moreover, defendant failed to object to similar questions asked of H.S., including, "Do you remember telling [your Grandma] about the things you and Gerry did?," and "[D]o you remember anything else about what happened between you and Gerry?" Accordingly, we conclude that defendant waived this objection and overrule this assignment of error. *See*, *e.g.*, *State v. Burgin*, 313 N.C. 404, 409, 329 S.E.2d 653, 657 (1985) ("Defendant failed to object to most of these questions. The one objection made was lodged after the witness responded to the question. Defendant made no motion to strike the answer, and therefore waived the objection.").

IV.

Defendant next contends the trial court erred by allowing forensic interviewer Nydia Rolon to offer the following testimony about B.R.: "A child—you know, a child her age with that much sexual knowledge indicates that something happened." Specifically, defendant argues that Ms. Rolon's statement, admitted without objection, was "non-responsive" to defense counsel's question and should have been stricken "since the case rested on the jury's assessment of B.R.'s credibility." Because the statement was admitted without objection, defendant (A) asserts plain error and, in the alternative, (B) claims he was deprived of effective assistance of counsel.

A.

[4] "Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007), *aff'd per curiam*, 362 N.C. 342, 661 S.E.2d 732 (2008); *see also* N.C. Gen. Stat. § 15A-1443(c) (2009) ("A defendant is not prejudiced by . . . error resulting from his own conduct."). In the present case, the following testimony was elicited from Ms. Rolon by defense counsel:

Q. I understand. But my question is, if you don't mind, did you think it was unimportant that [B.R.] basically turned around and denied Gerry doing anything to her?

A. No.

Q. Then why didn't you put it in your summary?

A. Because I'm stating all the information that the child wrote. And, again, this is a summary of the DVD.

Q. I know, but she put on her—she stated very clearly to you Gerry didn't do it. He didn't do nothing, nothing, nothing. Why didn't you put that in your summary?

A. Children—again, she was feeling like that—the trauma was resurfacing. She was making—trying to make decisions of her answers. *A child—you know, a child her age with that much sexual knowledge indicates that something happened.*

Q. *So you—you were thinking something must have happened.*

A. Yes.

Q. Okay. . . .

(Emphasis added.) Even assuming *arguendo* that Ms. Rolon's statement that "something happened" was erroneously admitted, immediately following her statement, defense counsel repeated her testimony, thereby inviting Ms. Rolon to again give her opinion that she thought "something must have happened." Since "a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review," *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001), *supersedeas denied and disc. reviews denied and dismissed as moot*, 355 N.C. 216, 560 S.E.2d 141-42 (2002), defendant's contention that it was plain error for the court to fail to strike Ms. Rolon's statement *sua sponte* is meritless.

B.

[5] "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985). "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Id.* at 563, 324 S.E.2d at 248. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 698, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984). The general rule is "that the incompetency (or one of its many synonyms) of counsel for the defendant in a criminal prosecution is not a Constitutional denial of his right to effective counsel unless the attorney's representation is so lacking that the trial has become a farce and a mockery of justice." *State v. Sneed*, 284 N.C. 606, 612, 201 S.E.2d 867, 871 (1974). Since "there can be no precise or 'yardstick' approach in applying the recognized rules of law in this area," "each case must be approached upon an *ad hoc* basis, viewing circumstances as a whole, in order to determine whether an accused has been deprived of effective assistance of counsel." *Id.* at 613, 201 S.E.2d at 872.

Here, defendant suggests that, but for his counsel's failure to move to strike Ms. Rolon's statement, there is a "reasonable probability" that the jury would not have returned a guilty verdict on the charge of taking indecent liberties with B.R. Defendant does not

argue that his counsel erred by repeating Ms. Rolon's statement; in fact, defendant does not even acknowledge that his counsel repeated Ms. Rolon's statement. Instead, defendant asserts only that Ms. Rolon's statement "vouch[ed] for the credibility of a child witness [and] improperly resolve[d] the only factual issue before the jury." After careful review of the substantive and corroborative testimony from all of the witnesses included in the record, much of which has been recounted in this opinion, we are not persuaded that defense counsel's failure to move to strike Ms. Rolon's singular comment amounted to a representation that was "so lacking" as to turn defendant's trial into "a farce and a mockery of justice." *See id.* at 612, 201 S.E.2d at 871. Accordingly, we overrule this error.

V.

[6] Finally, defendant contends the trial court erred by denying his motion to dismiss the charge of taking indecent liberties with B.R. because he argues that the "immoral, improper, or indecent libert[y]" identified in the court's instruction to the jury—"placing his penis between the feet of [B.R.]"—fatally varied from the indictment. Again, we find no error.

"[A]n indictment which charges a statutory offense, such as taking indecent liberties with a minor in violation of G.S. § 14-202.1, by using the language of the statute is sufficient, and need not allege the evidentiary basis for the charge." *State v. Miller*, 137 N.C. App. 450, 457, 528 S.E.2d 626, 630 (2000). In other words, "[t]he indictment need not allege specifically which of defendant's acts constituted the immoral, improper and indecent liberty." *Id.* (internal quotation marks omitted).

Further, "[a]s the statute indicates, the crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts." *State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990). "The evil the legislature sought to prevent in this context was the defendant's performance of *any* immoral, improper, or indecent act in the presence of a child for the purpose of arousing or gratifying sexual desire." *Id.* (emphasis added) (internal quotation marks omitted). "Defendant's purpose for committing such act is the gravamen of this offense; the particular act performed is immaterial." *Id.*

In the present case, the indictment returned by the grand jury charging defendant with the offense of taking indecent liberties with

B.R. used the language of N.C.G.S. § 14-202.1(a) and (b) to describe the elements of the alleged offense. Thus, the language used by the State in the indictment to charge defendant with the offense of violating N.C.G.S. § 14-202.1 strictly adhered to the enabling language of the statute. Consequently, the State was not required to allege an evidentiary basis for the charged offense. Additionally, the trial judge's instruction regarding what constitutes an indecent liberty in this case "was not derived from the statute, but was rather a clarification of the evidence presented for the jury's benefit." *Hartness*, 326 N.C. at 567, 391 S.E.2d at 181. Therefore, the trial court's instruction to the jury providing an evidentiary basis for the charge of indecent liberties with the specific act of "placing [defedant's] penis between the feet of [B.R.]" did not vary from the indictment and does not require a reversal of defendant's conviction on this charge.

[7] Even so, defendant urges this Court to find error based on his assertion that there was a fatal variance between the specific act identified in the jury instruction as the "immoral, improper, or indecent libert[y]" taken with B.R. and the evidence which defendant speculates was presented to the grand jury. *See* N.C. Gen. Stat. § 15A-623(e) (2009) ("Grand jury proceedings are secret and, except as expressly provided in [Article 31 of the General Statutes], members of the grand jury and all persons present during its sessions shall keep its secrets and refrain from disclosing anything which transpires during any of its sessions."); *State v. Porter*, 303 N.C. 680, 689, 281 S.E.2d 377, 384 (1981) ("An accused in this jurisdiction has no right to obtain a transcript of the grand jury proceedings against him. Such proceedings are considered 'secret.' "). Since defendant fails to direct our attention to any relevant law to support his assertion that this Court must find error based on evidence that may or may not have been presented in the grand jury proceeding, we decline to address defendant's meritless assertion further.

No Error.

Judges McGEE and ERVIN concur.

STATE OF NORTH CAROLINA v. EUGENE TATE HILL

No. COA10-399

(Filed 1 March 2011)

1. Robbery— with a dangerous weapon—sufficient evidence—motion to dismiss properly denied

The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon where there was sufficient evidence of each element of the offense, including that defendant acted in concert with another individual to rob the victim.

2. Evidence— prior offense committed by witness—chain of events—no unfair prejudice

The trial court did not err in allowing a witness to testify about a prior robbery he had committed as the testimony was evidence pertaining to the chain of events in defendant's robbery and the probative value of the evidence was not outweighed by unfair prejudice.

Appeal by Defendant from judgment entered 29 September 2009 by Judge James U. Downs in Superior Court, Buncombe County. Heard in the Court of Appeals 28 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Amanda P. Little, for the State.

Charlotte Gail Blake for Defendant-Appellant.

McGEE, Judge.

Eugene Tate Hill (Defendant) was indicted 6 July 2009 for one count of robbery with a dangerous weapon and was found guilty on 29 September 2009. The trial court classified Defendant's prior record level as "IV." Defendant was sentenced to 117 months to 150 months in prison. Defendant appeals.

I. Factual Background

Kevin Cole (Mr. Cole) and his cousin drove up to an automated teller machine (the ATM) in Asheville, North Carolina, on 13 May 2000, around 10:40 p.m. As Mr. Cole was withdrawing money from the

ATM, a man approached his vehicle, grabbed Mr. Cole's arm, and told Mr. Cole to hand over the money. Mr. Cole did not recognize the man. As the money came out of the ATM, the man grabbed the money and ran. Mr. Cole put his vehicle in "drive" and attempted to follow the man. While looking for the man, Mr. Cole saw a pickup truck (the truck) in a nearby parking lot. Mr. Cole asked the driver of the truck if he had seen anyone, and the driver said he had not. Mr. Cole and his cousin continued to search for the man, and they again saw the truck. Mr. Cole's cousin noted the license plate number on the truck and Mr. Cole called the police. Detective Kevin Taylor (Detective Taylor) of the Asheville Police Department responded.

Mr. Cole testified that he sustained a "bleeding laceration on [his] left wrist" as a result of the robbery, and the State entered into evidence a photograph of Mr. Cole's arm that depicted his injury. The State also offered into evidence a statement that Mr. Cole wrote and gave to police after the robbery. The trial court admitted Mr. Cole's statement to both corroborate Mr. Cole's testimony and to refresh Mr. Cole's recollection. Mr. Cole read his statement into evidence. In his statement, Mr. Cole said that a "man came beside the driver's side window [of his car] and pointed his hand with an object in it and told me to drive off. I grabbed his hand and looked at his face. . . . [T]he [man] grab[bed] [the money] and . . . ran away[.]" Mr. Cole further wrote that he "left the parking lot to pursue [the man] and . . . saw a . . . truck sitting in the parking lot across the street[.]" Mr. Cole "drove up to the side of the [truck] and asked the driver if he saw the [man], . . .—and I asked [the driver] to stay until APD arrived. [The driver] said 'I have an appointment.' I got [the truck's] license plate number[.]" Mr. Cole also said that "[t]he man in the [truck] returned and said he didn't see the guy, and I once again told him to stay until APD arrived. . . . He left."

Robert Jones (Mr. Jones) testified concerning a robbery that occurred earlier in the evening of 13 May 2000. Defendant objected to Mr. Jones' testimony, arguing that it was prejudicial because the charges regarding that robbery were dismissed, and that it was Rule "403(b)" evidence and Defendant had not been given proper notice of the State's intention to present the testimony. The trial court overruled Defendant's objection.

Mr. Jones testified that he drove up to an ATM in Asheville on 13 May 2000, around 6:00 p.m. As Mr. Jones waited for the ATM to emit his money, a man approached, held a knife to Mr. Jones' neck and

demanded his wallet. Mr. Jones was "able to push [the man's] arm up and let [his] car roll forward fifteen or twenty feet." Mr. Jones saw the unidentified man take the money from the ATM and enter the passenger side of "an '80's model GMC" two-tone pickup truck. Mr. Jones gave chase but eventually lost sight of the pickup truck.

Detective Taylor testified that he had investigated the robbery reported by Mr. Jones. Detective Taylor testified that Mr. Jones told him that the suspect "jumped in the passenger's side of a two-toned, white-and-purple GMC pick-up[,]" which was driven by a white male. Detective Taylor also testified regarding a statement that Mr. Cole made on the night of 13 May 2000, after reporting his robbery to police. Detective Taylor testified that Mr. Cole stated that the driver of the truck had initially responded "yes" when asked if he had seen "anybody fleeing." The truck later returned to the area, and the driver told Mr. Cole that he had not, in fact, seen anyone. Mr. Cole asked the driver to wait for police to arrive, but the driver left, saying that he had "an appointment."

Detective Taylor took a description of the truck and relayed the description and license plate number to other officers. Asheville Police Officer Darryl McCurry (Officer McCurry) saw a pickup truck matching the description and stopped the truck to speak with the driver. When Officer McCurry stopped the truck, it was being driven by Defendant. The license plate on the truck was not assigned to that vehicle, but belonged to a van owned by David and Nancy Webb. Further investigation showed that the truck was also owned by the Webbs, but the license plate was affixed to the wrong vehicle. Detective Taylor suspected David Webb as being the man who had committed both robberies, while Defendant participated as the driver of the truck. Defendant was arrested by Officer McCurry for outstanding arrest warrants from Charlotte.

II. Motion to Dismiss

[1] Defendant first argues that the trial court erred by denying his motion to dismiss the charge of robbery with a dangerous weapon based on insufficiency of the evidence. " 'In ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom.' " *State v. Golphin*, 352 N.C. 364, 458, 533 S.E.2d 168, 229 (2000) (citations omitted). "To withstand a defendant's motion to dismiss, 'the trial court need determine only whether

there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator.' " *Id.* (citation omitted).

> Circumstantial evidence may be utilized to overcome a motion to dismiss " 'even when the evidence does not rule out every hypothesis of innocence.' " . . . If the trial court finds substantial evidence, whether direct or circumstantial, or a combination, "to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." . . . If, however, 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."

Id., 533 S.E.2d at 229-30 (citations omitted). " 'Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then " 'it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.' " ' " *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) (citation and emphasis omitted).

The essential elements of robbery with a dangerous weapon are: "(1) the unlawful taking or attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened." *State v. Small*, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991) (citation omitted). "A person is constructively present during the commission of a crime if he is close enough to provide assistance if needed and to encourage the actual execution of the crime." *State v. Gaines*, 345 N.C. 647, 675-76, 483 S.E.2d 396, 413 (1997).

> It is not . . . necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

State v. Joyner, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979).

Defendant argues that the "State's evidence against [Defendant] at best raises only a suspicion that he joined with anyone to rob [Mr.] Cole." Defendant also argues that the State presented "insufficient

evidence that whoever actually robbed [Mr.] Cole possessed a dangerous weapon or that the robber obtained the property from [Mr.] Cole by endangering or threatening to endanger his life with a dangerous weapon." Further, Defendant contends that "the trial court should have dismissed the lesser included offense of common law robbery because there was no evidence the money was taken from . . . [Mr.] Cole by violence or by putting [Mr.] Cole in fear." Finally, Defendant argues that the State failed to "show that [Defendant] was present or constructively present during the . . . [r]obbery." We disagree with Defendant's arguments.

Defendant asserts that the State's evidence simply showed that he was in a two-toned pickup truck near the vicinity of the robbery shortly after the robbery occurred. Defendant argues that the "mere fact that [Defendant] was present somewhere in the area soon after [Mr.] Cole was robbed is not sufficient to show that [Defendant] acted in concert with anyone to rob [Mr.] Cole." However, viewing the evidence in the light most favorable to the State, we find that the State presented much more substantial evidence than "the mere fact" that Defendant was near the scene of the crime.

We note the State presented the following evidence at trial. Mr. Cole saw an unidentified man run away from the ATM after taking his money. The State presented a photograph depicting a "bleeding laceration" that Mr. Cole sustained during the robbery. The assailant ran in the direction of a parking lot where Mr. Cole found a maroon and silver two-tone GMC pickup truck parked. Mr. Cole asked the driver of the truck if he had seen a man running from the ATM. The driver replied "yes," but when asked again later, replied "no" and immediately left for an "appointment" at 10:40 p.m., despite Mr. Cole asking him to wait for the police. Mr. Cole gave the license plate number of the truck to police, who found Defendant driving the truck. The truck was owned by Mr. Webb, a suspect in the earlier robbery of Mr. Jones, who was robbed four hours earlier at an ATM. Mr. Jones' robber demanded money, brandished a knife, then took Mr. Jones' money out of the ATM and ran to a white and purple two-tone GMC pickup truck parked in a nearby parking lot.

Thus, in the light most favorable to the State, there was substantial evidence that a man had robbed Mr. Jones while Mr. Jones was using an ATM; the robber ran to a two-toned maroon and silver or purple and white GMC pickup truck; the robber got in the passenger side of the vehicle, which was driven by another person. Later, Defendant

was found driving near the ATM where Mr. Cole had been robbed, in a two-tone GMC pickup truck, similar to the truck described by Mr. Jones that was used in his robbery. Defendant gave inconsistent stories to Mr. Cole and also told Mr. Cole that he had an appointment at 10:40 p.m. In the light most favorable to the State, this is substantial evidence that Defendant was waiting for Mr. Webb and that the two acted in concert to commit the two robberies at the ATMs using a knife. Though Defendant asserts there was no evidence that he was present during the robbery, his involvement as driver resulted in his constructive presence at the scene of the crime despite his not being at the ATM, but rather in a truck parked nearby. *See State v. Lyles*, 19 N.C. App. 632, 636, 199 S.E.2d 699, 702 (1973) ("The driver of a get-away car is present at the scene of the crime, and he is a principal rather than an accessory before the fact."). The trial court did not err in denying Defendant's motion to dismiss.

III. Mr. Jones' Testimony

[2] Defendant next argues Mr. Jones' testimony concerning his robbery was not relevant and that "any probative value was outweighed by unfair prejudice[.]"

Evidence that is

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

State v. Agee, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (citation omitted).

Defendant first argues that Mr. Jones' testimony was irrelevant because the robberies were committed "several hours apart and in different parts of town." N.C. Gen. Stat. § 8C-1, Rule 401 (2009) defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Defendant cites to *Agee*, distinguishing it from the present case. In *Agee*, our Supreme Court addressed the admissibility of evidence that a police officer found marijuana on the person of the defendant in the process of searching him. The defendant was being tried for possession of other drugs, found after the officer arrested

the defendant for possession of the marijuana. *Agee*, 326 N.C. at 548, 391 S.E.2d at 174. The Supreme Court noted:

> "[A]ll facts, relevant to the proof of the defendant's having committed the offense with which he is charged, may be shown by evidence, otherwise competent, even though that evidence necessarily indicates the commission by him of another criminal offense. Thus, such evidence of other offenses is competent to show. . . the *quo animo*, intent, design, guilty knowledge, or scienter, or to make out the *res gestae*, or to exhibit a chain of circumstances in respect of the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions."

Id. at 547, 391 S.E.2d at 174 (citation omitted). The Court held that "discovery of the marijuana on defendant's person constituted an event in the officer's narrative which led naturally to the search of defendant's vehicle and the subsequent detection of the LSD." *Id.* at 548, 391 S.E.2d at 174. Defendant contends that, unlike the marijuana found in *Agee*, Mr. Jones' testimony was not evidence pertaining to the chain of events in Mr. Cole's robbery. We disagree.

Mr. Jones' testimony makes the existence of several material facts "more probable or less probable than [they] would be without the evidence." N.C.G.S. § 8C-1, Rule 401. For example, the facts that (1) Mr. Webb's truck had (2) been used by two people in the commission of a robbery (3) with a deadly weapon (4) at an ATM earlier that evening. This testimony is certainly relevant to the jury's determination of whether Defendant, found driving Mr. Webb's truck, was involved in an ATM robbery scheme. We therefore hold that Mr. Jones' testimony was relevant.

Defendant next argues that, even if Mr. Jones' testimony was relevant, its probative value was outweighed by the danger of unfair prejudice to Defendant. A determination of admissibility pursuant to Rule 403 requires the trial court to balance the probative value of proffered evidence against "the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2009). This balance is left to "the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling was 'manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Hyde*, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000) (citation omitted). However, "[e]vidence which is probative of the

State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990). Defendant cites no authority that the degree to which Mr. Jones' testimony was prejudicial to him was unfair. The trial court's admission of Mr. Jones' testimony was therefore not error.

No Error.

Judge BEASLEY concurs.

Judge HUNTER, JR. dissents with a separate opinion.

HUNTER, JR., Robert N., Judge dissenting.

The trial for the incident occurring on 13 May 2000 took place on 28 September 2009, over nine years after the event. The only eyewitness, Mr. Cole, when asked "Do you recall [the] incident?", answered "Parts of it; the majority of it." The bulk of his testimony was based on a written statement to the police, introduced only to refresh the recollection of the witness and to corroborate his testimony.

On 13 May 2000, Kevin Ray Cole and his cousin drove up to an automated teller machine (ATM) at a Wachovia in Asheville, North Carolina, sometime around 10:30pm. Mr. Cole put his ATM card into the machine and entered an amount of money (approximately one hundred dollars) to withdraw. Before Mr. Cole could remove the money from the ATM, an unidentified person approached his vehicle on the driver's side. At trial, Mr. Cole testified that this person "grabbed my arm and told me to give [the person] the cash or to leave it or something like that." In a previous statement to police, Mr. Cole said that the man "pointed his hand with an object in it and told me to drive off." Mr. Cole testified that at first, he thought "it was like a joke, so [he] turned around and looked and [he] saw a person [he] didn't know and realized they weren't kidding." The person then grabbed the money and ran away. At trial, a photograph was introduced into evidence showing a "bleeding laceration" received by Mr. Cole "[f]rom the robbery."

Mr. Cole then put his car in drive and drove in the direction the perpetrator was going, but he could not see the perpetrator. He saw a vehicle in a parking lot and stopped to ask the driver if he had seen anyone. Mr. Cole testified at trial that the driver of the vehicle said "No." In his previous statement, Mr. Cole stated the man in the truck told him " 'I have an appointment.' " He did not recall at trial how far

away the vehicle was from the bank. After driving around, Mr. Cole believed he saw the same vehicle again and told the driver to stay where he was until the police could arrive. Mr. Cole's cousin took down the license plate of the vehicle.

Evidence was also presented at trial of a previous incident also occurring on 13 May 2000. Earlier that day, Robert Jones drove up to an ATM at First Citizens Bank, inserted his card, and pressed a transaction. At that time, a man leaned into his open window, held a knife to Mr. Jones' neck, and said "Give it up." Mr. Jones was able to "push his arm up and let the car roll forward fifteen or twenty feet." The perpetrator grabbed the money from the ATM, and Mr. Jones pursued him. The perpetrator then jumped into a two-tone truck, an 80's model GMC or Chevrolet. Charges against Defendant for this incident were dismissed.

The night of 13 May 2000, Officer Darryl McCurry of the Asheville Police Department located a vehicle matching the description and license plate number provided by Mr. Cole and his cousin. Defendant was driving that vehicle at the time. Detective Kevin Taylor of the Asheville Police Department testified that the tag on the vehicle was not for that vehicle, but instead for a van registered to David and Nancy Webb. By using the bill of sale, Detective Taylor was later able to determine that the vehicle driven by Defendant belonged to David and Nancy Webb. The theory of the State at trial was that Defendant was acting in concert with David Webb, the eventual suspect in both incidents. There was no further evidence provided at trial of Mr. Webb's involvement.

Detective Taylor testified regarding both incidents, but his testimony was presented only for corroboration of the testimony of Mr. Cole and Mr. Jones. The jury was told that his testimony was limited to corroboration at the time of his testimony, and the trial court gave an instruction on statements not made under oath. Detective Taylor first testified about the incident with Mr. Jones, stating "[h]e informed me that he was trying to get money from the ATM when the suspect approached him, held a knife to him and ended up taking the money and fled." He then testified to the incident with Mr. Cole, stating "[a]gain, he tried to withdraw money from the ATM and was approached by an individual with a knife who robbed him of his money." Mr. Cole never testified that there was a knife involved and did not describe the shape or nature of any object involved in the incident.

Charges of robbery with a dangerous weapon and common law robbery were submitted to the jury. Defendant was found guilty of robbery with a dangerous weapon and sentenced to 117 to 150 months' imprisonment.

Defendant argues the trial court erred by denying his motion to dismiss the charge of robbery with a dangerous weapon based on insufficiency of the evidence.

On a motion to dismiss, the trial court must determine "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992). Substantial evidence is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.*

In determining whether there is substantial evidence, the trial court must look at the evidence in "the light most favorable to the State, and the State is entitled to every reasonable inference and intendment that can be drawn therefrom." *Id.* 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." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983). This is the case even if "the suspicion aroused by the evidence is strong." *Id.*

Armed robbery consists of "(1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened." *State v. Small*, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991); N.C. Gen. Stat. § 14-87 (2009). "Force or intimidation occasioned by the use or threatened use of firearms, is the main element of the offense." *Id.*

The "gravamen of the offense is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the perpetration of or even in the attempt to perpetrate the crime of robbery." *State v. Marshall*, 188 N.C. App. 744, 750, 656 S.E.2d 709, 714 (2008).

The difference between armed robbery and common law robbery is that armed robbery requires the State to produce sufficient evidence "to show that the victim was endangered or threatened by the use or threatened use of a 'firearm or other dangerous weapon,

implement or means.' " *State v. Joyner*, 295 N.C. 55, 63, 243 S.E.2d 367, 373 (1978). "The question in an armed robbery case is whether a person's life was in fact endangered or threatened by defendant's possession, use or threatened use of a dangerous weapon." *Id.*

Mr. Cole did not testify that there was a knife or any weapon or sharp object used or present during the incident. The written statement stated only that there was an "object" and did not describe that object or mention its shape. Detective Taylor did mention a knife in his testimony. However, his testimony was offered only to corroborate prior eyewitness testimony. "[A] prior statement is admitted only as corroboration of the substantive witness and is not itself to be received as substantive evidence." *State v. Stills*, 310 N.C. 410, 415, 312 S.E.2d 443, 447 (1984). As Mr. Cole did not testify to the nature of the object, Detective Taylor's mention of the knife did not corroborate Mr. Cole's testimony, and there is therefore no eyewitness evidence that a sharp object or knife was used or present.

The only other evidence of a "sharp object" being present is a photograph introduced at trial that shows a laceration on Mr. Cole's wrist. The photograph was introduced for illustrative purposes only. Mr. Cole testified that he received the laceration "[f]rom the robbery." There was no other testimony given regarding the source of the laceration, and there is no evidence that it came from a dangerous weapon of any kind. There was not substantial evidence that a firearm or other dangerous weapon was used or that the perpetrator threatened to use a firearm or dangerous weapon.

There is also no testimony that Mr. Cole's life was threatened or endangered. The facts showed that either the perpetrator grabbed Mr. Cole's arm and said to give him the cash, or the perpetrator "pointed his hand with an object in it" and told Mr. Cole to drive off. Mr. Cole first believed it was a joke. There was no testimony that Mr. Cole's life was in any danger or that his life was threatened in any way. Thus, there was not substantial evidence that a person's life was threatened or endangered.

Absent substantial evidence that a firearm or other dangerous weapon was used, and absent substantial evidence that a person's life was endangered or threatened, two of the three elements required for robbery with a dangerous weapon are not present. The motion to dismiss the charge of robbery with a dangerous weapon should have been granted.

I would reverse and remand for a new trial on common law robbery.

KENNETH R. LAMM, PLAINTIFF v. PAMELA R. LAMM, DEFENDANT

No. COA10-536

(Filed 1 March 2011)

1. Child Custody and Support— custody change—single conclusion—sufficient

The trial court's single conclusion in a child custody case reached all three of the required legal conclusions for modifying a child custody order. The court's conclusion clearly stated that substantial changes in circumstances had occurred, that these substantial changes affected the minor child, and that these substantial changes warranted a modification of the existing custody order because they affected the best interests of the child.

2. Child Custody and Support— custody change—findings—inferences supported by evidence

Disputed findings by the trial court in a child custody action were inferences supported by the evidence, and the findings supported the conclusions.

3. Pleadings— Rule 11 sanctions—emergency custody motion

The trial court did not abuse its discretion by imposing Rule 11 sanctions on defendant for filing an emergency custody motion. The three determinations required under *Turner v. Duke University*, 325 N.C. 152, were answered affirmatively.

4. Appeal and Error— record—social security numbers

Although sanctions were not imposed, counsel were cautioned against including social security numbers in the record on appeal.

Appeal by defendant from order and judgment entered October 2009 by Judge C. Christopher Bean in Pasquotank County District Court. Heard in the Court of Appeals 17 November 2010.

Aldridge, Seawell & Spence, LLP, by W. Mark Spence, for plaintiff.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Tobias S. Hampson, and Edward Eldred, for defendant.

ELMORE, Judge.

Pamela R. Lamm (defendant) appeals an order and judgment modifying a child custody order and imposing Rule 11 sanctions on her. For the reasons set out below, we affirm.

I. Background

Kenneth R. Lamm (plaintiff) and defendant were married on 28 December 1985 and divorced on 19 May 2005. They had three children together during their marriage: Caroline, born in 1988, Samantha, born in 1992, and Cody, born in 2001.[1] When plaintiff left the marriage, he began a relationship with Janet Markham (Janet), who gave birth to Amy, plaintiff's child, in 2005. Plaintiff and Janet married on 27 May 2005.

Before the final divorce decree, the trial court appointed Dr. David A. Zoll, Ph.D., "to conduct an impartial evaluation of the parties and the parties' minor children." Dr. Zoll concluded that, in order to safeguard the relationship between Cody and plaintiff, physical custody of Cody should be granted to plaintiff. In addition, he concluded that defendant should maintain custody of both Caroline and Samantha. Dr. Zoll went on to testify that he believed that defendant "lacked the ability to manage emotional distress" and that Cody may have viewed having a good relationship with his father as "traitorous" to his mother, with whom he was very close. Dr. Zoll noted that Cody had a "particularly strong attachment to his older sister, [Caroline]." He also testified that defendant, whether deliberately or not, was unable to refrain from expressing her anger regarding the separation and divorce in front of the children. According to Dr. Zoll, if Cody continued to live with defendant and his older sisters, and if their hostile and negative statements continued, then Cody's relationship with plaintiff would be "minimal or non-existent."

After hearing all of the evidence, the trial court concluded that defendant "is the party who will better promote the interest and welfare of the . . . minor children and should be awarded their custody subject to reasonable visitation privileges being granted to the Plaintiff with the minor child, [Cody]." The trial court also found that, "[i]f [Cody] continues to live with the defendant and his sisters, and, if their anger, hostile actions, and negative statements are not curtailed, [Cody's] relationship with the plaintiff will be minimal or non-existent." Continuation of these actions, the court noted, could result in a change of custody. Then, in a child custody order dated 13

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1. We use pseudonyms for all four children referenced in this opinion, recognizing that not all of them were minors at the time of the appeal.

February 2006, the court granted defendant primary custody of the three children and awarded plaintiff visitation rights with Cody.

Cody has been under the care of Christian Psychotherapy Service since 2005. His first therapist was Traci Smith, a licensed clinical social worker, with whom he attended fifty-one sessions. Cody's therapists have been a "matter of contention and inflexibiilty" between the parties. Plaintiff has attempted to bring Cody to therapists in his hometown, Elizabeth City, but defendant has objected to each one, thereby preventing therapy. In July 2007, Janet stated that she believed that Traci Smith was biased in favor of defendant, and, for that reason, Traci Smith withdrew. Cody then began therapy with Dr. Barry Burijon, another therapist at Christian Psychotherapy Service. The trial court found that, "[a]ccording to Dr. Burijon[, Cody's] behavior is regressing, he has no emotional energy, he is sullen, withdrawn and mistrusting." Plaintiff had expressed a lack of confidence in Dr. Burijon's ability to remain objective, and the trial court agreed that it was no longer possible for Dr. Burijon "to objectively and effectively engage in any meaningful family counseling."

Beginning in 2006, Cody began to exhibit violent behavior when visiting plaintiff: he knocked down his half-sister, Amy, who was only one year old at the time; he drew a line across her throat; and he kicked the family puppy. Cody also made statements expressing a hatred towards his father and a desire to kill him. However, there was also evidence that indicated that Cody was neither withdrawn nor depressed during his visits with plaintiff.

Following Cody's violent outbursts and defendant's refusals to allow plaintiff to select a therapist he found suitable, plaintiff filed a motion to modify custody on 31 July 2007. On 24 January 2008, the trial court appointed Harold J. May, Ph.D., to perform an impartial custody evaluation of the parties and their minor children. The trial court found that, while Dr. May's findings were not specific findings about plaintiff and defendant, they did corroborate the court's own findings regarding the characteristics of the parties.

While the motion to modify was pending, defendant filed a motion for emergency child custody on 11 June 2009 (emergency custody motion), the day that plaintiff's five-week summer visitation was scheduled to begin. The emergency motion alleged that Cody was "exposed to a substantial risk of bodily injury or sexual abuse, and an immediate order curtailing Plaintiff's visitation is necessary pursuant to" N.C. Gen. Stat. § 50-13.5(d)(2) and (3). Specifically,

defendant alleged that Cody had "returned from visitation at Plaintiff's house, on several occasions, with his rectal area red and raw. The child has refused to state how the area become red. The child does not have a red rectal area while in his mother's care." The trial court granted an emergency custody order, pending a hearing scheduled for 26 June 2009. Pasquotank County Department of Social Services (DSS) performed an investigation based on defendant's allegations, and Kids First, a child advocacy agency, made an additional examination. The DSS interview included interviews with Cody and other family members as well as reviews of custody evaluations by both Dr. Zoll and Dr. May. The investigating social worker found the report to be unsubstantiated, and the therapists at Kids First found no evidence of sexual abuse. Based on these findings and other evidence offered during the 26 June 2009 hearing, the court dismissed the emergency custody order.

On 7 August 2009, the trial court ordered primary custody to be granted to plaintiff until a final decision could be made. On 1 October 2009, the trial court entered a judgment and order placing primary custody of Cody with plaintiff. In its order, the trial court found that defendant's emergency custody motion had been made "without basis in law or in fact and was interposed for [the] improper purpose" of "block[ing] Plaintiff's scheduled summer visitation." Defendant now appeals.

II. Arguments

Defendant presents two arguments on appeal: (1) The trial court erred by modifying the custody order because its conclusions of law did not address whether the change in custody was in the child's best interest, and (2) the trial court erred by imposing Rule 11 sanctions on defendant. We address each argument in turn.

A. Modification of custody order

[1] Our Supreme Court concisely set out the method by which we review modifications to existing child custody orders:

> When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

> Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges. Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary.
>
> In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law. With regard to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interests. If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

Shipman v. Shipman, 357 N.C. 471, 474-75, 586 S.E.2d 250, 253-54 (2003) (quotations and citations omitted).

Here, with respect to her argument that the trial court erred by modifying the existing custody order, plaintiff has challenged the trial court's first conclusion of law and findings of fact 7 and 21. We first address the adequacy of conclusion of law 1, which states: "That substantial changes in circumstances affecting the best interests of the minor child herein have occurred warranting a modification of the February 14, 2006[,] Child Custody Order herein."

Plaintiff first argues that this conclusion of law is inadequate because, as the sole conclusion of law supporting the trial court's custody modification, it does not demonstrate that the trial court "decide[d] whether a modification of custody was in the child's best interests." *See id.* at 475, 586 S.E.2d at 254. Plaintiff correctly points out that the trial court conflated into a single conclusion of law the three conclusions that must precede a modification of an existing

custody order: (1) that "there has been a substantial change in circumstances," (2) that the substantial "change affected the minor child," and (3) that "a modification of custody [is] in the child's best interests[.]" *Id.* However, a single conclusion of law may still address all three required legal conclusions, even if they might be more obviously addressed in three separate conclusions of law. This particular conclusion of law does just that. The conclusion clearly states that substantial changes in circumstance have occurred, that these substantial changes affected the minor child, and that these substantial changes warrant a modification of the existing custody order because they affect the best interests of the minor child.

The key language is "warranting a modification." A modification is only warranted if a change in custody is in the child's best interest. Thus, if a trial court concludes that a modification is warranted, it follows that a change in custody is in the child's best interest. The contrapositive, for those who find the alternate wording more convincing, is that if a change is not in the child's best interest, no modification is warranted. The conclusion, read as a whole, demonstrates that the trial court reached all three required legal conclusions necessary to support a custody order modification.

[2] We next examine whether the conclusion of law is supported by the findings of fact. Plaintiff challenged only findings of fact 7 and 21 in her brief, and, therefore, the remaining findings of fact are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("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.") (citations omitted). The two challenged findings of fact are quite lengthy, but plaintiff challenges only small portions of them:

> 7. . . . Statements made by [Cody] to the social worker who conducted the investigation are clear indications of how he perceived his mother's and sisters' feelings toward Plaintiff, Janet Lamm (Plaintiff's current wife) and [Amy] Lamm (Plaintiff and Janet Lamm's daughter). Those statements include the following:
>
> a. [Samantha] hates dad.
>
> b. Mom doesn't like Janet and talked about Janet and dad a lot.
>
> c. I don't have to be nice to [Amy] or mind Janet.

* * *

> 21. . . . To refer to Plaintiff as "Ken", indicating a level of distance, could only have originated in [defendant's] home.

With respect to finding of fact 7, defendant argues, "Neither the social worker nor any other witness testified [Cody]'s statements were 'indications' of anything." This argument misses the point. The trial court did not say that a *witness* stated that Cody's statements were indications of his perceptions of his mother and sisters' opinions; the court made this inference itself on the *basis* of witness testimony. The finding of fact is supported by the following testimony by Dr. May, discussing a report drafted by a social worker:

> [Cody] went on fairly extensively to talk about [Samantha], he did not like her. She was always picking on him, mean to him, always hitting him, punches in the arms, back, chest.
>
> When asked why she would punch him, he said, "Every time I tell her I like Dad, she hits me."
>
> He said, "When Mom is away, she also hits me for no reason."
>
> In talking about the other sister, [Caroline], he said that he got along better with her than with [Samantha] but stated that she does not like—[Caroline]—she does not like Dad, and [Samantha] hates them.
>
> When asked why they hate Daddy, he said because of what they did.
>
> When asked what he did, he stated that he did not know and said that his mom hates Janet and his dad.
>
> Mom tells him that Janet is not his real mother and he is to never call Janet his mother.
>
> That if he called Janet "Mom," he stated Mom will be mad with him and punish him.
>
> His mother told him that his dad doesn't love him, but he said, "but he loves [Amy]."
>
> And [Cody] stated that he sometimes does not know what to say when his mother asks him if he's had a good time at his dad's house.

This testimony supports the trial court's finding that Cody's statements to a social worker "are clear indications of how he perceived his mother's and sisters' feelings toward" plaintiff, Janet, and Amy.

With respect to the challenged portion of finding 21, the trial court again made an inference based on the evidence, this time that Cody's habit of referring to his father by first name could only have been acquired at defendant's home. Even if we were to hold that this particular portion of this single finding of fact is not supported by the evidence, the remaining findings of fact still support the trial court's conclusions. Accordingly, we hold that the trial court did not err by concluding, as a matter of law, that a modification of the 2006 Child Custody Order was warranted.

B. Rule 11 Sanctions

[3] Defendant next argues that the trial court erred by imposing Rule 11 sanctions on defendant for filing her emergency custody motion. After the 26 June 2009 hearing, plaintiff filed a motion for attorneys' fees and costs, alleging that defendant's emergency custody motion "included no specific allegation of [bodily injury or sexual abuse,] only non-specific allegations intended to imply such risks." Plaintiff further alleged that, at the 26 June 2009 hearing, "[n]o evidence was produced by the Defendant to substantiate a substantial risk of bodily injury or sexual abuse and the Motion, and the Ex Parte hearing held thereon, were frivolous, without basis in law or fact." Plaintiff moved the court for attorneys' fees and costs incurred in the defense of defendant's emergency custody motion. In its order, the court ordered defendant to pay $3,500.00 to plaintiff, "representing attorney's fees incurred by the Plaintiff defending the Motion filed by the Defendant for an emergency Custody Order[.]"

Rule 11(a) provides, in relevant part, as follows:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law . . ., and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanc-

> tion, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

N.C. Gen. Stat. § 1A-1, Rule 11(a) (2009).

We review *de novo* a trial court's decision to impose mandatory sanctions under Rule 11(a) of our Rules of Civil Procedure. *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

> In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

Id. "The appropriateness of a particular sanction is reviewed for abuse of discretion." *Bledsole v. Johnson*, 357 N.C. 133, 138, 579 S.E.2d 379, 382 (2003) (citing *Turner*, 325 N.C. at 165, 381 S.E.2d at 714).

Following *Turner*, we first determine whether the trial court's conclusions of law support its decision to impose sanctions. The trial court did make any relevant conclusions of law in its order, but finding of fact 30 is more properly characterized as a mixed conclusion of law and finding of fact. Generally, "any determination requiring the exercise of judgment . . . or the application of legal principles . . . is more properly classified a conclusion of law." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations omitted). A finding of fact that is essentially a conclusion of law will be treated as a fully reviewable conclusion of law on appeal. *In re M.R.D.C.*, 166 N.C. App. 693, 697, 603 S.E.2d 890, 893 (2004). Mislabeling of a finding of fact as a conclusion of law is inconsequential if the remaining findings of fact support the conclusion of law. *In re R.A.H.*, 182 N.C. App. 52, 59, 641 S.E.2d 404, 409 (2007). Finding of fact 30 reads as follows:

> The Motion for emergency Custody Order herein was without basis in law or in fact and was interposed for an improper purpose. Said Motion was dismissed upon the Motion of the Plaintiff at the conclusion of Defendant's evidence for lack of sufficient evidence to support the claims stated therein. In addition said

> Motion was filed for an improper purpose, i.e. to block Plaintiff's scheduled summer visitation. Therefore, Plaintiff is entitled to recover attorney fee's incurred in the defense of said Motion for emergency Custody Order. Plaintiff's attorney incurred 14.11 hours in defending the Motion for emergency Custody Order. Said number of hours was reasonable and necessary considering the allegations set forth in said Motion. Plaintiff's attorney charges $250 per hour in representation of parties to domestic and family law cases which hourly rate is inline with the hourly rate charged by other similarly experienced attorneys in the First Judicial District and therefore the sum of $3,500 in attorney's fees incurred in defending the Motion for emergency Custody Order is reasonable and was necessary.

The first sentence of finding of fact 30 is clearly a conclusion of law, not a finding of fact. That conclusion, that defendant's emergency custody motion "was without basis in law or in fact and was interposed for an improper purpose[,]" supports the trial court's decision to impose sanctions.

Next, we examine whether the trial court's conclusions of law are supported by its findings of fact. A trial court cannot enter an order changing custody *ex parte*

> unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse or that there is a substantial risk of bodily injury or sexual abuse or that there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts.

N.C. Gen. Stat. § 50-13.5(d)(3) (2009). In both the hearing and the order, the trial court was clearly focused on defendant's implied allegation that Cody was being sexually abused while in his father's custody. Given the narrow exception set out in the statute, the trial court's focus on Cody's exposure to a substantial risk of sexual abuse was entirely appropriate. Indeed, the trial court explained, in finding of fact 23, that "[t]he emergency Order would never have been issued except for allegations of possible sexual abuse, in that the other allegations contained in the Motion were allegations that the Court was already aware of and had already been presented, in most part, in previous testimony." During the 26 June 2009 hearing, defendant presented evidence by multiple experts in support of her motion, but, as the trial court found in finding of fact 10, a physical examination

of Cody conducted at Children's Hospital of the King's Daughters "revealed no evidence of sexual abuse and resulted in no referral to the Department of Social Services as would be required by law if there were suspicions of sexual abuse." The trial court found, in finding of fact 11, that "a forensic interview was conducted at Kids First, a child advocacy agency in Elizabeth City, from which no evidence of sexual abuse was found." The trial court also found that defendant had filed her emergency custody order on "the first day of Plaintiff's scheduled summer visitation with" Cody after "Plaintiff had previously refused Defendant's request to rearrange the summer vacation." The trial court concluded, in finding of fact 23, that Cody's "statements are consistent with a pattern of continuing alienating behavior. This conclusion seems particularly true in light of the . . . the timing of the emergency Order in to it (examination at CHKD with no finding or suspicion of abuse)." All of these findings, taken together, support the trial court's conclusion that defendant filed the emergency custody motion for an improper purpose.

Finally, we examine whether these findings of fact are supported by sufficient evidence. After reading the 26 June 2009 hearing transcript, we are satisfied that the findings of fact are supported by sufficient evidence. No testimony supported defendant's insinuation that Cody had been sexually abused, and we find testimony to support the other findings cited above. At the end of the hearing, the trial court accurately summarized defendant's evidence:

> So what we're looking at is has Mrs. Lamm carried the burden required to show that there is a substantial risk of bodily injury or sexual abuse.
>
> And I cannot find that she has done that today.
>
> Much of the evidence that has been presented is evidence that clearly goes to what is in the best interest of the child in permanent custody and permanent visitation arrangements.
>
> But it does not—what has been presented today does not rise to the level that North Carolina law requires for the issuance of or the continuation of an emergency custody order.

Having made the three *Turner* determinations in the affirmative, we must uphold the trial court's decision to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a). We find no abuse of discretion in the trial court's sanction, the award of $3,500.00 in

attorneys' fees to plaintiff. Accordingly, we affirm the trial court's imposition of Rule 11(a) sanctions in its 1 October 2009 order.

C. Appellate Rules Violations

[4] Although neither party has alleged any violations of our Rules of Appellate Procedure, we bring to both parties' attention the inclusion of social security numbers in the record on appeal, in violation of Rule 9(a)(4) of our Rules of Appellate Procedure. *See* N.C.R. App. P. 9(a)(4) (2011) ("Social security numbers shall be deleted or redacted from any document before including the document in the record on appeal."). The record includes no fewer than four different individuals' social security numbers, including a social security number belonging to a minor child. Rule 9(b)(2) specifies that "[i]t shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the issues presented on appeal, such as social security numbers referred to in Rule 9(a)(4). The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion." N.C.R. App. P. 9(b)(2) (2011). We impose no sanction at this time, but we advise counsel for both parties to avoid this misstep in the future.

III. Conclusion

The order below is affirmed.

Affirmed.

Judges HUNTER, Robert C., and CALABRIA concur.

BENJAMIN FRANKLIN PASS, PLAINTIFF v. JACQUELINE ODETTE BECK, DEFENDANT

No. COA09-1647

(Filed 1 March 2011)

Child Custody and Support— modification of custody order— findings of fact support conclusions of law

The trial court did not err in a child custody case by modifying a custody order to grant joint custody of the child to both parties with primary custody to defendant. As plaintiff did not challenge any of the trial court's findings of fact, they were binding on

appeal. Moreover, the findings supported the conclusions of law that there had been a substantial change in circumstances affecting the welfare of the child and that it was in the best interest of the child that defendant be granted primary custody.

Appeal by plaintiff from order entered on or about 1 June 2009 by Judge Melinda H. Crouch in District Court, New Hanover County. Heard in the Court of Appeals 18 August 2010.

Lea, Rhine & Rosbrugh, PLLC by James W. Lea, III, for plaintiff-appellant.

No brief filed for defendant-appellee.

STROUD, Judge.

The current appeal arises from the trial court's custody order entered on or about 1 June 2009. Plaintiff alleges that the trial court erred in its finding that there had been a substantial change of circumstances affecting the welfare of the minor child justifying a modification of the then-existing custody order between the parties. For the following reasons, we affirm the decision of the trial court.

I. Background

Plaintiff is the father and defendant the mother of one minor child, Emily.[1] The two have been engaged in this highly contentious case regarding custody of Emily, who was born in 1998. since 2000. Although many temporary custody orders have been entered in the course of litigation, the last permanent custody order in this case was entered on 13 September 2006 ("2006 custody order"). The 2006 custody order granted full custody to plaintiff; barred defendant's visitation with the child; barred defendant from making any accusations of rape against plaintiff; and ordered a cessation of visitation between defendant and child until a full psychological evaluation of defendant had been completed. Further, the order made clear that "[a]ll provisions of previous orders [were to be] replaced by the terms of this Order."

After the end of the 2007 school year, plaintiff moved to Georgia without leave of the trial court.[2] Although prior orders in this case

1. Emily is a pseudonym adopted for the protection of the minor child's privacy.

2. Plaintiff claims that he filed a motion with the court for leave to relocate to Georgia and that defendant never objected to the motion. The record does not include this motion, nor does it appear from the record the motion was ever scheduled for a hearing.

had specifically prohibited the parties from relocating from the Wilmington, North Carolina area with the minor child, the 2006 custody order did not prohibit relocation. At some point after entry of the 2006 custody order, defendant began to comply with the provisions of the 2006 custody order which required her to have a psychological evaluation, and Emily and her parents entered into counseling. On or about 25 January 2008, the trial court entered a consent order which allowed for contact between defendant and Emily, encouraged the implementation of a gradual visitation schedule between defendant and Emily, and appointed a therapist for Emily. On 3 March 2008, the parties agreed to allow defendant to visit with Emily for one weekend per month. On 22 May 2008, the Georgia Department of Social Services was called to investigate a charge of child abuse against plaintiff; plaintiff believed that the charge was made by defendant and filed for an *ex parte* order suspending defendant's visitation on 23 June 2008. On 25 August 2008, the trial court entered an order allowing defendant limited telephone contact with Emily. On or about 2 September 2008, in response to defendant's motion for custody and plaintiff's motion to continue suspension of defendant's visitation, the trial court entered an order which transferred primary physical custody of Emily to defendant. On 20 October 2008, plaintiff filed a motion under Rule 59 of the North Carolina Rules of Civil Procedure requesting a new trial on defendant's motion for custody and plaintiff's motion to continue suspension of defendant's visitation based upon the lack of notice to Sam Drewes Ryan, Emily's duly appointed *Guardian Ad Litem*, prior to entry of the September 2008 order. On 12 December 2008, the *Guardian Ad Litem* filed a "Response to Plaintiff's Motion Pursuant to Rule 50 of the North Carolina Rules of Civil Procedure and *Guardian Ad Litem's* Motion Pursuant to Rule 59" in which she asserted that she had not been served with defendant's motion for custody and asked that the trial court set aside its September 2008 order and conduct a hearing in which she could participate. Upon hearing on those motions on 30 January 2009, the trial court granted a rehearing by order of 11 March 2009. The trial court then held a trial on all pending motions regarding custody and visitation on 4, 5, and 6 May 2009 and the *Guardian Ad Litem* was present to participate. Based upon the evidence received at this trial, the trial court issued its June 2009 order granting joint custody of Emily to both parties and primary physical custody to defendant. From this order, plaintiff appeals.

II. Analysis

Plaintiff asserts that the trial court erred in modifying the its 13 September 2006 custody order to grant joint custody of Emily to both parties with primary custody with defendant. We disagree.

A. Standard of Review

Our Supreme Court has made clear that appellate courts should begin their review of a "trial court's decision to grant or deny a motion for the modification of an existing child custody order" by examining "the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citations omitted). "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). If an appellate court concludes that the trial court's findings of fact are supported by substantial evidence, then those "findings are conclusive on appeal, even though the evidence might sustain findings to the contrary." *Pulliam*, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998) (citations and quotation marks omitted). However, any findings of fact which are not assigned as error are binding upon this Court.

> 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. Furthermore, the scope of review on appeal is limited to those issues presented by assignment of error in the record on appeal.

Koufman v. Koufman, 330 N.C. 93, 97-98, 408 S.E.2d 729, 731 (1991) (citations omitted).

The "trial court's factual findings [must] support its conclusions of law." *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254. To justify a change in custody, the trial court must first find that there has been a substantial change in circumstances since entry of the prior custody order and that the change has affected the minor child. *Id.* Further, the trial court must find that the proposed change in custody is in the best interests of the minor child. *Id.* If the conclusions of law were properly drawn from the findings of fact, the decision of the trial court will stand. *Id.* In addition, "[i]t is well settled that the trial court is vested with broad discretion in child custody cases. A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so

arbitrary that it could not have been the result of a reasoned decision." *Pass v. Beck*, 156 N.C. App. 597, 600, 577 S.E.2d 180, 182 (2003) (citations and quotations omitted).

Although plaintiff's brief addresses many of the findings of fact in the trial court's order, we first note that plaintiff failed to assign error to any finding of fact. Plaintiff made only five assignments of error: (1) to the "trial court's conclusion of law that Defendant is a fit and proper person to have custody of the minor child;" (2) to the "trial court's award of joint custody to the parties;" (3) to the "trial court's order that the minor child shall reside primarily with the defendant;" (4) to "the trial court's order that Plaintiff shall have periodic visitation with the minor child;" and (5) to "the trial court's conclusion of law that there has been a material and substantial change of circumstances affecting the welfare of the minor child since entry of the Order filed in September 2006." The legal basis stated for each of the assignments of error is the same: that such conclusion, award, or order "is contrary to North Carolina law, and constitutes an abuse of discretion." In his brief, plaintiff has not argued that any finding of fact was not supported by substantial evidence. Actually, plaintiff has not specifically mentioned any of his assignments of error in his brief. N.C.R. App. P. Rule 28(b)(6) provides that an appellant's brief shall contain within the argument as to each question presented for review "a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief . . . will be taken as abandoned." N.C.R. App. P. 28(b)(6).

Although plaintiff's brief is in violation of N.C.R. App. P. Rule 28(b)(6) in its failure to identify the assignments of error upon which the argument is based, we find that this nonjurisdictional rule violation is not so substantial as to impair the Court's review, so we will consider plaintiff's argument to the extent it addresses the assignments of error, which are quite limited in their scope. *See Dogwood Development and Management Co., LLC v. White Oak Transport Co., Inc.*, 362 N.C. 191, 198-99, 657 S.E.2d 361, 365-66 (2008) ("The final principal category of default involves a party's failure to comply with one or more of the nonjurisdictional requisites 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.' ").

Plaintiff presents only one argument on appeal: that "the New Hanover County district court improperly held that there had been a material and substantial change of circumstances affecting the welfare of the minor child since the entry of the Order filed in September 2006 and that such change in circumstances justified modification of said custody Order." Thus, plaintiff contends only that the uncontested findings of fact do not support the trial court's conclusions of law that there was a material and substantial change of circumstances affecting the welfare of the minor child since the entry of the order filed in September 2006 and that such change in circumstances justified modification of said custody order.

Because plaintiff has not challenged any of the trial court's findings of fact, they are binding on appeal, *Koufman*, 330 N.C. at 97-98, 408 S.E.2d at 731, and we must consider only whether the findings of fact supported the conclusions of law. *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254. The trial court in this case made the following specific findings of fact in its 1 June 2009 order:

> 15) Judge Gorham heard this matter in September, 2006, when the minor child was 7-years old; the minor child is now 10-years, 7-months old.
>
> 16) The minor child had resided in the New Hanover County area from her birth until after the end of the 2007 school year.
>
> 17) Prior orders of this Court had specifically prohibited the parties from relocating from the Wilmington, NC, area with the minor child, and the Court recognizes that the Order entered herein in September, 2006, is silent with respect to the prohibition of relocation of the parties from the New Hanover County Area.
>
> 18) Despite the silence regarding the issue of relocation, Plaintiff chose to relocate to the State of Georgia with the minor child, without obtaining Court approval, thus creating substantial distance between the minor child and her family and friends in the New Hanover County, NC area.

19) Prior orders of this Court and specific admonitions by Judges Corpening and Smith, provided that the minor child was to have no contact with her maternal grandfather, Willis Haynes, and Plaintiff was put on notice that no contact with Willis Haynes was a condition imposed by the Court that, “goes to the heart of protecting the child from potential emotional or physical abuse.”

20) The Court recognizes that Judge Gorham’s Order entered on September, 2006, is silent with respect to the issue of contact with Willis Haynes; however, the Plaintiff has, by his own admission, intentionally permitted and facilitated contact between the minor child and Willis Haynes, materially affecting the minor child’s welfare.

21) The minor child appeared happy, well-adjusted, and she expressed a strong desire to continue living with the Defendant and expressed a strong attachment to her mother and her friends in the Wilmington, NC, area.

22) Both parties harbor extreme hatred for each other and continue to demonstrate such hatred through their actions and such conduct can only serve to cause harm to the minor child. This conduct by both parties calls into question whether either is a fit and proper parent to have custody of the minor child.

23) The Defendant, having previously [sic] ordered not to mention the alleged rape to anyone except her physician, brought her friend, Cathy Iondoli, to the minor child’s school and when Defendant left the room, Ms. Iondoli relayed information of the alleged rape to Nick Smith, a school official, therefore indirectly violating this court’s order.

24) The testimony of Denise Scearce indicated that the minor child appeared happy residing with her mother, but that her statements to Ms. Scearce regarding the Plaintiff appeared to have been coached. The Court’s own observation of the minor child’s testimony in chambers likewise leads the Court to believe the testimony of the minor child regarding the Plaintiff to have been coached. The child’s testimony indicated that the Plaintiff smokes while she is in the car, that he speeds and drinks while driving, and that he calls her names and threatens to have her mother arrested and sent to jail. Whether or not any of these statements are true is hard to determine given the appearance that the statements appear rehearsed.

25) The testimony of Anne Bertrand demonstrated that she had gained a rapport with the minor child, but it also demonstrated that she has become so prejudiced towards the Plaintiff and the minor child's relationship with him, and so skeptical of the impartiality of the Court, that it would be detrimental to the child to continue counseling with Ms. Bertrand.

26) On the other hand, the minor child was injured while in the Plaintiff's custody when a Great Pyrenees dog, which Plaintiff had purchased for the minor child, bit her on her head. The child's injury required medical treatment at the emergency room where she received staples in her head. The Plaintiff testified, under oath, that he had not told the minor child that her mother was trying to have the dog destroyed after the dog bite. Plaintiff's testimony and his credibility with the court was discredited when Defendant's counsel introduced Plaintiff's recorded conversation with the child telling the child that her mother was trying to have the dog destroyed, exactly what he had just denied under oath. Furthermore, the Court is greatly concerned that Plaintiff in his testimony seemed to place responsibility for the dog bite on the minor child.

27) Testimony of numerous witnesses for Defendant showed that Plaintiff has been belligerent, hostile and verbally abusive upon visitation exchanges in the presence of the minor child.

28) This Court has strongly considered referring both parents' conduct to the New Hanover County Department of Social Services for an investigation into its potential as emotional neglect by both parents.

29) Plaintiff's current residence at an industrial site is not an appropriate place for him to exercise his visitation with the minor child and it is in the child's best interest that Plaintiff secure other living arrangements in order to exercise visitation with the minor child.

30) *The Guardian Ad Litem's* report does not recommend with whom the child should reside since the report raises serious questions of whether one or both parents are trying to alienate the child from the other.

31) Both parents should undergo a full psychological evaluation.

From the foregoing findings of fact the trial court made the conclusions of law *inter alia* that:

> 3) There has been a material and substantial change in circumstances affecting the welfare of the minor child since the entry of Judge Gorham's September 2006 order and such changes in circumstances justify modification of the custody ordered in Judge Gorham's order.
>
> 4) It is in the present best interest of the minor child that she be placed in the joint custody of the parties, with the Defendant having primary custody and the Plaintiff having secondary custody, with visitation occurring as set forth herein.

B. Substantive Analysis

We now turn to the issue of whether the undisputed findings of fact support the trial court's conclusions of law. We find that they do.

1) Substantial change in circumstances

Plaintiff contends that the trial court's findings of fact did not support its conclusion that there had been a substantial change in circumstances affecting Emily's welfare between the September 2006 custody order and the issuance of the order in question. Plaintiff's primary argument is that "the trial court failed . . . to demonstrate a connection between the substantial change in circumstances and the welfare of the child, and how it would be in the child's best interest to modify custody."

As we have noted, the trial court found, *inter alia*, that: plaintiff had moved with Emily to Georgia, "a substantial distance" away from Wilmington, where she had lived since birth; that plaintiff's current place of residence in North Carolina at an "industrial site" was inappropriate for visitation with Emily; that the child had been harmed by a dog while in plaintiff's care; and that plaintiff had facilitated renewed contact with Emily's maternal grandfather, which the trial court had previously determined was not in Emily's best interest. The trial court also noted its doubts regarding plaintiff's credibility and that "Plaintiff has been belligerent, hostile and verbally abusive upon visitation exchanges in the presence of the minor child." All of these findings address changes which occurred since entry of the 2006 custody order. We see no abuse of discretion in the trial court's conclusion that these factors constitute a substantial change in circumstances since the trial court's 2006 order, particularly with

regard to the appropriateness of plaintiff's residence, the ongoing contact between the minor child and with her maternal grandfather, and plaintiff's inappropriate conduct in the presence of the minor child at visitation exchanges.

2) Effects of substantial change on Emily

Plaintiff's argument focuses heavily upon his relocation to Georgia, stressing that if the alleged change is a "discrete set of circumstances," such as the relocation of a custodial parent, the trial court must make specific findings of fact with regard to the effect of the change of circumstances on the minor child. *Carlton v. Carlton*, 145 N.C. App. 252, 262, 549 S.E.2d 916, 923 (2001) (Tyson, J., dissenting) *rev'd per curiam per dissent*, 354 N.C. 561, 557 S.E.2d 529 (2001). Plaintiff also notes that the 2006 custody order did not prohibit him from moving, although prior orders had prohibited relocation with the child. Plaintiff's argument fails for two reasons. First, plaintiff's relocation was by no means the only basis for the trial court's decision. Secondly, the trial court did make findings as to the detrimental effect of the relocation to Georgia on Emily.

The trial court made many findings unrelated to plaintiff's move to Georgia to support the modification of custody. For example, the trial court found that plaintiff allowed the child to have contact with her maternal grandfather; that the child was injured by plaintiff's dog and that plaintiff "seemed to place responsibility for the dog bite on the minor child"; that plaintiff had been "belligerent, hostile and verbally abusive" at visitation exchanges in the presence of the child; that plaintiff's current place of residence in an "industrial site" was inappropriate for visitation with Emily; and that the trial court "strongly considered referring both parents' conduct to the New Hanover County Department of Social Services for an investigation into its potential as emotional neglect by both parents." As the North Carolina Supreme Court has observed, "the effects of the substantial changes in circumstances on the minor child" may be "self-evident, given the nature and cumulative effect of those changes as characterized by the trial court in its findings of fact." *Shipman*, 357 N.C. at 479, 587 S.E.2d at 256. The trial court also made findings regarding the effects of the relocation on the child. Specifically, the trial court found that Emily had lived "in the New Hanover county area from her birth until after the end of the 2007 school year;" that the move to Georgia put a "substantial distance between the minor child and her family and friends in the New Hanover County, NC area;" and that the

child "expressed a strong attachment to her mother and her friends in the Wilmington, NC, area." Taken together, the findings of the trial court fully support its conclusion of a substantial change in circumstances affecting the welfare of the minor child since entry of the 2006 custody order.

3) Emily's best interest

Finally, we turn to the issue of whether the trial court abused its discretion in concluding that modification of custody was in Emily's best interests. We find no abuse of discretion.

The trial court concluded that it was in Emily's best interest "that she be placed in the joint custody of the parties, with the Defendant having primary custody and the Plaintiff having secondary custody . . . ." "Before awarding primary physical custody of a child to a particular party, the trial court must conclude as a matter of law that the award of custody to that particular party will be in the best interest of the child." N.C. Gen. Stat. § 50-13.2(a) (2007). Such a conclusion must be supported by findings of fact. *In re Poole*, 8 N.C. App. 25, 29, 173 S.E.2d 545, 548 (1970). "These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978). "These findings cannot, however, be mere conclusions." *Hall v. Hall*, 188 N.C. App. 527, 532, 655 S.E.2d 901, 905 (2008) (citation and quotation marks omitted).

Plaintiff notes the trial court's negative findings of fact regarding defendant in support of his argument that granting defendant primary physical custody is not in Emily's best interest. In particular, plaintiff notes finding No. 22, that "both parties harbor extreme hatred for each other and continue to demonstrate such hatred through their actions and such conduct can only serve to cause harm to the minor child. This conduct by both parties calls into question whether either is a fit and proper parent to have custody of the minor child." Plaintiff also notes defendant's violations of the prior order and possible coaching of the child as stated in findings of fact No. 23 and 24, quoted above. The negative findings of fact as to both parties could certainly give any judge reason to wonder if it is in Emily's best interest to be in the custody of either defendant or plaintiff.

Considering all of the findings of fact, we find no abuse of discretion. There was much negative evidence regarding both parties, and "we are not in a position to re-weigh the evidence." *Id.* at 533, 655

S.E.2d at 905. The trial court carefully considered both the good and the bad as to each party and, although the trial court stated its concerns about the fitness of both parents, it balanced all of the evidence and determined that Emily would be best served by granting her primary physical custody to defendant.

III. Conclusion

As the uncontested findings of fact supported the conclusion that there had been a substantial change in circumstances affecting Emily, we conclude the trial court did not err in modifying the custody order to grant joint legal custody to the parties with defendant having primary custody.

AFFIRM.

Judges McGEE and ERVIN concur.

CRLP DURHAM, LP, PETITIONER v. DURHAM CITY/COUNTY BOARD OF ADJUSTMENT, AND ELLIS ROAD, LLC, RESPONDENT

No. COA10-120

(Filed 1 March 2011)

Appeal and Error— record—applicable law—prior and subsequent zoning ordinances

An appeal from a zoning decision was dismissed where the record did not permit determination of whether a prior or a subsequent zoning ordinance was applicable to the development plans in question.

Appeal by petitioner from decision and order entered on or about 19 August 2009 by Judge Orlando F. Hudson in Superior Court, Durham County. Heard in the Court of Appeals 9 June 2010.

Manning Fulton & Skinner P.A. by William C. Smith, Jr. and Katherine M. Bulfer, for petitioner-appellant.

City of Durham by Deputy City Attorney Karen Sindelar, for respondent-appellee Durham City/County Board of Adjustment.

Zaytoun Law Firm, PLLC, by Robert E. Zaytoun, for petitioner-appellee Ellis Road, LLC.[1]

STROUD, Judge.

CRLP Durham, LP, ("petitioner") appeals from a trial court's order in favor of Durham City/County Board of Adjustment and Ellis Road, LLC ("respondents"). For the following reasons, we dismiss petitioner's appeal.

I. Background

Respondent Ellis Road, LLC is the owner of a 42.76 acre parcel located on Ellis Road in Durham County and petitioner is the owner of an adjoining 28.21 acre parcel of property. On 27 November 2007, respondent Ellis Road, LLC, filed a site plan with the Durham City-County Planning Department ("the Planning Department") seeking to construct "344 apartment units with associated infrastructure improvement" on the 42.76 acre parcel and for the use of a cross-access connection between its property and the adjoining property owned by petitioner. As part of the evaluation of the submitted site plan, the Planning Department reviewed the submitted site plan to determine if it conformed with the existing development plan for that parcel of property. The Planning Department contacted the developer, as part of the site plan review, and informed him that pursuant to the existing development plan, use of the cross-access connection between respondent Ellis Road, LLC's property and the adjoining property owned by petitioner would be required. The developer contacted petitioner, and, in a letter to the Planning Department, petitioner "raised several concerns including the legality of the proposed use and the status of the cross-access connection."

On 29 September 2008, the Planning Department issued a decision stating that "the cross-access connection [was] . . . a required element of the development plan" and the development plan indicated that this cross-access connection "between properties . . . provided for free access without any limitations." The decision further stated that petitioner must allow for respondent Ellis Road, LLC to utilize this cross-access connection to cross petitioner's property without restrictions. Petitioner appealed the Planning Department's decision

1. Petitioner Ellis Road, LLC's brief on appeal "incorporte[d] by reference, the brief filed by Respondent-Appellee Durham City/County Board of Adjustment, including the Statement of Additional Facts and all arguments and authorities presented by Respondent-Appellee Durham City/County Board of Adjustment."

to the Durham City/County Board of Adjustment ("the Board"), arguing that the Planning Department erred in its decision because a conditional cross-access agreement limited the use of the cross-access connection to office use only and allowing its use for residential apartments violated that agreement. The Board held a hearing on this matter on 5 March 2009. Evidence presented at this hearing tended to show that the subject properties owned by petitioner and respondent Ellis Road, LLC were both originally part of a 70.97 acre tract of land which was partitioned and rezoned by an approved development plan on 7 February 2000, as a 28.21 acre parcel zoned for "Multi-Family RM-16(D)" ("petitioner's parcel") and a 42.76 acre parcel zoned for "Office OI-2(D)" ("respondent's parcel"), respectively. The approved development plan included a cross-access connection between the tracts, which allowed traffic going to and from respondent's parcel to access Ellis Road by crossing a portion of petitioner's parcel. The development plan also included design plans for an apartment complex on petitioner's parcel; respondent's parcel was labeled "Office Development[,]" but did not include design plans for any development, noting at the bottom of the development plan that "with the development of the office parcel a northbound right turn lane on Ellis Road will be constructed for the proposed access." The development plan also noted that "[a]t the time of subdivision and/or recombination plat approval a shared access agreement for the northern multi-family/office shared access driveway will be recorded." On or about 20 December 2000, an "Access Agreement" was filed with the Durham County Register of Deeds limiting the cross-access connection to office use only. Petitioner purchased the 28.21 acre parcel on 28 July 2005 after an apartment complex had been constructed. The 42.76 acre tract remained vacant until respondent purchased the property and filed the above-noted site plan on 27 November 2007 seeking to construct residential housing. At the hearing, Durham City/County Planning Director Steven Medlin testified that "under the zoning rules, development plans are schematic, which means that any use that is permissible in the OI-2 zone is actually permissible as long as you can meet the minimum design criteria that is established within the development plan[;]" the language regarding "office use" on the OI-2 portion of the 2000 development plan was merely suggestive of a potential use of the property but not a binding, committed element of the development plan; there were "no limitations imposed by either the development plan or the site plan of record for this project that limit[ed] the types of uses that can gain access" to respondent's parcel via the cross-access connection; the zoning ordinances

allowed for several uses for properties zoned OI-2, including office or multiplex/apartment; respondent's tract was zoned OI-2, and the access agreement limited the uses of the cross-access connection to office use only, which was more restrictive than that which was allowed by the zoning ordinances; restricting the cross-access connection to only residential uses in the "Access Agreement" amounted to "a significant change in location or configuration of [an] access point . . . that is considered to be a major deviation from the development plan" requiring the Board's approval before it was filed; and, as the "Access Agreement" did not receive prior approval by the Board, it was "not[] compliant with the approved development plan." Petitioner argued that the language on the development plan allowed for the access agreement; the conditional access agreement was consistent with the office restrictions in the development plan; petitioner bargained for and relied on this conditional access agreement when it purchased the subject properties; and the applicable zoning laws could not "trump" a private easement agreement.

Following the hearing on this matter, the Board, by order dated 29 April 2009, denied petitioner's appeal, voting unanimously to uphold the planning department's decision that the limitation of the cross-access agreement to office use only was a restriction not permitted by the development plan or site plan and was therefore, in violation of the zoning ordinance. On 11 May 2009, petitioner filed a petition for writ of certiorari with the superior court for review of the Board's decision. The superior court granted petitioner's writ of certiorari on 11 May 2009. On 29 May 2009, petitioner filed an "Amended Petition for Writ of Certiorari" which was identical to the first petition except it included a verification from a representative of petitioner, and this amendment was acknowledged and allowed by the superior court on 4 June 2009. Respondent Ellis Road, LLC, was allowed to intervene in the proceedings by order dated 18 August 2009. Following a 13 August 2009 hearing, the superior court, by order entered 20 August 2009, denied petitioner's request to reverse the Board's interpretation of the development plan and the zoning code and affirmed the decision of the Board. On 18 September 2009, petitioner filed notice of appeal from the superior court's order.

II. Standard of Review

We have stated that "[j]udicial review of the decisions of a municipal board of adjustment is authorized by N.C. Gen. Stat. § 160A-388(e2), which provides, in pertinent part, that '[e]very decision

of the board shall be subject to review by the superior court by proceedings in the nature of *certiorari*.' " *Four Seasons Mgmt. Servs. v. Town of Wrightsville Beach*, ––– N.C. App. –––, –––, 695 S.E.2d 456, 462 (2010). A superior court's review of a decision by the board of adjustment is limited to:

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

Wright v. Town of Matthews, 177 N.C. App. 1, 8, 627 S.E.2d 650, 656 (2006) (citation and quotation marks omitted). In review of a trial court's order, "[i]f a petitioner contends the Board's decision was based on an error of law, *de novo* review is proper. However, if the petitioner contends the Board's decision was not supported by the evidence or was arbitrary and capricious, then the reviewing court must apply the whole record test." *Four Seasons*, ––– N.C. App. at –––, 695 S.E.2d at 462 (citation and quotation marks omitted). "When this Court reviews a superior court's order which reviewed a zoning board's decision, we examine the order to: (1) determin[e] whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) decid[e] whether the court did so properly." *Cook v. Union County Zoning Bd. of Adjustment*, 185 N.C. App. 582, 587, 649 S.E.2d 458, 464 (2007) (citation, brackets, and quotation marks omitted).

III. Petitioner's appeal

Petitioner brings forth four arguments on appeal arguing that the superior court erred in upholding the Board's decision because: (1) the Board's interpretation of the development plan for the subject property was based upon an error of law; (2) the Board's decision was arbitrary and capricious as finding No. 4 "amounts to a license to make arbitrary change to a Development Plan or Zoning Ordinance whenever the Planning Director desires[;]" (3) "the Board's interpretation of the applicable municipal ordinances was affected by error of law[;]" and (4) "the Board misapplied or otherwise ignored controlling North Carolina law, leading to the erroneous conclusion that petitioner is required to provide unrestricted cross access to the adjoining tract."

Before we can address the substantive issues raised by petitioner, several of which involve the argument that the Board based its decision upon an error of law, we must first ascertain the applicable law, which in this instance would be the zoning ordinances. The record before us raises questions as to the "applicable municipal ordinances[.]" Planning Director Steven Medlin testified that the development plan in question was approved in 2000 under the Merged Zoning Ordinance ("MZO") but the MZO was "subsequently supplanted" in 2006 by the "Unified Development Ordinance" ("UDO"). However, Mr. Medlin testified as to the application of both the MZO and UDO to the 2000 development plan, noting that "[t]he development plan . . . was evaluated back in 2000 and found to be compliant with the Merged Zoning Ordinance standards." Consequently, the Board's" ruling noted the applicability of both the MZO and UDO in its findings:

> 2. Zoning for the Original Tract was approved by the Durham City Council on February 7, 2000, in case P99-30. That tract included a portion zoned RM-16(D), a multifamily district, on the south side ("southern tract") and a portion zoned OI-2(D), an office district, on the north side ("northern tract.") These designations were those that existed under the Merged Zoning Ordinance in effect at the time. The designations were subsequently changed to RS-M(D) and OI(D), respectively, upon the effective date of the successor to the Merged Zoning Ordinance, the Unified Development Ordinance ("UDO"), which was adopted on January 1, 2006. The uses allowed under the former ordinance and the UDO for the property were substantially the same.
>
> 3. In addition to establishing the base zoning districts for the Original Tract, described above, the February 2000 zoning of the Original Tract included a "development plan."
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> 4. Under both the former Merged Zoning Ordinance and the current UDO (Section 3.5.1.C), a development plan establishes certain parameters that control the future physical development of a property. Both ordinances establish that some of these parameters cannot be changed without governing body approval of a rezoning. Other descriptions on the development are considered conceptual and not binding.
>
> 5. Under both ordinances, site plans to develop a property subject to a development plan rezoning must be in accord with the portions of the approved development plan considered binding. . . . .

> 10. The prior Merged Zoning Ordinance and the current UDO allow many uses in office districts such as OI-2 and OI districts. Those uses include multifamily housing and apartments, among others.
>
> 21. Change to approved access points on a development plan is a significant change and requires a zoning map change. This ordinance requirement is found in Section 3.5.12A.9 of the UDO, and similar requirements existed in Section 15.3.6 of the Merged Zoning Ordinance, the ordinance in effect at the time the development plan was approved . . . .

Although the findings based on Mr. Medlin's testimony note that the UDO was "adopted" in 2006, there is no finding regarding the extent of the UDO's applicability to development plans approved in 2000 under the MZO; this is because there was no evidence presented at the hearing regarding whether the UDO completely "supplanted" the MZO or if the MZO was still applicable to development plans approved in 2000. However, the Board based its holding solely on the application of the UDO to the facts before them, presumably because it assumed or could determine based upon the ordinances that the UDO completely "supplanted" the MZO in 2006. Likewise, in its conclusion, the superior court pointed to the UDO as the applicable ordinance stating that: "The Board's conclusion that Petitioner violates the Durham zoning code, Durham's 'Unified Development Ordinance', by not providing such unrestricted, unconditional cross-access is not affected by error of law." We further note that on appeal, petitioner in its third argument regarding the Board's interpretation of the applicable municipal ordinances argues that the Merged Zoning Ordinance ("MZO") was the applicable ordinance but in the alternative also contends that the current Durham zoning ordinance, the Unified Development Ordinance ("UDO"), is substantially the same and would lead to the same result as to the facts before us. In a footnote, petitioner argues that, "While Petitioner believes the MZO governs whether Petitioner's predecessor-in-interest was required to obtain rezoning approval for the Access Agreement to have effect, the result under both the MZO and the UDO is the same." Yet we are unable to determine the accuracy of petitioner's declaration that "the result under both the MZO and the UDO" would be the same without having both sets of ordinances in the record.

In *Overton v. Camden County*, 155 N.C. App. 391, 574 S.E.2d 157 (2002), this Court addressed the specific issue of "which zoning

ordinance to apply when an alleged violation occurs while one ordinance is in effect, but enforcement is sought only after a new ordinance has replaced the previous ordinance" and held that "the zoning ordinance in effect at the time of the Board of Adjustment's decision is the correct ordinance to apply." *Id.* at 394, 396, 574 S.E.2d at 160, 161. In *Overton*, the petitioner had placed a mobile home on his property in 1972 and replaced that mobile home with another mobile home in 1995, without obtaining a building permit or conditional use permit. *Id.* at 392, 574 S.E.2d at 159. The county had enacted and adopted the Camden County Zoning Ordinance ("CCZO") on 20 December 1993; the CCZO was replaced on 1 January 1998, by the Camden County Unified Development Ordinance ("UDO"). *Id.* On 18 February 2000, the petitioner received a letter from a Camden County Code Enforcement Officer stating that he had violated portions of the CCZO by replacing the mobile home. *Id.* The petitioner appealed this decision to the board of adjustment and the board issued a decision stating that the replacement of the mobile home was a violation of the CCZO; the petitioner was required to obtain a building permit; and the petitioner was to abide by specific conditions for the replacement mobile home to remain on the petitioner's land. *Id.* The petitioner appealed this decision to the superior court and the court, in reversing and remanding the board's decision, held that the board erroneously applied the CCZO "where such ordinance had been replaced as of January 1, 1998 by the . . . UDO[;]" the board erred in ordering the "unauthorized conditions[;]" and the UDO only required petitioner to obtain a building permit for the replacement mobile home. *Id.* at 392-93, 574 S.E.2d at 159. The county appealed to this Court, arguing that "the trial court erred in applying the UDO to petitioner's zoning violation, instead of the CCZO." *Id.* at 394, 574 S.E.2d at 160. This Court noted that "[a]t the time of the alleged violation, being the replacement of a mobile home by petitioner in 1995, the CCZO was the zoning ordinance in effect[,]" but "when the enforcement action was brought by Camden County, the UDO had superseded the CCZO." *Id.* This Court noted that Judge Greene in his dissenting opinion in *Naegele Outdoor Advertising v. Harrelson*, 112 N.C. App. 98, 101-02, 434 S.E.2d 244, 246 (Greene, J., dissenting), *rev'd per curium*, 336 N.C. 66, 442 S.E.2d 32 (1994), had "reject[ed] the proposition that a court or board need not look at subsequent changes in the law when Board of Adjustment decisions are made." *Id.* After reviewing similar decisions from other jurisdictions, this Court held that because "the zoning ordinance in effect at the time of the Board of Adjustment's decision is the correct ordinance to

apply[,] . . . [t]he Board of Adjustment should have applied the UDO in the present case and the trial court did not err in applying the UDO." *Id.* at 395-96, 574 S.E.2d at 160-61. Thus, the decision in *Overton* rested upon the fact that a "new ordinance ha[d] replaced the previous ordinance[.]" *Id.* at 394, 574 S.E.2d at 161.

Contrary to *Overton*, from the record before us we cannot determine which "zoning ordinance [was] in effect at the time of the Board of Adjustment's decision[.]" *See id.* at 396, 574 S.E.2d at 161. This Court in *Overton* specifically noted that the CCZO was enacted in 20 December 1993 and was "replaced" on 1 January 1998 by the UDO. *Id.* at 394, 574 S.E.2d at 161. Although the record on appeal contains several substantive portions of the UDO, it does not contain any portion of the UDO that includes language stating when or if the UDO "superseded" or "replaced" the MZO or detailing the extent of the UDO's application to development plans approved under the MZO in 2000. Therefore, we cannot say that the UDO, as the "new ordinance" had "replaced the previous ordinance[,]" the MZO, *see id.*, and therefore, the rule in *Overton* is inapplicable.

All of petitioner's arguments on appeal would require the application of the correct Durham City/County zoning ordinances to determine whether the Board properly interpreted the development plan or the zoning ordinances; whether the findings involved arbitrary and capricious interpretations of the zoning ordinances; or how the applicable zoning ordinances relate to North Carolina law. Here, without language from the UDO stating when and if it replaced the MZO, the MZO could be the applicable zoning law for the 2000 development plan as it was approved under that ordinance. If the UDO did fully supplant the MZO, then, according to *Overton*, the UDO would be the applicable ordinance for the interpretation of the development plan approved under the MZO and the issues regarding the cross-access connection between the petitioner's and respondent's properties. We note that there are eleven pages of ordinance provisions included in the record on appeal dated "January 31, 2003[,]" which would indicate that these pages could be portions of the MZO as it existed prior to 2006, but these pages are labeled in the record index as "Unified Development Ordinance Section 15" which was not adopted until 2006. Without the applicable provisions of the MZO to compare to the UDO, we cannot determine that there was no relevant change in the ordinances, such that the result would be the same under either ordinance. We note that there may be portions of the UDO not included in the record on appeal which state specifically when and if

the UDO "superseded" the MZO or explaining the UDO's applicability to development plans approved in 2000 under the MZO. The planning director, Mr. Medlin did testify that the MZO was "subsequently supplanted" in 2006 by the UDO. However, our Courts have consistently held that we "will not take judicial notice of a municipal ordinance." *High Point Surplus Co. v. Pleasants*, 263 N.C. 587, 591, 139 S.E.2d 892, 895 (1965); *See Fulghum v. Selma*, 238 N.C. 100, 105, 76 S.E.2d 368, 371 (1953) ("We cannot take judicial notice of municipal ordinances."). "Appellate review is based 'solely upon the record on appeal,' N.C.R. App. P. 9(a); it is the duty of the appellants to see that the record is complete." *Collins v. Talley*, 146 N.C. App. 600, 603, 553 S.E.2d 101, 102 (2001) (citation omitted). More specifically, N.C.R. App. P. 9(a)(2)(e) states that, "[t]he record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings from administrative boards or agencies, . . . shall contain: . . . . copies of all items properly before the superior court as are necessary for an understanding of all errors assigned[.]"

From the record before us, we cannot, without engaging in speculation, determine whether the MZO or the UDO is the "applicable municipal ordinance" as petitioner failed to include in the record on appeal any portion of the UDO containing language stating when or if the UDO "superseded" the MZO or language from the UDO explaining its applicability to development plans approved under the MZO. As the record before us does not permit a proper examination of the issues before us, we must dismiss petitioner's appeal.

DISMISSED.

Judges McGEE and ERVIN concur.

PAMELA RANKIN, PLAINTIFF-APPELLANT v. FOOD LION, D/B/A DELHAIZE AMERICA INC., FOOD LION, INC., AND FOOD TOWN STORES, INC., AND FOOD LION STORE #276, DEFENDANT-APPELLEES

No. COA10-392

(Filed 1 March 2011)

Negligence— legally responsible party—summary judgment—properly granted

The trial court did not err by entering summary judgment in favor of defendants in a negligence action. Defendants adequately supported their motion for summary judgment on the basis that none of the defendants were legally liable for the alleged negligence of employees at the Food Lion store in which plaintiff fell. Moreover, the internet printouts upon which plaintiff relied to support her assertion that the store in which she was injured was owned by defendant Delhaize America, Inc. were not admissible and could not have been properly considered by the trial court in ruling on defendants' summary judgment motion.

Appeal by plaintiff from judgment entered 1 December 2009 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 October 2010.

Pamela A. Hunter, for Plaintiff-Appellant.

Patterson Dilthey, LLP, by Julie L. Bell, for Defendants-Appellees.

ERVIN, Judge.

Plaintiff Pamela Rankin appeals from an order granting summary judgment in favor of Defendants Food Lion d/b/a Delhaize American Inc.; Food Lion, Inc.; Food Town Stores, Inc.; and Food Lion Store #276 concerning her claim alleging that Plaintiff sustained personal injuries as a result of Defendants' negligence. After careful consideration of Plaintiff's challenges to the trial court's decision in light of the record and the applicable law, we conclude that the trial court properly granted summary judgment in favor of Defendant and that its order should be affirmed.

I. Factual and Procedural Background

On 29 May 2009, Plaintiff filed an unverified complaint against Defendants in which she alleged that, while shopping at Food Lion

Store #276 in Charlotte, North Carolina, on 24 June 2006, she slipped and fell in spilled soda while proceeding through the checkout line and sustained serious injuries. Plaintiff asserted that her injuries proximately resulted from Defendants' breach of their duty to maintain the store's floors in a safe manner, entitling her to recover compensatory and punitive damages.

On 16 October 2009, Defendants filed an answer in which they denied the material allegations of Plaintiff's complaint and sought dismissal of her claim. Defendant Food Lion Store #276 moved to dismiss Plaintiff's claim on the grounds that "it is not an entity and therefore cannot be sued," while all Defendants jointly moved that Plaintiff's complaint be dismissed pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(7), for failure to join a necessary party and, pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(4) and (5), for "lack of jurisdiction over the person, insufficiency of process and insufficiency of service of process." Defendants also disputed the validity of Plaintiff's claim for punitive damages.

On 21 October 2009, Defendants filed a motion for summary judgment in which they alleged, in pertinent part, that:

> . . . Plaintiff cannot prove negligence against Defendant Delhaize America, Inc., because Plaintiff cannot prove that Defendant Delhaize America, Inc. operated or had any control over the Food Lion store where this incident occurred on the date of the incident. Further, Defendant Food Lion, Inc and Food Town, Stores, Inc are no longer corporate entities as their names changed and the surviving entity is Delhaize America, Inc. In addition, Plaintiff has failed to join Food Lion, LLC, the entity that operates the grocery store where this incident happened, which is a necessary party to this action and Plaintiff cannot now add Food Lion, LLC as the statute of limitations has expired. Further, Food Lion Store #276 is not a legal entity and therefore cannot be sued.

In support of their summary judgment motion, Defendants submitted the affidavit of Jason D. Stevens, Senior Corporate Counsel for Food Lion, LLC, in which Mr. Stevens asserted, among other things, that (1) Defendant Food Lion Store #276 is not a legal entity; (2) neither Defendant Food Lion, Inc., nor Defendant Food Town Stores, Inc., currently exists; and (3) Defendant Delhaize America, Inc., is a holding company with no role in the operation of the Food Lion store in which Plaintiff allegedly fell. On 1 December 2009, the trial court con-

ducted a hearing on Defendants' summary judgment motion and granted summary judgment in Defendants' favor. Plaintiff noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Standard of Review

A trial court properly grants summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2010). As a result, the "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). The movant "has the burden of establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). " 'When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001)). In addition, " '[i]f 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.' " *Haugh v. County of Durham*, ––– N.C. App. –––, –––, 702 S.E.2d 814, ––– (2010) (quoting *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989)).

B. Legal Analysis

1. Legal Status of Delhaize America, Inc.

First, Plaintiff argues that the trial court erred by entering summary judgment in favor of Defendants on the grounds that "the evidence of record clearly establishes that the Defendant, Food Lion's legal owner, as registered with the Secretary of State for the State of North Carolina is Delhaize America, Inc." A careful review of the record demonstrates, however, that the materials upon which Plaintiff relies in support of this assertion are not admissible and could not, for that reason, have been properly considered by the trial court in ruling on Defendants' summary judgment motion.

The essential basis upon which Defendants sought summary judgment with respect to Plaintiff's negligence claim was that Defendant Delhaize America, Inc., had no control over the Food Lion store where Plaintiff allegedly fell; that Defendant Food Lion #276 is not a legal entity capable of suing and being sued; and that the remaining two defendants, Food Lion, Inc., and Food Town Stores, Inc., no longer exist. In addition, Defendants asserted that Food Lion, LLC, is the corporate entity that operates the Food Lion store in which Plaintiff allegedly fell; that Plaintiff had not named Food Lion, LLC, as a party defendant; and that Plaintiff could no longer join Food Lion, LLC, as a party defendant because the statute of limitations applicable to Plaintiff's claim had expired. In his affidavit in support of Defendants' motion, Mr. Stevens stated that, as senior corporate counsel for Food Lion, LLC, he was "familiar with the corporate form, history and relationship between Food Lion, LLC and Delhaize America Inc." In addition, Mr. Stevens asserted that:

> 3. All Food Lion retail grocery stores in North Carolina are operated by Food Lion, LLC and were operated by Food Lion, LLC on June 24, 2006 including Food Lion Store, No. 276.
>
> 4. Food Lion, LLC is a wholly owned subsidiary of Delhaize America Inc.
>
> 5. Delhaize America Inc. does not do business as Food Lion and did not do business as Food Lion on June 24, 2006.
>
> 6. Delhaize America Inc. is a holding company for Food Lion, LLC and other corporate entities and does not and did not on June 24, 2006 have any role in operation or control of the Food Lion store where the incident that is the subject of the Complaint in this action is alleged to have occurred.
>
> 7. Delhaize America, Inc. does not control the operation of Food Lion, LLC.
>
> 8. Food Lion, Inc. is the former name of Delhaize America, Inc.
>
> 9. Food Town Stores, Inc. is the former name of Food Lion, Inc.
>
> 10. Neither Food Lion, Inc. nor Food Town Stores, Inc. currently exists.
>
> 11. Food Lion Store #276 is not a legal entity.

As a result, the information contained in Mr. Stevens' affidavit establishes that none of the Defendants are legally liable for the alleged negligence of employees at Food Lion Store #276. For that reason, we conclude that Defendants adequately supported their request for the entry of summary judgment.

" 'Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial.' " *Pacheco v. Rogers and Breece, Inc.*, 157 N.C. App. 445, 448, 579 S.E.2d 505, 507 (2003) (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001)). " 'To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.' " *Id.* (quoting *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342 (1992)). A thorough review of the record compels us to conclude that Plaintiff failed to respond to Defendants' properly supported summary judgment motion with admissible evidence tending to show the existence of any genuine issue of material fact relevant to Plaintiff's negligence claim.

In challenging the trial court's order granting summary judgment on appeal, Plaintiff does not dispute the validity of Defendants' contentions that Defendant Food Lion Store #276 is not a legal entity and that neither Defendant Food Lion Inc., nor Defendant Food Town Stores, Inc., currently exists. Instead, Plaintiff seeks reversal of the trial court's order on the grounds that she presented evidence that the Food Lion store in which Plaintiff was injured is owned by Defendant Delhaize America, Inc., an assertion based on two documents included in the record, both of which appear to be printouts of internet website pages. One of these documents appears to consist of a page printed from the website of the North Carolina Secretary of State, while the other appears to consist of an internet posting concerning Defendant Delhaize America, Inc. As a result, we must examine the admissibility of each of these documents in order to determine whether they suffice to require a denial of Defendants' summary judgment motion.

According to N.C. Gen. Stat. § 1A-1, Rule 56(e):

> (e) Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be

> admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Furthermore:

> "The converse of this requirement is that affidavits or other material offered which set forth facts which would not be admissible in evidence should not be considered when passing on the motion for summary judgment." . . . "Where both competent and incompetent evidence is before the trial court, we assume that the trial court, when functioning as the finder of facts, relied solely upon the competent evidence and disregarded the incompetent evidence. When sitting without a jury, the trial court is able to eliminate incompetent testimony, and the presumption arises that it did so."

Wein II, LLC v. Porter, 198 N.C. App. 472, 476-77, 683 S.E.2d 707, 711 (2009) (quoting *Strickland v. Doe*, 156 N.C. App. 292, 295, 577 S.E.2d 124, 128 (2003), *disc. review denied*, 357 N.C. 169, 581 S.E.2d 447 (2003), and *In Re Foreclosure of Brown*, 156 N.C. App. 477, 487, 577 S.E.2d 398, 405 (2003)). Thus, "[h]earsay matters . . . should not be considered by a trial court in entertaining a party's motion for summary judgment." *Moore v. Coachmen Indusries, Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 776 (1998) (citing *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 52, 191 S.E.2d 683, 688-89 (1972)).

A careful examination of the documents upon which Plaintiff bases her challenges to the trial court's order demonstrates that they fail to meet the admissibility requirement of N.C. Gen. Stat. § 1A-1, Rule 56(e). Although Plaintiff characterizes these documents as "undisputed evidence of record" and argues that they establish that Defendant Delhaize America, Inc., is "Food Lion's legal owner," she failed to properly authenticate these documents at the time that she submitted them in opposition to Defendants' request for summary judgment. As a result, contrary to Plaintiff's contention, the trial

court was not authorized to consider either document in evaluating the validity of Defendants' request for summary judgment.

N.C. Gen. Stat. § 8C-1, Rule 901 provides, in pertinent part, that:

> (a) The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> (1) Testimony that a matter is what it is claimed to be.
>
> . . . .
>
> (7) Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

In addition, N.C. Gen. Stat. § 8C-1, Rule 902, provides, among other things, that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

> (4) A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this State.

The record contains no evidence that, at the time that Defendants' summary judgment motion was heard before the trial court, Plaintiff offered any evidence tending to show what the documents in question were, failed to proffer certified copies of either document, and did not make any other effort to authenticate these documents. As a result, we must necessarily conclude that neither of these documents was authenticated in the manner required by N.C. Gen. Stat. § 8C-1, Rules 901 or 902, demonstrating that neither of them was properly before the trial court at the time of the hearing on Defendants' summary judgment motion.

Furthermore, N.C. Gen. Stat. § 8C-1, Rule 801(c), defines hearsay 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." The documents upon which Plaintiff relies clearly amount to out-of-court statements that Plaintiff seeks to introduce in reliance upon the truth of their contents. For that reason, the documents in question constitute "unauthenticated hearsay[, and are] . . . analogous to the newspaper articles that courts in this circuit have frequently recognized as hearsay." *Williamson v. Prince George's County*, 2011 U.S. Dist. LEXIS 7518 (26 January 2011) (citing *United States v. Heijnen*, 149 Fed. Appx. 165, 169 (4th Cir. 2005), *cert. denied*, 552 U.S. 1051, 169 L. Ed. 2d 530, 128 S. Ct. 677 (2007) (concluding that "documents downloaded from the internet . . . are hearsay"), and *Gantt v. Whitaker*, 57 Fed. Appx. 141, 150 (4th Cir. 2003) (stating that "[t]his circuit has consistently held that newspaper articles are inadmissible hearsay to the extent that they are introduced to prove the factual matters asserted therein"). Thus, we conclude that the documents cited by Plaintiff were inadmissible at trial and were properly ignored by the trial court for this reason as well. In view of the inadmissibility of the documents upon which Plaintiff relies, we need not address Plaintiff's arguments concerning their legal significance.

We also observe that Plaintiff did not submit any affidavits or other sworn testimony in response to Defendants' summary judgment motion. " 'A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.' " *Merritt, Flebotte, Wilson, Webb & Caruso, PLLC v. Hemmings*, 196 N.C. App. 600, 605, 676 S.E.2d 79, 83-84 (2009) (quoting *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972)). On the other hand, "the trial court may not consider an unverified pleading when ruling on a motion for summary judgment." *Tew v. Brown*, 135 N.C. App. 763, 767, 522 S.E.2d 127, 130 (1999), *disc. review improvidently allowed*, 352 N.C. 145, 531 S.E.2d 213 (2000). Plaintiff's complaint in this case was not verified, so it could not be considered in the course of the trial court's deliberations concerning Defendants' summary judgment motion. Thus, since Plaintiff tendered no evidence in response to Defendants' properly supported summary judgment motion other than the documents that we have held to be inadmissible, we conclude that Plaintiff's contentions that she produced "evidence of record"

tending to show that Defendant Delhaize America, Inc., is the legal owner of the Food Lion store in which her injuries allegedly occurred, and that the trial court erred by granting Defendants' summary judgment motion in the face of this evidence, lack merit.

2. Service of Summons on Delhaize, America, Inc.

Next, Plaintiff argues that the trial court erred by granting summary judgment for Defendants on the grounds that "the evidence of record" establishes that Plaintiff properly served a summons and complaint on Defendant Delhaize America, Inc.; that Defendant Delhaize America, Inc., is "the legal owner of Food Lion, according to records provided to the Secretary of State of North Carolina;" and that "[i]t cannot be disputed, as a matter of public record, that Delhaize America, Inc., owns Food Lion, Inc." However, Plaintiff cites only the documents that we have already determined to be inadmissible in support of this argument, a fact that renders it without merit for the reasons discussed above.

3. Trial Court's Disregard of Plaintiff's Evidence

Finally, Plaintiff argues, in reliance on the documents that we have previously found to be inadmissible, that the trial court erred by "fail[ing] to consider the Plaintiff's proof of evidence of public record." For the reasons we have already discussed, we conclude that, to the extent that the trial court did, in fact, disregard Plaintiff's exhibits, it did not err by acting in that manner. Thus, this aspect of Plaintiff's challenge to the trial court's order lacks merit as well.

III. Conclusion

In *G & S Business Services v. Fast Fare, Inc.*, 94 N.C. App. 483, 486-87, 380 S.E.2d 792, 794, *disc. review denied*, 325 N.C. 546, 385 S.E.2d 497 (1989), the plaintiff sued Fast Fare, Inc., and Jerry Hill for non-payment of an account for services and materials. In seeking collection of the unpaid account, Plaintiff alleged that defendant Hill was believed to be a proprietor of a Fast Fare convenience store or a manager or director of Fast Fare, Inc. "In support of their motion to dismiss, defendants offered the affidavit of defendant Hill which stated facts showing Hill had no ownership interest in the corporate defendant Fast Fare, was in fact an employee of Fast Fare, and had otherwise incurred no personal liability on any corporate obligation between Fast Fare and plaintiff." This Court upheld the trial court's decision to grant summary judgment in favor of defendant Hill, noting that "Plaintiff did not respond to defendants' motion for sum-

mary judgment with any supporting materials of its own" and that "Defendant Hill's affidavit, if true, establishes that he was not liable to plaintiff on any corporate obligation of Fast Fare." Utilizing similar logic, and based on our determination that the internet printouts upon which Plaintiff relies do not constitute admissible evidence for purpose of the analysis required in connection with the consideration of Defendants' summary judgment motion, we conclude that the trial court did not err by entering summary judgment for Defendants and that its order should be, and hereby is, affirmed.

AFFIRMED.

Judges BRYANT and STEELMAN concur.

THOMAS S. DEANS AND WIFE YVONNE G. DEANS, PLAINTIFFS v. LINDA SIMMONS MANSFIELD, JOHNNY DIPIAZZA, PETER C. MACE, JOANNE F. MACE, HAYEK FARMS, LLC, JONATHAN C. HESCOCK, PATRICIA N. HESCOCK, GRANDE PINES HOMEOWNERS' ASSOCIATION, INC., JAMES A. JONES, ELIZABETH B. JONES, MNM LAND, LLC, MARC MASSAUX, SCOTT F. BREWTON, SONJA R. BREWTON, RONALD WALL, BARBARA WALL, DIRCK ANDREW YOW, MARY ELIZABETH YOW, GRANDE PINES, LLC, DEFENDANTS

No. COA10-398

Easements— prescriptive—summary judgment—erroneously granted

The trial court erred by granting summary judgment for defendants on a prescriptive easement claim in an action involving a dirt road across a subdivision. Plaintiffs presented evidence sufficient to establish a genuine issue of material fact as to each element of the claim from 1950 to 1972, and plaintiffs were entitled to the benefits of any prescriptive easement as a successor in interest. The burden of proof on defendants' oblique claim of abandonment was on defendants, with the issue of abandonment being a question for the jury.

Appeal by plaintiffs from orders entered 23 September 2009, 16 December 2009, and 4 January 2010 by Judge Jayrene R. Maness in Moore County District Court. Heard in the Court of Appeals 26 October 2010.

Law Office of Marsh Smith, P.A., by Marsh Smith, for plaintiff-appellants.

Nexsen Pruet, PLLC, by Brian T. Pearce, for defendant-appellees Linda Simmons Mansfield, Scott F. Brewton, and Sonja R. Brewton.

Foyles Law Firm, PLLC, by Jody Stuart Foyles, for defendant-appellees Ronald Wall and Barbara Wall.

Doster, Post, Silverman & Foushee, P.A., by Jonathan Silverman, defendant-appellees Peter C. Mace, Grande Pines, LLC, Grande Pines Homeowners' Association, Inc., James A. Jones and Elizabeth Jones.

STEELMAN, Judge.

Where evidence presented at the summary judgment hearing revealed that there was a genuine issue of material fact as to whether a prescriptive easement had been established in 1972 over the property of defendants, the trial court erred in granting summary judgment in favor of defendants.

I. Factual and Procedural Background

This action concerns a dispute regarding the use of a soil road leading from plaintiffs' property to Hoffman Road (S.R. 1004) over the real property of defendants in Sandhills Township, Moore County. Plaintiffs' property was originally owned by John Frederick Brown, who died intestate on 9 August 1941. Interests in the property descended as follows: (1) 1/3 interest to his wife Alice Brown (Alice), and (2) 2/3 interest divided between his six children (1/9 each): Mary, Howard, Phillip, Sadie, Clifton, and Vardell. Alice, Howard, and Vardell thereafter resided on the property (Brown estate). As early as 1950, Howard and Vardell maintained a soil road leading to Hoffman Road, a public roadway. Foster Williams (Williams), a neighbor, harvested timber from the Brown Estate for Alice and used the soil road to remove the timber. Williams observed Howard and Vardell maintain the soil road on numerous occasions using a John Deere tractor. Howard and Vardell built terraces across the soil road to keep the water from running down the middle of the road. Howard also used a bush hog and trimmed limbs to maintain the soil road. Williams also performed maintenance on the southern fork of the soil road. In addition to the Browns and Williamses, surrounding neighbors,

Arthur Thomas's family, Worth Brown's family, and, in the 1970's, Dr. Charles Hartsell, Jr.'s family, used the soil road to access Hoffman Road.

In 1972, Vardell died in an accident at the Firefox golf course. Thereafter, Alice and Howard lived on the Brown estate. On 13 July 1989, Howard conveyed to Thomas S. Deans (Deans) and Yvonne G. Deans (collectively, plaintiffs) approximately 69.24 acres of land which was adjacent to the Brown estate. Deans was Mary's son and Howard's nephew. No structures or improvements were on the property. In 1993, Mary died and devised her interest in the Brown estate to plaintiffs.

In 1998, Peter Mace (Mace) and Robert Edwards (Edwards) purchased approximately 1,500 acres of land and developed Grande Pines Subdivision. The soil road traversed several lots in the subdivision. Because Howard traveled over portions of these lots to access Hoffman Road, Mace obtained a Deed of Release from Howard in which he acknowledged that his use of the soil road prior to 11 August 1999 had been intermittent and permissive, and released all of his rights in the soil road. Subsequently, the soil road was blocked by the installation of a gate, plowed soil, and felled trees. On 5 December 2000, Deans and Williams filed a lawsuit against Mace and Edwards asserting the existence of a prescriptive easement in the soil road across lots in the Grande Pines Subdivision.

Howard died on 2 January 2001 and devised his interest in the Brown estate to Deans. Deans subsequently acquired the remaining interests in the Brown estate from his cousins.[1] In September 2002, the 2000 lawsuit went to mediation and the parties agreed to a settlement. A document entitled Easement Requirements was signed by Deans, Williams, Mace, and Edwards and stated that a prescriptive easement was to be defined by a survey of the existing roadway. On 25 September 2002, Deans and Williams voluntarily dismissed the first lawsuit against Mace and Edwards. In October 2003, Mace executed restrictive covenants for the Grande Pines Subdivision and noted that the equestrian easements were "subject to the right[s] of third parties for ingress, regress and egress as a result of the settlement of a claim of prescriptive rights to the use of an existing soil road."[2]

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1. Deans owned 11/12 of the Brown Estate. Fred McInnis, Sadie's child, owned 1/12. Deans petitioned to partition the property. The record does not indicate the disposition of that petition.

2. It does not appear from the record that Deans and Williams ever sought to enforce the settlement agreement against Mace or Edwards.

On 12 December 2006, Mace's attorney sent Deans a letter requesting that he voluntarily cease traveling from his property through Grande Pines Subdivision to Hoffman Road. On 2 January 2009, plaintiffs filed a complaint against the owners of the tracts of land in Grand Pines Subdivision which the soil road crossed and alleged that they had established a prescriptive easement to use the soil road for ingress and egress. Ronald and Barbara Wall, Linda Mansfield, Scott and Sonja Brewton, Marc Massaux, MNM Land, LLC, and Hayek Farms, LLC filed answers and denied the material allegations of plaintiffs' complaint. Thereafter, the Walls, Mansfield, and the Brewtons filed motions for summary judgment. James and Elizabeth Jones, Peter and Joanne Mace, Grande Pines, LLC, and Grande Pines HOA, Inc. also filed motions for summary judgment.

On 23 September 2009, the trial court granted defendants' motions for summary judgment. On 2 October 2009, plaintiffs filed a motion to alter or amend judgment. On 30 November 2009, plaintiffs filed a motion for summary judgment against the non-defaulted defendants who had not previously moved for summary judgment. On 16 December 2009, the trial court denied plaintiffs' motion to alter or amend the 23 September 2009 order. On 4 January 2010, the trial court entered an order granting summary judgment to certain non-moving defendants, *i.e.* MNM Land, LLC, Marc Massoux, and Hayek Farms, LLC. In this order, the trial court noted that default had been previously entered against the following defendants: Johnny DiPiazza, Jonathan C. Hescock, Patricia N. Hescock, Dirk Andrew Yow, and Mary Elizabeth Yow.[3]

Plaintiffs appeal.

II. Prescriptive Easement

In their first argument, plaintiffs argue that the trial court erred by entering summary judgment in favor of defendants. We agree.

A. 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

3. Plaintiffs' amended complaint also listed M. Davidson Builders, Inc. as a party defendant. However, the record is devoid of any order disposing of plaintiff's claims against this party.

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). "All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citation omitted).

B. Analysis

> In order to prevail in an action to establish an easement by prescription, a plaintiff must prove the following elements by the greater weight of the evidence: (1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period.

Potts v. Burnette, 301 N.C. 663, 666, 273 S.E.2d 285, 287-88 (1981) (citation omitted). An easement by prescription is not favored in the law, and "it [is] the better-reasoned view to place the burden of proving every essential element . . . on the party who is claiming against the interests of the true owner." *Id.* at 667, 273 S.E.2d at 288. Thus, we discuss each element in turn.

i. Adverse Use

In North Carolina, "[t]he law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears." *Dickinson v. Pake*, 284 N.C. 576, 580, 201 S.E.2d 897, 900 (1974) (citations omitted). "A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription." *Id.* at 581, 201 S.E.2d at 900 (citation omitted). To establish a hostile use of another's land, it does not require a heated controversy or a manifestation of ill will; rather, a hostile use is a use of "such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right." *Id.* at 580-81, 201 S.E.2d at 900 (quotation omitted).

In *Dickinson v. Pake*, our Supreme Court held that the following evidence was sufficient to rebut the presumption that the use of a roadway was permissive and create an issue of fact for the jury to consider: the roadway had been used by the plaintiffs and other mem-

bers of the public to reach the plaintiffs' property; the plaintiffs had performed the maintenance necessary to keep the road passable; permission to use the road had neither been sought nor given; and the plaintiffs testified they considered the road to be their own and had always had the right to use it. 284 N.C. at 582-84, 201 S.E.2d at 901-02; *see also Potts*, 301 N.C. at 668, 273 S.E.2d at 289; *Cannon v. Day*, 165 N.C. App. 302, 308, 598 S.E.2d 207, 212, *disc. review denied*, 359 N.C. 67, 604 S.E.2d 309 (2004). Although we note that in *Dickinson* our Supreme Court was reviewing a denial of a motion for directed verdict rather than a motion for summary judgment, the threshold question before the trial court at either stage of the litigation was whether there was sufficient evidence to rebut the presumption that the use of the roadway was permissive and carry the issue to the jury. Thus, the reasoning in *Dickinson* is applicable to the instant case.

At the outset, we note that plaintiffs base a portion of their argument that the use of the soil road was adverse upon Howard Brown's conduct from 1950 through 1972. Plaintiffs are estopped from using Howard's conduct as the basis of their claim of adverse use because of the deed of release executed by Howard in which he acknowledged that his use of the soil road prior to 11 August 1999 had been intermittent and permissive, and released all of his rights in the soil road. However, from 1950 to 1972, Alice and Vardell also lived on the Brown estate. The affidavit of Foster Williams stated that he observed Vardell maintain the soil road. While Williams's affidavit focuses mainly on Howard's conduct, he also stated that he observed Vardell "doing the same sort of road maintenance work that [he] recall[ed] seeing his brother, Howard, do until Vardell's death in 1972." This included the use of a John Deere tractor to maintain the road, and building terraces across the soil road to keep the water from running down the middle of the road. Williams also averred that Vardell drove Howard and himself to work at the Firefox golf course and used the soil road to access Hoffman Road. In addition, surrounding neighbors used the soil road to access Hoffman Road. Williams never knew any member of the Brown family to seek permission to use the soil road. "They always acted like they were certain that they had a right to use it and needed no one's permission to do so." No one ever attempted to close the soil road, even though it was "well maintained and in current use."

Although the evidence in this case is not as compelling as the evidence of adverse use in *Dickinson*, we hold that plaintiffs presented sufficient evidence to create a genuine issue of material

fact as to whether they could rebut the presumption of permissive use at trial.

ii. Open and Notorious Use

"The term adverse user or possession implies a user or possession that is not only under a claim of right, but that it is open and of such character that the true owner may have notice of the claim[.]" *Snowden v. Bell*, 159 N.C. 497, 500, 75 S.E. 721, 722 (1912). Plaintiffs presented evidence that Vardell openly maintained and used the soil road while he resided on the Brown Estate. Vardell's conduct was such that it would have placed the true owner on notice of his claim. *See Johnson v. Stanley*, 96 N.C. App. 72, 75, 384 S.E.2d 577, 579 (1989) ("Notice of a claim of right may be given in a number of ways, including . . . by open and visible acts such as repairing or maintaining the way over another's land." (citations omitted)).

iii. Continuous Use for Over Twenty Years

To establish a prescriptive easement, the adverse, open, and notorious use must have been continuous and uninterrupted for a period of at least twenty years. *Dickinson*, 284 N.C. at 581, 201 S.E.2d at 900. Williams averred that he observed Vardell maintain and use the soil road for twenty-two years from 1950 until his death in 1972.

iv. Substantial Identity

"To establish a private way by prescription, the user for twenty years must be confined to a definite and specific line. While there may be slight deviations in the line of travel there must be a substantial identity of the thing enjoyed." *Speight v. Anderson*, 226 N.C. 492, 496, 39 S.E.2d 371, 374 (1946) (citation omitted). In the instant case, there was no dispute as to the identity of the soil road. Plaintiffs submitted aerial photographs from 1939, 1955, 1966, and 1993, which show that the soil road remained in a fixed location for more than twenty years. Further, the 2002 settlement stated that a fourteen-foot-wide easement would be defined by a survey of the "existing roadway."

In the light most favorable to plaintiffs, the evidence presented was sufficient to establish that a genuine issue of material fact existed as to each element for the establishment of a prescriptive easement based upon Vardell's conduct from 1950 until 1972.

v. "Tacking"

Defendants argue that plaintiffs have not provided any evidence that they are entitled to "tack" any use of the soil road by Vardell

based upon the lack of continuity of possession or privity between Vardell and plaintiffs. We disagree.

"Tacking is the legal principle whereby successive adverse users in privity with prior adverse users can tack successive adverse possessions of land so as to aggregate the prescriptive period of twenty years." *Dickinson*, 284 N.C. at 585, 201 S.E.2d at 903 (citation omitted). However, if the adverse use of a roadway ripens into a prescriptive easement, the applicable legal principle is not tacking, but succession. *Id.* Where the "predecessors in interest acquired an easement by prescription; and . . . the easement was incidental to the use of what is now plaintiffs' property, it is an appurtenant easement that passe[s] by succession . . . ." *Oshita v. Hill*, 65 N.C. App. 326, 330, 308 S.E.2d 923, 926 (1983) (citation omitted); *see also Dickinson*, 284 N.C. at 586, 201 S.E.2d at 903 (stating that because an appurtenant easement "is incidental to the possession of the dominant tenement, every succeeding possessor is entitled to the benefit of it while it continues to exist as such an easement and he remains in possession.").

While the evidence before the trial court revealed that Howard signed the deed of release as discussed *supra*, Howard only owned a quarter interest in the Brown Estate in 1999.[4] Deans also owned a quarter interest in the Brown estate, which was conveyed to him upon his mother's death in 1993. Once a prescriptive easement was established, it attached to the Brown estate and "follow[ed] it into whosesoever hands it may come." *Dickinson*, 284 N.C. at 585-86, 201 S.E.2d at 903 (quotation omitted). Thus, Deans would be entitled to the benefits of any prescriptive easement as a successor in interest.

vi. Abandonment

Defendants make an oblique reference to the affirmative defense of abandonment in their brief. We note that the burden of proof to establish abandonment is on defendants. *Skvarla v. Park*, 62 N.C. App. 482, 486, 303 S.E.2d 354, 357 (1983). Further, the issue of abandonment is largely a matter of intention and is a question for a jury to determine. *Miller v. Teer*, 220 N.C. 605, 613, 18 S.E.2d 173, 178 (1942).

III. Conclusion

The trial court's 23 September 2009 order granting summary judgment in favor of the moving defendants is reversed. We must also

4. The record does not disclose how Howard acquired a quarter interest in the Brown estate nor does it disclose how Vardell's interest in the property was descended upon his death.

reverse the 4 January 2010 order granting summary judgment in favor of the non-moving defendants pursuant to Rule 56(c) of the Rules of Civil Procedure.

REVERSED.

Judges BRYANT and ERVIN concur.

BENJAMIN FRANK CATHEY, Plaintiff v. ANN LEO CATHEY, Defendant

No. COA10-762

(Filed 1 March 2011)

Divorce— alimony—obligation terminated—modification not allowed

The trial court erred in a domestic action by awarding defendant alimony after plaintiff's alimony obligation had been previously terminated. Under previous North Carolina alimony statutes, the right to modify a lump sum alimony award that was ordered to be paid over a fixed term was limited to the time period during which the alimony was actually ordered.

Appeal by plaintiff from order entered 1 March 2010 by Judge Laura A. Devan in Cumberland County District Court. Heard in the Court of Appeals 15 December 2010.

Lewis, Deese & Nance, LLP, by Renny W. Deese, for plaintiff-appellant.

Hedahl & Radtke, by Joan E. Hedahl, for defendant-appellee.

CALABRIA, Judge.

Benjamin Frank Cathey ("plaintiff") appeals from the trial court's order which required him to pay $300.00 per month in alimony to Ann Leo Cathey ("defendant"). We reverse.

Plaintiff and defendant were married to each other on 2 September 1961. They remained married for thirty years until they separated on 2 September 1991. Plaintiff and defendant were subsequently divorced on 30 October 1992.

On 30 August 1994, the Cumberland County District Court entered an equitable distribution order. The trial court ordered an unequal distribution. Defendant received, *inter alia*, twenty-five percent of plaintiff's military retirement. The trial court anticipated that defendant's share of plaintiff's retirement would be approximately $500.00 per month. On 21 November 1994, the trial court ordered plaintiff to pay defendant permanent alimony in the amount of $500.00 per month for a period of forty-two months. The trial court's order indicated that after these forty-two months of payments, plaintiff's permanent alimony obligation would terminate.

At the time of the equitable distribution judgment, plaintiff had a disability rating of 7%. In subsequent years, this rating continued to increase so that by 1 February 2005, the Department of Veterans Affairs had increased plaintiff's disability rating to 100%. As plaintiff's disability rating increased, plaintiff received an increase in the amount of his disability payments and a corresponding reduction in the amount of his retirement payments. Consequently, defendant's share of plaintiff's decreased retirement pay was gradually reduced to $125.50 per month.

On 16 September 2008, defendant filed a motion in the cause to either modify the equitable distribution order or modify the alimony order, due to the change in the parties' respective financial situations. After a hearing on defendant's motion, the trial court entered an order on 1 March 2010 that denied defendant's motion to modify the equitable distribution, but granted defendant's motion to modify alimony. The trial court awarded defendant permanent alimony of $300.00 per month beginning 1 September 2010. The new alimony award would terminate upon the death of either party or upon the remarriage of or cohabitation by defendant. Plaintiff appeals.

Plaintiff's sole argument on appeal is that the trial court erred by awarding defendant alimony after plaintiff's alimony obligations had been previously terminated. We agree.

The dispute in the instant case revolves entirely around the appropriate interpretation of the previous version of the alimony statutes, which was in effect at the time the original alimony order was entered on 21 November 1994.[1] "Questions of statutory interpre-

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1. After the alimony award was entered, the General Assembly amended the statutes which governed alimony actions and made the amendments effective to actions filed on or after 1 October 2005. *See* 1995 N.C. Sess. Laws 319. Since the alimony action in the instant case was initiated prior to 1 October 2005, we limit the scope and application of our analysis to the previous alimony statutes.

tation are ultimately questions of law for the courts and are reviewed de novo." *In re Summons Issued to Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (internal quotations and citations omitted).

When the original alimony award was entered, N.C. Gen. Stat. § 50-16.1 defined alimony as "payment for the support and maintenance of a spouse, either in lump sum or on a continuing basis, ordered in an action for divorce, whether absolute or from bed and board, or an action for alimony without divorce." N.C. Gen. Stat. § 50-16.1 (1994). This definition did not expressly allow a trial court to award a specified amount of alimony that would be paid over a fixed period of time.[2] Nonetheless, our Courts still permitted a trial court to "award lump sum alimony for a specified period only." *Whitesell v. Whitesell*, 59 N.C. App. 552, 553, 297 S.E.2d 172, 173 (1982). Under this construction of the previous alimony statutes, "an award of alimony for a specified period only . . . [wa]s 'indubitably alimony in gross or "lump sum alimony." ' " *Id.* at 552, 297 S.E.2d at 173 (quoting *Mitchell v. Mitchell*, 270 N.C. 253, 257, 154 S.E.2d 71, 74 (1967)) (brackets omitted).

Modification of alimony under the previous alimony statutes was governed by N.C. Gen. Stat. § 50-16.9, which stated, in relevant part: "An order of a court of this State for alimony or alimony pendente lite, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." N.C. Gen. Stat. § 50-16.9 (1994). Under this statute, an award of lump sum alimony for a specified period was subject to modification and termination prior to its payment in full, if the modification or termination occurred prior to the vesting of the last payment. *Potts v. Tutterow*, 114 N.C. App. 360, 365, 442 S.E.2d 90, 93 (1994), *aff'd per curiam*, 340 N.C. 97, 455 S.E.2d 156 (1995).

However, the motion to modify alimony in the instant case was not filed until several years *after* the lump sum alimony award ordered by the trial court had been paid in full. Our Courts have never directly addressed the question of whether, under the previous alimony statutes, modification of a lump sum award would be permissible under these circumstances. Nevertheless, the language of the previous alimony statutes and the holdings of our Courts inter-

2. N.C. Gen. Stat. § 50-16.3A (2009) now permits a trial court to award alimony "for a specified or for an indefinite term."

preting these statutes provide guidance on this issue and suggest that a dependent spouse whose alimony had either never existed or ceased to exist should no longer be entitled to alimony.

Under N.C. Gen. Stat. § 50-11 (1994), it was beyond the power of a trial court to enter an order awarding alimony after a judgment of absolute divorce, unless an alimony action was pending at the time of the absolute divorce judgment. *Mitchell v. Mitchell*, 270 N.C. 253, 258, 154 S.E.2d 71, 75 (1967); *Gilbert v. Gilbert*, 111 N.C. App. 233, 431 S.E.2d 805 (1993); *see also Baugh v. Baugh*, 44 N.C. App. 50, 52, 260 S.E.2d 161, 162 (1979) ("Although an order granting alimony may be modified, when a party has secured an absolute divorce, it is beyond the power of the court thereafter to enter a new order for alimony."). This was true even if the financial circumstances of the dependent spouse deteriorated significantly after the absolute divorce judgment.

In addition, our Supreme Court has held that the trial court's authority to modify an alimony award under N.C. Gen. Stat. § 50-16.9 upon a showing of changed circumstances includes the power to terminate alimony "absolutely." *Sayland v. Sayland*, 267 N.C. 378, 383, 148 S.E.2d 218, 222 (1966). An alimony award which is terminated absolutely must necessarily be terminated permanently and without restriction, as the word "absolute" is defined as "[f]ree from restriction, qualification, or condition" or "conclusive and not liable to revision." Black's Law Dictionary, 7 (9th ed. 2009). The trial court's power to terminate alimony absolutely would not be "absolute" if it were permitted, upon an appropriate showing of changed circumstances by the dependent spouse, to simply reinstate alimony months or years after termination. Moreover, there is no mechanism in the previous alimony statutes which would have allowed alimony to be reinstated after termination under any circumstances. Ultimately, reinstatement of previously terminated alimony would be the equivalent of ordering a new alimony award, which is impermissible under N.C. Gen. Stat. § 50-11 (1994).

Finally, under N.C. Gen. Stat. § 50-16.9(b) (1994), "[i]f a dependent spouse who is receiving alimony under a judgment or order of a court of this State shall remarry, said alimony shall terminate." There is nothing in this statute to suggest that a dependent spouse who remarries could later reinstate an alimony award under any circumstances. Consequently, under N.C. Gen. Stat. § 50-16.9(b), the remarriage of a dependent spouse permanently terminated alimony as a matter of law, and any change in the dependent spouse's financial circum-

stances after remarriage could not be used as a basis to reinstate the previous alimony award.

Defendant's situation does not differ substantially from that of a dependent spouse who was either not awarded alimony prior to the entry of an absolute divorce judgment or whose alimony was permanently terminated either by the trial court or by operation of law. As shown above, the prior alimony statutes provided no additional right to alimony or other protection for the dependent spouse whose alimony either never existed or ceased to exist, even if they were to later suffer an unexpected change of financial circumstances. While defendant's plight is unfortunate and sympathetic, she is still similarly situated to these other types of dependent spouses. As a result, there is nothing in the previous alimony statutes which would provide her with the right to be awarded additional alimony in the instant case.

Furthermore, "[t]he courts and the public are interested in the finality of litigation." *Hicks v. Koutro*, 249 N.C. 61, 64, 105 S.E.2d 196, 199 (1958). As the Vermont Supreme Court has noted, when faced with a question similar to that presented in the instant case,

> " '[t]here is no area of law requiring more finality and stability than family law...' " *Hilaire v. DeBlois*, 168 Vt. 445, 448, 721 A.2d 133, 136 (1998) (quoting *Hackley v. Hackley*, 426 Mich. 582, 395 N.W.2d 906, 914 (Mich. 1986)). Once a divorce decree is final and the maintenance order has expired, neither the parties nor the court should be burdened by the inevitable uncertainty that would flow from a perpetually unresolved maintenance award.

Arbuckle v. Ciccotelli, 857 A.2d 324, 327 (Vt. 2004). In light of our interest in finality, the principles established by the previous alimony statutes, and the cases where our Courts have interpreted these statutes, we hold that, under our previous alimony statutes, the right to modify a lump sum alimony award that was ordered to be paid over a fixed term is limited to the time period during which the alimony is actually ordered. Modification, pursuant to N.C. Gen. Stat. § 50-16.9 (1994), can occur "at any time" before the award has been vested and satisfied. *Potts*, 114 N.C. App. at 365, 442 S.E.2d at 93. However, after the supporting spouse fulfills their obligation as ordered by the trial court, the original alimony award ceases to exist, and there is no longer an alimony award for the trial court to later modify.

In the instant case, defendant was originally awarded "the sum of $500.00 . . . for a period of forty-two months, at which time permanent

alimony will terminate." This award was subject to modification at any time prior to the vesting of the last payment due. However, after plaintiff paid the full amount ordered by the trial court, the alimony award was terminated by the express language of the trial court's order and thus ceased to exist. The trial court's "modification" of this non-existent award instead created a new award, which is forbidden by N.C. Gen. Stat. § 50-11 (1994). Thus, the trial court's order attempting to modify defendant's previously terminated alimony award was invalid.

In reaching this determination, we join the many other jurisdictions which have also considered the issue of whether a fixed term alimony award is subject to modification after it has been satisfied in full and concluded that it is not. *See*, *e.g.*, *Banks v. Banks*, 336 So. 2d 1365 (Ala. Civ. App. 1976); *Mercer v. Mercer*, 641 P.2d 1003 (Idaho 1982); *Eckert v. Eckert*, 216 N.W.2d 837 (Minn. 1974); *Welke v. Welke*, 288 N.W.2d 41 (Neb. 1980); *Bellefeuille v. Bellefeuille*, 636 N.W.2d 195 (N.D. 2001); *Park v. Park*, 602 P.2d 1123 (Or. Ct. App. 1979); *Waddey v. Waddey*, 6 S.W.3d 230 (Tenn. 1999); *Arbuckle*, 857 A.2d 324; *Brown v. Brown*, 507 P.2d 157 (Wash. Ct. App. 1973); *Harshfield v. Harshfield*, 842 P.2d 535 (Wyo. 1992). As a result of our holding, the trial court's order requiring plaintiff to pay defendant $300.00 per month in alimony payments must be reversed.

Reversed.

Judges HUNTER, Robert C. and ELMORE concur.

HERBERT M. BELL, EMPLOYEE, PLAINTIFF v. HYPE MANUFACTURING, LLC, EMPLOYER, AND AMERICAN ZURICH INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA10-952

(Filed 1 March 2011)

Workers' Compensation— insurance policy—termination valid —nonpayment of premium

The Industrial Commission did not err in finding and concluding that defendant insurance carrier's preterm cancellation of defendant employer's workers' compensation coverage was

valid and effective. A workers' compensation insurance policy may be cancelled by the insurer before the expiation of the term for nonpayment of the premium and defendant employer failed to pay its quarterly premium.

Appeal by Defendant-employer from opinion and award filed 2 June 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 February 2011.

No brief for Plaintiff-employee.

Leicht & Associates, by Gene Thomas Leicht and Lynn A. Key, for Defendant-employer.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Kelli A. Burns and M. Duane Jones, for Defendant-carrier.

STEPHENS, Judge.

On 17 April 2008, Plaintiff-employee Herbert M. Bell filed a claim for workers' compensation benefits, alleging a compensable injury sustained in the course of his employment with Defendant-employer Hype Manufacturing, LLC, on 28 September 2006. On 9 July 2008, Defendant-carrier American Zurich Insurance Company denied coverage for the claim, asserting a lapse in Hype's coverage. On 2 September 2008, Hype moved to join American Zurich as a necessary and proper party. By order filed 4 September 2008, the deputy commissioner allowed the motion. Hype and Bell reached a settlement of all claims between them on 26 March 2009.

On 29 July 2009, a hearing was held before the deputy commissioner on issues including whether Hype had insurance through American Zurich on the date of Bell's injury and whether American Zurich was obligated to indemnify Hype for its settlement agreement with Bell. In an opinion and award issued 1 December 2009, the deputy commissioner denied Hype's claim for reimbursement after finding that American Zurich had cancelled its workers' compensation policy with Hype such that the policy was not in effect when Bell was injured. Hype appealed to the Full Commission. After reviewing the case on 8 April 2010, the Full Commission entered an opinion and award on 2 June 2010 affirming the decision of the deputy commissioner with minor modifications. From this opinion and award, Hype appeals. Bell is not a party to this appeal. As discussed below, we affirm.

Hype, a California corporation, expanded its operations in 2006 by opening two facilities in North Carolina in association with its operation of a NASCAR race team. In May 2006, Hype secured a workers' compensation insurance policy with American Zurich with a policy period of 17 May 2006 to 17 May 2007. Hype was required to submit a premium deposit of $13,581.00 when it submitted its application. The policy covered Hype's facilities in Statesville and Murphy.

On 21 July 2006, American Zurich mailed a premium bill to Hype at its California headquarters stating that a quarterly premium installment of $4,526.00 was due by 17 August 2006. This amount represented one-third of the balance of the policy's cost after payment of the premium deposit. On 28 July 2006, American Zurich mailed Hype a request for various financial documents. In response, Hype's insurance agent responded by email to Susie Smith, American Zurich's account manager underwriter, stating that Hype did not have the requested documents. In addition, Hype's agent advised Smith that Hype's Statesville location would be closed effective 1 August 2006 and requested a premium adjustment. On 21 August 2006, Smith entered premium adjustment changes into American Zurich's computer system as requested. The result was a reduction of Hype's total estimated premium, effective 14 August 2006. Hype did not make an installment payment on or before 17 August 2006.

On 23 August 2006, Smith issued a request to American Zurich's underwriting department to initiate a cancellation of Hype's workers' compensation coverage. As a result, on 24 August 2006, American Zurich sent Hype a notice of cancellation, effective 11 September 2006. The stated reason for cancellation was nonpayment of the premium due 17 August 2006, along with a past due premium notice in the amount of $4,526.00. Hype received this mailing on 25 August 2006, and, on 28 September 2006, Hype's accounting department processed and paid the past due amount of $4,526.00 which American Zurich received and deposited. American Zurich then reinstated Hype's coverage with a policy effective date of 29 September 2006. Bell, who worked as a machinist for Hype, sustained an injury by accident to his back when he fell while descending a ladder on 28 September 2006. American Zurich contends, and the Full Commission concluded, that a lapse in Hype's coverage existed from 11 through 28 September 2006.

On appeal, Hype brings forward two issues: whether the Commission erred in finding and concluding that American Zurich's

attempted pre-term cancellation of its workers' compensation coverage was valid and effective, and whether American Zurich is bound by the good faith settlement entered into by Hype and Bell.

Standard of Review

It is well-established that

> [t]he Workers' Compensation Act provides that the Industrial Commission is the sole judge of the credibility of the witnesses and the weight of the evidence. N.C.G.S. § 97-84,-85, -86 (2005); *Adams v. AVX Corp.*, 349 N.C. 676, 680-81, 509 S.E.2d 411, 413 (1998) (citing *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). We have repeatedly held 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." *E.g. Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965) (per curiam). Further, "[t]he evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (citation omitted); *accord Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 553 (2000). 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)).

Davis v. Harrah's Cherokee Casino, 362 N.C. 133, 137-38, 655 S.E.2d 392, 394-95 (2008). We review alleged errors of law by the Full Commission *de novo*. *Hawley v. Wayne Dale Constr.*, 146 N.C. App. 423, 427, 552 S.E.2d 269, 272 (2001).

Analysis

Hype first argues that the Commission erred in finding and concluding that American Zurich's attempted pre-term cancellation of its workers' compensation coverage was valid and effective. We disagree.

Cancellation of a workers' compensation policy is governed by N.C. Gen. Stat. § 58-36-105, which provides in pertinent part:

(a) No policy of workers' compensation insurance or employers' liability insurance written in connection with a policy of workers' compensation insurance shall be cancelled by the insurer before the expiration of the term or anniversary date stated in the policy and without the prior written consent of the insured, except for any one of the following reasons:

(1) Nonpayment of premium in accordance with the policy terms.

N.C. Gen. Stat. § 58-36-105 (2010). In addition, American Zurich's policy issued to Hype specified that it could not be cancelled without Hype's prior written consent except for various reasons, one of which was "[n]onpayment of premium in accordance with the policy terms."

In its brief, Hype contends that the Commission erred in making findings of fact 7, 9, 12 and 13, which state:

7. The terms of the Hype Manufacturing workers' compensation policy called for an initial 50% deposit of $13,583.00[1] with three future installments of $4,526.00 to be paid quarterly.

. . .

9. The three quarterly installment premium payments of $4,526.00 were to be due on August 17, 2006, November 17, 2006, and February 17, 2007, per agreement of the parties.

. . .

12. Hype Manufacturing's request for a premium reduction was processed on August 21, 2006 and the premium was reduced by $2,193.00[2] effective August 14, 2006. A copy of the amendment to the policy was mailed to Hype Manufacturing on August 21, 2006. The language in the statement Hype Manufacturing received stated that the premium adjustments would be reflected on the next billing cycle, which was November 17, 2006.

13. Pursuant to the policy, Hype Manufacturing was required to pay all premiums when due. Hype Manufacturing did not pay the $4,526.00 quarterly premium due on August 17, 2006, or any portion of it, by the due date.

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1. The record indicates that the policy actually called for an initial 50% deposit of $13,581.00, rather than $13,583.00.

2. Our review of the record, including the parties' stipulated exhibits, indicates that the premium was reduced by $7,193.00 rather than the $2,193.00 amount quoted in the opinion and award.

Specifically, Hype asserts that the "Premium Due Date Endorsement" is ambiguous about when premium payments are due and that the premium adjustment it requested and received absolved it of making an installment payment in some amount due 17 August 2006. However, upon careful review of the record and Hype's brief, it appears that Hype is not, with a small exception, asserting that these findings are not supported by competent evidence in the record. Instead, Hype appears to be rearguing its case to this Court and asking that we re-weigh the evidence in order to reach a different conclusion than the Full Commission. As noted above, this is not our task.

Hype acknowledges that the North Carolina Rate Bureau's deposit premium table, which specifies billing methods and practices, mandates a minimum of 50% as a premium deposit and three additional equal payments to be made quarterly for policies with estimated annual premiums in excess of $10,000.00 such as Hype's policy here. Hype made a premium deposit of 50% of the estimated annual premium, and then received a 21 July 2006 notice for an installment payment of $4,526.00 due 17 August 2006. This bill included a statement that, if Hype disputed the amount due, it must send written documentation of the dispute to American Zurich by the payment due date and also pay the undisputed portion of the installment by the due date. American Zurich processed the request by Hype on 21 August 2006, reducing the premium by $7,193.00, and made the change effective as of 14 August 2006. Thus, although Hype requested a premium reduction on 14 August 2006, it did not make any part of the installment payment by the due date, 17 August 2006. Because Hype had closed one facility but increased payroll at the remaining location, no final determination of the new premium amount was made until after the 17 August 2006 installment due date. In any event, the new total annual premium was $19,968.00 and Hype had paid only $13,581.00 in its initial deposit. Thus, even after the adjustment, under the terms of the Rate Bureau's table, Hype would have owed three quarterly installments of at least $2,129.00, a sum which had not been and could not have been determined as of 17 August 2006 when the premium installment came due.

Hype does argue that the Commission erred in finding 12 when it stated that Hype's premium was reduced by $2,193.00, when the evidence shows the reduction was $7,193.00. However, we believe this to be a mere clerical error, with the Commission typing a "2" in place of the correct "7." Even if this portion of finding 12 were actual error, it would not alter the Commission's conclusions of law. Regardless of

the amount of reduction, Hype still owed an outstanding balance as of 17 August 2006 and by the terms of the Rate Bureau table, it owed an installment payment of one-third of that amount. Yet it paid nothing by the due date. Thus, American Zurich's pre-term cancellation of Hype's workers' compensation coverage was both valid and effective.

Competent evidence in the record supports these findings, which, in turn, support the Commission's conclusions of law. Further, because Hype's second argument, that American Zurich is bound by the good faith settlement entered into by Hype and Bell, is premised on its first, we need not address it. Accordingly, the Commission's opinion and award is affirmed.

AFFIRMED.

Judges GEER and McCULLOUGH concur.

UNIVERSAL INSURANCE COMPANY, Plaintiff v. JOHN EDWARD PATTERSON and TWANA DENISE PATTERSON, Defendants, DIANCA PAULING and mother, PERNELL BODDIE, Intervenor-Defendants

No. COA10-896

(Filed 1 March 2011)

Insurance— auto—cancellation—effective date—receipt by insurance company

Defendants' insurance contract was in full force on 25 March 2008, the day of a car accident, where the request for cancellation by the company that financed the premiums stated an effective date of 24 March 2008 but the cancellation was not received by the insurance company until 28 March. Under N.C.G.S. § 58-35-85(3), an insurance policy is cancelled on the date the insurer receives the request for cancellation.

Appeal by plaintiff from order entered 19 April 2010 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 January 2011.

Burton & Sue, LLP, by Gary K. Sue and Stephanie W. Anderson, for plaintiff.

The Odom Firm, PLLC, by David W. Murray, for intervenor-defendants.

THIGPEN, Judge.

Defendants John Edward Patterson and Twana Denise Patterson were insured under an automobile insurance policy issued by Plaintiff Universal Insurance Company ("Universal") and financed by Budget Premium Service Co., Inc. ("Budget"). When the Pattersons failed to pay their scheduled premium payment to Budget, Budget notified John Patterson and Universal that the policy would be cancelled on 24 March 2008 for nonpayment. On 25 March 2008, Twana Patterson was involved in an automobile accident. On 28 March 2008, Universal received Budget's request for cancellation and cancelled the Pattersons' policy effective 24 March 2008, the date requested by Budget. We must decide whether the trial court erred when it granted summary judgment for the Intervenor-Defendants finding the insurance policy was in effect on the date of the accident.

North Carolina General Statutes section 58-35-85(3) (2009) provides that "[u]pon receipt of a copy of the request for cancellation notice by the insurer, the insurance contract shall be cancelled[.]" Because Universal did not receive the request for cancellation until 28 March 2008, we affirm.

Universal insured the Pattersons pursuant to Personal Auto Policy # NCA3518425 with effective dates of 12/15/07 to 6/15/08. The Pattersons financed their policy through Budget pursuant to a premium finance agreement with a power of attorney. The Pattersons' auto policy contained the following relevant language regarding cancellation:

> TERMINATION—CANCELLATION, NONRENEWAL, AUTOMATIC TERMINATION, OTHER TERMINATION PROVISIONS:
>
> . . .
>
> 4. We will cancel the Liability, Medical Payments . . . only for the following reasons:
>
> . . .

d. The cancellation of this policy pursuant to a power of attorney given to a company licensed pursuant to the provisions of G.S.58-35-5.

On 7 March 2008, because the Pattersons failed to pay their scheduled premium payment to Budget, Budget mailed a Ten Day Notice of Intent to Cancel ("Notice") to John Patterson and Universal. The Notice stated in relevant part: "Your insurance policy/policies will be cancelled effective 3/24/2008 at 12:01 A.M. unless this payment is received in our office no later than 03/21/2008."

After the Pattersons still had not made their premium payment, on 24 March 2008, Budget sent a Request of Cancellation to John Patterson and Universal. The Request of Cancellation requested the policy be canceled as of 24 March 2008. Universal received the Request of Cancellation on 28 March 2008, and it was stamped by Helen Lucas, a mail clerk at Universal, as received on "Mar 28 2008[.]" In response to Budget's Request of Cancellation, Universal cancelled the Pattersons' Auto Policy effective 24 March 2008 at 12:01 A.M., and sent a Notice of Cancellation dated 28 March 2008 to John Patterson.

On 25 March 2008, at approximately 7:40 p.m., Twana Patterson was driving a 2003 Ford Escape and was involved in a motor vehicle accident. Intervenor-Defendant Diana Pauling was a passenger in another vehicle who was also involved in the accident.

On 28 March 2008, John Patterson went to his insurance agent's office, paid the outstanding premium payments owed to Budget, and signed a Statement of No Losses. Universal thereafter reinstated the Pattersons' Auto Policy.

On 29 September 2009, Universal filed a complaint for declaratory judgment against the Pattersons, asking the court to find that Universal was not obligated to provide the Pattersons with liability coverage arising from the 25 March 2008 accident. On 16 October 2009, the Intervenor-Defendants, Ms. Pauling and her mother, Pernell Boddie, filed a motion to intervene, which was granted on 9 November 2009. On 17 February 2010, Ms. Pauling and Ms. Boddie filed a motion for summary judgment, asking the court to find that Universal provided liability insurance coverage to the Pattersons arising from the 25 March 2008 accident.

After a hearing before Judge Bridges on 19 April 2010, the court filed an order granting summary judgment for Ms. Pauling and Ms. Boddie. The court held that "[t]he liability insurance policy from

Universal covering Defendant John Patterson and the vehicle being operated by his wife, Defendant Twana Patterson, was in full force and effect on the date of the wreck, March 25, 2008, to and until March 28, 2008, as a matter of law."

Universal now appeals from the 19 April 2010 order, arguing the trial court erred by granting Ms. Pauling and Ms. Boddie's motion for summary judgment. We disagree.

Our standard of review for a trial court's order allowing summary judgment is *de novo*. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). "Summary judgment is appropriate when 'there is no genuine issue as to any material fact' and 'any party is entitled to a judgment as a matter of law.' " *Id.* (quoting N.C.G.S. § 1A-1, Rule 56(c) (2005)).

North Carolina General Statutes section 58-35-85 governs the procedure for cancellation of an insurance policy by an insurance premium finance company:

> When an insurance premium finance agreement contains a power of attorney or other authority enabling the insurance premium finance company to cancel any insurance contract or contracts listed in the agreement, the insurance contract or contracts shall not be cancelled unless the cancellation is effectuated in accordance with the following provisions:
>
> (1) Not less than 10 days' written notice is sent by personal delivery, first-class mail, electronic mail, or facsimile transmission to the last known address of the insured or insureds shown on the insurance premium finance agreement of the intent of the insurance premium finance company to cancel his or their insurance contract or contracts unless the defaulted installment payment is received. Notification thereof shall also be provided to the insurance agent.
>
> (2) After expiration of the 10-day period, the insurance premium finance company shall send the insurer a request for cancellation and shall send notice of the requested cancellation to the insured by personal delivery, first-class mail, electronic mail, electronic transmission, or facsimile transmission at his last known address as shown on the records of the insurance premium finance company and to the agent. Upon written request of the insurance company, the premium finance company shall furnish a copy of the power of attorney to the insurance company. The written

> request shall be sent by mail, personal delivery, electronic mail, or facsimile transmission.
>
> (3) *Upon receipt of a copy of the request for cancellation notice by the insurer*, *the insurance contract shall be cancelled* with the same force and effect as if the request for cancellation had been submitted by the insured, without requiring the return of the insurance contract or contracts.

(Emphasis added). "[T]he burden of proving compliance with N.C. Gen. Stat. § 58-35-85 is on the insurance company." *Cahoon v. Canal Ins. Co.*, 140 N.C. App. 577, 580, 537 S.E.2d 538, 540 (2000). Furthermore, "[t]he burden of proving cancellation by the insured or his agent is on the insurance company." *Id.* (citing *Ingram v. Insurance Co.*, 5 N.C. App. 255, 258, 168 S.E.2d 224, 227, *cert. denied*, 275 N.C. 545 (1969)). "In order to cancel a policy the carrier must comply with the procedural requirements of the statute or the attempt at cancellation fails and the policy will continue in effect despite the insured's failure to pay in full the required premium." *Pearson v. Nationwide Mutual Ins. Co.*, 325 N.C. 246, 254, 382 S.E.2d 745, 748 (1989) (citations omitted).

The pertinent issue in the instant case is whether the Pattersons' insurance policy was cancelled on 24 March 2008, the date stated on Budget's Request of Cancellation, or was still in effect through 28 March 2008, the date Universal received the Request of Cancellation from Budget. Universal argues "[s]ince Budget complied with the 10-day notice required by Chapter 58, pursuant to the POA, Universal was required to cancel the policy the effective date requested by Budget, as if the Patterson defendants had requested the cancellation, pursuant to the terms of the Patterson Policy." This argument is inconsistent with the cancellation procedure outlined in § 58-35-85(3) and our prior holdings.

In accordance with § 58-35-85(3), we have held that an insurance policy is cancelled on the date the insurer receives the request for cancellation. *Cahoon*, 140 N.C. App. at 582, 537 S.E.2d at 542 ("The applicable statute provides for cancellation of the insurance contract 'upon receipt of a copy of the request for cancellation notice by the insurer'. Thus, the policy in question was not cancelled until Piedmont, as agent for Canal, received the Notice of Cancellation on 2 January 1997.") (citations omitted); *Unisun Ins. Co. v. Goodman*, 117 N.C. App. 454, 457, 451 S.E.2d 4, 6 (1994) ("We, therefore, are guided only by the language of N.C. Gen. Stat. § 58-35-85. . . . Thus . . .

the insurance policy in the subject case was cancelled the day Unisun received the cancellation request[.]"), *disc. review denied*, 339 N.C. 742, 454 S.E.2d 662 (1995).

Universal attempts to distinguish *Cahoon* and *Unison* from the present case, arguing that we did not address the insurance policy cancellation language in those cases, and in the instant case, the Patterson Policy and power of attorney in the Premium Finance Agreement control regarding cancellation. We have previously outlined the rules of construction relating to insurance policies:

> First, an insurance policy is a contract, and is to be construed and enforced in accordance with its terms insofar as they are not in conflict with pertinent statutes and court decisions. As to the effect of any statute on an insurance policy, the law is clear that a statutory requirement or limitation applicable to a policy of insurance is to be read into the policy as if written therein and controls a contrary provision actually written into the policy.

South Carolina Ins. Co. v. Smith, 67 N.C. App. 632, 638, 313 S.E.2d 856, 861 (1984) (quotation marks and citations omitted), *rev. denied*, 311 N.C. 306, 317 S.E.2d 682 (1984). Accordingly, we do not need to address the cancellation language in the insurance policy because § 58-35-85 controls the procedure for the cancellation of an insurance policy by an insurance premium finance company.

Here, the Request of Cancellation sent by Budget stated an effective date of 24 March 2008. The parties do not dispute that Universal actually received the Request of Cancellation on 28 March 2008, three days after Twana Patterson's accident. Pursuant to § 58-35-85(3), we conclude the Pattersons' insurance policy was not cancelled until Universal received the Request of Cancellation on 28 March 2008. Thus, the contract was in full force and effect on 25 March 2008, the day of the car accident. Accordingly, we uphold the trial court's grant of summary judgment for Ms. Pauling and Ms. Boddie.

Affirmed.

Chief Judge MARTIN and Judge ROBERT C. HUNTER concur.

CHERI EVANS, EMPLOYEE, PLAINTIFF v. HENDRICK AUTOMOTIVE GROUP, SELF-INSURED, EMPLOYER/DEFENDANT, CHUBB SERVICES CORPORATION, THIRD-PARTY ADMINISTRATOR/DEFENDANT

No. COA10-39

(Filed 1 March 2011)

Appeal and Error— interlocutory orders and appeals—Industrial Commission—appeal dismissed

Defendants' appeal from an opinion and award by the Full Commission awarding temporary total disability benefits, temporary partial disability benefits, past and future medical expenses, costs, and attorney fees to plaintiff was dismissed as interlocutory. The opinion and award on its face contemplated further proceedings to resolve the amount of plaintiff's wage loss benefits.

Appeal by defendants from Opinion and Award entered on or about 30 September 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 August 2010.

Patterson Harkavy LLP by Valerie A. Johnson and Narendra K. Ghosh, for plaintiff-appellee.

McAngus, Goudelock & Courie, PLLC by Andrew Ussery and Daniel L. McCullough, for defendant-appellee.

STROUD, Judge.

Hendrick Automotive Group and Chubb Services Corporation (collectively referred to as "defendants") appeal an opinion and award by the Full Commission awarding temporary total disability benefits, temporary partial disability benefits, past and future medical expenses, costs, and attorney's fees to Cheri Evans ("plaintiff"). For the following reasons, we dismiss defendants' interlocutory appeal.

I. Background

The uncontested findings in the Full Commission's opinion and award establish that plaintiff was employed as an office manager by Honda Cars of McKinney in McKinney, Texas, which is an automotive dealership owned by defendant Hendrick Automotive Group. While on a business trip for her employer in Charlotte, North Carolina, plaintiff was returning to her hotel from an employer-sponsored dinner, which included alcoholic beverages, when she "put her leg over

the side of the escalator and [rode] . . . it down briefly" but "hit a pillar and fell to the tile floor approximately 25-30 feet below." As a result of her fall, plaintiff suffered severe injuries to her head and wrist and underwent multiple surgeries and procedures to treat those injuries, which included: surgical repair of "multiple fractures to her bilateral maxillary sinuses, her bilateral orbits, including a depressed fracture and three complex facial lacerations[;]" a left frontal craniotomy to remove blood from her brain; implantation of a steel plate in her skull to repair her skull fractures; two separate surgeries to repair her wrist, that included the installation of "hardware[;]" and repair of several broken teeth. Following her discharge from the hospital and return to Texas, plaintiff saw several health care professionals for continued treatment of her injuries.

Plaintiff returned to work but had difficulty in performing her job duties, as she had problems remembering and performing certain tasks. On 15 May 2006, plaintiff was terminated by her employer for changing "the pay for two office employees without authorization and issu[ing] a check without a required second signature[.]" Plaintiff was out of work for four months following her termination but did find work as a administrative supervisor. However, plaintiff's earnings at her new employment were less than her earnings as an employee with Honda Cars of McKinney.

On 13 December 2006, plaintiff filed a claim for workers' compensation benefits, requesting the claim be assigned for a hearing. Plaintiff's claim was heard before a deputy commissioner, who issued an opinion and award on 19 October 2008, finding that plaintiff had suffered a compensable injury by accident and awarding plaintiff temporary total disability benefits for her time out of work, temporary partial disability benefits for her loss of wages, and payment of medical expenses. Defendants appealed the deputy commissioner's opinion and award to the Full Commission. The Full Commission in its opinion and award affirmed the deputy commissioner, with minor modifications, and awarded plaintiff (1) temporary total disability benefits; (2) wage loss benefits for her temporary partial disability; (3) past and future medical expenses related to plaintiff's compensable injury; (4) payment for permanent damage to plaintiff's teeth; and (5) costs and attorney's fees. On or about 5 October 2009, plaintiff filed a motion to amend the Full Commission's award and opinion, arguing that some of the Commission's calculations of plaintiff's wage loss benefits contained clerical errors. Defendants concurred in this

motion. On 26 October 2009, defendants filed notice of appeal from the Full Commission's opinion and award dated 30 September 2009.

II. Plaintiff's motion to dismiss as interlocutory

We first address plaintiff's motion to dismiss defendants' appeal. Plaintiff argues that "defendants have sought to appeal from a non-final order of the Industrial Commission, which deprives this Court of jurisdiction to hear their appeal." Plaintiff, citing Industrial Commission Rule 702 and the unpublished case *James v. Carolina Power & Light*, 2008 N.C. App. LEXIS 374 (N.C. App. Mar. 4, 2008), argues that defendants' appeal was interlocutory because her motion to amend specifically addressed the amount of compensation in the opinion and award, and this issue required further determination by the Full Commission. Plaintiff concludes that because she filed her motion to amend before defendants filed their appeal, the opinion and award is a non-final judgment. Defendants, citing *Watts v. Hemlock*, 160 N.C. App. 81, 584 S.E.2d 97 (2003) and *Riggins v. Elkay Southern Corp.*, 132 N.C. App. 232, 510 S.E.2d 674 (1999), counter that the Full Commission's decision was a final decision because (1) the opinion and award did not expressly reserve any issues for further determination; (2) the Commission "adjudicated the issues of compensability and disability and awarded benefits accordingly[;]" and (3) "[t]here are no further proceedings contemplated by the Industrial Commission Opinion and Award in this case."

We have stated that

> [a]n order is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy. There is generally no right to appeal an interlocutory order.
>
> An interlocutory order is subject to immediate appeal only if (1) the order is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to Rule 54(b) of the Rules of Civil Procedure, or (2) the trial court's decision deprives the appellant of a substantial right that will be lost absent immediate review.

Gregory v. Penland, 179 N.C. App. 505, 509, 634 S.E.2d 625, 628 (2006) (citations and quotation marks omitted). An appeal from an opinion and award of the Industrial Commission is subject to the "same terms

and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions." N.C. Gen. Stat. § 97-86 (2007).

> Therefore, a decision of the Industrial Commission is interlocutory if it determines one but not all of the issues in a workers' compensation case. A decision that on its face contemplates further proceedings or . . . does not fully dispose of the pending stage of the litigation is interlocutory. Even where a decision is interlocutory, however, immediate review of the issue is proper where the interlocutory decision affects a substantial right. To qualify, the right affected must be substantial, and the deprivation of that substantial right must potentially work injury if not corrected before appeal from a final judgment.

Cash v. Lincare Holdings, 181 N.C. App. 259, 263, 639 S.E.2d 9, 13 (2007) (citation, brackets, and quotation marks omitted).

In *Watts*, the defendants appealed from a Full Commission's order which ordered that compensation should be paid to the plaintiff but "remanded the case for a hearing before a deputy Commissioner on the issues of 'plaintiff's average weekly wage at the time of plaintiff's compensable injury by accident and plaintiff's resultant weekly compensation rate.' " 160 N.C. App. at 83, 584 S.E.2d at 98-99. This Court, in dismissing the defendants' appeal as interlocutory, noted that

> the Commission's opinion and award specifically reserved the issue of the amount of plaintiff's compensation award pending a hearing to determine plaintiff's average weekly wage at the time of his compensable injury. Although the opinion determined that plaintiff suffered a compensable injury by accident, the total amount of compensation has yet to be determined, and the average weekly wage is in dispute. There being nothing in the record to indicate that the parties have resolved this issue independently after the Commission entered its opinion, this appeal is clearly interlocutory.

Id. at 84, 584 S.E.2d at 99.

Likewise, in *Riggins*, the defendants appealed from the Full Commission's award of temporary total disability compensation to the plaintiff but the order did not decide the dates for which the plaintiff was entitled to this compensation or "the issue of the amount of permanent partial disability[.]" 132 N.C. App. at 232, 510 S.E.2d at 674. This Court concluded that "[a]n opinion and award that settles preliminary questions of compensability but leaves unresolved the

amount of compensation to which the plaintiff is entitled and expressly reserves final disposition of the matter pending receipt of further evidence is interlocutory." *Id.* at 233, 510 S.E.2d at 675 (citations omitted). This Court, in dismissing the defendants' appeal as interlocutory, noted that "[t]he present opinion and award on its face reserves issues for further determination. There is nothing in the record to indicate that all of the matters in this case have been resolved. It is our duty to dismiss an appeal *sua sponte* when no right of appeal exists." *Id.*[1]

Accordingly, we look to the Full Commission's opinion and award, not the subsequent motion to amend, to determine whether defendant's appeal is interlocutory. Here, defendants appealed from the Full Commission's opinion and award dated 30 September 2009. The Full Commission's opinion and award sets the amount for plaintiff's temporary total disability, orders defendants to "pay past and future medical expenses for the effects of plaintiff's injury[,]" sets the amount for permanent damage to plaintiff's teeth, and sets the amount for the award of plaintiff's attorney's fees and orders defendants to pay costs. Even though it is not noted by either party on appeal, the Full Commission's opinion and award also makes the conclusion that, "The plaintiff has proved her entitlement to continuing wage loss benefits[,]" but also states that "[d]efendants are responsible for additional benefits *as will be determined by subsequent order*." (Emphasis added.) The Full Commission in the "Award" section orders defendants to pay $389.39 per week beginning as of September 15, 2006 and continuing through December 31, 2007[,]" for "plaintiff's wage loss benefits" but also notes that "[s]ubsequent weekly payments will be made *following the entry of an additional order*." (Emphasis added.) As in *Watts* and *Riggins*, the Full Commission's opinion and award expressly reserved pending issues regarding the amount of plaintiff's compensation award. *See Watts*, 160 N.C. App. at 84, 584 S.E.2d at 99; *Riggins*, 132 N.C. App. at 233, 510 S.E.2d at 675. Plaintiff's motion to amend the wage loss benefit portion of the opinion and award and defendants' concurrence in the motion to amend only

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1. As to the authority cited by plaintiff in support of her argument, we hold that I.C. Rule 702(1) governs the "running of the time for filing and serving a notice of appeal" from an Industrial Commission Opinion and Award, but is inapplicable in determining whether an appeal is interlocutory. In addition, as "[a]n unpublished decision of the North Carolina Court of Appeals is not controlling legal authority[,]" N.C.R. App. P. 30(e)(3), we will not address the plaintiff's argument in reliance on *James v. Carolina Power & Light*, 2008 N.C. App. LEXIS 374 (N.C. App. Mar. 4, 2008) (unpublished).

serves to emphasize the interlocutory nature of the appeal, as both filings indicate that this matter has not been fully resolved. *See id.* As the opinion and award "on its face contemplate[d] further proceedings[,]" *see Cash*, 181 N.C. App. at 263, 639 S.E.2d at 13, to resolve the amount of plaintiff's wage loss benefits, we hold that defendants' appeal is interlocutory. Defendants' raise no argument as to impairment of a substantial right which would be a basis for this Court to hear their interlocutory appeal, conceding that "[i]f the award is non-final, then the appeal is interlocutory, and . . . the appeal is premature." Accordingly, we grant plaintiff's motion and dismiss defendants' interlocutory appeal.

DISMISSED.

Judges McGEE and ERVIN concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER BUDDINGTON, DEFENDANT

No. COA10-286

(Filed 1 March 2011)

Firearms and Other Weapons— possession by felon—as applied constitutional challenge—no evidence or stipulations

The trial court erroneously dismissed an indictment for possession of a firearm by a felon where defendant filed an unverified motion to dismiss on constitutional grounds but no evidence was presented at the hearing and there were no clear stipulations. In order for defendant to prevail through an as-applied constitutional challenge to N.C.G.S. § 14-415.1, he must present evidence which would allow the trial court to make findings about the factors in *Britt v. State*, 363 N.C. 546.

Appeal by the State from order entered 5 October 2009 by Judge L. Todd Burke in Superior Court, Rockingham County. Heard in the Court of Appeals 13 September 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Joan M. Cunningham, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant-appellee.

STROUD, Judge.

Defendant was indicted for possessing a firearm as a felon. Defendant filed a motion to dismiss which the trial court granted. Because defendant failed to present any evidence in support of his motion to dismiss the indictment on an as-applied constitutional challenge, the trial court erred in granting the motion to dismiss, and we reverse.

I. Background

On or about 7 May 2007, defendant was indicted for possession of a firearm by a felon under N.C. Gen. Stat. § 14-415.1. On 18 September 2009, defendant filed an unverified motion to dismiss the possession of a firearm by a felon charge claiming, *inter alia*, that pursuant to *Britt v. State*, 363 N.C. 546, 681 S.E.2d 320 (2009), N.C. Gen. Stat. § 14-415.1 was unconstitutional as applied to him.[1] Defendant's motion discusses, *inter alia*, his prior felony of maintaining a vehicle/dwelling/place to keep controlled substances pursuant to N.C. Gen. Stat. § 90-108, his completion of probation, the restoration of his rights to possess a firearm, and how the subsequent amendments to N.C. Gen. Stat. § 14-415.1 affected his right to possess a firearm. On 5 October 2009, the trial court ordered that the indictment against defendant be dismissed because "N.C. Gen. Stat. § 14-415.1 as amended is not a reasonable regulation, as applied to the Defendant, and that applying said statute to the Defendant would violate his constitutional rights under Article I, Section 30 of the North Carolina Constitution." The State appeals.

II. No Evidence Presented at Hearing

The State first argues that "the findings of fact are not supported by competent evidence because there was no evidence presented." (Original in all caps.) The State contends that "[n]o evidence was presented at the hearing on defendant's motion to dismiss and no

1. We note that the legislature has now provided a way for qualified individuals to petition the court to have their right to possess a firearm restored pursuant to N.C. Gen. Stat. § 14-415.4. *See* 2010 N.C. Sess. Laws 108 § 1. N.C. Gen. Stat. § 14-415.4 "becomes effective February 1, 2011, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions." 2010 N.C. Sess. Laws 108 § 7.

stipulations were agreed to, and no documentary or physical evidence was marked, offered or admitted into evidence except defendant's motion for dismissal."

Though defendant filed a motion to dismiss, his motion is not based on a challenge to the sufficiency of the evidence. Instead, defendant's motion to dismiss is based upon a constitutional claim. "The standard of review for questions concerning constitutional rights is de novo. Furthermore, when considering the constitutionality of a statute or act there is a presumption in favor of constitutionality, and all doubts must be resolved in favor of the act." *Row v. Row*, 185 N.C. App. 450, 454-55, 650 S.E.2d 1, 4 (2007) (citation, quotation marks, and ellipses omitted), *disc. review denied*, 362 N.C. 238, 659 S.E.2d 741, *cert. denied*, ––– U.S. –––, 172 L. Ed. 2d 39 (2008).

We agree with the State that "no evidence was presented at the hearing[.]" The trial court's order provides that it is "[b]ased upon the records of the Clerk of Superior Court for Rockingham County, the motions filed in this matter, and the statements of counsel[.]" In the appellate record before us there are no "records of the Clerk of Superior Court for Rockingham County[,]" and according to the hearing transcript, no records were ever submitted to the trial court or admitted as evidence. Furthermore, the only motion we are aware of is defendant's unverified motion to dismiss. Defendant also did not file an affidavit in support of his motion to dismiss. Therefore, in considering what was before the trial court, we have only defendant's unverified motion to dismiss and "the statements of counsel[.]" However, neither unverified motions nor counsels' statements are evidence. *See State v. Roache*, 358 N.C. 243, 289, 595 S.E.2d 381, 411 (2004) ("[I]t is axiomatic that the arguments of counsel are not evidence." (citation and quotation marks omitted)); *Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 511, 181 S.E.2d 794, 798 (1971) ("The unverified motion did not prove the matters alleged therein and is not evidence thereof.")

Defendant contends that "the trial court's order rested on an adequate factual foundation as the parties stipulated to the evidence." (Original in all caps.) During the hearing, the attorneys discussed various matters, including: defendant's prior convictions; sentencing; how the case was to be tried in front of the jury; defendant's contentions of how *Britt* required that defendant's case be dismissed because N.C. Gen. Stat. § 14-415.1 was unconstitutional as applied to him; and the amendments to N.C. Gen. Stat. § 14-415.1 and how they had affected defendant's right to possess a firearm. After all

of these arguments and discussions, on page 14 of the transcript the trial court then asked the State, "Uh-huh. All right. On these facts, where was he when the—can y'all stipulate as to what the facts are, as to where he was when the—if you don't agree with it, Mr. Berger, [State's attorney,] let me know. Mr. Berger?" Mr. Berger then went on to state the specifics of defendant's pending charge; defendant's counsel did not stipulate to or indicate approval of the State's statements. Then both attorneys continued to argue about various matters, including the applicability of *Britt* to defendant's case. The trial court then ruled in favor of defendant.

"A stipulation is a judicial admission, dispensing with proof, recognized and enforced by the courts as a substitute for legal proof." *Realtors, Inc. v. Kinard* 45 N.C. App. 545, 546, 263 S.E.2d 38, 39 (1980). "While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them." *State v. Alexander*, 359 N.C. 824, 828, 616 S.E.2d 914, 917 (2005) (citation and quotation marks omitted). In order for defendant to prevail in a motion to dismiss through an as-applied constitutional challenge to N.C. Gen. Stat. § 14-415.1, he must present evidence which would allow the trial court to make findings of fact regarding

> (1) the type of felony convictions, particularly whether they "involved violence or the threat of violence," (2) the remoteness in time of the felony convictions; (3) the felon's history of "lawabiding conduct since the crime," (4) the felon's history of "responsible, lawful firearm possession" during a time period when possession of firearms was not prohibited, and (5) the felon's "assiduous and proactive compliance with the 2004 amendment."

State v. Whitaker, ––– N.C. App. –––, –––, 689 S.E.2d 395, 404 (2009) (brackets omitted) (citing *Britt* at 550, 681 S.E.2d at 323), *aff'd*, 364 N.C. 404, 700 S.E.2d 215 (2010).

Britt therefore requires presentation of some evidence upon which the trial court could make findings of fact regarding the factors. *See id.* Certainly, defendant's complete criminal record, both prior to and after his felony conviction up to the time of the charge for possession of a firearm by a felon, could show "the type of felony convictions" and their "remoteness in time" as well as defendant's "history of 'lawabiding conduct since the crime[.]' " *Id.* Evidence as to

defendant's criminal record or the other factors could also be presented by affidavits and witness testimony. Defendant and the State could also enter into stipulations as to these facts.

Here, our record does not demonstrate that defendant's criminal record was submitted to the trial court, although counsel for both defendant and the State discuss various convictions during their arguments. Without any evidence or any clear stipulation to facts which, at the very least, address the five factors in *Britt*, the trial court could not have properly granted defendant's motion to dismiss. *See id*. While the State through its failure to object, failure to correct, and/or silence may arguably have stipulated to some facts presented by defendant, the State certainly did not stipulate to all of the facts as stated by defendant in the transcript. *State v. Hurley*, 180 N.C. App. 680, 684, 637 S.E.2d 919, 923 (2006) ("Stipulations do not require affirmative statements and silence may be deemed assent in some circumstances, particularly if the defendant had an opportunity to object, yet failed to do so."), *disc. review denied*, 361 N.C. 433, 649 S.E.2d 394 (2007). Furthermore, the terms of any stipulations which may have occurred at the hearing were not "definite and certain." *Alexander* at 828, 616 S.E.2d at 917. In carefully considering the entire transcript, we have been unable to ascertain exactly which statements by defendant's counsel the State may have "stipulated" to, since, at times during the hearing, the State argued specific facts of its own and disagreed with defendant's characterization of the facts as applicable to the *Britt* factors. Without a "definite and certain" stipulation to the facts pertinent to the *Britt* factors, *id.*, and without any other evidence, the trial court had no basis for its findings of fact. Without evidence the trial court could not have found N.C. Gen. Stat. § 14-415.1 unconstitutional as applied to defendant. *Whitaker* at —–, 689 S.E.2d at 404. Therefore, we agree with the State's argument that the trial court erroneously dismissed the indictment against defendant.

III. Conclusion

As the trial court erroneously dismissed the indictment, we reverse. As we are reversing the order granting the motion to dismiss, we need not address the State's second argument on appeal.

REVERSED.

Chief Judge MARTIN and Judge ERVIN concur.

THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, PLAINTIFFP V. CAMMIE KATHLEEN WILLIAMS, AND SPOUSE, TIM WILLIAMS, MOSES LUSKI, TRUSTEE, TRACKAR, INC., ASSIGNEE, ERNEST DEHNERT, SUBSTITUTE TRUSTEE, BRANCH BANKING & TRUST COMPANY, BENEFICIARY, FRANK KNOX, SUBSTITUTE TRUSTEE, MECKLENBURG COUNTY TAX COLLECTOR, AND ANY OTHER PARTIES IN INTEREST, DEFENDANTS

No. COA10-715

(Filed 1 March 2011)

1. Appeal and Error— interlocutory orders and appeals—condemnation proceeding—substantial right affected

Plaintiff's appeal from the trial court's interlocutory order regarding her claim for adverse possession in a condemnation proceeding affected a substantial right and was immediately appealable.

2. Cities and Towns— condemnation proceedings—adverse possession—inadequate findings and conclusions

The trial court erred in a condemnation proceeding by failing to make adequate findings and conclusions regarding plaintiff's adverse possession claim following its hearing on her motion.

Appeal by Defendant Cammie Kathleen Williams from order entered 21 December 2009 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 January 2011.

Office of the City Attorney, by Gretchen R. Nelli and Chris Clare, for Plaintiff.

The Odom Firm, PLLC, by David W. Murray and Thomas L. Odom, Jr., for Defendant Cammie Kathleen Williams.

STEPHENS, Judge.

In this condemnation action, Plaintiff the City of Charlotte took a portion of Defendant Cammie Kathleen Williams' property for part of a road project. On 9 January 2008, the City filed a complaint, declaration of taking, and notice of deposit and service of plat. On 20 March 2008, Defendants Cammie Kathleen Williams and Tim Williams filed an answer and constitutional defenses, and on 13 August 2009, they filed an amended answer by written consent of the City. On 31 August 2009, Defendant filed a motion for determination of issues other than damages and to compel an amended plat. Following a 2 December

2009 hearing on the motion, on 21 December 2009, the trial court denied Defendant's motion. Defendant appeals and brings forward three arguments: that the trial court erred in failing to (I) comply with the requirements of N.C. Gen. Stat. § 136-108; (II) determine that she had established adverse possession of certain property; and (III) compel a revised plat of her property. As discussed herein, we agree with Defendant's first argument and remand to the trial court for entry of findings and conclusions. We do not address Defendant's remaining arguments.

The City took a corner of Defendant's property at 216 Stetson Drive ("the property") that included part of a paved parking lot which exists on Defendant's property and extends onto the adjacent property. The condemnation action was filed on 9 January 2008; by deed dated 12 December 2008 and filed on 15 December 2008, Defendant conveyed the property in fee simple to Lake Creek Commercial, LLC. The deed conveying the property included a metes and bounds description "LESS AND EXCEPT" the property condemned and recorded by the City. Defendant did not file her motion for determination of issues other than damages and to compel an amended plat in the condemnation action until 31 August 2009, more than eight months following her sale of the property. In her motion, Defendant claimed adverse possession of a strip of land on an adjacent property onto which the paved parking lot of the property extended. In the 21 December 2009 order it entered on Defendant's motion, without making any findings of fact or conclusions of law, the trial court ruled that:

> 1. Defendant's Motion pursuant to N.C. Gen. Stat. § 136-108 as to the adverse possession claim of [] Defendant[] has been Denied.
>
> 2. Defendant's Motion to Compel revised plat from [] Plaintiff has been Denied.

Grounds for Appellate Review

[1] At the outset, we note that Defendant's appeal is interlocutory. Our Supreme Court has held that

> [i]nterlocutory orders may be appealed immediately under two circumstances. The first is when the trial court certifies no just reason exists to delay the appeal after a final judgment as to fewer than all the claims or parties in the action. The second is when the appeal involves a substantial right of the appellant and the appellant will be injured if the error is not corrected before final judgment.

N.C. Dep't. of Trans. v. Stagecoach Village, 360 N.C. 46, 47-48, 619 S.E.2d 495, 496 (2005) (internal citations omitted). Here, there was no Rule 54(b) certification by the trial court. However, in condemnation proceedings, "interlocutory orders concerning title or area taken must be immediately appealed as vital preliminary issues involving substantial rights adversely affected." *Id.* at 48, 619 S.E.2d at 496 (quotation marks and citations omitted).

> One of the purposes of G.S. 136-108 is to eliminate from the jury trial any question as to what land the [government entity] is condemning and any question as to its title. Therefore, should there be a fundamental error in the judgment resolving these vital preliminary issues, ordinary prudence requires an immediate appeal, for that is the proper method to obtain relief from legal errors.

N.C. State Highway Com. v. Nuckles, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967). Because Defendant appeals from an order regarding her claim of adverse possession, which involves title, a vital preliminary issue in this condemnation proceeding, her interlocutory appeal is properly before us.

Analysis

[2] Defendant first argues that the trial court erred in failing to comply with the requirements of N.C. Gen. Stat. § 136-108. We agree.

A"claim of ownership . . . via adverse possession may be addressed in a N.C. Gen. Stat. § 136-108 condemnation hearing." *N.C. Dep't. of Trans. v. Byerly*, 154 N.C. App. 454, 457, 573 S.E.2d 522, 524 (2002) (citation omitted). In condemnation proceedings, section 136-108 provides:

> After the filing of the plat, the judge, upon motion and 10 days' notice by either the Department of Transportation or the owner, *shall*, either in or out of term, *hear and determine any and all issues raised by the pleadings other than the issue of damages*, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken.

N.C. Gen. Stat. § 136-108 (2009) (emphasis added). "In hearings pursuant to N.C. Gen. Stat. § 136-108, the trial court, after resolving any motions and preliminary matters, conducts a bench trial on the disputed issues except for damages." *Byerly*, 154 N.C. App. at 457, 573 S.E.2d at 524 (citations omitted). In such a determination pro-

ceeding, "the trial judge must make adequate findings of fact which support the conclusions of law." *Id.* (citing N.C. Gen. Stat. § 1A-1, Rule 52(a)(1)). Defendant asserts that the trial court erred in failing to make adequate findings and conclusions regarding her adverse possession claim following its hearing on her motion. In *Byerly*, "the trial court issued one mixed finding of fact and conclusion of law regarding [the] defendant's adverse possession claim, which not only fails to comply with Rule 52(a)(1), but also forms an inadequate basis for this Court to conduct a review and assess appellant's contentions." *Id.* at 458, 573 S.E.2d at 524-25. Thus, we remanded *Byerly* to the trial court for additional and adequate findings of fact and conclusions of law, pursuant to Rule 52(a)(1). *Id.* at 458, 573 S.E.2d at 525.

Likewise, here, in her 31 August 2009 motion, Defendant asserted adverse possession related to the property and the condemnation action, a proper claim in a motion under section 136-108. On 2 December 2009, the trial court held a hearing pursuant to section 136-108. As such, it was required by statute and case law to resolve the issues raised by Defendant's motion and to make adequate findings and conclusions in support thereof. However, the order denying Defendant's motion contains no findings or conclusions; it merely denies the motion without explanation. This not only violates the requirements of section 136-108 and Rule 52(a)(1), it forms an inadequate basis for this Court to conduct any type of appellate review of the merits of Defendant's adverse possession claim. Thus, we are unable to address Defendant's remaining arguments on appeal. We express no opinion as to the validity of Defendant's adverse possession claim or the counter-arguments made by the City, but instead remand the matter to the trial court for entry of a new order containing adequate findings of fact and conclusions of law.

Remanded.

Judges GEER and HUNTER, JR., concur.

DANA D. WEBB, PLAINTIFF v. DOUGLAS H. PRICE, II AND NEW HANOVER COUNTY SHERIFF'S DEPARTMENT, DEFENDANTS

No. COA10-284

(Filed 1 March 2011)

Appeal and Error— interlocutory appeals—orders and statues not applicable—no substantial right affected

Defendant's appeal from the trial court's denial of his motion to dismiss plaintiff's negligence complaint was dismissed. Because N.C.G.S. § 162-16 governs only a method of personal service of process upon a sheriff and does not establish the sole method of service of process upon a sheriff, N.C.G.S. § 162-16 was not applicable to service in this case, so defendant's appeal was from an interlocutory order. Furthermore, defendant's motion to dismiss based on a statute of limitations did not affect a substantial right and was therefore not immediately appealable.

Appeal by defendant Douglas H. Price, II from order entered on or about 2 December 2009 by Judge W. Allen Cobb, Jr. in Superior Court, New Hanover County. Heard in the Court of Appeals 13 September 2010.

Fox Law, P.A., by Angela Bullard Fox, and David & Associates, by D. Stuart Smith, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Christopher G. Lewis and Natalia K. Isenberg, for defendant-appellant Douglas H. Price, II.

STROUD, Judge.

Defendant Douglas H. Price, II appeals the trial court's denial of his motion to dismiss. Because N.C. Gen. Stat. § 162-16 governs only a method of personal service of process upon a sheriff and does not establish the sole method of service of process upon a sheriff, N.C. Gen. Stat. § 162-16 is not applicable to service in this case, so defendant's appeal is interlocutory. We therefore dismiss the appeal.

I. Background

On 30 December 2008, plaintiff filed a complaint alleging negligence on the part of defendants. The summons issued on 30 December 2008 expired, but an alias and pluries summons was issued

on 9 April 2009, and on 29 May 2009, defendant Price was served with the summons and complaint. On 24 June 2009, plaintiff filed an amended complaint. On 12 February 2009, defendant Price

> move[d] the Court pursuant to Rules 12(b)(2), 12(b)(4), 12(b)(5) and 12(b)(6) of the North Carolina Rules of Civil Procedure to dismiss the Complaint for lack of personal jurisdiction, insufficiency of process, insufficiency of service of process, and the failure to state a claim upon which relief can be granted. In support of this motion, Defendant shows the Court that he has not been properly served with Summons or Complaint. Further, the plaintiff's claims are barred by the doctrines of governmental and sovereign immunity.

On or about 2 December 2009, the trial court denied defendant Price's motion to dismiss.[1] Defendant Price appeals.

II. Interlocutory Appeal

Plaintiff filed a motion to dismiss defendant Price's appeal as interlocutory, and defendant Price concedes that his appeal is interlocutory but argues that we should hear his appeal because the trial court's order "deprives Deputy Price of his substantial right to be immune from suit due to plaintiff's failure to comply with the statutory method of invoking personal jurisdiction over sheriffs[.]"

> Ordinarily an order denying a motion to dismiss pursuant to G.S. § 1A-1, Rule 12(b) is considered interlocutory and not affecting a substantial right, and consequently there is no right of immediate appeal therefrom. However, an immediate right to appeal from an order denying a motion to dismiss exists pursuant to G.S. § 1-277(b) which provides that any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause. This Court has interpreted G.S. § 1-277(b) as allowing an immediate right of appeal only when the jurisdictional challenge is substantive rather than merely procedural. In *Berger v. Berger*, *supra*, we held that: While G.S. 1-277(b) appears to authorize such right, it is our duty on appeal to examine the underlying nature of defendant's

1. Although defendant Price's brief asserts that the "New Hanover County Sheriff's Department was dismissed as a party prior to this appeal[,]" our record does not include any documentation as to this dismissal.

> motion: If defendant's motion raises a due process question of whether his contacts within the forum state were sufficient to justify the court's jurisdictional power over him, then the order denying such motion is immediately appealable under G.S. 1-277(b). If, on the other hand, defendant's motion, though couched in terms of lack of jurisdiction under Rule 12(b)(2), actually raises a question of sufficiency of service or process, then the order denying such motion is interlocutory and does not fall within the ambit of G.S. 1-277(b).

Hart v. F.N. Thompson Const. Co., 132 N.C. App. 229, 230-31, 511 S.E.2d 27, 28 (1999) (citation, quotation marks, and brackets omitted). Furthermore, "this Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999).

Here, defendant Price argues that the trial court lacked personal jurisdiction and that this jurisdictional issue "is substantive rather than merely procedural." *Hart* at 230-31, 511 S.E.2d at 28. Defendant Price's argument is based on the lack of service of the summons and complaint as required by N.C. Gen. Stat. § 162-16, which provides that "if the sheriff be a party, the coroner shall be bound to perform the service, as he is now bound to execute process where the sheriff is a party; and this Chapter relating to sheriffs shall apply to coroners when the sheriff is a party." N.C. Gen. Stat. § 162-16 (2009). Defendant Price contends that

> [w]ith the enactment of N.C. Gen. Stat. § 162-16, the North Carolina legislature created the sole means by which a Sheriff and their [sic] deputies can be served with legal process and be subject to the personal jurisdiction of the Courts. This statutory requirement preempts any provision of the N.C. Rules of Civil Procedure allowing for methods of substitute service.

Defendant claims that N.C. Gen. Stat. § 162-16 is a "statutory requirement" which "affects a substantial right . . . which would be lost if litigants are allowed to proceed with litigation against Sheriffs and their deputies in the absence of following the clearly established statutory method of subjecting such persons to the jurisdiction of the Court."

However, even if we assume *arguendo* that non-compliance with N.C. Gen. Stat. § 162-16 affects a substantial right and is not merely

procedural, defendant has not demonstrated that this statute was applicable to service in this case. Defendant was not personally served with the summons and complaint; he was served by certified mail pursuant to N.C. Gen. Stat. § 1A-1, Rule 4. N.C. Gen. Stat. § 162-16 does not provide the only way of serving a sheriff or deputy. *See* N.C. Gen. Stat. § 1A-1, Rule 4. Instead, N.C. Gen. Stat. § 162-16 provides the method of service when *personal* service is needed, as the sheriff or deputy obviously could not effect personal service upon himself. Defendant argues that *Mabee v. Onslow Cty. Sheriff's Dep't* requires that service upon a sheriff or deputy be performed by the coroner under N.C. Gen. Stat. § 162-16. 174 N.C. App. 210, 620 S.E.2d 307 (2005), *disc. review denied*, 360 N.C. 364, 629 S.E.2d 854 (2006). However, in *Mabee*, *personal service* was used, not service by certified mail. *Id.*

Although our current version of N.C. Gen. Stat. § 162-16 was adopted in 1971, a prior version of the statute which was substantially the same dates back at least as far as the late 1800s. *See State v. Baird*, 118 N.C. 854, 862, 24 S.E. 668, 670 (1896). Despite over one hundred years of this law's existence, we have been unable to find any case holding that N.C. Gen. Stat. § 162-16 creates the sole method of service upon a sheriff or deputy, although it does establish the sole method of *personal* service. *See Mabee*, 174 N.C. App. 210, 620 S.E.2d 307. Defendant cites no authority, and we find none, establishing that N.C. Gen. Stat. § 162-16 replaces the requirements of N.C. Gen. Stat. § 1A-1, Rule 4 as to methods of service other than personal service, including certified mail as was used in this case. Thus, N.C. Gen. Stat. § 162-16 is not applicable to defendant Price and any objections that he may raise as to erroneous service based on non-compliance with this statutory provision are "merely procedural[,]" so his appeal is interlocutory and must be dismissed. *Hart* at 230-31, 511 S.E.2d at 28; *see Cook v. Cinocca*, 122 N.C. App. 642, 644, 471 S.E.2d 108, 109 (1996) ("Defendant's appeal here pertains merely to the process of service used to bring the party before the court[.] Accordingly, we dismiss defendant's appeal ex mero motu as interlocutory." (citation, quotation marks, and ellipses omitted)).

Defendant Price also raises an issue regarding the statute of limitations and argues that he was entitled to dismissal based upon "Rule 12(b)(6) because the statute of limitations had run before Deputy Price was served." However, "our Supreme Court has previously determined that a motion to dismiss based on a statute of limitations does not affect a substantial right and is therefore not

[immediately] appealable." *Lee v. Baxter*, 147 N.C. App. 517, 520, 556 S.E.2d 36, 38 (2001) (citation, quotation marks, and brackets omitted)). Accordingly, we grant plaintiff's motion to dismiss[2] and dismiss defendant Price's appeal as interlocutory.

DISMISSED.

Chief Judge MARTIN and Judge ERVIN concur.

THE TRAVELERS INDEMNITY COMPANY, PLAINTIFF v. WALL, WALL & KNUDSON, LTD., DEFENDANT

No. COA10-292

(Filed 1 March 2011)

Appeal and Error— interlocutory orders and appeals—Rule 54(b) certification—failure to exhaust administrative remedies

An appeal from a partial summary judgment involving workers' compensation insurance rates was dismissed as not being from a final order, despite the trial court's Rule 54(b) certification. Defendant had not exhausted its administrative remedies and the issue upon which summary judgment was not granted was directly related to the other issues.

Appeal by defendant from judgment entered 18 November 2009 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 September 2010.

Strauch Fitzgerald & Green, P.C., by Andrew L. Fitzgerald, for plaintiff-appellee.

Giordano, Gordan & Burns, P.L.L.C., by Marc R. Gordon, for defendant-appellant.

BRYANT, Judge.

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2. Plaintiff also requested that we sanction defendant Price pursuant to Rule 34 of the North Carolina Rules of Appellate Procedure for filing a frivolous appeal; however, as we are dismissing this appeal, in our discretion we will not sanction defendant Price.

Notwithstanding its Rule 54(b) certification, where the trial court's ruling on partial summary judgment was not a final order as to a party or claim, and when there is no contention or showing that a substantial right would be affected absent immediate review, this interlocutory appeal must be dismissed.

Defendant Wall, Wall and Knudson, LTD., (Wall) a temporary employment agency, appeals from a trial court order granting plaintiff Travelers Indemnity Company (Travelers) partial summary judgment as to three out of five of Wall's defenses to the claim asserted in Travelers' complaint. The trial court certified the matter for immediate appeal pursuant to Rule 54(b).

On 24 September 2008, Travelers filed a complaint in Mecklenburg County Superior Court alleging that Wall failed to pay premiums totaling $811,619.00 pursuant to two insurance policies covering workers compensation claims. On 3 December 2008, Wall filed an answer alleging several defenses: (1) the experience rating modification number used to calculate Wall's premium was incorrect; (2) defendant's change in business ownership did not affect the experience modification rating; (3) Travelers improperly assessed an "ARAP" charge; (4) Travelers improperly changed the classifications codes for almost half of Wall's employees resulting in a higher premium; and (5) defenses of estoppel, waiver and laches bar any recovery sought by Travelers.

On 25 September 2009, Travelers filed a motion to dismiss and for summary judgment directed to Wall's defenses arguing that Wall had not exhausted its administrative remedies and had not alleged that the class codes, as applied to Wall's employees, were incorrect. In response, Wall alleged that, while the North Carolina Rate Bureau assigned the experience rating modification number, the rating was calculated by the National Counsel of Compensation Insurance (NCCI), which was not subject to the Administrative Procedure Act (APA). Therefore, in contesting the calculation of the experience rating modification number, there were no administrative remedies to exhaust.

Following a hearing on 4 November 2009, the trial court granted in part and denied in part Travelers' motion for summary judgment. Travelers' motion, as to Wall's defenses 1 through 3, was granted; Travelers' motion as to Wall's defense number 4—that Travelers improperly changed the classification code—was denied.[1]

1. The trial court did not rule on Wall's defense number 5—estoppel, waiver and laches.

> [The trial court] finds that it is entering final judgment against [Wall's] defenses due to lack of jurisdiction and for lack of proper parties before the Court, and there is no just reason for delay. The Court also finds that such final judgment against such defenses affects a substantial right of [Wall].

The trial court certified the matter for immediate appeal pursuant to Rule 54(b). Wall appeals based solely on the trial court's Rule 54(b) certification.

On appeal, Wall argues that the experience rating modification number, as calculated by NCCI, an insurance trade organization which assigns experience modification ratings to various employers for workers compensation purposes, was erroneous. Further, Wall argues that the NCCI is not subject to the APA; therefore, in effect, Wall has exhausted any remedies available to contest NCCI's calculation of the experience rating modification number under the APA. On these grounds, Wall argues that the trial court erred in determining that it lacked jurisdiction to address Wall's defenses and erred in dismissing Wall's defenses. Because, notwithstanding the 54(b) certification, we determine that the trial court's Rule 54(b) certification is ineffective and that Wall has not claimed that a substantial right is affected that would be lost absent immediate review, we dismiss this appeal as interlocutory.

Pursuant to Rule 54(b),

> When more than one claim for relief is presented in an action . . . the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes.

N.C. R. Civ. P. 54(b) (2009).

Here, the trial court dismissed three of the five defenses Wall asserted in response to Travelers's complaint. Those defenses that were dismissed clearly assert Wall's objection to the experience

rating modification number applied. The trial court's ruling seems to reflect its concern that, at least as to the North Carolina Rate Bureau, Wall has yet to exhaust its remedies pursuant to the APA. *See generally* N.C. Gen. Stat. § 58-36-1(1) (2009) (North Carolina Rate Bureau created)[2]; N.C. Gen. Stat. § 150B-1 *et seq.* (Administrative Procedure Act)[3]. Further, the trial court's ruling regarding each of the proper parties reflects a concern that NCCI, whom Wall asserts improperly calculated its experience rating modification number, should have been made a party to this action. However, Wall's fourth (4) defense —that Travelers improperly changed classification codes—appears to be directly related to defenses two thru five, as Wall alleges the changes in classification codes occurred after issuance of the policies at issue in the case.[4] Therefore, since the trial court's order did not resolve Traveler's claim against Wall, the trial court's decision was not a final order, and, as such, we cannot give deference to the Rule 54(b) certification. In addition, Wall has neither contended nor shown that the trial court's order affects a substantial right. Accordingly, this appeal is dismissed.

Though we make no assertion as to the outcome of a separate proceeding, we suggest that the trial court hold the matter in abeyance and allow Wall to seek recourse on the underlying question of whether the experience rating modification number was incorrectly determined pursuant to the review provided for under our General Statutes.

Dismissed.

Judges STEELMAN and ERVIN concur.

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2. Under N.C. Gen. Stat. § 58-36-1(1), it is the function of the North Carolina Rate Bureau, "(1) [t]o assume the functions formerly performed by the North Carolina Fire Insurance Rating Bureau, the North Carolina Automobile Rate Administrative Office, and the Compensation Rating and Inspection Bureau of North Carolina, with regard to the promulgation of rates, . . . for workers' compensation and employers' liability insurance written in connection therewith except for insurance excluded from the Bureau's jurisdiction in G.S. 58-36-1(3)."

3. Administrative Procedure Act, Policy and Scope. "This Chapter establishes a uniform system of administrative rule making and adjudicatory procedures for agencies." N.C. Gen. Stat. § 150B-1 (2009).

4. Wall's fifth defense—estoppel, waiver and laches—remains before the trial court.

DANIEL BOONE AND REBECCA BOONE, PLAINTIFFS v. WILLIAM JACK ROGERS, DEFENDANT

No. COA10-426

(Filed 1 March 2011)

Parties— necessary—tenants by the entirety

Judgment was improperly entered without a necessary party where a dispute arose over the dividing line between two properties, defendant's land was owned as tenants by the entirety with his wife, and she was not included as a party.

Appeal by defendant from order entered 20 October 2009 by Judge Danya Ledford Vanhook in District Court, Graham County. Heard in the Court of Appeals 26 October 2010.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Esther E. Manheimer, for plaintiff-appellees.

Moody & Brigham. PLLC, by Fred H. Moody, Jr., for defendant-appellant.

STROUD, Judge.

As the trial court entered an order without all of the necessary parties, we vacate and remand.

I. Background

In defendant's brief, he states the procedural background, which plaintiffs adopt, as follows:

> At the time of the institution of this action, the Plaintiffs-Appellees owned a tract of land in the Cheoah Township of Graham County. *The Defendant-Appellant and his wife, who was not made a party to this action, owned* an adjoining tract or parcel of land. A dispute arose as to the correct dividing line between the lands of the Plaintiffs-Appellees and the Defendant-Appellant and the Plaintiffs-Appellees sued to establish ownership of their land and for trespass, punitive damages and attorney fees.
>
> The Defendant-Appellant answered the Plaintiffs-Appellees' Complaint and counterclaimed for title to the land claimed by the Defendant-Appellant *and his wife*, for trespass and for a declaratory judgment that the Plaintiffs-Appellees had no right or title to

> a road crossing the lands of the Defendant-Appellant *and his wife*. This appeal involves only the issues concerning the Defendant-Appellant's Counterclaim for declaratory judgment that the Plaintiff-Appellees own no easement for a road across the land of the Defendant-Appellant *and his wife*.
>
> . . . .
>
> At trial, the Plaintiff-Appellees contended that the evidence presented established that they owned an easement by necessity and, at the close of all the evidence, the Plaintiffs-Appellees moved for a directed verdict, which motion was denied.

(emphasis added) (citations omitted).

The jury found, *inter alia*, that plaintiffs were not entitled to an easement. On 19 August 2009, plaintiffs filed a motion for, *inter alia*, judgment notwithstanding the verdict ("JNOV"). On 20 October 2009, the trial court, *inter alia*, granted plaintiffs' motion for JNOV.

II. Necessary Party

In defendant's counterclaim, he alleges that he owns real property with his wife in fee simple absolute and that "the Plaintiffs claim to own some road right or easement over and across the lands[.]" Defendant alleges that his and his wife's property is described "in deed book 61 page 449 and deed book 78 at page 553 Office of the Register of Deeds for Graham County, North Carolina". Indeed, the deeds included in the record on appeal confirm that defendant and his wife, Wanda Rogers, own the real property as tenants by the entirety, and this real property is the land upon which plaintiffs claim the right to an easement.

Because the record reveals that Ms. Rogers, one of the owners of an undivided interest in the real property which is the subject of the dispute in this case, was not included as a party, we *ex mero motu* raise the issue of necessary parties. *See Rice v. Randolph*, 96 N.C. App. 112, 113, 384 S.E.2d 295, 296 (1989).

> Rule 19 of the North Carolina Rules of Civil Procedure requires that those who are united in interest must be joined as plaintiffs or defendants. A person is united in interest with a party when that person's presence is necessary for the court to determine the claim before it without prejudicing the rights of a party or the rights of another who is not before the court. Necessary parties are those who have or claim material interests in the

> subject matter of a controversy, and those interests will be directly affected by an adjudication of the controversy. When there is a absence of necessary parties, the trial court should correct the defect *ex mero motu* upon failure of a competent person to make a proper motion. A judgment which is determinative of a claim arising in an action in which necessary parties have not been joined is null and void.

Id. at 113, 384 S.E.2d at 296-97 (citation and quotation marks omitted).

In *Rice*,

> [p]laintiffs brought suit to enjoin defendants from interfering with plaintiffs' user rights in an easement or right of way created by deeds referencing a recorded plat of a subdivision in which the parties' land is located. Defendants raised abandonment of the easement as a defense and also counterclaimed for a declaration of their rights to the land described in their deed, which purported to convey fee ownership to a tract of land consisting of a portion of lot 1 in the subdivision as well as a portion of the easement. Defendants claimed ownership of that portion of the easement by virtue of seven years' adverse possession under color of title and, alternatively, by twenty years' adverse possession.
>
> A jury answered the questions of abandonment and adverse possession in favor of defendants, and the trial court entered judgment decreeing defendants owners of the property described in their deed free and clear of any claims of plaintiffs to the right of way shown on the subdivision plat and further enjoining plaintiffs from interfering with or going upon defendants' property.

Id. at 112-13, 384 S.E.2d at 296. The plaintiffs in *Rice* appealed, but this Court determined it need not consider plaintiffs' issues as "the verdict and judgment must be vacated because necessary parties were absent from the action." *Id.* at 113, 384 S.E.2d at 296. This Court vacated and remanded the action for the joinder of necessary parties because

> a dispute as to the extinguishment of a subdivision easement by abandonment or adverse possession cannot be resolved without the joinder of the grantor, or his heirs, who retain fee title to the soil and the record owners of lots in the subdivision, who have user rights in the easement. Those owners of interests in the easement have a material interest in the subject matter of the controversy, and their interest will be directly affected by the court's decision.

Id. at 114, 384 S.E.2d at 297.

Here, defendant and Ms. Rogers owned the real property as tenancy by the entirety.

> When land is conveyed or devised to a husband and wife as such, they take the estate so conveyed or devised, as tenants by the entirety, and not as joint tenants, or tenants in common. This tenancy by the entirety takes its origin from the common law when husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person. The estate rests upon the doctrine of the unity of person, and upon the death of one the whole belongs to the other, not solely by right of survivorship, but also by virtue of the grant which vested the entire estate in each grantee. These two individuals, by virtue of their marital relationship, acquire the entire estate, and each is deemed to be seized of the whole, and not of a moiety or any undivided portion thereof.

Davis v. Bass, 124 S.E. 566, 567-68 (N.C. 1924). Ms. Rogers, as one of the owners of an undivided interest in the real property, *see id.*, has a "material interest[] in the subject matter of a controversy, and [her] interests will be directly affected by an adjudication of the controversy." *Rice* at 113, 384 S.E.2d at 297. Therefore, we "vacate the verdict and judgment below and remand so that a new trial may be had upon joinder of all necessary parties." *Id.* at 114, 384 S.E.2d at 297.

III. Conclusion

As judgment was improperly entered without a necessary party, we vacate and remand. As we are vacating and remanding the judgment, we need not consider defendant's contentions on appeal.

VACATED AND REMANDED.

Chief Judge MARTIN and Judge STEPHENS concur.

VICTOR KUBIT, SANJAY B. SHAH, LARRY DALE WITHERS AND CUMBERLAND ANESTHESIA ASSOCIATES, PA, PLAINTIFFS v. MAG MUTUAL INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, AMERICAN ECONOMY INSURANCE COMPANY, AMERICAN STATES INSURANCE COMPANY, CINCINNATI INSURANCE COMPANY, UNITED STATES FIDELITY & GUARANTY COMPANY, TRAVELERS PROPERTY & CASUALTY COMPANY OF AMERICA, TRAVELERS INDEMNITY COMPANY AND VIREN DESAI, DEFENDANTS

No. COA09-1056

(Filed 15 March 2011)

1. Insurance— coverage under policy—employees of named insured—insured

Defendant insurance companies MAG Mutual's and American's argument that the individual plaintiffs were not insureds under the policies was overruled. The individual plaintiffs were employees of the named insured and the actions that formed the bases of the complaint involved actions undertaken while the individual plaintiffs were performing duties related to the conduct of the named insured's business.

2. Insurance— duty to defend—negligent misrepresentation—bodily injury—claim not covered

Defendant insurance companies did not have a duty to defend plaintiffs against complainant's negligent misrepresentation claim because the claim did not fall within the policies' bodily injury coverage.

3. Insurance— duty to defend—defamation—personal injury —claim not covered

Defendant insurance companies had a duty to defend plaintiffs against complainant's defamation claim. The claim fell within the policies' coverage for personal injury and no exclusions were applicable.

4. Insurance— duty to defend—defamation—negligent misrepresentation—quality assurance activities

Defendant insurance company MAG had a duty to defend plaintiffs in a negligent misrepresentation and defamation case because complainant's factual allegations were based in part on the individual plaintiffs' quality assurance activities.

5. Insurance— duty to defend—notice of action—actual notice—timely notice not received—no duty

Where plaintiffs failed to give proper notice of a complaint filed against them to an agent of defendant insurance companies American and Cincinnati, the insurers' duty to defend plaintiffs did not arise until the insurers themselves received notice. Moreover, where defendant Travelers insurance companies did not receive timely notice of the action, those carriers were relieved of their duty to defend.

Appeal by plaintiffs from orders entered 5 March 2009, 9 March 2009, and 10 March 2009 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 11 February 2010.

Smyth & Cioffi, LLP, by Theodore B. Smyth, for plaintiffs-appellants.

Ellis & Winters LLP, by J. Donald Cowan, Jr. and Stephen C. Keadey, for defendant-appellee MAG Mutual Insurance Company.

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

Womble Carlyle Sandridge & Rice, PLLC, by Garth A. Gersten, for defendants-appellees Travelers Property & Casualty Company of America, Travelers Indemnity Company, and United States Fidelity & Guaranty Company.

Moreau & Marks, PLLC, by Daniel C. Marks, for defendants-appellees American Economy Insurance Company and American States Insurance Company.

GEER, Judge.

Plaintiffs Victor Kubit, Sanjay B. Shah, and Larry Dale Withers (collectively "the individual plaintiffs"), along with Cumberland Anesthesia Associates, PA, appeal from the trial court's orders denying their motions for summary judgment and granting summary judgment in favor of the defendant insurance carriers. Plaintiffs contend that the trial court erred in concluding that the defendant insurers had no duty to defend plaintiffs in a tort action brought by Wayne Welsher, M.D. We affirm the trial court's orders in part and reverse in part.

Applying the comparison test set out in *Waste Management of Carolinas, Inc. v. Peerless Insurance Co.*, 315 N.C. 688, 340 S.E.2d 374 (1986), we agree with plaintiffs that insurers MAG Mutual Insurance Company; American Economy Insurance Company and American States Insurance Company (collectively "American"); and Cincinnati Insurance Company all had a duty to defend plaintiffs in the underlying action. That duty arose, however, only when the insurers were given actual notice of the underlying complaint. Because we have concluded that plaintiffs have failed to establish that they gave proper notice to an agent of American or Cincinnati, the insurers' duty did not arise until the insurers themselves received notice.

As for United States Fidelity & Guaranty Company, Travelers Property & Casualty Company of America, and Travelers Indemnity Company (collectively "Travelers"), there is no dispute that Travelers did not receive notice of the Welsher action until more than eight months after the Welsher action was filed. Since plaintiffs have failed to offer any reason for their failure to timely notify Travelers of the action, we are compelled to conclude that those carriers were relieved of their duty to defend because of plaintiffs' failure to give Travelers timely notice of the Welsher action.

Facts

On 3 July 2006, Dr. Welsher, a cardiothoracic and vascular surgeon at Cape Fear Valley Medical Center ("the Hospital"), filed suit against the individual plaintiffs and Dr. Viren Desai (collectively "the individual anesthesiologists"). The individual anesthesiologists were members of Cumberland Anesthesia, a medical practice that provided anesthesia services at the Hospital. The Welsher complaint included causes of action for defamation, tortious interference with contract, tortious interference with prospective economic advantage, intentional or negligent infliction of emotional distress, and unfair and deceptive trade practices.

The Welsher complaint alleged that the individual anesthesiologists engaged in a series of "conspiratorial acts" in order "to destroy Dr. Welsher's practice, to interfere with his relationships with his patients, hospital staff, and referral physicians, and to have him removed from the Hospital." In particular, the Welsher complaint alleged that after the individual anesthesiologists joined Cumberland Anesthesia in 2001, they instituted new rules of operation at the Hospital regarding the provision of anesthesia services. Dr. Welsher

alleged that the individual anesthesiologists retaliated against him when he opposed the rules as being contrary to patient safety.

The complaint further alleged that the individual anesthesiologists tried to persuade or intimidate other hospital staff members to join them in their efforts to have Dr. Welsher removed from the Hospital. According to the complaint, the individual anesthesiologists intentionally created "a hostile environment for Dr. Welsher, repeatedly challenging his decisions and undermining his authority." The complaint claimed that as a result of the individual anesthesiologists filing "patently erroneous and hostile" and "false and malicious" complaints, the Medical Executive Committee of the Hospital summarily suspended Dr. Welsher's privileges for a period of 30 days in 2002. Finally, the complaint asserts that, taken together, the individual anesthesiologists' actions "caused irreparable harm to Dr. Welsher's reputation and practice."

The defendant insurance companies that provided coverage to Cumberland Anesthesia received notice of the Welsher complaint at different times. Plaintiffs contend that MAG Mutual received notice on 7 July 2006, four days after the Welsher complaint was filed, when Catherine Green, the Practice Manager of Cumberland Anesthesia, faxed the complaint to MAG Insurance Agency. Plaintiffs contend that Cincinnati and American received notice on 28 September 2006 when Ms. Green faxed the complaint to an insurance agency, Insurance Service Center of Fayetteville. Cincinnati and American dispute whether Insurance Service Center was their agent and whether the notice to the agency was sufficient to provide them with notice. Cincinnati contends that it did not receive notice until 26 March 2007, while American argues that it only received notice on 9 July 2007. It is undisputed that Travelers received notice of the Welsher complaint on 21 March 2007.

Plaintiffs had retained Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP to defend the Welsher action. Upon receiving notice of the action, Travelers agreed to provide a defense to plaintiffs under a complete reservation of rights, and the defense was transferred to Yates McLamb & Weyher. Travelers paid all of the attorneys' fees and costs charged by Yates McLamb & Weyher. The record indicates that Dr. Welsher voluntarily dismissed his action without prejudice in August 2007 and did not subsequently re-file his complaint.

On 12 May 2008, plaintiffs filed this action against MAG Mutual, Cincinnati, American, Travelers (collectively "defendants"), Federal

Insurance Company, and Dr. Desai.[1] With respect to the insurance carriers, plaintiffs alleged a claim for breach of contract based on the carriers' failure to provide a defense or to indemnify plaintiffs for defense costs they incurred in defending the Welsher action. In the alternative, Cumberland Anesthesia sought to recover damages from Dr. Desai for breaching his agreement to pay a portion of the total defense costs.[2]

MAG Mutual filed a motion for summary judgment against plaintiffs on 30 December 2008, seeking a declaratory judgment that MAG Mutual had no duty to defend the Welsher complaint. Plaintiffs, in turn, filed a motion for summary judgment against defendants on 4 February 2009, seeking a declaratory judgment that defendants all had a duty to defend the Welsher complaint. Cincinnati, on 6 February 2009, and American, on 9 February 2009, also filed summary judgment motions seeking declaratory judgments that they had no duty to defend plaintiffs.

On 5 March 2009, the trial court entered an order granting MAG Mutual's motion. On 9 March 2009, the trial court denied plaintiffs' motion for summary judgment as to Travelers and entered summary judgment in favor of Travelers pursuant to Rule 56(c) of the Rules of Civil Procedure. The trial court granted American's motion for summary judgment also on 9 March 2009. Cincinnati's motion for summary judgment was allowed on 10 March 2009. Plaintiffs timely appealed to this Court.

Discussion

Our Supreme Court has observed that "the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy." *Waste Mgmt.*, 315 N.C. at 691, 340 S.E.2d at 377. This duty to defend "is ordinarily measured by the facts as alleged in the pleadings." *Id.* "When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable." *Id.* An insurer is excused from its

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1. The Statement of Jurisdiction in the Record on Appeal states that this action was filed on 12 May 2008. The Record on Appeal, however, includes an "Amended Complaint" as the pleading filed on 12 May 2008.

2. Plaintiffs and Dr. Desai later mutually stipulated to a dismissal without prejudice. Plaintiffs also voluntarily dismissed with prejudice the complaint against Federal Insurance Company. Dr. Desai and Federal Insurance Company are not parties to this appeal.

duty to defend only "if the facts are not even arguably covered by the policy." *Id.* at 692, 340 S.E.2d at 378.

In our Supreme Court's most recent decision on the duty to defend, the Court explained that in order to answer the question whether an insurer has a duty to defend, we apply the " 'comparison test,' reading the policies and the complaint 'side-by-side . . . to determine whether the events as alleged are covered or excluded.' " *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 6, 692 S.E.2d 605, 610 (2010) (quoting *Waste Mgmt.*, 315 N.C. at 693, 340 S.E.2d at 378). In performing this test, "the facts as alleged in the complaint are to be taken as true and compared to the language of the insurance policy. If the insurance policy provides coverage for the facts as alleged, then the insurer has a duty to defend." *Id.* at 7, 692 S.E.2d at 611.

The Supreme Court stated in *Waste Management*, 315 N.C. at 691 n.2, 340 S.E.2d at 377 n.2 (emphasis added), that "allegations of facts that describe a hybrid of covered and excluded events or pleadings that disclose *a mere possibility* that the insured is liable (and that the potential liability is covered) suffice to impose a duty to defend upon the insured." This Court subsequently relied upon this language as holding that if the "pleadings allege multiple claims, some of which may be covered by the insurer and some of which may not, the *mere possibility* the insured is liable, and that the potential liability is covered, may suffice to impose a duty to defend." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 735, 504 S.E.2d 574, 578 (1998) (emphasis added). *See also Naddeo v. Allstate Ins. Co.*, 139 N.C. App. 311, 319, 533 S.E.2d 501, 506 (2000) (holding that pleadings which disclose " 'mere possibility' " that potential liability is covered suffice to impose duty to defend upon insurer (emphasis omitted) (quoting *Waste Mgmt.*, 315 N.C. at 691 n.2, 340 S.E.2d at 377 n.2)).

It appears, however, that the Supreme Court's *Harleysville* decision has changed the law:

> In addressing the duty to defend, *the question is not whether some interpretation of the facts as alleged could possibly bring the injury within the coverage provided by the insurance policy*; the question is, assuming the facts as alleged to be true, whether the insurance policy covers that injury. The manner in which the duty to defend is "broader" than the duty to indemnify is that the statements of fact upon which the duty to defend is based may not, in reality, be true. As we observed in *Waste*

> *Management*, "[w]hen the pleadings state facts demonstrating that the alleged injury *is covered* by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable." [*Waste Mgmt.*, 315 N.C. at 691, 340 S.E.2d at 377] (emphasis added) (citations omitted).

Harleysville, 364 N.C. at 7, 692 S.E.2d at 611 (first emphasis added). Under *Harleysville*, the duty to defend is broader than the duty to indemnify *only* "in the sense that an unsubstantiated allegation requires an insurer to defend against it so long as the allegation is of a covered injury; however, even a meritorious allegation cannot obligate an insurer to defend if the alleged injury is not within, or is excluded from, the coverage provided by the insurance policy." *Id.*

Harleysville does not specifically address and nothing in its language appears to revisit the following caveat to the comparison test set out in *Waste Management* imposing a duty on the insurance carrier to investigate:

> Conversely, when the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend.
>
> Where the insurer knows or could reasonably ascertain facts that, if proven, would be covered by its policy, the duty to defend is not dismissed because the facts alleged in a third-party complaint appear to be outside coverage, or within a policy exception to coverage. In this event, the insurer's refusal to defend is at his own peril: if the evidence subsequently presented at trial reveals that the events are covered, the insurer will be responsible for the cost of the defense. This is not to free the carrier from its covenant to defend, but rather to translate its obligation into one to reimburse the insured if it is later adjudged that the claim was one within the policy covenant to pay. In addition, many jurisdictions have recognized that the modern acceptance of notice pleading and of the plasticity of pleadings in general imposes upon the insurer a duty to investigate and evaluate facts expressed or implied in the third-party complaint as well as facts learned from the insured and from other sources. Even though the insurer is bound by the policy to defend groundless, false or fraudulent lawsuits filed against the insured, if the facts are not even arguably covered by the policy, then the insurer has no duty to defend.

Waste Mgmt., 315 N.C. at 691-92, 340 S.E.2d at 377-78 (internal citations and quotation marks omitted).

This Court has held, citing this part of *Waste Management's* holding, that "[a]lthough the insurer's duty to defend an action is generally determined by the pleadings, facts learned from the insured and facts discoverable by reasonable investigation may also be considered." *Duke Univ. v. St. Paul Fire & Marine Ins. Co.*, 96 N.C. App. 635, 638, 386 S.E.2d 762, 764, *disc. review denied*, 326 N.C. 595, 393 S.E.2d 876 (1990). The Court in *Duke University* determined that, "[t]herefore," affidavits filed by the plaintiff explaining what actually occurred during an accident—contrary to allegations in the underlying complaint—were "relevant to the determination of defendant's duty to defend." *Id.* Since *Harleysville* did not overrule this portion of *Waste Management* or *Duke University*, we remain bound by this authority.

I. Qualification of Individual Plaintiffs as "Insureds" under the Policies

[1] As an initial matter, MAG Mutual and American contend that the individual plaintiffs were not insureds under the policy. Each of the policies identified Cumberland Anesthesia as the only "named insured." As a result, in order for the individual plaintiffs to be entitled to a defense, they must come within the definition of an "insured" contained in the policies.[3] The policies define the term "insured" as follows:

> 1. If you [Cumberland Anesthesia] are designated in the Declarations as:
>
> . . . .
>
> d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. . . ."
>
> 2. Each of the following is also an insured:
>
> a. . . . your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) . . . but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. . . .

3. The policies contain substantially the same language.

The individual plaintiffs presented evidence in an affidavit by plaintiff Dr. Kubit that each of them was a director of and employed by Cumberland Anesthesia during the times alleged in the underlying complaint. The question is, therefore, whether the actions that formed a basis for the complaint (1) involved their duties as directors, (2) were within the scope of their employment, or (3) occurred while they were performing duties related to the conduct of Cumberland Anesthesia's business.

The business of the named insured, Cumberland Anesthesia, was providing anesthesia and related services in Cumberland County, including at the Hospital. Among other allegations, the underlying complaint challenged new rules promulgated by Cumberland Anesthesia and the individual anesthesiologists relating to their provision of anesthesia services; alleged that the individual anesthesiologists retaliated against Dr. Welsher for his opposing their rules, which he contended were inappropriate; alleged that the individual anesthesiologists wrote false medical notes regarding what occurred in operations to counter notes written by Dr. Welsher; and alleged that the individual anesthesiologists made groundless complaints regarding the quality of Dr. Welsher's surgical work and the professionalism of his behavior at the Hospital.

In support of their argument that they qualify as insureds under the policies, the individual plaintiffs point to Dr. Kubit's affidavit, in which he stated that "[a]ll activity undertaken by them as described herein, was authorized by Cumberland Anesthesia Associates, PA, as part of an ongoing desire by both Cumberland Anesthesia Associates, PA and Cape Fear Valley Medical Center to provide the best quality health care services and patient safety to their mutual patients." The Kubit affidavit further stated, apparently with respect to actions by the individual anesthesiologists in connection with the Hospital's peer review activities and committees, that the anesthesiologists "were performing these duties as licensed physicians with privileges at Cape Fear Valley Medical Center, with the specific consent and authority of their anesthesiology group, Cumberland Anesthesia Associates, PA."

The Welsher complaint's allegations—including the promulgation and enforcement of rules, the writing of medical notes, and the making of complaints in connection with peer review activities approved by the named insured—involve acts undertaken while the individual anesthesiologists were "performing duties related to the conduct of

[Cumberland Anesthesia's] business" of providing anesthesia and related services at the Hospital. Since this activity falls within the definition of an "insured" employee, we need not address whether the alleged conduct involved the individual anesthesiologists' duties as directors.

In arguing otherwise, both MAG Mutual and American point to cases involving sexual assaults by school employees. *See Medlin v. Bass*, 327 N.C. 587, 398 S.E.2d 460 (1990), and *Durham City Bd. of Educ. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 109 N.C. App. 152, 426 S.E.2d 451, *disc. review denied*, 333 N.C. 790, 431 S.E.2d 22 (1993). Although *Medlin* did not involve a question of insurance coverage, the Supreme Court emphasized that "[w]here the employee's actions conceivably are within the scope of employment and in furtherance of the employer's business, the question is one for the jury." 327 N.C. at 593, 398 S.E.2d at 463. The Court nonetheless concluded that, for purposes of *res judicata*, a principal was not acting within the scope of his employment when he sexually assaulted a student because the principal could only be advancing a completely personal objective, and "[t]he assault could advance no conceivable purpose of [the Board of Education]." *Id.* at 594, 398 S.E.2d at 464.

In *Durham City Board of Education*, this Court addressed whether a school employee who had taken a student to his home and sexually assaulted her was an insured under the Board of Education's insurance policy. According to the language of the policy, the employee would only be covered if the acts alleged to have been committed by him had occurred while he was acting within the scope of his duties as an employee of the school district. 109 N.C. App. at 157, 426 S.E.2d at 454. Applying *Medlin*, this Court concluded that the employee's sexual assault was not within the scope of his employment and, therefore, the carrier had no duty to defend the employee. *Durham City Bd. of Educ.*, 109 N.C. App. at 157-58, 426 S.E.2d at 454.

We cannot conclude that the allegations in the Welsher complaint are analogous to a school employee's sexual assault. The allegations do not establish that the individual anesthesiologists were acting to advance purely personal objectives as opposed to objectives related to their employment with Cumberland Anesthesia. In contrast to both *Medlin* and *Durham City Board of Education*, the alleged actions could conceivably advance a purpose of Cumberland Anesthesia. The Welsher complaint does not include any allegation suggesting a personal agenda for any of the individual anesthesiologists unrelated

to the business of Cumberland Anesthesia. Indeed, the complaint contains a number of allegations suggesting that the individual anesthesiologists were acting to allow Cumberland Anesthesia to gain influence and control at the Hospital. Accordingly, we hold that MAG Mutual and American's argument that the individual plaintiffs were not insureds was not a proper basis for granting summary judgment to those carriers.

II. Coverage of Alleged Acts Under the Policy

Plaintiffs contend that defendants had a duty to defend because the acts alleged in the Welsher complaint fall within the policies' coverage for "bodily injury," "personal injury," and, as to the MAG Mutual policy, quality assurance activities. We address each of the different types of coverage in turn.

Under North Carolina law, "the insured . . . has the burden of bringing itself within the insuring language of the policy. Once it has been determined that the insuring language embraces the particular claim or injury, the burden then shifts to the insurer to prove that a policy exclusion excepts the particular injury from coverage." *Hobson Constr. Co. v. Great Am. Ins. Co.*, 71 N.C. App. 586, 590, 322 S.E.2d 632, 635 (1984), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 890 (1985). "Exclusionary clauses are interpreted narrowly while coverage clauses are interpreted broadly to provide the greatest possible protection to the insured." *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 542-43, 350 S.E.2d 66, 71 (1986).

A. *Bodily Injury*

[2] Plaintiffs argue that the Welsher complaint's claim for negligent misrepresentation falls within the policies' bodily injury coverage. Defendants' policies all provided coverage for "bodily injury" arising out of an "occurrence." The policies generally define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policies also excluded coverage for "bodily injury" expected or intended from the standpoint of the insured. Defendants MAG Mutual, American, and Cincinnati all argue that no duty to defend exists because either the Welsher complaint did not allege an "occurrence" or the allegations fall within the exclusion for intended/expected injuries. Travelers does not make this argument.

Where, as here, the term "accident" is not defined in an insurance policy, it is construed to include " 'injury resulting from an intentional

act, *if the injury is not intentional or substantially certain to be the result of the intentional act.*' " *Am. Mfrs. Mut. Ins. Co. v. Morgan*, 147 N.C. App. 438, 441, 556 S.E.2d 25, 28 (2001) (quoting *Russ v. Great Am. Ins. Cos.*, 121 N.C. App. 185, 188, 464 S.E.2d 723, 725 (1995), *disc. review denied*, 342 N.C. 896, 467 S.E.2d 905 (1996)), *cert. denied*, 355 N.C. 747, 565 S.E.2d 191 (2002). " '[I]f an intentional act is either intended to cause injury or substantially certain to result in injury, it is not an occurrence under the policy definitions . . . and no coverage is provided.' " *Id.* (quoting *Henderson v. U.S. Fid. & Guar. Co.*, 124 N.C. App. 103, 110, 476 S.E.2d 459, 464 (1996), *aff'd as modified on other grounds*, 346 N.C. 741, 488 S.E.2d 234 (1997)). This Court held in *State Auto Insurance Cos. v. McClamroch*, 129 N.C. App. 214, 220, 497 S.E.2d 439, 443 (1998), that an intent to injure "may be inferred where the act is substantially certain to result in injury."

We believe that *McClamroch* controls as to the issue of coverage for bodily injury. In *McClamroch*, the carrier sought a declaration that it had no duty to defend the defendants who had been sued for picketing a physician's home in order to cause him to cease performing abortions. *Id.* at 215, 497 S.E.2d at 440. The insureds contended that the carrier had a duty to defend them because the underlying complaint, although including various intentional causes of action, also asserted a claim for negligent infliction of emotional distress. The insureds argued that this negligence claim fell within the coverage for bodily injury. This Court, in holding that the negligence claim did not give rise to a duty to defend, explained:

> [The insureds] were intentionally engaged in targeted residential picketing with the intent of inflicting sufficient emotional distress to coerce [a physician] from engaging in the legal, though controversial, activity of performing abortions. *An intent to injure is the only logical conclusion to be inferred from defendants' conduct. The addition of the negligence claim is not sufficient to invoke coverage, because the amended complaint merely alleges " 'but a different characterization of the same wilful act . . . .' " Eubanks* [*v. State Farm Fire & Cas. Co.*], 126 N.C. App. [483,] 489, 485 S.E.2d [870,] 873[, *disc. review denied*, 347 N.C. 265, 493 S.E.2d 452 (1997)]. The [physician and his wife] have simply "recast their allegations of intentional conduct under a heading of negligence." Accordingly, we hold that the intentional acts exclusion of the insurance contract applies and summary judgment was properly granted.

Id. at 220-21, 497 S.E.2d at 443 (emphasis added).

In this case, the Welsher complaint similarly alleged a systematic and intentional course of conduct "with the ultimate goal of having Dr. Welsher removed from the Hospital's medical staff." Dr. Welsher's allegations refer only to intentional conduct, the very nature of which leads to one conclusion: that the defendants (plaintiffs in this action) intended to injure Dr. Welsher. Indeed, as in *McClamroch*, the alleged purpose of the conduct in this case was to cause sufficient emotional distress to coerce Dr. Welsher into withdrawing from or being forced to leave his practice. Like the negligent infliction of emotional distress claim in *McClamroch*, Dr. Welsher's negligent misrepresentation claim does nothing more than re-label the same intentional conduct as negligence. The mere fact that the tort complaint "recasts" the intentional acts into a claim for negligence does not trigger coverage or a duty to defend. Thus, no duty to defend arose from the claim of bodily injury, because the facts alleged in the Welsher complaint fall under the intentional injury exclusion.

We further conclude that the Welsher complaint did not allege an occurrence. The injuries alleged in this case were substantially certain to result from the individual plaintiffs' intentional acts, and, therefore, the duty to defend was not triggered under the policies. *See N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 709, 412 S.E.2d 318, 325 (1992) (holding that if intentional act is either intended to cause injury or "substantially certain" to result in injury, it is not an occurrence under policy, and there is no coverage).

B. *Personal Injury*

[3] Next, plaintiffs argue that defendants had a duty to defend based on the Welsher complaint's defamation claim for relief because the claim falls within the coverage for "personal injury." Each of defendants' liability and umbrella policies provided coverage for "[p]ersonal and advertising injury" arising out of one or more of the following offenses: "[o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services."

Plaintiffs correctly point out that this Court has upheld coverage of intentional torts, including defamation, when the policy has specifically listed the intentional tort in coverage provisions like the ones in this case regarding "personal injury." In *Stanback v. Westchester Fire Insurance Co.*, 68 N.C. App. 107, 114-15, 314 S.E.2d 775, 779

(1984) (emphasis added), this Court recognized that when a policy "define[s] 'personal injury' to include false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution, *libel and slander*[,] . . . clearly intentional torts," a conflict exists between the coverage provisions and any exclusion for intentional torts. The Court held that, because a policy must be given the construction most favorable to the insured and since the insurance company chose the language, "the apparent conflict between coverage and exclusion must therefore be resolved in favor of [the insured] . . . ." *Id.* at 115, 314 S.E.2d at 779.

Since defendants' policies specifically state that they cover "[o]ral or written publication, in any manner, of material that slanders or libels a person," plaintiffs have established that Dr. Welsher's claim for defamation falls within the coverage of the policies for "personal injury." MAG Mutual and American, however, contend that "personal injury" coverage is unavailable because of the policies' exclusion for damages "[c]aused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury' " and for damages "[a]rising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity."

Despite their specific reliance upon these two exclusions, MAG Mutual and American, in their briefs, focus on the intentional nature of the acts. American argues that no coverage exists because the Welsher complaint alleges "that the individual anaesthesiologists knew and intended that their statements and conduct would cause injury to Dr. Welsher's personal and professional reputation. In fact, that was their purpose and goal as alleged by Dr. Welsher." MAG Mutual similarly argues that "as alleged in the Welsher Complaint, the Plaintiff-Appellants knew and intended that their conduct would cause injury to Dr. Welsher's professional reputation." Because of the policies' express coverage of the intentional torts of slander and libel, the fact that plaintiffs may have acted intentionally is immaterial.

Instead, the exclusions upon which MAG Mutual and American rely require (a) knowledge that the statements made would "violate the rights of another" and inflict "personal or advertising injury" or (b) knowledge that the statements were false. While the first exclusion includes intentional infliction of injury, it also requires a knowing violation of a person's rights. *See Burlington Ins. Co. v. Superior Nationwide Logistics, Ltd.*, 783 F. Supp. 2d 958, 964, 2010 WL

3155916, *5, 2010 U.S. Dist. LEXIS 80648, *12 (S.D. Tex. Aug. 10, 2010) (unpublished) ("Thus, in this instance where NATCO has alleged defamation as a 'personal and advertising injury,' Policy coverage for Defendants is excluded if the insured both (1) knows that the statement would violate another's rights, and (2) knows that the statement would inflict damage to another's reputation."). As for the second exclusion, coverage would still exist for a truthful statement made knowing, or even intending, that it would injure a person. *See Pennfield Oil Co. v. Am. Feed Indus. Ins. Co. Risk Retention Group, Inc.*, 2007 WL 1290138, *9, 2007 U.S. Dist. LEXIS 21456, *26 (D. Neb. Mar. 12, 2007) (unpublished) (holding that identical exclusion did not apply if "allegedly false representations were either made without knowledge of falsity or were not false").

The central question as to the exclusions at issue is, therefore, whether the Welsher complaint alleges any facts permitting the conclusion that the individual anesthesiologists did not know that their statements regarding Dr. Welsher were false and did not know that they were violating Dr. Welsher's rights and inflicting "personal and advertising injury," which is defined as including slandering or libeling a person or disparaging the person's services. There is no question that the Welsher complaint does contain numerous allegations that the individual anesthesiologists made "malicious falsehoods," "baseless accusations," and "baseless allegations" against Dr. Welsher that were "patently false," and "false and malicious."

On the other hand, other allegations regarding injurious statements by the individual plaintiffs do not necessarily require the conclusion that the individual plaintiffs knew the statements were false or that they knew the statements violated Dr. Welsher's rights. The Welsher complaint specifically alleges in the defamation cause of action that "[the individual anesthesiologists] made the statements negligently, with knowledge that they were false, and/or with reckless disregard as to whether or not they were false." As discussed in connection with the "bodily injury" coverage, the fact that a plaintiff attempts to re-label intentional conduct as negligent or reckless is not binding for coverage purposes if the specific conduct at issue is only intentional conduct. Nevertheless, here, the complaint contains a number of allegations regarding false statements that could have been made negligently or with reckless disregard as to the truth of the statements.

The Welsher complaint's allegation that "[a]t every opportunity, [the individual anesthesiologists] and others criticized Dr. Welsher"

does not require that these criticisms were knowingly false or a knowing violation of Dr. Welsher's rights. The complaint refers to multiple incidents in which a dispute arose between Dr. Welsher and one of the individual anesthesiologists during a surgery, Dr. Welsher wrote an allegedly "accurate" note in the patient's chart regarding what happened, and the individual anesthesiologist "documented his version of the events," which was false. The complaint also describes another occasion in which some of the anesthesiologists filed complaints with the Hospital because Dr. Shah "believ[ed] that Dr. Welsher had communicated to the [patient's] family and others that he canceled the surgery due to Dr. Shah's conduct," an allegation that suggests a lack of knowledge that the complaint was false. The complaint also distinguishes between "malicious falsehoods" and "unfounded complaints," with the latter potentially being the result of negligence or reckless disregard for the truth.

Thus, although the Welsher complaint contained numerous allegations that fell within the exclusions, it also contained allegations supportive of the defamation claim that arguably did not fall within the exclusions. As a result, the Welsher complaint includes allegations supporting its defamation claim that are covered and not excluded by the policies, and MAG Mutual and American had a duty to defend the defamation claim. *Waste Mgmt.*, 315 N.C. at 691 n.2, 340 S.E.2d at 377 n.2.

Cincinnati, on the other hand, concedes that "[t]he slander claim in the [Welsher action] falls within the definition of 'personal and advertising injury' in the Cincinnati Policy as an enumerated 'defamation' offense."[4] The carrier argues, however, (1) that the Welsher complaint fails to allege slander that occurred within its policy period or (2) that any claim would fall within its policy's prior publication exclusion. Cincinnati's policy period began on 20 May 2006.

The Welsher complaint did not include allegations regarding any distinctly identified statements made within Cincinnati's policy period. The last event specifically described occurred in April 2006. Nevertheless, the Welsher complaint alleges that "Dr. Welsher has also recently learned that Defendants *have contacted and continue to contact* the physicians who comprise Dr. Welsher's referral base and those physicians to whom he makes referrals." (Emphasis added.) According to the complaint, these contacts involved efforts

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4. Travelers, the remaining carrier, makes no argument regarding the coverage for "personal injury."

to stop referrals through "malicious and false statements." The complaint further alleges that the individual anesthesiologists have "continue[d] their efforts to this day[] to destroy Dr. Welsher's practice, to interfere with his relationships with his patients, hospital staff, *and referral physicians*, and to have him removed from the Hospital." (Emphasis added.) Since the Welsher complaint was filed on 3 July 2006, we believe that the alleged continuing and "ongoing" slander preceding that date would arguably fall within the Cincinnati policy coverage period. Therefore, Cincinnati was not exempted from its duty to defend on this ground.

Cincinnati next points to the prior publication exclusion for slander "[a]rising out of oral or written publication of material whose first publication took place before . . . inception of this policy." In *Superformance International Inc. v. Hartford Casualty Insurance Co.*, 332 F.3d 215, 224 (4th Cir. 2003), the Fourth Circuit concluded that this exclusion applied when the facts in the underlying complaint "ma[d]e clear that any false advertising or disparagement that [could] be inferred from the . . . claims first occurred before the policy period."

In this case, numerous statements were made prior to Cincinnati's policy period. Nevertheless, a carrier's duty to defend is not excused by this exclusion simply because statements amounting to personal or advertising injury were made both before and after the commencement of a policy period. In *Harleysville Mutual Insurance Co. v. Buzz Off Insect Shield, L.L.C.*, 190 N.C. App. 28, 35, 664 S.E.2d 317, 321 (2008), *rev'd in part on other grounds and disc. review improvidently allowed in part*, 364 N.C. 1, 692 S.E.2d 605 (2010), the carrier's policy commenced on 20 June 2004. The carrier argued that the prior publication exclusion applied because the underlying complaint alleged that the false advertising at issue had first begun in August 2003. This Court concluded that there was a duty to defend notwithstanding the prior publication exclusion because there were "new press releases" containing false advertising as late as 15 September 2004. *Id.*

Here, if, as the Supreme Court's decision in *Harleysville* requires, we take as true the allegations that the individual anesthesiologists continued "to this day" to contact Dr. Welsher's referral physicians, making "malicious and false statements," then there were "new" publications following the inception of Cincinnati's policy period. The complaint's allegations did not indicate that the new publications were simply republications of prior statements.

It is not sufficient that the statements made before the commencement of coverage are similar in content to those made after 5 May 2006. The statements in *Harleysville* were similar. Instead, the prior publication exclusion "is intended to and in fact bars coverage of an insured's continuous or repeated publication of *substantially the same* offending material previously published at a point of time before a policy incepts, while *not* barring coverage of offensive publications made during the policy period which *differ in substance* from those published before commencement of coverage." *Ringler Assocs. v. Maryland Cas. Co.*, 80 Cal. App. 4th 1165, 1183, 96 Cal. Rptr. 2d 136, 150-51 (2000). *See also Adolfo House Distrib. Corp. v. Travelers Prop. & Cas. Ins. Co.*, 165 F. Supp. 2d 1332, 1343 n.5 (S.D. Fla. 2001) (holding that duty to defend existed despite prior publication exclusion because "[c]onduct which is merely similar is deemed insufficient to trigger this exclusion" and "there is a question raised as to whether the advertising injury activity which occurred during the policy term involved simple republication of pre-policy inception activity, or instead was merely 'similar' to it in theme or content").

The burden of establishing the applicability of the prior publication exclusion rested on Cincinnati. Because the allegations of the Welsher complaint do not establish that the statements made prior to 5 May 2006 were substantially the same as those made afterwards, Cincinnati had a duty to defend based on the defamation cause of action notwithstanding the prior publication exclusion.

C. *Quality Assurance Activities*

[4] Plaintiffs also argue that MAG Mutual had a duty to defend because the Welsher complaint's factual allegations were based in part on the individual plaintiffs' quality assurance activities. In addition to the Businessowner's Policy and the Umbrella Policy, MAG Mutual issued a Physicians and Surgeons Liability Policy to Cumberland Anesthesia. The "Quality Assurance Coverage" provision of the Physicians and Surgeons Liability Policy provided as follows:

> We'll cover you for your quality assurance activities when performed for the purposes of evaluating and improving the quality of healthcare services and for patient safety. We'll cover you when you participate as a member, a witness or a clinical practice advisor of a formal credentialing, peer review, or quality assurance board or committee formed by an organization for the purposes of improvement of patient safety or the quality of healthcare services delivered to patients.

MAG Mutual argues that the Welsher complaint's allegations are not sufficient to give rise to a duty to defend because they do not allege "that any of the individual Defendants were serving as a member, witness or clinical practice advisor of a peer review committee." Plaintiffs, however, argue that the provision sets out two types of coverage, and MAG Mutual has addressed only one. First, the policy states "[w]e'll cover you" for "quality assurance activities" for specified purposes and, second, the policy states "[w]e'll cover you" for participation in certain capacities related to a formal credentialing, peer review, or quality assurance board or committee. Applying the well-established principle that "coverage clauses are interpreted broadly to provide the greatest possible protection to the insured," *State Capital Ins.*, 318 N.C. at 542-43, 350 S.E.2d at 71, we hold that this provision provides coverage for two separate types of activities. This conclusion is also required by "the rule of construction which requires us to construe all ambiguities in favor of coverage." *Duke Univ.*, 96 N.C. App. at 641, 386 S.E.2d at 766.

Because MAG Mutual focuses only on the second sentence of the coverage provision, the carrier does not explain why the complaint fails to fall within the first sentence's coverage. According to the Welsher complaint, the individual anesthesiologists "peppered" or "littered" Dr. Welsher's "peer review file" with complaints. The Welsher complaint further alleges that the Hospital's Medical Executive Committee acted on these complaints in 2002, summarily suspending Dr. Welsher's privileges for a period of 30 days. The complaint specifically alleges that "[a] summary suspension is typically reserved for situations in which a physician poses an imminent danger to his patients." The complaint acknowledges that the Hospital ultimately "rendered its final decision affirming the suspension . . . ." In addition, the complaint alleges that, in 2005, the individual anesthesiologists "continued their attack on Dr. Welsher's privileges at the Hospital" by making another complaint based on an incident during surgery. The complaint states that "[a]s with the first peer review action on his privileges, the Hospital's investigation of this complaint was clearly inadequate."

These allegations refer to quality assurance activities relating to the quality of healthcare services and patient safety. They do not, however, indicate that the actions were taken for the purposes specified in the coverage provision. While the Welsher complaint alleges that these actions were undertaken to remove Dr. Welsher from the Hospital and to retaliate against him, it is undisputed that Cumberland

Anesthesia faxed MAG Mutual a copy of the Welsher complaint with a cover sheet stating that the Welsher lawsuit was "ultimately about a challenge to Welsher's peer review file." MAG Mutual and plaintiffs, however, vigorously disagree regarding what Cumberland Anesthesia told MAG Mutual in a subsequent telephone call about whether the complaint implicated the quality assurance coverage.

MAG Mutual submitted the affidavit of Ben Bowman, a Senior Litigation Specialist with MAG Mutual, who spoke with Ms. Green. Mr. Bowman claimed that he asked Ms. Green whether any of the Cumberland Anesthesia physicians "were named as defendants in the Welsher action for their work as a" member of, a witness before, or a clinical practice advisor of a formal credentialing, peer review, or quality assurance board or committee. Mr. Bowman stated that Ms. Green answered "[n]o." Mr. Bowman then stated that he "did not have any further conversations with Ms. Green[], or anyone else at [Cumberland Anesthesia], regarding the Welsher action."

MAG Mutual, through Mr. Bowman, therefore, only inquired about the second type of quality assurance coverage even though it was on notice that the allegations involved peer review activities. Mr. Bowman could, with a proper inquiry, have learned through reasonable investigation that, as Dr. Kubit stated in his affidavit, the actions of the individual anesthesiologists were "for the betterment of health care services and patient safety at [the Hospital], relating to Dr. Welsher." We hold that MAG Mutual "*could reasonably [have] ascertain[ed]* facts that, if proven, would be covered by its policy." *Waste Mgmt.*, 315 N.C. at 691, 340 S.E.2d at 377 (emphasis added). Consequently, it had a duty to defend plaintiffs even though the Welsher complaint alleged purposes for plaintiffs' actions that would "appear to be outside coverage." *Id.*

III. <u>Compliance with the Policies' Notice Provision</u>

[5] Finally, Cincinnati, American, and Travelers argue that even if their policies provided coverage for factual allegations contained in the Welsher complaint, plaintiffs breached a policy provision requiring them to give notice "as soon as practicable" or "as soon as possible" as a precondition to coverage.[5] Cincinnati and American contend that they had no obligation to defend plaintiffs until they received actual notice and dispute when that notice was received. Travelers contends that its duty to defend was completely excused by plaintiffs' failure to provide timely notice.

5. MAG Mutual does not make any argument as to this issue.

A. *Timing of Cincinnati and American's Duty to Defend*

As an initial matter, we address the parties' contentions regarding the point at which an insurer's duty to defend attaches: Does it attach when the insurer receives notice or when a claim is filed? We recognize that jurisdictions are divided as to this issue. The majority of jurisdictions, however, hold that the duty to defend is triggered when the insurer receives notice of the underlying complaint. *See*, *e.g.*, *Wm. C. Vick Constr. Co. v. Pa. Nat'l Mut. Cas. Ins. Co.*, 52 F. Supp. 2d 569, 596 (E.D.N.C. 1999) (concluding that insurer's duty to defend is triggered when insurer first receives notice of lawsuit and not when complaint is filed), *aff'd per curiam*, 213 F.3d 634 (4th Cir. Apr. 28, 2000) (unpublished); *Coastal Ref. & Mktg., Inc. v. U.S. Fid. & Guar. Co.*, 218 S.W.3d 279, 294 (Tex. Ct. App. 2007) ("Because an insurer's duty to defend is triggered by notice, the insurer has no duty to reimburse the insured for defense costs incurred before the insured gave the insurer notice of the lawsuit."), *review denied*, 2008 Tex. LEXIS 48 (Jan. 11, 2008); *Great Am. Ins. Co. v. Aetna Cas. & Sur. Co.*, 76 Haw. 346, 352, 876 P.2d 1314, 1320 (1994) ("[U]nder Hawaii law, Aetna had no duty to contribute to defense costs incurred prior to its receiving notice of the underlying action."); *Rovira v. LaGoDa, Inc.*, 551 So. 2d 790, 794 (La. Ct. App. 1989) ("The duty to defend arises when the insurer receives notice of the litigation."), *cert. denied*, 556 So. 2d 36 (La. 1990).

In view of our courts' repeated emphasis on the importance of an insurer's "ability to investigate and defend" claims against its insured—*see*, *e.g.*, *Great Am. Ins. Co. v. C. G. Tate Constr. Co.*, 303 N.C. 387, 390, 279 S.E.2d 769, 771 (1981) ("*Great American I*")—we adopt the majority rule. We, therefore, hold that, in North Carolina, the duty to defend arises when an insurer receives actual notice of the underlying action.

In this case, plaintiffs allege that on 28 September 2006, they notified Cincinnati and American of the Welsher complaint by giving notice to Insurance Service Center, which they allege is an insurance agent for Cincinnati and American. It is well established that notice of a potential claim given to an insurance agent constitutes notice to the insurer. *Blue Bird Cab Co. v. Am. Fid. & Cas. Co.*, 219 N.C. 788, 797, 15 S.E.2d 295, 301 (1941). Plaintiffs assert that Cincinnati and American's duty to defend was, therefore, triggered on 28 September 2006.

Cincinnati and American contend, however, that (1) plaintiffs presented no evidence that Insurance Service Center is their agent,

and (2) plaintiffs presented no admissible evidence that they actually gave Insurance Service Center notice of the Welsher complaint. According to Cincinnati, it did not actually receive notice until 26 March 2007. American asserts that any duty it had to defend plaintiffs was not triggered until it received notice of the Welsher complaint on 9 July 2007.

While both Cincinnati and American assert in their briefs that plaintiffs presented no evidence identifying Insurance Service Center as their agent, the declaration pages of their policies do in fact list Insurance Service Center as the agent or agency.[6] In the face of this evidence, neither Cincinnati nor American have cited any evidence that Insurance Service Center was not their agent, even though both carriers submitted affidavits specifically addressing the issue of notice.

Cincinnati and American contend that, even if Insurance Service Center was their agent, the notice given to Insurance Service Center was inadequate. Plaintiffs, in arguing that notice was received by the two carriers on 28 September 2006, primarily rely on one of their responses to MAG Mutual's interrogatories. That response indicates that, in conjunction with "a fax from Cumberland Anesthesia," Ms. Green spoke to Shannan Milner, "the principal contact person" at Insurance Service Center, "on or about" 28 September 2006 "about the litigation and requested a defense."

Although the individual plaintiffs verified the response, Ms. Green did not, and there is no suggestion in the record that the individual plaintiffs had personal knowledge of the content of any fax to or conversation Ms. Green had with Insurance Service Center regarding the Welsher complaint. Necessarily, someone must have told one of the individual plaintiffs what Ms. Green said in her conversation with Ms. Milner.

The description of that conversation in the interrogatory is, therefore, hearsay, and hearsay statements contained in interrogatory responses are inadmissible. *See* N.C.R. Civ. P. 33(b) (providing that interrogatory "answers may be used to the extent permitted by the rules of evidence"); *Corda v. Brook Valley Enters., Inc.*, 63 N.C. App.

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6. In its brief, Cincinnati asserts that its declaration page, unlike MAG Mutual's, "does *not* list any 'agent.' " The page cited following this claim is not the Cincinnati declaration page, however. Plaintiffs, on the other hand, have referred the Court to a Cincinnati declaration page that does identify Insurance Service Center as the agency for the policy.

653, 657, 306 S.E.2d 173, 176 (1983) (affirming trial court's exclusion of interrogatory answers that could not be based upon personal knowledge); *Byrd v. Hopson*, 265 F. Supp. 2d 594, 602 (W.D.N.C. 2003) (holding that interrogatory answers describing conversations participated in by someone other than person answering interrogatories were "inadmissible hearsay"), *aff'd in part*, *rev'd in part*, 108 F. App'x. 749 (4th Cir. 2004).

Plaintiffs urge that any hearsay problem was cured by Dr. Kubit's affidavit in which he stated that "[u]pon being served with process in the underlying Welsher Lawsuit the various insurance companies named as defendants in this action were notified of the lawsuit as set forth in Answer to Interrogatory NO. 3 of Plaintiffs' Answers to Defendant MAG Mutual Insurance Company's First Set of Interrogatories." There is no indication, however, that the information in this paragraph is based on personal knowledge. *See* N.C.R. Civ. P. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.").

Plaintiffs point to the second paragraph of Dr. Kubit's affidavit as establishing the necessary personal knowledge: "I am also familiar with and have access to the business records of Cumberland Anesthesia Associates, PA, relating to the procurement of a defense of the Welsher Lawsuit . . . , which were maintained in the ordinary course of business by Cumberland Anesthesia Associates, PA." There is, however, no suggestion in either the affidavit or the interrogatory answer that there was ever a record of Ms. Green's call or that Dr. Kubit specifically reviewed such a record.

Even assuming Dr. Kubit reviewed records regarding Ms. Green's call or any notice to Insurance Service Center, his affidavit does not address the necessary foundational requirements for the admission of a "business record" under Rule 803(6) of the Rules of Evidence. As a result, he has failed to establish personal knowledge for the statements in his affidavit that are based on Cumberland Anesthesia's records. *See Gilreath v. N.C. Dep't of Health & Human Servs.*, 177 N.C. App. 499, 503-04, 629 S.E.2d 293, 296 (holding that " '[k]nowledge obtained from the review of records, qualified under Rule 803(6), constitutes "personal knowledge" within the meaning of Rule 56(e),' " but " '[i]f . . . the affiant obtained information from a written record and the record did not comply with requirements of the business records

exception to the hearsay rule, this information would . . . not be based on the affiant's personal knowledge' " (quoting *Hylton v. Koontz*, 138 N.C. App. 629, 635 & n.3, 532 S.E.2d 252, 256, 257 & n.3 (2000), *disc. review denied*, 353 N.C. 373, 546 S.E.2d 603 (2001))), *disc. review denied and cert. denied*, 360 N.C. 576, 635 S.E.2d 595, *aff'd per curiam*, 361 N.C. 109, 637 S.E.2d 537 (2006).

Alternatively, plaintiffs point to a fax of the Welsher complaint that Cumberland Anesthesia sent to Insurance Service Center on 4 October 2006 in connection with a renewal application for Cumberland Anesthesia's employment practices liability insurance with Evanston Insurance Company. In a statement accompanying the renewal application, Cumberland Anesthesia was asked whether all employment practices liability claims, including suits filed during the last 12 months, had been reported. A check in the "Yes" box is marked out, and the "No" box is checked. The next preprinted line says, "If No, provide details[,]" after which is written: "Case filed against 4 current/former employees by surgeon—we filed motion to dismiss—granted in part—case attached, pending."

In other words, plaintiffs are contending that they gave notice to Cincinnati and American of the Welsher complaint by reporting the lawsuit to Evanston Insurance Company, through Insurance Service Center, as part of a renewal of a wholly unrelated insurance policy. The rule imputing the knowledge of an agent to its principal is not, however, so broad as to permit a determination that this communication constituted notice to Cincinnati and American.

" '[A] principal is chargeable with, and bound by, the knowledge of or notice to his agent received while the agent is acting as such within the scope of his authority and in reference to a matter over which his authority extends, although the agent does not in fact inform his principal thereof.' " *Rea v. Hardware Mut. Cas. Co.*, 15 N.C. App. 620, 625, 190 S.E.2d 708, 712 (quoting *Norburn v. Mackie*, 262 N.C. 16, 24, 136 S.E.2d 279, 285 (1964)), *cert. denied*, 282 N.C. 153, 191 S.E.2d 759 (1972). *See also Thomas-Yelverton Co. v. State Capital Life Ins. Co.*, 238 N.C. 278, 281-82, 77 S.E.2d 692, 694 (1953) ("The rule with respect to the knowledge of an agent being imputable to his principal is well stated in the case of *[National Life] Insurance Co. v. Grady*, [185 N.C. 348, 351, 117 S.E. 289, 291 (1923)], in the following language: 'In the absence of fraud or collusion between the insured and the agent, the knowledge of the agent when acting within the scope of the powers entrusted to him will be imputed to the company . . . .' ").

Here, Cumberland Anesthesia was communicating with Insurance Service Center in its capacity as agent for Evanston Insurance Company in reference to a matter—renewal of an insurance policy—over which Insurance Service Center had been granted authority by Evanston. The evidence does not support a finding that Insurance Service Center was, under these circumstances, acting within the scope of any authority granted by Cincinnati or American or that the renewal—the matter at issue—related to such authority. While general notice of the existence of a lawsuit to an insurance agency acting as an agent for multiple carriers might be sufficient to provide notice to the various carriers, we need not resolve that question because that fact pattern is not present here.[7]

We hold that under the circumstances of this case, Cumberland Anesthesia's communication to Insurance Service Center in connection with the Evanston Insurance Company renewal application did not provide notice of the Welsher action to Cincinnati and American. Since plaintiffs present no other evidence of an earlier notice date, we hold that Cincinnati's duty to defend was not triggered until 26 March 2007, and American's duty to defend was not triggered until 9 July 2007.

B. *Travelers' Duty to Defend in Light of Breach of Notice Provision*

There is no dispute that plaintiffs first notified Travelers of the Welsher complaint on 21 March 2007. In contrast to Cincinnati and American, Travelers argues that plaintiffs' breach of the timely notice provision in Travelers' policies altogether exempts Travelers from any duty to defend plaintiffs.

In *Great American I*, 303 N.C. at 390, 279 S.E.2d at 771 (emphasis added), the Supreme Court held that "an unexcused delay by the insured in giving notice to the insurer of an accident does not relieve the insurer of its *obligation to defend* and indemnify unless the delay operates materially to prejudice the insurer's ability to investigate and defend." In *Great American I* and *Great American Insurance Co. v. C. G. Tate Construction Co.*, 315 N.C. 714, 340 S.E.2d 743 (1986) ("*Great American II*"), our Supreme Court established a three-prong test for determining when a delay in providing notice relieves an insurer of its duty to defend and indemnify:

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7. Although American argues that the notice was not sufficient because Cumberland Anesthesia did not expressly request a defense, we do not address that issue.

> "When faced with a claim that notice was not timely given, the trier of fact must first decide whether the notice was given as soon as practicable. If not, the trier of fact must decide whether the insured has shown that he acted in good faith, *e.g.*, that he had no actual knowledge that a claim might be filed against him. If the good faith test is met the burden then shifts to the insurer to show that its ability to investigate and defend was materially prejudiced by the delay."

Great American II, 315 N.C. at 717-18, 340 S.E.2d at 746 (quoting *Great American I*, 303 N.C. at 399, 279 S.E.2d at 776).

With respect to the first prong—"whether there has been any delay in notifying the insurer"—the Supreme Court has noted that "[i]n most instances, unless the insurer's allegations that notice was not timely are patently groundless, this first part of the test is met by the fact that the insurer has introduced the issue to the court." *Great American II*, 315 N.C. at 719, 340 S.E.2d at 747. Travelers thus met the first prong by raising the issue of plaintiffs' failure to notify Travelers of the Welsher complaint until 21 March 2007.

As to step two, where "any period of delay beyond the limits of timeliness" has been shown, the insured bears the burden of showing that such delay was in good faith. *Great American I*, 303 N.C. at 399, 279 S.E.2d at 776. "This test of lack of good faith involves a two-part inquiry: 1) Was the insured aware of his possible fault, and 2) Did the insured purposefully and knowingly fail to notify the insurer?" *Great American II*, 315 N.C. at 720, 340 S.E.2d at 747.

Travelers points out that plaintiffs were clearly aware of their possible fault in the Welsher action—they notified MAG Mutual of the Welsher complaint a mere four days after it was filed. Yet, Travelers asserts, plaintiffs never presented an explanation to the trial court for their over eight-month delay in notifying Travelers of the Welsher complaint. This omission has continued on appeal—plaintiffs still have made no attempt to explain their delay in giving notice to Travelers. In their brief, with regard to the issue of when Travelers received notice, plaintiffs merely state in a footnote: "[Travelers] hired a law firm to transition into the case to provide a defense as soon as they received notice."

Since plaintiffs have apparently never made any argument that they did not knowingly and purposefully fail to notify Travelers from July 2006 through March 2007, the good faith test is not met. Thus, the

burden does not shift to Travelers to show that its ability to investigate and defend was materially prejudiced by the delay. Travelers, we conclude, did not have a duty to defend plaintiffs against the Welsher complaint.

Conclusion

We have concluded that MAG Mutual, American, and Cincinnati all had a duty to defend with respect to the Welsher complaint based on their policies' "personal injury" coverage. MAG Mutual also had a duty to defend as a result of its quality assurance coverage. MAG Mutual's duty was triggered as of 7 July 2006. Cincinnati's duty to defend did not arise until 26 March 2007, while American's duty to defend did not arise until 9 July 2007. Plaintiffs' failure to provide Travelers with timely notice relieved Travelers of its duty to defend. Thus, we affirm the trial court's order as to Travelers, but reverse as to MAG Mutual, American, and Cincinnati.

Affirmed in part; reversed in part.

Judges CALABRIA and STEPHENS concur.

KATHY JEAN CHIDNESE, Plaintiff v. PATRICK N. CHIDNESE and DIANE McDONALD, Defendants

No. COA10-195

(Filed 15 March 2011)

1. Appeal and Error— interlocutory orders—Rule 54(b) certification

Although plaintiff wife appealed from the trial court's interlocutory order dismissing plaintiff's claims only against defendant husband's attorney, the order included an N.C.G.S. § 1A-1, Rule 54(b) certification that there was no just reason to delay plaintiff's appeal.

2. Malicious Prosecution— liability of attorneys—motion to dismiss—vagueness—motion for more definite statement

The trial court erred by dismissing plaintiff wife's claim for malicious prosecution. Attorneys in North Carolina may be held liable for a malicious criminal prosecution only when the attorney

advised the client, without any instigation from the client, to initiate criminal proceedings and the attorney acted without probable cause or for an improper purpose. Mere vagueness or lack of detail were not grounds for a motion to dismiss, but should have been attacked by a motion for a more definite statement.

3. Abuse of Process— civil action—temporary restraining order—motion in the cause—criminal action—information for arrest warrant

The trial court erred by dismissing plaintiff wife's claim for abuse of process in the civil action because plaintiff properly alleged that defendant husband's attorney did not obtain a temporary restraining order or file a motion in the cause for regular and legitimate functions, but instead provided knowingly false information to the trial court in order to use these processes to gain an advantage over plaintiff in a collateral matter. However, the trial court did not err by dismissing plaintiff wife's claim for abuse of process in the criminal action because the attorney's actions in providing information and assistance to execute the arrest warrant against plaintiff after it had been issued did not constitute an improper act.

4. Emotional Distress— intentional infliction—failure to show extreme and outrageous behavior

The trial court did not err by dismissing plaintiff's claim for intentional infliction of emotional distress. Plaintiff's complaint and brief simply stated that defendants' behavior was extreme and outrageous without providing any support for this assertion.

Appeal by plaintiff from order entered 3 December 2009 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 1 September 2010.

Carter & Kropelnicki, P.A., by Steven Kropelnicki, for plaintiff-appellant.

Long, Parker, Warren, Anderson, & Payne, P.A., by William A. Parker and Philip S. Anderson, for defendant-appellee Diane McDonald.

CALABRIA, Judge.

Kathy Jean Chidnese ("plaintiff") appeals the trial court's order dismissing, with prejudice, all of her claims against defendant Diane

McDonald ("McDonald") pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2009). Plaintiff's claims against defendant Patrick N. Chidnese ("Chidnese") had not been resolved at the time the trial court's order was entered, and as a result, Chidnese is not a party to this appeal. We affirm in part and reverse in part.

I. Background

According to the allegations contained in plaintiff's complaint, plaintiff married Chidnese on 16 February 1985. The couple lived together until 3 January 2009, when plaintiff left the couple's marital home in Asheville, North Carolina ("the marital home" or "the home"), intending to visit her father in West Virginia and find another place to live. Plaintiff planned to retrieve the substantial amount of her personal belongings that still remained in the home at a later date.

On 19 January 2009, plaintiff called Chidnese to inform him that she intended to return to the marital home to retrieve her belongings. Chidnese asked plaintiff to wait until he removed his belongings the following weekend. Plaintiff agreed. Soon thereafter, Chidnese removed not only his belongings, but also some of plaintiff's belongings from the marital home. On 23 January 2009, Chidnese and his attorney, McDonald (collectively "defendants") initiated an action against plaintiff in Buncombe County District Court ("the civil action"). On or about 30 January, Chidnese had the utilities at the marital home turned off, and no one lived in the home after that date.

On or about 21 February 2009, Chidnese instructed the Chideneses' daughter to call plaintiff to inform her that she could remove her belongings from the marital home. Plaintiff drove to Asheville from her new residence in Indiana. When she arrived at the home on 2 March 2009, she found that the doors were locked and the home was vacant.

When plaintiff entered the home, she found that many of her personal effects were missing. Plaintiff removed the remainder of her belongings, but did not remove any of Chidnese's property or any property to which Chidnese had any rightful claim. Plaintiff was unaware that defendants had instructed the parties' daughter to ask plaintiff to return to the marital home to retrieve her belongings. Defendants obtained an *ex parte* temporary restraining order ("the restraining order") against plaintiff in the civil action on 27 February 2009. Pursuant to the restraining order, plaintiff could neither enter the marital home nor "remove, secrete, sell and/or destroy any marital

personal property . . . ." Plaintiff was not served with the restraining order until 3 March 2009. The restraining order indicated that a hearing on the order was scheduled for 5 March 2009.

On 3 March 2009, McDonald filed a "Motion in the Cause" in the civil action alleging that plaintiff had broken and entered the marital home and removed items of marital personal property. The motion requested an order for plaintiff to immediately return these items.

On 5 March 2009, Chidnese appeared before a magistrate and alleged that plaintiff had removed items of marital property from the marital home, failed to return the items after ordered to do so, and committed the offense of domestic criminal trespass, in violation of N.C. Gen. Stat. § 14-134.3(A) (2009). A warrant was issued for plaintiff's arrest, and plaintiff was arrested on 10 March 2009, while meeting with her attorney. Plaintiff alleges that McDonald advised Chidnese to have plaintiff arrested on false charges.

On 15 April 2009, plaintiff's criminal case was calendared in Buncombe County District Court. McDonald appeared on behalf of Chidnese and filed a motion to continue the case until a later date. In support of the motion, McDonald included two letters from medical professionals stating that Chidnese would be unable to testify against plaintiff for an indefinite period of time. The motion to continue the case was granted, but the Buncombe County district attorney later dismissed the charges.

On 18 August 2009, plaintiff initiated an action against defendants in Buncombe County Superior Court. In her complaint, plaintiff asserted claims of malicious prosecution, abuse of process, and intentional infliction of emotional distress ("IIED") against both defendants. On 19 October 2009, McDonald filed a motion to dismiss plaintiff's action. After hearing McDonald's motion, the trial court dismissed all claims against her with prejudice on 3 December 2009. Plaintiff appeals.

II. Interlocutory Appeal

[1] As an initial matter, we note that the trial court's order dismissing plaintiff's claims against McDonald is interlocutory, as it does not dispose of the entirety of the case.

> An appeal from an interlocutory order is permissible only if [(1)] the trial court certified the order under Rule 54(b) of the Rules of Civil Procedure, or (2) the order affects a substantial right that

> would be lost without immediate review. The burden rests on the appellant to establish the basis for an interlocutory appeal.

Harco National Ins. Co. v. Grant Thornton LLP, ––– N.C. App. –––, –––, 698 S.E.2d 719, 722 (2010) (citation omitted). In the instant case, the trial court's order indicated that it dismissed "all claims" against McDonald pursuant to Rule 12(b)(6) and included a Rule 54(b) certification that there was no just reason to delay plaintiff's appeal.

> Rule 54(b) certification by the trial court is reviewable by this Court on appeal in the first instance because the trial court's denomination of its decree a final . . . judgment does not make it so, if it is not such a judgment. Similarly, the trial court's determination that there is no just reason to delay the appeal, while accorded great deference, cannot bind the appellate courts because ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court.

First Atl. Mgmt. Corp. v. Dunlea Realty Co., 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998) (internal quotations and citations omitted).

Rule 54(b) allows the trial court to "enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal. . . ." N.C. Gen. Stat. § 1A-1, Rule 54(b) (2009). "A final judgment is one which disposes of the cause[,] . . . leaving nothing to be judicially determined between [the parties] in the trial court. . . ." *Veazey v. Durham*, 231 N.C. 354, 361-62, 57 S.E.2d 377, 381 (1950). "Under G.S. § 1A-1, Rule 54(b), when multiple parties are involved in an action, the court may enter a final judgment as to one or more but fewer than all of the parties. Such a judgment, though interlocutory for appeal purposes, shall then be subject to review if the trial judge certifies that there is no just reason for delay." *Hoots v. Pryor*, 106 N.C. App. 397, 401, 417 S.E.2d 269, 272 (1992). The trial court's order dismissing all claims against McDonald constituted a final judgment between plaintiff and McDonald because it left "nothing to be judicially determined" between them. *Veazey*, 231 N.C. at 361, 57 S.E.2d at 381. Since the order also included a Rule 54(b) certification that there was no just reason to delay plaintiff's appeal, plaintiff's appeal is properly before this Court. *Hoots*, 106 N.C. App. at 401, 417 S.E.2d at 272.

III. Standard of Review

> The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true.
>
> Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Scheerer v. Fisher, ––– N.C. App. –––, –––, 688 S.E.2d 472, 474 (2010) (citations omitted). "A complaint should not be dismissed for failure to state a claim unless it appears to a certainty that plaintiff is legally entitled to no relief under any construction of the facts asserted." *Powell v. Wold*, 88 N.C. App. 61, 63, 362 S.E.2d 796, 797 (1987). "The standard of review on an appeal of a grant of a motion to dismiss is *de novo*." *Scheerer*, ––– N.C. App. at –––, 688 S.E.2d at 474.

IV. Malicious Prosecution and Abuse of Process

[2] Plaintiff argues that the trial court erred by dismissing her claims for malicious prosecution and abuse of process against McDonald. We agree.

"Protection against wrongful litigation is afforded by a cause of action for either abuse of process or malicious prosecution. The legal theories underlying the two actions parallel one another to a substantial degree, and often the facts of a case would support a claim under either theory." *Stanback v. Stanback*, 297 N.C. 181, 200, 254 S.E.2d 611, 624 (1979), *overruled on other grounds by Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). "The distinction between an action for malicious prosecution and one for abuse of process is that malicious prosecution is based upon malice in causing the process to issue, while abuse of process lies for its improper use after it has been issued." *Barnette v. Woody*, 242 N.C. 424, 431, 88 S.E.2d 223, 227 (1955).

A. Malicious Prosecution

"An action in tort for malicious prosecution is based upon a defendant's malice in causing process to issue." *Middleton v. Myers*, 299 N.C. 42, 44, 261 S.E.2d 108, 109 (1980). To prove a claim for malicious prosecution, a plaintiff must establish four elements: (1) the defendant instituted, procured, or participated in a criminal proceeding against the plaintiff; (2) without probable cause; (3) with malice; and (4) the criminal proceeding terminated in favor of the plaintiff. *Cook v. Lanier*, 267 N.C. 166, 147 S.E.2d 910 (1966). The only element at issue in the instant case is whether McDonald instituted, procured, or participated in a criminal proceeding against the plaintiff. There is no dispute that plaintiff's complaint alleges that the criminal proceeding against her was procured without probable cause, with malice, and that the criminal proceeding was dismissed.

Initially, we note that plaintiff's complaint alleges that McDonald was liable for malicious prosecution in her role as Chidnese's attorney. Both parties appear to agree that an attorney may be held liable for malicious prosecution in certain circumstances. However, the parties dispute whether an attorney can be held liable for a criminal proceeding that is initiated by a client. No North Carolina case has ever been directly presented with this question. Nonetheless, this Court's decision in *Jackson v. Jackson*, 20 N.C. App. 406, 201 S.E.2d 722 (1974) provides implicit support for the proposition that attorneys in North Carolina may be liable for a malicious criminal prosecution initiated by a client.

In *Jackson*, the plaintiff initiated, *inter alia*, a malicious prosecution action against his wife and four partners in a law firm, alleging that one of the members of the firm, James N. Golding ("Golding"), had conspired with plaintiff's wife to institute criminal proceedings against the plaintiff maliciously and without probable cause. *Id.* at 406, 201 S.E.2d at 722. The criminal proceedings were initiated by the plaintiff's wife after she had consulted with Golding. *Id.* The remaining three partners sought and obtained summary judgment on the basis that they did not participate or authorize any acts which led to the prosecution of the plaintiff. *Id.* This Court affirmed the grant of summary judgment, holding that the three law partners could not be held vicariously liable for the alleged malicious prosecution actions of Golding because "it [could not] be held that malicious prosecution is within the ordinary course of business of a law partnership." *Id.* at 408, 201 S.E.2d at 724. The *Jackson* Court based its holding primarily

upon the relevant provisions of the North Carolina Canons of Professional Ethics and the North Carolina State Bar Code of Professional Responsibility which were in effect at that time. *Id.*

Although the *Jackson* Court was not directly presented with the question of whether an attorney may be held liable for a malicious criminal prosecution initiated by a client, its reasoning strongly suggests that such liability exists. As explained by the Court:

> Advising the initiation of a criminal prosecution is clearly within the normal range of activities for a typical law partnership, but taking such action maliciously and without probable cause is quite a different matter. In this case the acting partner, Mr. Golding, *was either conducting himself lawfully and ethically in his relationship with his client, in which event neither he nor any of his partners would have any liability, or he was conducting himself maliciously and unlawfully and would not be acting in the ordinary course of the partnership business.*

Id. at 407-08, 201 S.E.2d at 723 (emphasis added). Thus, the *Jackson* Court drew a distinction between an attorney who advises a client to initiate a criminal proceeding in good faith, in which case the Court held that there would be *no liability for either the attorney or his law partners*, and an attorney who maliciously and unlawfully advises a client to initiate a criminal proceeding, in which case there would only be *no vicarious liability to the attorney's partners*. While the *Jackson* Court does not explicitly address the liability of the attorney in the latter scenario, the implication is that an attorney who maliciously and unlawfully advised a client to initiate a malicious prosecution would meet all elements of the tort of malicious prosecution, including procurement, and would be directly liable for that tort. Thus, taking the reasoning of *Jackson* to its logical conclusion, we hold that an attorney may be held liable for a malicious criminal prosecution initiated by a client in certain circumstances, assuming all elements of the tort are met.

However, McDonald still contends that her specific involvement in the instant case as Chidnese's attorney did not amount to the institution, procurement, or participation in the criminal proceeding against plaintiff. *Jackson* itself does not provide substantial guidance on what would constitute procurement of a malicious prosecution by an attorney; it only refers generally to "[a]dvising the initiation of a criminal prosecution . . . maliciously and without probable cause." *Id.* at 407, 201 S.E.2d at 723. Additionally, our research reveals no cases

which have directly addressed the question of what constitutes procurement by an attorney in this context. However, the Restatement (Second) of Torts creates the following framework for determining whether a lawyer should be held liable for procuring a malicious prosecution initiated by a client:

> *Procurement by attorneys*. An attorney at law who is consulted by a client as to whether the facts laid before him are sufficient to justify the initiation of criminal proceedings, does not by advising his client to commence a prosecution procure the institution of the proceedings that are brought by his client. (See Illustration 6 below). Under other circumstances, however, the connection of the attorney with the proceedings may be such a decisive factor as to justify a finding that the attorney procured their institution. *Thus if a client lays before his attorney certain facts and asks the attorney's advice as to what course he should pursue in order to secure some private advantage, and the attorney advises him that the best way in which to obtain the desired result is to initiate criminal proceedings, it may be found that the attorney procured the institution of the proceedings.*

Restatement (Second) of Torts, § 653 cmt. h (1977) (emphasis added). In addition, the Restatement (Third) of the Law Governing Lawyers[1] also briefly explains how lawyers may be liable for criminal malicious prosecution initiated by their clients, including a discussion of what constitutes procurement:

> A private lawyer representing a client, for example a complaining witness, could under certain circumstances be liable for malicious prosecution. To establish such liability, a plaintiff must show that the lawyer procured the initiation of criminal proceedings, *for example by advising the client to institute them, as opposed to informing the client of available legal options* (see Restatement Second, Torts § 653, Comment h). It is also necessary that the lawyer acted without good cause and primarily for a purpose other than bringing an offender to justice or assisting a client to assert the client's rights. The lack of probable cause and improper purpose of a lawyer are assessed separately from those of a client, and the burden of persuading the trier of fact of their

1. The Restatement (Second) of Torts (1977) will henceforth be referred to as "the Restatement (Second)." The Restatement (Third) of the Law Governing Lawyers (2000) will henceforth be referred to as "the Restatement (Third)." They will collectively be referred to as "the Restatements."

existence rests on the plaintiff in the malicious-prosecution action.

Restatement (Third) of the Law Governing Lawyers § 57 cmt. e (2000) (emphasis added).

These provisions in the Restatements indicate that in those situations in which the attorney alone suggests the initiation of malicious criminal proceedings, without any impetus from the client, the attorney may be held to have procured the malicious prosecution. The Restatement (Second) demonstrates this principle with the following examples:

> 6. A, who believes that B is unlawfully withholding certain chattels from him, seeks the advice of his attorney, C. C advises him that a criminal prosecution is the only practical method of forcing B to return the chattels. A swears out a warrant for the arrest of B. C has procured the institution of the proceedings against B.
>
> 7. A goes to his attorney B and states that valuable jewelry has disappeared from his house under circumstances that make him believe that it must have been stolen by his only servant, C. A asks whether, assuming these facts to be true, he is justified in swearing out a warrant for the arrest of C for larceny. B advises A that it is proper for him to do so. A swears out the warrant. B has not procured the institution of proceedings against C.

Restatement (Second) of Torts § 653, cmt. h, Illustrations 6-7. The main difference between these two illustrations is that in the former, it is the attorney who first specifically suggests the criminal prosecution, thus procuring the prosecution. In contrast, in the latter illustration, it is the client who first inquires about the criminal prosecution, and consequently, the criminal prosecution was not procured by the attorney. Thus, under the Restatements, an attorney procures a malicious prosecution only when that attorney counsels the client specifically to initiate a criminal proceeding without the client first seeking counsel about initiating such a proceeding. Accordingly, we hold that an attorney should be considered to have procured a malicious criminal prosecution initiated by a client only when the attorney advises the client, without any instigation from the client regarding a criminal prosecution, to initiate criminal proceedings.

However, it is important to ensure that an attorney is not punished for zealously and lawfully advocating for a client whose improper motives are unknown to the attorney. Therefore, when

assessing the liability of an attorney, we adopt as a framework the following previously quoted language of the Restatement (Third):

> It is also necessary that the lawyer acted without good cause and primarily for a purpose other than bringing an offender to justice or assisting a client to assert the client's rights. The lack of probable cause and improper purpose of a lawyer are assessed separately from those of a client[.]

Restatement (Third) of the Law Governing Lawyers § 57 cmt. e. Under this framework, a plaintiff who seeks to recover in tort against an attorney for malicious criminal prosecution must prove all of the elements of the tort separately from the liability of the client.

Finally, to provide attorneys additional protection, we adopt the exception to liability for malicious criminal prosecution established by the Restatement (Third): "A lawyer . . . procuring the institution of criminal proceedings by a client is not liable to a nonclient for . . . malicious prosecution if the lawyer has probable cause for acting, or if the lawyer acts primarily to help the client obtain a *proper* adjudication of the client's claim in that proceeding." Restatement (Third) of the Law Governing Lawyers § 57(2) (emphasis added). This is consistent with the *Jackson* Court's statement that when an attorney is "conducting himself lawfully and ethically in his relationship with his client, . . . neither he nor any of his partners would have any liability." *Jackson*, 20 N.C. App. at 407, 201 S.E.2d at 723.

Applying these principles to the instant case, plaintiff's complaint states a valid cause of action for malicious prosecution against McDonald. Plaintiff's complaint makes the following relevant allegations:

> 32. On information and belief, attorney McDonald advised and counseled Mr. Chidnese to have plaintiff arrested on false charges, and he paid substantial sums for her advice and assistance in procuring plaintiff's arrest without probable cause.
>
> . . .
>
> 46. As set out above, Mr. Chidnese procured a warrant for plaintiff's arrest by giving false testimony to Magistrate Wadhams.
>
> . . .
>
> 50. The criminal charges against plaintiff were dismissed.
>
> . . .

> 52. Ms. McDonald counseled, encouraged, aided and abetted Mr. Chidnese in his malicious prosecution of plaintiff.
>
> 53. In all of the foregoing, defendants acted maliciously, willfully, and intentionally, with full knowledge of the falsity of the charges instigated against plaintiff, and with the intent to deprive her of her liberty and cause her severe embarrassment, humiliation, and emotional distress.

Treating these allegations as true, these facts can be construed to state that McDonald procured a criminal prosecution against plaintiff with malice and without probable cause, and that the prosecution terminated favorably for the plaintiff, satisfying all of the elements of malicious prosecution. *Middleton*, 299 N.C. at 44, 261 S.E.2d at 109. While plaintiff's allegations do not definitely reveal whether McDonald actually procured the criminal prosecution by initiating the idea with Chidnese, "[m]ere vagueness or lack of detail is not ground for a motion to dismiss, but should be attacked by a motion for a more definite statement." *Gallimore v. Sink*, 27 N.C. App. 65, 67, 218 S.E.2d 181, 183 (1975) (citations omitted). Since it does not appear to "a certainty that plaintiff is legally entitled to no relief under any construction of the facts asserted[,]" *Powell*, 88 N.C. App. at 63, 362 S.E.2d at 797, the trial court erred by dismissing plaintiff's malicious prosecution claim. Consequently, that portion of the trial court's order must be reversed.

B. Abuse of Process

[3] "[A]buse of process is the misuse of legal process for an ulterior purpose. It consists in the malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ. It is the malicious perversion of a legally issued process whereby a result not lawfully or properly obtainable under it is attended [sic] to be secured." *Fowle v. Fowle*, 263 N.C. 724, 728, 140 S.E.2d 398, 401 (1965).

> [A]buse of process requires both an ulterior motive and an act in the use of the legal process not proper in the regular prosecution of the proceeding, and that [b]oth requirements relate to the defendant's purpose to achieve through the use of the process some end foreign to those it was designed to effect. The ulterior motive requirement is satisfied when the plaintiff alleges that the prior action was initiated by defendant or used by him to achieve a collateral purpose not within the normal scope of the process

> used. The act requirement is satisfied when the plaintiff alleges that once the prior proceeding was initiated, the defendant committed some wilful act whereby he sought to use the existence of the proceeding to gain advantage of the plaintiff in respect to some collateral matter.

Stanback, 297 N.C. at 201, 254 S.E.2d at 625 (internal quotations and citations omitted).

Initially, we once again note that the allegations against McDonald involve her conduct as an attorney. As with the tort of malicious prosecution, an attorney's liability for abuse of process must be assessed separately from the client's, and the attorney's actions must independently satisfy each element of the tort. Additionally, a lawyer should not be liable for abuse of process "when the lawyer acted for some proper purpose, such as securing adjudication of the client's claim, even though this would also procure the lawyer a fee. However, a lawyer may be liable for acting for an improper purpose . . . ." Restatement (Third) of the Law Governing Lawyers § 57 cmt. d.

It is undisputed that plaintiff's complaint alleged that defendants, including McDonald, acted with an ulterior purpose. However, the parties disagree about whether the actions of McDonald were for an improper purpose and thus constituted "the use of legal process not proper in the regular prosecution of the proceeding."

"[T]he gravamen of a cause of action for abuse of process is the improper use of the process *after it has been issued*." *Petrou v. Hale*, 43 N.C. App. 655, 659, 260 S.E.2d 130, 133 (1979) (emphasis added). As a result, "[t]here is no abuse of process where it is confined to its regular and legitimate function in relation to the cause of action stated in the complaint." *Finance Corp. v. Lane*, 221 N.C. 189, 196-97, 19 S.E.2d 849, 853 (1942). In accordance with this principle, our courts have repeatedly upheld dismissal of an abuse of process claim when there are no allegations that a defendant misused process *after* proceedings had been initiated. For example, in *Stanback*, our Supreme Court affirmed the dismissal of an abuse of process claim when the plaintiff alleged that the true purpose of an action brought against her "was not to seek legitimate relief but to harass, embarrass and annoy the plaintiff . . . and to cause her to incur expenses for the defense of said action and to cause her to forego her legal rights and remedies." 297 N.C. at 200, 254 S.E.2d at 624. Since the plaintiff failed to allege "that defendant committed any wilful act not proper in the

regular course of the proceeding once he initiated the suit against her," her abuse of process claim was properly dismissed. *Id.*; *see also, e.g.*, *Petrou*, 43 N.C. App. at 659, 260 S.E.2d at 134-35 (The plaintiff's allegation "[t]hat the sole purpose of the Defendants and each of them, in filing and maintaining said action, was to coerce the Plaintiff and his malpractice insurance carrier into making a cash settlement in order to free themselves from said false, malicious, and vexacious [sic] litigation" did not allege "any evidence of subsequent misuse of process lawfully issued" and thus, could not support an abuse of process claim); *Hewes v. Johnston*, 61 N.C. App. 603, 604, 301 S.E.2d 120, 121 (1983) (no abuse of process claim when complaint "alleges a motive of harassment in the filing of suit by third-party defendants, but there is no allegation of an improper wilful act during the course of the proceedings."). As these cases indicate, the mere filing of a civil action with an ulterior motive is not sufficient to sustain a claim for abuse of process.[2] In order to proceed on an abuse of process claim, a plaintiff must allege the misuse of process after an action between the parties has already commenced.

1. The Civil Action

In the instant case, plaintiff's complaint does not allege that defendants improperly filed the civil action with an ulterior purpose. Instead, plaintiff's complaint makes the following allegations about defendants' misuse of process *after* the civil action had been initiated:

> 54. Defendants abused the process of the Buncombe County District Court in that they obtained a temporary restraining order without notice, knowing that there existed no just cause for the issuance of such an order, knowing that Mr. Chidnese already had removed all of the items of "marital property" which had any substantial value and which were easily movable, and knowing that plaintiff would suffer substantial expense and inconvenience if she were deprived of possession of the clothing and personal effects he had left in the house.
>
> . . .
>
> 22. Defendants had no reason to believe that plaintiff had any intention of removing any property from the house for any

2. However, the *Stanback* Court determined that the plaintiff's complaint, while failing to state a claim for abuse of process, would have stated a valid claim for malicious prosecution if the plaintiff had also alleged special damages. 297 N.C. at 204-05, 254 S.E.2d at 626.

> improper purpose, or that she intended to remove anything except her personal belongings.
>
> 23. Defendants in fact knew that before they applied for or obtained that *ex-parte* restraining order, that Mr. Chidnese had instructed his daughter to tell plaintiff that she was free to go into the house and get her belongings.
>
> 24. There was, in fact, no lawful basis for the issuance of any *ex-parte* restraining order, and defendants obtained that order merely to harass, inconvenience, and annoy plaintiff, and to punish her for separating from defendant Chidnese.
>
> . . .
>
> 26. On 3 March 2009 McDonald filed a "Motion in the Cause" in the civil action alleging that plaintiff and her agents "broke and entered the property located " [the marital property] and did remove many items of marital personal property and returned to Indiana with the said items." That motion requested that plaintiff be required immediately to "return all items of marital property removed from the parties' marital home."
>
> 27. Defendants knew when that motion was filed that plaintiff had not in fact "broke and entered" the former marital residence.
>
> . . .
>
> 55. Defendants abused the process of the Buncombe County District Court by obtaining an *ex parte* order requiring plaintiff to return to Buncombe County the clothing and personal effects which she had removed from the former marital residence.

These allegations, when treated as true, sufficiently state a cause of action against McDonald for abuse of process. While it is true that obtaining an *ex parte* temporary restraining order ("TRO") is permitted in a civil action, the Rules of Civil Procedure require that a TRO only issue when "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." N.C. Gen. Stat. § 1A-1, Rule 65 (2009). In contrast, plaintiff's complaint alleged that McDonald specifically knew that there was no basis to obtain a TRO, and that the restraining order was only obtained to harass, inconvenience, and annoy plaintiff, and to punish her for separating from Chidnese. Moreover, plaintiff alleged that McDonald, with the same ulterior motive and for the same improper purpose, filed a motion in the cause stating that plain-

tiff had violated the restraining order, even though McDonald knew that plaintiff had permission to enter the marital home and retrieve her belongings. Thus, under the allegations in plaintiff's complaint, McDonald did not obtain a TRO or file a motion in the cause for their regular and legitimate functions, but instead provided knowingly false information to the trial court in order to use these processes to gain an advantage over plaintiff in a collateral matter. This constitutes a valid claim for abuse of process. *See Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 603, 646 S.E.2d 826, 831 (2007) (complaint stated a valid cause of action for abuse of process when it alleged that the defendant sought an injunction to coerce the plaintiffs to pay a judgment for which they were not responsible and to oppress their business activities until such judgment was paid); *Hewes v. Wolfe and Hewes v. Johnston*, 74 N.C. App. 610, 614, 330 S.E.2d 16, 19 (1985) (complaint stated a valid cause of action for abuse of process when it alleged that, while another civil action between the parties was pending, the defendants maliciously filed notices of *lis pendens* and notices of lien on property owned by the plaintiffs "for the purpose of injuring and destroying the credit business of the plaintiffs and in general to oppress the plaintiffs[]."). Consequently, the trial court erred in dismissing plaintiff's abuse of civil process claim.

2. The Criminal Action

Plaintiff's complaint also alleged that McDonald was liable for abuse of process in the criminal proceedings against plaintiff, based on the following allegations:

> 38. After her arrest plaintiff was ordered to appear in Buncombe County District Court on 15 April 2009 to answer to the false charges. At that time Ms. McDonald appeared and filed a motion to continue the criminal case. Attached to that motion was a paper-writing purporting to be a letter from one Stephen D. Brown, M.D., stating that Patrick Chidnese was his patient and "due to his emotional and physical condition, should not testify on April 15 in a court of law, or have any confrontation, if possible, with his wife, Kathy for an indeterminate period of time thereafter.["]
>
> 39. Ms. McDonald also presented a document purporting to be a letter from Emily C. Gordon, PhD, stating that in her professional opinion, Mr. Chidnese would not be able to testify "now or in the foreseeable future in the case concerning his estranged wife."

> 40. Mr. Chidnese in fact suffered from no condition on 15 April 2009 which would have prevented him from appearing in court or testifying in the criminal case which he instigated against plaintiff. He procured false statements in support of his lawyer's motion to continue that matter solely for the purpose of causing Ms. Chidnese to waste time and incur expense traveling from Indiana to North Carolina, only to have the case continued. On information and belief, Ms. McDonald counseled him to seek the continuance and file the affidavits.
>
> . . .
>
> 56. After Mr. Chidnese gave false testimony to obtain the issuance of a warrant for plaintiff's arrest, defendants abused that process by:
>
> > A. Hiring agents to arrange for plaintiff's arrest while she was attempting to confer with the counsel she hired to protect her interest in the civil action;
> >
> > . . .
> >
> > C. Filing the motion to continue the criminal case (which Ms. McDonald did not cause to be served on plaintiff's counsel of record in the criminal case) and obtaining a continuance solely for the purpose of harassing and annoying plaintiff and subjecting her to unnecessary inconvenience and expense.

Plaintiff's complaint essentially alleges that McDonald was liable for abuse of process on the basis of two actions: 1) assisting in obtaining plaintiff's arrest; and 2) filing a motion to continue in the criminal case. However, McDonald's actions in providing information and assistance to execute the arrest warrant against plaintiff after it had been issued did not constitute an improper act during the course of a criminal proceeding, and thus cannot provide the basis for an abuse of process claim. *Stanback*, 297 N.C. at 200, 254 S.E.2d at 624.

In addition, there is nothing in plaintiff's complaint regarding the filing of the motion to continue in the criminal case which suggests that McDonald's actions were improper. Taking the allegations as true, it was Chidnese who procured false statements which were submitted to the trial court. Unlike plaintiff's malicious prosecution claim, which specifically alleged that McDonald knew there was no basis for criminal charges against plaintiff, this particular abuse of process claim contains no allegation that McDonald knew that the

letters from Stephen D. Brown, M.D. and Emily C. Gordon, Ph.D. were false or that Chidnese in fact was not suffering from a mental condition. Plaintiff merely alleged that McDonald counseled Chidnese to seek the continuance and file the letters in support of that motion. Since plaintiff is seeking to have McDonald found liable as an attorney for abuse of process, her claim must include specific allegations that establish that McDonald acted with an improper purpose. Without an allegation that McDonald knew that the letters were false and thus provided no basis for a motion to continue, McDonald's actions can only be construed as properly securing adjudication of her client's claim. McDonald cannot be held liable as an attorney under these circumstances, and so the trial court properly dismissed plaintiff's abuse of process claims against McDonald which related to her actions during the criminal proceedings against plaintiff. Plaintiff's argument to the contrary is overruled.

V. Intentional Infliction of Emotional Distress

[4] Plaintiff argues that the trial court erred by dismissing her claim for IIED against Ms. McDonald. We disagree.

The essential elements of a claim for IIED are "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another." *Dickens*, 302 N.C. at 452, 276 S.E.2d at 335.

> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion.
>
> . . .

Briggs v. Rosenthal, 73 N.C. App. 672, 677, 327 S.E.2d 308, 311 (1985) (quoting Restatement (Second) of Torts § 46 cmt. d)." 'Conduct is extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Johnson v. Colonial Life & Accident Ins. Co.*, 173 N.C. App. 365, 373, 618 S.E.2d 867, 872 (2005) (quoting *Guthrie v. Conroy*,

152 N.C. App. 15, 22, 567 S.E.2d 403, 408-09 (2002)). "The determination whether conduct rises to the level of extreme and outrageous behavior is a question of law." *Foster v. Crandell*, 181 N.C. App. 152, 168, 638 S.E.2d 526, 537 (2007).

Plaintiff's complaint and brief simply state that defendants' previously discussed behavior was extreme and outrageous, without providing any support or case for this assertion. However, "this Court has set a high threshold for a finding that conduct meets the standard" of extreme and outrageous conduct. *Dobson v. Harris*, 134 N.C. App. 573, 578, 521 S.E.2d 710, 715 (1999), *rev'd on other grounds*, 352 N.C. 77, 530 S.E.2d 829 (2000). Based upon this principle, the *Dobson* Court held that falsely reporting child abuse did not constitute extreme and outrageous conduct. *Id.* In *Moore v. City of Creedmoor*, this Court held that causing the District Attorney to file a nuisance abatement action against the plaintiff's nightclub did not constitute extreme and outrageous conduct, even if the facts may have supported a malicious prosecution action. 120 N.C. App. 27, 48, 460 S.E.2d 899, 911 (1995), *aff'd in part and rev'd in part on other grounds*, 345 N.C. 356, 481 S.E.2d 14 (1997).

Plaintiff's specific allegations against McDonald in the instant case[3] do not differ substantially from the conduct at issue in *Dobson* and *Moore*. Thus, while McDonald's alleged conduct would be unprofessional and sufficient to give rise to other tort claims, it did not "exceed[] all bounds of decency tolerated by society[,]" *West v. King's Dep't Store, Inc.*, 321 N.C. 698, 704, 365 S.E.2d 621, 625 (1988), and therefore does not constitute extreme and outrageous conduct as a matter a law. While not binding on our decision, we note that courts in other jurisdictions have reached the same result on similar facts. *See Bozman v. Bozman*, 806 A.2d 740, 747 (Md. Ct. Spec. App. 2002) (wife's filing of false criminal charges against husband which resulted in his arrest and incarceration on five occasions did not constitute outrageous conduct), *rev'd on other grounds*, 830 A.2d 450 (2003); *Layne v. Builders Plumbing Supply Co.*, 569 N.E.2d 1104, 1109 (Ill. App. Ct. 2d Dist. 1991) (a false statement to the police that the plaintiff harassed, assaulted, and verbally threatened a coworker did not rise to the level of extreme and outrageous conduct); *Slatkin v.*

3. The complaint alleges that Chidnese engaged in additional conduct which plaintiff contended would also constitute extreme and outrageous conduct. However, as these additional allegations are unnecessary to our analysis of McDonald's liability, we do not address what impact, if any, these additional allegations have on Chidnese's liability.

Lancer Litho Packaging Corp., 33 A.D.3d 421, 422 (N.Y. App. Div. 1st Dep't 2006) ("instigation of the individual plaintiff's arrest by means of false statements to the police" did not constitute extreme and outrageous conduct). Since plaintiff's complaint does not contain allegations which satisfy all of the elements of IIED, the trial court properly dismissed this portion of plaintiff's complaint against McDonald. This argument is overruled.

VI. Conclusion

Treating her allegations as true, plaintiff's complaint alleges facts that could be construed to find that McDonald, acting as Chidnese's attorney, procured a criminal proceeding against plaintiff with malice and without probable cause, and that the proceeding terminated in plaintiff's favor. As a result, plaintiff's complaint states a valid cause of action against McDonald for malicious prosecution. That portion of the trial court's order dismissing plaintiff's malicious prosecution claim against McDonald is reversed.

Additionally, plaintiff's complaint contains allegations that McDonald misused legal process with an ulterior purpose after the civil action had been initiated. These allegations stated a valid cause of action against McDonald for abuse of process in the civil action. That portion of the trial court's order dismissing plaintiff's abuse of process claim based upon McDonald's conduct in the civil action is also reversed.

However, the allegations in plaintiff's complaint regarding McDonald's conduct in the criminal action did not state a valid abuse of process claim. Treating plaintiff's allegations as true, McDonald did not use the criminal process for an improper purpose when she helped secure plaintiff's arrest pursuant to a valid warrant. In addition, McDonald was only acting for the proper purpose of securing adjudication of her client's claim when she filed the motion to continue on his behalf. Accordingly, that portion of the trial court's order dismissing plaintiff's abuse of process claim based upon McDonald's conduct in the criminal action is affirmed.

Finally, the trial court properly dismissed plaintiff's IIED claim against McDonald. The specific conduct by McDonald which formed the basis of plaintiff's IIED claim did not rise to the level of extreme and outrageous conduct as a matter of law. Consequently, the portion of the trial court's order dismissing plaintiff's IIED claim against McDonald is affirmed.

Affirmed in part and reversed in part.

Judges McGEE and GEER concur.

JOEL ROBINSON, PLAINTIFF v. DAWN ROBINSON, DEFENDANT

No. COA10-604

(Filed 15 March 2011)

1. Divorce— equitable distribution—findings—valuation and classification of property

The trial court erred in an equitable distribution order by not making a finding as to the total net value of the marital estate, by not classifying or valuing the marital residence, and by not explicitly classifying another property as separate property.

2. Divorce— equitable distribution—agreement—written stipulation required

The trial court erred in an equitable distribution action by concluding that the parties were in agreement concerning the division of certain personal property where there was no written stipulation in the record.

3. Divorce— equitable distribution—valuation of property—date of separation—finding binding

Although plaintiff contended that the trial court erred in an equitable distribution action in the date used to value certain accounts, plaintiff did not challenge that finding and it was therefore binding.

4. Divorce— alimony—findings—earnings

The trial court did not err in the amount of alimony awarded where the court's finding as to the parties' earnings while married was supported by the record.

5. Divorce— alimony—ability to pay

The trial court clearly considered plaintiff's actual ability to pay when determining alimony; the court's inability to make more detailed findings was due to plaintiff's failure to attend the hearing or to submit more detailed information.

6. Divorce— alimony—consideration of child care expenses

The trial court erred when determining alimony by determining plaintiff's child support obligation under the Child Support Guidelines, then making its own calculations regarding actual expenses and using that total to determine defendant's shortfall to calculate alimony. Defendant may benefit from having her child care expenses considered in the calculation of alimony, but may not receive the benefit of a finding based in part upon her actual child support expenditures if plaintiff is credited only with his Guideline proportionate share of child support expenses.

7. Child Custody and Support— retroactive—actual expenditures—findings required

An order of retroactive child support was reversed and remanded where it contained no findings as to the actual expenditures made for the benefit of the minor children during the relevant time.

8. Child Custody and Support— plaintiff's income—finding supported by evidence

There was no merit in a child support action to plaintiff's challenge to a finding concerning his income where the finding was supported by the evidence. The court had before it plaintiff's tax filing, his company's profit and loss statement, and defendant's testimony.

9. Divorce— equitable distribution—payments toward debt—allocation—debts not properly classified

The Court of Appeals could not determine in a domestic action whether plaintiff's payments on debts should have been included in equitable distribution or allocated toward plaintiff's alimony and child support obligations where the debts were not properly classified, valued, and distributed.

10. Appeal and Error— mootness—child visitation—child reaching majority

A child visitation issue was not addressed where the child had reached majority and was no longer subject to any visitation agreement between his parents.

11. Attorney Fees— combined domestic action—fees not allocated—underlying issues unresolved—remanded

An award of attorney fees in a combined action for equitable distribution, alimony, and child support was vacated and remanded where there were no findings attributing the fees to the underlying actions ("ttorney fees are not recoverable in equitable distribution actions), and underlying issues involving child support were remanded for further action.

Appeal by plaintiff from judgment entered 15 December 2009 by Judge Wendy M. Enochs in Guilford County District Court. Heard in the Court of Appeals 15 November 2010.

McKinney & Justice, P.A., by Rebecca Perry, for plaintiff-appellant.

Tuggle Duggins & Meschan, P.A., by Jessica B. Cox, for defendant-appellee.

MARTIN, Chief Judge.

Plaintiff Joel Robinson and defendant Dawn Robinson[1] were married to each other on 21 December 1985, and separated sometime between 1 September 2006 and 2 January 2007. The parties had two children: Amber, born 28 February 1989, and Anson, born 11 December 1992. From the date of the parties' separation until the children reached the age of majority, they lived with Ms. Robinson. Amber reached the age of majority on 28 February 2007 and Anson recently reached the age of majority on 11 December 2010.

On 6 November 2007, Mr. Robinson filed a complaint for divorce, custody, and equitable distribution. Ms. Robinson filed an answer and counterclaims, seeking custody, child support, post-separation support, alimony, attorney's fees, and equitable distribution. The parties entered into a mediated parenting agreement in February 2008 with regard to Anson, providing that he would reside primarily with Ms. Robinson subject to scheduled visitation with Mr. Robinson, who was then a resident of Georgia. By order entered 4 November 2009, which recites that it was delivered to counsel for both parties, the matter

1. Dawn Robinson has apparently begun to use the surname "Zachary" and refers to herself as "Ms. Zachary" throughout her appellee's brief. However, for purposes of consistency with the trial court's order, we will refer to her in this opinion as Ms. Robinson.

was set for trial on 7 December 2009 on the remaining issues of child support, alimony, and equitable distribution.

Neither Mr. Robinson nor his then-attorney attended the 7 December 2009 hearing. The trial court heard evidence offered by Ms. Robinson and entered an Order and Judgment in which it made a distribution of property, set the 2010 visitation schedule for Anson, awarded retroactive and prospective child support, awarded alimony in the amount of $1,900.00 per month, and awarded attorney's fees in the amount of $12,836.40. Mr. Robinson appeals.

On appeal, Mr. Robinson presents six issues for our review. He contends the trial court (I) erred in its equitable distribution of the parties' property and debts, (II) erred in awarding alimony, (III) erred in awarding child support, (IV) erred in calculating that he owed amounts for retroactive alimony and child support, (V) erred in setting the visitation schedule, and (VI) erred in awarding Ms. Robinson attorney's fees.

I. Equitable Distribution

[1] Mr. Robinson first contends the trial court erred by failing to identify, classify, value, and distribute all of the parties' property and debts. Our review of an equitable distribution order is limited to determining whether the trial court abused its discretion in distributing the parties' marital property. *Hartsell v. Hartsell*, 189 N.C. App. 65, 68-69, 657 S.E.2d 724, 726 (2008) (quoting *Stone v. Stone*, 181 N.C. App. 688, 590, 640 S.E.2d 826, 827-28 (2007)); *Beightol v. Beightol*, 90 N.C. App. 58, 60, 367 S.E.2d 347, 348 ("The distribution of marital property is vested in the discretion of the trial courts and the exercise of that discretion will not be upset absent clear abuse."), *disc. review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988). "Accordingly, the findings of fact are conclusive if they are supported by any competent evidence from the record." *Beightol*, 90 N.C. App. at 60, 367 S.E.2d at 348 (citing *Alexander v. Alexander*, 68 N.C. App. 548, 552, 315 S.E.2d 772, 776 (1984)).

However, even applying this generous standard of review, there are still requirements with which trial courts must comply. Under N.C.G.S. § 50-20(c), equitable distribution is a three-step process; the trial court must (1) "determine what is marital [and divisible] property"; (2) "find the net value of the property"; and (3) "make an equitable distribution of that property." *Beightol*, 90 N.C. App. at 63, 367 S.E.2d at 350.

Mr. Robinson contends the trial court erred by not including findings as to the classification or value of a number of different items of property and debts, including: the marital residence located at 4625 Jamesford Drive, the home located at 3114 Iron Gate Trail titled in the names of both parties and Ms. Robinson's father, certain bank accounts, vehicles, vehicle loans, the home mortgages, and the total net marital estate. We agree.

The first step of the equitable distribution process requires the trial court to classify *all* of the marital and divisible property—collectively termed distributable property—in order that a reviewing court may reasonably determine whether the distribution ordered is equitable. *See Cunningham v. Cunningham*, 171 N.C. App. 550, 555-56, 615 S.E.2d 675, 680 (2005). In fact, "to enter a proper equitable distribution judgment, the trial court must specifically and particularly *classify and value all assets and debts maintained by the parties at the date of separation*." *Dalgewicz v. Dalgewicz*, 167 N.C. App. 412, 423, 606 S.E.2d 164, 171 (2004) (emphasis added). In determining the value of the property, the trial court must consider the property's market value, if any, less the amount of any encumbrance serving to offset or reduce the market value. *Alexander*, 68 N.C. App. at 550-51, 315 S.E.2d at 775. Furthermore, "in doing all these things the court must be specific and detailed enough to enable a reviewing court to determine what was done and its correctness." *Carr v. Carr*, 92 N.C. App. 378, 379, 374 S.E.2d 426, 427 (1988) (citing *Wade v. Wade*, 72 N.C. App. 372, 376, 325 S.E.2d 260, 266, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985)).

In this case, the trial court made no finding with respect to the total net value of the parties' marital estate. *See*, *e.g.*, *id.* (finding that the order was incomplete as it failed to contain findings of fact concerning the net value of the total marital estate.); *Little v. Little*, 74 N.C. App. 12, 18, 327 S.E.2d 283, 288 (1985). Moreover, there was no finding as to the classification or value of the marital residence at 4625 Jamesford Drive, where Ms. Robinson was still living as of the hearing, notwithstanding substantial evidence in the record as to its value. *See Soares v. Soares*, 86 N.C. App. 369, 371-72, 357 S.E.2d 418, 419 (1987). In fact, the court failed to even mention that residence at 4625 Jamesford Drive in its order. With respect to the property located at 3114 Iron Gate Trail, the trial court found only that "[t]he parties acquired [the] house and lot at 3114 Iron Gate Trail" and then ordered that Mr. Robinson "convey his one-third undivided interest in said residence to [Ms. Robinson] and her father." While Ms.

Robinson's testimony with respect to that property leads this Court to believe that the trial court meant to classify the 3114 Iron Gate Trail property as separate property, it failed to explicitly do so. It is not enough that evidence can be found within the record which could support such classification; the court must actually classify all of the property and make a finding as to the value of all marital property. *Warren v. Warren*, 175 N.C. App. 509, 514-15, 623 S.E.2d 800, 804 (2006) (citing *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980)).

[2] In a related argument, Mr. Robinson also challenges the trial court's finding of fact that the parties

> have stipulated and agreed that each should keep the household furniture and furnishings and vehicles now in each party's possession, having an approximately equal value. The parties have further stipulated and agreed that the defendant should be distributed her individual checking account having a balance of $329.45 and the joint checking account having a balance of $1,000.00 and that plaintiff should be distributed his individual checking account having a balance of $2,273.10.

Mr. Robinson argues that this finding is not supported by competent evidence because no such stipulation appears in the record. Therefore he contends the trial court erred by not valuing and distributing the personal property enumerated in the finding. Decisions of this Court validate his arguments. We have held that a simple oral division of marital property is not binding. *See Holder v. Holder*, 87 N.C. App. 578, 582, 361 S.E.2d 891, 893 (1987); *McIntosh v. McIntosh*, 74 N.C. App. 554, 555, 328 S.E.2d 600, 601 (1985) (providing that a contemporaneous inquiry of parties by trial court is required before accepting oral stipulations regarding distribution of marital property).

Separation agreements are favored, as they "tend to simplify, shorten, or settle litigation as well as save costs to the parties," *McIntosh*, 74 N.C. App. at 556, 328 S.E.2d at 602, while " 'enabling divorcing partners to come to a mutually acceptable settlement of their financial affairs.' " *Brenenstuhl v. Brenenstuhl*, 169 N.C. App. 433, 435, 610 S.E.2d 301, 303 (2005) (quoting *Hagler v. Hagler*, 319 N.C. 287, 290, 354 S.E.2d 228, 232 (1987)). For this reason, N.C.G.S. § 50-20(d) makes binding such agreements between parties only if they are written, "duly executed, and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1" (requiring agreements

between spouses not to be against public policy and be acknowledged before a certifying officer not a party to the contract). These requirements for enforcement were enacted to insure against fraud and overreaching on the part of one of the spouses. *McIntosh*, 74 N.C. App. at 556, 328 S.E.2d at 602.

This Court held in *McIntosh* that the

> same scrutiny which is applied to separation agreements must also be applied to stipulations entered into by a husband and a wife regarding the distribution of their marital property. Any agreement entered into by parties regarding the distribution of their marital property should be reduced to writing, duly executed and acknowledged. If . . . oral stipulations are not reduced to writing it must affirmatively appear in the record that the trial court made contemporaneous inquiries of the parties at the time the stipulations were entered into. It should appear that the court read the terms of the stipulations to the parties; that the parties understood the legal effects of their agreement and the terms of the agreement, and agreed to abide by those terms of their own free will.

Id.

No evidence of a written stipulation appears in the record before us. The only source for the court's conclusion that the parties were in agreement concerning the division of this personal property was a representation to the court by Ms. Robinson's attorney that they had agreed to such an arrangement. No inquiry was made by the court into the parties' understanding of the terms of their agreement. Therefore, we hold that the trial court's reliance on counsel's representation was error, and the court should have valued and distributed those items of personal property.

[3] Mr. Robinson also contends the trial court should value the bank and credit accounts as of 1 September 2006, because that is the date upon which the parties separated. He argues that the trial court's values, as recited in the alleged stipulation, appear to have been taken from a spreadsheet offered by Ms. Robinson showing those values "as of late November 2006." While we agree that, "[f]or purposes of equitable distribution, marital property shall be valued as of the date of the separation of the parties[,]" N.C. Gen. Stat. § 50-21(b) (2009), his contention in this case has no merit. The trial court found that the parties had separated on 24 November 2006 and Mr. Robinson has not

challenged such finding. It is therefore binding. *Langston v. Richardson*, ––– N.C. App. –––, –––, 696 S.E.2d 867, 870 (2010).

For the foregoing reasons, we must vacate the equitable distribution order in its entirety and remand this case to the trial court for findings and conclusions which properly classify, value, and distribute the parties' property according to statutory and case law.

II. Alimony

[4] Mr. Robinson next challenges the trial court's alimony award. "Alimony" is defined as "an order for payment for the support and maintenance of a spouse or former spouse, periodically or in a lump sum, for a specified or for an indefinite term, ordered in an action for divorce, whether absolute or from bed and board, or in an action for alimony without divorce." N.C. Gen. Stat. § 50-16.1A (2009). In awarding alimony, the trial court is required to follow a two-step inquiry: first, the court determines whether a spouse is entitled to alimony, and, then if a spouse is so entitled, the court then determines the amount of alimony to be awarded. *Helms v. Helms*, 191 N.C. App. 19, 23, 661 S.E.2d 906, 909, *disc. review denied*, 362 N.C. 681, 670 S.E.2d 233, (2008), *appeal withdrawn*, 363 N.C. 258, 676 S.E.2d 469 (2009).

In the present case, the court, after noting that Ms. Robinson presently earns "$34,000 per year gross income," "was either unemployed outside the home or employed part time" during the marriage, and that Mr. Robinson "consistently earned over $100,000 per year during the last years of the marriage," determined that Ms. Robinson "is a dependent spouse as that term is defined in G.S. § 50-16.1A(2) and [Mr. Robinson] is a supporting spouse as that term is defined in G.S. § 50-16.1A(5)." The trial court then awarded Ms. Robinson an alimony payment of $1,900.00 per month from the date of separation, continuing for eighteen years from the time of the hearing.

Mr. Robinson does not challenge that Ms. Robinson is entitled to alimony; rather he limits his challenge to the amount of alimony awarded. He argues that the trial court's finding as to the parties' standard of living during the marriage was unsupported by the evidence, that the trial court failed to consider his ability to pay, and that, when determining Ms. Robinson's monthly expenses, it erred by including the expenses of the parties' minor child.

Decisions concerning the amount and duration of alimony are entrusted to the trial court's discretion and will not be disturbed absent a showing that the trial court has abused such discretion.

Fitzgerald v. Fitzgerald, 161 N.C. App. 414, 420, 588 S.E.2d 517, 522 (2003). The court is not required to make findings about the weight and credibility which it gives to the evidence before it. *Hartsell*, 189 N.C. App. at 75, 657 S.E.2d at 730.

Mr. Robinson challenges the court's finding that the parties, while married to each other, "consistently earned over $100,000[.00] per year" as not being supported by the evidence. The evidence, however, showed that, according to the parties' tax returns, in 2007 Ms. Robinson made $12,381.00 and Mr. Robinson made $91,024.00. The evidence also showed, again according to the parties' tax records, that Mr. Robinson's 2008 pre-alimony income was $89,936.00, while Ms. Robinson's income was $11,407.00. We conclude therefore that Mr. Robinson's challenge to the court's finding that the parties' income was "over $100,000[.00] per year" is without merit.

[5] Mr. Robinson next contends that, in determining what was an appropriate alimony payment, the trial court failed to consider his ability to pay. After determining that Ms. Robinson was the dependent spouse and that Mr. Robinson was the supporting spouse, the trial court was required to "consider all relevant factors" in determining the amount and duration of alimony. *See* N.C. Gen. Stat. § 50-16.3A(b) (2009). The statute enumerates sixteen relevant, but non-exclusive, factors, including:

(1) The marital misconduct of either of the spouses. . . .;

(2) The relative earnings and earning capacities of the spouses;

(3) The ages and the physical, mental, and emotional conditions of the spouses;

(4) The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;

(5) The duration of the marriage;

(6) The contribution by one spouse to the education, training, or increased earning power of the other spouse;

(7) The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;

> (8) The standard of living of the spouses established during the marriage;
>
> (9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;
>
> (10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;
>
> (11) The property brought to the marriage by either spouse;
>
> (12) The contribution of a spouse as homemaker;
>
> (13) The relative needs of the spouses;
>
> (14) The federal, State, and local tax ramifications of the alimony award;
>
> (15) Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper;
>
> (16) The fact that income received by either party was previously considered by the court in determining the value of a marital or divisible asset in an equitable distribution of the parties' marital or divisible property.

N.C. Gen. Stat. § 50-16.3A(b). When determining an alimony award, the trial court must at least "make a specific finding of fact on each of the [above listed] factors . . . if evidence is offered on that factor." N.C. Gen. Stat. § 50-16.3A(c). Mr. Robinson does not contend the trial court failed to make findings with respect to any of the factors enumerated by the statute, only that the court failed to consider his ability to pay. While this Court has acknowledged that a critical issue is the supporting spouse's actual ability to make alimony payments, *Barham v. Barham*, 127 N.C. App. 20, 27, 487 S.E.2d 774, 779 (1997), *aff'd per curiam*, 347 N.C. 570, 494 S.E.2d 763 (1998), we have held:

> [a]ctual ability to pay is not a factor requiring findings of fact under N.C.G.S. § 50-16.3A(b). Furthermore, "the failure of the court to make a specific finding of fact as to [the supporting spouse's] ability to pay is not deemed a sufficient ground for disturbing the court's order." Although actual ability to pay is relevant to the court's determination of fairness to the parties, it is not error for a court to omit a specific finding of actual ability

to pay where the court clearly considered the defendant's actual ability to pay.

Swain v. Swain, 179 N.C. App. 795, 800-01, 635 S.E.2d 504, 508 (2006) (quoting *Mills v. Mills*, 257 N.C. 663, 666, 127 S.E.2d 232, 234 (1962)), *disc. review denied*, 361 N.C. 437, 649 S.E.2d 897 (2007).

Here, the trial court clearly considered Mr. Robinson's "actual ability to pay." *Id.* "The determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge." *Whedon v. Whedon*, 58 N.C. App. 524, 529, 294 S.E.2d 29, 32, *disc. review denied*, 306 N.C. 752, 296 S.E.2d 764 (1982). "Implicit in this is the idea that the trial judge may resort to [her] own common sense and every-day experiences in calculating the reasonable needs and expenses of the parties." *Bookholt v. Bookholt*, 136 N.C. App. 247, 250, 523 S.E.2d 729, 732 (1999), *superseded on other grounds by statute as stated in Williamson v. Williamson*, 142 N.C. App. 702, 704-05, 543 S.E.2d 897, 898 (2001). The trial court noted that Mr. Robinson "earns an income, including personal expenses paid by [his] company of approximately $90,000[.00] per year." The trial court's inability to make more detailed findings of fact regarding Mr. Robinson's current actual ability to pay was due to his failure to attend and testify at the hearing or to submit more detailed financial information about his current expenses. We believe the court acted within its discretion in relying upon Mr. Robinson's previous year tax records, Ms. Robinson's testimony as to his expenses, and the court's "own common sense and every-day experiences" in order to conclude that the alimony payment was affordable. *See Haddon v. Haddon*, 42 N.C. App. 632, 636, 257 S.E.2d 483, 486 (1979) (conceding that, while "it would be more desirable for the trial court to have more evidence of defendant's earnings and financial condition and that the court make more detailed findings of fact based on such evidence," "such evidence was not available to the court because of defendant's failure or refusal to prepare business records and file income tax returns and that the alimony was temporary," "the evidence and findings are sufficient to support the awards of alimony Pendente lite and child support," and that "the statutory requirements for determining awards for support of dependent children (G.S. 50-13.4) and spouses (G.S. 50-16.5) must be so construed that legislative purpose is not vanquished by the rule of strict construction"). Therefore Mr. Robinson's challenge to the alimony award on this ground is without merit.

[6] Mr. Robinson also contends, with respect to the issue of alimony, that the trial court incorrectly included, in its finding as to Ms. Robinson's expenses, expenses which should have been attributed to Ms. Robinson's portion of the support of the parties' children. He argues that the alimony award effectively requires him "to pay [an] additional portion of [his minor son's] expenses beyond his guideline child support obligation" which constitutes "double dipping" in that he is being required to contribute to Anson's expenses through both child support and alimony.

The trial court found that:

> [Ms. Robinson] presented an affidavit as to her monthly needs and those of the minor child. The [c]ourt finds the expenses listed . . . to be reasonable. The defendant's monthly expenses are: $1,100 for rent, $167 for electricity, $50 for heat, $17 for garbage, $100 for Cablevision, $167 for telephone, $333 for groceries, $400 for car payment, $167 for gasoline, $50 for work lunches, $25 for uninsured prescription drugs, $100 for clothing, $75 for laundry/dry cleaning, $20 for activities, $50 for entertainment and recreation, $150 for meals out, $40 for Christmas gifts, $20 for birthday gifts, $17 for life insurance, $50 for car insurance, $10 for car registration, and $45 for pets. [Her] monthly expenses for herself total $3,119.00 and for the minor child total $1,603.00. [She therefore] has a monthly shortfall of approximately $1,900.00 after deducting her net monthly income and the plaintiff's child support obligation of $935 from her monthly expenses.

The court then ordered that Mr. Robinson pay Ms. Robinson retroactive monthly alimony payments in the sum of $1,900.00 beginning in December 2006 through the date of the hearing and prospective monthly alimony payments of $1,900.00 for the ensuing eighteen years.

In making these calculations, the trial court relied upon Ms. Robinson's testimony and affidavit. The court added Anson's total monthly expenses (individual and one-third of the shared household expenses for a total of $1,603.00), the parties' emancipated adult child Amber's one-third of the shared household monthly expenses, Ms. Robinson's individual monthly expenses, and her one-third of the shared household monthly expenses ($3,119.00) before subtracting Ms. Robinson's net monthly income ($1,900.00) and Mr. Robinson's monthly child support payment ($935.00). The court then concluded

that Ms. Robinson experienced a monthly shortfall of "approximately $1,900.00." We agree with Mr. Robinson that the court was overly inclusive in calculating Ms. Robinson's expenses when it included Anson's *actual* expenses. We additionally note that the court, without explanation, included Amber's one-third of the shared household expenses. *See* N.C. Gen. Stat. § 50-16.3A(b)(7) (including as one of the sixteen, non-exclusive, relevant alimony factors: "[t]he extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child" while making no mention of voluntary support that parents may provide adult children).

While we recognize the general rule that alimony and child support must be kept separate when the court determines the appropriate awards as to each, " 'the distinction between the two kinds of payments is easily blurred, particularly when the child for whom the support is needed resides primarily with the recipient of the alimony.' " *Fink v. Fink*, 120 N.C. App. 412, 420, 462 S.E.2d 844, 851 (1995) (quoting *Wolfburg v. Wolfburg*, 27 Conn. App. 396, 402, 606 A.2d 48, 52 (1992)), *disc. rev. denied*, 342 N.C. 654, 467 S.E.2d 710 (1996). " '[T]he question of the correct amount of alimony . . . is a question of fairness to all parties.' " *Broughton v. Broughton*, 58 N.C. App. 778, 787-88, 294 S.E.2d 772, 779 (quoting *Beall v. Beall*, 290 N.C. 669, 674, 228 S.E.2d 407, 413 (1976)), *disc. review denied*, 307 N.C. 269, 299 S.E.2d 214 (1982). As part of this fairness inquiry, all of the circumstances of the parties should be taken into consideration, including: the property, earnings, earning capacity, condition and accustomed standard of living, and child care expenses. *Fink*, 120 N.C. App. at 418, 462 S.E.2d at 849 (quoting *Peeler v. Peeler*, 7 N.C. App. 456, 461, 172 S.E.2d 915, 918 (1970)). In 1995, our legislature clarified this issue by explicitly codifying that "the extent to which the earning power, expenses, or financial obligations of a spouse *will be affected by reason of serving as the custodian of a minor child*" is one of the factors to be considered by a court when setting alimony. N.C. Gen. Stat. § 50-16.3A(b)(7) (emphasis added); *see also Hames v. Hames*, 190 N.C. App. 205, 661 S.E.2d 326 (2008) (unpublished) (noting with approval that, when setting alimony, the trial court considered the child support paid by defendant in determining plaintiff's "total monies available" to pay her expenses and the children's expenses, and deducted this same amount from defendant's available income, and considered the actual child support expenditures alleged by both parties).

However, while "the trial court . . . [must] take into account the custodial spouse's financial and care-giving obligations in determining dependency, 'fairness' unquestionably requires that the non-custodial spouse's contributions in this area also be considered." *Fink*, 120 N.C. App. at 422, 462 S.E.2d at 852. In its order, the trial court determined that Mr. Robinson's prospective child support obligation is $935.00 per month. The order states that the court arrived at this figure "based upon the incomes of the parties, the expenses of the minor child, and the Child Support Guidelines." Our review of the attached and incorporated guideline worksheets show, however, that the trial court's calculations relied exclusively upon the income of the parties and the relevant Guidelines—and did not include any consideration of Anson's actual expenses.

As Mr. Robinson's child support obligation was determined under the Guidelines, the trial court erred in making its own calculations, based upon Ms. Robinson's testimony and financial affidavit, regarding Anson's actual expenses and then using that higher calculated total ($1,603.00) to determine Ms. Robinson's monthly shortfall for purposes of calculating what alimony she was owed. *Fink*, 120 N.C. App. at 423, 462 S.E.2d at 853. Ms. Robinson may benefit from having her child care expenses considered in the court's calculation of alimony. N.C. Gen. Stat. § 50-16.3A(b)(7). However, she may not receive the benefit of a finding based in part upon her *actual* child support expenditures as she alleges them to be in her affidavit if Mr. Robinson is credited only with his Guideline proportionate share of child support expenses. *Fink*, 120 N.C. App. at 423, 462 S.E.2d at 853.

Therefore the alimony award must be vacated and remanded for a proper determination based upon Ms. Robinson's shortfall after paying only her Guideline share of Anson's expenses.

III. Child Support

[7] Mr. Robinson next challenges the trial court's child support award. Child support is to be set 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 the homemaker contributions of each party, and other facts of the particular case." N.C. Gen. Stat. § 50-13.4(c) (2009). Trial courts have great discretion in establishing the amount of support to be provided minor children. *Rice v. Rice*, 81 N.C. App. 247, 251, 344 S.E.2d 41, 44, *disc. review denied*, 317 N.C. 706, 347 S.E.2d 439 (1986). The amount

of child support awarded will therefore not be disturbed upon appeal absent a showing of abuse of discretion. *E.g.*, *Evans v. Evans*, 169 N.C. App. 358, 365, 610 S.E.2d 264, 270 (2005). Furthermore, an amount of child support which falls within the "guidelines is presumptively correct." *See*, *e.g.*, *Beamer v. Beamer*, 169 N.C. App. 594, 599, 610 S.E.2d 220, 224 (2005). "The 'ultimate objective in setting awards for child support is to secure support commensurate with the needs of the children and the ability of the [obligor] to meet the needs.' " *Cauble v. Cauble*, 133 N.C. App. 390, 394, 515 S.E.2d 708, 711 (1999) (quoting *Pittman v. Pittman*, 114 N.C. App. 808, 810, 443 S.E.2d 96, 97 (1994)).

The trial court calculated plaintiff's retroactive child support obligation, relying upon the "incomes of the parties, the expenses of the minor children and the Child Support Guidelines," and concluded that Mr. Robinson "should have paid $1,528[.00] per month to [Ms. Robinson] as child support from December 2006 through June 2007 for the support of the two minor children," "$1,017[.00] per month . . . from July 2007 through December 2008" after the oldest child turned eighteen, and "$873[.00] per month . . . beginning in January 2009 and continuing through November 2009." Thus, the court calculated that up through the date of the hearing, Mr. Robinson should have paid a total of $38,605.00 in retroactive child support.

However, "[r]etroactive child support payments are only recoverable for amounts *actually expended* on the child's behalf during the relevant period." *Rawls v. Rawls*, 94 N.C. App. 670, 675, 381 S.E.2d 179, 182 (1989) (emphasis added). Therefore, a party seeking retroactive child support must present sufficient evidence of past expenditures made on behalf of the child, and evidence that such expenditures were reasonably necessary. *Savani v. Savani*, 102 N.C. App. 496, 501, 403 S.E.2d 900, 903 (1991). In this case, the order contained no findings as to the actual expenditures made for the benefit of the minor children during the time period for which retroactive support was sought. Therefore, we must reverse the order awarding retroactive child support and remand the issue to the trial court for further findings and a proper award.

[8] Turning to Mr. Robinson's prospective child support obligation, the court concluded that Mr. Robinson should pay $935.00 per month for the support of Anson beginning in December 2009. Mr. Robinson contends the trial court erred by finding that he "earns an income, including personal expenses paid by the company, of approximately

$90,000.00 per year." He alleges that this finding of fact is not supported by the evidence.

The court had before it Mr. Robinson's 2008 tax filing which showed that in 2008 he made $68,180.00 after deducting his alimony payment of $21,216.00. Thus, his 2008 pre-alimony income was $89,936.00 ($68,180.00 + $21,216.00). Additionally, Mr. Robinson's company's 2009 profit and loss statements showed that his gross revenue was $181,272.00. Ms. Robinson provided testimony to the effect that after including a number of personal expenses which Mr. Robinson paid for with his business account—including lease, maintenance, and tax payments on his vehicle, fuel, meals, entertainment, rent, groceries, and cash advances—his compensation for 2009 was $90,000.00. We conclude, therefore, that Mr. Robinson's challenge to the court's finding that he made approximately $90,000.00 per year and his resulting challenge to the prospective child support award is without merit.

IV. Post-Separation Marital Debt Payments

[9] Mr. Robinson also contends the trial court erred in its calculation of payments he had already made towards his alimony and child support obligations. Specifically, he challenges the court's finding that mortgage and car payments were payments towards marital debt to be included in the equitable distribution of the parties' debts and assets. The court found that:

> The parties have each made post-separation payments on marital debt for which they should be given credit. [Mr. Robinson] paid $10,297[.00] in 2008 and $16,421.11 in 2009 for items such as [Ms. Robinson's] car payment, the children's and her automobile insurance, the daughter's car payments, and home repairs and mortgage payments on the former marital residence, totaling $26,718.00. [Ms. Robinson] paid $1,102.38 in 2006, $13,665.40 in 2007, $13,528.36 in 2008, and $1,497.29 in 2009 for items such as the daughter's car payments and repairs, home repairs, boat loan and storage, [Mr. Robinson's] health insurance, and the children's car insurance, totaling $29,793.43. Each party should have paid one-half of such expenses. As a result, [Ms. Robinson] should have and recover [sic] of [Mr. Robinson] the sum of $1,537.72 for her overpayment of her share of such expenses.

The court also concluded:

> [Mr. Robinson] has provided some support to [Ms. Robinson] since the date of separation. [He] made direct payments to [her] in the sum of $4,500.00 in 2006, $39,000.00 in 2007, $22,200.00 in 2008, and $12,900.00 in 2009, for a total of $78,600.00.
>
> [These] payments should be applied first to alimony, and then to child support. . . . [His] total alimony obligation from the date of separation is $68,400[.00] ($1,900[.00] x 36). After applying the amount the plaintiff has paid to date directly to the defendant of $78,600[.00] [sic] to the total amount of the alimony arrears of $68,400[.00] and the total amount of child support arrears of $38,605.00, [Mr. Robinson] has child support arrears of $28,405.00.

Mr. Robinson argues that the car and mortgage payments he made in 2008 and 2009 should have been credited towards his retroactive alimony obligation rather than included as part of the equitable distribution of the parties' debts, so that the direct payments he made to Ms. Robinson totaled more than the $78,600.00 the trial court credited him with having paid.

The merits of this allegation rest upon whether the car and mortgage payments were correctly classified as payments towards marital debt to be included in the equitable distribution or whether they were payments made to Ms. Robinson for her personal expenses or to make payments on her separate property. As we have noted, there were no specific findings as to whether the marital residence was separate or marital property, and the trial court improperly relied upon the invalid "stipulation" with respect to the parties' vehicles. Until these debts are properly classified, valued, and distributed by the court upon remand, we cannot determine whether the court should have allocated those payments towards Mr. Robinson's alimony and child support obligations, or included them within its equitable distribution order.

V. Visitation

[10] Mr. Robinson also challenges the trial court's order setting his child custody visitation schedule for Anson. We decline to address this issue because it is now moot. The visitation schedule applied only through calendar year 2010. Anson reached the age of majority on 11 December 2010, and can no longer be subject to any visitation agreement between his parents. Therefore, any ruling that this Court

might make regarding the issue would be entirely academic. *See Woncik v. Woncik*, 82 N.C. App. 244, 249, 346 S.E.2d 277, 280 (1986) (holding that an appeal from an order terminating visitation privileges pending a hearing was moot because the hearing had been held and privileges restored); *Smithwick v. Frame*, 62 N.C. App. 387, 391, 303 S.E.2d 217, 220 (1983) (declining to review a temporary custody order rendered moot by entry of a permanent custody order).

VI. Attorney's Fees

[11] Finally, Mr. Robinson challenges the trial court's award of Ms. Robinson's attorney's fees. The court found:

> [Ms. Robinson] is an interested party, who filed this action in good faith, and is unable to defray the expense of litigation. [Mr. Robinson] has failed to pay child support in an adequate amount, taking into account the financial circumstances of the parties. [Ms. Robinson] is entitled to an award of attorney's fees. The fees and expenses incurred by the defendant are reasonable in light of the skill of the attorney and the complexity of the issues before the [c]ourt and [Mr. Robinson] should pay those fees and expenses to counsel for [Ms. Robinson].

Mr. Robinson challenges that there is no statutory authority for awarding attorney's fees for the equitable distribution portion of the case and that the affidavit of attorney's fees does not differentiate work related to the parties' claims for equitable distribution from legal work related to claims for child support and alimony. We agree.

A party can recover attorney's fees only if " 'such a recovery is expressly authorized by statute.' " *McGinnis Point Owners Ass'n v. Joyner*, 135 N.C. App. 752, 756, 522 S.E.2d 317, 320 (1999) (quoting *Stillwell Enters., Inc. v. Equip. Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980)). Here, the trial court considered three substantive issues: the equitable distribution of the parties' property and debts, the award of child support, and the award of alimony.

Following the determination of child custody actions, the trial court is permitted to award attorney's fees among the parties according to N.C.G.S. § 50-13.6:

> [T]he court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact

> that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding.

N.C. Gen. Stat. § 50-13.6 (2009). Attorney's fees may also be awarded "[a]t any time that a dependent spouse would be entitled to alimony pursuant to G.S. 50-16.3A . . . to be paid and secured by the supporting spouse in the same manner as alimony." N.C. Gen. Stat. § 50-16.4 (2009).

Attorney's fees, however, are not recoverable in actions for equitable distribution. *E.g.*, *Hartsell v. Hartsell*, 99 N.C. App. 380, 390, 393 S.E.2d 570, 576 (1990), *aff'd*, 328 N.C. 729, 403 S.E.2d 307 (1991); *Holder*, 87 N.C. App. at 583-84, 361 S.E.2d at 894-95; *Patterson v. Patterson*, 81 N.C. App. 255, 262, 343 S.E.2d 595, 600 (1986). Because this is a combined action for equitable distribution, alimony, and child support, the trial court's findings should have reflected that the fees awarded are attributable only to fees which Ms. Robinson incurred with respect to the alimony and/or child support actions. *See Patterson*, 81 N.C. App. at 262, 343 S.E.2d at 600. In the absence of findings or conclusions indicating to what facet or facets of this case the fee award is attributable, we are unable to determine whether the trial court erred by awarding fees for equitable distribution.

In addition, even when awarding attorney's fees in matters involving child support and alimony, the trial court does not possess "unbridled discretion; it must still make findings of fact to support its award." *Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002) (citing *Hudson v. Hudson*, 299 N.C. 465, 471, 263 S.E.2d 719, 723 (1980)). In its order awarding attorney's fees, the court must include findings as to the basis of the award, including: the nature and scope of the legal services, the skill and time required, and the relationship between the fees customary in such a case and those requested. *See*, *e.g.*, *id.*; *Coleman v. Coleman*, 74 N.C. App. 494, 499, 328 S.E.2d 871, 874 (1985). Once these "statutory requirements have been met, the amount of attorney's fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion." *Burr*, 153 N.C. App. at 506, 570 S.E.2d at 224 (citing *Hudson*, 299 N.C. at 472, 263 S.E.2d at 724).

In this case, it is apparent, and Mr. Robinson has not challenged, that Ms. Robinson is entitled to attorney's fees for the legal costs of pursuing her claim for alimony. He does challenge, however, her entitlement to attorney's fees for her claim for child support. He

contends that had the trial court properly calculated his retroactive child support obligation and properly credited his post-separation payments, the amount of child support which he paid would have been adequate and he would owe no arrearage. Until the issues of retroactive child support and classification, valuation, and distribution of the marital assets and liabilities have been properly determined upon remand, we cannot determine whether Mr. Robinson provided, or failed to provide, adequate child support. Thus, we must vacate the award of attorney's fees, and remand the issue for a new award based on appropriate findings of fact.

In summary, we affirm the order providing for Anson's child support from December 2009 until he reached the age of majority. The balance of the trial court's order is vacated and remanded for a determination with respect to equitable distribution of the parties' property, a proper award of alimony, determination of plaintiff's obligation for retroactive child support, if any, and attorney's fees.

Affirmed in part, Vacated in part, and Remanded.

Judges McGEE and ERVIN concur.

PETE WALL PLUMBING CO., INC., PLAINTIFF-APPELLANT v. SANDRA ANDERSON BUILDERS, INC., SANDRA B. ANDERSON (GROAT), HOUSING AUTHORITY OF THE CITY OF GREENSBORO, WILLOW OAKS DEVELOPMENT, LLC, CAROLINA BANK, ANDREA M. BULLARD, CRYSTAL M. YOUNG, ALMA PICKARD, OCTAVIA T. LILES, EBONY M. WASHINGTON, MARCUS L. PURCELL AND WIFE, LAKEISHA R. PURCELL, DEFENDANT-APPELLEES

No. COA09-1449

(Filed 15 March 2011)

1. Liens— motion to strike allegations—considered under lien statute—filing sufficient

Plaintiff plumbing company's lien filings were sufficient to protect its interests, if they created a valid lien or a valid notice of lien, where they contained all of the information required by N.C.G.S. §§ 44A-12 and -19. Although defendant Anderson filed a motion to strike based only on N.C.G.S. § 1A-1, Rule 12(f), striking material allegations from the pleadings is not akin to reaching a final determination, and the discharge of statutory liens is governed by N.C.G.S. § 44A-16.

2. Liens— plumbing supplies and services—contractor's property interest extinguished by sale

The trial court properly ordered that plaintiff plumbing company's claims of lien be discharged where the action involved the construction of single family houses on property owned by the Housing Authority of Greensboro, with the construction managed through leases and subleases and financed through multi-party agreements. Upon completion, the houses were conveyed to private owners. The lien statutes provided plaintiff only a claim of lien to the extent of an owner's interest in the property; here, the builder's sublease had been extinguished by the sale to private owners before plaintiff began enforcement proceedings.

3. Liens— notice of claim on funds—received by bank after sale of property

Notices of a claim of lien on funds against a bank were correctly discharged where the properties for which services and supplies had been furnished were conveyed free of the bank's ownership interest before the notice of claim of lien on funds was received. Liability only attaches to funds after the notice of claim of lien on funds is received.

4. Liens— consent judgment—discharge of lien—harmless error

Any error by the trial court in discharging liens against a builder was harmless where plaintiff eventually entered into a consent judgment against the builder for the full amount it sought.

5. Liens— extinguishment—foreclosure on property

Carolina Bank's foreclosure of two properties extinguished plaintiff's claims of liens against those properties where Carolina Bank recorded deeds of trust on the lots before plaintiff provided labor and materials. Carolina Bank's deeds of trust were senior to plaintiff's claims of lien.

6. Liens— notice of claim on funds—foreclosure—no evidence of payments for improvements

The trial court erroneously discharged plaintiff's notices of claim of lien on funds where the record did not contain evidence about whether payments were made for improvements between receipt of the notices and the foreclosure. The issue was remanded to determine the issue of payments.

7. Pleadings— allegations stricken—lien filings

The trial court did not abuse its discretion by striking from a complaint by a plumbing company allegations regarding lien filings that the court correctly discharged. However, the court abused its discretion by striking allegations regarding a potentially viable lien on funds.

Judge STEELMAN concurring.

Appeal by plaintiff from order entered 22 April 2009 by Judge Ronald E. Spivey in Guilford County Superior Court. Heard in the Court of Appeals 13 April 2010.

Smith, James, Rowlett & Cohen, L.L.P., by Seth R. Cohen and J. David James, for plaintiff-appellant.

Sharpless & Stavola, P.A., by Joseph P. Booth III, for defendant-appellee Housing Authority of the City of Greensboro.

Womble Carlyle Sandridge & Rice, PLLC, by Michael Montecalvo and Sarah L. Buthe, for defendant-appellee Willow Oaks Development, LLC.

Ward and Smith, P.A., by Thomas S. Babel, for defendant-appellees Carolina Bank, Andrea M. Bullard, Crystal M. Young, Ebony M. Washington, Marcus L. Purcell and Lakeisha R. Purcell.

CALABRIA, Judge.

Pete Wall Plumbing Co., Inc. ("plaintiff") appeals the trial court's order (1) granting Sandra Anderson (Groat)'s motion to strike and (2) discharging plaintiff's Notices of and Claims of Lien. We affirm in part and reverse in part.

I. Background

From January through July 2008, plaintiff delivered plumbing supplies and services for the construction of six homes, located on lots 20, 25, 25B, 34, 37, and 54B of Willow Oaks-Zone B (collectively "the properties"), to defendant Sandra Anderson Builders, Inc. ("SAB").[1] The cost of the plumbing supplies and services provided to

1. SAB is now dissolved and not a party to this appeal.

the properties totaled $18,576.12.[2] SAB failed to pay plaintiff for these supplies and services.

At the time plaintiff provided plumbing supplies and services to the properties, they were owned by defendant Housing Authority of the City of Greensboro ("the Housing Authority"). The Housing Authority had entered into a ground lease ("the Ground Lease") covering the properties, along with numerous additional properties, with defendant Willow Oaks Development, LLC ("Willow Oaks"). Willow Oaks, in turn, individually subleased the properties, along with many others, to SAB ("the Ground Subleases" or "the Subleases").

Under the terms of the Ground Subleases, SAB was required to construct certain improvements on the properties; specifically, SAB was to construct single-family homes. In each of the Subleases, Willow Oaks and SAB acknowledged and agreed that SAB would be the owner of these improvements during the term of the Subleases. However, upon completion of the improvements on any lot, SAB was required to "convey the Improvements to a Homebuyer in accordance with the provisions set forth in the Master Ground Lease." At the end of the term of the Subleases, SAB was required to surrender the properties in "as-is" condition. Additionally, the Subleases specifically stated that SAB had no right to bind any interest of Willow Oaks to any lien or other security interest. The Subleases were officially recorded with the Guilford County Register of Deeds ("the Register of Deeds").

The construction of the homes was financed by defendant Carolina Bank. In order to secure this financing, the Housing Authority, Willow Oaks, SAB, and Carolina Bank entered into a Multiparty Agreement for each of the properties, whereby the Housing Authority and Willow Oaks agreed to subordinate their interests in the properties to Carolina Bank's deeds of trust in SAB's subleasehold interests in the properties ("the Multiparty Agreements"). Each of the Multiparty Agreements included a provision describing the duties of Carolina Bank, the Housing Authority, and Willow Oaks in the event of SAB's default on the loan. Essentially, in the event of

2. Plaintiff asserts in its brief that the debt resulting from SAB's failure to pay for the provision of supplies and services on the six properties at issue totals $22,376.12. However, our review of the record indicates that this amount includes a debt alleged for provision of materials to a seventh property, Lot 54. According to the record, the filing against this property was independently satisfied, and plaintiff filed a cancellation of its filing against Lot 54. Consequently, the sum of the debt claimed in plaintiff's filings for the properties at issue in the instant case actually totals $18,576.12.

default, Carolina Bank could (1) elect to assume the rights and responsibilities of SAB (*i.e.*, become the sublessee) or (2) force the Housing Authority to choose between either (“) paying the amount due under the loan or (b) transferring to Carolina Bank, upon the payment of $15,000.00, the interests of the Housing Authority and Willow Oaks in the subject property. The Multiparty Agreements were officially recorded with the Register of Deeds.

On 3 July and 11 July 2008, plaintiff filed six “Notices of and Claims of Lien” on each of the respective properties (“the filings” or “plaintiff’s filings”), which were purported to be filed “pursuant to Article 2 of Chapter 44A of the North Carolina General Statutes.” The filings were given file numbers 08 CVM 333, 345-348 and 350 by the clerk of court. Each of plaintiff’s filings alleged that plaintiff had provided, pursuant to a contract with SAB, “plumbing, labor, supplies and or/materials” for the construction of real property improvements located on the properties. While there was some variation in the exact dates the labor and/or materials were provided to the individual properties, the filings all referenced labor and/or materials that were provided between January and April 2008. The specific dates for each lot, according to plaintiff’s filings, were as follows:

File Number	Lot Number:	Date Materials First Provided:	Date Materials Last Provided:
08 CVM 333	Lot 37	9 January 2008	6 March 2008
08 CVM 345	Lot 20	29 February 2008	15 April 2008
08 CVM 346	Lot 34	24 January 2008	31 March 2008
08 CVM 347	Lot 25B	31 January 2008	31 March 2008
08 CVM 348	Lot 25	29 January 2008	25 March 2008
08 CVM 350	Lot 54B	2 January 2008	14 March 2008

At the time plaintiff’s filings were made, four of the properties had been conveyed by general warranty deed from the Housing Authority and SAB: (1) lot 54B was conveyed to defendant Ebony M. Washington (deed recorded 28 January 2008); (2) lot 25B was conveyed to defendants Marcus and Lakeisha Purcell (deed recorded 1 February 2008); (3) lot 25 was conveyed to defendant Andrea M. Bullard (deed recorded 10 April 2008); and (4) lot 34 was conveyed to defendant Crystal M. Young (deed recorded 17 April 2008).[3] Each deed to the private owners included a clause which provided that the

3. Ebony M. Washington, Marcus and Lakeisha Purcell, Crystal M. Young, and Andrea M. Bullard will be collectively referred to as “the private owners.”

Housing Authority and SAB released the conveyed property from the Ground Lease, its respective Ground Sublease, and its respective Multiparty Agreement. Additionally, the deeds stated that the Ground Lease, Ground Sublease, and Multiparty Agreement were expressly terminated "and shall have no further force or effect with respect to the property" conveyed in the deed.

On 29 August 2008, plaintiff filed a "Complaint and Action to Enforce Lien" against SAB, Sandra B. Anderson (Groat), the Housing Authority, Willow Oaks, Carolina Bank, and the private owners (collectively "defendants"). In the complaint, plaintiff alleged, *inter alia*, that it had valid and enforceable liens against the properties. In addition to the materialman's liens, the complaint also sought an "equitable lien" against the interests of the Housing Authority and Willow Oaks. Furthermore, the complaint alleged that plaintiff was entitled to money damages from SAB, Sandra Anderson (Groat) individually, the Housing Authority, and Willow Oaks. Plaintiff's prayer for relief requested, *inter alia*, that the trial court enforce its liens and order a sale of the properties.

On 16 September 2008, defendant Sandra Anderson (Groat) filed a motion to strike pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(f). The motion to strike requested that the trial court "strike the allegations regarding Notice of and Claim of Lien and the Notices of and Claims of Lien . . . as referenced in the Complaint and that the Court award her such other and further relief as to the Court may seem just and proper." None of the other defendants joined in the motion to strike.

On 8 October 2008 and 2 February 2009, the trial court conducted separate hearings on the motion to strike. Plaintiff was represented by different counsel at the different hearings. At the first hearing, plaintiff's counsel argued that the filings constituted valid notices of claim of lien on funds pursuant to N.C. Gen. Stat. § 44A, Article 2, Part 2. At the second hearing, plaintiff's counsel argued that the filings constituted valid claims of lien pursuant to N.C. Gen. Stat. § 44A, Article 2, Part 1.

On 4 February 2009, the two unsold properties, lots 20 and 37, were foreclosed upon ("nd subsequently purchased) by Carolina Bank. Carolina Bank's deeds of trust were executed and filed before plaintiff had provided labor and/or materials to these lots.

On 22 April 2009, the trial court issued an order stating that each of the filings that plaintiff sought to enforce was invalid. In addition,

the trial court's order struck from plaintiff's complaint a number of allegations including, *inter alia*, each assertion that plaintiff had a valid lien on the properties. The order further stated that "[u]pon the filing of this order with the Clerk of Superior Court, the Notices of and Claims of Lien [for all the properties] shall be marked as discharged, pursuant to N.C.G.S. § 44A-16."

As a result of the trial court's order, plaintiff voluntarily dismissed, with prejudice, all of its claims against Carolina Bank and voluntarily dismissed, without prejudice, some of its claims against Sandra Anderson (Groat). In addition, the trial court later dismissed plaintiff's claims against the Housing Authority, Willow Oaks and the private owners. On 2 June 2009, the trial court entered a consent order for summary judgment against SAB for $49,913.11. After final judgment was entered on the remaining claims on 27 July 2009, plaintiff appealed the trial court's 22 April 2009 order.

II. Discharge of Notices of and Claims of Lien

[1] Plaintiff argues that the trial court erred by discharging the filings because they complied with all relevant statutory requirements. Plaintiff contends that the filings were valid and enforceable against SAB's subleasehold interest in each of the properties.

As an initial matter, it is necessary to address the procedural irregularities which led to the trial court's order. The trial court's order granted two forms of relief: the discharge of the liens pursuant to N.C. Gen. Stat. § 44A-16 and the striking of any references to the liens from plaintiff's complaint pursuant to Rule 12(f). However, the motion to strike filed by Sandra Anderson (Groat) was based solely upon Rule 12(f). Moreover, since the motion to strike was only filed by Sandra Anderson (Groat) in her individual capacity, it is not clear from the record why the trial court granted relief to the remaining defendants when it granted the motion.[4]

A final determination on the merits is not the relief contemplated by a defendant filing a motion to strike pursuant to Rule 12(f). Rule 12(f), by its own terms, only allows the trial court to strike matters from "*any pleading* any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter." N.C. Gen. Stat. § 1A-1, Rule 12(f) (2009) (emphasis added). Thus, a ruling on a Rule

4. The record on appeal does not contain a transcript from either of the hearings on the motion to strike, and as a result, we are unable to determine which additional defendants, if any, participated in these hearings.

12(f) motion should not have been used as the basis for discharging plaintiff's filings upon the filing of the order, because striking material from the pleadings is not akin to reaching a final determination of the matter.

The discharge of statutory liens is instead governed by N.C. Gen. Stat. § 44A-16 (2009). Indeed, the trial court's order stated that it was discharging the liens pursuant to that statute. N.C. Gen. Stat. § 44A-16 lists six methods by which a filed lien can be discharged. Subsection 4 is the relevant method of discharge in the instant case. This subsection states:

> Any claim of lien on real property filed under this Article may be discharged by any of the following methods:
>
> . . .
>
> (4) By filing in the office of the clerk of superior court the original or certified copy of a judgment or decree of a court of competent jurisdiction *showing that the action by the claimant to enforce the claim of lien on real property has been dismissed or finally determined adversely to the claimant.*

N.C. Gen. Stat. § 44A-16 (2009) (emphasis added). Typically, "[t]his subsection requires that a judgment be filed showing that the action to perfect a lien has been dismissed or otherwise decided adversely to the lien claimant in order to discharge the lien." *Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc.*, 333 N.C. 250, 251, 424 S.E.2d 383, 384 (1993). The trial court's order decreed that, "upon the filing of this order with the Clerk of Superior Court, the Notices of and Claims of Lien . . . shall be marked as discharged, pursuant to N.C. Gen. Stat. § 44A-16[.]" Since the trial court's order appears to comply with N.C. Gen. Stat. § 44A-16 (4) and plaintiff does not contend that this portion of the trial court's order was not validly entered, we will review the portion of the trial court's order which directed that plaintiff's filings be discharged.

The materialman's lien statute has its genesis in our State Constitution, which requires that "[t]he General Assembly shall provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject-matter of their labor." N.C. Const. art. X, § 3. The requirement for a materialman's lien statute was satisfied by the enactment of Chapter 44A of our General Statutes ("Chapter 44A"). When interpreting Chapter 44A, our Supreme Court has made clear that

> [t]he materialman's lien statute is remedial in that it seeks to protect the interests of those who supply labor and materials that improve the value of the owner's property. A remedial statute must be construed broadly in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained.

O & M Indus. v. Smith Eng'r Co., 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006) (internal quotations and citations omitted).

Article 2 of Chapter 44A contains two parts: Part 1 of Article 2 ("Part 1") governs the "Liens of Mechanics, Laborers, and Materialmen Dealing with Owner." It is intended to govern the rights of contractors and materialmen who deal directly with the owner of the subject property. Specifically, Part 1 entitles such mechanics, laborers, and materialmen to a lien on an owner's property in order to ensure they are compensated for their work and/or materials, so long as they follow the proper procedure in the statute, including the filing of a "claim of lien." N.C. Gen. Stat. § 44A-8 (2009). A suggested format for a claim of lien is contained in N.C. Gen. Stat. § 44A-12 (2009).

In contrast, Part 2 of Article 2 ("Part 2") governs the "Liens of Mechanics, Laborers, and Materialmen Dealing with One Other Than Owner." Part 2 is intended to govern the rights of subcontractors and delineate their priority in the funds which are due to the contractor. *See* N.C. Gen. Stat. §§ 44A-8 and -18 (2009). Specifically, it entitles a subcontractor to a lien on funds paid to the contractor or subcontractor with whom it had dealt for the improvements for which the subcontractor had provided labor, materials, or rental equipment. Part 2 requires the subcontractor to follow specific procedures, including serving the party the subcontractor dealt with a "notice of claim of lien upon funds." N.C. Gen. Stat. § 44A-20 (2009). A suggested format for a notice of claim of lien upon funds is contained in N.C. Gen. Stat. § 44A-19 (2009).

In the instant case, SAB was both: (1) an owner of the properties under Part 1, by virtue of the Subleases, *see* N.C. Gen. Stat. § 44A-7 ("An 'owner' is a person who has an interest in the real property improved and for whom an improvement is made and who ordered the improvement to be made."); and (2) a contractor under Part 2, based upon the language in the Subleases requiring it to make improvements upon the properties. *See* N.C. Gen. Stat. § 44A-17 (" 'Contractor' means a person who contracts with an owner to improve real property."). Plaintiff's filings indicate that its counsel

attempted to ensure that his client received the protections of Parts 1 and 2 by filing an amalgamation of the forms contained in Parts 1 and 2, titling each of plaintiff's filings as a "Notice of *and* Claim of Lien" and including substantially all of the information contained on each statutory form.

A claimant utilizing either a claim of lien or a notice of claim of lien on funds is not required to use the model statutory form and "deviation from the statutory form is permissible so long as all of the information set out in the statutory form is contained" within the filing. *Contract Steel Sales, Inc. v. Freedom Const. Co.*, 321 N.C. 215, 222, 362 S.E.2d 547, 551 (1987). However, a claim of lien and a notice of claim of lien on funds each require specific information in order to be valid. The major difference between the two is that a claim of lien "need only identify the owner, the claimant, and the party with which the claimant contracted[,]" while a notice of claim of lien "must identify all the parties in the 'contractual chain' between the claimant and the owner." *Universal Mechanical v. Hunt*, 114 N.C. App. 484, 488, 442 S.E.2d 130, 132 (1994). The specific requirements for a claim of lien affecting title to real property are

> intended to place 'the world' on notice of the claim. Such notice must clearly delineate the tiered relationships in which the claimant is involved. This is so the owner may understand how the lien has arisen, and also so a title-searcher may ascertain which entities are potential claimants and how each is connected to the real estate.

Cameron & Barkley Co. v. American Insurance Co., 112 N.C. App. 36, 45, 434 S.E.2d 632, 637 (1993).

Reviewing plaintiff's filings, it appears that all of the information required by N.C. Gen. Stat. §§ 44A-12 and -19 is contained within. In addition, the filings contain enough information to allow a title searcher to "ascertain which entities are potential claimants and how each is connected to the real estate." *Id.* Thus, plaintiff's filings were sufficient to protect its rights under both parts of Article 2 of Chapter 44A. Nonetheless, it must still be determined whether plaintiff's filings actually created a valid claim of lien under Part 1 or a valid notice of claim of lien on funds under Part 2.

A. The Private Owners

The private owners argue that any claims of liens or notices of claim of lien on funds filed against their properties were invalid

because they each received general warranty deeds that cancelled the interests of SAB in their properties before plaintiff's filings were made. We agree.

1. Claims of Lien

[2] Our Supreme Court has explicitly approved the judicial enforcement of a materialman's lien against a leasehold ("nd, by extension, a subleasehold) interest in real property, when the enforcement is completed before the interest terminates. *See Asheville Woodworking Co. v. Southwick*, 119 N.C. 611, 615, 26 S.E. 253, 254 (1896) (A materialman's lien on a leasehold interest "can be levied upon and sold under execution. The mechanic's lien is executionary in its nature, operation, and effect, and, like other attaching liens, it gives cause of action."); *Weathers v. Cox*, 159 N.C. 575, 576, 76 S.E. 7, 8 (1912) (A materialman's lien "attaches to a lessee's leasehold estate, subject to all the conditions of the lease . . . .").

However, a claim of lien is only valid "to the extent of the interest of the owner." N.C. Gen. Stat. § 44A-9 (2009). In the instant case, plaintiff did not begin enforcement proceedings on lots 25, 25B, 34, and 54B until after SAB's ownership interests in these lots as sublessee had been extinguished by the sale and conveyance of the properties to the private owners. Upon the termination of this interest, by a conveyance which was explicitly required by the terms of the Subleases filed with the Register of Deeds, "the property revert[ed] to the lessor, free from the lien of mechanics, unless these [we]re in some way protected by the statute." *Id.* Since our statutes only provide plaintiff with a claim of lien to the extent of an owner's interest in a property, plaintiff possessed no statutory protection in the private owners' properties after SAB's interest in each property was terminated. Thus, the trial court properly ordered plaintiff's claims of lien against lots 25, 25B, 34, and 54B, filed in 08 CVM 346-48 and 350, to be discharged.

As the facts of the instant case demonstrate, the combination of the time limited nature of a leasehold interest and the time required to judicially enforce a materialman's lien effectively makes the protections of a claim of lien against a leasehold interest almost theoretical for shorter-termed leases. However, this result is necessitated by previous decisions of our Supreme Court and by the language of Chapter 44A of our General Statutes. It was ultimately plaintiff's decision to furnish materials to an entity with only a time-limited interest in the properties. The extent and terms of SAB's inter-

est in the properties were filed with the Register of Deeds and were thus a matter of public record, readily ascertainable by plaintiff. As our Supreme Court has previously admonished a party similarly situated to plaintiff,

> [i]f [plaintiff was] unwilling to do the work and furnish the material upon . . . credit and intended to look to the security provided by statute, ordinary prudence required that [plaintiff] exercise that degree of diligence which would enable them to ascertain the status of the title to the land upon which the building was to be erected and to obtain the approval or procurement of the owners. Their loss must be attributed to their failure so to do.

Brown v. Ward, 221 N.C. 344, 347-48, 20 S.E.2d 324, 326-27 (1942).

2. Notices of Claim of Lien on Funds

[3] In addition, the sale and conveyance of the private owners' properties significantly impacted plaintiff's filed notices of claim of lien on funds. Under Part 2, a claim of lien on funds does not attach to any funds until after it is received by an obligor:

> *Upon receipt of the notice of claim of lien upon funds* provided for in this Article, the obligor shall be under a duty to retain any funds subject to the lien or liens upon funds under this Article up to the total amount of such liens upon funds as to which notices of claims of lien upon funds have been received.

N.C. Gen. Stat. § 44A-20 (") (2009) (emphasis added). In Part 2, an " 'Obligor' means an owner, contractor or subcontractor in any tier who owes money to another as a result of the other's partial or total performance of a contract to improve real property." N.C. Gen. Stat. § 44A-17(3) (2009). Thus, at the time plaintiff provided plumbing services and supplies to what would later become the private owners' properties, both SAB and Carolina Bank, by virtue of their ownership interests in the properties, qualified as obligors under the statute. *See Neil Realty Co. v. Medical Care, Inc.*, 110 N.C. App. 776, 778, 431 S.E.2d 225, 226 (1993) ("North Carolina is considered a title theory state with respect to mortgages, where a mortgagee does not receive a mere lien on mortgaged real property, but receives legal title to the land for security purposes.").

However, when these properties were conveyed to the private owners in fee simple, they were conveyed free of Carolina Bank's deeds of trust. Carolina Bank no longer had an ownership interest in

these properties and was no longer disbursing any funds for any improvements to these properties. Since liability only attaches to funds *after* the notice of claim of lien on funds is received, Carolina Bank had no duty to "retain any funds subject to the lien or liens upon funds" pursuant to its extinguished deeds of trust. N.C. Gen. Stat. § 44A-20(a) (2009). Consequently, Carolina Bank was not subject to any liability under plaintiff's filings. Thus, the trial court correctly discharged the notices of claim of lien on funds against Carolina Bank.

[4] With regards to SAB, the record is silent on whether it failed to comply with N.C. Gen. Stat. § 44A-20 after it received notice of plaintiff's filings. However, such information is immaterial, because plaintiff eventually received a judgment against SAB for the full amount it sought in its complaint. This judgment was consented to by SAB and was not appealed. Therefore, even assuming, *arguendo*, that plaintiff possessed a valid lien on funds paid by SAB, so that the trial court's order discharging the lien on funds would constitute error, that error would be harmless. Plaintiff could not have received a larger judgment if it had been permitted to pursue a lien on funds against SAB than it had already received by virtue of the consent judgment. The assignments of error regarding plaintiff's filings filed against the private owners' properties are overruled.

B. Lots 20 and 37

On 4 February 2009, Carolina Bank foreclosed upon its deeds of trust on lots 20 and 37. Carolina Bank recorded a deed of trust on lot 20 on 6 February 2008. Plaintiff's filing alleged that labor and/or materials were first provided to lot 20 on 29 February 2008, after the deed of trust was recorded. Similarly, plaintiff's filing on lot 37 alleged that labor and/or materials were first provided to that lot on 9 January 2008, after Carolina Bank recorded a deed of trust on 1 November 2007.

1. Claims of Lien

[5] "A claim of lien on real property granted by this Article shall relate to and take effect from the time of the first furnishing of labor or materials at the site of the improvement by the person claiming the claim of lien on real property." N.C. Gen. Stat. § 44A-10 (2009). Since Carolina Bank recorded deeds of trust on lots 20 and 37 before plaintiff provided labor and/or materials to them, Carolina Bank's deeds of trust were senior to plaintiff's claims of lien.

> Long settled case law holds, [t]he sale [under a mortgage or deed of trust] . . . cuts out and extinguishes all liens, encumbrances and

> junior mortgages executed subsequent to the mortgage containing the power. Ordinarily, all encumbrances and liens which the mortgagor or trustor imposed on the property subsequent to the execution and recording of the senior mortgage or deed of trust will be extinguished by sale under foreclosure of the senior instrument.

In re Foreclosure of Lien by Ridgeloch Homeowners Ass'n, 182 N.C. App. 464, 469, 642 S.E.2d 532, 536 (2007) (internal quotations and citations omitted). Therefore, foreclosure by Carolina Bank of these two properties extinguished plaintiff's claims of lien against lots 20 and 37. Because plaintiff's lien interests resulting from the claims of liens filed on lots 20 and 37, in file numbers 08 CVM 333 and 345, had been extinguished, the trial court properly ordered these claims of lien to be discharged.

2. Notices of Claim of Lien on Funds

[6] However, a notice of claim of lien on funds only attaches to "funds that are owed to the contractor with whom the . . . subcontractor dealt and that arise out of the improvement on which the . . . subcontractor worked or furnished materials." N.C. Gen. Stat. § 44A-18 (2009). A lien on funds does not attach to real property, and thus the foreclosures of lots 20 and 37 had no effect on these filings. The record contains no evidence as to whether Carolina Bank made any payments to SAB for improvements on lots 20 and 37 between receiving plaintiff's notices of claim of lien on funds on 3 and 11 July 2008 and the foreclosure of those lots on 4 February 2009. Without this evidence, it was error for the trial court to discharge plaintiff's notices of claim of lien on funds on lots 20 and 37 in 08 CVM 333 and 345. That portion of the trial court's order is reversed and remanded for further proceedings in order to determine what payments, if any, Carolina Bank made to SAB for improvements between 3 and 11 July 2008 and 4 February 2009.[5]

V. Motion to Strike

[7] Plaintiff finally argues that the trial court erred by granting the motion to strike any reference to the Liens in plaintiff's complaint. Rule 12(f) states:

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5. As previously noted, the erroneous discharge of any lien on funds against SAB would be harmless, and thus we do not disturb the trial court's order discharging the notice of claim of lien on funds for improvements on lots 20 and 37 against SAB.

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 30 days after the service of the pleading upon him or upon the judge's own initiative at any time, the judge may order stricken from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter.

N.C. Gen. Stat. § 1A-1, Rule 12(f) (2009). "Rule 12(f) motions are addressed to the sound discretion of the trial court and its ruling will not be disturbed absent an abuse of discretion." *Reese v. City of Charlotte*, 196 N.C. App. 557, 567, 676 S.E.2d 493, 499 (2009) (internal quotations and citation omitted). However, "[m]atter should not be stricken unless it has no possible bearing upon the litigation. If there is any question as to whether an issue may arise, the motion [to strike] should be denied." *Id.*

In the instant case, plaintiff's complaint sought to enforce its filings of both a claim of lien and a notice of claim of lien on funds against all of the properties. The trial court's order struck all allegations regarding these filings. Since the trial court correctly discharged all of plaintiff's claims of lien, it did not abuse its discretion by striking any allegations related to these claims of lien.

However, since there was still a potentially viable lien on funds that may have been distributed by Carolina Bank for improvements on lots 20 and 37, the trial court abused its discretion by striking the allegations in plaintiff's complaint which related to Carolina Bank. That portion of the trial court's order is reversed.

VI. Conclusion

Plaintiff argued only that its filings were valid against SAB's subleasehold interest in each of the properties. Because SAB's subleasehold interest in lots 25, 25B, 34, and 54B had been extinguished by general warranty deeds to the private owners, as explicitly contemplated by the Subleases, the trial court properly discharged plaintiff's notices of and claims of lien filed in 08 CVM 346-48 and 08 CVM 350. That portion of the trial court's order is affirmed.

Additionally, Carolina Bank's foreclosure of its deeds of trust on lots 20 and 37 extinguished plaintiff's alleged junior claims of lien. Thus, the trial court properly discharged plaintiff's claims of lien filed in 08 CVM 333 and 345, and that portion of the trial court's order is also affirmed. However, since there was no evidence in the record

regarding what funds, if any, may have been distributed by Carolina Bank for improvements on lots 20 and 37 after it received notice of plaintiff's filings, the trial court erred by discharging the notices of claim of lien on funds against Carolina Bank in 08 CVM 333 and 345. That portion of the trial court's order is reversed.

The trial court did not abuse its discretion by striking the allegations in plaintiff's complaint that referred to discharged claims of lien in 08 CVM 333, 345-48, and 350 and notices of claim of lien on funds filed in 08 CVM 346-48 and 350. That portion of the trial court's order is affirmed. However, because there was no evidence which would allow the trial court to discharge the notices of claim of lien on funds against Carolina Bank in 08 CVM 333 and 345, the trial court abused its discretion in striking plaintiff's allegations against Carolina Bank. That portion of the trial court's order is reversed.

Affirmed in part and reversed in part.

Judge HUNTER, Jr., Robert N. concurs.

Judge STEELMAN concurs with separate opinion.

STEELMAN, Judge concurring.

I concur in the majority opinion. It carefully and thoroughly analyzes each of the transactions involved and reaches the correct legal conclusions under the present state of our statutory and case law.

I write separately because I am concerned that the present state of our law does not provide adequate protection to suppliers of labor and materials as envisioned by Article X, section 3 of the North Carolina Constitution. In addition, the increasingly complex real estate arrangements now being used make it virtually impossible for a supplier of labor or materials to protect themselves under our lien laws.

I. Constitutional Provisions

Article X, section 3 of the North Carolina Constitution provides:

Sec. 3. Mechanics' and laborers' liens.

> The General Assembly shall provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject-matter of their labor. The provisions of Sections 1 and 2 of this

> Article shall not be so construed as to prevent a laborer's lien for work done and performed for the person claiming the exemption or a mechanic's lien for work done on the premises

The General Assembly enacted Article 2 of Chapter 44A of the General Statutes to give effect to this Constitutional provision. *See Steel Corp. v. Brinkley*, 255 N.C. 162, 164, 120 S.E.2d 529, 531 (1961) ("Our Constitution contains a mandate directing the General Assembly to enact legislation to give mechanics and laborers a lien on the subject matter of their labor."); *Smith & Associates v. Properties, Inc.*, 29 N.C. App. 447, 449, 224 S.E.2d 692, 693 (1976) ("North Carolina's Lien Law is mandated by Article X, Section 3, of our State Constitution . . . ."). The purpose of the materialman's lien statute is to "protect the interest of the contractor, laborer or materialman." *Embree Construction Group v. Rafcor, Inc.*, 330 N.C. 487, 492, 411 S.E.2d 916, 920 (1992); *see also Carolina Builders Corp. v. Howard-Veasey Homes, Inc.*, 72 N.C. App. 224, 229, 324 S.E.2d 626, 629 (stating that the purpose of Article 2 is "to protect the interest of the supplier in the materials it supplies; the materialman . . . should have the benefit of materials that go into the property and give it value." (citation omitted)), *disc. review denied*, 313 N.C. 597, 330 S.E.2d 606 (1985).

II. Contractor as Lessee

In the instant case, the property was owned by the Housing Authority, which leased the property to Willow Oaks, which subleased the property to SAB. Plaintiff supplied labor and materials to SAB. Any lien is valid "to the extent of the interest of the owner." N.C. Gen. Stat. § 44A-9 (2009). In a lease situation, such as that before this Court, the lien protection of the supplier of labor and materials is illusory. The lien can only attach to the extent of the sublessee's interest, and this evaporates upon expiration of the lease. I agree that this result is mandated by the Supreme Court decision in *Brown v. Ward*, 221 N.C. 344, 20 S.E.2d 324 (1942). However, I believe that such a holding does not provide suppliers of labor and materials with "an adequate lien" as mandated by our Constitution. The Supreme Court should reconsider its holding in *Brown* and the General Assembly should consider revising the provisions of Chapter 44A to prevent this unjust result.

III. Complex Real Estate Agreements

In the instant case, a series of complex agreements were executed to achieve two purposes: (1) the erection of dwellings upon the

lots owned by the Housing Authority; and (2) by contract to eliminate the possibility of any lien ever attaching to the lots and improvements in question.

Where it is clear that the principal purpose of the agreements was the construction of improvements upon real estate to the joint benefit of the owner, the lessee, and the sublessee, those parties should be deemed to be joint venturers, and the clauses in the leases prohibiting the lessee and sublessee from causing any lien to attach to the lots be declared void as against public policy.

If such provisions in leases and subleases are enforced by the courts, then they will effectively eviscerate the constitutionally protected lien rights of laborers and materialmen.

IN THE MATTER OF: L.H., A MINOR CHILD

No. COA10-523

(Filed 15 March 2011)

1. **Termination of Parental Rights— grounds—failure to offer alternative placement for minor child**

   The trial court did not err by concluding that grounds existed under N.C.G.S. § 7B-1111(a)(6) to terminate respondent father's parental rights. The trial court's finding that respondent had not offered an alternative placement for the minor child was sufficient, in conjunction with the undisputed determination that respondent father lacked the capacity to care for the minor child, to support the court's conclusion.

2. **Termination of Parental Rights— improper combining of dispositional hearing and Rule 60(b)(2) motion—best interests of child**

   The trial court's disposition and order related to the N.C.G.S. § 1A-1, Rule 60(b)(2) motion were reversed because the trial court combined the Rule 60(b)(2) hearing with what was essentially a new dispositional hearing without proper notice and concluded that it would still find that termination was in the best interests of the minor child even in the absence of the maternal grandmother. The case was remanded for a new dispositional

hearing to determine whether termination of respondent father's parental rights was in the minor child's best interest.

Appeal by respondent from order entered 2 February 2010 by Judge Timothy I. Finan in Wayne County District Court. Heard in the Court of Appeals 7 September 2010.

Baddour, Parker & Hine, P.C., by James W. Spicer, III, for petitioner-appellee.

Windy H. Rose for respondent-appellant.

Penry Riemann PLLC, by Neil A. Riemann, for guardian ad litem.

GEER, Judge.

Respondent father appeals from the order terminating his parental rights to his son, L.H. ("Luke").[1] On appeal, respondent father does not dispute that he is incapable of caring for his son. He argues, however, that the trial court erred in determining that he lacked an appropriate alternative child care arrangement and in subsequently concluding that grounds, N.C. Gen. Stat. § 7B-1111(a)(6) (2009) (dependency), existed to terminate his parental rights.[2]

After this matter was on appeal, respondent father filed a Rule 60(b)(2) motion following the procedure set out in *Bell v. Martin*, 43 N.C. App. 134, 142, 258 S.E.2d 403, 409 (1979), *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980). In that motion, respondent father pointed out that, in the disposition phase of the proceedings, the trial court had relied heavily on Luke's bond with his maternal grandmother and the plan that she would adopt Luke in reaching the court's decision that termination of parental rights was in Luke's best interests. The Rule 60(b)(2) motion asked that the trial court set aside its termination of parental rights order because Luke's guardian ad litem had since filed a motion for review asserting that while Luke was living with his maternal grandmother, he was living in an abusive environment.

The trial court held a hearing on the motion in conjunction with a review hearing and filed an order indicating that it would deny the

1. The pseudonym "Luke" is used throughout this opinion to protect the minor's privacy and for ease of reading.

2. Respondent mother has not challenged the termination of her parental rights and is not a party to this appeal.

motion because (1) the trial court would still find that grounds existed to terminate respondents' parental rights, and (2) respondents had failed to present evidence that it was not in Luke's best interests not to terminate those rights. The issues before this Court are whether the trial court erred in terminating respondent father's parental rights in the initial order and, also, whether the trial court erred in determining that the Rule 60(b)(2) motion should be denied.

We affirm the trial court's decision that grounds existed to terminate respondent father's parental rights. The trial court's finding that respondent father had not offered an alternative placement for Luke is sufficient, in conjunction with the undisputed determination that respondent father lacked the capacity to care for Luke, to support the court's conclusion that grounds existed under N.C. Gen. Stat. § 7B-1111(a)(6).

We must, however, reverse the disposition and the order as to the Rule 60(b)(2) motion because the trial court combined the Rule 60(b)(2) hearing with what was essentially a new dispositional hearing and concluded that it would still find that termination was in the best interests of Luke even in the absence of the maternal grandmother. The trial court lacked jurisdiction to conduct a new dispositional hearing while this matter was on appeal, and the record contains no indication that the parties received proper notice that the trial court would be conducting a new dispositional hearing. We, therefore, remand for a new dispositional hearing to determine whether termination of respondent father's parental rights is in Luke's best interest.

Facts

On 3 April 2008, the Wayne County Department of Social Services ("DSS") was contacted shortly after Luke's birth because the hospital staff was concerned that his mother was unable to care for him. Hospital staff informed DSS that respondent mother was 20 years old and mentally retarded, that respondent father was 17 years old and mentally retarded, and that respondent mother lived with her mother, who was respondent mother's legal guardian.

DSS social worker Tammy Mathis went to the hospital to investigate the report. Ms. Mathis spoke with respondent mother, respondent father, and Luke's maternal grandmother and developed a safety plan for Luke. The plan established that Luke would stay in the care of his maternal grandmother and that his maternal grandmother would supervise respondent mother's contact with Luke.

On 14 January 2009, DSS filed a juvenile petition alleging that Luke was a dependent juvenile. DSS further alleged that both respondent mother and respondent father agreed to have the maternal grandmother pursue guardianship of Luke. On 26 March 2009, the trial court filed an order finding that (1) respondent mother admitted that, at the time of the filing of the petition, Luke was a dependent juvenile, (2) respondent father admitted he was unable to care for Luke, and (3) respondent father's mother, the paternal grandmother, was not willing to have Luke live with her. The trial court adjudicated Luke a dependent juvenile and ordered continued placement of Luke in the home of the maternal grandmother.

After a review hearing on 23 April 2009, the trial court found that DSS had attempted to work with respondent parents, but neither parent had the ability to parent Luke. The trial court conducted a permanency planning hearing on 6 August 2009 and entered an order on 26 August 2009 finding that respondent parents were both mentally challenged; that DSS and the guardian ad litem recommended that the plan for Luke be adoption; that the maternal grandmother "is willing and anxious to adopt [Luke] if [Luke] is free for adoption"; that neither respondent mother nor respondent father is able to care for Luke; that the paternal grandmother was unable to care for Luke at that time; and that DSS had taken reasonable steps to attempt to reunite Luke with a parent, but was unable to do so because of the mental condition of respondent parents. The trial court then ordered that the permanent plan be termination of parental rights and adoption.

On 10 September 2009, DSS filed a petition to terminate respondent parents' parental rights based on N.C. Gen. Stat. § 7B-1111(a)(6) in that respondent mother and respondent father were incapable of providing care and supervision for Luke such that Luke was a dependent juvenile. The trial court held a hearing on the termination petition on 10 December 2009. By order filed 2 February 2010, the trial court made the following pertinent findings of fact:

4. That the Department of Social Services was contacted about this juvenile while the juvenile was in the hospital after his birth. An investigation ensued and the Department of Social Services made a plan for the safety for [sic] the juvenile, and that plan was placement of the juvenile with a relative.

5. That after investigation, the Department of Social Services received input from both parents and on its own, placed the juvenile with . . . the maternal grandmother.

6. That the mother's plan had been to take the juvenile home to her mother's house, but not necessarily place the child in the custody of her mother, [the maternal grandmother].

7. That neither parent has offered an alternative placement for the juvenile.

8. That it was the plan of [DSS] that placed the juvenile with a relative, the maternal grandmother, not the plan of the parents.

. . . .

13. That in an order of the Court entered on February 26, 2009, and signed on March 24, 2009, the mother of the juvenile admitted that at the time of the filing of the Petition, the juvenile was a dependent juvenile and that the father of the juvenile admitted that he is unable to care for the juvenile and that his mother, the paternal grandmother is unwilling to have the juvenile live with her. The Court also found that the juvenile is a dependent juvenile within the meaning of the North Carolina General Statutes and adjudicated the juvenile a dependent juvenile. Custody of the juvenile was placed with [DSS] and [DSS] was authorized to continue placement of the juvenile in the home of the maternal grandmother . . . .

. . . .

21. That the Court received, without objection, a document from Dr. Muthiah K. Sabanayagam of East Carolina Psychiatric Consultants concerning the father . . . . [Respondent father's] diagnosis includes Bipolar Disorder I, severe mixed with questionable psychotic features, Attention Deficit Hyperactivity Disorder; Oppositional Defiant Disorder; Moderate Mental Retardation; Acquired microcephaly; severe adoptive difficulties, behavioral difficulties and poor problem solving. It is the opinion of Dr. M. K. Sabanayagam that [respondent father] "Is not capable of parenting a child . . . [and] . . . should not have independent visitation or the permission to take the child ou[t] of the legal custodian's care independently".

22. That the Court concurs with the opinion of Dr. M. K. Sabanayagam and so finds.

23. That the Court received, without objection, a letter dated August 3, 2008, concerning the mother . . . from Dr. Scott Allen, Ph.D. licensed psychologist with Waynesborough

> Psychological Services, PLLC. Dr. Allen found that [respondent mother] is mentally retarded and is obviously mentally delayed. Her full scale IQ was 53, placing her in the 0.1 per centile rank of the standardization sample an[d] within the mild range of mental retardation. Dr. Scott Allen feels that there are concerns for the safety of the juvenile based on the mother's limited intellectual functioning and limited judgement and insight. He does not feel that [respondent mother] would be able to adequately care for the juvenile independently. The Court concurs in the opinion of Dr. Scott Allen and so finds.

. . . .

> 25. That the grounds to terminate the parental rights of the parents of the juvenile are that the parents of the juvenile are incapable of providing the proper care and supervision of the juvenile such that the juvenile is a dependent juvenile within the meaning of the North Carolina General Statutes 7B-101 and that there is reasonable probability that such incapability will continue for the foreseeable future.

Based on these findings, the trial court concluded that grounds existed to terminate the parental rights of respondent parents.

The trial court's order contained further findings related to Luke's best interests. The court found that Luke was placed at birth with the maternal grandmother pursuant to a DSS safety plan. The trial court repeatedly authorized continued placement of Luke with the maternal grandmother. Ultimately, following the permanency planning hearing, the trial court found that the maternal grandmother was a fit and proper person to care for Luke and established a permanent plan of termination of parental rights and adoption.

The trial court then found that the maternal grandmother was not motivated by financial incentive, "but has acted and continues to act in the best interest of the juvenile and has provided good care for the juvenile." The court continued: "[A] loving bond exists between [the maternal grandmother] and the juvenile and the juvenile is in a stable and loving home with [the maternal grandmother], who is meeting his emotional and physical needs. The juvenile treats [the maternal grandmother] as his parent and treats his birth mother as a sibling or someone with whom to play." The court also noted that respondent mother desired that Luke continue to live with the maternal grandmother. Finally, the trial court found that termination of parental rights would allow the permanent plan of adoption to proceed.

Based on these findings, the trial court determined that termination of parental rights was in Luke's best interests. Accordingly, both parents' rights were terminated. The order also directed that the permanent plan of adoption proceed. Respondent father timely appealed the order to this Court.

While this appeal was pending, respondent father filed a motion with the trial court pursuant to Rule 60(b)(2), seeking relief from the termination of parental rights order based on newly discovered evidence. Respondent father reported to the trial court that Luke's guardian ad litem had filed a motion for review alleging that Luke was in an abusive situation. Respondent father's motion alleged that (1) Luke was living with the maternal grandmother and nine other persons in a three bedroom home, (2) the maternal grandmother had neglected respondent mother's medical needs and emotionally abused her, (3) the maternal grandmother was leaving Luke in the care of his maternal aunt for a significant amount of time so that she could gamble at an internet store, and (4) the maternal aunt had claimed that Luke actually lived with respondent mother in one room and respondent mother was acting as his primary caregiver. According to respondent father's motion, an adult protective services report had been filed against the maternal grandmother and, as a result, respondent mother had been removed from her home. Luke in turn had been placed in foster care.

Because this matter was already pending on appeal, respondent father asked the trial court pursuant to *Bell* to indicate how it would rule on the motion if the current appeal were not pending. He asked that the trial court set aside the order terminating his parental rights and grant him a new hearing with the trial court taking additional testimony. On 7 September 2010, respondent father filed a notice to delay consideration of appeal pending the trial court's entry of an order regarding the Rule 60(b)(2) motion. This Court allowed the notice to delay on 22 September 2010.

On 18 November 2010, the trial court held a hearing on the Rule 60(b)(2) motion in conjunction with a review hearing and later entered an order on 4 January 2010. With respect to the Rule 60(b)(2) motion, the trial court did not address the specific allegations in the motion regarding the maternal grandmother; did not address whether information relied upon in the motion constituted newly discovered evidence; and did not address whether presentation of that evidence would have affected the trial court's decision in the initial termination of parental rights order.

Instead, the trial court noted that the placement with the maternal grandmother "has disrupted" and found:

13. That if the appeal were not pending, the Court would still find that grounds clearly exist to terminate the parental rights of the parents of the juvenile.
14. That the Court would consider not terminating the parental rights of the parents of the juvenile based on the best interest of the juvenile, if evidence by the parents had so indicated, but the evidence did not so indicate.
15. That the Court finds no basis to grant the Rule 60(b)(2) Motion.

Based on these findings, the trial court concluded that the Rule 60(b)(2) motion should be denied and stated that it would not be inclined to set aside the order terminating respondent parents' parental rights. The court further concluded that the best interests of Luke would be served by continuing custody with DSS "pursuant to the terms and conditions of the previous order entered herein except as specifically modified by this order." That order was then forwarded to this Court.

Discussion

Termination of parental rights involves a two-stage process. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). At 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." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002). Findings of fact supported by competent evidence are binding on appeal even if evidence has been presented contradicting those findings. *In re N.B., I.B., A.F.*, 195 N.C. App. 113, 116, 670 S.E.2d 923, 925 (2009). "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." *In re Anderson*, 151 N.C. App. at 98, 564 S.E.2d at 602. The trial court's decision to terminate parental rights is reviewed under an abuse of discretion standard. *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001).

I

[1] With respect to the adjudication phase, respondent father challenges the trial court's determination that grounds existed to terminate his

parental rights under N.C. Gen. Stat. § 7B-1111(a)(6). That subsection provides that a parent's rights may be terminated upon a finding

> [t]hat the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

Id.

N.C. Gen. Stat. § 7B-101(9) (2009) defines a "[d]ependent juvenile" as "[a] juvenile in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement." In determining whether a juvenile is dependent, the trial court "must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005).

Respondent father does not dispute that he is unable to parent, but contends that the trial court erred in finding that DSS, and not he, placed Luke with the maternal grandmother. Respondent father further argues that, in any event, the trial court's finding that "neither parent has offered an alternative placement for the juvenile" is not sufficient to establish that he lacks an appropriate alternative child care arrangement. According to respondent father, whether DSS arranged the placement of Luke with his maternal grandmother "should not have a bearing on whether there was an appropriate, alternative child care arrangement."

The trial court specifically found that DSS went to the hospital upon Luke's birth and made a safety plan, which provided that Luke would be placed with a relative. DSS then, according to the trial court, "on its own, placed the juvenile with . . . the maternal grandmother." After finding that neither parent had offered an alternative placement for Luke, the court found that "it was the plan of [DSS]

that placed the juvenile with a relative, the maternal grandmother, not the plan of the parents."

These findings of fact were supported by the testimony of DSS social worker Tammy Mathis, who explained that upon being contacted by the hospital, DSS formulated Luke's safety plan, which provided that Luke would stay in the care of his maternal grandmother and that the maternal grandmother would supervise respondent mother's contact with Luke. When asked, "wasn't it the Department that came up with [the maternal grandmother] as the placement for [Luke,]" Mathis responded, "Yes." Mathis also testified that respondent father "didn't have any problem with the child going home with [the maternal grandmother]" and that respondent father did not interfere with that placement. Mathis further testified that respondent mother and respondent father confirmed DSS's recommendation and that neither had suggested or made a recommendation regarding any other placement. Thus, DSS made alternative child care arrangements and respondent father consented to those arrangements. The trial court's findings are, therefore, fully supported by the evidence.

Those findings are adequate to support the trial court's determination that respondent father lacked an appropriate alternative child care arrangement. Respondent father appears to be arguing that if a relative exists who is willing to take responsibility for a child, then the parent does not lack an alternative child care arrangement. According to respondent father, the statute does not require that a parent arrange for the alternative placement rather than DSS.

Our courts have, however, consistently held that in order for a parent to have an appropriate alternative child care arrangement, the parent must have taken some action to identify viable alternatives. For example, in *In re D.J.D.*, *D.M.D.*, *S.J.D.*, *J.M.D.*, 171 N.C. App. 230, 239, 615 S.E.2d 26, 32 (2005), this Court explained:

> The evidence supports the conclusion that these children are dependent since their parents were neither able to care for them nor did they suggest appropriate alternate placements. Respondent contends that he did propose an alternate placement; *i.e.*, his aunt, whom he brought to DSS's attention at the termination hearing, but with whom he acknowledged that he had not spoken in five years. There was no evidence she was willing or able to care for these children.

See also In re J.D.L., 199 N.C. App. 182, 189, 681 S.E.2d 485, 490 (2009) ("A conclusion that a juvenile is dependent may be supported by evidence that *the parent is unable* to care for the child or *to suggest* an appropriate alternative placement for the child." (emphasis added)); *In re J.L.*, 183 N.C. App. 126, 130, 643 S.E.2d 604, 606 (2007) (holding that "to adjudicate [the child] as dependent, the trial court was required to find that respondent, [the child's] father, was either unable to care for [the child] himself, or was unable to secure an alternative child care arrangement").

Here, the trial court's findings—supported by adequate evidence—establish both that respondent father was unable to care for Luke and that he did not suggest an appropriate alternative placement. Under the above cases, these findings are sufficient to support the existence of the dependency ground.

In arguing otherwise, respondent father primarily relies upon unpublished decisions. Although those decisions are not in any event controlling, none of them actually hold that the identification by DSS on its own of a relative willing to care for a child negates any finding that the parent lacks an appropriate alternative care arrangement. Respondent father also cites *In re N.B., I.B., & A.F.*, 200 N.C. App. 773, 778-79, 688 S.E.2d 713, 717 (2009), in which this court reversed a termination of parental rights based on dependency. The mother argued that she did not lack an appropriate childcare arrangement because she had left her children with the same family members that DSS was proposing as adoptive parents. *Id.* at 778, 688 S.E.2d at 717. This Court did not specifically address the mother's argument, but rather reversed because the trial court did "not make any findings of fact which directly address whether Respondent lacked an appropriate alternative childcare arrangement." *Id.* at 779, 688 S.E.2d at 717. In contrast, in this case, the trial court specifically made a finding of fact that neither parent offered an alternative childcare arrangement.

None of the four opinions cited by respondent father supports his argument that he had an appropriate alternative childcare arrangement because DSS placed Luke with his maternal grandmother. This Court has never held that if DSS places the child with a relative, an appropriate alternative childcare arrangement exists, and we decline to do so here.

As the guardian ad litem points out, the fact that Luke was placed with his maternal grandmother cannot mean, without anything more, that respondent father had an alternative care arrangement. If this

were the case, the requirement would be meaningless because, in the words of the guardian ad litem, "our courts will always do their best to ensure that someone" cares for children. Having an appropriate alternative childcare arrangement means that the parent himself must take some steps to suggest a childcare arrangement—it is not enough that the parent merely goes along with a plan created by DSS. *See, e.g.*, *In re Clark*, 151 N.C. App. 286, 289-90, 565 S.E.2d 245, 248 (holding that trial court erred in concluding that incarcerated father was incapable of providing for his daughter's care when father provided DSS with names of several close relatives who might be "willing and able" to care for his daughter until his release from prison, but DSS never contacted those individuals and instead placed child with maternal cousin), *disc. review denied*, 356 N.C. 302, 570 S.E.2d 501 (2002).

Respondent father next argues that his mother, the paternal grandmother, "had consistently offered to be a placement resource for the minor child." The record, however, contains evidence that the paternal grandmother is not able to care for Luke in addition to her son, including findings of fact in prior orders and the paternal grandmother's own statement to that effect in open court.

The findings of the trial court demonstrate that DSS made the alternative child care arrangement for Luke. The trial court was permitted to find, as it did, that respondent father did not suggest any alternative placement plan, but rather merely went along with the arrangement made by DSS. The findings of the trial court support the conclusion that Luke is dependent. We, therefore, hold that the trial court properly found that grounds existed under N.C. Gen. Stat. § 7B-1111(a)(6) to terminate respondent father's parental rights.

II

[2] In his appellant's brief, respondent father made no challenge to the court's conclusion of law that termination of his parental rights was in Luke's best interest. Respondent father's Rule 60(b)(2) motion, however, relates directly to the dispositional phase of the termination of parental rights proceeding.

The filing of an appeal generally removes jurisdiction from the trial court, yet the trial court does "retain[] limited jurisdiction to indicate how it is inclined to rule on a Rule 60(b) motion." *Hall v. Cohen*, 177 N.C. App. 456, 458, 628 S.E.2d 469, 471 (2006). Under *Bell*, 43 N.C. App. at 142, 258 S.E.2d at 409, this Court set out a procedure

regarding the proper filing and consideration of Rule 60(b) motions during the pendency of an appeal:

> It appears to us that the better practice is to allow the trial court to consider a Rule 60(b) motion filed while the appeal is pending for the limited purpose of indicating, by a proper entry in the record, how it would be inclined to rule on the motion were the appeal not pending. At the time the motion is made in the lower court the movant should notify the appellate court so that it may delay consideration of the appeal until the trial court has considered the 60(b) motion. Upon an indication of favoring the motion, appellant would be in position to move the appellate court to remand to the trial court for judgment on the motion and the proceedings would thereafter continue until a final, appealable judgment is rendered. An indication by the trial court that it would deny the motion would be considered binding on that court and appellant could then request appellate court review of the lower court's action. This procedure allows the trial court to rule in the first instance on the Rule 60(b) motion and permits the appellate court to review the trial court's decision on such motion at the same time it considers other assignments of error.

Under *Bell*, therefore, this Court has jurisdiction to review whether the trial court properly concluded that respondent father's Rule 60(b)(2) motion should be denied.

Under Rule 60(b)(2), a trial court may set aside an order or judgment based on "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." "In order for evidence to be 'newly discovered evidence' under [Rule 60(b)(2)], it must have been in existence at the time of the trial, and not discoverable through due diligence." *Broadbent v. Allison*, 176 N.C. App. 359, 364, 626 S.E.2d 758, 763 (2006), *disc. review denied*, 361 N.C. 350, 644 S.E.2d 4 (2007).

"Generally, a motion for setting aside a judgment pursuant to Rule 60(b) is addressed to the sound discretion of the trial court, and the standard of appellate review is limited to determining whether the court abused its discretion." *McLean v. Mechanic*, 116 N.C. App. 271, 276, 447 S.E.2d 459, 462 (1994), *disc. review denied*, 339 N.C. 738, 454 S.E.2d 653, 654 (1995). Abuse of discretion is shown only when the challenged actions are manifestly unsupported by reason. *Woods v. Billy's Auto.*, 174 N.C. App. 808, 811, 622 S.E.2d 193, 196 (2005).

Here, the Rule 60(b)(2) motion was based on the guardian ad litem's filing of a motion for review indicating that the maternal grandmother was causing Luke to live in an abusive environment. The trial court should have first determined whether any evidence of abusive conditions was in existence at the time of the termination of parental rights hearing and whether information regarding those conditions could have been discovered by respondent father with due diligence. We note that the trial court joined its hearing on this motion with the review hearing and, therefore, evidence regarding the maternal grandmother should have been squarely before the court. While the trial court incorporated by reference into its order two court summaries, it did not attach them to the order and it made no findings indicating what information those summaries contained. As a result, this Court does not know what evidence the trial court had before it.

The only allusion to the Rule 60(b)(2) motion's allegations is the finding that "subsequently, the placement of the juvenile with the maternal grandmother has disrupted." The trial court never addressed the reason for the "disruption" or whether the behavior leading to that disruption had existed at the time of the termination of parental rights hearing. Similarly, the trial court apparently never considered whether the information about the maternal grandmother could have been discovered by respondent father earlier.[3]

The trial court nonetheless found that no basis existed for granting the Rule 60(b)(2) motion. As for the adjudication portion of the order, the court found: "That if the appeal were not pending, the Court would still find that grounds clearly exist to terminate the parental rights of the parents of the juvenile." We agree that the trial court did not abuse its discretion as to this portion of the termination of parental rights order. The conditions experienced by Luke while living with his maternal grandmother were irrelevant to whether grounds existed under N.C. Gen. Stat. § 7B-1111(a)(6) to terminate respondent father's parental rights.

As for the dispositional or "best interests" portion of the order, the trial court found: "That the Court would consider not terminating the parental rights of the parents of the juvenile based on the best interest of the juvenile, if evidence by the parents had so indicated,

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3. It would seem, however, that the failure of DSS and the guardian ad litem to uncover this information by the time of the termination of parental rights hearing would preclude a finding of a lack of due diligence by the mentally retarded respondent father.

but the evidence did not so indicate." Earlier in the order, the court had found that all parties were given an opportunity to present evidence. Although these findings are somewhat cryptic, they imply that the trial court recognized that the underpinnings for its best interests determination in the termination of parental rights order—adoption by a loving maternal grandmother—were gone, but that it was still finding that termination was in Luke's best interests because respondent parents had not presented, at the Rule 60(b)(2) and review hearing, any new best interests evidence.

The trial court's basis for denying the Rule 60(b)(2) motion appears to mistake the court's role at this stage. It was respondent father's responsibility to present evidence supporting his claim that newly discovered evidence warranted setting aside the termination of parental rights order and holding a new hearing. Any new best interests evidence would then be presented at the new hearing. The trial court improperly merged the Rule 60(b)(2) and review hearing with what was essentially a dispositional hearing.

The parties presumably would have come to the hearing prepared to present evidence as to why the Rule 60(b)(2) motion should or should not be granted. By determining that, even without consideration of the maternal grandmother, it would still make the same best interests determination because of respondents' lack of evidence, the trial court effectively held a dispositional hearing without providing adequate notice to the parties. The trial court may not hold a termination of parental rights dispositional hearing while only noticing a Rule 60(b)(2) or review hearing. *Cf. In re D.C., C.C.*, 183 N.C. App. 344, 356, 644 S.E.2d 640, 646-47 (2007) (reversing and remanding order of guardianship "[b]ecause N.C. Gen. Stat. §§ 7B-507 and 907 do not permit the trial court to enter a permanent plan for a juvenile during disposition, respondent did not have statutorily required notice that the trial court would consider a permanent plan for [juvenile], and the trial court did not make findings mandated by sections 7B-907(b), (c), and (f) . . .").

In addition, the trial court lacked jurisdiction to revisit the best interests determination while this case was on appeal. *See* N.C. Gen. Stat. § 7B-1003 (2009). It had authority to enter an order setting out whether it believed that the newly discovered evidence warranted a new hearing. If the trial court believed that the evidence regarding the maternal grandmother was sufficient to warrant allowing respondent parents another opportunity to argue that termination was not in

the best interests of Luke—as the court's finding seems to indicate—then the court should have indicated that it would grant the Rule 60(b)(2) motion. Such a ruling would not require that the trial court ultimately decide that termination was not in Luke's best interests. The ruling would simply lead to a new dispositional hearing at which the parties would again present evidence regarding Luke's best interests.

The approach followed by the trial court in this case is also inconsistent with the requirements for the disposition phase of a termination of parental rights hearing. Our legislature has determined that if a trial court determines that one or more grounds for termination exist, then in order to decide whether it is in the child's best interests to terminate the parental rights, the court "shall consider" the following factors: (1) the age of the juvenile; (2) the likelihood of adoption of the juvenile; (3) whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile; (4) the bond between the juvenile and the parent; (5) the quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement; and (6) any relevant consideration. N.C. Gen. Stat. § 7B-1110(a) (2009). The trial court in this case has only considered these factors as they relate to the maternal grandmother.

While that fact would not be an issue if any problems with the maternal grandmother's conduct post-dated the termination of parental rights order, we cannot reach the same conclusion if the trial court had before it, at the Rule 60(b)(2) hearing, evidence that existed at the time of the termination of parental rights hearing that negated the findings in the original order. If that is the case, then there has never been any valid consideration of Luke's best interests. The Rule 60(b)(2) order contains no consideration of these factors in the absence of the maternal grandmother.

We could simply reverse the Rule 60(b)(2) order and remand for further findings of fact and conclusions law, but, under the circumstances and given the findings in that order, such an approach would not advance Luke's need for permanency at the earliest possible point. It appears to us that the approach that best serves Luke's interests is to reverse the dispositional portion of the termination of parental rights order as well as the Rule 60(b)(2) portion of the 4 January 2011 order and remand for a new dispositional hearing as to whether termination of respondent father's parental rights is in Luke's best interests.

Affirmed in part; reversed and remanded in part.

Judges McGEE and BRYANT concur.

STATE OF NORTH CAROLINA v. BRIAN KEITH BOOZER AND DELSHAUN DARRON COVINGTON

No. COA10-1018

(Filed 15 March 2011)

1. Kidnapping— first-degree—sufficient evidence—intent to cause bodily harm or terrorize

The trial court did not err in denying defendants' motions to dismiss first-degree kidnapping charges. The State presented sufficient evidence of each element of the crime, including defendants' intent to cause bodily harm or terrorize.

2. Kidnapping— first-degree—lesser-included offense—jury instruction—no error

The trial court did not commit plain error in a first-degree murder case by failing to instruct the jury on the lesser-included offense of false imprisonment. The State presented sufficient evidence that defendants removed the victim for the purpose of doing him serious bodily harm or terrorizing him.

3. Identification of Defendants— Harris factors—findings support conclusion

The trial court did not err in denying defendant's motion to suppress a witness's identification of defendant. The trial court's findings on each of the factors set forth in *State v. Harris*, 308 N.C. 159, fully supported its conclusion that there was no likelihood of irreparable misidentification.

4. Constitutional Law— effective assistance of counsel—counsel's performance not deficient

Defendant in a first-degree kidnapping case did not receive ineffective assistance of counsel during the trial. Defense counsel's performance was not deficient and although the trial court's kidnapping instruction was erroneous, the error was not prejudicial.

5. Kidnapping— first-degree—jury instruction—erroneous—not prejudicial

The trial court did not commit plain error in its instruction to the jury on first-degree kidnapping. Although the instruction was erroneous, the error did not have a probable impact on the jury's finding of guilt.

Appeal by Defendants from judgments entered 5 March 2010 by Judge James E. Hardin, Jr., in Wake County Superior Court. Heard in the Court of Appeals 10 February 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Kevin Anderson, for the State (Boozer appeal).

Attorney General Roy Cooper, by Assistant Attorney General Kimberley A. D'Arruda, for the State (Covington appeal).

Gilda C. Rodriguez for Defendant Boozer.

Kevin P. Bradley for Defendant Covington.

STEPHENS, Judge.

I. Procedural Background

On 30 November 2009, the Wake County Grand Jury returned indictments against Defendants Brian Keith Boozer ("Boozer") and Delshaun Darron Covington ("Covington") (collectively, "Defendants") for assault with a deadly weapon with intent to kill inflicting serious injury, robbery with a dangerous weapon, and first-degree kidnapping. The cases were tried jointly at the 1 March 2010 criminal session of Wake County Superior Court. The jury found each Defendant guilty of assault inflicting serious injury, common law robbery, and first-degree kidnapping. The trial court sentenced the Defendants identically: it consolidated the robbery and assault offenses and imposed a sentence of 16 to 20 months in prison, to run concurrently with a sentence of 93 to 121 months imprisonment for the kidnapping offenses. Both Defendants appealed.

II. Factual Background

About 10:00 p.m. on 14 September 2009, Clifton Batts rode his bicycle to the Raleigh home where Earnest Kincy resided with his son, Jonathan, and two cousins. Batts wanted to play cards with Kincy, but Kincy had already gone to bed. As Batts was leaving the house, he got into an argument with some people outside whom he

did not know. Batts could not remember the substance of the argument, but knew that, at some point, he was struck from behind. Batts did not recall what happened to him next.

Kincy and Jonathan heard the commotion as Batts was leaving and went outside on the front porch, where they saw three men in Kincy's yard assaulting someone they later learned was Batts. The men were kicking and hitting Batts in the head as he lay on the ground, and one of the men, known to Kincy and his son as "Taco," slammed Batts' bicycle down onto Batts several times and then took something from his wallet. From the porch, Kincy told the men to stop, but they continued to attack Batts. Kincy then walked down into the yard and again asked the men to stop. The three men stopped their attack and dragged Batts to the driveway where they attempted to stuff him into a garbage can. When they were unable to do so, they dragged Batts to a nearby ditch and threw him in before driving away.

Just after midnight on 15 September 2009, Officer Eric Wilson of the Raleigh Police Department received a call about the assault and went to investigate. He was familiar with the Kincy home because the police had received previous complaints of fights and drug sales there, as well as allegations that it was a liquor house. He found Batts lying in several inches of water in a 10-to 12-foot-deep ditch with mucus bubbling out of his mouth and nose. Responding paramedic Dwayne Tant arrived to find Batts non-responsive with facial lacerations and bruising across his head and chest. Kincy spent ten days in the hospital and underwent two surgeries. He suffered from a broken collarbone, broken nose, concussion, multiple lacerations, had his jaw wired shut for more than six weeks, and required a tube in his neck to help him breathe. The injuries left Batts disabled and unable to work.

Questioned by Officer David Deach, Kincy first said he did not see anything and did not want to be involved. After Detective P.A. Dupree told Kincy about the seriousness of Batts' injuries, Kincy described the assault and stated that he recognized the three men as people who had come to his house to "hang out" before, although he did not know their names. Kincy told Det. Dupree that a picture of one of the men was in a weekly newspaper called The Slammer, and Det. Dupree used the computer in his car to show Kincy the online edition of the paper. The edition included about 200 photographs with names, and Kincy viewed each page online, indicating that he did not see the man until the page showing Covington came up. Kincy identi-

fied Covington as one of the men who had assaulted Batts. Kincy's son Jonathan also identified Covington as one of the men, noting his light skin and dreadlocks as distinctive.

On 16 September 2009, Kincy called Det. Dupree to say that a different edition of The Slammer included a picture of another of Batts' assailants, and gave Det. Dupree the name Brian Boozer. Det. Dupree obtained a photograph of Boozer which Kincy confirmed as showing the second assailant. Later, Kincy provided Det. Dupree with the name "Taco" as the third man involved in Batts' assault. Police determined that "Taco" was a nickname for Brandon McCullers, whom Kincy identified in a photo lineup. One of McCullers' fingerprints was found on Batts' bicycle, but neither Covington's nor Boozer's fingerprints were matched to those on the bicycle.

Officer B.C. Scioli testified that he assisted in Boozer's arrest on 9 October 2009, and that, when told the officers were serving warrants for robbery and attempted murder, Boozer stated, "I only hit that man twice." Neither Covington nor Boozer presented evidence at trial.

On appeal, both Boozer and Covington argue that the trial court erred in denying their motions to dismiss the kidnapping charges for insufficiency of the evidence and failing to instruct the jury on the lesser included offense of false imprisonment. Because their arguments are similar and the evidence against them was the same, we address their contentions on these two issues together. Boozer also argues that the trial court erred in denying his motion to suppress Kincy's out-of-court identification of Boozer.

Covington makes two additional arguments: that he received ineffective assistance of counsel ("IAC"), and that the trial court committed plain error in instructing the jury on the kidnapping charge. For the reasons discussed below, we find no error as to Boozer. We find no prejudicial error as to Covington on the kidnapping instruction, and no error as to his remaining issues.

III. Joint Issues on Appeal

A. Denial of Motions to Dismiss the First-Degree Kidnapping Charges

[1] Defendants argue that the trial court erred in denying their motions to dismiss the first-degree kidnapping charges for insufficient evidence of intent to cause bodily harm or terrorize.We disagree.

Appellate review of a denial of a motion to dismiss for insufficient evidence is *de novo*. *State v. Robledo*, 193 N.C. App. 521, 525, 668

S.E.2d 91, 94 (2008). "[T]he trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996) (quoting *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). Substantial evidence is evidence that a reasonable person could accept as sufficient to support a conclusion. *Id.* When considering a motion to dismiss, "the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence." *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 256 (2002) (quoting *State v. Gibson*, 342 N.C. 142, 150, 463 S.E.2d 193, 199 (1995)). Further, any contradictions in the evidence are to be resolved in the State's favor. *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001). The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine witness credibility. *Id.*

Defendants were convicted under N.C. Gen. Stat. § 14-39(a)(3) which provides:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . .
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person[.]

N.C. Gen. Stat. § 14-39(a) (2009). Thus, kidnapping is a specific intent crime and the State must show that the confinement, restraint, or removal of the victim was for one of the purposes listed in the statute. *State v. Rodriguez*, 192 N.C. App. 178, 187, 664 S.E.2d 654, 660 (2008). "A defendant's intent is rarely susceptible to proof by direct evidence; rather, it is shown by his actions and the circumstances surrounding his actions." *Id.* Here, Defendants were charged with confining, restraining or removing Batts for the purpose of doing serious bodily harm or terrorizing him. Defendants argue the State presented insufficient evidence on this element of intent. We disagree.

"Terrorizing is defined as more than just putting another in fear. It means putting that person in some high degree of fear, a state of

intense fright or apprehension." *State v. Davis*, 340 N.C. 1, 24, 455 S.E.2d 627, 639 (1995) (quotation marks and citation omitted). "In determining the sufficiency of the evidence, the test is not whether subjectively the victim was in fact terrorized, but whether the evidence supports a finding that *the defendant's purpose was to terrorize the victim*." *Id.* (emphasis added) (internal quotation marks omitted). Likewise, it is not "the extent of physical damage to [the victim]" when considering the sufficiency of the evidence regarding intent to cause serious bodily injury. *State v. Washington*, 157 N.C. App. 535, 539, 579 S.E.2d 463, 466 (2003). "The question is whether [the] defendant's actions could show a specific intent *on his part* to do serious bodily harm to [the victim]." *Id.* (emphasis added).

Defendants assert that, because it was dark at the time, the assailants could not have known the depth of the ditch or that there were rocks at the bottom, and, thus, they cannot have intended to do serious bodily harm to Batts. They further assert that Batts did not remember anything after the first blow and thus could not have been terrorized by his assailants' actions. They contend that they and the other assailant simply wanted to remove Batts from Kincy's property so they could leave. These arguments go to the weight of the evidence and also rely on evidence unfavorable to the State, neither of which is considered by the trial court in making a sufficiency determination on a motion to dismiss. *Lucas*, 353 N.C. at 581, 548 S.E.2d at 721.

Evidence favorable to the State which could support a reasonable inference of intent to terrorize or cause bodily harm to Batts included the following: Boozer had been to Kincy's home on several prior occasions, during which he may have seen the deep ditch. After severely beating Batts, Defendants first attempted to stuff him into a garbage can. When that proved impossible, they dragged him across Kincy's yard and threw him into a 10- to 12-foot-deep ditch with rocks and water in the bottom. Batts could not recall anything after the assault began and was not struggling or moving during this process. This evidence could support a reasonable inference that Defendants intended to cause Batts serious bodily injury if they believed he was unconscious and unable to protect himself as he was thrown into the deep ditch, landing on rocks and possibly drowning. Alternatively, this evidence could support a reasonable inference that Defendants intended to terrorize Batts if they believed him to be conscious and aware of being stuffed into a garbage can and then flung into a deep, rocky, water-filled ditch. In the light most favorable to the State and giving the State the benefit of every reasonable inference, we conclude that

this evidence could support a conclusion by a reasonable person that Defendants intended to terrorize or cause serious bodily harm to Batts. Accordingly, the trial court properly denied Defendants' motions to dismiss. This argument is overruled.

B. Jury Instruction on False Imprisonment

[2] Defendants also argue that the trial court committed plain error in failing to instruct the jury on the lesser included offense of false imprisonment because removal occurred without the intent to do serious bodily harm or terrorize. We disagree.

As Defendants concede, they did not request an instruction on false imprisonment, and thus are limited to arguing plain error in the trial court's failure to give the instruction *sua sponte*. Plain error occurs when "the error is so fundamental that it undermines the fairness of the trial, or where it had a probable impact on the guilty verdict." *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 240 (2002).

It is well-established that

> the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that [the] defendant committed the lesser included offense. However, when the State's evidence is positive as to every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged, the trial court is not required to submit and instruct the jury on any lesser included offense. The determining factor is the presence of evidence to support a conviction of the lesser included offense.

State v. Boykin, 310 N.C. 118, 121, 310 S.E.2d 315, 317 (1984) (citations omitted). "Failure to so instruct the jury constitutes reversible error not cured by a verdict of guilty of the offense charged." *State v. Whitaker*, 316 N.C. 515, 520, 342 S.E.2d 514, 518 (1986) (citation omitted).

"False imprisonment is a lesser[]included offense of kidnapping." *State v. Kyle*, 333 N.C. 687, 703, 430 S.E.2d 412, 421 (1993). The distinguishing factor between kidnapping and false imprisonment is the purpose of the confinement, restraint or removal of another person. *Id.* "So, whether a defendant who confines, restrains, or removes another is guilty of kidnapping or false imprisonment, depends upon whether the act was committed to accomplish one of the purposes enumerated in our kidnapping statute." *State v. Lang*,

58 N.C. App. 117, 118-19, 293 S.E.2d 255, 256, *cert. denied*, 306 N.C. 747, 295 S.E.2d 761 (1982). "Thus, the State must prove that the defendant kidnapped with the intent to commit the particular felony charged in the indictment." *Rodriguez*, 192 N.C. App. at 189, 664 S.E.2d at 661 (citation omitted). "However, the trial court does not have to instruct on false imprisonment if there is sufficient evidence that the defendant acted with a purpose enumerated in N.C. Gen. Stat. § 14-39." *Id.* To prevail, Defendants would have to show that the State did not present sufficient evidence that they removed Batts for the purpose of doing him serious bodily harm or terrorizing him, *and* "that the jury probably would have convicted [them] of false imprisonment rather than kidnapping if the judge had given an instruction on false imprisonment." *Id.* at 190, 664 S.E.2d at 662 (discussing the defendant's burden when arguing plain error on this point).

Here, Defendants base their arguments on the contentions they made regarding sufficiency of the evidence on the purpose element. Having rejected that argument above, we likewise reject it here, and hold that the State presented sufficient evidence that Defendants removed Batts for the purpose of doing him serious bodily harm or terrorizing him. Thus, no instruction on false imprisonment was required and Defendants cannot show any error by the trial court, let alone plain error.

IV. Boozer's Appeal

A. Identification Procedure

[3] Boozer argues that the trial court erred in denying his motion to suppress Kincy's identification of Boozer. We disagree.

"This Court's review of a trial court's denial of a motion to suppress in a criminal proceeding is strictly limited to a determination of whether the court's findings are supported by competent evidence, even if the evidence is conflicting, and in turn, whether those findings support the court's conclusions of law." *In re Pittman*, 149 N.C. App. 756, 762, 561 S.E.2d 560, 565 (citation omitted), *disc. review denied*, 356 N.C. 163, 568 S.E.2d 608 (2002), *cert. denied*, 538 U.S. 982, 155 L. Ed. 2d 673 (2003). "[I]f so, the trial court's conclusions of law are binding on appeal." *State v. West*, 119 N.C. App. 562, 565, 459 S.E.2d 55, 57, *disc. review denied*, 341 N.C. 656, 462 S.E.2d 524 (1995). "If there is a conflict between the [S]tate's evidence and [the] 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. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982).

Regarding suppression of out-of-court identifications, we have held that:

> Identification evidence must be suppressed if the facts show the pretrial identification procedures were so suggestive as to create a very substantial likelihood of irreparable misidentification. *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985). The determination of this question involves a two-step process: "First, the Court must determine whether the pretrial identification procedures were unnecessarily suggestive. If the answer to this question is affirmative, the court then must determine whether the unnecessarily suggestive procedures were so impermissibly suggestive that they resulted in a substantial likelihood of irreparable misidentification." *State v. Fisher*, 321 N.C. 19, 23, 361 S.E.2d 551, 553 (1987).
>
> The likelihood of irreparable misidentification depends on the totality of the circumstances. *Id.* Factors to be considered in this determination include:
>
>> (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.
>
> *State v. Harris*, 308 N.C. 159, 164, 301 S.E.2d 91, 95 (1983).

State v. Capps, 114 N.C. App. 156, 161-62, 441 S.E.2d 621, 624-25 (1994).

Here, Boozer challenges only two portions of the trial court's finding of fact 10, which states:

> 10. Mr. Kincy testified at the hearing that he knew the defendant and the defendant's name prior to the date of the incident. He (Kincy) also stated that he had played cards with the defendant on three different occasions. Each of these card games had lasted two or three hours. On the night of the subject incident, Kincy had seen the defendant in the hallway and had briefly spoken to him. Once the beating began, Kincy had observed the defendant in the front yard of the Malta Avenue [house] for approximately fifteen minutes. During that time, Kincy

> was separated from the defendant by a distance of three feet or less.

Specifically, Boozer contends that while the trial court found that "[e]ach of these card games had lasted two to three hours[,]" Kincy's testimony was actually that he had played cards with Boozer for two or three hours *total*. Boozer also contends that the trial court incorrectly found that Boozer and Kincy spoke on the night of the attack. On direct examination, Kincy was asked if he spoke to Boozer that night, to which Kincy replied, "Not that night." We agree that those two portions of finding 10 are not supported by competent evidence. However, the remainder of finding 10 and the trial court's additional findings of fact are unchallenged and, thus, are binding on appeal.

In his brief, Boozer does not argue that any specific conclusion of law is not supported by the remainder of finding 10 and the trial court's other findings. Instead, he argues that, "[u]nder the totality of the circumstances described and the factors considered, the suggestive procedure used in the identification of Mr. Boozer created a substantial likelihood of irreparable misidentification." Boozer discusses evidence from the suppression hearing and contends that, applying the factors listed in *Harris*, the trial court should have reached different conclusions and allowed his motion to suppress. While Boozer was free to make this argument at the suppression hearing in the trial court, it is misplaced on appeal to this Court where our task is "strictly limited to a determination of whether the [trial] court's . . . findings support [its] conclusions of law." *In re Pittman*, 149 N.C. App. at 762, 561 S.E.2d at 565. However, we treat Boozer's contentions as a challenge to the trial court's conclusion 2:

> 2. That this Court finds, by at least a preponderance of the evidence, that the pretrial identification procedure employed by Detective Dupree, to wit: the showing of a photograph of [] defendant initially generated from "The Slammer Newspaper" to the witness, was neither impermissibly suggestive, nor was there any likelihood of irreparable misidentification, in consideration of the "totality of the circumstances." State of North Carolina v. Harris, 308 N.C. 159 (1983).

The first two factors under *Harris* are "the opportunity of the witness to view the criminal at the time of the crime" and "the witness's degree of attention[.]" *Harris*, 308 N.C. at 164, 301 S.E.2d at 95. As noted above, in finding 10, the trial court stated: "Once the beating began, Kincy had observed the defendant in the front yard of

the Malta Avenue [house] for approximately fifteen minutes. During that time, Kincy was separated from the defendant by a distance of three feet or less." This finding indicates that Kincy had the opportunity to view Boozer at close range for an extended period of time and that Kincy was focused on and paying attention to Boozer for at least fifteen minutes.

Relevant to the third and fourth *Harris* factors, "the accuracy of the witness's prior description of the criminal" and "the level of certainty demonstrated by the witness at the confrontation[,]" the trial court made the following findings:

> 3. Ernest Kincy also told Detective Dupree that he was familiar with all three suspects and that they came to his residence on Malta Avenue on a regular basis. Kincy further indicated that he knew all three suspects by sight but did not know their names.
>
> . . .
>
> 7. On the following day, September 16, 2009, Kincy contacted Detective Dupree by phone and informed him that he had observed one of the suspects from this case in another edition of "The Slammer Newspaper." He said that this suspect's name was Brian Boozer and that he had been arrested approximately two weeks earlier on a warrant issued as a result of a Failure to Appear for Court.
>
> . . .
>
> 9. Detective Dupree met with Ernest Kincy a short time later and presented him (Kincy) with the August 27, 2009 arrest photo of [D]efendant. Mr. Kincy immediately identified [D]efendant as one of the individuals that he had seen beating and robbing the victim on September 15, 2009.

These findings show that Kincy had previously described one suspect as Brian Boozer, a person he knew and had interacted with previously, and that he immediately identified a photograph of Boozer. These findings indicate high levels of both accuracy and confidence in Kincy's description and identification of Boozer. Finally, as determined in findings 3, 7 and 9, Kincy stated that he recognized but could not name the suspects on the night of the attack on Batts. However, Kincy then named Boozer as a suspect and identified a photograph of him the next day, a very brief "length of time between the crime and the confrontation[,]" the fifth factor listed in *Harris*. *Id.*

The trial court's findings on each of the *Harris* factors fully support its conclusion 2, that there was no "likelihood of irreparable misidentification, in consideration of the 'totality of the circumstances.' " The trial court, thus, properly denied Boozer's motion to suppress, and accordingly, this argument is overruled.

V. Covington's Appeal

A. Ineffective Assistance of Counsel

[4] Covington argues that he received ineffective assistance of counsel during his trial. We disagree.

In making his IAC claim, Covington asserts four errors by his trial counsel: failing to seek remedy for alleged violations of the Eyewitness Identification Reform Act, failing to object to the admission in evidence of Boozer's admission of participation in the assault, failing to object to the trial court's kidnapping instruction, and failing to request submission of false imprisonment as a lesser included offense of kidnapping.

Criminal defendants are entitled to the effective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985) (citation omitted).

> When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness. *Strickland v. Washington*, [466] U.S. [668], [687,] 80 L. Ed. 2d 674, 693 (1984). In order to meet this burden defendant must satisfy a 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*. (Emphasis added).
>
> *Id.* at [687], 80 L. Ed. 2d at 693.

Id. at 561-62, 324 S.E.2d at 248. In considering IAC claims, "if 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." *Id.* at 563, 324 S.E.2d at 249.

Covington first contends that he received IAC because his trial counsel did not seek remedy for Kincy's identification of Covington by examining online pages of The Slammer, which he contends was a violation of N.C. Gen. Stat. § 15A-284.52(b) (2009) (specifying eyewitness identification procedures for lineups conducted by law enforcement officers). Subsection (d) of this statute provides remedies available for noncompliance with the procedures:

> (1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress eyewitness identification.
>
> (2) Failure to comply with any of the requirements of this section shall be admissible in support of claims of eyewitness misidentification, as long as such evidence is otherwise admissible.
>
> (3) When evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications.

N.C. Gen. Stat. § 15A-284.52(d).

Covington's trial counsel did not put on evidence of noncompliance with the statute's requirements at trial, nor did he seek any of these remedies. Covington asserts that Det. Dupree pressured Kincy to make an identification from The Slammer. Covington now contends that, had trial counsel asked for a jury instruction "that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications" as provided in subsection (d)(3), the jury might have reached a different verdict. We are not persuaded.

First, because Covington did not present evidence of noncompliance with the statute's requirements at trial, the remedies of subsection (d)(3) are not available to him. There was no "credible evidence of compliance or noncompliance" for the jury to consider.

Further, we do not believe any violation of section 15A-284.52 occurred. In addition to the specific procedures listed in subsection (b), subsection (c) allows the use of "[a]ny other procedures that achieve neutral administration[,]" emphasizing that "[a]ny alternative

method shall be carefully structured to achieve neutral administration and to prevent the administrator from knowing which photograph is being presented to the eyewitness during the identification procedure." N.C. Gen. Stat. § 15A-284.52(c).

Here, Kincy told Det. Dupree that he had seen one of the men in The Slammer, but did not recall his name. Lacking a name for the suspect, the detective could not arrest the suspect or obtain his photograph, and, thus, the officer was unable to conduct a live or photographic lineup complying with the requirements of subsection (c). However, the method employed here, allowing Kincy to look through pages of photographs for the picture he recalled, did employ a neutral administration. Det. Dupree did not know who Kincy was looking for and therefore could not have pressured him to select Covington. It was Kincy who suggested he had seen a suspect in the paper, and no evidence at trial suggests that Det. Dupree pressured Kincy to make a selection of any photograph. Covington notes that Det. Dupree told Kincy that if "it's his house, he is responsible for what happened at his house and we need to find out what happened. If he had information he needed to cooperate with me and tell me." Covington characterizes this comment as "pressuring [Kincy] to choose a photograph from The Slammer." We find nothing objectionable in this exchange and conclude that Covington has failed to show any violation of N.C. Gen. Stat. § 15A-284.52, and in turn, has failed to show IAC on this basis.

Covington next contends that his trial counsel erred by failing to point out the prejudice to him of Boozer's admission to police that "I only hit that man twice" and to request an instruction that the jury not consider the admission against Covington. "[I]n a joint trial[,] the admission of a non-testifying codefendant's extrajudicial confession, which implicates his codefendant[], is a violation of the codefendant's 'right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.' " *State v. Gonzalez*, 311 N.C. 80, 92, 316 S.E.2d 229, 236 (1994) (quoting *Bruton v. United States*, 391 U.S. 123, 126, 20 L. Ed. 2d 476, 479 (1968)). However, a codefendant's statement which does not mention or refer to the defendant does not implicate the Confrontation Clause or *Bruton*. *Id.* at 94, 316 S.E.2d at 237.

Here, Covington acknowledges that Boozer's statement did not mention Covington; thus, its admission did not implicate his constitutional rights and was not a violation of our case law or statutes. Thus, his trial counsel did not err in failing to raise this issue. We further note that Covington does not explain how Boozer's admission

of his own involvement in the assault altered the outcome of Covington's trial. Covington has failed to show IAC on this basis.

Covington also alleges IAC in his trial counsel's failure to object to the trial court's kidnapping instruction and to request submission of false imprisonment as a lesser included offense. As discussed above, because the State presented sufficient evidence about the purpose of Batts' removal, such an instruction was not warranted. Thus, Covington's trial counsel's performance was not deficient. Further, as discussed below, although the trial court's kidnapping instruction was erroneous, the error was not prejudicial. Covington's IAC claims are overruled.

B. Kidnapping Instruction

[5] Covington argues that the trial court committed plain error in its instruction to the jury on first-degree kidnapping. We disagree.

Specifically, Covington asserts that the trial court erred in instructing the jury that, in order to find him guilty of first-degree kidnapping, it must find that the restraint or removal of Batts was "a separate, complete act *independent of and apart from the injury or terror to the victim*" rather than "a separate, complete act, *independent of and apart from [] the assault and robbery charged in this case*." Covington did not object to the instruction at trial and, thus, argues plain error on appeal. *State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315 (2005) (holding that defendants who do not object to jury instructions at trial are subject to a plain error standard of review on appeal).

> [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. Cummings, 361 N.C. 438, 470, 648 S.E.2d 788, 807 (2007) (emphasis and brackets in original) (citation omitted). "In deciding

whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Smith*, 162 N.C. App. 46, 51, 589 S.E.2d 739, 743 (2004) (citation omitted). Here, we conclude that, although the instruction was erroneous, the error did not impact the jury's finding of guilt.

Under N.C. Gen. Stat. § 14-39, kidnapping is defined as the unlawful confinement, restraint, or removal from one place to another of "any other person 16 years of age or over without the consent of such person, . . . if such confinement, restraint or removal is for [one or more of various listed purposes.]" N.C. Gen. Stat. § 14-39(a) (2009). Our courts have construed

> the phrase "removal from one place to another" to require a removal separate and apart from that which is an inherent, inevitable part of the commission of another felony. To permit separate and additional punishment where there has been only a technical asportation, inherent in the other offense perpetrated, would violate a defendant's constitutional protection against double jeopardy.

State v. Irwin, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981) (citation omitted). However, "there is no constitutional barrier to the conviction of a defendant for kidnapping, by restraining his victim, and also of another felony to facilitate which such restraint was committed, provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony." *State v. Clinding*, 92 N.C. App. 555, 560, 374 S.E.2d 891, 893-94 (1989) (quoting *State v. Fulcher*, 294 N.C. 503, 524, 243 S.E.2d 338, 352 (1978)); *see, e.g.*, *State v. Battle*, 61 N.C. App. 87, 93, 300 S.E.2d 276, 279 ("pproving instruction " 'that the defendant removed [the victim] from one place to another for the purpose of facilitating flight after committing a felony.' "), *disc. rev. denied*, 309 N.C. 462, 307 S.E.2d 367 (1983).

Here, the trial court instructed the jury that it need only find that the restraint or removal aspect of the kidnapping "was a separate, complete act *independent of and apart from the injury or terror to the victim*." (Emphasis added). Unlike the jury instructions in *Battle* and *Clinding*, the instruction here did not distinguish between the restraint as a part of the kidnapping and any restraint or removal that was part of the assault or robbery of Batts. Thus, the trial court's instruction was error.

However, because the evidence indicates that the assault stopped before Batts' removal, we cannot conclude that this "instructional error had a probable impact on the jury's finding of guilt." *Smith*, 162 N.C. App. at 51, 589 S.E.2d at 743. Our review of the record reveals the following evidence regarding restraint or removal of Batts during the attack by Covington and the other assailants. Kincy testified that when he heard a commotion, he went to his door and saw three men beating and kicking another man who was on the ground. Kincy went out onto his porch and told the men to stop, but they did not. Kincy went on to testify:

> [Kincy]: . . . They wouldn't stop so I walked to the bottom of the steps, and like I said, they were hitting him upside the head so *I stepped right up by his head and I asked them to stop again and one of the biggest guy, he looked up at me and he stopped.* I mean he said come on, let's get him out of his yard.
>
> Q. What happened then?
>
> [Kincy]: So then when they stopped they picked him up, they tried to put him in the city trash can but they couldn't raise him high enough to put him in the trash can. So they drug him over to the drive and threw him down the ditch.

(Emphasis added). Kincy's uncontradicted testimony indicates that the assault on Batts stopped before the men removed Batts, first to the trash can and then to the ditch. No evidence suggested that the assault was continuing during the time Batts was removed. We thus conclude that the erroneous instruction did not have a probable impact on the jury's finding of guilt, and accordingly, we overrule this argument.

No error as to Defendant Boozer.

No error and no prejudicial error as to Defendant Covington.

Judges GEER and McCULLOUGH concur.

GEORGE v. GREYHOUND LINES, INC.

[210 N.C. App. 388 (2011)]

STEVEN GEORGE, ADMINISTRATOR OF THE ESTATE OF ALBERT GEORGE[,] AND JUDY CANFIELD, PLAINTIFFS v. GREYHOUND LINES, INC. AND ANTONIO FORD, DEFENDANTS

No. COA10-512

(Filed 15 March 2011)

1. Damages and Remedies— punitive damages—motion to dismiss—compensatory damages

The trial court did not err by denying defendants' motion to dismiss plaintiff's appeal based on plaintiff's alleged abandonment of her punitive damages claims by electing to proceed to trial on the issue of compensatory damages after dismissal of the punitive damages claim. Instead of dismissing plaintiff's appeal in order to comply with N.C.G.S. § 1D-30, the case would be remanded for a new trial on all issues including liability for compensatory damages if plaintiff's appeal was successful.

2. Civil Procedure— motion for partial summary judgment—proper legal standard

The trial court did not apply an incorrect legal standard when ruling on defendants' motion for partial summary judgment. While the trial court did not specifically state that defendants had first met their burden to show the lack of a triable issue of fact, it was implicit in the trial court's statement that it heard the arguments of counsel and then considered plaintiff's forecast of evidence.

3. Damages and Remedies— punitive damages—partial summary judgment—willful and wanton conduct

The trial court did not err in an action arising out of an automobile accident by granting partial summary judgment for defendants on the issue of whether defendants' conduct was willful or wanton. While the evidence was sufficient to show that the bus driver fell asleep while driving the bus, inadvertent driver error caused by falling asleep behind the wheel by itself did not support an award of punitive damages. Thus, there was also an insufficient forecast of evidence that the bus company participated in or condoned the bus driver's alleged willful or wanton conduct.

Appeal by Plaintiff Judy Canfield from order entered 26 January 2009 and judgment entered 25 January 2010 by Judge Milton F. Fitch, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 3 November 2010.

The Kessler Law Firm, P.L.L.C., by Christopher C. Kessler and Phillip T. Evans, for Plaintiff-Appellant.

Young Moore and Henderson, P.A., by Brian O. Beverly, David M. Duke, and Michael S. Rainey, for Defendants-Appellees.

STEPHENS, Judge.

I. Procedural History

On 30 June 2003, Albert George and Judy Canfield (collectively, "Plaintiffs") were injured when the recreational vehicle ("RV") in which they were traveling was struck in the rear by a bus operated by Antonio Ford ("Ford") and owned by Greyhound Lines, Inc. ("Greyhound") (collectively, "Defendants"). On 29 June 2005, Plaintiffs filed this action against Defendants seeking compensatory and punitive damages.

Defendants moved "to bifurcate the trial of the issues of liability for punitive damages and the amount of punitive damages, if any, from the issue of the amount of compensatory damages." On 30 July 2008, Defendants filed a motion for partial summary judgment on Plaintiffs' claim for punitive damages. Defendants' motion was heard on 26 January 2009 by the Honorable Milton F. Fitch, Jr. By order entered that day, the trial court granted Defendants' motion.

The case proceeded to trial on 26 January 2009. On 30 January 2009, the jury returned a verdict awarding Plaintiff Stephen George, as administrator of the estate of Albert George, $6,500 for personal injuries and $1,000 for property damage and awarding Judy Canfield ("Canfield") $60,000 for personal injuries and $11,000 for property damage.

On 24 February 2009, Canfield filed notice of appeal from the order granting Defendants' motion for partial summary judgment. By order entered 29 September 2009, this Court dismissed Canfield's appeal as interlocutory.

On 25 January 2010, judgment was entered on the jury verdict rendered 30 January 2009.[1] From the order granting partial summary judgment to Defendants and the judgment entered on the jury verdict, Canfield appeals. For the reasons stated herein, we affirm the trial court's order and judgment.

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1. There is no explanation in the record for the year-long delay between rendering of the jury's verdict and entry of the court's judgment thereon.

II. Factual Background

Ford recounted his version of the events leading up to the accident in a handwritten statement he gave to a highway patrolman. In that statement, Ford wrote:

> I was driving up I-95 south at approx[imately] 5:00 a.m. Myself and another vehicle about a half mile in front of me moved to the left lane to pass a vehicle heading right lane [sic]. As I approached the vehicle on the right, I noticed the vehicle in the left had either slowed or stopped. There were no brake lights to indicate stopping. It was still dark so I could not see that the vehicle had stopped in the left lane. To avoid hitting the car, I tried to move back into the right lane to get on the emergency lane to pass the vehicle in the right lane. The next thing I see is debris hitting the windshield and the back of a camper.

Ford recounted a similar sequence of events involving a third vehicle in a telephone call he made to Greyhound from the scene of the accident; in an internal form he filled out and submitted to Greyhound; in his answers to interrogatories; and in his deposition testimony.

The investigating officer's official report does not mention a third vehicle's involvement in the accident. Likewise, David Faas, a passenger on the bus at the time of the accident, testified at deposition that both the RV and the bus were in the right lane, and there was no other traffic around. Faas testified that as the bus came up behind the RV, a passenger in front of him started yelling, " 'Whoa, whoa.' " Faas then yelled, " 'Whoa, whoa.' " A third passenger behind Faas also yelled out, " 'Whoa[.]' " According to Faas, the bus crashed into the rear of the RV without hitting the brakes, changing lanes, or making any other evasive maneuver.

III. Discussion

A. Defendants' Motion to Dismiss

[1] We first address Defendants' motion to dismiss Canfield's appeal because Canfield "abandoned her punitive damages claims by electing to proceed to trial on the issue[] of compensatory damages *after* dismissal of the punitive damages claim[.]" We disagree.

Pursuant to N.C. Gen. Stat. § 1D-30,

> [u]pon the motion of a defendant, the issues of liability for compensatory damages and the amount of compensatory dam-

> ages, if any, shall be tried separately from the issues of liability for punitive damages and the amount of punitive damages, if any. Evidence relating solely to punitive damages shall not be admissible until the trier of fact has determined that the defendant is liable for compensatory damages and has determined the amount of compensatory damages. The same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to punitive damages.

N.C. Gen. Stat. § 1D-30 (2009).

On 26 January 2009, Defendants' motion for partial summary judgment on the issue of punitive damages was granted. The case proceeded to trial on the issue of compensatory damages on 26 January 2009. On 24 February 2009, Canfield appealed the trial court's grant of partial summary judgment. On 29 September 2009, this Court dismissed the appeal as interlocutory. Although the jury returned its verdict on 30 January 2009, judgment was not entered on the jury verdict until 25 January 2010. Canfield now appeals from both the partial summary judgment order and the judgment.

Defendants argue that Canfield's appeal should be dismissed because, pursuant to N.C. Gen. Stat. § 1D-30, Canfield's punitive damages claim could not be tried by a different jury from the jury that heard Canfield's compensatory damages claim. Defendant's argument misapprehends the law. Instead of dismissing Canfield's appeal in order to comply with section 1D-30, "we are required to remand for a new trial on *all* issues, including *liability* for compensatory damages" if Canfield's appeal is successful. *Lindsey v. Boddie-Noell Enters.*, 147 N.C. App. 166, 177, 555 S.E.2d 369, 376 (2001), *reversed on other grounds*, 355 N.C. 487, 562 S.E.2d 420 (2002).

Accordingly, Defendants' motion to dismiss this appeal is denied.

B. Canfield's Appeal of Partial Summary Judgment

1. Legal Standard Applied

[2] Canfield first argues that the trial court applied the incorrect legal standard in ruling on Defendants' motion for partial summary judgment. We disagree.

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."

N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). " 'When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (*quoting Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001)). The moving party has the burden "to show the lack of a triable issue of fact and to show that he is entitled to judgment as a matter of law." *Moore v. Crumpton*, 306 N.C. 618, 624, 295 S.E.2d 436, 441 (1982). "The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Collingwood v. General Electric Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). If the defendant meets this burden, then the plaintiff must "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a *prima facie* case at trial." *Id.* This Court reviews a trial court's entry of 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).

"Punitive damages may be awarded . . . to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." N.C. Gen. Stat. § 1D-1 (2009). In order for punitive damages to be awarded, a claimant must prove by clear and convincing evidence an aggravating factor of fraud, malice, or willful or wanton conduct. N.C. Gen. Stat. § 1D-15 (2009). "The clear and convincing evidence standard is greater than a preponderance of the evidence standard required in most civil cases, and requires evidence which should fully convince." *Schenk v. HNA Holdings, Inc.*, 170 N.C. App. 555, 560, 613 S.E.2d 503, 508 (internal citations and quotation marks omitted), *disc. review denied*, 360 N.C. 177, 626 S.E.2d 649 (2005).

At the summary judgment hearing, the trial court stated the following:

> After hearing the argument on the issue of whether or not there should be a partial summary judgment, the Court is aware of what the standard is, that it must be by clear and convincing evidence justifying a finding of willful and wanton behavior on behalf of the driver, Antonio Ford, and Greyhound Line[s], Inc.

> After hearing the arguments of Counsel and the forecast of the Plaintiff as to [her] evidence, the Court will grant partial summary judgment on this particular summary judgment in this particular matter on behalf of both Greyhound and Antonio Ford.

Canfield argues that these remarks indicate the trial court incorrectly placed the burden of proof upon her to put forth at the summary judgment hearing " 'clear and convincing evidence justifying a finding of willful and wanton behavior on behalf of the driver, Antonio Ford, and Greyhound Line[s], Inc.' " We disagree with Canfield's characterization of the trial court's statements.

The trial court first stated that it was "aware" that in order for punitive damages to be awarded at trial, Canfield must prove by "clear and convincing evidence" willful or wanton conduct. This is a correct statement of the law. *See* N.C. Gen. Stat. § 1D-15. The trial court then determined that Canfield had failed to produce a forecast of evidence to make out at least a *prima facie* case for an award of punitive damages at trial. *See Builders Mut. Ins. Co.*, 361 N.C. at 88, 637 S.E.2d at 530. While the trial court did not specifically state that Defendants had first met their burden to show the lack of a triable issue of fact, *see Moore*, 306 N.C. at 624, 295 S.E.2d at 441, this is implicit in the trial court's statement that it heard the arguments of counsel and then considered Canfield's forecast of evidence.

Accordingly, we conclude that the trial court did not apply the incorrect legal standard in granting Defendants' motion for partial summary judgment. Canfield's argument is overruled.

2. Grant of Partial Summary Judgment

[3] Canfield next argues that the trial court erred in granting partial summary judgment for Defendants because there were genuine issues of material fact as to whether Defendants' conduct was willful or wanton. We disagree.

"Punitive damages are allowable for injuries caused by the willful or wanton operation of a motor vehicle." *Marsh v. Trotman*, 96 N.C. App. 578, 580, 386 S.E.2d 447, 448 (1989), *disc. review denied*, 326 N.C. 483, 392 S.E.2d 91 (1990). " 'Willful or wanton conduct' means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. 'Willful or wanton conduct' means more than gross negligence." N.C. Gen. Stat. § 1D-5(7) (2009). "An act is willful when there is a deliber-

ate purpose not to discharge a duty, assumed by contract or imposed by law, necessary for the safety of the person or property of another." *Lashlee v. White Consol. Indus., Inc.*, 144 N.C. App. 684, 694, 548 S.E.2d 821, 827, *disc. review denied*, 354 N.C. 574, 559 S.E.2d 179 (2001). "A wanton act is an act done with a 'wicked purpose or . . . done needlessly, manifesting a reckless indifference to the rights of others.' " *Id.* at 693-94, 548 S.E.2d at 827 (*quoting Benton v. Hillcrest Foods, Inc.*, 136 N.C. App. 42, 51, 524 S.E.2d 53, 60 (1999)).

Canfield's claim for punitive damages is based on allegations that Ford knew or should have known that he was overtired, sleepy, or otherwise not fit to operate the bus; that he continued to operate the bus and failed to remain awake and alert immediately prior to the collision; and that he fell asleep while operating the bus, causing the collision. Canfield also alleges that Greyhound knew or should have known that Ford was overtired, sleepy, or otherwise not fit to operate the bus. Canfield alleges that Ford's and Greyhounds's conduct violated the following Federal Motor Carrier Safety Administration Regulation:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the commercial motor vehicle.

49 CFR 392.3 (2009).

We first note that while "the violation of a safety regulation . . . may establish negligence *per se* in a civil trial in certain circumstances[,]" *Mosteller v. Duke Energy Corp.*, ––– N.C. App. –––, –––, 698 S.E.2d 424, 432 (2010), the violation of a safety statute or regulation does not establish *willful* conduct *per se*. Instead, there must be sufficient evidence of a "*deliberate purpose* not to discharge a duty" imposed by the safety regulation. *Lashlee*, 144 N.C. App. at 694, 548 S.E.2d at 827 (emphasis added).

The following forecast of evidence was relevant to the issue of willful or wanton conduct:

1. David Faas

Faas testified at deposition that he was seated along the aisle on the left side of the bus and saw the collision take place. He said that

both the RV and the bus were in the right lane, and there was no other traffic around. As the bus came up behind the RV, a passenger in front of him started yelling, " 'Whoa, whoa.' " Faas then yelled, " 'Whoa, whoa.' " A third passenger behind Faas also yelled out, " 'Whoa[.]'". The bus crashed into the rear of the RV without hitting the brakes, changing lanes, or making any other evasive maneuver.

When Faas was asked how many people were awake on the bus at the time of the accident, Faas stated, "I know us three were. I can't say if the bus driver was or not. There was only—in my opinion, there was only three people awake, and the bus driver wasn't one of them." When asked specifically if he thought the bus driver was asleep, Faas responded, "He was either asleep or he wasn't paying attention."

Faas also testified that he observed Ford's operation of the bus for approximately 30 minutes before the collision and that during this time, Ford's driving was perfectly normal.

2. Jahan Hafshejani

Jahan Hafshejani submitted an affidavit in which he stated that he was a passenger on the bus and was awake prior to and at the time of the collision. He was seated approximately four or five rows behind the driver, on the opposite side of the aisle. Hafshejani stated that he called out to warn the bus driver of the impending collision. Although Hafshejani was not looking at Ford immediately before or at the time of the accident, it was his opinion that "the bus driver fell asleep at the wheel causing the collision." Hafshejani stated that from the time he boarded the bus in Richmond, Virginia until the time the accident occurred near Rocky Mount, North Carolina, "the bus was driving normal."

3. Judy Canfield

Canfield testified at deposition that a couple of passengers walked by her after the accident and said that their bus driver was falling asleep and they were screaming to wake him up.

4. Antonio Ford

Ford testified at deposition that he did not remember when he had slept or worked or what bus runs he had been on during the week leading up to the accident. He further testified that he was off during the day of 29 June 2003, "so I don't, really don't even know what I did." Ford was asked, "From the 28th, the day before, to the 29th[,]

did you sleep that night?" Ford responded, "I don't even know what I did on the 28th. Can't recall what I did on the 28th, you know."

Ford was asked numerous times if "it might be some day[s] you sleep during the day, some days you sleep a normal nighttime sleep[?]" Ford acknowledged this, but explained that he was used to the schedule and had been doing it for ten years. Ford was then asked if he would "agree that that would be taxing on the human body with being fatigued, not having a regular sleep/work schedule?" Ford responded, "I'm not going to agree to that. I mean for you maybe, but for somebody that does it every day, we know how to sleep."

During the 43 hours that Ford was off work before beginning his 1:00 a.m. run on 30 June 2003, Ford either placed or received 77 phone calls. When Ford reported for duty sometime after midnight on 20 June 2003, he reported to no one at the terminal and no one from Greyhound observed him before he departed the station.

5. Alex Guariento

Alex Guariento, the Vice President of Safety and Security for Greyhound, was responsible for policy and safety procedures for occupational and fleet safety and security for Greyhound in North America. He acknowledged at his deposition that as a commercial motor carrier, Greyhound must abide by the Federal Motor Carrier Safety Administration Regulations.

Guariento explained that Greyhound does not personally observe all drivers for impairment due to fatigue before permitting them to begin or continue their runs and that Greyhound has never considered having every driver observed in person before permitting them to begin their runs.

Guariento testified that it is possible Ford could have reported to work the morning of 30 June 2003 without having had sufficient rest, but Guariento did not know how much sleep Ford had gotten before beginning the run that ended in the collision.

An internal Greyhound memo authorized by Guariento indicates that inverting the sleep/awake cycle during off days "invites trouble when returning to work, as our internal clock needs time to readjust." The memo also indicates that during the early morning hours from 2 a.m. to 6 a.m., people are more at risk of falling asleep, particularly if they have not had enough rest before returning to work.

Canfield argues that Ford's testimony[2] regarding his sleeping habits before reporting to work on 30 June 2003 "was some evidence that [] Ford was fatigued when he began his run that ended in the crash[.]" We do not agree. Although Canfield's attorney attempted to elicit testimony from Ford at his deposition to show that Ford's sleeping habits caused him to be fatigued when he started his run on 30 June 2003, no such evidence was actually elicited. Instead, Ford's testimony tends to show that he was accustomed to his sleeping patterns and was not fatigued as a result of them.

Moreover, while the pleadings, depositions, answers to interrogatories, and affidavits may be sufficient to show that Ford fell asleep while driving the bus, inadvertent driver error caused by falling asleep behind the wheel *by itself* does not support an award of punitive damages. *See Marsh*, 96 N.C. App. at 581, 386 S.E.2d at 448 (evidence was sufficient to support an award of punitive damages based on defendant's willful and wanton operation of a motor vehicle and did *not* establish as a matter of law "that defendant [] was *merely inadvertent*—either by failing to observe the approaching vehicles or the lay of the highway, by failing to control the vehicle, by failing to drive on the right half of the highway, *or perhaps even by dropping off to sleep* . . . .") (emphasis added). There is no evidence that Ford acted with a "deliberate purpose" not to discharge any duty imposed by 49 CFR 392.3 or acted with a "reckless indifference" to the rights of others by talking on the telephone and failing to get sufficient rest before beginning his run on 30 June 2003. On the contrary, at most the evidence establishes that Defendant was merely inadvertent by dropping off to sleep. Accordingly, we conclude that Canfield failed to produce a forecast of evidence sufficient to support a claim for punitive damages against Ford. Thus, the trial court did not err in granting summary judgment in favor of Ford on Canfield's punitive damages claim.

2. Greyhound

Punitive damages may not be awarded against a party solely on the basis of vicarious liability for the acts or omissions of another. N.C. Gen. Stat. § 1D-15(c). Moreover, punitive damages may only be awarded against a corporation if "the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages." *Id.*

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2. Canfield tends to mischaracterize her attorney's questions during deposition as being Ford's testimony.

Canfield contends that Greyhound is "intentionally non-compliant" with the Federal Motor Carrier Safety Administration Regulations by "consciously and intentionally not observing its drivers before departing on runs[.]" We disagree. Because we conclude that Canfield offered an insufficient forecast of evidence that Ford engaged in willful or wanton conduct, we likewise conclude that there was an insufficient forecast of evidence that Greyhound "participated in or condoned" Ford's alleged willful or wanton conduct. Accordingly, the trial court did not err in granting summary judgment in favor of Greyhound on Canfield's punitive damages claim.

The order and judgment of the trial court are

AFFIRMED.

Judges STEELMAN and HUNTER, JR. concur.

DAVID MICHAEL BAIN AND DAVID H. BAIN, PLAINTIFFS v. UNITRIN AUTO AND HOME INSURANCE COMPANY, DEFENDANT

No. COA09-1524

(Filed 15 March 2011)

1. Insurance— duty to defend—defense costs

The trial court did not err in granting summary judgment in favor of defendant insurance company on plaintiffs' claim for reimbursement for expert witness fees where plaintiffs failed to offer any evidence that the expert fees were defense costs.

2. Insurance— duty to defend—equitable estoppel—no evidence of reliance

Defendant insurance company was not equitably estopped from claiming that the services of an expert witness who was hired by plaintiffs in conjunction with their negligence claim were not defense costs. Plaintiffs failed to demonstrate that they relied upon any statement or conduct of defendant or its attorney.

3. Insurance— duty to defend—defense costs—unjust enrichment—contract

Plaintiffs' claim that defendant was unjustly enriched by receiving the benefit of plaintiffs' expert witness's services with-

out having to pay for them was overruled. The doctrine of unjust enrichment did not apply where, as here, a contract between the parties existed.

Appeal by plaintiffs from order entered 14 September 2009 by Judge Edgar B. Gregory in Guilford County Superior Court. Heard in the Court of Appeals 28 April 2010.

Forman Rossabi Black, P.A., by Amiel J. Rossabi and Michael C. Taliercio, for plaintiffs-appellants.

McAngus Goudelock & Courie, by John T. Jeffries and James D. McAlister, for defendant-appellee.

GEER, Judge.

Plaintiffs David Michael Bain ("Michael Bain") and David H. Bain ("David Bain") appeal from the trial court's grant of summary judgment to defendant Unitrin Auto and Home Insurance Company. Michael Bain, an insured under David Bain's policy with Unitrin, brought suit for personal injuries arising out of an automobile accident ("the underlying action"). After the defendants in the underlying action counterclaimed for property damage, Unitrin retained counsel to defend the counterclaim in accordance with its policy's duty to defend. Plaintiffs contend that Unitrin is liable for expenses incurred for an expert witness who testified on Michael Bain's behalf in the underlying action. Because plaintiffs have not presented evidence sufficient to create a genuine issue of material fact as to whether the expert's services constitute a "defense cost" for which Unitrin is responsible, we affirm.

Facts

On or about 11 September 2005, Unitrin issued an automobile insurance policy to David Bain covering the period from 11 September 2005 through 11 March 2006. Pursuant to that policy, Unitrin agreed to insure, among other things, a GMC van owned by David Bain and David Bain's son, Michael Bain.

The policy provided with respect to payment of damages and costs:

> We will pay damages for "bodily injury" or "property damage" for which any "insured" becomes legally responsible because of an auto accident. Damages include prejudgment interest awarded against the "insured." We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. *In addition*

> *to our limit of liability, we will pay all defense costs we incur.* Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted. We have no duty to defend any suit or settle any claim for "bodily injury" or "property damage" not covered under this policy.

(Emphasis added.)

On 20 September 2005, Michael Bain, who was driving the GMC van with the consent of David Bain, collided with Kevin Ray Bellow, who was driving a dump truck owned by his employer, the Koury Corporation. Michael Bain was significantly injured in the accident and filed a personal injury lawsuit against Bellow and Koury on 5 December 2005. In connection with that action, Michael Bain retained an engineering expert, Dr. Rolin F. Barrett, Sr., who began working on the case on 23 November 2005, before suit was filed. Dr. Barrett performed a site inspection of the intersection where the accident occurred and examined the vehicles involved on 12 January 2006.

On 6 February 2006, Bellow and Koury filed an answer, including a counterclaim for property damage to the dumptruck. Unitrin received notice of the counterclaim on 2 March 2006, and on 9 March 2006, Unitrin acknowledged that it had a duty to defend the counterclaim under the policy. The same day, Unitrin retained Joseph Brotherton to defend the counterclaim.

Dr. Barrett's deposition was taken in the underlying action on 9 May 2007. He testified that, in his opinion, based on the ordinary reaction times for drivers, the vehicles involved, the road conditions at the time of the accident, and the likely speed of the vehicles when they collided, Michael Bain could not have avoided the accident. Mr. Brotherton attended that deposition, and asked Dr. Barrett the following questions:

> Q. Dr. Barrett, I didn't hire you to do anything in this case, did I?
>
> A. That's correct. You did not.
>
> Q. And you've described to us in some detail the work you've done, the measurements you've taken, and that sort of thing and—and that is reflected by the documents—some of the documents contained in Exhibit 1, correct?
>
> A. Yes.

Q. All right. Now—and—and you have formed some opinions and you have told us about all of the opinions that you have formed thus far?

A. Correct.

Q. Without you doing any further work, if—if you were asked the question that were to put the facts that you're aware of and the knowledge that you have to looking at it from a little different angle, you could form other opinions without doing any further work that you have not formed as of today?

A. That's certainly possible.

MR. BROTHERTON: Okay. Thank you.

No transcript of the trial proceedings in the underlying action was filed with this Court. It is undisputed by the parties, however, that Michael Bain's privately-retained counsel, Amiel Rossabi, tried the majority of the case. Mr. Brotherton did not participate in the jury selection, opening statements, or in examining or cross-examining any witnesses. Mr. Brotherton did, however, give a closing argument. The record on appeal contains no transcript or detailed description of that closing argument. Michael Bain submitted an affidavit, stating that, while he did not recall everything that Mr. Brotherton argued, he did remember that Mr. Brotherton "argued, among other things, that Dr. Barrett's opinions should be adopted and he did not in any way disavow Dr. Barrett's testimony."

On 3 August 2007, the jury returned a verdict finding that Michael Bain was not injured by the negligence of Bellow, and that Bellow and Koury were not injured by the negligence of Michael Bain. Dr. Barrett's invoices for providing expert services in the case totaled $20,966.28. Unitrin has refused to pay any portion of these expenses.

Plaintiffs filed this action on 7 November 2008 against Unitrin and Insurance Associates of the Triad, Inc., seeking recovery of the expenses associated with Dr. Barrett. Plaintiffs voluntarily dismissed the claim against Insurance Associates on 22 June 2009. On 14 September 2009, the trial court granted summary judgment to Unitrin. Plaintiffs timely appealed to this Court.

Discussion

[1] The parties agree that the insurance policy in this case obligated Unitrin to defend Michael Bain against the counterclaim asserted by

Koury and Bellow in the underlying action and to pay for costs incurred by Unitrin in that defense. The question presented by this action is what constitutes a defense cost for which an insurer is liable under its duty to defend.

Usually, this issue arises when an insured has been sued and then also asserts a counterclaim. For example, in *Duke University v. St. Paul Mercury Insurance Co.*, 95 N.C. App. 663, 665, 384 S.E.2d 36, 37-38 (1989), Duke University sued its general liability insurer, St. Paul, to recover attorneys' fees Duke incurred as a defendant in another lawsuit in which Duke had asserted counterclaims. The trial court concluded that Duke could only recover the portion of the fees incurred that were reasonable and necessary for defending matters covered by the St. Paul policy. *Id.* at 668, 384 S.E.2d at 39. Duke was not entitled to recover fees incurred in the prosecution of its counterclaims. *Id.*

On appeal, this Court affirmed, explaining that " '[a]n insurer, being obligated only to defend claims brought "against" the insured, is not required to bear the cost of prosecuting a counterclaim on behalf of the insured.' " *Id.* at 680, 384 S.E.2d at 46 (quoting A. Windt, *Insurance Claims and Disputes* § 4.39 (1982)). The Court adopted the following commentary as "the correct rule":

> "An insurer, being obligated only to defend claims brought 'against' the insured, is not required to bear the cost of prosecuting a counterclaim on behalf of the insured. Because of the compulsory counterclaim rule, however, the insurer should not be allowed to direct the counsel that it hires on behalf of the insured to ignore the existence of counterclaims. *The assumption of the insured's defense necessarily entails an obligation not to conduct the defense in a manner that will prejudice the insured's rights.* Failure to advise the insured of the existence of a counterclaim that, if not asserted, will be lost should constitute a breach of that obligation.
>
> As a practical matter, therefore, when hiring defense counsel, the insurer should advise counsel that *it will not bear the costs of prosecuting a counterclaim, but it should not attempt to limit the attorney in connection either with investigating and evaluating possible counterclaims or with giving the insured advice with respect to such claims. If it does, it should be deemed to have breached its duty to defend* and, assuming the insured had a meritorious compulsory counterclaim that was lost

as a result of the insurer's action, the insurer should be liable for the value of the barred claim."

Id. at 679-80, 384 S.E.2d at 46 (emphasis added) (quoting A. Windt, *supra* § 4.39).

Here, there can be no question that Unitrin was not liable for the costs of prosecuting Michael Bain's claims against Koury and Bellow. Further, Unitrin could not interfere with Michael Bain's privately-retained counsel's investigation and prosecution of those affirmative claims. Unitrin could not, therefore, limit Michael Bain's decision to incur expenses, including expert witness fees, that he and his privately-retained counsel deemed reasonable and necessary for pursuing his claims for relief.

The question remains, however, whether plaintiffs have presented any basis for considering the expert fees "defense costs." Unitrin's policy provided: "[W]e will pay all defense costs we incur." In construing this same language our Supreme Court held that " '[d]efense costs' refer to costs associated with the process of defending a claim such as attorney fees, deposition expenses, and court costs including such items as subpoena and witness fees." *Sproles v. Greene*, 329 N.C. 603, 611, 407 S.E.2d 497, 502 (1991). The issue is, therefore, whether Dr. Barrett's expenses were a cost associated with the process of defending the property damage counterclaim.

In support of its motion for summary judgment, Unitrin points to the fact that Dr. Barrett was hired prior to the filing of the underlying action by counsel whom Michael Bain had privately retained to represent him in connection with his personal injury claims. Mr. Brotherton, the attorney Unitrin hired to defend Michael Bain in connection with the property damage counterclaim, stated in his affidavit: "[A]t no time during my representation of David Michael Bain in the defense of the counterclaim was I consulted about hiring Dr. Rolin Barrett, Sr. as an expert witness to defend the counterclaim pending against David Michael Bain."

With respect to the need for an expert witness to defend the property damage counterclaim, Mr. Brotherton stated: "[I]n my representation of David Michael Bain in the defense of the counterclaim pending against him, I would not have hired an expert to help defend against the counterclaim." He explained that it was his opinion that he could have successfully defended the counterclaim without Dr. Barrett's testimony.

According to Mr. Brotherton, he never set up a meeting to discuss the case with Dr. Barrett, and the first time he met with him was at his deposition. Mr. Brotherton attended the deposition, but only briefly questioned Dr. Barrett. He asked, "Dr. Barrett, I didn't hire you to do anything in this case, did I?" Dr. Barrett responded, "That's correct. You did not." According to Mr. Brotherton, at trial, he did not elicit "any testimony from Dr. Rolin Barrett, Sr. with respect to his findings in this matter."

In arguing that Dr. Barrett's expenses were a defense cost incurred by Unitrin, plaintiffs did not submit any evidence that disputed Mr. Brotherton's affidavit. Specifically, they do not dispute that Dr. Barrett was retained prior to the existence of the counterclaim for the purpose of serving as an expert witness in support of Michael Bain's personal injury claims and that Mr. Brotherton was not consulted regarding whether Dr. Barrett should be used in conjunction with the defense of Koury's property damage claim. They also have presented no evidence that expert testimony was reasonably necessary to defend the counterclaim.

Instead, plaintiffs first argue that Unitrin never explicitly stated that it believed Dr. Barrett's assistance was unnecessary for the counterclaim. Mr. Brotherton's question at Dr. Barrett's deposition did precisely that, however.

Plaintiffs also argue that because Mr. Brotherton allowed the privately-retained counsel to control the action and took no active steps to control the defense of the counterclaim, Unitrin intentionally relinquished or waived control of the defense of the counterclaim and cannot now assert that Dr. Barrett's testimony was unnecessary to the counterclaim. Plaintiffs cite no North Carolina authority or any authority at all involving similar circumstances to support this position.[1] Because this action was originally filed as a personal injury claim against Koury and its employee, and Unitrin's duty to defend

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1. Plaintiffs cite an unpublished opinion from the United States District Court for the Western District of Texas, *Landmark Am. Ins. Co. v. Ray*, 2006 U.S. Dist. LEXIS 95517, 2006 WL 4092436 (W.D. Tex. Dec. 21, 2006). *Ray*, however, involved the more traditional context of the insured being sued and then asserting counterclaims. The lawsuit itself triggered the duty to defend, but the carrier not only did not provide counsel for four months, but then the carrier's counsel did not actively participate in the action, allowing privately-retained counsel to take responsibility for the case. The court found that the carrier had not provided the insured with any substantive defense. *Id.*, *26, 2006 WL 4092436, *7. The privately-retained counsel ultimately spent 49% of his time on matters related to both the defense and the counterclaim, 47% of his time solely on counterclaim-related tasks, and 4% of his time on solely defense-related

only arose upon the filing of Koury's counterclaim for property damage to its truck, we see no basis for concluding that Unitrin's attorney, by allowing the privately-retained attorney to continue to take the lead in the action, waived the right to argue that certain expenses primarily related to the affirmative claims were not necessary to defend the counterclaim.

The defense mounted should be in proportion to the claim. If the insurer insisted on taking the lead in the action, then we would have the tail (the smaller value property damage claim) wagging the dog (the personal injury claims) and a risk of the insured claiming that the insurer had violated the "rule" set out in *Duke University* prohibiting the insurer from interfering with the prosecution of the affirmative claims. The consequence, under *Duke University*, could be a determination that the insurer had breached its duty to defend and, if the retained attorney's actions caused the insured to lose his affirmative claims, that the insurer was liable for the value of those claims. 95 N.C. App. at 680, 384 S.E.2d at 46. We decline to hold, under the circumstances of this case, that Unitrin's actions waived any argument that Dr. Barrett's testimony was not necessary to the defense of the counterclaim.

Plaintiffs next contend that Dr. Barrett's testimony was associated with the defense of the counterclaim because (1) Mr. Brotherton attended Dr. Barrett's deposition, (2) Dr. Barrett's trial testimony had the effect of supporting the defense of the counterclaim, and (3) Mr. Brotherton "incorporated and adopted the testimony and opinions of Dr. Barrett" in his closing argument. Mere attendance at the deposition cannot be deemed use of Dr. Barrett's testimony in defense of the counterclaim when plaintiffs have presented no evidence that Mr. Brotherton participated in that deposition other than to establish that he had not retained Dr. Barrett to assist with the defense of the counterclaim.

With respect to the trial testimony, plaintiffs appear to acknowledge that the mere fact that evidence supported Mr. Brotherton's position on the counterclaim was not sufficient to establish that

tasks. *Id.*, *16, 2006 WL 4092436, *5. The district court ordered the carrier to reimburse the insured for those fees and expenses that the court deemed defense-related or necessary to both the defense and the counterclaims. *Id.*, *34-*35, 2006 WL 4092436, *10. Here, in contrast, the lawsuit was initiated by the insured; the expenses were incurred for the affirmative claims, which predominated over the property damage counterclaim; there was no contention during the underlying action that Unitrin was breaching its duty to defend the much more limited property damage counterclaim; and plaintiffs have made no showing that the expert services were a necessary part of defending the counterclaim.

Unitrin incurred the cost without also a showing that Mr. Brotherton used the testimony in the defense. In opposition to Unitrin's motion for summary judgment, plaintiffs submitted the affidavit of Michael Bain. He acknowledged in that affidavit that Mr. Brotherton did not participate in examining or cross-examining any of the witnesses, which would include Dr. Barrett.[2] In support of their contention that Mr. Brotherton did rely upon Dr. Barrett at trial, plaintiffs point to Michael Bain's assertion that Mr. Brotherton relied upon the testimony in his closing argument: "While I do not recall everything Mr. Brotherton said during his closing argument during the trial, Mr. Brotherton argued, among other things, that Dr. Barrett's opinions should be adopted and he did not in any way disavow Dr. Barrett's testimony."

On appeal, plaintiffs properly do not argue that the failure to disavow the testimony gave rise to a duty to pay for it. Such a disavowal would likely constitute a breach of the duty to defend. Plaintiffs do, however, expand upon Mr. Bain's statement and argue not just that Mr. Brotherton argued "that Dr. Barrett's opinions should be adopted" by the jury, but that Mr. Brotherton "incorporated and adopted the testimony and opinions of Dr. Barrett." The sole support for this argument is the single statement included in Mr. Bain's affidavit.

We cannot tell from Mr. Bain's affidavit what Mr. Brotherton actually said about Dr. Barrett or his opinions. At best, the affidavit indicates that Mr. Brotherton argued to the jurors that they should find Dr. Barrett's testimony credible. The affidavit does not necessarily go as far as plaintiffs' brief. The record, however, contains nothing more specific. Plaintiffs did not submit a transcript of Mr. Brotherton's closing argument; there is no deposition or other discovery asking Mr. Brotherton to summarize or describe his closing argument. While the record contains the transcript of Dr. Barrett's deposition in the underlying action, plaintiffs have not provided us with his trial testimony or other evidence of what he said at trial, so we cannot know precisely what opinions Mr. Brotherton urged the jury to adopt. Without being able to read Dr. Barrett's trial testimony and Mr. Brotherton's closing arguments, we have no way of determining to

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2. The Bain affidavit also states: "Mr. Brotherton talked with Dr. Rolin Barrett prior to and during the trial of this matter about his opinions in the case." Since Mr. Bain does not indicate how he obtained personal knowledge regarding these conversations between Mr. Brotherton and Dr. Barrett, this portion of the affidavit is inadmissible. *See* N.C.R. Civ. P. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, . . . and shall show affirmatively that the affiant is competent to testify to the matters stated therein.").

what extent Unitrin relied upon or used Dr. Barrett's services in the defense of the counterclaim and, therefore, cannot determine whether those services should count as a defense cost for which Unitrin is responsible.

In sum, plaintiffs seek to hold Unitrin liable for expert witness fees for an expert plaintiffs retained to support Michael Bain's claims for personal injury. The undisputed evidence is that the expert witness was hired prior to the existence of the counterclaim giving rise to Unitrin's duty to defend; the counterclaim was only for property damage to a truck; Unitrin's retained counsel was never consulted about using the expert witness; Unitrin's retained counsel did not believe it was necessary to have an expert witness to defend the property damage claim; Unitrin's retained counsel believed that he could prevail on the property damage claim in the absence of expert testimony; Unitrin's retained counsel did not participate in the deposition of the expert witness other than to establish that counsel had not hired the witness to assist on the counterclaim; and Unitrin's retained counsel did not question the expert witness at trial.

The sole evidence offered by plaintiffs in support of their claim that the expert witness expenses were associated with the defense of the claim for property damage to the truck is that Unitrin's retained counsel made some unspecified statement that the jury should adopt the expert witness' opinions. We hold that the reference in Mr. Bain's affidavit, standing alone, is insufficient evidence that Mr. Brotherton used Dr. Barrett's testimony in a manner that effectively made it a defense cost incurred by Unitrin.

[2] Alternatively, plaintiffs contend that Unitrin is equitably estopped from claiming that Dr. Barrett's services are not a defense cost. "Equitable estoppel arises when one party, by his acts, representations, or silence when he should speak, intentionally, or through culpable negligence, induces a person to believe certain facts exist, and that person reasonably relies on and acts on those beliefs to his detriment." *Gore v. Myrtle/Mueller*, 362 N.C. 27, 33, 653 S.E.2d 400, 405 (2007).

In *Duke University*, 95 N.C. App. at 672, 384 S.E.2d at 42, this Court held that in the absence of evidence that Duke University (the insured) had relied on conduct by its insurer indicating it would pay for some, if not all, of Duke's legal defense, the insurer was not equitably estopped from pleading the statute of limitations. The Court explained that " '[i]n order to warrant the application of the doctrine

of estoppel, it must be shown that the conduct of the party against whom waiver of the . . . limitation is claimed is such as to cause the adverse party to change his position by lulling him into false security, and causing him to delay or waive assertion of his rights to his damage.' " *Id.* at 672-73, 384 S.E.2d at 42 (quoting 18A Rhodes, *Couch on Insurance 2d* § 75:183, at 177 (1983)).

In this case, plaintiffs have failed to demonstrate that they relied upon any statement or conduct of Unitrin or Mr. Brotherton. Plaintiffs hired Dr. Barrett in connection with Michael Bain's lawsuit against Koury and Bellow well before the filing of the counterclaim and before Unitrin had any duty to defend. Indeed, Dr. Barrett had completed his actual investigation before the counterclaim was filed and Unitrin became involved in the case. Plaintiffs have pointed to no evidence that they were lulled by Unitrin into a false sense of security in connection with the expenses being incurred with respect to Dr. Barrett. They have not shown that they would have acted any differently with respect to Dr. Barrett if Unitrin or Mr. Brotherton had expressly stated that Unitrin would not reimburse plaintiffs for expert witness fees incurred.

Moreover, at Dr. Barrett's deposition, Mr. Brotherton confirmed on the record that he had not retained Dr. Barrett for any purpose. Any reliance after that date would not have been reasonable. We, therefore, hold that plaintiffs have not presented sufficient evidence of the elements of equitable estoppel to survive a motion for summary judgment.

[3] Finally, plaintiffs argue that Unitrin was unjustly enriched by receiving the benefit of Dr. Barrett's services without having to pay for them. It is well settled, however, that a claim for unjust enrichment is "a claim in quasi contract or a contract implied in law" and, therefore, "[i]f there is a contract between the parties the contract governs the claim and the law will not imply a contract." *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988). *See also Atl. & E. Carolina Ry. Co. v. Wheatly Oil Co.*, 163 N.C. App. 748, 753, 594 S.E.2d 425, 429 ("The doctrine of unjust enrichment is based on 'quasi-contract' or contract 'implied in law' and thus will not apply here where a contract exists between two parties."), *disc. review denied*, 358 N.C. 542, 599 S.E.2d 38 (2004); *Delta Envtl. Consultants of N.C., Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 165, 510 S.E.2d 690, 694 (reversing trial court's decision to allow unjust enrichment claim on grounds that two contracts "govern[ed] the relationship

between the parties with regard to payment and services rendered" and, therefore, "an action for breach of contract, rather than unjust enrichment, is the proper cause of action"), *disc. review denied*, 350 N.C. 379, 536 S.E.2d 70 (1999).

Here, the parties' relationship, including Unitrin's liability for any costs of the action under its duty to defend, was governed by the Unitrin insurance policy. Since a contract exists between the parties governing the claim, no claim for unjust enrichment can arise. Accordingly, the trial court properly granted summary judgment as to this claim as well.

Affirmed.

Judges ROBERT C. HUNTER and STEPHENS concur.

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST FROM ELOISE HALL TO SIDNEY P. JESSUP, TRUSTEE, DATED OCTOBER 2, 2007 AND RECORDED IN BOOK 1745, PAGE 243, DARE COUNTYPUBLIC REGISTRY; SEE SUBSTITUTION OF TRUSTEE RECORDED IN BOOK 1812, PAGE 300

No. COA10-1002

(Filed 15 March 2011)

Mortgages and Deeds of Trust— default—foreclosure—hypothecation agreement

The trial court erred by finding that the debt owed by the construction company to the bank was evidenced by the 2008 note secured by the deed of trust under the terms of the hypothecation agreement and that the construction company had defaulted under the deed of trust. Thus, the trial court erred by concluding that the substitute trustee was entitled to foreclose on respondent appellant's property pursuant to the power of sale under the terms of the deed of trust.

Appeal by respondent Eloise Hall from order entered 29 March 2010 by Judge J. Carlton Cole in Dare County Superior Court. Heard in the Court of Appeals 10 February 2011.

Oliver & Friesen, PLLC, by Jonathan E. Friesen, for Eloise Hall respondent appellant.

Hornthal, Riley, Ellis & Maland, LLP, by L. Phillip Hornthal, III, for Bank of Currituck petitioner appellee.

McCULLOUGH, Judge.

Eloise Hall ("respondent-appellant") appeals from an order entered by the trial court authorizing a substitute trustee to proceed with foreclosure on her property pursuant to the terms of a deed of trust held by the Bank of Currituck. We reverse.

I. Background

On 19 April 2007, Matthew Hall, President of Outer Banks Construction Co., Inc. ("OBC"), executed a promissory note in favor of the Bank of Currituck (the "Bank") in the principal amount of $550,000 with a maturity date of 18 April 2008 (the "2007 Note"). The purpose of the 2007 Note was to provide a back-up letter of credit on which OBC's bonding company could draw for the building of a construction project. The 2007 Note was labeled "Loan Number 65257145."

Subsequently, on 2 October 2007, respondent-appellant, mother of Matthew Hall, executed a North Carolina Future Advance Deed of Trust (the "Deed of Trust") to the Trustee for the Bank, which was recorded in the office of the Register of Deeds of Dare County on 4 October 2007. The Deed of Trust contained the following provision:

> This Deed of Trust is given to secure all present and future advances made or to be made pursuant to the terms of the obligation. . . . [T]he maximum amount of present and future obligations which may be secured at any one time is $350,000.00 . . . . The period within which any and all future advances are to be made and secured hereunder is the period between the date hereof and April 18th 2008.

The Deed of Trust further provided that the "loan documents" secured by the Deed of Trust included:

> [A] Promissory Note, issued by [the Bank] dated February 15th, 2007 in the face amount of $150,000 and modified and reduced to $80,000 on July 26th, 2007 and an Irrevocable Letter of Credit issued by [the Bank] dated April 19th, 2007 in the aggregate face amount of up to $550,000, and a Back up Line of Credit Facility dated April 19th, 2007 in the face amount of up to $500,000 executed by Matthew F. Hall President as [sic] Outer Banks Construction Co[.] Incorporated[.]

The Deed of Trust provisions made no reference to securing any renewals, modifications, or extensions of the obligations listed. At the time the Deed of Trust was executed, the present obligation secured totaled zero, as reflected on the face of the Deed of Trust.

On 2 October 2007, respondent-appellant also executed a Hypothecation Agreement. The terms of the Hypothecation Agreement authorized "Matthew Hall President Outer Banks Construction Co. Inc." to hypothecate or pledge as collateral certain property of Eloise Hall to secure "any present or future indebtedness, obligation or liability howsoever evidenced, . . . or any extension, modification or renewal thereof, the undersigned [Eloise Hall] hereby consenting to the extension or renewal . . . and waiving any notice of any such extension, modification or renewal."

As of 18 April 2008, the maturity date on the 2007 Note, OBC's bonding company had made no demands on the letter of credit. Therefore, on 19 April 2008, Matthew Hall executed a new promissory note in the principal amount of $550,000 (the "2008 Note"). The 2008 Note was labeled "Renewal of 65257145." In August 2008, OBC's bonding company began making draws on the letter of credit. No payments were made on the 2008 Note, and OBC defaulted.

The Substitute Trustee commenced this action upon filing a Notice of Hearing on Foreclosure of Deed of Trust on behalf of the Bank on 5 October 2009. A hearing was conducted before the Clerk of Superior Court of Dare County on 15 January 2010. The Clerk entered an order authorizing the Substitute Trustee to proceed with foreclosure under the terms of the Deed of Trust. Pursuant to statute, the order made the following findings of fact:

> 1. That The Bank of Currituck is the holder and owner of the [2008 Note], . . . and the balance and amounts due on [the 2008 Note] constitutes a valid debt owed by Outer Banks Construction Co., Inc. to The Bank of Currituck.
>
> 2. That the debtor, Outer Banks Construction Co., Inc., is in default under the [2008 Note] and the deed of trust . . . securing the debt which is identified and referred to hereinabove.
>
> 3. That said debt owed by Outer Banks Construction Co., Inc. to The Bank of Currituck is secured by [the Deed of Trust] . . . pursuant to the terms and provisions of the Hypothecation Agreement . . . .

> 4. That, under the terms and provisions of the deed of trust, the Substitute Trustee has the authority to foreclose under the power of sale set forth in the deed of trust.
>
> 5. That notice of this hearing has been served upon [all proper parties] . . . .
>
> . . . .
>
> 7. The deed of trust contains a power of sale. The note holder has the right to have the deed of trust foreclosed under the power of sale contained and set forth therein.

On 25 January 2010, respondent-appellant filed notice of appeal with the Clerk of Superior Court of Dare County. On 5 March 2010, a hearing was conducted in the Superior Court of Dare County. At the hearing, the trial court considered the documents involved and heard the testimony of Mr. Lee Wilson, credit administrator for the Bank. Mr. Wilson testified that it was the understanding of the parties that the 2008 Note was merely an extension of the 2007 Note for an additional year because of construction delays on the project for which the 2007 Note was issued and that the Deed of Trust would continue to secure the renewal. However, Mr. Wilson acknowledged that he was not present at the time of the signing of the 2008 Note. On 29 March 2010, the trial court entered an order affirming the findings of fact made by the Clerk of Court and authorizing the Substitute Trustee to proceed with foreclosure under the terms of the Deed of Trust. Respondent-appellant appeals.

II. Standard of Review

N.C. Gen. Stat. § 45-21.16 (2009) provides that a mortgagee who seeks to exercise a power of sale under a deed of trust may do so only upon proper notice to all interested parties and only after a hearing before the clerk of superior court. *Id.* Any party may appeal from the clerk's findings to the superior court. N.C. Gen. Stat. § 45-21.16(d1). The superior court, like the clerk of court, is limited in its review to determination of four factual issues set out in N.C. Gen. Stat. § 45-21.16(d):

> [T]he trial court in the appeal of a foreclosure action is to conduct a *de novo* hearing to determine the same four issues determined by the clerk of court: (1) the existence of a valid debt of which the party seeking foreclosure is the holder, (2) the existence of default, (3) the trustee's right to foreclose under the instrument,

> and (4) the sufficiency of notice of hearing to the record owners of the property.

In re Foreclosure of Azalea Garden Bd. & Care, Inc., 140 N.C. App. 45, 49-50, 535 S.E.2d 388, 392 (2000) (citing *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 374, 432 S.E.2d 855, 858 (1993)). "The applicable standard of review on appeal where . . . the trial court sits without a jury, is whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings." *Id.* at 50, 535 S.E.2d at 392 (citing *Walker v. First Federal Savings and Loan*, 93 N.C. App. 528, 532, 378 S.E.2d 583, 585, *disc. review denied*, 325 N.C. 320, 381 S.E.2d 791 (1989)).

III. Discussion

Respondent-appellant assigns error to the trial court's findings of fact that the 2008 Note is secured by the Deed of Trust and that such Deed of Trust secures the 2008 Note pursuant to the terms of the Hypothecation Agreement. Respondent-appellant contends that neither the terms of the Hypothecation Agreement nor the provisions of the Deed of Trust extend her property as collateral to secure the debt incurred under the 2008 Note. We agree.

To be a valid lien on real property, North Carolina law requires a deed of trust to specifically identify the obligation it secures. *Putnam v. Ferguson*, 130 N.C. App. 95, 98, 502 S.E.2d 386, 388 (1998); *In re Foreclosure of Enderle*, 110 N.C. App. 773, 775, 431 S.E.2d 549, 550 (1993); *see also In re Head Grading Co., Inc.*, 353 B.R. 122, 123 (Bankr. E.D.N.C. 2006) ("North Carolina law requires deeds of trust to specifically identify the debt referenced therein."). In the present case, the Deed of Trust very specifically describes the obligation secured as including:

> [A] Promissory Note, issued by [the Bank] dated February 15th, 2007 in the face amount of $150,000 and modified and reduced to $80,000 on July 26th, 2007 *and an Irrevocable Letter of Credit issued by [the Bank] dated April 19th, 2007 in the aggregate face amount of up to $550,000*, and a Back up Line of Credit Facility dated April 19th, 2007 in the face amount of up to $500,000 executed by Matthew F. Hall President as [sic] Outer Banks Construction Co[.] Incorporated . . . .

(Emphasis added.) Therefore, the Deed of Trust explicitly secures the 2007 Note.

In addition, our Supreme Court has held that a deed of trust executed as security for a debt will secure all renewals of the debt unless a different intent appears. *Wachovia Nat'l Bank v. Ireland*, 122 N.C. 571, 574, 29 S.E. 835, 835 (1898) ("The deed contains a covenant that the charge shall be binding for all renewals of the debts specified. This would be so without any agreement, unless a different intent appeared."). Although more than a hundred years old, this holding has never been overturned and still serves as controlling precedent in North Carolina today. *See In re Blevins*, 255 B.R. 680, 684 (W.D.N.C. 2000) ("ffirming Bankruptcy Court's holding that, under North Carolina contract law, a promissory note executed as a renewal does not cancel the original promissory note or the deed of trust securing the debt incurred under the original promissory note). Our Supreme Court has further held, "Where a note is given merely in renewal of another note and not in payment thereof, the effect is to extend the time for the payment of the debt without extinguishing or changing the character of the obligation[.]" *Dyer v. Bray*, 208 N.C. 248, 248, 180 S.E. 83, 83 (1935). Accordingly, a promissory note executed as a renewal only operates as an extension of time for payment and will continue to be secured by a deed of trust that secures the original debt, unless a contrary intent appears.

In the present case, respondent-appellant disputes that the 2008 Note, in addition to the 2007 Note, is secured by the Deed of Trust. The face of the 2008 Note specifically states that it is a "renewal of" loan number "65257145." This loan number is the loan number of the 2007 Note. Therefore, the documents indicate the fact that the 2008 Note was issued as a renewal of the 2007 Note, and because a renewal note is not intended to extinguish the original obligation, the Deed of Trust that encompasses the original 2007 Note also secures the new 2008 Note, unless a contrary intent appears. The Bank maintains that the Deed of Trust "evinces the intent" that the Deed of Trust secures the 2008 Note based simply on the fact that the 2008 Note is a renewal of the 2007 Note. However, counter to the Bank's assertion, the terms of the Deed of Trust do in fact reflect the contrary intent that the debts incurred under the 2008 Note are not secured under the Deed of Trust.

On the face of the Deed of Trust appears the following future advances clause:

> This Deed of Trust is given to secure all present and future advances made or to be made pursuant to the terms of the oblig-

> ation. The amount of the present obligation secured hereunder is $00.00 (zero) and the maximum amount of present and future obligations which may be secured at any one time is $350,000.00 (three hundred and fifty thousand dollars). *The period within which any and all future advances are to be made and secured hereunder is the period between the date hereof and April 18th, 2008.* This Deed of Trust is made pursuant to Article 7 of Chapter 45 of the North Carolina General Statutes.

(Emphasis added.) Article 7 of Chapter 45 of the North Carolina General Statutes addresses "Instruments to Secure Future Advances and Future Obligations." N.C. Gen. Stat. §§ 45-67 through –79 (2009). The future advances clause in the Deed of Trust is consistent with the provisions of N.C. Gen. Stat. § 45-68(1) (2007) ("mended 2009) in effect at the time the Deed of Trust was executed, which instructs that a security instrument, including a deed of trust, shall secure future advances and future obligations so as to give priority so long as certain criteria are stated in the security instrument. *Id.* Notably, one term that must be stated in a deed of trust is: "The period within which future obligations may be incurred, which period shall not extend more than 15 years beyond the date of the security instrument . . . ." *Id.* Therefore, in anticipation of any extensions or renewals, the Bank could have secured priority for future advances or future obligations for up to fifteen years pursuant to the terms of the statute in effect at that time. However, the Deed of Trust expressly limits the time period for which future advances "are to be made and secured hereunder" to the period expiring on 18 April 2008. As such, the Deed of Trust evinces the intent to limit the extent to which the Deed of Trust secures future advances to only those made prior to 18 April 2008.

Furthermore, our courts adhere to the central principle of contract interpretation that " '[t]he various terms of the [contract] are to be harmoniously construed, and if possible, every word and every provision is to be given effect.' " *Duke Energy Corp. v. Malcolm*, 178 N.C. App. 62, 65, 630 S.E.2d 693, 695 (2006) (quoting *Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299-300, 524 S.E.2d 558, 563 (2000)); *see also In re Den-Mark Const., Inc.*, 398 B.R. 842, 850 (Bankr. E.D.N.C. 2008) ("Contract interpretation in North Carolina must favor an interpretation of a contract that gives meaning to every clause over an interpretation that does not."). "It is a well-settled principle of legal construction that it must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to

mean." *Self-Help Ventures Fund v. Custom Finish*, ––– N.C. App. –––, –––, 682 S.E.2d 746, 749 (2009) (internal quotation marks and citations omitted). "Moreover, all contemporaneously executed written instruments between the parties, relating to the subject matter of the contract, are to be construed together in determining what was undertaken." *Id.* (internal quotation marks and citation omitted). "Thus, where a note and a deed of trust are executed simultaneously and each contains references to the other, the documents are to be considered as one instrument and are to be read and construed as such to determine the intent of the parties." *In re Foreclosure of Sutton Investments*, 46 N.C. App. 654, 659, 266 S.E.2d 686, 689 (1980).

In the present case, respondent-appellant executed two documents contemporaneously on 2 October 2007: the Deed of Trust and the Hypothecation Agreement. Respondent-appellant contends that the trial court erred in finding that the Deed of Trust secures the 2008 Note pursuant to the terms of the Hypothecation Agreement. Respondent-appellant argues that in construing the Deed of Trust and the Hypothecation Agreement together, the intent of the parties was to limit the period in which advances could be made and secured under the Deed of Trust. We find respondent-appellant's argument particularly persuasive under the facts of this case.

The primary purpose of the Hypothecation Agreement signed by respondent-appellant on 2 October 2007 is to:

> [A]uthorize[] Matthew Hall President Outer Banks Construction Co. Inc. (Debtor) to hypothecate, pledge and/or deliver to [the Bank] . . . property (Collateral) described below belonging to the undersigned [Eloise Hall], and the undersigned agrees that when so hypothecated, pledged and/or delivered said Collateral shall be collateral to secure any present or future indebtedness, obligation or liability howsoever evidenced, owing by Debtor to [the Bank], or any extension, modification or renewal thereof, the undersigned hereby consenting to the extension or renewal . . . and waiving any notice of any such extension, modification or renewal.

The language of the Hypothecation Agreement thereby authorized OBC to pledge the property of respondent-appellant for any present or future obligations to the Bank, including any extensions or renewals of those obligations. The future advances provision in the Deed of Trust, on the other hand, made no provision for extensions

or renewals of the specified obligations and expressly limited both the amount that the Deed of Trust would secure, as well as the period within which advances could be made and secured. Further, the Deed of Trust expressly stated the final date for payment of the obligation secured thereunder was 18 April 2008, the same maturity date reflected on the 2007 Note. Construed together, the instruments reveal that respondent-appellant provided OBC with the authority to pledge her property as security for any renewals or extensions on the obligations, but limited the initial time period during which any advances would be secured by that property to the period ending 18 April 2008.

Respondent-appellant cites *McNeary's Arborists v. Carley Capital Group*, 103 N.C. App. 650, 406 S.E.2d 644 (1991) in support of her contention that the future advances time limitation stated in the Deed of Trust must control. In *McNeary's Arborists*, the deed of trust at issue explicitly stated that "the period within which future obligations may be incurred hereunder expires March 3, 1988." *Id.* at 651, 406 S.E.2d at 645. Subsequently, on 10 June 1988, the parties modified the terms of the deed of trust to extend the time period within which future advances may be made. *Id.* However, this Court found that any obligations incurred in the interim period between 3 March and 10 June 1988 did not have seniority over an intervening mechanic's lien filed against the subject property pledged as collateral under the deed of trust. This Court held: "Under the explicit terms of [the lender's] deed of trust, the period within which Carley's future obligations could be incurred expired on 3 March 1988." *Id.* at 652, 406 S.E.2d at 645. Accordingly, we agree with respondent-appellant's contention that the express time limitation for future advances contained in the terms of the Deed of Trust controls and evinces the intent of the parties that the property of respondent-appellant pledged as collateral was meant to secure only those advances made prior to 18 April 2008.

Alternatively, the Bank contends that, because the 2008 Note is a renewal of the 2007 Note, any advances made under the 2008 Note should not be considered an advance made after the expiration of the future advances period, but rather should be considered as the original debt. The only case applying North Carolina law on which the Bank relies for its contention is *In re Blevins*, 255 B.R. 680 (W.D.N.C. 2000). In *Blevins*, the debtors both applied for *and received* two loans from the lender in December 1992. *Id.* at 682. Both loans were secured by deeds of trust pledging certain real property of the debtor as collateral. *Id.* The original promissory notes specifically provided that the

debtor would continue to be obligated to pay the loans, "even if the loans were renewed or extended." *Id.* When the 1992 Notes became due one year later, the debtor was unable or unwilling to pay the amounts owed on the notes at that time, and instead of foreclosing on the notes, the lender allowed the debtor to extend the loans for an additional year pursuant to a renewal note. *Id.* at 682-83. Therefore, the debtor executed renewal promissory notes on the 1992 Notes in 1993, 1994, and 1995. *Id.* at 683. The bankruptcy court, applying North Carolina contract law, held that the renewal notes executed by the debtor in 1993, 1994, and 1995 "were merely extensions of the 1992 Promissory Notes and therefore did not cancel the 1992 Notes or the 1992 Deeds of Trust executed by the Debtor." *Id.* at 684.

Unlike the facts in *Blevins*, in the present case no amounts were owed at the time of the original maturity date of the 2007 Note, which was 18 April 2008. The renewal notes in *Blevins* extended the time for payment on amounts already advanced and owed under the original note for which the deed of trust was executed. However, in the present case, the 2008 Note, despite being labeled a "renewal" of the 2007 Note, was not an extension of time for payment, as no debt was owed under the original 2007 Note which the Deed of Trust secured. Had the amounts been advanced under the original 2007 Note and renewed under the 2008 Note, as in *Blevins*, then the advances would have been made prior to the 18 April 2008 expiration date and would have been secured by the Deed of Trust. Such is not the case here.

Additionally, the North Carolina Supreme Court case of *Ireland*, 122 N.C. 571, 29 S.E. 835, which established the rule regarding renewals on which the Bank relies, is also distinguishable from the facts of the present case. In *Ireland*, the deed of trust at issue contained an express covenant that the property pledged as collateral "shall be binding for all renewals of the debts specified." *Id.* at 574, 29 S.E. at 835. However, in the present case, the Deed of Trust made no covenants for renewals. Rather, the Deed of Trust expressed a clear intent to limit the initial period for which the collateral would be pledged as security to cover advances made before 18 April 2008.

Lastly, this result is compelled by the "well[-]settled" principle "that a power of sale contained in a deed of trust must be exercised in strict conformity with the terms of the instrument." *Sutton Investments*, 46 N.C. App. at 659, 266 S.E.2d at 688. If the language in a separate instrument is contradictory, "language in a deed of trust expressly limiting the exercise will govern." *Id.* at 659, 266 S.E.2d at 689.

In the present case, the Deed of Trust expressly limits the collateral pledged as security for only those advances made prior to 18 April 2008. The facts before the trial court unequivocally established that all advances made to OBC were under the 2008 Note and were made after the 18 April 2008 date. Despite signing a new promissory note, the Bank overlooked the term limit under the Deed of Trust securing its future advances. As between the two parties, the responsibility of ensuring that future advances are adequately secured falls on the Bank. The Bank failed to execute a modification of the time period for which future advances would be secured under the Deed of Trust, despite both its ability to extend the term pursuant to N.C. Gen. Stat. § 45-68 and OBC's authority to pledge the collateral for such a modification, extension, or renewal pursuant to the Hypothecation Agreement. As such, the Deed of Trust expired on 18 April 2008, since no sums were advanced prior to that date, and all advances made after that express date pursuant to the 2008 Note were no longer secured under the Deed of Trust. Thus, the trial court erred in finding that the Deed of Trust secures the debt evidenced by the 2008 Note either by its terms or pursuant to the terms and provisions of the Hypothecation Agreement. Consequently, the trial court erred in finding that OBC is in default under the Deed of Trust and that the Substitute Trustee thereby has the authority to foreclose on respondent-appellant's property under the Deed of Trust's power of sale provision.

IV. Conclusion

We hold the trial court erred in its findings of fact that the debt owed by OBC to the Bank as evidenced by the 2008 Note is secured by the Deed of Trust pursuant to the terms of the Hypothecation Agreement and that OBC is in default under the Deed of Trust. Because these findings are not supported by competent evidence, the trial court erred in its conclusion that the Substitute Trustee is entitled to foreclose on respondent- appellant's property pursuant to the power of sale under the terms of the Deed of Trust. Accordingly, the order of the trial court authorizing the Substitute Trustee to proceed with foreclosure under the power of sale contained in the Deed of Trust must be reversed.

Reversed.

Judges GEER and STEPHENS concur.

IN RE J.M.D.

[210 N.C. App. 420 (2011)]

IN THE MATTER OF: J.M.D

No. COA10-1001

(Filed 15 March 2011)

Child Abuse, Dependency, and Neglect— permanency planning—findings of fact—custody with father—termination of juvenile court jurisdiction—no further presentation of evidence

The trial court erred on remand in a permanency planning proceeding by failing to follow the Court of Appeals' mandate to make findings of fact addressing the factors set out in N.C.G.S. § 7B-907(b). The statute was applicable even though the juvenile was placed in his biological father's home because the juvenile was not returned to the home from which he was removed. The trial court was ordered to make appropriate findings of fact if it found that termination of the juvenile court's jurisdiction was proper. Further, the trial court did not err in refusing to allow respondent to present evidence after remand as the matter was within the discretion of the trial court.

Appeal by respondent-mother from order entered 3 June 2010 by Judge R. Les Turner in District Court, Greene County. Heard in the Court of Appeals 16 February 2011.

James W. Spicer, III, for petitioner-appellee Greene County Department of Social Services.

Pamela Newell, for guardian ad litem.

Lisa Skinner Lefler for respondent-appellant mother.

STROUD, Judge.

Respondent-mother appeals from the permanency planning order entered after this Court reversed a previous order and remanded the matter to the trial court. Respondent-mother contends that the trial court ignored this Court's mandate by failing to allow her to present evidence and by refusing to make findings addressing the factors listed in N.C. Gen. Stat. § 7B-907(b) (2009). We reverse the trial court's order entered upon remand, and remand the case for entry of an order consistent with this opinion.

We previously summarized the procedural history of this case in more detail in our opinion in respondent-mother's prior appeal, *In re J.M.D.*, ––– N.C. App. –––, 687 S.E.2d 710, 2009 N.C. App. LEXIS 1684 (N.C. Ct. App. Nov. 3, 2009) (unpublished). In relevant part, the Greene County Department of Social Services ("DSS") filed a petition in October 2007 alleging that J.M.D. ("Jake")[1] and three siblings were neglected juveniles, as DSS had discovered in July of 2007 that respondent-mother and her children were living in unsanitary conditions in respondent-mother's home. Respondent-mother also had several mental health disorders which were not being treated, and the children were not receiving necessary medical care. On 30 January 2008, Jake was adjudicated neglected and removed from respondent-mother's home and placed in non-secure custody. At the time of the non-secure custody order, K.W. ("Kevin")[2] had not yet been adjudicated as Jake's biological father, but, in February of 2008, Jake was placed with Kevin. Following a 29 September 2008 permanency planning hearing, the trial court ordered DSS to continue placement of Jake with Kevin and adopted a permanency plan "of custody of [Jake] . . . with [Kevin] . . . and the stepmother."

On 24 November 2008, the trial court placed Jake in Kevin's temporary custody. The matter came on for a permanency planning hearing on 16 February 2009. On 25 February 2009, following a paternity test of Jake, Kevin was adjudicated as Jake's father. On 30 March 2009, the trial court entered a permanency planning order in which the trial court concluded that it was in Jake's best interest to place him in Kevin's custody. As a result, the trial court adopted as the permanent plan for Kevin to have custody and relieved DSS and the guardian *ad litem* of further responsibility. The trial court continued respondent-mother's visitation as previously ordered, but directed the parties to provide a sibling visitation schedule.

Respondent-mother appealed from the order, arguing that the trial court failed to make sufficient findings of fact as required by N.C. Gen. Stat. §§ 7B-507 and 7B-907. *J.M.D.*, 2009 N.C. App. LEXIS 1684, *4. This Court disagreed with respondent-mother as to N.C. Gen. Stat. § 7B-507, but agreed as to N.C. Gen. Stat. § 7B-907(b). *Id.* This Court concluded "that the trial court failed to make sufficient findings to support its order pursuant to N.C. Gen. Stat. § 7B-907."

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1. We will refer to the minor child J.M.D. by the pseudonym Jake, to protect the child's identity and for ease of reading.

2. A pseudonym.

J.M.D., 2009 N.C. App. LEXIS 1684, *9. As a result, this Court reversed the permanency planning order and remanded the matter to the trial court. *Id.*

The matter came on for a new hearing on 21 December 2009. Kevin was not present or represented at the hearing, as his appointed counsel had been relieved by a prior order. Respondent-mother requested that the trial court either place Jake in her custody or conduct a new permanency planning hearing and hear evidence. The trial court declined to hear further evidence and refused to allow respondent-mother to make an offer of proof.

In open court, the trial court noted:

> For the record, this Court disagrees respectfully with the Court of Appeals but recognizes the hierarchy of the court system and will honor the order obviously of the Court of Appeals' three-judge panel with regard to the Court's findings under 7B-907. The basis for the Court's disagreement is that the child was placed with the biological father.

The trial court then stated that it believed that the factors listed in N.C. Gen. Stat. § 7B-907(b) were not relevant to this case because it had placed Jake in Kevin's custody. After engaging in that analysis, the trial court concluded:

> The Court finds this to be an oxymoron with regard to the words and legislative intent in the Court of Appeals' decision in this matter reversing and remanding. If the juvenile is not returned home, again emphasis added, then the Court shall enter an order consistent with its findings that juvenile within a timely manner in accordance with the permanent plan. Therefore, the Court can connote from that language that return home would include a biological father because DSS is not involved in this matter and there's no point for them to be involved in this matter. So therefore, it returns on the definition of legislative intent of the phrase return home.

By an order announced in open court on 21 December 2009 and filed on 3 June 2010,[3] the trial court found:

3. N.C. Gen. Stat. § 7B-907(c)(2009) requires that orders from a permanency planning hearing be entered within 30 days from the date of hearing. The record does not reveal the reason for this delay of over five months.

12. That at the initial hearing, the Trial Court did not make specific findings as set out in N.C.G.S. 7B-907(b), because the juvenile had been returned to the home of the father. The Court did not believe that it was necessary to make such findings.

. . . .

14. That the Court finds that the term relative as used in N.C.G.S. 7B-907(b)(2) does not mean the mother or father and the juvenile was returned to the home of the father.

15. That since the juvenile has been returned to the father, adoption should not be pursued.

16. That N.C.G.S. 7B-907(b)(4) is inapplicable since the juvenile is in fact in the home of a parent.

17. That the Court finds that N.C.G.S. 7B-907(b)(5) is inapplicable because the Court, in previous orders, has found that the Department of Social Services has taken reasonable steps to reunify the juvenile with a parent and in fact, the child is with a parent.

. . . .

30. That this Court believes that the return home means to return to the home of either parent and not necessarily the return to the home of the parent from which the juvenile was initially removed.

. . . .

32. That when the juvenile was placed in the home of the father and subsequently in the custody of the father, the Court was not convinced that the mother had complied with the orders of the Court and was convinced that the best interest of the juvenile would be promoted and served by placing custody with the father.

33. That one of the reasons the father needed to have custody of the juvenile was to have medical insurance placed on the juvenile.

34. That this matter has become a custody dispute between the parents.

The trial court ordered that Kevin continue to have custody of Jake; that the previous visitation plan remain in effect; that "this matter is removed from the active calendar of the Greene County Juvenile court[;]" "[t]hat this matter is transferred to the Greene County . . . Domestic Court with the appropriate motion of either the mother or the father of the juvenile[;]" and "that Kim Conner Benton is relieved as counsel for the mother . . . 30 days after receipt of this order." On 15 June 2010, respondent-mother gave notice of appeal.

On appeal, respondent-mother argues that the trial court failed to follow this Court's mandate by refusing to allow her to present new evidence, or make an offer of proof, at the hearing after remand, and by refusing to make findings of fact addressing the factors set out in N.C. Gen. Stat. § 7B-907(b). We agree that the trial court failed to adequately address N.C. Gen. Stat. § 7B-907(b).

In any permanency planning order in which a juvenile is not returned home, the trial court must make written findings concerning the following criteria that are relevant:

> (1) Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interests to return home;
>
> (2) Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents;
>
> (3) Where the juvenile's return home is unlikely within six months, whether adoption should be pursued and if so, any barriers to the juvenile's adoption;
>
> (4) Where the juvenile's return home is unlikely within six months, whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why;
>
> (5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile;
>
> (6) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B-907(b)(2009).

This Court has "not required trial courts to specifically identify the factors set forth in section 7B-907(b), provided that the record demonstrates that the factors were taken into account." *In re T.R.M.*, 188 N.C. App. 773, 779, 656 S.E.2d 626, 630 (2008). However, "[w]hen a trial court is required to make findings of fact, it must make the findings of fact specially." *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003).

"Once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question not only on remand at trial, but on a subsequent appeal of the same case." *N.C. Nat'l Bank v. Va. Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983) (citations omitted). "On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure." *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 667, 554 S.E.2d 356, 363 (2001) (citations and quotation marks omitted), *disc. rev. denied and appeal dismissed*, 355 N.C. 348, 563 S.E.2d 562 (2002).

In this case, the trial court, although it professed an intention to act consistently with this Court's opinion, did not follow this Court's mandate. In respondent-mother's initial appeal, this Court held that the trial court had failed to make findings sufficiently addressing the factors outlined in N.C. Gen. Stat. § 7B-907(b), and reversed the order and remanded the matter. *See J.M.D.*, 2009 N.C. App. LEXIS 1684, *9. The trial court's written order after remand, however, still does not address N.C. Gen. Stat. § 7B-907(b)(1) or (2) at all, and only addresses subsections (2), (4), and (5) insofar as it deems them inapplicable because Jake was placed in Kevin's home. The order does not mention subsection (6).[4] Essentially, the trial court found that it need not make findings regarding any subsection of N.C. Gen. Stat. § 7B-907(b), because it determined that none were "relevant" in this case. *See* N.C. Gen. Stat. § 7B-907(b) ("[I]f the juvenile is not returned home, the court shall consider the following criteria and make

4. We note that in its oral findings at the 21 December 2009 hearing, the trial court in considering "any other criteria the Court deems necessary" pursuant to N.C. Gen. Stat. § 7B-907(b)(6) noted that the trial court had given custody to the father based on "the father's job status, stability status, home status, marital status and ability of love and affection and to care for that child." However, the trial court failed to make these findings in the 3 June 2010 order and we are bound by that written order. *See* N.C. Gen. Stat. § 1A-1, Rule 58 (2009) ("[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court[.]").

written findings regarding those that are *relevant*: . . . ." (emphasis added)). However, the prior opinion of this Court determined that at least one "criterion" under N.C. Gen. Stat. § 7B-907(b) was "relevant," or we would not have ordered a remand for findings of fact. *See J.M.D.*, 2009 N.C. App. LEXIS 1684, *6-8. Thus, we agree with respondent-mother that the trial court acted inconsistently with this Court's opinion when it failed to make findings adequately addressing N.C. Gen. Stat. § 7B-907(b).

Moreover, the trial court makes explicit, both in its order and in its statements in the transcript, that it assumes that the term "home" as used throughout N.C. Gen. Stat. § 7B-907(b) contemplates the home of either biological parent and is not specific to the home from which the juvenile was removed. The trial court's interpretation of the statute is the stated reason that it found several of the subsections of N.C. Gen. Stat. § 7B-907(b) inapplicable. We hold that the trial court's interpretation is inconsistent with both our prior opinion in this case and our prior case law.

In *Buncombe County Dep't of Soc. Servs. v. Ledbetter (In re Ledbetter)*, 158 N.C. App. 281, 580 S.E.2d 392 (2003), we dealt with identical relevant facts related to this issue. In that case, the respondent-mother agreed to remove the juvenile from her home and place the juvenile with a family friend after DSS filed a petition alleging neglect. *Id.* at 282, 580 S.E.2d at 392. In *Ledbetter*, as in this case, at a subsequent permanency planning hearing the trial court found that the respondent-mother had failed to comply with the court's orders and ordered that the juvenile be placed with the father. *Id.* at 283, 580 S.E.2d at 393. The respondent-mother appealed, and this Court held that the trial court was required to make findings pursuant to N.C. Gen. Stat. § 7B-907(b) when it declined to return the juvenile to the respondent-mother's home, even though the juvenile was placed with the father. *Id.* at 285-86, 580 S.E.2d at 394.

In addition, we note that N.C. Gen. Stat. § 7B-907 repeatedly and consistently uses the word "home" in conjunction with the word "return[;]" that is, it refers to what should occur "if the juvenile is not *returned home*." *See* N.C. Gen. Stat. § 7B-907(b)(1)- (4). Depending on the context, the word "return" may be an intransitive verb, which cannot have a direct object, or a transitive verb, which must have a direct object. As an intransitive verb, "return" means "to go or come back again[.]" Merriam-Webster's Collegiate Dictionary 1065 (11th ed. 2005). As a transitive verb, "return" means "to bring, send, or put back to a former or proper place[.]" *Id.* In N.C. Gen. Stat. § 7B-907,

"return" is used as a transitive verb, and its direct object is "home." The word "home" in the statute is clearly referring to the *home from which the juvenile was removed.* Although a juvenile may have a "home" with either parent, he cannot *return* to a home in which he has never lived. At the time Jake was removed from respondent-mother's home, he had never lived with Kevin. Although we understand the trial court's frustration with trying to make this case fit within subsections (1) through (5) of N.C. Gen. Stat. § 7B-907(b), since Jake was living in his father's home, neither we nor the trial court can re-write the statute which the General Assembly has given us.

Yet we need not attempt to re-write the statute, as subsection (6) of N.C. Gen. Stat. § 7B-907(b) gives the trial court great flexibility. Subsection (6) must be considered in conjunction with the other subsections: "[I]f the juvenile is not returned home, the court shall consider the following criteria and make written findings regarding those that are relevant: . . . . (6) Any other criteria the court deems necessary." N.C. Gen. Stat. § 7B-907(b) (6). There is no requirement that the trial court consider any particular number of the six subsections, and the statute contemplates that in a particular situation, not all of the criteria will be "relevant." *See* N.C. Gen. Stat. § 7B-907(b). Thus, the trial court had only to make findings as to N.C. Gen. Stat. § 7B-907(b) subsection (6), "[a]ny other criteria the court deems necessary[,]" if the court determined that none of the other "criteria" in subsections (1) through (5) were applicable. These "other criteria" could be any facts which would be relevant in the context of the purpose of the permanency planning hearing, which the trial court deems as "necessary" in its development of "a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-907(a).

Findings of fact 32, 33, and 34 could perhaps be considered as "other criteria" under subsection (6) which the trial court "deemed necessary" in this particular case. We would like to be able to interpret the order in this way to avoid another remand for additional findings, but the trial court was quite emphatic in its declaration that N.C. Gen. Stat. § 7B-907(b) was not applicable because the child was in fact placed at "home" with his father. Although these findings may be appropriate factors for consideration under subsection (6) of N.C. Gen. Stat. § 7B-907(b), we cannot interpret them in this way in the order before us.[5] This opinion therefore does not preclude the trial

5. As noted above, the trial court did address factors it found to be relevant under subsection (6) of N.C. Gen. Stat. § 7B-907(b) in open court, although these findings were not included in the written order.

court from making similar findings on remand, if the trial court deems them to be "other criteria" which are "necessary" in this case.

Thus, in this case, as in *Ledbetter*, the trial court was required to make findings of fact addressing the N.C. Gen. Stat. § 7B-907(b) factors, even though Jake was placed in his father's custody. The trial court's failure to make the necessary findings is contrary to this Court's prior opinion which remanded the case for findings of fact and to established case law. Accordingly, we must reverse the trial court's order and remand the matter again for entry of an order consistent with this opinion.

As we are remanding this case for entry of a new permanency planning order based upon the 16 February 2009 hearing and in the interest of putting an end to the issues involving Jake's custody before the trial court, we will also note that the trial court's order of 3 June 2010 finds that "this matter has become a custody dispute between the parents" and purports to "transfer" the matter "to the Green County Domestic Court with the appropriate motion of either the mother or father of the juvenile." However, the trial court did not by this order terminate its jurisdiction over the juvenile as provided by N.C. Gen. Stat. § 7B-201 (2009). *See In re S.T.P.*, ––– N.C. App. –––, 689 S.E.2d 223 (2010). The trial court also did not follow the requirements of N.C. Gen. Stat. § 7B-911 (2009) for transferring a custody matter from juvenile court to civil court. *See Sherrick v. Sherrick*, ––– N.C. App. –––, ––– S.E.2d –––, 2011 N.C. App. LEXIS 53 (N.C. Ct. App. Jan. 4, 2011). On remand, if the trial court determines that termination of the juvenile court's jurisdiction is proper or that the case should be transferred to civil court, the trial court should make the appropriate findings as required by N.C. Gen. Stat. § 7B-201 and/or N.C. Gen. Stat. § 7B-911.

Finally, because the issue is likely to be raised again upon remand, we also address respondent-mother's argument that the trial court erred by refusing to allow her to present evidence after remand. Respondent-mother cites no law which would indicate that the trial court was required to hold another hearing on remand to permit presentation of additional evidence and the prior opinion of this Court did not require or even suggest that a new hearing be held upon remand. "Whether on remand for additional findings a trial court receives new evidence or relies on previous evidence submitted is a matter within the discretion of the trial court." *Hicks v. Alford*, 156 N.C. App. 384, 389, 576 S.E.2d. 410, 414 (2003) (citing *Hendricks v. Sanks*, 143 N.C. App. 544, 549, 545 S.E.2d 779, 782 (2001)). It was

entirely within the trial court's discretion as to whether to permit presentation of additional evidence on remand, and respondent-mother has demonstrated no abuse of discretion. In fact, as the trial court was simply making findings of fact based upon the evidence before it at the 16 February 2009 permanency planning hearing, we fail to see how additional evidence would have been relevant or helpful to the trial court. Remand is not intended to be an opportunity for either respondent or petitioner to retry its case. The same is true of this second remand for additional findings. Thus, the trial court is again required to exercise its own discretion in determining whether to hear additional evidence on remand.[6]

On remand, we direct that the trial court make additional findings of fact addressing any subsections of N.C. Gen. Stat. § 7B-907(b) as it deems relevant, but specifically including N.C. Gen. Stat. § 7B-907(b)(6), setting forth the "other criteria" which it deems "necessary" in entering its order making custody with Kevin the permanent plan for Jake. In addition, should the trial court again determine that termination of the juvenile court's jurisdiction or transfer of the matter to civil court is appropriate, it should make the findings and decrees as required by N.C. Gen. Stat. § 7B-201 regarding termination of jurisdiction or N.C. Gen. Stat. § 7B-911 regarding transfer.

REVERSED AND REMANDED.

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

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6. We note that the trial court's 30 March 2009 permanency planning order which was the subject of the first appeal ordered that "the Guardian ad Litem and the Department of Social Services are relieved of the responsibility of any monitoring efforts[,]" and Jake's father, Kevin, made no appeal from that order. *See J.M.D*, 2009 N.C. App. LEXIS 1684, *1. At the 21 December 2009, hearing on remand, there was an issue as to whether Kevin's appointed trial counsel had been dismissed in a prior proceeding. Consequently, the trial court in its 3 June 2010 order, found that "when the Court signed it's [sic] order on March 30, 2009, the attorney for the father of the juvenile was relieved and the father was not represented on appeal[,]" but made no other findings or orders regarding the appointment of counsel for Kevin. Additionally, Kevin did not attend this hearing but counsel for respondent-mother stated that she had sent notice of the hearing to Kevin. The record on appeal contains a "notice of hearing in [the] juvenile proceeding" dated "11 December 2009" but respondent-mother's counsel was not certain as to whether this notice contained an updated address for Kevin or whether Kevin actually received notice for the 21 December 2009 hearing. As the trial court's proceedings on remand may directly affect Kevin's interests, on remand the trial court should ensure that Kevin receives notice and consider whether counsel should be appointed for Kevin. *See* N.C. Gen. Stat. § 7B-602(a)(2009) ("The court may reconsider a parent's eligibility and desire for appointed counsel at any stage of the proceeding.")

STATE OF NORTH CAROLINA v. PATRICK LOREN TOWE

No. COA10-401

(Filed 15 March 2011)

1. Evidence— examining doctor's testimony—sexual abuse —no physical signs—impermissibly bolstered victim's credibility

The trial court committed plain error in a sexual offense with a child and statutory rape case by allowing a doctor who examined the juvenile victim to testify that the victim was sexually abused but showed no physical symptoms of abuse. The testimony impermissibly bolstered the victim's credibility in the eyes of the jury.

2. Evidence— prior crimes or bad acts—purpose for which evidence offered—at issue

The trial court failed to properly admit evidence of defendant's prior bad acts for the purpose of demonstrating a common plan or scheme where the trial court failed to determine whether the purposes for which the evidence was offered were at issue.

3. Appeal and Error— sentencing—issues not addressed—new trial

The Court of Appeals declined to address defendant's arguments with respect to his criminal sentence in a sexual offense with a child and statutory rape case where defendant was given a new trial.

Appeal by Defendant from judgments and orders entered 10 November 2009 by Judge Ronald E. Spivey in Surry County Superior Court. Heard in the Court of Appeals 28 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Laura E. Crumpler, for the State.

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

HUNTER, JR., Robert N., Judge.

Defendant argues the trial court committed reversible error in both the guilt–innocence and sentencing phases of his trial. For the

following reasons, we grant Defendant a new trial and address several issues that are likely to arise on remand.

I. Factual and Procedural Background

A Surry County grand jury indicted Defendant for three counts of first-degree sexual offense with a child under thirteen (N.C. Gen. Stat. § 14-27.4(a)(1)) and two counts of first-degree statutory rape of a child under thirteen (N.C. Gen. Stat. § 14-27.2(a)(1)). Defendant entered pleas of not guilty to all charges.

The uncontested evidence at trial tended to show the following. Between 1994 and 1999, Defendant and Susan Barnhart were married and had three children: two sons and a daughter named "Shirley."[1] In 1999, Defendant and Ms. Barnhart separated, and their divorce was finalized in 2003. After the divorce, Shirley and her two brothers lived with Shirley's mother. Defendant lived with his mother, Dana Mitchell (Defendant's girlfriend), and Ms. Mitchell's three children in a two-bedroom apartment in Mount Airy. In the summer of 2007, Shirley and her two older brothers lived with Defendant in the apartment. There were approximately nine people sleeping there at that time: Shirley, her two brothers, Defendant, Defendant's mother, Ms. Mitchell, and Ms. Mitchell's three children. Shirley slept with Ms. Mitchell's oldest daughter in one bedroom, Defendant's mother slept in the other bedroom, and everyone else slept in the living room, which served as a make-shift bedroom. Shirley returned home to live with her mother in August of 2007.

The State's evidence tended to show the following. On 1 November 2007, Ms. Barnhart took Shirley to see Dr. Sarah Ryan because Shirley was having abdominal pains. (Ms. Barnhart thought Shirley might be starting her menstrual cycle.) During the physician visit, Dr. Ryan noticed irritation and redness near the lower vaginal area and a "shiny" line that could have been a scar; this prompted her to ask if there had been any abuse. Prior to this moment, Shirley did not tell anyone her father had sexually abused her, and both Shirley and her mother initially denied any sexual abuse had occurred. But when Shirley and her mother went to the bathroom at the doctor's office, Shirley told her mother that Defendant touched her "private area" all the time. Shirley and her mother returned to Dr. Ryan's office, and Shirley told Dr. Ryan that Defendant had "been inserting his fingers into her vagina."

1. A pseudonym conceals the victim's identity.

The following day, Shirley's mother took Shirley to the Mount Airy Police Department to file a report, where Officer Vanessa Vaught interviewed Shirley. Officer Vaught testified Shirley told her that Defendant had touched her (Shirley's) genital area, digitally penetrated her vagina, held her down when she asked him to stop, rubbed his penis on her genitals, and asked if he could put his penis in her vagina.

Several weeks later, Shirley was taken to Wake Medical Center's child sexual abuse team, where clinical social worker Nicole Alderfer interviewed her. Ms. Alderfer testified Shirley told her that Defendant had digitally penetrated her vagina, fondled her breasts, engaged in genital to genital contact, and engaged in penile–vaginal penetration.

Ms. Alderfer also testified as follows:

> Q: Ms. Alderfer, did [] Ms. Susan Barnhart, did she disclose to you the nature of the abuse that had [sic] reported thus far?
>
> A: This is how she first became aware of the abuse, because of the doctor's appointment.
>
> Q: What specifically did she say the allegations of abuse were to that point?
>
> A: That [Shirley] had been sexually abused by her father.

Shirley underwent a physical examination on the same day she was interviewed by Ms. Alderfer. Dr. Denise Everett, who examined Shirley, testified the genital examination revealed a normal hymen. Dr. Everett also testified that a tear in the hymen could heal within a day or two, and a nine-year-old girl could heal from trauma such that there would not be any evidence of prior trauma. She stated that even though there were no signs of physical injury to Shirley's genital area, the hymen could appear normal even after penetration by a penis. She also testified that the "lack of any findings would not be inconsistent with sexual abuse."

The following exchange occurred between Dr. Everett and the prosecutor:

> Q: And do you have an opinion, ma'am, based upon your knowledge, experience and training, and the articles that you have read in your professional capacity as to the percentage of children who report sexual abuse who exhibit no physical findings of abuse?

> A: I would say approximately 70 to 75 percent of the children who have been sexually abused have no abnormal findings, meaning that the exams are either completely normal or very non-specific findings, such as redness.
>
> Q: And that's the category that you would place [Shirley] in; is that correct?
>
> A: Yes, correct.

Defendant's former sister-in-law, Bridget Dawn Leftwich, also testified Defendant had touched her inappropriately in 1997, when she was ten. Specifically, Ms. Leftwich stated that in early December of 1997, Defendant picked her up and took her into another room and "started rubbing [her] vagina." She stated that Defendant rubbed her vagina for "probably five to ten minutes" and then left the room without saying anything. The trial court admitted this evidence, over Defendant's objection, to establish Defendant's identity as the perpetrator and motive to commit the crime.

Defendant did not testify, but he offered testimony from Ms. Mitchell and Rebecca Peters—the social worker who investigated Defendant after Shirley's allegations. Both testified they did not witness any sexual abuse. Ms. Mitchell testified she was present "all the time" during the summer of 2007 and never saw Defendant sexually abuse Shirley. Ms. Peters testified Defendant denied ever touching Shirley inappropriately and agreed to cooperate with the Department of Social Services. Ms. Peters also testified she made "approximately" one visit per week, until March of 2008, after which she did not make any more visits to Defendant's residence.

After an eight-day trial, the jury convicted Defendant of three counts of first-degree sexual offense on a child under the age of thirteen and two counts of first-degree rape of a child under the age of thirteen. The trial court sentenced Defendant to consecutive sentences of 346-425 months in prison for his two convictions of first-degree rape of a child and 346-425 months in prison for his three convictions of first-degree sexual offense. The trial court found Defendant had been convicted of an aggravated offense and ordered him to register as a sex offender and enroll in satellite based monitoring ("SBM") for the remainder of his life.

II. Jurisdiction

Defendant gave oral notice of appeal on the date of his conviction and sentencing. Because Defendant entered a plea of not guilty as to all charges, he was entitled to appeal his conviction as a matter of right, and we have jurisdiction over the appeal of his conviction. *See* N.C. Gen. Stat. § 7A-27(e) (2009) ("From any . . . order or judgment of the superior court [not described in N.C. Gen. Stat. § 7A-27] from which an appeal is authorized by statute, appeal lies of right directly to the Court of Appeals."); N.C. Gen. Stat. § 15A-1444(a) (2009) ("A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered.").

Because we have held SBM orders are civil in nature, Defendant was required give notice of appeal of the SBM order pursuant to N.C. R. App. P. 3(a) to confer jurisdiction on this Court. *State v. Brooks*, ––– N.C. App. –––, –––, 693 S.E.2d 204, 206 (2010). Recognizing that he has failed to comply with Rule 3(a), Defendant asks us to treat his brief as a petition for certiorari. In the interest of justice, we allow Defendant's petition for certiorari and elect to review the civil orders pertaining to lifetime sex offender registry and SBM.

III. Analysis

A. Expert Testimony

[1] Defendant argues Dr. Everett's testimony impermissibly bolstered Shirley's credibility in the eyes of the jury. Defendant failed to object to the testimony at trial; therefore, he must establish the trial court committed plain error. N.C. R. App. P. 10(a)(4).

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

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) ("lterations in original). We must determine whether, absent the alleged error, the "jury probably would have returned a different verdict." *State v. Davis*, 321 N.C. 52, 59, 361 S.E.2d 724, 728 (1987). The error must be so grave as to have "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).

Under the North Carolina Rules of Evidence, a qualified expert may testify as to her opinion in her field of expertise if the testimony will assist the jury in understanding the evidence. N.C. R. Evid. 702(a). An expert may not, however, testify as to the witness's credibility or state that she believes the defendant is guilty. *State v. Heath*, 316 N.C. 337, 341-42, 341 S.E.2d 565, 568 (1986).

In sexual abuse cases involving child victims, an expert may not testify that sexual abuse has occurred without physical evidence supporting her opinion. *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (per curiam). An expert may not testify that the child has been "sexually abused" if the testimony is based solely on the interview with the child-victim. *State v. Grover*, 142 N.C. App. 411, 419, 543 S.E.2d 179, 183, *aff'd per curiam*, 354 N.C. 354, 553 S.E.2d 679 (2001). But expert testimony is not inadmissible solely because it supports the witness's credibility or "states an opinion that abuse has occurred." *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 89 (1997). If an expert has a "proper foundation," she may testify as to the characteristics of sexually abused children and whether a particular victim has symptoms "consistent therewith." *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789; *see also State v. Bush*, 164 N.C. App. 254, 258, 595 S.E.2d 715, 718 (2004) (stating "consistent therewith" testimony is permissible "to inform the jury that the lack of physical evidence of abuse is not conclusive that abuse did not occur").

Defendant contends Dr. Everett's testimony amounted to a statement that Shirley had been the victim of sexual abuse. Dr. Everett stated seventy to seventy-five percent of sexually abused children show no clear physical signs of abuse. When asked whether she would put Shirley in that group, Dr. Everett responded that she would. Thus, Dr. Everett testified Shirley was sexually abused, but showed no physical symptoms of abuse. *Stancil* plainly prohibits this type of testimony.

The dispositive issue, then, is whether the trial court's failure to intervene *sua sponte* constituted plain error. This Court has previously found plain error in similar cases when the victim's credibility is critical because there is little or no other direct evidence of sexual abuse. *See State v. Delsanto*, 172 N.C. App. 42, 44-49, 615 S.E.2d 870, 872-75 (2005) (finding plain error and providing an extensive discussion of case law on this point); *State v. Ewell*, 168 N.C. App. 98, 105-06, 606 S.E.2d 914, 919-20 (2005) (finding plain error where "the only evidence linking defendant to [victim] were her statements and other witnesses' corroborative testimony"); *State v. Bush*, 164 N.C. App. 254, 259, 595 S.E.2d 715, 718-19 (2004) (finding plain error where victim's "credibility was questionable as to the sexual abuse for a number of reasons" and physician's testimony amounted to "a stamp of credibility"); *State v. Couser*, 163 N.C. App. 727, 731, 594 S.E.2d 420, 423 (2004) (finding plain error because State's only direct evidence of abuse was victim's testimony, which was corroborated by other witnesses). Dr. Everett's testimony placed a stamp of approval on Shirley's testimony. Without the doctor's testimony, it is highly plausible that the jury could have reached a different result. We hold the admission of Dr. Everett's testimony amounted to plain error. Below, we address several issues that may arise during Defendant's new trial. *See, e.g.*, *Coleman v. Coleman*, 89 N.C. App. 107, 109, 365 S.E.2d 178, 180 (1988) ("ddressing non-dispositive issues "likely to arise on remand").

B. Uncharged Conduct Evidence

[2] Defendant argues Ms. Leftwich's testimony was inadmissible under North Carolina Rules of Evidence 401-404. We decline to analyze in detail whether the trial court erred in admitting the evidence because our review of the record suggests the trial court intended, but failed, to admit this evidence for the purpose of demonstrating a common plan or scheme. (The trial court remarked that the incidents were sufficiently similar for the purposes of establishing motive, identity, and *common plan or scheme*, but ultimately did not mention common plan or scheme when announcing the court's decision on Defendant's motion to exclude the 404(b) evidence or in the jury instructions.) We note, however, that the admission of this evidence was clearly problematic in at least one respect: the trial court failed to determine whether the purposes for which the evidence was offered were at issue.

While a criminal defendant's identity can always be labeled a "material fact," *State v. Jeter*, 326 N.C. 457, 458, 389 S.E.2d 805, 806 (1990), a defendant's identity is not necessarily *at issue* (*i.e.*, material) within the meaning of Rule 401, *State v. Parker*, 113 N.C. App. 216, 224, 438 S.E.2d 745, 750 (1994); *State v. White*, 101 N.C. App. 593, 600, 401 S.E.2d 106, 110 (1991); *see also* N.C. R. Evid. 401 commentary (stating that, although the statutory definition of relevance contained in Rule 401 speaks only of "relevance" by name, it contains two basic concepts: relevancy and materiality). "[T]here must be a determination of whether the identity of the perpetrator is at issue." *State v. White*, 101 N.C. App. 593, 600, 401 S.E.2d 106, 110 (1991). Our case law indicates the defendant's identity is not at issue when the case hinges on whether the alleged crime occurred, but it may be at issue when the defendant contends someone else committed the alleged crime. *Compare State v. Bagley*, 321 N.C. 201, 205-06, 362 S.E.2d 244, 246-47 (1987) (identity not at issue when defendant argued at trial that he and victim were engaged in consensual foreplay), *with State v. Thomas*, 310 N.C. 369, 374, 312 S.E.2d 458, 461 (1984) (defendant placed his identity at issue by relying on an alibi defense).[2] Admitting the evidence for the purpose of demonstrating Defendant's motive to commit the crimes charged does not pose the same problem. Motive is at issue when a defendant denies committing the crime charged. *See State v. Haskins*, 104 N.C. App. 675, 683, 411 S.E.2d 376, 382 (1991) (motive at issue when defendant denied his participation in a robbery).

Should the State seek to reintroduce the uncharged conduct evidence on remand, we trust the trial court will determine the materiality of *each* purpose for which the evidence is offered in addition to conducting the other steps in the uncharged conduct analysis. *See, e.g.*, T.M. Ringer, *A Six Step Analysis of "Other Purposes" Evidence Pursuant to Rule 404(b) of the North Carolina*

2. Professors Wright and Graham have addressed this issue:

> The prosecution should only be permitted to introduce evidence of other crimes under the identity exception where the question of identity is in issue. Sometimes, for example, in sex crimes the victim and the accused are well-known to each other and there is not the slightest possibility of mistaken identity; the real issue in the case is whether the crime took place. To admit evidence of other crimes under the present exception in such a case is simply an evasion of the general rule that evidence of other crimes cannot be used to prove the conduct of the defendant through an inference as to his character.

22 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5246, 514-15 (1978) (footnotes omitted).

Rules of Evidence, 21 N.C. Cent. L.J. 1 (1995). The trial court should also be careful to articulate whether the evidence is admissible to establish common plan or scheme, as it appears, based on our review of the record and the parties' briefs, there was confusion on this matter below.

C. Sentencing

[3] Defendant raises several arguments with respect to his criminal sentence and the trial court's order requiring him to register as a sex offender and for SBM. We decline to address these arguments in detail. However, should Defendant's new trial result in conviction, we trust the trial court will ensure Defendant's rights are adequately protected during sentencing, *see*, *e.g.*, N.C. Gen. Stat. § 15A-1340.16(a6) (2009) (requiring 30-day written notice before trial of intent to seek a probation point); N.C. Gen. Stat. § 15A-1022.1 (2009) (providing sentencing hearing protections), and will review the pertinent SBM and sex offender registry case law, *see*, *e.g.*, *State v. Davison*, ––– N.C. App. –––, –––, 689 S.E.2d 510, 517 (2009) (holding that only the elements of a conviction may be considered as part of SBM analysis); *State v. Treadway*, ––– N.C. App. –––, –––, 702 S.E.2d 335, 348 (2010) (holding N.C. Gen. Stat. § 14-27.4(a)(1) is not an aggravated offense).

IV. Conclusion

Defendant is entitled to a new trial because it was plain error to admit expert testimony that Shirley had been sexually abused.

New Trial.

Judges McGEE and BEASLEY concur.

STATE OF NORTH CAROLINA v. GINA NICHELE SMITH

No. COA10-504

(Filed 15 March 2011)

1. Appeal and Error— preservation of issues—imposition of restitution—no objection required

Defendant did not fail to preserve for appellate review the issue of whether the State failed to present evidence to support the amounts of restitution ordered in an assault with a deadly weapon inflicting serious injury case. No objection was required to preserve for appellate review issues concerning the imposition of restitution.

2. Damages and Remedies— restitution—amount ordered unsupported by evidence—plain error

The trial court committed plain error in an assault with a deadly weapon inflicting serious injury case by ordering defendant to pay restitution because the State failed to present evidence to support the amounts of restitution ordered.

3. Probation and Parole— period based on improper factors—restitution

The trial court erred in an assault with a deadly weapon inflicting serious injury case by basing its decision to impose a longer period of probation than necessary upon consideration of the restitution to be paid and nature of the offense.

4. Assault— deadly weapon inflicting serious injury—peremptory instruction—serious injury—no error

The trial court did not commit error or plain error in an assault with a deadly weapon inflicting serious injury case by giving a peremptory instruction to the jury that multiple gunshot wounds in the upper body constituted a serious injury. The victim required emergency surgery, was left with scars on his chest, shoulder, back, and neck, and testified that a bullet remained in his neck and that it caused him continuing pain.

5. Assault— deadly weapon inflicting serious injury—lesser-included offense—peremptory instruction—no error

The trial court did not commit plain error in an assault with a deadly weapon inflicting serious injury case by failing to instruct the jury on the lesser-included offense of assault with a deadly

weapon. The trial court's peremptory instruction to the jury that the victim's injuries were serious was correct.

6. Constitutional Law— effective assistance of counsel—no different result

Defendant's trial counsel in an assault with a deadly weapon inflicting serious injury case did not provide ineffective assistance of counsel. Even assuming *arguendo* that defendant's counsel made errors at trial, there was no reasonable probability the result of the proceeding would have been different absent the alleged errors.

Appeal by Defendant from judgment entered 16 October 2009 by Judge Ripley E. Rand in Superior Court, Wake County. Heard in the Court of Appeals 26 October 2010.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra M. Hightower, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for Defendant.

McGEE, Judge.

Gina Nichele Smith (Defendant) was convicted by a jury of assault with a deadly weapon inflicting serious injury. Based on Defendant's prior record Level I, the trial court sentenced her to twenty-five months to thirty-nine months in prison. The trial court then suspended Defendant's sentence, placing her on forty-eight months of supervised probation.

The State's evidence at trial tended to show that Joe Nunn (Nunn) was driving his mother's car on the night of 20 July 2008. Nunn and a friend were driving around southeast Raleigh at approximately 11:30 p.m., when Nunn saw Defendant sitting in her front yard with two friends. Nunn stopped the car in front of Defendant's house, got out, and approached Defendant and her friends. Defendant told Nunn to leave; there was an altercation, and Nunn pushed Defendant to the ground. Defendant got up off the ground and went into her house. Nunn then left Defendant's house and dropped his friend off a few streets away. When he dropped off his friend, he remained to talk to a man called Lawrence. As they talked, Nunn remained in the car and Lawrence stood outside the car. Nunn heard gunshots behind him. However, he did not pay too much attention to the gunshots because the music playing in the car was loud. Then Lawrence said, "oh, s—"

and ran off. At that point, Nunn looked around and saw Defendant shooting at him from close range. Nunn was shot three times in his side and neck. Nunn apparently realized he had been shot, but because he had been drinking alcohol and smoking marijuana, his wounds did not hurt initially. Nunn drove off and returned to his mother's house, where he lived. Nunn testified about being shot:

> So when I [drove] off, I was like, damn, I'm f------ shot. When it didn't hurt, I'm thinking I'm about to die, you know what I'm saying, I don't know what's going on. So I get home, and I lay on the couch. I just lay there like five, ten minutes. I'm like damn. I got wheezy. I'm like, let me call my mom.

Nunn called his mother who was upstairs and she drove him to the hospital where he had emergency surgery. However, one bullet remained lodged in his neck. Nunn was released the next day. He testified that he was given pain medication at the hospital, but that he was not really in pain that night after the surgery. Nunn also testified that his neck still hurt where the bullet lodged. He showed the jury the scars on his neck and torso.

Detective Sean Hoolan (Detective Hoolan) of the Raleigh Police Department testified that he investigated the shooting and questioned Defendant while Nunn was in surgery because Nunn had made comments implicating Defendant. Detective Hoolan visited Nunn in the hospital the morning after the shooting. Detective Hoolan testified, without objection, that Nunn told him he had known Defendant for a long time, and that Nunn was certain it was Defendant who had shot him. Detective Hoolan said he interviewed others that day, including Alantrics Loftin (Loftin), whose recitation of events involving the actual shooting mostly corroborated Nunn's. Loftin stated she saw Defendant "get out of the car and pull a long silver gun from the center of her waist." [Tp 104] Loftin described the gun as longer in the barrel than the gun Detective Hoolan was carrying when he questioned her. Loftin said that "she heard [Defendant] say, [']M------------, I told you I'd shoot the s--- out of you,['] and [Defendant] fired three times when [Defendant] was next to [Nunn]." Loftin told Detective Hoolan she was "a hundred percent" certain it was Defendant who shot Nunn, as Loftin knew Defendant from high school.

Detective Hoolan also interviewed Rhonda Debnam (Debnam), who stated that she saw the shooting. Debnam said the gun used was "two or three inches longer than [Detective Hoolan's], and she thought it was silver." Debnam "remembered hearing . . . [']Naw,

m-------------------, do something now, m----------------,['] and [the woman] shot three times." Debnam did not know the shooter, but she gave Detective Hoolan a description that matched Defendant.

At trial, Loftin testified that she saw Defendant drive up to the car Nunn was in, jump out, and shoot Nunn three times. However, Debnam, in her testimony, gave a different account of events that night, stating she never witnessed a shooting. When asked if she remembered the contradictory statement she gave to Detective Hoolan, Debnam testified that she did not remember telling Detective Hoolan those things.

The jury was instructed on assault with a deadly weapon with intent to kill inflicting serious injury and the lesser-included offense of assault with a deadly weapon inflicting serious injury. The jury returned a verdict of guilty on the lesser offense. Defendant was sentenced to a presumptive range of twenty-five to thirty-nine months in prison, suspended, and an intermediate level sentence was entered. Pursuant to the intermediate sentence, Defendant was ordered to pay $3,422.00 in restitution and $2,550.00 in attorney's fees, and was given a suspended sentence of forty-eight months of supervised probation, including an active term of six months with recommended immediate work release. Defendant appeals. Additional relevant facts will be discussed in the body of the opinion.

I.

Defendant contends in her first argument that the trial court committed plain error in ordering her to pay restitution because the State failed to present evidence to support the amounts of restitution ordered. We agree.

[1] We first address the State's argument that this issue was not preserved for appellate review. The State cites *State v. Canady*, 153 N.C. App. 455, 570 S.E.2d 262 (2002), which states:

> However, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make[.]" N.C.R. App. P. 10(b)(1). Where a defendant fails to object to the judgment or the amount of restitution ordered at the sentencing hearing or to a trial court's order that a defendant make restitution, an appeal concerning the appropriateness of an imposition of restitution is not properly before this Court. *State v. Hughes*, 136 N.C. App. 92,

> 97-98, 524 S.E.2d 63, 66 (1999), *disc. review denied*, 351 N.C. 644, 543 S.E.2d 878 (2000).

Id. at 460, 570 S.E.2d at 266, *see also State v. Best*, 196 N.C. App. 220, 232, 674 S.E.2d 467, 476 (2009). The State also states that contrary authority has been published by this Court.

> At the sentencing hearing, defendant failed to object to the order of restitution. However, it is well established that a restitution order may be reviewed on appeal despite no objection to its entry. *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004); *see also* N.C. Gen. Stat. § 15A-1446(d)(18) (2009).

State v. Davis, ––– N.C. App. –––, –––, 696 S.E.2d 917, 921 (2010).

Our Supreme Court recently resolved this issue, stating that N.C. Gen. Stat. § 15A-1446(d)(18) (2009), relied upon by *Davis*, is not in conflict with N.C.R. App. P. 10(a)(1), and therefore no objection is required to preserve for appellate review issues concerning the imposition of restitution. *State v. Mumford*, 364 N.C. 394, 402-03, 699 S.E.2d 911, 917 (2010).[1] We therefore address Defendant's argument.

[2] "[T]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995) (citation omitted). Unsworn statements made by the State are insufficient to support a restitution amount. *Id.* at 727, 459 S.E.2d at 196 (citation omitted). "This Court has held . . . that a restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution." *State v. Mauer*, ––– N.C. App. –––, –––, 688 S.E.2d 774, 778 (2010) (citation omitted).

We first address the trial court's order requiring Defendant to pay $385.00 in restitution for fees related to her house arrest. After the trial court had pronounced its sentence ordering Defendant to pay restitution for hospital bills in the amount of $3,037.00, plus $2,550.00 in court appointed attorney's fees, the State interjected the following:

> [THE STATE]: Judge, one thing. A representative from house arrest is here. Apparently there was $385.00 in house arrest fees, and I can add that information to the restitution work sheet.

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1. We note that our Supreme Court did not reference any Court of Appeals cases in *Mumford*, or acknowledge the split in authority in our Court. The holding in *Mumford*, however, makes clear that the *Davis* line of cases applies the correct law on this issue. *Mumford* appears to have overruled the *Canady* line of cases, though *Mumford* does not expressly do so.

THE COURT: With respect to the money owed for $385.00 [house arrest] fees, it is also ordered.

This was the first time the State had brought up the issue of house arrest fees and was the sole pronouncement from the State on the matter. Though there was apparently a representative at the sentencing hearing who could have presented some evidence in support of the amount of $385.00 for house arrest fees, the State did not call that person as a witness. The State presented nothing beyond its own unsworn statement to support this amount. We therefore vacate the trial court's order of $385.00 in house arrest fees and remand for rehearing on the issue. *Mauer*, ––– N.C. App. at –––, 688 S.E.2d at 778.

We next address Defendant's argument that the State failed to present sufficient evidence in support of the award of $3,037.00 in restitution for Nunn's hospital expenses. At the sentencing hearing, the State made the following statement: "There are some substantial medical bills in the case. The only amount we have, we have from Mr. [N]unn's confirmation was around $3,000 when we talked to him about it yesterday." The State then presented the restitution worksheet and indicated that further information concerning the medical bills could be obtained from Nunn or the hospital. The worksheet provided the addresses for both Nunn and the hospital. The trial court asked Defendant's attorney if he wanted to ask Defendant "about the amount of the restitution being $3,037[,]" to which Defendant's attorney answered: "NO." The State indicated that "[f]rom a review of the medical records and my experience I would . . . imagine that the actual amount of money that [Nunn] or Wake Med is out for his treatment is substantially more than that. I would venture a guess in the probably $20,000 range, but I don't have documentation."

Nunn was not at the sentencing hearing and did not testify concerning the amount of his hospital bills. As far as we can tell from the record, no documentation concerning the amount of Nunn's hospital bills was entered into evidence, and all the trial court had to rely on in coming up with the $3,037.00 amount was the unsworn testimony of the prosecutor and the restitution worksheet prepared by the State. Neither of these is competent evidence to support the award of restitution in the amount of $3,037.00. *Wilson*, 340 N.C. at 727, 459 S.E.2d at 196; *Mauer*, ––– N.C. App. at –––, 688 S.E.2d at 778. We do not consider Defendant's silence or lack of objection to the restitution amount to constitute a "definite and certain" stipulation as required

by North Carolina law. *Mumford*, 364 N.C. at 403, 699 S.E.2d at 917 ("Issues at a sentencing hearing may be established by stipulation of counsel if that stipulation is 'definite and certain.' ") (citations and quotation marks omitted). We therefore vacate the trial court's order of $3,037.00 in restitution for hospital expenses and remand for rehearing on the issue. *Mauer*, ––– N.C. App. at –––, 688 S.E.2d at 778.

II.

[3] In Defendant's second argument she contends that the trial court erred in basing its decision to impose a longer period of probation than necessary upon consideration of improper factors. We agree.

Defendant argues that the trial court erred in requiring forty-eight months of supervised probation pursuant to N.C. Gen. Stat. 15A-1343.2(d) (2009) based upon the restitution to be paid and nature of the offense. Defendant first argues that the trial court's "consideration of the amount of restitution . . . was improper because . . . the State presented no evidence to support [the amount of] restitution[.]" Having determined that the State failed to present sufficient evidence in support of the amounts of restitution ordered for house arrest fees and hospital expenses, we must remand on this issue as well. The trial court shall reconsider the length of Defendant's probationary period in light of new evidence concerning the amount of restitution, if any, presented on rehearing.

III.

[4] Defendant contends that the trial court committed plain error "when it peremptorily instructed the jury that 'multiple gunshot wounds in the upper body would constitute a serious injury.' " We disagree.

We will find plain error 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 the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' or where it can fairly be said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.' "

State v. Murray, 310 N.C. 541, 546, 313 S.E.2d 523, 527-28 (1984) (citations omitted), *overruled on other grounds by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988).

> A trial court may peremptorily instruct the jury on the serious injury element if "the evidence 'is not conflicting and is such that reasonable minds could not differ as to the serious nature of the injuries inflicted.' " In *Hedgepeth*, the victim was shot through the ear, causing a wound requiring six or seven stitches to close. She bled profusely, suffered a bruise and burns, and required emergency medical treatment. At the time of trial, she still suffered a ringing in her ear. This Court determined, based on that evidence, that "reasonable minds could not differ as to the seriousness" of the physical injuries.
>
> In this case, evidence showed that the bullet entered Woodbury's leg from the side into the top part of his calf and exited out of the bottom of the calf muscle. His leg went numb and then began burning and throbbing. Woodbury needed assistance to leave the building and was taken to the hospital for treatment. Based on this evidence, we decline to disturb the trial court's determination that Woodbury's injury was "serious" within the meaning of N.C. Gen. Stat. § 14-32(a) and that reasonable minds could not differ as to the seriousness of his injuries. Thus, the trial court was not required to submit the lesser-included offense of assault with a deadly weapon to the jury.

State v. Crisp, 126 N.C. App. 30, 37, 483 S.E.2d 462, 466-67 (1997) (internal citations omitted).

In the present case, Nunn required emergency surgery, was left with scars on his chest, shoulder, back and neck, and testified that a bullet remained in his neck and that it caused him continuing pain. We hold it was not error, and certainly not plain error, for the trial court to peremptorily instruct the jury that the three gunshot wounds Nunn received to his neck and torso constituted a serious injury as contemplated by N.C. Gen. Stat. § 14-32 (2009). This argument is without merit.

IV.

[5] Defendant also contends the trial court committed plain error when it failed to instruct the jury on the lesser-included offense of assault with a deadly weapon. We disagree.

Defendant contends that the trial court should have instructed on the lesser-included offense, even though Defendant never requested the instruction, because "the evidence supported a finding that [Nunn's] injuries were not serious. Having already held that the trial court did not err in peremptorily instructing the jury that Nunn's injuries were serious, we further hold that the trial court did not err, much less commit plain error, in failing *sua sponte* to instruct the jury on the lesser-included offense of assault with a deadly weapon. *Crisp*, 126 N.C. App. at 37, 483 S.E.2d at 466-67. This argument is without merit.

V.

[6] In Defendant's final argument, she contends her trial counsel provided her ineffective assistance of counsel. We disagree.

"[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." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985). We have thoroughly reviewed the record, and even assuming *arguendo* that Defendant's counsel made errors at trial, there is no reasonable probability the result of the proceeding would have been different absent the alleged errors. *Id.* We do not factor into our analysis any potential errors related to Defendant's arguments concerning restitution, as we have granted Defendant a rehearing on those issues. This argument is without merit.

No error in part, vacated and remanded in part.

Judges HUNTER, JR. and BEASLEY concur.

STATE OF NORTH CAROLINA v. PEDRO JOSE MANUAL LUGO SANTOS

No. COA10-668

(Filed 15 March 2011)

1. Criminal Law— guilty plea—withdrawing—procedure

Whether a guilty plea was made knowingly and voluntarily was considered because of the length of defendant's sentences, even though he did not move to withdraw his plea and did not seek a writ of *certiorari*.

2. Criminal Law— guilty plea—knowing and voluntary

Defendant's guilty plea was knowing and voluntary based on a review of the record, despite defendant's argument that he did not have the time he needed to reflect on his decision.

3. Satellite-based monitoring— aggravated offense—first-degree sexual offense

The trial court erred by finding that a first-degree sexual offense was an aggravated offense for purposes of ordering lifetime satellite-based monitoring. First-degree sexual offense pursuant to N.C.G.S. § 14-27.4(a)(1) requires that the victim be under the age of 13, while an aggravated offense under N.C.G.S. § 14-208.6(1a) requires that the child be less than 12 years old.

Appeal by defendant from judgments entered 12 September 2008 by Judge Richard T. Brown in Hoke County Superior Court. Heard in the Court of Appeals 11 January 2011.

Attorney General Roy Cooper, by Assistant Attorney General Yvonne B. Ricci, for the State.

Paul Y. K. Castle for defendant-appellant.

BRYANT, Judge.

Where the record reveals that defendant's guilty plea was knowing and voluntary, the trial court does not err in accepting the plea. However, where a trial court's determination that a defendant's eligibility for lifetime satellite-based monitoring under N.C.G.S. § 14-208.40A relies on the underlying facts giving rise to a conviction rather than on the elements of the offense, it errs and the order must be vacated.

Facts

Defendant Pedro Jose Manual Lugo Santos[1] was born in the Dominican Republic, but has lived in the United States since the age of six. He was born prematurely and suffered from learning disabilities requiring special education classes. At the time of his arrest, he was employed as a janitor. A psychological evaluation conducted after his arrest revealed mild depression and anxiety despite his medication. Testing revealed that defendant was functionally illiterate and showed symptoms of mild mental retardation. The psychologist concluded that he was competent to proceed with trial under certain conditions. Specifically, she concluded that he needed "extra time allowed for legal matters that require a decision on his part." Further, she noted that he might say he understood things when he did not and that additional careful questioning would be needed to assess his true comprehension. After his arrest, defendant was transferred to Central Prison because of "serious depression and psychotic symptoms, [and] auditory hallucinations." He was discharged back to the Hoke County Jail in August 2007 and was stable and showed no psychotic symptoms at that time.

On 14 January 2008, the grand jury returned indictments against defendant for one count of first-degree statutory sexual offense, sixteen counts of taking indecent liberties with children, and one count of crime against nature. Pursuant to a plea agreement, defendant pled guilty to all charges at the 12 September 2008 criminal session of Hoke County Superior Court. Because the offenses occurred over the course of several years, the trial court entered two judgments. The first judgment, sentencing defendant under the Fair Sentencing Act for one count of first-degree sexual offense, three counts of taking indecent liberties with children, and one count of crimes against nature, all with offense dates between 1988-1993, consolidated the convictions and imposed a sentence of life imprisonment. The trial court found the first-degree sexual offense for which defendant was convicted (N.C. Gen. Stat. § 14-27.4(a)(1)) to be an aggravated offense, and therefore, ordered that defendant, upon release from prison, be enrolled in a satellite-based monitoring program for life. The trial court sentenced defendant for the remaining offenses, with offense dates between 2004 and 2006, under the Structured Sentencing Act. The trial court consolidated two of the

1. The record contains a number of different names and spellings for defendant, including Emmanuel Jose Lupo Santos. However, pursuant to court practice we use the above name and spelling listed on the Judgment from which appeal is taken.

indecent liberties charges and sentenced defendant to sixteen to twenty months in prison. The trial court sentenced defendant to sixteen to twenty months for each of the remaining indecent liberties offenses. The trial court specified that the Structured Sentencing Act sentences were to run consecutive to each other and concurrently with defendant's life sentence under the Fair Sentencing Act. Defendant appeals.

On appeal, defendant argues the trial court committed reversible error in (I) accepting his guilty plea when it was not knowing and voluntary and (II) finding that first-degree sexual offense is an aggravated offense for purposes of ordering lifetime satellite-based monitoring.

I

[1] Defendant first argues that his guilty plea was not made voluntarily and knowingly. We disagree.

"A defendant's right to appeal a conviction is 'purely statutory.' " *State v. Corbett*, 191 N.C. App. 1, 3, 661 S.E.2d 759, 761 (quoting *State v. Shoff*, 118 N.C. App. 724, 725, 456 S.E.2d 875, 876 (1995), *affirmed per curiam*, 342 N.C. 638, 466 S.E.2d 277 (1996)), *affirmed per curiam*, 362 N.C. 672, 669 S.E.2d 323 (2008). " '[A] defendant who has entered a plea of guilty is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea.' " *Id.* (quoting *State v. Pimental*, 153 N.C. App. 69, 73, 568 S.E.2d 867, 870, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002)). Thus, a defendant does not have an appeal as a matter of right to challenge the trial court's acceptance of his guilty plea as knowing and voluntary absent a denial of a motion to withdraw that plea. *See* N.C. Gen. Stat. § 15A-1444(e) (2009).

Here, defendant did not move the trial court to withdraw his plea, and thus, is not entitled to an appeal of right regarding his plea. Nor has defendant sought a writ of certiorari as permitted under § 15A-1444(e). However, given defendant's lengthy sentences, we elect to treat his brief as a petition for writ of certiorari and address his contentions.

[2] "A plea of guilty involves the waiver of several fundamental rights, including freedom from self-incrimination and the right to a trial by jury. It is therefore imperative that guilty pleas represent a voluntary,

informed choice." *State v. Atkins*, 349 N.C. 62, 97, 505 S.E.2d 97, 119 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). Section 15A-1022(a) requires that a trial court may not accept a guilty plea from a defendant without:

> (1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
>
> (2) Determining that he understands the nature of the charge;
>
> (3) Informing him that he has a right to plead not guilty;
>
> (4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;
>
> (5) Determining that the defendant, if represented by counsel, is satisfied with his representation;
>
> (6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge; and
>
> (7) Informing him that if he is not a citizen of the United States of America, a plea of guilty or no contest may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.

N.C. Gen. Stat. § 15A-1022(a) (2009). However, our State's courts have refused "to adopt a technical, ritualistic approach" in assessing the voluntariness of guilty pleas. *State v. Richardson*, 61 N.C. App. 284, 289, 300 S.E.2d 826, 829 (1983). Thus, the omission of this inquiry has been held to be harmless error if the record demonstrates that the defendant's plea was knowingly and voluntarily entered. *Id.*

In *Richardson*, for example, our Court found the defendants' guilty pleas voluntary, even though the trial court did not inform them of the mandatory minimum sentences they faced. *Id.* Instead, the Court held the pleas were voluntarily and intelligently given because "the trial judge questioned each defendant regarding the voluntariness of their pleas, and each stated their plea was given voluntarily. . . . and the trial judge's failure to comply strictly [with] N.C. Gen. Stat. § 15A-1022(a)(6) was not prejudicial error." *Id.*

Defendant contends that his guilty plea was not knowing and voluntary because it was the result of unreasonable and excessive

pressure by the State and the trial court. Specifically, he asserts that the trial court pressured him to accept the plea during a fifteen minute recess, denying him the time he needed to reflect on this important decision. We disagree and conclude that defendant's plea was knowing and voluntary.

At the beginning of proceedings on 12 September 2008, defendant's counsel informed the trial court and the State that defendant had decided to reject the plea offer. The trial court had the State recite the terms of the plea offer. The transcript reveals that the State had apparently made the plea offer some days before the in-court proceedings; defense counsel stated that a "[p]lea offer was extended from the State. . . . There's been communications back and forth." The trial court told the defendant to listen carefully and after the recitation, the trial court asked defendant if he understood the offer; defendant stated that he did. The trial court then recessed for fifteen minutes, requesting that defense counsel "let me know where everything stands" when court reconvened. When the trial court reconvened, defense counsel stated that defendant wanted to accept the plea offer. The trial court then went through a detailed colloquy, covering all of the points required by § 15A-1022(a) and going beyond its mandate. In addition to informing him of the maximum sentence to which he was exposed under the offenses, the court specifically asked defendant if he understood his plea arrangement, that he would receive a life sentence under Fair Sentencing and a concurrent sentence for the structured sentencing offenses, and whether defendant freely and voluntarily entered into the plea agreement of his own free will, and that he understood what he was doing. Defendant responded *yes* to these questions. The trial court also reviewed the evaluation of the psychologist who had examined defendant and noted that defendant needed simple explanations and repetition to comprehend the proceedings, and the trial court once again asked defendant if he had been able to understand all of the questions asked by the trial court, to which defendant responded, "yes sir." Based on our review of the record before us, we conclude that defendant's plea was knowing and voluntary.

II

[3] Defendant next argues that the trial court erred in finding that first-degree sexual offense is an aggravated offense pursuant to N.C. Gen. Stat. § 14-208.6(1a) for purposes of ordering lifetime satellite-based monitoring ("SBM"). We agree.

As the State concedes, we have already resolved this issue and agreed with the defendant in *State v. Davison*, ––– N.C. App.–––, 689 S.E.2d 510 (2009), *disc. review denied*, ––– N.C. –––, ––– S.E.2d ––– (2010). In that case, we held that "when making a determination pursuant to N.C.G.S. § 14-208.40A, 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." ––– N.C. App. at –––, 689 S.E.2d at 517. Determination of a defendant's eligibility for SBM is controlled by N.C.G.S. § 14-208.40A, which provides, in pertinent part:

> (a) When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), during the sentencing phase, the district attorney shall present to the court any evidence that (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an *aggravated offense*, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor.

N.C. Gen. Stat. § 14-208.40A(a) (2009) (emphasis added).

Under N.C. Gen. Stat. § 14-208.6(1a), an "aggravated offense" is defined as:

> any criminal offense that includes either of the following: (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.G.S. § 14-208.6(1a) (2009). Our Court in *Davison* held that "[w]hen the language of a statute is clear and without ambiguity, it is the duty of [our Courts] to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Davison*, ––– N.C. App. at –––, 689 S.E.2d at 515 (quoting *State v. Abshire*, 363 N.C. 322, 329-30, 677 S.E.2d 444, 450 (2009)).

> Reviewing the plain language of the statute, it is clear that an 'aggravated offense' is an offense including: first, a sexual act involving vaginal, anal or oral penetration; and second, either (1) that the victim is less than twelve years old or (2) the use of force or the threat of serious violence against a victim of any age.

Id.

N.C. Gen. Stat. § 14-27.4 states that:

> (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; or (2) With another person by force and against the will of the other person, and: a. Employs or displays a dangerous or deadly weapon . . . or b. Inflicts serious personal injury upon the victim or another person; or c. The person commits the offense aided and abetted by one or more other persons.

N.C.G.S. § 14-27.4 (2009). From our review of the plain language of the statutes at issue, we conclude that the trial court erred when it determined that first-degree sexual offense was an aggravated offense. First-degree sexual offense pursuant to N.C.G.S. § 14-27.4(a)(1) requires that the child victim be "under the age of 13," while an aggravated offense requires that the child be "less than 12 years old." *See* N.C.G.S. § 14-27.4(a)(1) and N.C.G.S. § 14-208.6(1a) (2009). "Clearly, [because] a child under the age of 13 is not necessarily also a child less than 12 years old. . . . 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." *State v. Treadway*, ––– N.C. App. –––, –––, 702 S.E.2d 335, 348 (2010) (citation omitted).

> In other words, without a review of "the underlying factual scenario giving rise to the conviction," which is prohibited under *Davison*, a trial court could not know whether an offender was convicted under [N.C.G.S. § 14-27.4(a)(1) because he committed a sexual act with a child victim under the age of 13 or under the age of 12.]

State v. Phillips, ––– N.C. App. –––, –––, 691 S.E.2d 104, 107 (2010) (internal citation omitted).

Therefore, the trial court erred in finding that defendant's first-degree sexual offense conviction was an aggravated offense as defined under N.C.G.S. 14-208.6(1a) because, "when considering the elements of the offense *only* and not the underlying factual scenario giving rise to this defendant's conviction, the elements of [first-degree sexual offense pursuant to N.C.G.S. § 27.4(a)(1)] do not 'fit within' the statutory definition of 'aggravated offense.' " *Id.* at –––, 691 S.E.2d at 108 (citation omitted). Accordingly, we vacate the trial court's

order finding defendant's conviction for first degree sexual offense pursuant to N.C.G.S. § 14-27.4(a)(1) to be an aggravated offense and requiring defendant to enroll in a satellite-based monitoring program for life. Further, because the trial court made no determination as to the other statutory factors that might compel defendant's enrollment in satellite-based monitoring for life, we remand for consideration of defendant's eligibility for satellite-based monitoring pursuant to any of the other categories described in N.C.G.S. § 14-208.40A.[2]

No error in part; sentence vacated in part; remanded in part.

Judges McGEE and BEASLEY concur.

SANDRA D. BOYD, Plaintiff v. ALTA D. SANDLING, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF JAMES ALFRED SANDLING, JR., SDLG HOLDINGS, INC. D/B/A SANDLING FUNERAL HOME, INC., Defendants

No. COA10-590

(Filed 15 March 2011)

Negligence— personal injury—sufficiency of service of process—statute of limitations

The trial court erred by dismissing plaintiff's complaint for personal injury arising out of an automobile accident based on alleged insufficient process, and the case was remanded for further proceedings. Defendant was properly served, both individually and as executrix of an estate, within the time prescribed by N.C.G.S. § 1A-1, Rule 4. Further, plaintiff brought her suit before the expiration of either the statute of limitations under N.C.G.S. § 1-52(16) for personal injury due to negligence or the time limit set by the non-claim statute under N.C.G.S. § 28A-19-3(f).

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2. We note defendant's assignments of error and arguments on appeal only challenge satellite-based monitoring as to first degree sexual offense. We also note that the printed record contains several judgments imposing satellite-based monitoring with respect to indecent liberties upon finding that the offense was an aggravated offense under N.C. Gen. Stat. § 14-208.6(1a). We further note that our courts have held that indecent liberties is not an aggravated offense, and thus not subject to lifetime satellite-based monitoring. *Davison*, ––– N.C. App. at –––, 689 S.E.2d at 515. However, as these judgments were not assigned as error nor argued as such, they are taken as abandoned, and we will not review them on appeal. N.C. R. App. P. 28(b)(6) (2009).

BOYD v. SANDLING

[210 N.C. App. 455 (2011)]

Appeal by plaintiff from order entered 12 February 2010 by Judge Orlando F. Hudson, Jr., in Vance County Superior Court. Heard in the Court of Appeals 17 November 2010.

Arlene L. Velasquez-Colon for plaintiff.

Haywood, Denny & Miller, L.L.P., by Robert E. Levin, for defendants.

ELMORE, Judge.

Sandra D. Boyd (plaintiff) appeals an order dismissing her claim against Alta D. Sandling (defendant), executrix of the Estate of James A. Sandling, Jr. (Sandling Estate). After careful consideration, we reverse the order below.

On 3 April 2009, plaintiff filed a complaint against defendant, "individually, and as executrix of the Estate of James Alfred Sandling, Jr.," and SDLG Holdings, Inc., d/b/a Sandling Funeral Home, Inc. According to the complaint, on 5 April 2006, plaintiff was the passenger in a vehicle driven by Danielle McDougal Lemay while Lemay drove south on Capital Boulevard in Franklinton. James Sandling was driving east on RP 1127 and failed to stop at the road's intersection with Capital Boulevard. Sandling entered the intersection, crossing Lemay's path southward. Lemay's vehicle collided with Sandling's. Sandling died as a result of the collision, and plaintiff was seriously injured. Plaintiff alleged that Sandling's negligence in driving his vehicle was the proximate cause of her injuries. She also alleged that defendant was the owner of the vehicle that caused her injuries.

On 20 April 2006, defendant became the executrix of the Sandling Estate. On 29 January 2007, plaintiff's attorney sent a letter to defendant via certified mail. The letter was addressed to "Alta D. Sandling[,] Executrix for the Estate of James L. Sandling, Jr." In relevant part, the letter stated:

> Please be advised that I am representing [plaintiff] Sandra Boyd, a passenger in a motor vehicle accident that occurred on April 5, 2006[,] involving your husband. Ms. Boyd sustained serious physical injuries during this accident.
>
> This letter serves as a notice to you in your official capacity as the executrix of your late husband's estate concerning Ms. Boyd's forthcoming claim against the Estate of James A. Sandling, Jr. Currently, the amount of that claim is not yet known. Please forward a copy of this letter to Mr. Sandling's insurance company.

Plaintiff also sent copies of the Franklin County Clerk of Court and defendant's counsel, Currin & Dutra, LLP.

On 22 August 2008, defendant submitted an affidavit of notice to creditors to the Franklin County Clerk of Court. The form includes two options, and defendant checked the second option, which "should be checked only in cases where the decedent had no outstanding debts, or the personal representative has paid in full all known debts." The second option states: "No copy of the Notice to Creditors required by G.S. 28A-14-1 was mailed or personally delivered because, after making a reasonable effort within the time provided by law, I am satisfied that there are no persons, firms or corporations having unsatisfied claims against the decedent." On 8 October 2008, defendant filed a final account of the Sandling Estate. Defendant was discharged from her duty as executrix, and the estate was closed.

On 3 April 2009, plaintiff filed her complaint. On the same day, a summons was issued to "Alta D. Sandling, Individually and as Executrix of the Estate of James Alfred Sandling, Jr.," at her address in Youngsville. On 14 May 2009, plaintiff submitted an affidavit of service by certified mail, stating that "Alta D. Sandling" had been served a copy of the summons and complaint. Plaintiff included a photocopy of the return receipt, which includes defendant's signature and is dated 17 April 2009.

On 11 June 2009, defendant, as executrix of the Sandling Estate, filed a response to plaintiff's complaint. Defendant moved to dismiss plaintiff's complaint for failure to state a claim, alleging that, because she had been discharged as executrix, she could not be a proper party to the suit as a matter of law. She also alleged that the complaint should be dismissed for insufficiency of process and insufficiency of service of process. On the same day, defendant, individually, answered plaintiff's complaint and moved to dismiss it for failure to state a claim.

On plaintiff's motion, the Franklin County Clerk reopened the Sandling Estate on 30 December 2009 *nunc pro tunc* 8 October 2008. Specifically, the Clerk's order decreed:

> [T]he Estate of James A. Sandling, Jr[.,] shall be reopened, Alta D. Sandling shall continue to serve as the Executrix of the Estate of James A. Sandling, Jr., and Sandra D. Boyd's claims against the Estate of James A. Sandling, Jr.[,] shall be limited to any automobile insurance policies in effect at the time of the

> April 5, 2006[,] automobile accident involving James A. Sandling, Jr.[1]

In her order, the Clerk concluded that "[n]otice was given by Sandra Boyd's attorney to Executrix Alta D. Sandling and her representative concerning Sandra D. Boyd's forthcoming claim," and "Executrix Alta D. Sandling did not mail a personal notice to known creditor, Sandra D. Boyd."

After a hearing, the trial court entered an order granting the motion to dismiss "filed by the Defendant, Alta D. Sandling, named as Executrix of the Estate of James Alfred Sandling, Jr.[,] pursuant to Rules of Civil Procedure, 12(b)(2), 12(b)(4), 12(b)(5), 12(b)(6) and due to the expiration of the applicable statutes of limitation." Plaintiff now appeals from that order.

Plaintiff argues that the trial court erred by granting defendant's motion to dismiss. We agree.

> We review a trial court's decision to dismiss an action based on the statute of limitations *de novo*. Ordinarily, a dismissal predicated upon the statute of limitations is a mixed question of law and fact. But where the relevant facts are not in dispute, all that remains is the question of limitations which is a matter of law. The statute of limitations having been pled, the burden is on the plaintiff to show that his cause of action accrued within the limitations period.

Reece v. Smith, 188 N.C. App. 605, 607, 655 S.E.2d 911, 913 (2008) (quotations and citations omitted).

According to the hearing transcript, the trial court dismissed plaintiff's complaint because process was insufficient. Plaintiff's appeal raises several other interrelated procedural questions, which we address as they arise in our analysis.

Rule 4 of our Rules of Civil Procedure requires that, after a complaint is filed, a summons be issued within five days. N.C. Gen. Stat. § 1A-1, Rule 4(a) (2009). The summons "shall be directed to the defendant or defendants and shall notify each defendant to appear and to answer[.]" *Id.*, Rule 4(b). "All actions . . . brought . . . against personal representatives . . . upon any cause of action or right to which the estate of the decedent is the real party in interest, must be

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1. We express no opinion as to the propriety of this order, and its inclusion herein should not be construed as an endorsement.

brought against them in their representative capacity." N.C. Gen. Stat. § 28A-18-3 (2009). If the complaint and the caption of the summons set out the appropriate defendant, "any confusion arising from . . . ambiguity in the directory paragraph of the summons [is] eliminated[.]" *Storey v. Hailey*, 114 N.C. App. 173, 178, 441 S.E.2d 602, 605 (1994); *see also Hazelwood v. Bailey*, 339 N.C. 578, 586, 453 S.E.2d 522, 526 (1995) (discussing several cases in which service was not defective even though the person to whom the summons was directed and the person named in the summons caption and complaint were not identical).

The personal representative of an estate is a natural person. *Storey*, 114 N.C. App. at 179, 441 S.E.2d at 606. Service upon a natural person may be made by "certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee." N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)c (2009). "Personal service . . . must be made within 60 days after the date of the issuance of summons. When a summons has been served upon every party named in the summons, it shall be returned immediately to the clerk who issued it, with notation thereon of its service." *Id.*, Rule 4(c). "When there is neither endorsement by the clerk nor issuance of alias or pluries summons within [60 days], the action is discontinued as to any defendant not theretofore served with summons within the time allowed." *Id.*, Rule 4(e).

Here, plaintiff filed her complaint on 3 April 2009, and, on the same day, a summons was issued to defendant. Under "Name Of Defendant(s)" on the summons form, the summons lists "SDLG Holdings, Inc. D/B/A Sandling Funeral Home, Inc.,"[2] and "Alta D. Sandling, Individually and as Executrix of the Estate of James Alfred Sandling, Jr." Under "To Each of the Defendant(s) Named Below" and "Name And Address Of Defendant 2" on the summons form, the summons lists "Alta D. Sandling" and her address in Youngsville. The caption of the complaint names plaintiff in her individual capacity and her capacity as executrix of the Sandling Estate. The record includes an affidavit of service filed by plaintiff's counsel, which states

> [t]hat a copy of the Summons and Complaint filed in this action were deposited in the United States Mail by certified mail, return receipt requested, to the Defendant, Alta D. Sandling, to her last known address; that the Summons and Complaint were

2. It appears from the record that SDLG Holdings, Inc., was not served, and plaintiff indicates in her brief that she dismissed her complaint against SDLG Holdings, Inc.

> in fact received as evidenced by the signed return receipt attached hereto and incorporated herein by reference.

Defendant argues that the affidavit of service proves that the summons was only issued to Alta D. Sandling in her individual capacity, but we can find no authority for the proposition that the affidavit of service trumps the summons in this respect. It appears clear from the record before this Court that defendant was properly served, both individually[3] and as executrix of the Sandling Estate, within the time prescribed by Rule 4.

We turn next to the time limits imposed by the nonclaim statute and the statute of limitations. "In North Carolina, when a claim is brought against a decedent, there are two statutory mechanisms that limit the time in which a claimant can bring the suit against the decedent's estate: (1) the non-claim statute (section 28A-19-3) and (2) the applicable statute of limitations." *Azalea Garden Bd. & Care, Inc. v. Vanhoy*, 196 N.C. App. 376, 386, 675 S.E.2d 122, 129 (2009). "A cause of action may be barred by either or both of these statutes." *Ragan v. Hill*, 337 N.C. 667, 671, 447 S.E.2d 371, 374 (1994). The nonclaim statute

> serves a different purpose and operates independently of the statute of limitations that may also be applicable to a given claim. Section 28A-19-3 is a part of Chapter 28A, . . . [which was] enacted . . . to provide faster and less costly procedures for administering estates. The time limitations prescribed by this section allow the personal representative to identify all claims to be made against the assets of the estate early on in the process of administering the estate. The statute also promotes the early and final resolution of claims by barring those not presented within the identified period of time.

Id. Subsection 28A-19-3(a) applies to claims that arose against a decedent's estate before his death; with exceptions not applicable here, the statute requires such claims to be filed within ninety days of the date that either general notice to creditors is published or individual notices are sent to creditors. N.C. Gen. Stat. § 28A-19-3(a) (2009). If a claim is not brought within the prescribed time period,

3. Plaintiff also asserts that the 12 February 2010 order dismissed her claim against defendant, individually, as well as her claim against the Sandling Estate. To allay plaintiff's fear, we note that the order only dismissed plaintiff's claim against defendant as the executrix of the Sandling Estate. The order had no effect on plaintiff's claim against defendant, individually. Defendant openly agrees.

the claim is barred. *Id.* However, when, as here, neither individual notices nor general notice were issued to creditors, claims otherwise "barrable" under subsection (a) are barred "three years after the death of the decedent." *See* N.C. Gen. Stat. § 28A-19-3(f) (2009) ("All claims barrable under the provisions of subsections (a) and (b) hereof shall, in any event, be barred if the first publication or posting of the general notice to creditors as provided for in G.S. 28A-14-1 does not occur within three years after the death of the decedent.").

The non-claim statute also addresses the intersection of statutes of limitation and the non-claim statute: "Except as otherwise provided by subsection (f) of this section, no claim shall be barred by the statute of limitations which was not barred thereby at the time of the decedent's death, if the claim is presented within the period provided by subsection (a) hereof." N.C. Gen. Stat. § 28A-19-3(c) (2009).

"The statute of limitations for personal injury due to negligence is three years." *Latham v. Cherry*, 111 N.C. App. 871, 873, 433 S.E.2d 478, 480 (1993) (citing N.C. Gen. Stat. § 1-52(16)). Personal injury claims accrue when the "bodily harm to the claimant . . . becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." N.C. Gen. Stat. § 1-52(16) (2009). Here, the bodily harm to plaintiff became apparent on the day of the car accident, 5 April 2006, which was also the day that James Sandling died. Accordingly, both the three-year statute of limitations and the three-year time limit set by § 28A-19-3(f) began to run on 5 April 2006, and both time limits expired on 5 April 2009.

Plaintiff brought her suit on 3 April 2009, before the expiration of either the statute of limitations or the time limit set by the non-claim statute. She named the estate's personal representative as a defendant, as required by statute. *See* N.C. Gen. Stat. § 28A-18-3 (2009). The estate was closed at the time plaintiff brought her suit, but the executor of a closed estate may, in some circumstances, still be a proper defendant in a lawsuit. *See In re Miles*, 262 N.C. 647, 652, 138 S.E.2d 487, 491 (1964) ("[A]n order of discharge made by the probate court on a final accounting by an executor cannot do more in any event than discharge the executor from liability for the past. *It does not destroy the executorship* . . . . We do not believe the right of [the] petitioner can be defeated merely because the administratrix c. t. a. of the estate of Miles has filed her so-called final account and been discharged, when . . . [the] petitioner . . . commenced the action to recover damages for wrongful death *within the statutory period*.")

(emphases added; quotations and citations omitted). Neither defendant nor the trial court have offered any other support for the dismissal of plaintiff's case, nor is any apparent to us.

Accordingly, we reverse the order dismissing plaintiff's complaint and remand to the trial court for further proceedings.

Reversed.

Judges HUNTER, Robert C., and CALABRIA concur.

PAULA MAY TOWNSEND, PLAINTIFF v. MARK WILLIAM SHOOK, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF OF WATAUGA COUNTY; AND WESTERN SURETY COMPANY; DEFENDANTS

No. COA10-383

Filed 15 March 2011)

1. **Appeal and Error— interlocutory orders and appeals—prior action pending—compulsory counterclaim—immediately appealable**

   Defendants' appeal from the trial court's interlocutory order denying their motion to dismiss in a wrongful termination case was considered by the Court of Appeals. The refusal to abate an action on grounds of a prior action pending and the denial of a motion to dismiss pursuant to Rule 13(a) relating to compulsory counterclaims were immediately appealable.

2. **Employer and Employee— wrongful termination—prior action pending doctrine—not applicable**

   The trial court did not err in a wrongful termination case by denying defendants' motions to dismiss. The prior action pending doctrine was not applicable to this case because the parties, legal issues, and subject matter were not substantially similar to those raised in defendant's pending prior lawsuit.

3. **Employer and Employee— wrongful termination—no compulsory counterclaim**

   The trial court did not err in a wrongful termination case by denying defendants' motions to dismiss. Plaintiff's wrongful termination claim under N.C.G.S. § 143-422.2 was not a compulsory counterclaim to defendant Shook's pending lawsuit.

Appeal by defendants from order entered 28 January 2010 by Judge Richard L. Doughton in Watauga County Superior Court. Heard in the Court of Appeals 26 October 2010.

Gray Newell, LLP, by Angela Newell Gray, for plaintiff-appellee.

Forman Rossabi Black, P.A., by Emily J. Meister and Gavin J. Reardon for defendant-appellant Mark Shook, in his individual capacity; and Womble Carlyle Sandridge & Rice, by James R. Morgan, Jr. and Bradley O. Wood, for defendant-appellants Mark Shook, in his official capacity as Sheriff of Watauga County, and Western Surety Company.

STEELMAN, Judge.

The prior action pending doctrine is not applicable where the parties, legal issues, and subject matter in this case are not substantially similar to those raised in Shook's lawsuit filed in 2007. Plaintiff was not required to file her wrongful termination claim as a compulsory counterclaim to Shook's action under Rule 13 of the Rules of Civil Procedure.

I. Factual and Procedural Background

On 12 December 2006, Paula Townsend (plaintiff) filed an action in the United States District Court for the Western District of North Carolina against Mark Shook (Shook), individually and in his official capacity as Sheriff of Watuaga County; Watauga County; and Western Surety Company, the provider of Shook's surety bond pursuant to N.C. Gen. Stat. § 162-8 (collectively, defendants). Plaintiff asserted claims for wrongful termination under Title VII; violations of 42 U.S.C. § 1983 and N.C. Gen. Stat. § 143-422.2; intentional and negligent infliction of emotional distress; and negligent supervision and retention of Shook by Watauga County. Plaintiff contended that she was subjected to disparate treatment due to her gender and that she was terminated from her position as Chief Deputy Sheriff for Watauga County based upon her refusal to submit to Shook's sexual advances. Defendants filed an answer denying the material allegations of plaintiff's complaint. Shook, in his individual capacity, filed a counterclaim for defamation based upon alleged statements plaintiff made to others that he "forced himself on her[.]" All parties filed cross-motions for summary judgment.

On 18 October 2007, the United States District Court granted summary judgment in favor of defendants on all of plaintiff's claims with the exception of her claim for intentional infliction of emotional distress. The court dismissed this claim and Shook's counterclaim for defamation without prejudice to re-file in state court. Plaintiff appealed that order to the United States Fourth Circuit Court of Appeals.

While plaintiff's appeal was pending, Shook re-filed his claim for defamation in the Superior Court of Catawba County (07 CVS 4087) on 5 December 2007. The parties filed a joint motion to place Shook's action on inactive status while plaintiff's appeal was pending, and a consent order was entered placing the action on inactive status. On 24 April 2009, the Fourth Circuit issued an unpublished opinion, which vacated the entry of summary judgment in favor of defendants with respect to plaintiff's wrongful termination claim pursuant to N.C. Gen. Stat. § 143-422.2, remanded the case to the District Court for further proceedings, and affirmed the remaining portions of the District Court's order. On 24 June 2009, the United States District Court entered an order that declined to exercise supplemental jurisdiction over plaintiff's wrongful termination claim and dismissed it without prejudice to re-file in an appropriate state court.

On 14 July 2009, plaintiff re-filed her wrongful termination claim pursuant to N.C. Gen. Stat. § 143-422.2 in Watauga County against Shook, both in his individual and official capacity, and against Western Surety Company.[1] On 20 September and 13 October 2009, defendants filed motions to dismiss based on several grounds, including that her claim was barred by the prior action pending in Catawba County; that her claim was a compulsory counterclaim in Shook's defamation lawsuit; that Shook, individually, was not the employer of plaintiff; and that plaintiff failed to assert a cause of action against Western Surety as required by N.C. Gen. Stat. § 58-76-5. The trial court denied all of defendants' motions to dismiss.

Defendants appeal.

II. Interlocutory Nature of Appeal

[1] At the outset, we note that this appeal is interlocutory. *See Reid v. Cole*, 187 N.C. App. 261, 263, 652 S.E.2d 718, 719 (2007) ("Typically,

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1. It does not appear from the record that plaintiff re-filed her intentional infliction of emotional distress claim against defendants.

the denial of a motion to dismiss is not immediately appealable to this Court because it is interlocutory in nature." (citation omitted)). However, this Court has held that the refusal to abate an action on grounds of a prior action pending is immediately appealable. *Gillikin v. Pierce*, 98 N.C. App. 484, 486, 391 S.E.2d 198, 199, *disc. review denied*, 327 N.C. 427, 395 S.E.2d 677 (1990); *Atkins v. Nash*, 61 N.C. App. 488, 489, 300 S.E.2d 880, 881 (1983). The denial of a motion to dismiss pursuant to Rule 13(a) relating to compulsory counterclaims is also immediately appealable. *Hendrix v. Advanced Metal Corp.*, 195 N.C. App. 436, 438, 672 S.E.2d 745, 747 (2009).

We only address the issues that are properly before us.

III. Prior Action Pending Doctrine

[2] In their first argument, defendants contend that the trial court erred by denying defendants' motions to dismiss on the basis that there was a prior action pending between the parties. We disagree.

"Under the law of this state, where a prior action is pending between the same parties for the same subject matter in a court within the state having like jurisdiction, the prior action serves to abate the subsequent action." *Eways v. Governor's Island*, 326 N.C. 552, 558, 391 S.E.2d 182, 185 (1990) (citations omitted). In order to determine "whether or not the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior action is this: Do the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded?" *Cameron v. Cameron*, 235 N.C. 82, 85, 68 S.E.2d 796, 798 (1952) (citations omitted).

In the instant case, the parties, legal issues, and subject matter in this case are not substantially similar to those raised in Shook's prior lawsuit filed in Catawba County. In Shook's lawsuit, the parties are Shook and plaintiff, in their individual capacities as private citizens. Shook alleged plaintiff defamed him by stating to Ms. Frieda Regan that Shook "forced himself on her[.]" Shook alternatively pled claims for slander *per se* and slander *per quod*. The issue presented in the lawsuit is whether Shook can produce sufficient evidence to establish slander. In order to prove a claim for slander *per se*, Shook will have to produce evidence that the statement was false, communicated to another person, and involved an accusation of crimes or offenses involving moral turpitude. *See Donovan v. Fiumara*, 114 N.C. App. 524, 527-28, 442 S.E.2d 572, 574-75 (1994). In order to prove a claim for slander *per quod*, Shook will have to produce

evidence that the statement was false, communicated to another person and made with malice, and that he suffered actual pecuniary loss as a result of the statement. *Id.* at 527, 442 S.E.2d at 574-75. Shook seeks to recover monetary damages in the form of compensatory, special, and punitive damages.

In plaintiff's lawsuit in Watauga County, the parties are plaintiff; Shook, individually and in his official capacity as Sheriff of Watauga County; and Western Surety Company. This action arises out of an employer-employee relationship. The issue presented is whether plaintiff was terminated from her employment in the Watauga County Sheriff's Office in violation of N.C. Gen. Stat. § 143-422.2. Evidence regarding her job performance and reasons for termination will be at issue. Plaintiff seeks monetary damages in the form of compensatory and punitive damages. Contrary to defendants' contentions, the dispositive issue in this lawsuit is not whether Shook "forced himself" on plaintiff, but, rather, whether plaintiff was discriminated against and wrongfully terminated from her employment.

Because the parties, legal issues, and subject matter in this case are not substantially similar to those raised in Shook's prior lawsuit filed in Catawba County, the prior action pending doctrine is not applicable to the instant case.

This argument is without merit.

IV. Compulsory Counterclaim

[3] In their second argument, defendants contend that the trial court erred by denying their motions to dismiss on the basis that plaintiff's wrongful termination claim under N.C. Gen. Stat. § 143-422.2 is a compulsory counterclaim to Shook's lawsuit in Catawba County. We disagree.

Rule 13(a) of the Rules of Civil Procedure provides, in part:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . .

N.C. Gen. Stat. § 1A-1, Rule 13(a) (2009). Our Supreme Court has stated that in order to determine whether two or more claims arose out of the same transaction or occurrence for purposes of Rule 13(a),

the court must examine the following factors: "(1) whether the issues of fact and law raised by the claim and counterclaim are largely the same; (2) whether substantially the same evidence bears on both claims; and (3) whether any logical relationship exists between the two claims." *Jonesboro United Methodist Church v. Mullins-Sherman Architects, L.L.P.*, 359 N.C. 593, 599-600, 614 S.E.2d 268, 272 (2005) (quotation and alterations omitted). "There is no simple test for determining whether a counterclaim is compulsory. Each proposed counterclaim must be examined individually regarding its relationship to the original claim." 1 G. Gray Wilson, *North Carolina Civil Procedure*, § 13-3, at 13-8 (3rd ed. 2007).

Both parties reiterate their arguments presented in the appellant's first issue on appeal. Shook specifically argues that there is a clear and logical relationship between the actions and contends that "[a] determination that [he] did not sexually harass Townsend would present an insurmountable bar to her [N.C. Gen. Stat. § 143-422.2] claim and would almost completely determine and resolve in Shook's favor his defamation claim against Townsend asserted in the Prior Pending Action." Shook's argument is misplaced.

Shook's lawsuit for defamation is solely based on his allegation that plaintiff stated to Ms. Frieda Regan that Shook had "forced himself on her[.]" As articulated above, Shook would have to prove that this statement was false, was made with malice, and damaged his reputation. Even if a jury found that Shook did not "force" himself on plaintiff, that inquiry would not be determinative of plaintiff's wrongful termination action.

Plaintiff made numerous allegations of misconduct by Shook as the basis of her wrongful termination claim, including that Shook wrote a letter expressing his love for her; Shook began to assign plaintiff to work on assignments specifically with him; Shook expressed his desire to engage in a personal, intimate relationship with plaintiff at various times from 2002 until 2005; after continually rejecting these advances, Shook negatively altered her work conditions; Shook excluded plaintiff from important staff meetings; Shook made derogatory statements about her to other male sheriff deputies; decreased her responsibilities and authority; and ultimately terminated her employment. In order to prevail on this claim, plaintiff would have to present evidence of these acts.

Contrary to defendants' assertion, the wrongful termination lawsuit and the defamation lawsuit do not involve substantially the same

issues of fact and law nor substantially the same evidence. *See, e.g.*, *Winston-Salem Joint Venture v. Cathy's Boutique*, 72 N.C. App. 673, 675, 325 S.E.2d 286, 287 (1985) (holding that a claim for breach of a lease is not a compulsory claim in a lawsuit for libel where the only relationship existing between the fact, claims, and nature of the action was the landlord-tenant relationship).

Although these two actions have certain common factual issues, this is not sufficient to require that plaintiff's wrongful termination action be designated a compulsory counterclaim in Shook's defamation action. *Hailey v. Allgood Construction Co.*, 95 N.C. App. 630, 633, 383 S.E.2d 220, 222 (1989); *see also Murillo v. Daly*, 169 N.C. App. 223, 227, 609 S.E.2d 478, 481 (2005) (holding that a common origin alone is insufficient to characterize a claim as a compulsory counterclaim).

This argument is without merit.

Defendants also filed a petition for writ of *certiorari* requesting that this Court determine an additional issue on appeal. Defendant concedes that no immediate right of appeal exists as to this issue, and, thus, we do not address it because of its interlocutory nature.

AFFIRMED.

Judges BRYANT and ERVIN concur.

JOYCE OTTO, PLAINTIFF v. DANIEL AND KIMBERLY CERTO, DEFENDANTS

No. COA10-172

(Filed 15 March 2011)

Constitutional Law— due process—motion for new trial—failure to give notice of hearing

The trial court's order in a summary ejectment case was reversed and remanded for further proceedings because defendants' due process rights were violated when they did not receive notice of the hearing on their motion for a new trial.

Appeal by defendants from a judgment entered on or about 5 October 2009 by Judge William A. Leavell, III and from an order

entered 19 September 2008 by Judge Jack E. Klass in District Court, Madison County. Heard in the Court of Appeals 30 August 2010.

No plaintiff-appellee's brief filed.

The Sutton Firm, P.A. by April Burt Sutton, for defendants-appellants.

STROUD, Judge.

Daniel and Kimberly Certo ("defendants") appeal from a district court's judgment and from an order denying their motion for a new trial. Because defendants did not receive notice of the hearing on their motion for new trial, we reverse the district court's 5 October 2009 order and remand for further proceedings.

On 18 August 2008, Joyce Otto ("plaintiff") initiated this action by filing a "Complaint in Summary Ejectment" in district court alleging that defendants had entered into an "oral" lease agreement with plaintiff to pay the "First of each month . . . . $744.62" to rent the property located at "170 High Rock Mountain Road[,] Marshall, NC 28753" but the lease had ended on "August 1, 2008" and "defendant[s] [were] holding over after the end of the lease period." A "Magistrate Summons" for a small claims action was issued on 18 August 2008 setting the date of trial for 10:00 A.M. on 3 September 2008 and was served on both defendants on 23 August 2008. On 29 August 2008, defendants, proceeding *pro se*, filed a written answer denying plaintiff's title to the property in question, counterclaiming for equitable relief, and demanding trial by jury. Defendants amended their answer and counterclaim on 29 August 2008.

Following a bench trial on 17 September 2008, the district court, on 19 September 2008, entered a handwritten judgment finding that on 12 November 1996 plaintiff and defendants entered into a written offer to purchase real estate in Madison County, North Carolina; defendants were the buyers and plaintiff was the seller; the purchase price was $89,400 and the earnest money was $4,500 paid by "personal check, nonrefundable by seller[;]" by agreement on September 1997, the parties extended the contract to purchase for an additional 36 months and at the end of 24 months they agreed for payment of an additional $2,550.00; and under the terms of the extension, defendants had until 12 November 2001 to purchase the real property. The Court then "Ordered Adjudged and decreed":

> That the Defendants are granted an extension to purchase said property until Jan. 2, 2009: On Jan 2, 2009 if Defendants have failed [to] purchase said property and pay to the Plaintiff the balance of the amount owing to Plaintiff, Then Plaintiff shall be entitled to recover the said Real Estate upon payment to the Defendants all amounts paid by the[m] for back Real Estate Tax and Insurance on said real Estate. The costs of this action shall be share[d] equally by the parties. This 19 day of September 2008. [District Court Judge Klass' Signature].
>
> [Addendum:] The court in rendering this Judgment feels that from the evidence [that] Both Parties should have acted sooner to finalize this matter—
>
> This is a very rough order I will be glad to be more specific on Sept 29, 2008, when I return. Thanx.

Despite the district court's note that "[t]his is a very rough order I will be glad to be more specific on Sept. 29, 2008," no additional order appears in the record on appeal.

On 29 September 2008, defendants filed a *pro se* motion for (1) transfer of the matter to superior court; (2) a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59; (3) relief from the judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60; and (4) summary judgment. In this motion, defendants also raised arguments regarding "Lack of Adequate Notice [,]" "Matter Not Ripe for Hearing[,]" "Order Unclear[,]" "Compliance with Court's Order Inequitable[,]" "Certos Have Note [sic] Breached Contract[,]" and "Fraud by Plaintiff[,]" among others.[1] On 7 October 2008, plaintiff moved to (1) strike defendants' 29 September 2008 pleadings; (2) to dismiss defendant's motions to transfer to superior court, for a new trial, relief from the judgment, and summary judgment; and (3) for sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11. On 6 November 2008, plaintiff filed a "Notice of Hearing" setting plaintiff's motions for 24 November 2008 in District Court, Madison County at 9:30 a.m. "or as soon thereafter as the Court may hear same." On this notice was a stamped "Certificate of Service" stating that "*counsel* for the opposing party" had been served with this notice of hearing "by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage

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1. We note that 29 September 2008, the date of defendants' motion, is the same date upon which the trial court indicated in its handwritten order that it would "be more specific[.]" However, the record does not include any indication of any court proceedings on 29 September 2009.

thereon," that was dated 30 October 2008, and signed by plaintiff's counsel. (Emphasis added.) Despite the certificate of service's reference to serving defendants' "counsel[,]" the record does not include any indication that defendants were ever represented by counsel in the proceedings before the district court in this matter.

On 21 July 2009, the district court held a hearing on all pending motions of both plaintiff and defendants. On 8 October 2009, the district court entered an order denying defendants' motions for a transfer to superior court, new trial, relief from the judgment, and summary judgment. The district court also denied plaintiff's motion to strike and for sanctions and ordered the parties to bear their own costs. The district court's order notes that only plaintiff's counsel was present for the 22 July 2009 hearing on plaintiff's and defendants' motions. Defendants gave written notice of appeal on 28 October 2009 from the 19 September 2008 judgment and the 8 October 2009 order.

Although defendants first argue their issues arising from the 19 September 2008 judgment, we find that the second issue, regarding the denial of their motion for new trial, is dispositive. "Appellate review of a denial of a Rule 59 motion for a new trial is distinct from review of the underlying judgment or order upon which such a motion may be based." *Davis v. Davis*, 360 N.C. 518, 526, 631 S.E.2d 114, 120 (2006). We will therefore address the second issue, regarding lack of notice of the 21 July 2009 hearing.

Defendants argue that the district court abused its discretion in denying their Rule 59 request for a new trial because they lacked notice of the 21 July 2009 hearing on plaintiff's and defendants' motions and this amounted to a violation of their due process rights. We have noted that

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

Brown v. Ellis, ––– N.C. App. –––, –––, 696 S.E.2d 813, 822 (2010) (citation omitted). "Whether a party has adequate notice is a question of law, which we review *de novo*." *Id.* (citation omitted).

Here, following the 19 September 2008 judgment on the merits of the case, defendants on 29 September 2008, filed a motion making numerous requests, including a motion for a new trial pursuant to Rule 59. On 7 October 2008, plaintiff filed concurrent motions to strike, for sanctions, and to dismiss defendants' motion. On 6 November 2008, plaintiff's counsel filed a "notice of hearing" setting plaintiff's motions "at the November 24th, 2008 term of Madison County District Court at 9:30 a.m. or as soon thereafter as the Court may hear same." However, the hearing was not held on 24 November 2008. Although the record neither reveals any reason that the hearing was not held on 24 November 2008 nor any additional notice of hearing, all of the plaintiff's and defendants' pending motions were heard on 21 July 2009. It was noted in the hearing transcript that defendants were not present or represented by counsel and there is no indication in the record that defendants received notice of the 21 July 2009 hearing.

Because notice of hearing to defendants is the issue before us, and notice can be given to a party's counsel, we have examined the record for any indication that defendants received notice of the hearing through counsel but have found none. Although there is no appearance of an attorney of record for defendants before the trial court, the record does include a 1 May 2009 letter from a West Virginia attorney, Ralph C. Young, on behalf of defendants, to plaintiff's counsel. This letter does not state that Mr. Young would be appearing as counsel for defendants and in fact notes his understanding that both plaintiff's counsel and "Mr. Cogburn, as counsel for Mr. and Mrs. Certo, have agreed to let me work to accomplish" a resolution of the case.[2] In addition, the letter notes that Mr. Young had "retained the services of a North Carolina attorney [April Sutton] to prepare a Quit-Claim Deed[.]" Additionally, from the 21 July 2009 hearing transcript, it is clear that plaintiff's counsel had been in contact with Mr. Young and Mr. Cogburn, and he knew "that April Sutton may be involved in it." However, Ms. Sutton's first appearance as counsel for defendants was on 28 October 2009 on the notice of appeal. We further note that no additional documents or information regarding any scheduling or notice of a hearing upon the motions of either

2. It appears that Mr. Cogburn was representing defendants herein in another legal matter arising out of their contract to purchase the plaintiff's property.

plaintiff or defendants are included in the record. While discussing defendants' absence with the trial court at the start of the 21 July 2009 hearing, plaintiff's counsel stated in open court that "[i]f I made a phone call, I bet you I could have [defendants] here in five minutes." However, there is no indication in the hearing transcript that plaintiff's counsel contacted defendants prior to the hearing nor did plaintiff's counsel state that defendants had actual notice of the 21 July 2009 hearing. As defendants did not receive any notice, much less "adequate" notice "reasonably calculated . . . to apprise" them of the 21 July 2009 hearing, they were not afforded "an opportunity to present their objections[,]" in violation of their due process rights. *See Brown*, ––– N.C. App. at –––, 696 S.E.2d at 822. Because the defendants' motion as well as the plaintiff's motions must be heard again by the district court, we need not address the substantive issues raised in these motions. Accordingly, we reverse the district court's 8 October 2009 order which rules upon the defendants' and plaintiff's pending motions and remand for further proceedings consistent with this opinion.

REVERSED.

Chief Judge MARTIN and Judge ERVIN concur.

ROGER STEVENSON, PLAINTIFF v. N.C. DEPARTMENT OF CORRECTION, DEFENDANT

No. COA10-1169

(Filed 15 March 2011)

1. **Medical Malpractice— Tort Claims Act—Rule 9(j)—applicable**

   An inmate's allegation in a complaint under the Tort Claims Act that a physician's assistant failed to provide the appropriate standard of medical care fell squarely within the definition of a medical malpractice claim. Compliance with N.C.G.S.§ 1A-1, Rule 9(j) was required.

2. **Medical Malpractice— Rule 9(j) certification—res ipsa loquitur—not established**

   Although a claim which fails to comply with N.C.G.S. § 1A-1, Rule 9(j) may still be valid if it establishes negligence under *res*

ipsa loquitur, plaintiff's allegation that a physician assistant's examination consisted of only a cursory glance was not the type of negligence a jury could infer through common knowledge and experience and plaintiff did not establish negligence through *res ipsa loquitur*.

3. Judgments— clerical error—remanded for correction

A clerical error in a Tort Claims order was remanded for correction where the Industrial Commission concluded that plaintiff had complied with the special pleading requirements of Rule 9(j), even though it was clear from the context that the Commission had intended the opposite.

Appeal by plaintiff from order entered 8 April 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 February 2011.

Roger Stevenson, pro se, for plaintiff-appellant.

Attorney General Roy Cooper, by Associate Attorney General Christina S. Hayes, for defendant-appellee.

CALABRIA, Judge.

Roger Stevenson ("plaintiff") appeals an order of the North Carolina Industrial Commission ("the Commission") dismissing his complaint under the Tort Claims Act without prejudice. Plaintiff's claim against the North Carolina Department of Correction ("defendant") was dismissed for his failure to comply with N.C. Gen. Stat. 1A-1, Rule 9(j)(2009) ("Rule 9(j)"). We affirm and remand for correction of a clerical error.

I. Background

Plaintiff is an inmate at the Lanesboro Correctional Institute in Polkton, North Carolina. On 5 May 2008, plaintiff sought medical treatment for a skin condition from Physician Assistant Frank Stanford ("P.A. Stanford"). Plaintiff requested that P.A. Stanford renew his prescription for skin cream. However, after an examination, P.A. Stanford determined that plaintiff no longer required a prescription for skin cream and denied plaintiff's request. Plaintiff alleges that P.A. Stanford failed to review his medical records and only gave plaintiff's skin a "cursory" glance before deciding to deny plaintiff's request for treatment.

On 14 May 2008, plaintiff filed a *pro se* Tort Claims Affidavit against defendant with the North Carolina Industrial Commission ("the Commission"). On 10 June 2008, defendant filed a motion to dismiss plaintiff's claim on the basis of, *inter alia*, plaintiff's failure to comply with Rule 9(j). Defendant's motion to dismiss was heard before Deputy Commissioner Myra L. Griffin on 3 June 2009. On 30 June 2009, Deputy Commissioner Griffin entered an order dismissing plaintiff's claim for failure to comply with Rule 9(j).

Plaintiff appealed to the Full Commission. On 8 April 2010, the Commission entered an order dismissing plaintiff's claim without prejudice. The Commission's order permitted plaintiff to re-file his claim with the required Rule 9(j) certification, so long as plaintiff re-filed his claim before the earlier of either (1) the expiration of the applicable statute of limitations or (2) one year after the entry of the Commission's order. Plaintiff appeals.

II. Rule 9(j)

[1] Under the Tort Claims Act, the Commission is "constituted a court for the purpose of hearing and passing upon tort claims against . . . all . . . departments, institutions and agencies of the State."

N.C. Gen. Stat. § 143-291(a) (2009). The Commission

> shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

Id. "The standard of review for an appeal from the Full Commission's decision under the Tort Claims Act shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions . . . ." *Pate v. N.C. DOT*, 176 N.C. App. 530, 533-34, 626 S.E.2d 661, 664 (2006).

"[T]he North Carolina Rules of Civil Procedure apply in tort claims before the Commission, to the extent that such rules are not inconsistent with the Tort Claims Act, in which case the Tort Claims Act controls." *Doe 1 v. Swannanoa Valley Youth Dev. Ctr.*, 163 N.C. App. 136, 141, 592 S.E.2d 715, 719 (2004) (citing N.C. Gen. Stat.

§ 143-300 and 4 NCAC 10B.0201(a)). In the instant case, plaintiff's claim was dismissed for failure to comply with Rule 9(j). This rule states:

> Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
>
> (2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
>
> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2009). "It is well established that if a complaint is filed without a Rule 9(j) certification, Rule 9(j) mandates that the trial court grant a defendant's motion to dismiss." *Ford v. McCain*, 192 N.C. App. 667, 671, 666 S.E.2d 153, 156 (2008).

N.C. Gen. Stat. § 90-21.11 defines a medical malpractice action as "a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider." N.C. Gen. Stat. § 90-21.11 (2009). In the instant case, plaintiff's claim alleged that P.A. Stanford was negligent in failing to properly diagnose and treat plaintiff's skin condition with a prescription skin cream. Specifically, plaintiff alleged that P.A. Stanford was negligent by only giving the infected area a cursory glance before refusing to prescribe the skin cream, and that, as a result, plaintiff was "forced to endure" pain and suffering resulting from the lack of treatment. This allegation, that P.A. Stanford's denial of plaintiff's request for a prescription skin cream constituted a failure by P.A. Stanford to provide

plaintiff with the appropriate standard of medical care, fell squarely within the definition of a medical malpractice claim. Consequently, plaintiff's claim was required to comply with Rule 9(j).

[2] Plaintiff's claim failed to include an assertion that plaintiff's medical care was reviewed by an expert who was willing to testify that P.A. Stanford's actions did not comply with the applicable standard of medical care. Therefore, plaintiff's claim did not comply with either Rule 9(j)(1) or (2). However, a claim which fails to comply with Rule 9(j)(1) or (2) will still be valid if the claim establishes negligence under the common law doctrine of *res ipsa loquitur.* N.C. Gen. Stat. § 1A-1, Rule 9(j)(3) (2009)."[I]n order for *res ipsa loquitur* to apply, the negligence complained of must be of the nature that a jury—through common knowledge and experience—could infer." *Diehl v. Koffer*, 140 N.C. App. 375, 378-79, 536 S.E.2d 359, 362 (2000). Plaintiff's allegation that P.A. Stanford's examination was inadequate because it only consisted of what plaintiff characterized as a Acursory" glance at the infected area is not the type of negligence that a jury could infer through common knowledge and experience. Expert testimony would be required in order to determine whether P.A. Stanford's examination was sufficient under the applicable standard of care, and as a result, plaintiff's claim also failed to establish negligence under the doctrine of *res ipsa loquitur*. Thus, plaintiff's claim does not comply with Rule 9(j) and the Commission properly dismissed the claim.

III. Clerical Error

[3] However, the Commission's order contains a clerical error. "A clerical error is an error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination." *Marolf Constr. v. Allen's Paving Co.*, 154 N.C. App. 723, 726, 572 S.E.2d 861, 863 (2002) (internal quotations and citations omitted). The Commission's third conclusion of law states, "Although Plaintiff has asserted a cause of action for medical malpractice, his Affidavit *does comply* with the special pleading requirements of Rule 9(j), and Plaintiff's claim for medical malpractice is therefore subject to dismissal without prejudice." (Emphasis added). It is clear from the context of this conclusion of law and the remainder of the Commission's order that the Commission intended to conclude that plaintiff's claim did *not* comply with the special pleading requirements of Rule 9(j).

Consequently, we remand the instant case to the Commission for correction of this clerical error.[1]

IV. Conclusion

Since plaintiff's claim was a medical malpractice action, he was required to comply with Rule 9(j). Plaintiff's failure to comply with this rule "mandates that the trial court grant . . . defendant's motion to dismiss." *Ford*, 192 N.C. App. at 671, 666 S.E.2d at 156. Accordingly, the Commission correctly dismissed plaintiff's claim without prejudice. However, the Commission inadvertently omitted the word "not" in its third conclusion of law, and thus, we remand for correction of this clerical error.

Affirmed; remanded for correction of clerical error.

Judges STEELMAN and BEASLEY concur.

STATE OF NORTH CAROLINA v. KEITH LEONARDO SHROPSHIRE

No. COA10-1113

(Filed 15 March 2011)

Criminal Law— guilty plea—motion to withdraw plea summarily denied—no error

The trial court did not err in a first-degree rape and statutory rape case by summarily denying defendant's motion to withdraw his guilty plea after sentencing. Defendant presented no questions of fact that needed to be resolved by an evidentiary hearing, nothing in the record indicated that defendant's plea was not the product of a free and a intelligent choice, and the trial court expressed willingness to allow defendant to confer with defense counsel about the propriety of his motion. Furthermore, defendant was not entitled to withdraw his guilty plea as he failed to show manifest injustice.

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1. Deputy Commissioner Griffin's order contained an identically worded conclusion of law, which we also consider a clerical error.

Appeal by Defendant from judgments entered 19 April 2010 by Judge Christopher M. Collier in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 February 2011.

Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Appellate Defendant Staples Hughes, by Assistant Appellate Defenders Mary J. Cook and Kristen L. Todd, for Defendant.

STEPHENS, Judge.

On 26 April 2004, Defendant Keith Leonardo Shropshire ("Shropshire") was indicted on one count of first-degree rape and one count of statutory rape. At the 19 April 2010 Criminal Session of Mecklenburg County Superior Court,[1] the Honorable Christopher M. Collier presiding, pursuant to a plea agreement, Shropshire pled guilty to attempted first-degree rape and attempted statutory rape in exchange for the State's agreement that "sentencing will be in the mitigated range at the court's discretion" and that "the court will determine whether the sentences will be served concurrently or consecutively." After conducting a plea colloquy with Shropshire, in which the court questioned Shropshire about his understanding and acceptance of the plea, the trial court accepted Shropshire's plea and sentenced him to consecutive sentences of 151 to 191 months in the custody of the North Carolina Department of Correction. After the court pronounced Shropshire's sentence, the following exchange took place:

[SHROPSHIRE]: I didn't understand, your Honor.

THE COURT: 151 minimum to 191 minimum [sic] plus the same thing.

[SHROPSHIRE]: Your Honor —

THE COURT: Take him out.

[SHROPSHIRE]: I appeal this on the grounds my constitutional rights were violated. I appeal.

THE COURT: [Defense counsel], if you'll take a couple minutes to explain with [Shropshire] the limited grounds for appeal. If he alleges grounds that

1. Shropshire consented to a mistrial in his first trial on these charges in February 2009.

	are allowed to be appealed to the guilty plea I will allow him to plea [sic].
[SHOPRSHIRE]:	I would also like to reject my plea.
THE COURT:	That's a motion to withdraw your plea, is that what that is?
[SHROPSHIRE]:	Yes, sir.
THE COURT:	Motion denied. Take him out.

Thereupon, Shropshire gave notice of appeal.[2]

On appeal, Shropshire argues that the trial court erred by "summarily den[ying] [his] motion to withdraw his plea after sentencing[.]" Citing *Dickens*, 299 N.C. at 84, 261 S.E.2d at 188, Shropshire contends that it was error for the trial court to fail to " 'patiently and fairly' consider [Shropshire's] motion to determine whether it [had] any merit." We are unpersuaded by Shropshire's argument.

"A post-sentencing motion to withdraw a plea is a motion for appropriate relief." *State v. Salvetti*, ––– N.C. App. –––, –––, 687 S.E.2d 698, 703 (citing *State v. Handy*, 326 N.C. 532, 536, 391 S.E.2d 159, 161 (1990)), *disc. review denied*, *appeal dismissed*, 364 N.C. 246, 699 S.E.2d 919 (2010). "Any party is entitled to a hearing on questions of law or fact arising from [such a motion] . . . unless the court determines that the motion is without merit." N.C. Gen. Stat. § 15A-1420(c)(1) (2009). As held by our Supreme Court in *Dickens*, "in most cases reference to the verbatim record of the guilty plea proceedings will conclusively resolve all questions of fact raised by a defendant's motion to withdraw a plea of guilty and will permit a trial judge to dispose of such motion without holding an evidentiary hearing." *Id.* at 84, 261 S.E.2d at 188. Accordingly, "[e]videntiary hearings are required in [such] post-conviction proceedings only when necessary to resolve questions of fact." *Id.*

2. Although Shropshire pled guilty in the trial court, Shropshire may properly appeal to this Court pursuant to N.C. Gen. Stat. § 15A-1444(e) (2009) ("[E]xcept when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court.") and *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1980) ("[W]hen a motion to withdraw a plea of guilty or no contest has been denied, the defendant is entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court.").

In this case, Shropshire presented no questions of fact that needed to be resolved by an evidentiary hearing. Shropshire's statement that he didn't understand the trial court's decision to run the sentences consecutively did not raise any factual issue where Shropshire had already stated that he accepted and understood the plea agreement and its term that "the court will determine whether the sentences will be served concurrently or consecutively." Furthermore, Shropshire fails to raise any questions of fact on appeal. Instead, he simply quotes *State v. Dickens*, 41 N.C. App. 388, 395, 255 S.E.2d 212, 215 (1979) (Clark, J., dissenting), *rev'd*, *Dickens*, 299 N.C. 76, 261 S.E.2d 183, and argues that, "regardless of whether an evidentiary hearing would have been required, 'the importance of protecting the innocent and insuring that guilty pleas are a product of free and intelligent choice requires that such claims be patiently and fairly considered by the courts.' " Here, however, there is nothing in the record to indicate that Shropshire's guilty plea was not the product of free and intelligent choice. It appears from the transcript that Shropshire's only reason for moving to withdraw his plea was his dissatisfaction with his sentence. Further, based on the trial court's expressed willingness to allow Shropshire to confer with defense counsel about the propriety of his motion, it appears the trial court did not deny Shropshire's motion the fair consideration it was due. Therefore, we conclude that, under the circumstances, the trial court's denial of Shropshire's motion without a hearing was not error.

We further note that where a defendant seeks to withdraw a guilty plea after he is sentenced consistent with his plea agreement, the defendant is entitled to withdraw his plea only upon a showing of manifest injustice. *State v. Russell*, 153 N.C. App. 508, 509, 570 S.E.2d 245, 247 (2002). "Factors to be considered in determining the existence of manifest injustice include whether: [d]efendant was represented by competent counsel; [d]efendant is asserting innocence; and [d]efendant's plea was made knowingly and voluntarily or was the result of misunderstanding, haste, coercion, or confusion." *Id.* (citing *Handy*, 326 N.C. at 539, 391 S.E.2d at 163). In this case, none of the factors listed above were present. On the contrary, Shropshire was represented by competent counsel, Shropshire admitted his guilt to the court, Shropshire averred that he made the plea knowingly and voluntarily, and Shopshire admitted that he fully understood the plea agreement and that he accepted the arrangement. Accordingly, we conclude that Shropshire was not entitled to withdraw his guilty plea and that the trial court did not err in denying Shropshire's motion to do so.

AFFIRMED.

Judges HUNTER, Robert C. and ERVIN concur.

STATE OF NORTH CAROLINA v. CALVIN McKINLEY HUGHES

No. COA10-495

(Filed 15 March 2011)

Appeal and Error— appealability—failure to give notice of appeal from judgment

The Court of Appeals dismissed defendant's appeal in a felonious breaking or entering, felonious larceny, felonious possession of stolen goods, and misdemeanor larceny case based on lack of jurisdiction caused by defendant's failure to note an appeal from the trial court's judgment as required by N.C. R. App. P. 4.

Appeal by defendant from judgment entered 23 September 2009 by Judge W. Russell Duke, Jr., in Northampton County Superior Court. Heard in the Court of Appeals 15 November 2010.

Attorney General Roy Cooper, by Christine A. Goebel, Assistant Attorney General, for the State.

Paul Y. K. Castle for Defendant-Appellant.

ERVIN, Judge.

Defendant Calvin Hughes appeals from judgments sentencing him to a minimum term of 96 months and a maximum term of 125 months imprisonment in the custody of the North Carolina Department of Correction based upon jury verdicts finding him guilty of felonious breaking or entering, felonious larceny, felonious possession of stolen goods, and misdemeanor larceny and his plea of guilty to having attained the status of an habitual felon. On appeal, Defendant argues that he is entitled to relief from his convictions and the trial court's judgment because the trial court erroneously instructed the jury concerning the burden of proof and reasonable doubt and because he received deficient representation from his trial counsel. After careful consideration of Defendant's challenges to his convictions and sentence in light of the record and the applicable law,

we conclude that this Court lacks jurisdiction over Defendant's appeal due to Defendant's failure to note an appeal from the trial court's judgment in compliance with N.C.R. App. P. 4 and that his appeal must, therefore, be dismissed.

I. Factual Background

On 4 May 2009, the Northampton County grand jury returned bills of indictment charging Defendant with felonious breaking or entering, felonious larceny, felonious possession of stolen property, misdemeanor larceny, and having attained the status of an habitual felon. The charges against Defendant came on for trial before the trial court and a jury at the 22 September 2009 criminal session of the Northampton County Superior Court. On 22 September 2009, the jury returned verdicts convicting Defendant of felonious breaking or entering, felonious larceny, felonious possession of stolen goods, and misdemeanor larceny. On the following day, Defendant entered a plea of guilty to having attained the status of an habitual felon.

At the ensuing sentencing hearing, the trial court found that Defendant had nine prior record points and should be sentenced as a Level IV offender. In addition, the trial court found as a mitigating factor that Defendant "supports the defendant's family" and concluded that the factors in mitigation outweighed the factors in aggravation so "that a mitigated sentence is justified." After making those determinations, the trial court consolidated Defendant's convictions for judgment[1] and ordered that Defendant be sentenced to a minimum term of 96 months and a maximum term of 125 months imprisonment in the custody of the North Carolina Department of Correction. Defendant claims to have noted an appeal from the trial court's judgments.

II. Legal Analysis

According to N.C. R. App. P. 4:

(a) Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by

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1. Although the trial court indicated that the verdict in the felonious possession of stolen property case should be arrested at the time that he orally imposed sentence on Defendant, the written judgment contained in the record lists the felonious possession of stolen property conviction as one of the convictions that the trial court consolidated for judgment.

(1) giving oral notice of appeal at trial, or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment[.]

A failure on the part of the appealing party to comply with Rule 4 deprives this Court of jurisdiction to consider his or her appeal:

> [A] default precluding appellate review on the merits necessarily arises when the appealing party fails to complete all of the steps necessary to vest jurisdiction in the appellate court. It is axiomatic that courts of law must have their power properly invoked by an interested party . . . . The appellant's compliance with the jurisdictional rules governing the taking of an appeal is the linchpin that connects the appellate division with the trial division and confers upon the appellate court the authority to act in a particular case . . . . A jurisdictional default, therefore, precludes the appellate court from acting in any manner other than to dismiss the appeal . . . . *see also State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (stating correctly that "compliance with the requirements of Rule 4(a)(2) is jurisdictional and cannot simply be ignored by [the] Court" (citation omitted)), *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005). Stated differently, a jurisdictional default brings a purported appeal to an end before it ever begins. Moreover, in the absence of jurisdiction, the appellate courts lack authority to consider whether the circumstances of a purported appeal justify application of [N.C.R. App. P.] 2.

Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 197-98, 657 S.E.2d 361, 364-65 (2008) (citing *Moore v. Vanderburg*, 90 N.C. 10, 10 (1884), and *Williams v. Williams*, 188 N.C. 728, 730, 125 S.E. 482, 483 (1924) (other citations omitted)).

A careful examination of the record on appeal provides no indication that Defendant ever filed a written notice of appeal. Similarly, our review of the transcript of Defendant's trial and sentencing hearing provides no indication that Defendant orally noted an appeal to this Court from the trial court's judgment. Although the trial court signed a written judgment using AOC Form NO. CR-601, Judgment and Commitment, the trial court did not check the box on that form stating that "[t]he defendant gives notice of

appeal from the judgment of the trial court to the appellate division." Finally, Defendant never asserts in his brief before this Court that he gave notice of appeal as required by N.C.R. App. P. 4. As a result, it does not appear from the record that Defendant properly gave notice of appeal from the trial court's judgment.

The record does, however, include a copy of AOC Form NO. CR-350, Appellate Entries, which was signed by the trial judge on 23 September 2009. On Form NO. CR-350, the box stating that "[t]he defendant has given Notice of Appeal to the N.C. Court of Appeals" is checked. "Although the record includes appellate entries . . . which indicate through boilerplate that defendant gave notice of appeal, mere appellate entries are insufficient to preserve the right to appeal." *In re Me.B., M.J., Mo.B.*, 181 N.C. App. 597, 600, 640 S.E.2d 407, 409 (2007) (citing *State v. Blue*, 115 N.C. App. 108, 113, 443 S.E.2d 748, 751 (1994)). In *Blue*, we concluded that the "defendant did not preserve his right to appeal his convictions" where the "record on appeal include[d] appellate entries . . . but contained no written notices of appeal as required by Rule 4 of the Rules of Appellate Procedure." As a result, the fact that the record contains appellate entries does not, without more, suffice to show that Defendant properly appealed from the trial court's judgment to this Court. Thus, since the record simply does not establish that Defendant ever gave notice of appeal from the trial court's judgment as required by N.C.R. App. P. 4, we lack jurisdiction to consider Defendant's appeal, which must, therefore, be dismissed.

DISMISSED.

Chief Judge MARTIN and Judge McGEE concur.

DAVID C. WINSTON, Plaintiff v. LIVINGSTONE COLLEGE, INC. and LIVINGSTONE COLLEGE AND HOOD THEOLOGICAL SEMINARY, INC., Defendants

No. COA10-1070

(Filed 15 March 2011)

1. Civil Procedure— summary judgment—uncontested findings must be clearly delineated

An order granting summary judgment should not include findings of fact. If the trial court chooses to recite uncontested findings of fact, they should be clearly denominated as such.

2. Statutes of Limitation and Repose— expiration on Sunday —filing on Monday

The trial court erred by granting summary judgment for defendant based on the statute of limitations where the limitations period expired on a Sunday and defendant filed his action on Monday.

Appeal by plaintiff from judgment entered 24 May 2010 by Judge Theodore S. Royster, Jr. in Rowan County Superior Court. Heard in the Court of Appeals 26 January 2011.

The Law Office of Mark N. Kerkhoff, PLLC, by Mark N. Kerkhoff, for plaintiff-appellant.

Erwin and Eleazar, P.A., by L. Holmes Eleazar, Jr. and Ronald L. Gibson, for defendant-appellees.

STEELMAN, Judge.

Where the three-year statute of limitations for a tort action expired on a Sunday, plaintiff was permitted to file his action on Monday, the next day that the courthouse was open, pursuant to N.C. Gen. Stat. § 1-593 and Rule 6(a) of the North Carolina Rules of Civil Procedure.

I. Factual and Procedural Background

The complaint filed in this action alleged that David C. Winston (plaintiff) was employed by Livingstone College, Inc. as Director of Plant Operations. An inspection of the boilers revealed that they were in violation of the applicable laws and regulations. When he brought these issues to the attention of defendants, he was terminated by

letter dated 25 October 2006. On 26 October 2009, plaintiff filed an application and obtained an order granting him permission to file a complaint seeking damages for wrongful discharge in violation of public policy within twenty (20) days pursuant to Rule 3 of the North Carolina Rules of Civil Procedure. The complaint was filed on 13 November 2009. On 3 February 2010, defendants filed a motion for summary judgment asserting that plaintiff's action was barred by the three-year statute of limitations set forth in N.C. Gen. Stat. § 1-52(1). On 24 May 2010, the trial court granted defendants' motion for summary judgment based upon the three-year statute of limitations. Plaintiff appeals.

II. Findings of Fact in a Summary Judgment Order

[1] The order of the trial court granting summary judgment contains findings of fact. The appellate courts of this state have on numerous occasions held that it is not proper to include findings of fact in an order granting summary judgment. *See*, *e.g.*, *McArdle Corp. v. Patterson*, 115 N.C. App. 528, 531, 445 S.E.2d 604, 606 (1994), *aff'd*, 340 N.C. 356, 457 S.E.2d 596 (1995); *Warren v. Rosso and Mastracco, Inc.*, 78 N.C. App. 163, 164, 336 S.E.2d 699, 700 (1985); *Capps v. City of Raleigh*, 35 N.C. App. 290, 292, 241 S.E.2d 527, 528 (1978). If there are issues of fact to be determined by the trial court, then it is not appropriate for the trial court to grant summary judgment. *Capps*, 35 N.C. App. at 293, 241 S.E.2d at 529. If the trial court chooses to recite *uncontested* findings of fact in its order, they should be clearly denominated as such.

However, based upon the record in this case, we hold that there were no genuine issues of material fact as to the questions of law raised by this appeal.

III. Computation of Time Pursuant to Rule 6 of the North Carolina Rules of Civil Procedure

[2] Plaintiff contends that the trial court erred in ruling that his claim was barred by the three-year statute of limitations. We agree.

The manner in which time is to be computed in North Carolina is set forth by statute. "The time within which an act is to be done, as provided by law, shall be computed in the manner prescribed by Rule 6(a) of the Rules of Civil Procedure." N.C. Gen. Stat. § 1-593 (2009). Rule 6(a) provides, in relevant part:

> Rule 6. Time.
>
> (a) Computation.—In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, including rules, orders or statutes respecting publication of notices, the day of the act, event, default or publication after which the designated period of time begins to run is not to be included. *The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday when the courthouse is closed for transactions, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions.*

N.C. Gen. Stat. § 1A-1, Rule 6(a) (2009) (emphasis added). Rule 6(a) applies to all computations of time for statutory periods set forth in the General Statutes, including the statute of limitations provided in N.C. Gen. Stat. § 1-52(1). See N.C. Gen. Stat. § 1-593 (2009).

In computing time periods designated by the General Statutes, North Carolina courts have held that under Rule 6(a), the relevant time period runs until the end of the next business day when the last day of the period is a Saturday, Sunday, or legal holiday. *See Pearson v. Nationwide Mut. Ins. Co.*, 325 N.C. 246, 252, 382 S.E.2d 745, 747 (1989); *Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 409, 363 S.E.2d 643, 648, *disc. review denied*, 322 N.C. 113, 367 S.E.2d 917 (1988); *In re Underwood*, 38 N.C. App. 344, 347, 247 S.E.2d 778, 780 (1978). The rule applies to the calculation of multi-year limitations periods. *See Kinlaw v. Norfolk S. Ry. Co.*, 269 N.C. 110, 119, 152 S.E.2d 329, 336 (1967); *Hardbarger v. Deal*, 258 N.C. 31, 33, 127 S.E.2d 771, 773 (1962); *In re H.T.*, 180 N.C. App. 611, 616, 637 S.E.2d 923, 927 (2006). If the last day of a period of limitation for commencing an action falls on a Sunday or on a legal holiday, the period is extended and the action may be commenced on the following secular or business day. *Hardbarger*, 258 N.C. at 33, 127 S.E.2d at 773. The rule applies to all computations of time, whether they involve days, months, or years. *Id.* at 33, 127 S.E.2d at 772-73.

In the present case, plaintiff was terminated from his employment on 25 October 2006 and commenced his lawsuit on 26 October 2009 by obtaining an order extending the time for filing his action. The limitations period for a tort action based upon wrongful discharge in violation of public policy is three years. See N.C. Gen. Stat. § 1-52(1) (2009). The end of the three-year limitations period occurred on 25

October 2009, a Sunday. Rule 6(a) provides that the final day of a limitations period extends to the following business day when the end of the period occurs on a Sunday. By obtaining an extension to file his action on Monday, 26 October, and filing his complaint within the extension period, plaintiff's action was timely filed.

We hold that the trial court erred in granting defendants' motion for summary judgment based upon the statute of limitations. The trial court's order granting defendants' motion for summary judgment is reversed.

REVERSED.

Judges ELMORE and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 15 March 2011)

ALLIANCE MUT. INS. CO. v. GUILFORD INS. CO. No. 10-619	New Hanover (09CVS1545)	Affirmed
BAKER v. CHIZEK TRANSP., INC. No. 10-985	Indus. Comm. (062355)	Affirmed
BECK v. CITY OF RALEIGH No. 10-893	Wake (09CVS7458)	Affirmed
CARNEY v. GREENVILLE TV & APPLIANCE, INC. No. 10-1088	Indus. Comm. (088604)	Dismissed
EDWARDS v. CNTY. OF BLADEN No. 10-1029	Bladen (09CVS271)	Reversed and Remanded
ENSLEY v. FMC CORP. No. 10-522	Indus. Comm. (676703)	Affirmed in Part, Reversed & Remanded in Part
IN RE B.G. No. 10-1239	Iredell (06JA/JT5-6)	Affirmed
IN RE C.C.S. No. 10-1040	Vance (09JA27)	Dismissed
IN RE C.G.P. No. 10-1052	Surry (06JT40)	Affirmed in Part, Reversed and remanded in part
IN RE D.C. No. 10-1004	Nash (09JB133)	Reversed and Remanded
IN RE D.N.W. No. 10-919	Buncombe (08JT89)	Affirmed
IN RE J.M.D.W. No. 10-1005	Guilford (05JT877)	Affirmed
IN RE L.D. No. 10-1193	Harnett (09JT5)	Affirmed
IN RE M.A.W. No. 10-1128	Wilkes (10JT17)	Reversed and Remanded

Case	County	Disposition
IN RE M.J.L. No. 10-1073	Montgomery (09JB15)	Affirmed
IN RE P.A.N.Y. No. 10-1269	Haywood (08JT80)	Affirmed
IN RE T.C.L. No. 10-1068	Stokes (08JT109-110)	Affirmed
IN RE T.T. No. 10-1300	Mecklenburg (06JT1258-1259)	Affirmed
JACOBS v. DEP'T OF CORR. No. 09-1588	Indus. Comm. (546756)	Affirmed
MUNDACA FIN. SERVS., LLC v. CASELLA No. 10-714	Haywood (09CVS1431)	Reversed and Remanded
PEGRAM-WEST v. SANDRA ANDERSON BUILDERS No. 09-1448	Guilford (08CVS10825)	Affirmed in part, reversed in part, and dismissed in part.
PRICE v. PRICE No. 10-924	New Hanover (09CVS1104)	Affirmed
RITCHIE v. RITCHIE No. 10-1189	Stanly (04CVD927)	Dismissed
STATE v. CARTER No. 10-1110	Buncombe (10CRS1246-1247) (10CRS1249-1252)	Affirmed
STATE v. DAVIS No. 10-1011	Stanly (08CRS53009)	Affirmed
STATE v. GOODMAN No. 10-457	Duplin (09CRS51133)	No Error
STATE v. GUTHRIE No. 09-1595	Mecklenburg (07CRS253582)	No Error
STATE v. HEAN No. 10-630	Guilford (09CRS73546) (09CRS80003) (09CRS73540-42)	Affirmed
STATE v. JOHNSON No. 10-1061	Rockingham (08CRS52143-44)	Dismissed

STATE v. LACY No. 10-755	Mecklenburg (08CRS258520-22)	No Error
STATE v. MCCAIN No. 10-1047	Guilford (09CRS24832) (09CRS82484) (09CRS82486)	No Error
STATE v. MEBANE No. 10-447	Guilford (10CRS24029)	No Error
STATE v. MENSER No. 10-424	Guilford (08CRS78629)	No error in part; Remanded in part
STATE v. ODOM No. 10-716	Mecklenburg (08CRS237250-51)	No Error
STATE v. SCHAEFFER No. 10-545	Buncombe (06CRS11560) (06CRS62351-53)	No Error in Part, Order of Restitution Vacated and Matter Remanded for a New Hearing
STATE v. SHAFIQ-KHAN No. 10-1013	Durham (09CRS42170)	No Error
STATE v. WASH No. 10-436	Cabarrus (06CRS54319) (06CRS15071-72)	No Error
STATE v. WASHINGTON No. 10-960	Forsyth (08CRS37914) (08CRS60938)	No prejudicial error.
STATE v. WILLIFORD No. 10-937	Onslow (05CRS54013)	Reversed and remanded for new SBM hearing.
YOUS v. GREIF, INC. No. 10-962	Indus. Comm. (894698)	Affirmed

STATE OF NORTH CAROLINA v. RALPH EDWARD GRAY

No. COA10-307

(Filed 5 April 2011)

Evidence— prior crimes or bad acts—eighteen years earlier—probative value outweighed by prejudicial effect—reasonable probability of different result

The trial court committed prejudicial error in a first-degree sexual offense and taking indecent liberties with a child case by admitting evidence that defendant had sexually assaulted a four-year-old boy eighteen years before the alleged sexual assault in this case. Any probative value of the evidence was substantially outweighed by the danger of unfair prejudice and there was a reasonable possibility that, had the improper evidence not been admitted, a different result would have been reached at trial.

Appeal by Defendant from judgments entered 11 June 2009 by Judge John G. Caudill in Superior Court, Cleveland County. Heard in the Court of Appeals 12 October 2010.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for Defendant-Appellant.

McGEE, Judge.

Defendant was indicted by a grand jury on 22 September 2008 on one count of first-degree sex offense and one count of taking indecent liberties with a child. A jury found Defendant guilty of both charges on 11 June 2009. The trial court found Defendant to have a prior record level II, and sentenced Defendant to consecutive active sentences of 288-315 months for the first-degree sex offense and to 19-23 months for taking indecent liberties with a child.

Trial testimony indicated the following: At the time of the alleged incident, the alleged victim (the child) was five years old and lived with her maternal grandparents (the grandparents). The child's uncle also lived with the grandparents. The uncle had befriended Ralph Edward Gray (Defendant), and Defendant and the uncle spent a lot of time together, including time at the grandparents' house. The child's mother testified that she was at the grandparents' house one day in

June or July of 2008. As she approached a bedroom in the grandparents' house, she "observed [the child] lying across the bed and . . . saw her like kick a leg. I couldn't actually see [Defendant] until I came around the corner; then that's when he jumped back." The mother clarified that she "couldn't see if [Defendant] was standing or what. All I know is I saw him jump back and I saw her like kick her leg and I came around the corner . . . . And that's all I saw." The mother then questioned the child about the incident, and the child said that Defendant "was trying to touch her." The mother testified that the child told her Defendant had touched the child inside her vagina. The child also told her mother that she felt "stinging" in her vaginal area. The mother testified that it was not unusual for the child, or girls in general, to feel "stinging" in that area on occasion.

The mother took the child home with her. The mother kept the shorts, shirt, and underwear that the child had been wearing and did not wash them. The mother subsequently gave those clothes to a detective. The mother gave the child a bath that night after the alleged incident, but did not "notice anything" abnormal while bathing the child. The following morning, the mother called the Children's Clinic in Shelby to have the child "checked out."

Dr. Charles Hayek (Dr. Hayek) of the Children's Clinic testified that he examined the child on 12 August 2008. Dr. Hayek testified that the child complained "about holding her urine and burning with urination[.]" Dr. Hayek testified that burning with urination was a very common complaint with younger girls and was often the result of improper wiping after urination, which could cause a yeast infection. Dr. Hayek further stated that in the summer, a burning sensation was a particularly common complaint due to the wearing of bathing suits or other wet clothing. When asked by the prosecutor whether a burning sensation was "particularly indicative of sexual abuse[,]" Dr. Hayek answered: "No, ma'am." The child had previously been treated by Dr. Hayek for the same burning sensation complaint. Dr. Hayek did testify that digital penetration of the child's vagina could have caused the burning sensation.

Dr. Hayek was informed by the mother that the child might have been sexually assaulted the day before. Dr. Hayek asked the child why she was at the Children's Clinic and the child replied that her uncle's friend[1] (the man) had been rubbing her bottom when the child was at the grandparents' house. When asked to show where the man

1. According to Dr. Hayek, the child did not remember the name of her uncle's friend when Dr. Hayek asked her.

had been rubbing her, the child pointed to both her bottom and her vaginal area. The child also told Dr. Hayek that the man had inserted his finger in her "cat," which the child identified as her vagina. The child told Dr. Hayek that when that happened, her clothes were on and the man had reached underneath her clothes to touch her.

When Dr. Hayek examined the child, he noticed an injury to her hymen that had healed. He testified that this type of injury would be consistent with "a penetrating injury . . . or a stretching." Dr. Hayek explained that this kind of injury could be consistent with the insertion of a man's finger into a child's vagina, or something else that penetrated the vagina. Dr. Hayek testified that the injury to the child's hymen was consistent with what the child had told him concerning the touching. Dr. Hayek testified that this kind of scarring on the hymen would have led him to report possible sexual abuse even had there been no suspicion of sexual abuse prior to the examination. The scarring Dr. Hayek observed on the child's hymen "would have had to [have] been . . . at least several weeks old." It was not a fresh injury "because it was already healed[.]" The injury could have been sustained as early as October 2005.

Terre Bullock (Bullock) from the Children's Advocacy Center conducted a forensic interview with the child on 28 August 2008. Bullock testified that the child was "very, very smart[,]" and that the child knew "all of her family members and—and could name them. In fact, she could name them faster than I could write." Bullock also testified that the child "could even tell [Bullock] those that were—that didn't have children yet but had one on the way[.]"

The child testified at trial. The child described the events surrounding the alleged assault in multiple ways, but did not waver in her core testimony that Defendant had touched her inside her vagina.

The jury returned guilty verdicts on both charges on 11 June 2009 and Defendant was sentenced to consecutive active sentences of 288-315 months for first-degree sex offense and 19-23 months for taking indecent liberties with a child. Defendant appealed. Subsequent to the filing of Defendant's notice of appeal, the trial court modified Defendant's sentence for first-degree sex offense to 288-355 months because the original sentence for this charge did not fall within the guidelines of N.C. Gen. Stat. § 15A-1340.17 (2009). Additional relevant facts will be discussed in the body of the opinion.

I.

We find Defendant's first argument dispositive. Defendant argues that the trial court committed prejudicial error by admitting evidence that Defendant had sexually assaulted a four-year-old boy eighteen years before the alleged sexual assault in this case. We agree.

The State called as a witness Elizabeth Carroll (Carroll), a retired investigator from the Sheriff's Department of York County, South Carolina. Pursuant to Rule 404(b) of the North Carolina Rules of Evidence, the State sought to admit, through Carroll, evidence that Defendant had "admitted responsibility for conducting lewd or sexual acts with [a four-year-old boy]" in April of 1990. This evidence was supported by records from South Carolina showing that Defendant had been convicted of "assault & battery, high & aggravated nature" in December of 1990. After a *voir dire* of Carroll, and over Defendant's objection, the trial court allowed the State to present Carroll's testimony for the purposes of proving identity, intent, and a common scheme or plan.

In *State v. Carpenter*, 361 N.C. 382, 646 S.E.2d 105 (2007), our Supreme Court reviewed the law governing the admission of evidence of prior crimes or bad acts pursuant to Rule 404(b). In *Carpenter*, our Supreme Court held that evidence of a 1996 conviction for selling cocaine was improperly admitted in a defendant's trial where the defendant had been charged in 2004 with possession of cocaine with intent to sell. The Court further held that the improper admission of the prior conviction was prejudicial, and ordered a new trial. *Id*. The Court in *Carpenter* began with a thorough analysis of Rule 404(b):

> North Carolina Rule of Evidence 404(b) provides:
>
> > (b) *Other crimes*, *wrongs*, *or acts*.—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.
>
> We have characterized Rule 404(b) as a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54

(1990). However, we have also observed that Rule 404(b) is "consistent with North Carolina practice prior to [the Rule's] enactment." *State v. DeLeonardo*, 315 N.C. 762, 770, 340 S.E.2d 350, 356 (1986); *accord State v. McKoy*, 317 N.C. 519, 525, 347 S.E.2d 374, 378 (1986). Before the enactment of Rule 404(b), North Carolina courts followed "[t]he general rule . . . that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. This is true even though the other offense is of the same nature as the crime charged." *State v. McClain*, 240 N.C. 171, 173, 81 S.E.2d 364, 365 (1954) (citations omitted); *see also DeLeonardo*, 315 N.C. at 769, 340 S.E.2d at 355 ("Since *State v. McClain* . . . it has been accepted as an established principle in North Carolina that 'the State may not offer proof of another crime independent of and distinct from the crime for which defendant is being prosecuted even though the separate offense is of the same nature as the charged crime.' "). As we explained in *McClain*, the general rule "rests on these cogent reasons":

> (1) Logically, the commission of an independent offense is not proof in itself of the commission of another crime.
>
> (2) Evidence of the commission by the accused of crimes unconnected with that for which he is being tried, when offered by the State in chief, violates the rule which forbids the State initially to attack the character of the accused, and also the rule that bad character may not be proved by particular acts, and is, therefore, inadmissible for that purpose.
>
> (3) Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence.
>
> (4) Furthermore, it is clear that evidence of other crimes compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the charge immediately before it. The rule may be said to be an application of the principle that the evidence must be confined to the point in issue in the case on trial.

240 N.C. at 173-74, 81 S.E.2d at 365-66 (citations and quotation marks omitted); *see also McKoy*, 317 N.C. at 526, 347 S.E.2d at 378. Thus, while we have interpreted Rule 404(b) broadly, we have also long acknowledged that evidence of prior convictions must be carefully evaluated by the trial court.

Accordingly, we have observed that evidence admitted under Rule 404(b) "should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002). When evidence of a prior crime is introduced, the " 'natural and inevitable tendency' " for a judge or jury " 'is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge.' " *Id.* at 154, 567 S.E.2d at 122-23 (quoting IA John Henry Wigmore, *Evidence* § 58.2, at 1212 (Peter Tillers ed., 1983)). Indeed, "[t]he dangerous tendency of [Rule 404(b)] evidence to mislead and raise a legally spurious presumption of guilt requires that its admissibility should be subjected to strict scrutiny by the courts." *State v. Johnson*, 317 N.C. 417, 430, 347 S.E.2d 7, 15 (1986).

In light of the perils inherent in introducing prior crimes under Rule 404(b), several constraints have been placed on the admission of such evidence. Our Rules of Evidence require that in order for the prior crime to be admissible, it must be relevant to the currently alleged crime. N.C.G.S. § 8C-1, Rule 401 (2005) (" '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."); *id.*, Rule 402 (2005) ("Evidence which is not relevant is not admissible."). In addition, "the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity." *Al-Bayyinah*, 356 N.C. at 154, 567 S.E.2d at 123; *see also State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993) ("The admissibility of evidence under [Rule 404(b)] is guided by two further constraints—similarity and temporal proximity."). This Court has stated that "remoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admis-

> sibility." *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991). Nevertheless, we note that the two offenses in the case at bar are separated by eight years. Moreover, as to the "similarity" component, evidence of a prior bad act must constitute " 'substantial evidence tending to support a reasonable finding by the jury that the defendant committed [a] *similar* act.' " *Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123. "Under Rule 404(b) a prior act or crime is 'similar' if there are 'some unusual facts present in both crimes . . . .' " Finally, if the propounder of the evidence is able to establish that a prior bad act is both relevant and meets the requirements of Rule 404(b), the trial court must balance the danger of undue prejudice against the probative value of the evidence, pursuant to Rule 403.

Carpenter, 361 N.C. at 386-89, 646 S.E.2d at 109-10 (some internal citations omitted).

We note that our Supreme Court in *Carpenter* quotes *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991), for the "statement" that "remoteness in time generally affects only the weight to be given [the] evidence, not its admissibility." Yet, the Court in *Carpenter* goes on to highlight the eight-year gap between the two offenses in a manner suggesting that, in its admissibility analysis, the Court was weighing remoteness in time. *Id.* A review of the appellate cases of our State reveals confusion surrounding whether the temporal prong of the test for admissibility still applies, and, if it does, the weight to be given the temporal prong when determining admissibility of prior bad act evidence pursuant to Rule 404(b).

We find that a thorough review of our Supreme Court's decisions supports considering the length of time between offenses when determining whether to *admit* at trial prior bad act evidence pursuant to Rule 404(b). *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *vacated and remanded on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990) ("The use of evidence as permitted under Rule 404(b) is guided by two constraints: similarity and temporal proximity. When the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value. When otherwise similar offenses are distanced by significant stretches of time, commonalities become less striking, and the probative value of the analogy attaches less to the acts than to the character of the actor.") (citations omitted); *State v. Jones*, 322 N.C. 585, 589, 369 S.E.2d 822, 824 (1988) ("Moreover, evidence of

other crimes may distract the fact finders and confuse their consideration of the issues at trial. With these considerations bearing great weight, this Court has required that evidence of prior bad acts, admitted to show a common plan under Rule 404(b), be 'sufficiently similar and not so remote in time' before they can be admitted against a defendant.") (citations omitted); *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988) ("Nevertheless, the ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403. *State v. Cotton*, 318 N.C. 663, 665, 351 S.E.2d 277, 278-79 (1987).").

However, in *Stager* our Supreme Court stated:

> Remoteness in time between an uncharged crime and a charged crime is more significant when the evidence of the prior crime is introduced to show that both crimes arose out of a common scheme or plan. *Riddick*, 316 N.C. at 134, 340 S.E.2d at 427. In contrast, remoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility. *See Smoak*, 213 N.C. at 93, 195 S.E. at 81.

Stager, 329 N.C. at 307, 406 S.E.2d at 893. It appears the *Stager* Court supports its statement that, "*[i]n contrast*, remoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident[,]" *id.* (emphasis added), solely by way of comparison to the language in *Riddick*, which merely states that remoteness in time is *more* significant when the evidence sought to be admitted is for the purpose of showing a common scheme or plan. *Riddick* does not suggest any *diminished* significance in the remoteness in time inquiry for admission of prior bad act evidence for purposes other than showing a common scheme or plan. Thus, the lesser significance of remoteness in time attached to evidence of intent, *et cetera*, is only *relative* to the greater significance of remoteness in time with respect to evidence of a common scheme or plan. In *Stager*, the language concerning the importance of remoteness in making admissibility determinations for evidence related to intent, *et cetera*, does not serve to diminish the significance of the remoteness analysis with respect to this kind of evidence below any pre-*Stager* standard.

The Court in *Stager* cites *State v. Smoak*, 213 N.C. 79, 93, 195 S.E. 72, 81 (1938), in support of its statement that "remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *Stager*, 329 N.C. at 307, 406 S.E.2d at 893. The Court in *Smoak*, before the adoption of the North Carolina Rules of Evidence, reviewed the law relevant to admission of evidence of alleged prior offenses:

> "Evidence of other crimes may be admitted when it tends to establish a common scheme or plan embracing the commission of a series of crimes so related to each other that proof of one tends to prove the other, and to show the defendant's guilt of the crime charged. . . . The question is one of induction, and the larger the number of consistent facts the more complete the induction. . . . Like crimes committed against the same class of persons, *at about the same time*, tend to show the same general design, and evidence of the same is relevant and may lead to proof of identity."
>
> . . . "Another exception to the general rule is that evidence of other crimes of the same general character is admissible when it tends to prove, plan, system, habit, or scheme of related offenses, or a design to commit a series of like crimes. . . .
>
> "It is undoubtedly the general rule of law, with some exceptions, that evidence of a distinct substantive offense is inadmissible to prove another and independent crime, the two being wholly disconnected and in no way related to each other. But to this there is the exception, as well established as the rule itself, that proof of the commission of other like offenses is competent to show the *quo animo*, intent, design, guilty knowledge, or scienter, when such crimes are so connected with the offense charged as to throw light upon this question. Proof of other like offenses is also competent to show the identity of the person charged with the crime.

Smoak, 213 N.C. at 90-91, 195 S.E. at 79-80 (emphasis added) (internal citations omitted).

In *Smoak*, the defendant was on trial for the 1936 strychnine poisoning death of his daughter, Annie Smoak. At trial, over the defendant's objection, evidence was presented that tended to implicate the defendant in the strychnine poisonings of three other individuals who died, two of whom were the defendant's first and second wives. The defendant's first wife, Georgia Smoak, died in 1922; his second

wife, Alice Smoak, died in 1935. The third woman, Bertha Stewart, seems to have been poisoned in 1935, though the opinion is not entirely clear on this point. The defendant was the beneficiary of life insurance policies on all three of these women. The defendant had also taken out life insurance policies on his daughter prior to her poisoning death. The defendant was never tried for the earlier alleged poisonings. However, evidence of these suspected poisonings was admitted at trial, including results from an autopsy performed on Georgia Smoak's exhumed body, which discovered fatal quantities of strychnine. An autopsy of the defendant's daughter also discovered fatal levels of strychnine. *Smoak*, 213 N.C. 79, 195 S.E. 72. In *Smoak*, our Supreme Court looked to other jurisdictions to inform its decision in holding that the evidence of prior poisonings was admissible for certain limited purposes:

> The admissibility of evidence of previous poisonings to show motive and *scienter* is most clearly brought out by the case of *People v. Gosden*, 56 P.2d 211 (Calif., 1936). The defendant had taken out insurance on a first and second wife. Both had died from strychnine poisoning. He was tried for the death of his second wife, and at the trial objected to introduction of evidence showing the similarity of the circumstances surrounding the death of his first wife. In upholding the admissibility of the evidence, the California Court said: "This evidence tended to show that each died of strychnine poisoning, each was insured with the appellant as the beneficiary, and in each case the appellant attempted immediately upon the death of the wife to collect the insurance upon her life. The evidence as to the death of the first wife and the fact that her life was insured with the appellant as beneficiary was properly admitted to show *motive* of the appellant in the murder of his second wife. It was also admissible to show *knowledge on the part of the appellant as to the effect of administering strychnine to a human being.*"

Smoak, 213 N.C. at 91, 195 S.E. at 80 (internal citations omitted) (emphasis added). Our Supreme Court then cited cases where similar evidence was admitted "to show criminal intent[.]" *Id.* at 92, 195 S.E. at 80 (citations omitted). However, our review of *Smoak* fails to uncover any support in that opinion for the statement concerning prior bad act evidence that "remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *Stager*, 329 N.C. at 307, 406 S.E.2d at 893.

The Court in *Smoak* clearly laid out the similarities between the evidence of the prior poisonings and the poisoning murder of the defendant's daughter, for which he was on trial. The evidence suggested that the defendant began a series of strychnine poisonings with his first wife, Georgia Smoak, in 1922, in order to collect life insurance benefits from policies the defendant had taken out with himself as beneficiary. Though the poisoning of Georgia Smoak occurred some fourteen years prior to the poisoning death of the defendant's daughter, in light of the undeniable similarities between the facts surrounding the two poisoning deaths and the two intervening poisonings, also remarkably similar to the first and last, our Supreme Court held: "The other like offenses were to show the *scienter*, intent, and motive of defendant. *On this record* they are so connected or associated that this evidence would throw light upon the question of his guilt." *Smoak*, 213 N.C. at 90, 195 S.E. at 79 (emphasis added).

Referring specifically to evidence of the earliest alleged poisoning, the Court in *Smoak* stated: "The evidence in regard to the defendant's first wife, Georgia Jones Smoak, was remote, but, *linked in with the other evidence*, we think it was a circumstance to be considered by the jury." *Smoak*, 213 N.C. at 93, 195 S.E. at 81 (emphasis added). This quote is apparently the one upon which the *Stager* Court relied for the statement that remoteness in time is generally not a factor to consider when determining the *admissibility* of evidence of prior bad acts. When read in context, the clear meaning of this quote from *Smoak* is that, though the evidence concerning Georgia Smoak was remote in time, when considered in light of the similarities between that evidence and the murder of the defendant's daughter, and the evidence of an ongoing *pattern* of similar poisonings perpetrated for financial gain, the trial court did not err in admitting the evidence. Due to the striking similarities between the prior bad act evidence and the crime charged, and the pattern established by that evidence, allowing the jury to consider evidence of Georgia Smoak's poisoning did not constitute error. This quote does not suggest that remoteness in time should not be a factor when determining whether to admit the evidence in the first instance. The Court in *Smoak* clearly did consider remoteness in time in its admissibility analysis, but found that remoteness was outweighed by other factors.

That *Smoak* did not serve to remove remoteness in time from the admissibility analysis is supported by opinions from our Supreme Court, following *Smoak*, that have held that evidence of prior bad acts should have been excluded due to the remoteness in time

between the alleged commission of those prior bad acts and the charges for which those defendants were then being tried.

> In *State v. Shane*, 304 N.C. 643, 285 S.E. 2d 813 (1982), this Court held it was error for the trial court to permit a witness to testify to evidence of prior crimes committed by the defendant *because the period of time separating the crimes, a period of seven months, lessened the probative force of that evidence*. The Court in *Shane* stated that "it is evident that *the period of time elapsing between the separate sexual events plays an important part in the balancing process*, especially when the State offers the evidence of like misconduct to show the existence of a common plan or design for defendant's perpetration of this sort of crime." *Id.* at 654, 285 S.E. 2d at 820.

Jones, 322 N.C. at 589-90, 369 S.E.2d at 824 (emphasis added) (footnote omitted). Our Supreme Court has acknowledged the ongoing relevance of the remoteness analysis in determining whether 404(b) evidence is admissible, even after *Stager*. *See State v. Badgett*, 361 N.C. 234, 243-44, 644 S.E.2d 206, 212 (2007); *State v. Al-Bayyinah*, 356 N.C. 150, 154-55, 567 S.E.2d 120, 123 (2002); *State v. Frazier*, 344 N.C. 611, 615-16, 476 S.E.2d 297, 299-300 (1996); *State v. Penland*, 343 N.C. 634, 653-54, 472 S.E.2d 734, 745 (1996); *State v. White*, 331 N.C. 604, 615-16, 419 S.E.2d 557, 564 (1992).

Perhaps most relevantly, in *Jones*, our Supreme Court was asked to address the precise issue of whether remoteness in time should be a factor in the decision to admit or deny admission of prior bad act evidence. *Jones*, 322 N.C. at 590-91, 369 S.E.2d at 825. In *Jones*, our Supreme Court expressly rejected the State's request to limit the temporal prong of the 404(b) admissibility test to the weight to be given the evidence, and to not consider that prong when deciding admissibility:

> Similarly, the time period between the alleged prior acts of defendant and the acts upon which this appeal is based is of such a span that any similarity between the two acts is severely attenuated. The period of seven years "substantially negate[s] the plausibility of the existence of an ongoing and continuous plan to engage persistently in such deviant activities." As such, the reasoning that gave birth to Rule 404(b) exceptions is lost. *See State v. Scott*, 318 N.C. 237, 347 S.E. 2d 414 (1986) (nine-year period held to be too remote to be probative or relevant).

> Evidence of other crimes *must be connected by point of time and circumstance.* Through this commonality, proof of one act may reasonably prove a second. However, *the passage of time between the commission of the two acts slowly erodes the commonality* between them. The probability of an ongoing plan or scheme then becomes tenuous. Admission of other crimes at that point allows the jury to convict defendant because of the kind of person he is, rather than because the evidence discloses, beyond a reasonable doubt, that he committed the offense charged.
>
> The *State argues that remoteness of time should go to the weight and credibility to be given this type of evidence and not to its admissibility.* The State directs this Court to *Cooper v. State*, 173 Ga. App. 254, 325 S.E. 2d 877 (1985), where a Georgia court held that the lapse of time between prior occurrences and the offenses charged goes only to the weight and credibility of such testimony and would not prevent its admissibility. *Our cases, however, are to the contrary,* and we support their reasoned conclusion that *the passage of time must play an integral part in the balancing process to determine admissibility* of such evidence. *See State v. Boyd*, 321 N.C. 574, 364 S.E. 2d 118; *State v. Cotton*, 318 N.C. 663, 351 S.E. 2d 277 (1987); *State v. Weaver*, 318 N.C. 400, 348 S.E. 2d 791 (1986).
>
> It seems incongruous that such testimony should be allowed into evidence when its probative impact has been so attenuated by time that it has become little more than character evidence illustrating the predisposition of the accused. Such is proscribed by Rules 403 and 404 of our rules of evidence. *We think that a process that allows for the passage of time to be weighed in a court's initial decision to admit such evidence is the better reasoned approach* and one that ensures that an accused is tried only for the acts for which he has been indicted. *We therefore decline to follow Cooper v. State*, 173 Ga. App. 254, 325 S.E. 2d 877.

Jones, 322 N.C. at 590-91, 369 S.E.2d at 824-25 (emphasis added).

Our Supreme Court has not overruled *Jones*, and we believe we are still bound by the holding in *Jones*. Our Supreme Court has continued to cite *Jones* for this proposition. *Frazier*, 344 N.C. at 615, 476 S.E.2d at 300; *White*, 331 N.C. at 616, 419 S.E.2d at 564; *Artis*, 325 N.C. at 300, 384 S.E.2d at 482 ("Attenuated by time, the pertinence of evidence of prior offenses attaches to the defendant's character rather than to the offense for which he is on trial. In other words, remote-

ness in time tends to diminish the probative value of the evidence and enhance its tendency to prejudice."); *State v. Shamsid-Deen*, 324 N.C. 437, 444-45, 379 S.E.2d 842, 847 (1989). We are also bound by our Supreme Court opinions, some mentioned above, which were filed after *Smoak*, *Jones*, or *Stager*, that continue to consider remoteness in time between bad acts when evaluating the *admissibility* of evidence pursuant to Rule 404(b). Furthermore, as our Supreme Court in *Carpenter* acknowledged, the language from *Stager* constituted a statement, not a holding. *Carpenter*, 361 N.C. at 388, 646 S.E.2d at 110 ("This Court has stated that 'remoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility.' *Stager*, 329 N.C. at 307, 406 S.E.2d at 893. Nevertheless, we note that the two offenses in the case at bar are separated by eight years."). Because this quote from *Stager* was not necessary to the decision reached by our Supreme Court in *Stager*, it constitutes *obiter dictum*. *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) ("Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby.") (citations omitted). In *Jones*, however, our Supreme Court made a definite holding rejecting the proposition that remoteness in time was a factor to be considered only for the weight to be given the evidence, not the admissibility of that evidence. *Jones*, 322 N.C. at 590-91, 369 S.E.2d at 824-25.

We acknowledge another line of cases originating in this Court with *State v. Hall*, 85 N.C. App. 447, 451, 355 S.E.2d 250, 253 (1987), which interpreted *State v. Brown*, 280 N.C. 588, 187 S.E.2d 85 (1972), to stand for the proposition that, pursuant to Rule 404(b), remoteness usually goes to the weight of the evidence and not its admissibility. In *Brown*, our Supreme Court stated that

> [A police officer] testified that five days after these crimes he found a cartridge near the door of the bedroom where the rapes took place, and this was the cartridge later identified by the expert as the one having been ejected from [a defendant's] rifle. Defendants contend that the identification of the cartridge found on February 17 should not have been admitted because of remoteness. The five-day lapse occurring between the crimes and the discovery of the cartridge is not a significantly long period. This lapse of time would not render the evidence incompetent, but would only affect the probative force of the evidence.

Id. at 596, 187 S.E.2d at 91. The relevant language in *Brown* has nothing to do with Rule 404(b) or the admission of prior bad act evidence. Furthermore, the *Brown* Court held that the lapse in time was not "significantly long"—a only five days—and, therefore, "would not render the evidence incompetent[.]" *Id.* In *Brown*, our Supreme Court conducted a remoteness analysis, and it simply determined the five-day time period did not render the evidence too remote. In light of the conflict between *Hall* and *Jones*, we are bound by *Jones*.

II.

Nonetheless, it is clear that there are no bright line rules when considering the remoteness prong of the Rule 404(b) admissibility test. For example, when the evidence challenged by a defendant suggests an ongoing and repetitive course of conduct by that defendant, a longer period of time in which the defendant has allegedly been *continuing* the similar conduct tends to make the evidence more relevant, not less, for proving a common scheme or plan. *State v. Frazier*, 344 N.C. 611, 616, 476 S.E.2d 297, 300 (1996) ("Here, the testimony in question tended to prove that defendant's prior acts of sexual abuse occurred continuously over a period of approximately twenty-six years and in a strikingly similar pattern. All of the victims were adolescents at the time defendant began his sexual assaults. In each instance, defendant slowly began touching the victim and gradually reached more serious abuse culminating in intercourse. During the period of the abuse, defendant bought his victims gifts and gave them money. He also threatened each of them that if she revealed to anyone what he was doing, she would be sent away or suffer some other severe sanction. All of the victims were related to defendant, either through his own marriage or the marriages of his children, and all lived with or near defendant during the course of the abuse. We conclude that this evidence presents a classic example of a common plan or scheme. 'When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan.' *Shamsid-Deen*, 324 N.C. at 445, 379 S.E.2d at 847."). Certain occurrences, such as imprisonment, may toll the length of time for remoteness purposes, if the defendant has been involuntarily prevented from continuing to engage in the relevant conduct. *State v. Jacob*, 113 N.C. App. 605, 607-12, 439 S.E.2d 812, 813-16 (1994). Furthermore, the more striking the similarities between the facts of the crime charged and the facts of the prior bad act, the longer evidence of the prior bad act remains relevant and potentially admissible for certain purposes.

> Remoteness in time is less important when the other crime is admitted because its *modus operandi* is so strikingly similar to the *modus operandi* of the crime being tried as to permit a reasonable inference that the same person committed both crimes. It is reasonable to think that a criminal who has adopted a particular *modus operandi* will continue to use it notwithstanding a long lapse of time between crimes. It is this latter theory which sustains the evidence's admission in this case.

State v. Riddick, 316 N.C. 127, 134, 340 S.E.2d 422, 427 (1986).

In the present case, the trial court instructed the jury that it could consider the fact of Defendant's prior conviction

> solely for the purpose of showing the identity of the person who committed the crime charged in this case; that the person charged in this case had the intent, which is a necessary element of the crime charged in this case; that there existed in the mind of [Defendant] in this case a plan or design involving crimes charged in this case.

III.

Rule 404(b) evidence is admissible to prove identity when the defendant is not definitely identified as the perpetrator of the alleged crime. *State v. Moore*, 309 N.C. 102, 106, 305 S.E.2d 542, 545 (1983) (citation omitted); *see also State v. Tuggle*, 284 N.C. 515, 521, 201 S.E.2d 884, 888 (1974) (evidence of similar crime that occurred less than thirty minutes earlier and less than four miles away admissible for purposes of identity as "evidence as to *what happened* [during the commission of the crime] was not contradicted. The primary issue was whether *defendant* committed these crimes."). In the present case, Defendant was identified by the child as the perpetrator, assuming a crime was committed. The child testified that Defendant, and only Defendant, improperly touched her inside her vagina. The primary issue in this case is what, if anything, happened, not who was responsible if a crime was, in fact, committed.

> Assuming, *arguendo*, that the defendant was not definitely identified as the perpetrator of the crime charged, the circumstances of the two crimes must still be such as to "tend to show that the crime charged and another offense were committed by the same person" before the evidence will be admissible. Therefore, before this exception can be applied, there must be shown some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes. To

> allow the admission of evidence of other crimes without such a showing of similarities would defeat the purpose of the general rule of exclusion.

Id. at 106-07, 305 S.E.2d at 545 (internal citations omitted).

Following his South Carolina conviction for "assault and battery of a high and aggravated nature[,]" Defendant was incarcerated in December 1990. The underlying offense occurred in April 1990. There was no evidence presented at the hearing that established how long Defendant remained incarcerated. Evidence was presented that showed Defendant was sentenced to eight years of imprisonment. However, no evidence was presented that showed how much of that sentence Defendant actually served. The trial court stated, "I can only, I guess, assume by what's before me that [Defendant] served eight years. So if I—if one concluded that, then we're talking about 12 years instead of 20 years." The trial court, therefore, made no finding of fact concerning how long Defendant was incarcerated for the 1990 conviction. We hold that, absent competent evidence concerning the length of Defendant's incarceration, the prior act must be considered without tolling for the time Defendant spent in prison.

"Evidence that a defendant engaged in previous sexual abuse is inadmissible when a significant lapse of time exists between the instances of alleged sexual abuse." *State v. Delsanto*, 172 N.C. App. 42, 50, 615 S.E.2d 870, 875 (2005) (citation omitted) (evidence that the defendant had sexually molested his four-year-old niece twenty-three years earlier too remote for admission to show a common scheme or plan in trial where the defendant was accused of sexually molesting his three-year-old granddaughter).

In the present case, the trial court made the following ruling concerning the evidence at issue:

> And taking [the *Carpenter*] approach as to the evidence in this case, I do note the similarity of the settings; the similarity of the relationships among the folks involved—that is, relatives, friends of the victim having relationships, friendship or other relationships with those same individuals and the—and the child; the manner of previous relationship between the perpetrator and the victim regarding the aura of trust that defendant proceeded to feel with the victim; and the manner of the approach and execution of the specific offense—note that both are sexual offenses; distinct differences in the objects and the purposes involved in

> each, but the tender age of each child engaged with the defendant is a similarity of, the [c]ourt's opinion, overwhelming proportions, and the [c]ourt finds that even considering the strict phrases of *State versus Carpenter* and the [c]ourt noting the dangerous tendency to mislead, the court finds this evidence to be strongly relevant and probative and not outweighed by the danger of unfair prejudice to the defendant pursuant to 403 consideration.

The South Carolina offense occurred in April of 1990 and the offense in the present case allegedly occurred in August 2008, nearly eighteen and one-half years later. Assuming *arguendo*, there was evidence to support a finding that Defendant spent eight years in prison for the 1990 conviction, there would remain over ten years between his release and the alleged commission of the crimes from which he appeals. Because there was no evidence of an ongoing pattern of crimes between the 1990 offense and the present case, but rather only the single prior conviction for an offense over eighteen years old, remoteness in time becomes more significant in the analysis for admission for the purpose of showing a common scheme or plan. *Riddick*, 316 N.C. at 134, 340 S.E.2d at 427; *see also Frazier*, 344 N.C. at 616, 476 S.E.2d at 300.

We next look to the similarities and differences between the acts underlying the 1990 conviction and the alleged acts in the case before us. Carroll was an investigator for the York County South Carolina Sheriff's Office in 1990, and investigated the incident in question. According to Carroll's report, and her affidavit in support of an arrest warrant, the four-year-old victim, a boy, was spending the night at his babysitter's house when the assault occurred. According to the victim's mother, Defendant would visit the babysitter's house "on different occasions while [the victim] was there." The victim told Carroll that Defendant engaged in anal intercourse with the victim while the victim was in bed. Carroll testified at the suppression hearing that the victim stated that he "had slept in the bed with [Defendant] on several different occasions during the time when [the victim was at the babysitter's house] and that he—he had woken one night and [Defendant] was on top of him with his penis in his [anus]." Defendant was a cousin to the husband of the babysitter and, at the time, Defendant was thirty-five years of age.

In the case before us, the child was a five-year-old girl at the time of the alleged assault. Testimony given at trial at the suppression hearing included the following. The child testified that she was spending the night at her grandparents' house on the night of the

assault. The child's uncle lived at the grandparents' house. The child testified that Defendant sometimes visited her uncle when she was spending the night at her grandparents' house. The child's uncle testified that Defendant was a friend; that he and Defendant spent a lot of time together visiting Defendant's family, going to stores and restaurants, and spending time at Defendant's house and the grandparents' house. The uncle testified that the child was sometimes at the grandparents' house when Defendant would come to visit the uncle. The uncle further testified that Defendant would give the child candy and then hug her in an inappropriate manner. The child also testified that Defendant gave her candy. However, the child testified that Defendant gave her uncle candy, too, and that Defendant didn't ask her to do anything in return for the candy. The child testified that she just thanked Defendant for the candy. The child further testified that Defendant touched her vagina with his finger but never touched her inappropriately with any other part of his body.

The child's mother testified that one day when she stopped by the grandparents' house to see the child, she saw Defendant and the child in a bedroom. The child was

> lying across the bed and [the mother] saw her like kick a leg. I couldn't actually see [Defendant] until I came around the corner; then that's when he jumped back. . . . I couldn't see if he was standing or what. All I know is I saw him jump back and I saw her like kick her leg and I came around the corner . . . . And that's all I saw.

The mother later asked the child what had happened in the room, and the child stated that Defendant "stuck his finger in her." The child also told her mother that she was "stinging" in her vaginal area. The mother saved the child's clothes and turned them over to the police, unwashed. The mother took the child to the doctor the next day.

The main relevant similarity between the 1990 offense, and the facts presented to the trial court in the present case, is that both children involved were quite young—four and five years of age—at the time the acts allegedly occurred. Another similarity is that both alleged acts occurred at a caretaker's house where Defendant was a reasonably frequent visitor.

The main differences between the two alleged assaults involve the nature of the alleged assaults. In the 1990 incident, Defendant was accused of forcing anal intercourse on a boy while the boy was sleep-

ing. This would have necessitated at least partial removal of the boy's clothes and Defendant's clothes. Defendant apparently slept in the same bed with the boy multiple times before this incident occurred. In the present case, Defendant was accused of inserting his finger in the vagina of a girl. This occurred during daylight hours, and neither the child's clothes nor Defendant's clothes were removed. The child testified that Defendant never touched her with any part of his body other than his hand. There was no evidence that Defendant ever spent the night with the child. In the 1990 case, Defendant was a cousin of the babysitter's husband. In the present case, Defendant was not related to anyone in the house where the alleged assault occurred. Defendant gave candy to the child in the present case, but there was no evidence of gift-giving to the boy in the 1990 case. Defendant was thirty-five years old in 1990, and fifty-three years old when the assault in the present case allegedly occurred. There was no evidence presented that Defendant had committed any acts of assault against anyone in the intervening years.

The similarities show little more than that the alleged perpetrator of both acts was attracted to young children, and that he used the fact that he was a welcome guest in the house where each child was staying to find time alone with that child in order to commit the assaults. These facts are all too common in cases involving sexual assaults on minors by an adult. "[A]s to the 'similarity' component, evidence of a prior bad act must constitute ' " 'substantial evidence tending to support a reasonable finding by the jury that the defendant committed [a] *similar* act.' "' *Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123." *Carpenter*, 361 N.C. at 388, 646 S.E.2d at 110.

> While it is true that "North Carolina courts have been consistently liberal in admitting evidence of similar sex offenses in trials on sexual crime charges[,]" when two or three decades have passed between the incidents, certainly the Court must require more similarity between the acts than what was provided herein—namely, that the victims were young girls in defendant's care, the incidents happened in his home, and he told the girls not to report his behavior. While "the similarities between the two incidents need not be unique and bizarre[,] . . . the similarities simply must tend to support a *reasonable* inference that the same person committed both the earlier and later acts." Such is not the case here. Admission of this testimony was, therefore, error.

State v. Webb, 197 N.C. App. 619, 623, 682 S.E.2d 393, 395-96 (2009) (internal citations omitted) ("the trial court erred in allowing the tes-

timony of two witnesses who alleged that defendant had abused them twenty-one and thirty-one years prior"); *see also State v. White*, 135 N.C. App. 349, 353, 520 S.E.2d 70, 73 (1999) ("Except for the fact that both incidents involve young females who were allegedly assaulted in their own homes, there are few points of similarity.").

In the present case, in light of the dissimilarities between the two alleged acts and the great length of time between them, we hold that the State has failed to show sufficient "unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes." *Moore*, 309 N.C. at 106, 305 S.E.2d at 545, *see also Al-Bayyinah*, 356 N.C. at 155-56, 567 S.E.2d at 123; *Jones*, 322 N.C. at 590, 369 S.E.2d at 825; *Moore*, 309 N.C. at 106-08, 305 S.E.2d at 545-46 (our Supreme Court held evidence of a prior attack should have been excluded because the prior attack was insufficiently similar, included distinct dissimilarities, and was somewhat remote in time and place (though the two attacks both occurred in Greensboro and within two months of each other)); *Delsanto*, 172 N.C. App. at 50-52, 615 S.E.2d at 875-76. Evidence related to Defendant's 1990 sexual assault on the four-year-old boy was improperly admitted pursuant to Rule 404(b) for the purposes of identity.

IV.

We reach the same holding for admission of the 1990 evidence for the purposes of showing a common scheme or plan or proving intent. In light of the fact that only a single prior act was introduced, and the fact that it was very remote in time and lacking in unusual shared facts, the evidence of the 1990 assault was not admissible to show a common scheme or plan. In *Jones*, the trial court found the following similarities between alleged sexual assaults against the victim and another State's witness (State's witness):

> 1. That the State has introduced evidence tending to show that the defendant, Charlie James Jones, was living in the same home as [the victim] during the relevant periods . . . . That the defendant during previous periods lived in the home with [State's witness].
>
> 2. That while the defendant was living in the home with [the victim] she was 12, 13 and 14-years-old. While he lived in the home with [State's witness] she was 11, 12, and 13-years-old.
>
> 3. That in both homes the defendant was an adult male in a position of authority when the girls . . . were 11, 12, and 13.

> 4. That the defendant had vaginal intercourse with both [the victim] and [State's witness] in the afternoons and at night.
>
> 5. That in both instances the defendant was throughout those periods having normal sexual relations with adult women—during the episode with [the victim], with his wife . . .; and during the episode with [State's witness], with her sister . . . .
>
> 6. That in both cases the defendant used hand guns to physically threaten the girls to force submission to his sexual advances.

Jones, 322 N.C. at 586-87, 369 S.E.2d at 823. In *Jones*, the similarities between the alleged acts against the victim and the alleged acts against [State's witness] were far greater than the similarities present in the case before us. Nonetheless, our Supreme Court reasoned:

> The State's own evidence tended to show that the alleged assaults against [State's witness] occurred between the years 1970 and 1975. The crimes for which defendant was indicted occurred between the years 1982 and 1985. Thus, there was a twelve-year lapse of time between the start of the alleged assaultive conduct against [State's witness] by defendant and the start of assaultive behavior against the victim in this case. Furthermore, the time differential between the commencement of the assault against the prosecutrix was seven years after the last of the alleged assaultive episodes against [State's witness]. Such an extreme time lapse raises serious concerns about the probative nature of such evidence.

Id. at 589, 369 S.E.2d at 824. Based upon this reasoning, our Supreme Court held

> that the admission of the testimony relating to the alleged assaultive conduct against [State's witness] was prejudicial to the defendant's fundamental right to a fair trial on the charges for which he was indicted because the prior acts were too remote in time. Accordingly, defendant is entitled to a [new trial].

Id. at 591, 369 S.E.2d at 825; *see also Webb*, 197 N.C. App. at 623, 682 S.E.2d at 395-96; *White*, 135 N.C. App. at 353, 520 S.E.2d at 73.

"Even if offered for a proper purpose under Rule 404(b), evidence of prior 'crimes, wrongs, or acts' must be relevant, and such evidence is not relevant unless it 'reasonably tends to prove a material fact in issue' other than the character of the accused." *State v. Haskins*, 104

N.C. App. 675, 679, 411 S.E.2d 376, 380 (1991) (citation omitted). In the present case, based on the facts upon which the trial court made its ruling, we hold that the evidence of the 1990 assault does not reasonably tend to prove Defendant had the intent to assault the child. The prior act is simply too remote, and too different in character, to be relevant in proving Defendant had the intent to sexually assault the child. *See Webb*, 197 N.C. App. at 623, 682 S.E.2d at 395-96; *White*, 135 N.C. App. at 353, 520 S.E.2d at 73. The similarities relied upon by the trial court in making its ruling are far too generic in light of the dissimilarities involved, *see Al-Bayyinah*, 356 N.C. at 155-56, 567 S.E.2d at 123, and again, the long period of time separating the two alleged assaults greatly diminishes any potential probative value. *See Jones*, 322 N.C. at 590, 369 S.E.2d at 825. " 'It is when the transactions are so connected or contemporaneous as to form a continuing action that evidence of the collateral offense will be heard to prove the *intent* of the offense charged.' " *State v. Gammons*, 258 N.C. 522, 524, 128 S.E.2d 860, 862 (1963), *overruled on other grounds*, *State v. Hunt*, 283 N.C. 617, 197 S.E.2d 513 (1973) (citation omitted).

V.

Furthermore, even assuming *arguendo* that the 1990 assault was relevant for some proper purpose under Rule 404(b), we hold that the great danger of prejudice warned of in *State v. McClain*, 240 N.C. 171, 173-74, 81 S.E.2d 364, 365-66 (1954), outweighs whatever minimal relevance this evidence could have had. *See also Jones*, 322 N.C. at 590, 369 S.E.2d at 825 ("It seems incongruous that such testimony should be allowed into evidence when its probative impact has been so attenuated by time that it has become little more than character evidence illustrating the predisposition of the accused. Such is proscribed by Rules 403 and 404 of our rules of evidence."); *compare Jacob*, 113 N.C. App. at 606-12, 439 S.E.2d at 813-16 (because of overwhelming similarities between prior bad acts and the crimes for which the defendant was charged, and in light of the fact that the time period was tolled because the defendant did not have access to the kind of victim he preferred, Rule 404(b) was not violated by admission of evidence of the prior bad acts).

Though we have held that the length of time between the two alleged assaults was not tolled by Defendant's prison sentence following his 1990 conviction—because no evidence was presented concerning how long a sentence Defendant actually served—we would reach the same holdings above whether the time period between the

two alleged assaults is calculated at eighteen years or ten years. Because of the lack of similarities between the alleged assaults and the dissimilarities between them, and the fact that there was no evidence of any ongoing pattern—just evidence of the single 1990 assault—ten years would have eroded any relevance of the 1990 assault to such an extent that it cannot outweigh the prejudice to Defendant.

VI.

Having determined that the trial court erred in admitting, over Defendant's objection, evidence of the 1990 assault, we must now determine if the admission of that evidence prejudiced Defendant to such an extent as to warrant a new trial. N.C. Gen. Stat. § 15A-1443(a) (2009) (Defendant prejudiced in this instance if there was a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."). When we compare the facts of the present case to those of other cases where the admission of evidence of prior sexual assaults was held prejudicial, we likewise hold that Defendant was prejudiced by the admission of the evidence of the 1990 assault. *See, e.g.*, *Jones*, 322 N.C. at 586-91, 369 S.E.2d at 823-25; *State v. Scott*, 318 N.C. 237, 347 S.E.2d 414 (1986); *Moore*, 309 N.C. at 108, 305 S.E.2d at 546; *State v. Shane*, 304 N.C. 643, 655-56, 285 S.E.2d 813, 821 (1982); *Gammons*, 258 N.C. 522, 128 S.E.2d 860.

"Attenuated by time, the pertinence of evidence of prior offenses attaches to the defendant's character rather than to the offense for which he is on trial. In other words, remoteness in time tends to diminish the probative value of the evidence and enhance its tendency to prejudice." *Artis*, 325 N.C. at 300, 384 S.E.2d at 482. Any probative value of the 1990 evidence is substantially outweighed by the danger of unfair prejudice, namely the "substantial likelihood that the jury w[ould] consider the evidence only for the purpose of determining the defendant's propensity to commit the crimes with which he ha[d] been charged." *State v. White*, 331 N.C. 604, 615-16, 419 S.E.2d 557, 564 (1992) (citation omitted).

We reach this result because the case against Defendant rested almost entirely on the child's testimony, presented at trial by the child herself; and by the testimonies of the mother, Dr. Hayek, and Bullock, relating statements the child had made to them prior to trial. *State v. Couser*, 163 N.C. App. 727, 731-32, 594 S.E.2d 420, 423 (2004) (citations omitted); *see also Webb*, 197 N.C. App. at 620, 682 S.E.2d at 394 ("As is so often true with cases of sexual abuse, the only person able

to testify directly to the events of the abuse was the victim herself."). For this reason, the outcome of this trial rested almost entirely on the credibility of the child, weighed against the credibility of Defendant. "For a jury trial to be fair it is fundamental that the credibility of witnesses must be determined by" the jury. *State v. Holloway*, 82 N.C. App. 586, 587, 347 S.E.2d 72, 73-74 (1986); *see also State v. Horton*, ––– N.C. App. –––, –––, 682 S.E.2d 754, 758 (2009). The physical evidence introduced by Dr. Hayek was inconclusive and inconsistent with a theory that the child had been assaulted the day before Dr. Hayek's examination. *Couser*, 163 N.C. App. at 731-32, 594 S.E.2d at 423.

In this case, the child's testimony was inconsistent internally and as presented over time through statements the child made to others who testified at trial. The only physical evidence presented at trial was Dr. Hayek's testimony that the child's hymen showed scarring that could be consistent with the crime with which Defendant was charged. However, Dr. Hayek's testimony was that the injury to the child's hymen had healed, suggesting the injury was at least weeks, and possibly even years, old. The State's theory of the case seems to have been that Defendant sexually assaulted the child on 11 August 2008, the day before Dr. Hayek examined the child. However, the mother testified that it was "probably in June or July" when she caught Defendant in a room with the child. The mother testified that she surprised Defendant in a room with the child and that Defendant acted very suspiciously. The mother asked the child what had happened in the room, and the child said that Defendant had touched her inside her vagina. The mother testified the child told her that "Ralph" was the one who touched her, and the child seemed to "understand who Ralph was [Defendant]." The child testified that she was only touched in that manner one time. Dr. Hayek examined the child the day after this alleged sexual assault. Following this evidence, if the child's testimony was believed, according to Dr. Hayek, Defendant could not have caused the injury to the child's hymen because there would not have been sufficient time for the injury to have healed. Absent this evidence, the only remaining evidence that the child had been sexually assaulted by Defendant was the statements made by the child herself.

At one point in the child's testimony, the trial court stopped the questioning, sent the jury out of the courtroom, and asked the mother to refrain from nodding encouragement to the child's answers. We make no credibility determinations nor do we predict what evidence the jury might find compelling and what evidence the jury might dis-

miss. We must, however, evaluate the potential prejudice of the improperly admitted evidence within the context of the evidence presented at trial. There was no physical evidence that proved an assault had occurred; neither the mother, the uncle, nor the child appeared to remember when the alleged assault occurred; Dr. Hayek's testimony was that, if the injury to the child's hymen was the result of a sexual assault, (and his testimony was that it could have been caused by a sexual assault, but could also have been caused by some other means), it was not evidence of any assault having occurred the day before his examination; and the child's statements to others, and her testimony, contained a number of inconsistencies.

For example, the child was asked if she sometimes did things with her uncle and Defendant, and she answered that she did. When asked what, she testified that they went to see animals together. When asked to clarify if Defendant and her uncle were with her when she went to see the animals, the child answered: "No. It was [the child, her grandparents and her uncle]." When specifically asked if Defendant went with them as well, she answered: "No." She was then asked: "Do you remember anything that y'all three [her, her uncle and Defendant] did together?" The child answered: "The only thing I know, [is] that we went to the thing to see the animals." The child also told Dr. Hayek that Defendant had touched her "cat" while in her uncle's car while her uncle was watching. This contradicts the child's testimony at trial.

Bullock testified that the child was "very, very smart" and that the child knew "all of her family members and . . . could name them. In fact, she could name them faster than I could write." But Dr. Hayek testified that the child couldn't remember Defendant's name when she visited Dr. Hayek the day following the alleged assault, even though Defendant supposedly spent a lot of time with the child. The child introduced the name "Ralph" to Bullock, and referred to the man who she alleged had touched her as "Ralph." The child apparently did not know the name "Ralph" when she spoke with Dr. Hayek the day after the alleged event.

There was testimony from the child that did not seem to fit the State's theory, and which was not supported by additional evidence. For instance, the child told Bullock that Defendant got on top of her and punched her, and the child, using dolls, suggested that Defendant had sexual intercourse with her. The child told Dr. Hayek that Defendant took off his pants and got on top of her and moved his "tail" up and down. The child told Dr. Hayek that her uncle was

watching while the man did this. The child's testimony at trial was that Defendant had his clothes on, and there was no evidence presented that Defendant was unclothed in any way when the mother surprised Defendant in the room with the child on the day in question. The child testified that her uncle was not in the room when Defendant assaulted her. The child also told Bullock that Defendant had kissed her, but she did not tell anyone else that this had happened.

The child told Dr. Hayek that Defendant had touched her inside her bottom as well as inside her vagina. Dr. Hayek testified that he might have seen physical evidence of anal penetration within forty-eight hours of such an incident, but he did not see any evidence of anal penetration when he examined the child the day after the child's mother found the child in the room with Defendant. The child apparently did not tell anyone else she had been touched inside her bottom, and testified at trial that she was only touched inside her vagina and on her elbow. The child's testimony was inconsistent concerning whether Defendant had given her candy, and whether he had asked for "hugs" in return.

The child testified that she had been going to school during the time period that her mother caught Defendant in the bedroom with the child; then the child said that it was summertime and not during the school year. She testified that, on the day in question, her uncle left her alone in a room with Defendant and that Defendant "got on top" of her and then her uncle "came back in and we took a nap." The child then testified that, when her uncle left, Defendant got on top of her but did not do anything while on top of her, and then her mother came into the room. The mother testified that she took the child home directly following this incident. Therefore, the child could not have taken a nap with her uncle.

The child then testified that Defendant had touched her on a different day than when her mother found her in her uncle's room with Defendant. She testified that Defendant had touched her on two different days, and had done different things to her. She then stated that Defendant had only touched her vagina and her elbow. However, the mother testified that the child told her Defendant had been "touching on her" but the first time Defendant "actually stuck his finger in her" was when the mother found the child in the bedroom with Defendant. The child told Dr. Hayek that "the man" had touched her in her "cat" "a lot of times."

A video of Bullock's interview with the child existed, but due to technical difficulties, the jury did not have an opportunity to see the

video. Bullock appeared to be uncertain about some of her interview with the child, as captured on the video, though Bullock had viewed the video shortly before trial. The mother testified that police investigators collected the clothing that the child had been wearing during the alleged incident, and that the mother had not washed the clothing following the incident. However, no further evidence concerning the clothing, or any analysis that might have been done on the clothing, was admitted at trial.

We do not raise these inconsistencies as an attack on the credibility of the child. Testifying at trial is for most people a difficult experience. That difficulty is compounded when the witness is a child, and the testimony concerns alleged sexual abuse. It is the province of the jury to determine credibility and weigh testimony and other evidence. We are obligated to determine whether there is a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a).

VII.

Our appellate courts have found *plain error* when a sexual assault case has relied primarily on the testimony of the alleged victim in instances when it had been determined that expert testimony that the victim was sexually assaulted had been admitted without a proper foundation. *See Couser*, 163 N.C. App. at 729-32, 594 S.E.2d at 422-24; *see also State v. Giddens*, —– N.C. App. —–, —–, 681 S.E.2d 504, 509 (2009) (plain error where, "as in *Couser*, 'the central issue to be decided by the jury was the credibility of the victim[s].' [The victims] provided detailed and consistent accounts of the sexual abuse they alleged [the defendant] inflicted upon them. . . . The children's testimony was corroborated by the testimony of . . . the Detective Sergeant from Macon County Sheriff's Department, and the child forensic interviewer from Mission Children's Clinic. Although the children's testimony and the corroborating testimony is strong evidence, our prior case law instructs that this alone is insufficient to survive plain error review of the testimony of a witness vouching for the children's credibility."); *State v. O'Connor*, 150 N.C. App. 710, 712, 564 S.E.2d 296, 297, *disc. review denied*, 356 N.C. 173, 567 S.E.2d 144 (2002) (it was plain error to admit expert testimony on the credibility of the victim in a sexual offense case where the State's case was almost entirely dependent on the credibility of the victim and corroboration testimony of others).

In some instances, the improper admission of a prior bad act of a defendant may raise the same concerns as the improper testimony of an expert witness that an alleged victim has been abused—both of these kinds of evidence may lend credibility to an alleged victim's testimony. Improper expert testimony that an assault has occurred obviously bolsters an alleged victim's testimony that she was assaulted. The improper admission of a prior sexual assault by a defendant tends to bolster an alleged victim's testimony that an assault occurred *and* that the defendant was the perpetrator, since such evidence informs the jury that the defendant has committed sexual assault in the past. This evidence further tends to diminish the defendant's credibility, and creates the possibility that the jury will convict the defendant based upon the prior bad act instead of solely on properly admitted evidence. *Jones*, 322 N.C. at 590-91, 369 S.E.2d at 824-25.

VIII.

In this case, Defendant objected to the admission of the evidence of the 1990 assault, so Defendant does not have to meet the plain error standard. On these facts, we hold that there was a reasonable possibility that, had the improper evidence concerning the 1990 sexual assault not been admitted, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a). We must therefore vacate both convictions in this matter and remand for a new trial. Because we remand for a new trial, we do not address Defendant's additional arguments.

New trial.

Judges HUNTER, JR. and BEASLEY concur.

CLEVELAND CONSTRUCTION, INC., PLAINTIFF v. ELLIS-DON CONSTRUCTION, INC.; HKS, INC.; STATE OF NORTH CAROLINA THROUGH THE UNIVERSITY OF NORTH CAROLINA HEALTH CARE SYSTEM; THE UNIVERSITY OF NORTH CAROLINA HOSPITALS AT CHAPEL HILL; FEDERAL INSURANCE COMPANY; THE TRAVELERS CASUALTY AND SURETY COMPANY F/K/A THE AETNA CASUALTY AND SURETY COMPANY, DEFENDANTS

No. COA10-525

(Filed 5 April 2011)

1. Estoppel— quasi-estoppel—received periodic payments without conditions—construction claims

The trial court did not err in a construction claims case by granting partial summary judgment in favor of defendant EDCI on plaintiff CCI's extra/changed work, delay/disruption, and inefficiency claims. Based on the doctrine of quasi-estoppel, CCI was precluded from asserting the claims which it expressly acknowledged that it did not have as a condition of payment when it received periodic payments based on the applications submitted.

2. Estoppel— equitable estoppel—improper assertion of statute of limitations defense

The referee did not err in a construction claims case by concluding that plaintiff CCI timely filed suit within the three-year statute of limitations provided by N.C.G.S. § 1-52(1). Having obtained, through third party settlements, funds derived from CCI's claims, EDCI was equitably estopped from asserting the statute of limitations as a defense to those claims.

3. Evidence— extrinsic evidence—referee exceeded scope of trial court's summary judgment order

The referee erred in a construction claims case by considering extrinsic evidence regarding the scope of the trial court's summary judgment order for the claims of delay, disruption, and inefficiency damages occurring prior to 21 June 2001. The trial court's order unequivocally stated that all claims not specifically reserved by CCI arising prior to 21 June 2001 were barred.

4. Interest— prejudgment—breach of contract claims—waiver

The trial court did not err by awarding plaintiff CCI prejudgment interest on disputed breach of contract claims from the date of 3 November 2005. After the 1985 amendment to N.C.G.S. § 24-5(a), interest is awarded as a matter of law once the relevant facts

have been established entitling the party to damages. By failing to contest the referee's finding regarding the date of breach, defendant EDCI waived review of that determination.

5. Construction Claims— delay damages—concurrent delay—partial responsibility

The trial court erred in a construction claims case by overruling defendant EDCI's exceptions to the referee's determination that EDCI was not entitled to recover delay damages from plaintiff CCI for a 12.5 week delay at the end of the project based on the principle of concurrent delay because EDCI was found to be not responsible for any portion of the delay. However, there was no authority supporting the proposition that CCI was fully liable for EDCI's delay damages despite being only partially responsible for the delay.

6. Construction Claims— delay and disruption—cost sharing—doctrine of implication of unexpressed terms—customary practice

The trial court did not err in a construction claims case by overruling its exception to the referee's requirement that plaintiff CCI share the costs defendant EDCI incurred in pursuing CCI's delay and disruption claims against the owner and designers of the project based on the doctrine of implication of unexpressed terms. There was no evidence regarding the existence of a customary practice in the construction industry concerning the sharing of recovery costs or CCI's actual or constructive knowledge of such a custom.

Appeal by plaintiff from order entered 11 April 2007 by Judge Paul G. Gessner and by plaintiff and defendants from judgment entered 1 December 2009 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 17 November 2010.

Jordon Price Wall Gray Jones & Carlton, PLLC, by Henry W. Jones, Jr. and Brian S. Edlin; and Chamberlain, Hrdlicka, White, Williams & Martin, by Seth R. Price, Atlanta, Georgia, pro hac vice, for plaintiff.

Nigle B. Barrow, Jr.; and Hendrick Phillips Salzman & Flatt, by Martin R. Salzman, Atlanta, Georgia, pro hac vice, for defendants Ellis-Don Construction, Inc., Federal Insurance Company, and The Travelers Casualty and Surety Company.

HUNTER, Robert C., Judge.

Plaintiff Cleveland Construction, Inc. ("CCI") appeals from the trial court's entry of partial summary judgment on CCI's extra/changed work, delay/disruption, and inefficiency claims against defendants Ellis-Don Construction, Inc. and its sureties, Federal Insurance Company and The Travelers Casualty and Surety Company (collectively, "EDCI"). After careful review, we affirm the summary judgment order. Both CCI and EDCI appeal from the trial court's final judgment adopting, with modifications, the report of the referee who conducted the evidentiary hearings in this case. We affirm in part and reverse in part.

Factual and Procedural Background

This case arises out of the construction of the North Carolina Children's Hospital and the North Carolina Women's Hospital ("the project"), located in Chapel Hill, North Carolina. The University of North Carolina Hospitals ("UNCH"), a state "public body" and owner of the project, awarded the project on a multi-prime basis on 10 April 1997. UNCH entered into a contract with HKS, Inc. to design and manage the construction of the project. HKS hired Smith Seckman Reid, Inc. ("SSR") and Corley Redfoot Zack, Inc. ("CRZ") to serve as consultants on the project, with SSR providing services relating to the mechanical, plumbing, electric, and fire protection systems, and CRZ providing architectural services, including planning and design work, administration of the construction process, and inspections.

On 2 June 1997, UNCH awarded EDCI, a North Carolina licensed general contractor, the general contract ("prime contract") for the construction of the project. The original contract amount was for approximately $47.6M and the original contract duration was for 1,095 calendar days. The prime contract provided for liquidated damages for late completion and awarded a bonus for early completion. UNCH issued a notice to proceed on the project on 30 June 1997, with an original completion date of 30 June 2000.

As the general prime contractor on the public project, EDCI had statutory as well as contractual duties regarding scheduling and coordinating the work on the project. Under the prime contract, EDCI provided performance and payment bonds—issued by Federal and Travelers—ensuring completion of the project and payment of EDCI's subcontractors. The project was large and complex, involving construction of two new towers, renovations in the main hospital building, and construction of corridors connecting the towers to the main

building. The multi-prime project delivery system increased the difficulty in coordinating the work on the project. The project was "significantly troubled" and was not substantially completed until 24 March 2003, almost three years after the prime contract's original completion date. Problems during the project generated claims at every level—claims between the subcontractors and the prime contractors as well as claims between the primes and the owner and designers.

Pertinent to this appeal, EDCI and CCI entered into a subcontract on 15 October 1997, with CCI agreeing to furnish and install, in compliance with the prime contract's specifications, metal studs, drywall, firewalls, vapor barrier, insulation, and acoustical ceiling and ceiling tiles. The original subcontract price was for almost $6.6M. Throughout CCI's work on the project, CCI submitted to EDCI numerous change order requests ("CCIPIs") and extra work orders ("EWOs"). Under the subcontract, CCI submitted periodic payment applications, containing a sworn certification statement in which CCI "acknowledge[d] that it ha[d] no unsettled change order requests or claims" pending against EDCI as of the date each application was submitted. Beginning with its 20 August 2000 application for payment (No. 29) and continuing with each successive application, CCI attached an "Exhibit A," which listed all then-pending CCIPIs. Starting with CCI's 20 June 2001 payment application (No. 39), CCI began including in Exhibit A pending EWO claims in addition to the CCIPIs. CCI first listed claims for delay, disruption, and inefficiency damages in its 31 December 2001 payment application (No. 43).

As the project neared completion, EDCI informed its principal subcontractors, including CCI, that it intended to submit a claim for additional compensation to UNCH and the State Construction Office to recover costs it had incurred as a result of the problems associated with the project. To the extent that the subcontractors desired to participate, EDCI requested that they submit a claim to EDCI to "pass through" to the State. On 28 March 2003, CCI submitted a verified claim to EDCI, in which CCI requested approximately $4.2M. On 1 July 2003, EDCI submitted a verified claim, which included CCI's claim as well as the claims of other subcontractors, to the Director of the State Construction Office. A hearing on the claims was held at the State Construction Office on 28-29 April 2004.

On 3 October 2005, EDCI and UNCH executed a settlement agreement in which UNCH agreed to pay EDCI $5M in full settlement of its claims against UNCH. The agreement provides that both EDCI and UNCH "believe[d]" that the project's designers—HKS, SSR, and CRZ—

were "primarily and proximately responsible for the major problems encountered during the course of the Project[.]" The agreement specifies that the claims settled by the parties included EDCI's claims on its contract balance, liquidated damages, accrued interest, and change orders, but did not include any payment for delay/disruption or inefficiency damages, or subcontractor claims.

Shortly after settling with UNCH, EDCI received a demand letter from CCI, demanding payment on its extra/changed work claims as well as its remaining subcontract balance. EDCI responded in a letter dated 3 November 2005, refusing to pay the amount requested by CCI, explaining that it believed that numerous backcharges against CCI "substantially reduced" the amounts owed on CCI's claims. On 30 November 2004, CCI filed a complaint against EDCI, HKS, the State of North Carolina, UNCH, Federal, and Travelers, asserting claims for CCI's outstanding subcontract balance, extra/changed work, delay/disruption, and inefficiency damages.

While CCI's action was ongoing, on 21 December 2005, EDCI entered into a settlement agreement with HKS and SSR in which the designers made a lump sum payment of $5.5M to EDCI in exchange for EDCI releasing all its claims against HKS and SSR for "substantial additional costs incurred in performing its work on the Project . . . ." Roughly two years later, on 4 January 2007, EDCI settled its claims against the remaining designer, CRZ, with CRZ paying a lump sum of $390,000 to EDCI in consideration of EDCI's releasing all its claims against CRZ arising out of the project. As a result of the settlement agreements, EDCI received $10.89M from the project's owner and designers on its initial claim of over $21M.

CCI voluntarily dismissed the State and UNCH as defendants in this action, and the trial court granted HKS' motion for summary judgment on CCI's claims for failure to file its claims within the applicable statute of limitations period—leaving EDCI and its sureties, Federal and Travelers, as the remaining defendants in this lawsuit. On 4 December 2006, EDCI filed a motion for partial summary judgment on certain of CCI's extra/changed work, delay/disruption, and inefficiency claims, asserting, among other things, that "all such claims [we]re barred by the applicable statute of limitations"; and that those claims arising prior to certain dates were waived and released under oath by CCI in its periodic payment applications. After conducting a hearing on EDCI's motion, Superior Court Judge Paul G. Gessner entered partial summary judgment in favor of EDCI, ruling

that CCI had waived and released the challenged claims. Judge Gessner, however, denied EDCI's motion for partial summary judgment based on the statute of limitations.

In preparation for trial, a dispute arose between CCI and EDCI as to what claims were, in fact, barred by Judge Gessner's 11 April 2007 summary judgment order. Consequently, on 18 February 2008, EDCI filed a motion *in limine* to prevent CCI from presenting evidence at trial regarding (1) its claims for extra/changed work and delay/disruption damages that arose prior to 20 August 2000, and (2) its claims for extra/changed work and delay/disruption damages that arose between 21 August 2000 and 20 June 2001 that were not identified and reserved in Exhibit A in CCI's periodic payment applications. Although Superior Court Judge Robert H. Hobgood initially denied EDCI's motion *in limine*, he ultimately entered an order on 28 April 2008 granting EDCI's subsequent motion, providing:

> [CCI] shall not be allowed to submit any evidence related to delay, disruption, or labor inefficiency claims and/or damages against [EDCI]. . . . [I]t is not the intent of this Order to preclude [CCI] from presenting evidence of delay, disruption or lost efficiency claims, to the extent that [EDCI] did pass those claims through to third parties, and received payment thereon.

Prior to conducting a jury trial, Judge Hobgood determined that "this case involves the resolution of an issue that requires the examination of a long or complicated account in the field of public construction law" and that "[a] referee with expertise in public construction law and accounting is necessary to take testimony, review exhibits and report to the Court . . . ." As a result, Judge Hobgood referred the case to a referee pursuant to Rule 53 of the Rules of Civil Procedure. After conducting extensive evidentiary hearings, the referee submitted his report to Judge Hobgood on 14 July 2009. In his report, the referee awarded CCI the principal amount of $1,618,808, which consisted of CCI's subcontract balance of $369,951, and $1,248,857 based on CCI's extra/changed work, delay/disruption, and inefficiency claims. The referee also awarded CCI prejudgment interest on the "undisputed" subcontract balance.

Both CCI and EDCI filed exceptions to the referee's report. After holding a hearing on 15 October 2009, Judge Hobgood entered final judgment on 1 December 2009, largely adopting the referee's report and overruling the parties' exceptions. Judge Hobgood, however, modified the report to assess prejudgment interest on CCI's total

award, running from 3 November 2005 to the date of judgment. EDCI filed a motion to amend the final judgment on 3 December 2009, and Judge Hobgood denied the motion on 8 February 2010. CCI appeals from Judge Gessner's 11 April 2007 summary judgment order, and both CCI and EDCI appeal from Judge Hobgood's 1 December 2009 final judgment.

Summary Judgment

[1] CCI argues that entry of partial summary judgment was improper in this case. The standard of review of an order granting summary judgment requires a two-part analysis of whether (1) on the basis of the materials supplied to the trial court, there is a genuine issue of material fact and (2) 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); N.C. R. Civ. P. 56(c). The moving party has the burden of demonstrating the lack of any triable issue of fact and entitlement to judgment as a matter of law. *Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 572, 515 S.E.2d 438, 441 (1999). The evidence produced by the parties is viewed in the light most favorable to the non-moving party. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). A trial court's ruling on a motion for summary judgment is reviewed de novo as the court resolves only questions of law. *Va. Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986).

CCI contends that Judge Gessner erred in entering summary judgment in EDCI's favor on CCI's extra/changed work, delay/disruption, and inefficiency claims[1]:

> (1) As to all claims of the Plaintiff which arose prior to August 20, 2000, there is no genuine issue of material that all such claims were waived and released under oath; Defendants are, therefore, entitled to judgment as a matter of law, that all claims which arose prior to August 20, 2000 have been waived and released by Plaintiff and that Plaintiff is not entitled to recover any sum for such claims.
>
> (2) As to all claims arising during the time frame of August 20, 2000 through and including June 20, 2001, there is no genuine issue of material that all of Plaintiff's claims not specifically

1. As the parties lump all of these claims together in their respective arguments, unless specified, we do not attempt to differentiate between them in addressing the parties' contentions.

reserved in its payment applications were waived and released under oath; Defendants are, therefore, entitled to judgment as a matter of law, that all claims arising after August 20, 2000 through and including June 20, 2001, which were not specifically reserved in Plaintiff's payment applications were waived and released by the Plaintiff and that Plaintiff is not entitled to recover any sum for all such claims not specifically reserved in the payment applications.

Judge Gessner ruled that CCI had "waived and released under oath" all of its unreserved claims arising prior to 21 June 2001 based on language in the parties' form labeled "Subcontractor's Application for Payment and Interim Waiver and Release Upon Payment," which provides in pertinent part:

CERTIFICATE OF SUBCONTRACTOR:

The undersigned mechanic and/or materialman ("Sub contractor") acknowledges that it has no unsettled change order requests or claims against said Contractor for said building or premises through the date hereof. Subcontractor also certifies that the payments, less applicable retention, have been made through the period covered by previous payments received from the Contractor to (1) all subcontractors (sub-subcontractors) and (2) for all materials and labor used in or in connection with the performance of the Subcontract. . . . This certification is for the benefit of, and may be relied upon by the owner, the prime contractor, the construction lender, the principal and surety on any labor/material bond. This certification is made upon personal knowledge.

INTERIM WAIVER AND RELEASE UPON PAYMENT:

The undersigned mechanic and/or materialman has been employed by Ellis-Don Construction, Inc. to furnish LABOR & MATERIALS (describe materials and/or labor) for the construction of improvements known as UNCH which is located in the City of CH, County of Orange, and is owned by UNIV. OF NORTH CAROLINA (name of owner) and more particularly described as follows: 101 MANNING DRIVE, CHAPEL HILL, NC (Describe the property upon which the improvements were made by either a metes and bounds description, the land lot district, block and lot number, or street address of the project)

Upon receipt of the sum of $__________, the mechanic and/or materialman waives and releases any and all liens or claims of

> lien it has upon the foregoing described property through the date of __________, and excepting those rights and liens that the mechanic and/or materialman might have in any retained amounts on account of labor or materials, or both, furnished by the undersigned to or on account of said contractor for said building or premises.

The payment applications were signed by CCI under seal and notarized.

EDCI contends that CCI's assertion of its unreserved pre-21 June 2001 claims in this lawsuit is inconsistent with CCI's "[c]ertificat[ion]" in its periodic payment applications "acknowledg[ing] that it has no unsettled change order requests or claims against [EDCI] for said building or premises through the date [of application]." Thus, EDCI argues, the doctrine of "quasi-estoppel" operates to bar CCI from asserting these claims in this lawsuit. Under the quasi-estoppel theory, also known as "estoppel by benefit," a party who "accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 18, 591 S.E.2d 870, 882 (2004). As the "essential purpose of quasi-estoppel . . . is to prevent a party from benefitting by taking two clearly inconsistent positions[,]" *B & F Slosman v. Sonopress, Inc.*, 148 N.C. App. 81, 88, 557 S.E.2d 176, 181 (2001), it is an "inherently flexible" doctrine and "cannot be reduced to any rigid formulation[,]" *Whitacre P'ship*, 358 N.C. at 18, 591 S.E.2d at 882. Quasi-estoppel "does not require detrimental reliance" by the party asserting the doctrine, "but is directly grounded instead upon a party's acquiescence or acceptance of payment or benefits, by virtue of which that party is thereafter prevented from maintaining a position inconsistent with those acts." *Godley v. Pitt County*, 306 N.C. 357, 361-62, 293 S.E.2d 167, 170 (1982).

Here, under the terms of the payment application, CCI received periodic payments under the subcontract with EDCI in exchange for its certified "acknowledg[ment]" that, when it submitted its application, it had "no unsettled change order requests or claims" against EDCI. As the application specifies, the owner of the project and EDCI, as the prime contractor, as well as others, intended to "rel[y]" on "[t]his certification." Having received periodic, CCI is now precluded from asserting the claims which it expressly "acknowledge[d]" that it did not have as a condition of payment.

While Judge Gessner granted EDCI's motion for partial summary judgment on CCI's unreserved pre-21 June 2001 claims on the basis that CCI had waived and released these claims, our Supreme Court has explained that "[i]f the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989). The trial court's entry of partial summary judgment on CCI's claims is, consequently, affirmed.

Final Judgment

Both CCI and EDCI challenge Judge Hobgood's final judgment adopting, with modifications, the referee's report. Where, as here,

> "exceptions are taken to a referee's findings of fact and law, it is the duty of the [trial] judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases—use his own faculties in ascertaining the truth and form his own judgment as to fact and law. This is required not only as a check upon the referee and a safeguard against any possible errors on his part, but because he cannot review the referee's findings in any other way."

Quate v. Caudle, 95 N.C. App. 80, 83, 381 S.E.2d 842, 844 (1989) (quoting *Thompson v. Smith*, 156 N.C. 345, 346, 72 S.E. 379, 379 (1911)) (emphasis omitted). "After conducting this review, the trial court may adopt, modify, or reject the referee's report in whole or in part, remand the proceedings to the referee, or enter judgment." *Gaynor v. Melvin*, 155 N.C. App. 618, 622, 573 S.E.2d 763, 766 (2002); N.C. R. Civ. P. 53(g)(2).

In reviewing the trial court's judgment entered on the referee's report, "the findings of fact by a referee, approved by the trial [court], are conclusive on appeal if supported by any competent evidence." *Trucking Lines. v. Insurance Corp.*, 250 N.C. 732, 733, 110 S.E.2d 293, 294 (1959) (per curiam). Similarly, as the trial court has the authority to affirm, modify, or disregard the referee's findings and make its own findings upon review of the parties' exceptions to the referee's report, different or additional findings by the court are binding on appeal if they are supported by competent evidence. *Hughes v. Oliver*, 228 N.C. 680, 686, 47 S.E.2d 6, 10 (1948); *Biggs v. Lassiter*, 220 N.C. 761, 769-70, 18 S.E.2d 419, 423-24 (1942). Any conclusions of law made by the referee, however, are reviewed de novo by the trial court, and the trial court's conclusions are reviewed de novo by the

appellate court. *See U.S. Energy Corp. v. Nukem, Inc.*, 400 F.3d 822, 830 (10th Cir. 2005) ("Although this court has not previously stated a standard of review for a district court's review of a special master's legal conclusions, since the district court's review is de novo, it follows that we in turn would review the district court's legal conclusions de novo.").

A. Statute of Limitations

[2] EDCI first contends that the referee erroneously concluded that CCI timely filed suit within the three-year statute of limitations provided by N.C. Gen. Stat. § 1-52(1) (2009). CCI counters, however, that EDCI should be equitably estopped from asserting the statute of limitations as a defense to its claims.[2]

As this Court has explained, "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." *Friedland v. Gales*, 131 N.C. App. 802, 806, 509 S.E.2d 793, 796 (1998). The doctrine of equitable estoppel may apply to bar a party from relying on a statute of limitations defense when the delay in initiating an action was induced by acts, representations, or conduct that would constitute a breach of good faith. *Nowell v. Tea Co.*, 250 N.C. 575, 579, 108 S.E.2d 889, 891 (1959). "There need not be actual fraud, bad faith, or an intent to mislead or deceive for the doctrine of equitable estoppel to apply." *Gore v. Myrtle/Mueller*, 362 N.C. 27, 33, 653 S.E.2d 400, 405 (2007). Rather, " '[i]t is the subsequent inconsistent position, and not the original conduct[,] that operates to the injury of the other party.' " *Hamilton v. Hamilton*, 296 N.C. 574, 576-77, 251 S.E.2d 441, 443 (1979) (quoting H. McClintock, *Equity* § 31 (2d ed. 1948)). The "basic question" in determining whether the doctrine of equitable estoppel operates to bar a defendant from relying on the statute of limitations as a defense is whether the "defendant's actions have lulled [the] plaintiff into a false sense of security and so induced [the plaintiff] not to institute

2. To the extent that CCI failed to preserve its equitable estoppel argument for appellate review by not noticing an exception to the referee's determination that the doctrine did not preclude EDCI from asserting the defense, we exercise our discretion under Rule 2 of the Rules of Appellate Procedure in order to prevent manifest injustice to CCI and suspend the requirements of Rule 10(a). *See Potter v. Homestead Preservation Assn.*, 330 N.C. 569, 576, 412 S.E.2d 1, 5 (1992) (suspending appellate rules to consider plaintiff's dismissed claim where record reflected parties and trial court operated under "erroneous[] assum[ption]" regarding statute of limitations).

suit in the requisite time period." *Turning Point Indus. v. Global Furn., Inc.*, 183 N.C. App. 119, 125-26, 643 S.E.2d 664, 668 (citation and internal quotation marks ommitted), *disc. review denied*, 361 N.C. 575, 651 S.E.2d 563 (2007).

In this case, EDCI notified its subcontractors, including CCI, that it intended to submit a claim for additional compensation with UNCH and the State Construction Office. EDCI solicited claims from its subcontractors to be aggregated and passed through to UNCH for settlement. CCI submitted a verified claim on 28 March 2003, which included claims for extra/changed work, delay/disruption, and inefficiency damages. On 1 July 2003, EDCI submitted CCI's claim "in its entirety" to UNCH, and notified CCI on 12 August 2003 that its claim had been passed through to the State. While EDCI was pursuing the aggregated claim, EDCI sent a letter to CCI encouraging CCI not to file suit against EDCI in order to present a "unified front" to the State during the administrative process.

EDCI's affirmative representations that it was pursuing CCI's claims against the State and that initiating a lawsuit would jeopardize the "success[]" of recovery justifiably "lulled [CCI] into a false sense of security" and induced CCI's delaying filing, *Turning Point Indus.*, 183 N.C. App. at 125, 643 S.E.2d at 668 (citation and internal quotation marks omitted), as CCI reasonably believed that EDCI would pass through to CCI any proceeds attributable to its claim from EDCI's settlements. *See Duke Univ. v. Stainback*, 320 N.C. 337, 341, 357 S.E.2d 690, 693 (1987) ("Stainback is estopped to plead the statute of limitations as a defense. The factual findings indicate a course of conduct by Stainback, through his attorney, which misled Duke. The actions and statements of Stainback's attorney caused Duke to reasonably believe that it would receive its payment for services rendered once the case between Stainback and Investors was concluded, and such belief reasonably caused Duke to forego[] pursuing its legal remedy against Stainback. The actions and statements of Stainback lulled Duke into a false sense of security."). EDCI, moreover, acknowledges in its brief to this Court that through its settlement agreements with the project's designers, it "received . . . settlement monies" on CCI's claims. Having obtained, through third party settlements, funds derived from CCI's claims, EDCI is equitably estopped from asserting the statute of limitations as a defense to those claims. *See N.C. State Bar v. Gilbert*, 189 N.C. App. 320, 325, 663 S.E.2d 1, 4 (2008) (holding attorney was "equitably estopped from asserting the statute of limitations for conversion" where attorney

used clients' funds for personal expenses without clients' consent and could "not unjustly benefit from the [clients]' delayed discovery" of the conversion). EDCI's statute of limitations argument is overruled.

B. Scope of Summary Judgment Order

[3] EDCI next contends that the referee exceeded the scope of Judge Gessner's summary judgment order by "permitt[ing] CCI to submit evidence and recover upon its claims for delay, disruption and inefficiency damages occurring prior to 21 June 2001." In his order granting partial summary judgment to EDCI, Judge Gessner ruled that: (1) "all claims which arose prior to August 20, 2000 have been waived and released by [CCI] and that [CCI] is not entitled to recover any sum for such claims"; and (2) "all claims arising after August 20, 2000 through and including June 20, 2001, which were not specifically reserved in [CCI]'s payment applications were waived and released by [CCI] and that [CCI] is not entitled to recover any sum for all such claims not specifically reserved in the payment applications."

Prior to this case being referred, the parties disputed the scope of Judge Gessner's 11 April 2007 summary judgment order—whether judgment was granted in favor of EDCI on just CCI's extra/changed work claims arising prior to 21 June 2001 (as argued by CCI), or whether judgment was entered on CCI's delay/disruption and inefficiency claims, as well as its extra/changed work claims, arising before 21 June 2001 (as advocated by EDCI). After conducting a hearing on a motion *in limine* filed by EDCI to exclude evidence of the challenged claims, Judge Hobgood entered an order labeled "Order Granting Defendant's Motion In Limine to Preclude Plaintiff from Presenting Any Evidence in Connection with Delay, Disruption, or Labor Inefficiency Damages," in which Judge Hobgood ruled:

> [CCI] shall not be allowed to submit any evidence related to delay, disruption, or labor inefficiency claims and/or damages against [EDCI]. . . . [I]t is not the intent of this Order to preclude [CCI] from presenting evidence of delay, disruption or lost efficiency claims, to the extent that [EDCI] did pass those claims through to third parties, and received payment thereon.

The order referring the case to the referee similarly directed the referee to "comply with the ruling of the Honorable Paul G. Gessner in his Order dated 11 April 2007 . . . ."

As reflected in his report, the referee determined that "Judge Gessner's order is ambiguous on the issue of whether the delay and

disruption claims are among the claims that are barred," considered "extrinsic evidence" in the form of an email sent by Judge Gessner to counsel informing them of his rulings on EDCI's motion for summary judgment, and concluded that the email "supports the view that these claims are not barred by the order." As a result, the referee permitted CCI to present evidence on its delay/disruption and inefficiency claims arising on or before 20 June 2001.

EDCI contends that the "unambiguous" and "unequivocal language" of Judge Gessner's order "barred CCI from being entitled to recover on any of its claims, including claims for delay, disruption or inefficiency damages allegedly incurred by CCI on the Project on or before 20 June 2001 . . . ." The interpretation of a court's judgment or order "presents a question of law," which is "fully reviewable on appeal." *Reavis v. Reavis*, 82 N.C. App. 77, 80, 345 S.E.2d 460, 462 (1986). Court judgments and orders "must be interpreted like other written documents, not by focusing on isolated parts, but as a whole." *Id.* As with other writings, such as statutes and contracts, where a judgment or order is unambiguous, the court is "limited to an interpretation in keeping with the express language of the document and without considering parol evidence." *Bicket v. McLean Securities, Inc.*, 124 N.C. App. 548, 564, 478 S.E.2d 518, 527(1996), *disc. review denied*, 346 N.C. 275, 487 S.E.2d 538 (1997); *see also Neujahr v. Neujahr*, 223 Neb. 722, 728, 393 N.W.2d 47, 51 (1986) (explaining that where decree is unambiguous, its meaning must be "determined from [its] four corners" and "neither what the parties thought the judge meant nor what the judge thought he or she meant . . . is of any relevance").

Here, Judge Gessner's order is unequivocal: it states that "all claims" not specifically reserved by CCI arising prior to 21 June 2001 are barred. Consistent with the order's plain language, we believe that "all claims" means precisely that: "all claims." *See Financial Servs. of Raleigh, Inc. v. Barefoot*, 163 N.C. App. 387, 395, 594 S.E.2d 37, 43 (2004) ("[W]hen the parties stated that they were releasing 'all claims of any kind,' we must construe the release to mean precisely that: an intent to release all claims of any kind in existence."). The referee, therefore, erred in considering extrinsic evidence regarding the scope of Judge Gessner's summary judgment order.

EDCI's argument, however, ignores Judge Hobgood's subsequent order in which he *grants* EDCI's motion *in limine*, clarifying that CCI would be permitted to present evidence regarding its delay/disruption and inefficiency claims to the extent that EDCI "pass[ed] th[e]se

claims through to third parties, and received payment thereon." On appeal, EDCI fails to identify and differentiate between those claims that, although initially barred, were properly submitted to the referee due to EDCI's recovering on them from third parties and those barred claims on which EDCI made no third-party recovery but on which CCI nevertheless presented evidence. Nor does EDCI specify which erroneously considered claims—if there are any—were awarded to CCI by the referee. EDCI, as the appellant on this issue, bears the burden of "not only . . . show[ing] error, but also . . . *enabl[ing] th[is] Court to see that [it] was prejudiced* and that a different result would have likely ensued had the error not occurred." *Hasty v. Turner*, 53 N.C. App. 746, 750, 281 S.E.2d 728, 730 (1981) (emphasis added). EDCI has failed to satisfy this burden on appeal.

C. Prejudgment Interest

[4] EDCI next contends that Judge Hobgood erred in awarding CCI prejudgment interest on certain "disputed" breach of contract claims. In his report, the referee determined:

> 194. Prejudgment interest is not an entitlement. Even though the referee has found in favor of CCI on many claims, he has concluded that many of CCI's claims are not justified, and CCI itself reduced its claims over the extended life of this case significantly. EDCI had legitimate defenses and a legitimate basis to withhold most of the funds it withheld. Neither party is a "prevailing party" and the referee would not tax prejudgment interest as a cost except as stated below.
>
> 195. The referee believes that CCI's subcontract balance of $369,951, as computed by EDCI, was undisputed as of November 3, 2005. It should bear interest at the judgment rate from that date in the amount of $109,140.

CCI noticed an exception to this ruling by the referee and Judge Hobgood modified the report in his final judgment, "conclud[ing] that [CCI] is entitled to interest at the judgment rate on that portion of the net amount that was not 'undisputed,' from the date of the breach, November 3, 2005."

In breach of contract actions, N.C. Gen. Stat. § 24-5(a) (2009) "authorizes the award of pre-judgment interest on damages from the date of the breach at the contract rate, or the legal rate if the parties have not agreed upon an interest rate." *Members Interior Construction v. Leader Construction Co.*, 124 N.C. App. 121, 125, 476

S.E.2d 399, 402 (1996), *disc. review denied*, 345 N.C. 754, 485 S.E.2d 56 (1997). EDCI contends that Judge Hobgood erred in awarding pre-judgment interest on the "disputed" contract claims, relying on this Court's holing in *Lawrence v. Wetherington*, 108 N.C. App. 543, 550, 423 S.E.2d 829, 833 (1993) (citing *Rose v. Materials Co.*, 282 N.C. 643, 194 S.E.2d 521 (1973)), that "[a]s a general rule, in breach of contract cases, pre-judgment interest (from the date of breach) may be allowed only where the amount of the claim is obvious or ascertainable from the contract itself." Because, EDCI argues, the amounts involved in the "disputed" claims "were not ascertainable solely from the terms of the contract[,]" Judge Hobgood should not have awarded prejudgment interest on these claims.

The *Lawrence* Court, in stating its "rule," relied upon the Supreme Court's holding in *Rose*, 282 N.C. at 671, 194 S.E.2d at 540 (quoting *General Metals v. Manufacturing Co.*, 259 N.C. 709, 713, 131 S.E.2d 360, 363 (1963)): " 'When the amount of damages in a breach of contract action is ascertained from the contract itself, or from relevant evidence, or from both, interest should be allowed from the date of the breach.' " This Court has explained, however, that the rule set out in *General Metals* was superseded by the General Assembly's amendment to N.C. Gen. Stat. § 24-5(a) in 1985:

> Prior to its amendment in 1985, G.S. § 24-5(a) provided that '[a]ll sums of money due by contract of any kind . . . shall bear interest.' The statute did not address the date from which the courts were to apply interest. To fill this void, our appellate courts developed the rule that '[w]hen the amount of damages in a breach of contract action is ascertained from the contract itself, or from relevant evidence, or from both, interest should be allowed from the date of breach.' *General Metals v. Truitt Manufacturing Co.*, 259 N.C. 709, 713, 131 S.E.2d 360, 363 (1963)[.] . . .
>
> The legislature amended G.S. § 24-5(a) in 1985 to provide that '[i]n an action for breach of contract, . . . the amount awarded on the contract bears interest from the date of breach.' Subsequently, in *Steelcase, Incorporated v. The Lilly Company*, this Court noted that, as amended, G.S. § 24-5(a) 'clearly provides for interest from the date of breach in breach of contract actions.' *Steelcase, Inc. v. The Lilly Co.*, 93 N.C. App. 697, 703, 379 S.E.2d 40, 44, *disc. review denied*, 325 N.C. 276, 384 S.E.2d 530 (1989).
>
> Here, both parties tailor their arguments to the case law developed prior to the 1985 amendment and the rule quoted from

> *General Metals*. However, it is clear to this Court that resort to that rule, *developed only to determine the date from which to apply interest*, is no longer necessary. When the legislature amended the statute, and provided a time from which to apply interest, it obviated any need for the rule. In doing so, it removed the confusing questions of ascertainment and certainty that so often muddled the statute's application.

Metromont Materials Corp. v. R.B.R. & S.T., 120 N.C. App. 616, 617-18, 463 S.E.2d 305, 306-07 (1995) (internal citation omitted) (emphasis added), *disc. review denied*, 342 N.C. 895, 467 S.E.2d 903 (1996).

After the 1985 amendment to N.C. Gen. Stat. § 24-5(a), "[o]nce the relevant facts have been established entitling the party to damages, interest is awarded as a matter of law." *Metromont*, 120 N.C. App. at 618, 463 S.E.2d at 307; *accord Cap Care Grp., Inc. v. McDonald*, 149 N.C. App. 817, 824, 561 S.E.2d 578, 583 ("Once breach is established, plaintiffs are entitled to interest from the date of the breach as a matter of law."), *disc. review denied*, 356 N.C. 611, 574 S.E.2d 676 (2002).

Here, the referee found that EDCI breached the subcontract with CCI on 3 November 2005 when EDCI notified CCI by letter that it would not pass through to CCI any funds EDCI had recovered through its settlement agreement with UNCH. In a footnote in its brief, EDCI asserts that this date is "incorrect" as EDCI did "not receive[] any settlement monies on [these] claims until" it settled with HKS and SSR on 21 December 2005 and CRZ on 11 January 2007. EDCI, however, did not notice an exception to the referee's finding that the breach occurred on 3 November 2005 and raised the issue for the first time in its motion to amend the final judgment. A motion to amend judgment, however, "cannot be used as a means to reargue matters already argued or to put forth arguments which were not made but could have been made" at the trial court level. *Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417 (1997). By failing to contest the referee's finding regarding the date of breach, EDCI waived review of that determination by the trial court and this Court. *See State ex rel. Gilchrist v. Cogdill*, 74 N.C. App. 133, 136, 327 S.E.2d 647, 649 (1985) ("In the absence of exceptions to the factual findings of the referee, the findings are conclusive . . . .").

EDCI also contends that the award of prejudgment interest was erroneous because it had legitimate defenses and justifiable grounds to withhold most of the funds that it withheld during this lawsuit. This contention also has been rejected by this Court: "We are

unaware of any appellate interpretation which holds that N.C. Gen. Stat. § 24-5(a) has a 'good faith' exception. Indeed, the plain language of the statute indicates otherwise." *Salvaggio v. New Breed Transfer Corp.*, 150 N.C. App. 688, 692, 564 S.E.2d 641, 644 (2002). EDCI's arguments regarding prejudgment interest are overruled.

D. Delay Damages

[5] With respect to its own claims presented to the referee, EDCI contends that Judge Hobgood erred in overruling its exception to the referee's determination that EDCI was not entitled to recover delay damages from CCI for a 12.5 week delay at the end of the project. In his report, the referee found that as the project expeditor, "EDCI was significantly delayed and disrupted by causes attributable to the owner and the designers . . . ." For roughly 12.5 weeks during the delay (25 September 2001 through 21 December 2001), "CCI's work relating to fire rated walls and vapor barrier installation" concurrently delayed completion of the project. After the project was complete, EDCI submitted to the owner and project designers verified claims, including a claim for delay damages stemming from the September-December 2001 period. During the settlement negotiations, "the owner and designers cited issues attributable to CCI in contesting EDCI's delay and disruption claims[,]" which ultimately "contributed to [EDCI's] decision to compromise its claims" against the owner and designers.

As part of the proceedings before the referee, EDCI submitted a backcharge for "delay damages against CCI for 116 days associated with the fire rated wall issues." The referee determined that the 12.5 week delay was "a CCI-caused critical path delay that [wa]s concurrent with owner-caused delays[.]" Concluding that "this was a concurrent delay," the referee denied EDCI's claim for damages.

EDCI argues on appeal, as it did before the trial court, that the referee incorrectly "appl[ied] the theory of 'concurrent delay' to deprive [EDCI] of its rightful damages from and against CCI based on the delays that CCI caused concurrently with [UNCH]." EDCI's damages theory is premised on its assertion that "[EDCI] would have recovered from UNCH and HKS for owner and architect-caused delays between September and December of 2001, *but for* CCI's defective construction of the fire-rated walls which concurrently delayed the Project during this same period of time." Under the construction law principle of "concurrent delay," where two or more parties proximately contribute to the delay of the completion of the

project, none of the parties may recover damages from the other delaying parties, "unless there is proof of clear apportionment of the delay and expense attributable to each party." *Biemann & Rowell Co. v. Donohoe Cos.*, 147 N.C. App. 239, 245, 556 S.E.2d 1, 5 (2001) (citing *Blinderman Const. Co., Inc. v. United States*, 695 F.2d 552, 559 (Fed. Cir. 1982)).

Applied here, the principle of concurrent delay only precludes CCI, UNCH, and HKS from recovering delay damages from each other (in the absence of proof of apportionment); it does not, however, operate to bar EDCI's delay claim against CCI, since EDCI was—as the referee found—not responsible for any portion of the delay. Judge Hobgood, therefore, erred in overruling EDCI's exception to the referee's conclusion that the principle of concurrent delay operated to bar EDCI's delay damages claim against CCI. EDCI, however, as the appellant, "must not only show error, but also that the error is material and prejudicial, amounting to a denial of a substantial right and that a different result would have likely ensued." *Cook v. Southern Bonded, Inc.*, 82 N.C. App. 277, 281, 346 S.E.2d 168, 171 (1986).

As CCI points out, the referee found—and EDCI does not dispute—that EDCI recovered in its settlements with the project designers some amounts "necess[arily] . . . attributable" to its delay claim. In fact, in a footnote in its brief, EDCI admits that it recovered some amount of money from HKS, SSR, and CRZ on its claim. On appeal, EDCI fails to point to any evidence it presented as to how much it recovered from the designers on its delay claim. Without any evidence identifying the amount EDCI recovered from the designers, it is impossible to determine how much, if any, EDCI is entitled to recoup from CCI without obtaining a double recovery. *See Markham v. Nationwide Mut. Fire Ins. Co.*, 125 N.C. App. 443, 455, 481 S.E.2d 349, 357 (1997) ("Simply put, although plaintiff is entitled to full recovery for its damages, plaintiff is nevertheless not entitled to 'double recovery' for the same loss or injury." (internal citations omitted)).

EDCI nonetheless argues that "[w]hile the concurrent delay caused by CCI precluded [EDCI] from collecting its delay claims from the Owner and Architect, it should not . . . prevent [EDCI] from recover[ing] . . . those damages directly from the party who actually caused the concurrency—namely, CCI." EDCI, however, fails to cite any authority—and we have found none—supporting the proposition that CCI is fully liable for EDCI's delay damages despite being only partially responsible for the delay. EDCI mischaracterizes its injury

as being the "concurrency" of the delay rather than as the net effect of the delay itself. This argument is overruled.

E. Recovery Costs

[6] CCI also appeals from the final judgment, contending that Judge Hobgood erred in overruling its exception to the referee's requiring CCI to "share" the costs EDCI incurred in pursuing CCI's delay and disruption claims against the owner and designers of the project:

> CCI should . . . share in the costs of pursuing the claim[s]. But for EDCI's pursuit of the claims, CCI would have recovered nothing on them. Indeed, CCI's claim[s] . . . against the designers were likely time-barred. EDCI's fees represented 16% of its total recovery. CCI's recovery on th[ese] claim[s] must be reduced by 16%, or $165,933, representing a portion of the fees incurred by EDCI i[n] pursuing the claim[s]. Accordingly, CCI's total recover on these claims is $871,150.

CCI, relying on the subcontract's integration clause, contends that because the subcontract does not include any express provision for the "sharing" of costs in pursuing claims against third parties, "the Referee should not have reduced CCI's recovery for delay and disruption for 'costs' incurred by [EDCI]." Indeed, the referee noted in several places in his report that CCI had "entered into no agreement with EDCI relating to the sharing of the costs . . . of EDCI's claims."

EDCI, acknowledging that there is no explicit contractual provision providing for the sharing of recovery costs, relies on the "doctrine of implication of unexpressed terms," which provides that a contract "encompasses not only its express provisions but also all such implied provisions as are necessary to effect the intention of the parties unless express terms prevent such inclusion." *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E.2d 622, 624 (1973) (citing 4 Williston, *Contracts* § 601B (3d ed. 1961)). The *Lane* Court elaborated on the doctrine, stating:

> "If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contract or is necessary to carry their intention into effect, the law will imply the obligation and enforce it. The policy of the law is to supply in contracts what is presumed to have been inadvertently omitted or to have been deemed perfectly obvious by the parties, the parties

> being supposed to have made those stipulations which as honest, fair, and just men they ought to have made."

Id. at 410-11, 200 S.E.2d at 625 (quoting 17 Am. Jur. 2d *Contracts* § 255 (1964)).

EDCI argues that a "sharing" provision should be incorporated into the subcontract by implication because it is "standard construction industry practice" that the costs incurred by a general contractor in pursuing third party claims that ultimately benefit a subcontractor are passed through to the subcontractor. EDCI maintains that, "as sophisticated parties well-versed in standard construction practice," EDCI and CCI must have been "aware" at the time of executing the subcontract that any such recovery costs would be passed through to CCI. It is well established that "a lawful and existent business custom or usage, *clearly established*, concerning the subject-matter of a contract, *may be received in evidence* to explain ambiguities therein, or to add stipulations about which the contract is silent . . . ." *Cohoon v. Harrell*, 180 N.C. 39, 41, 103 S.E. 906, 906 (1920) (emphasis added). Where the "custom is known to the parties, or its existence is so universal and all-prevailing that knowledge will be imputed, the parties will be presumed to have contracted in reference to it, unless excluded by the express terms of the agreement between them." *Id.*

As CCI points out, EDCI did not present any evidence in the numerous hearings before the referee regarding any construction industry custom regarding the "sharing" of recovery costs or CCI's actual or constructive knowledge of the purported custom. EDCI, apparently recognizing the lack of evidence on the issue, asserts that the referee, who was selected based on his "expertise in public construction law and accounting," was "well within his authority to conclude that the costs incurred by [EDCI] in prosecuting its claim should have been shared by CCI in accordance with accepted industry custom and practice." While EDCI is correct that "[l]ong-established customs and usages are to be judicially recognized as part of the law[,]" *Hamilton v. R. R.*, 200 N.C. 543, 557, 158 S.E. 75, 83 (1931), where, as here, "no evidence [i]s introduced as to usage or custom" and the fact-finder "did not, nor was it requested to, take judicial notice of any [custom or] usage," reliance on the doctrine of custom and usage is "not appropriate." *Peterson v. McCarney*, 254 N.W.2d 438, 444 (N.D. 1977); *see also Katz v. Brooks*, 65 Ill. App. 2d 155, 160, 212 N.E.2d 508, 511 (1965) ("The existence of the custom or usage must be proved as any other matter of fact and the burden is on the

party asserting it." (internal citation omitted)); *Clark Adver. Agency, Inc. v. Avco Broad. Corp.*, 178 Ind. App. 451, 455, 383 N.E.2d 353, 355 (1978) ("Of course, he who would avail himself of a custom or usage has the burden to establish its existence." (citation and internal quotation marks omitted)).

Here, there is simply no evidence in the record regarding (1) the existence of a customary practice in the construction industry concerning the sharing of recovery costs or (2) CCI's actual or constructive knowledge of such a custom. The referee did not take judicial notice of any custom; nor did EDCI request that he take judicial notice of the custom. The referee, moreover, failed to make any findings on these issues—he simply concluded, without any explanation of his rationale, that CCI should "share" in the costs. Without having taken judicial notice of the custom or having received any evidence on the practice, the referee's determination lacks the necessary support to be upheld on appeal under our standard of review. *Compare Crown Co. v. Jones*, 196 N.C. 208, 211, 145 S.E. 5, 6 (1928) ("As the record discloses that there was evidence to be considered by the referee of a verbal agreement and of a general custom of the trade, his findings of fact, having been approved by the trial judge, determine the controversy."). The trial court, therefore, erred in overruling CCI's exception.

EDCI alternatively argues that if we "do[] not affirm the trial court's adoption of the Referee's finding to imply the existence of a term requiring [recovery] costs to be proportionally paid by CCI," we should remand the case to the trial court for the parties to present evidence on the existence and extent of any customary practices in the construction industry concerning the sharing of recovery costs. EDCI, however, fails to cite any authority in support of the proposition that a party is entitled to remand on an issue on which that party bore the burden of proof at trial and where that party elected not to present any evidence on the issue.

Conclusion

In sum, we conclude that Judge Gessner properly granted partial summary judgment on CCI's extra/changed work, delay/disruption, and inefficiency claims. With respect to EDCI's appeal from Judge Hobgood's final judgment entered on the referee's report, we conclude that EDCI is equitably estopped from asserting the statute of limitations as a defense to those claims it "passed through" to third parties for settlement. With respect to CCI's production of evidence

on its delay/disruption and inefficiency claims, EDCI has failed to demonstrate prejudice. As for EDCI's arguments concerning the imposition of prejudgment interest, Judge Hobgood correctly modified the referee's report to include the interest. EDCI has failed to demonstrate prejudice resulting from Judge Hobgood's denial of its claim for concurrent delay damages. With respect to CCI's appeal from final judgment, we conclude that the referee's determination that CCI is required to proportionally share EDCI's recovery costs is not supported by the evidence or the referee's findings. Accordingly, the final judgment is affirmed in part and reversed in part.

Affirmed in part; reversed in part.

Judges CALABRIA and ELMORE concur.

JOSEPH MICHAEL GRIFFITH, Plaintiff v. NORTH CAROLINA DEPARTMENT OF CORRECTION, THEODIS BECK, and BOYD BENNETT, Defendants

No. COA10-1157

(Filed 5 April 2011)

1. Judgments— oral orders—not reduced to writing—non-existent

Two assignments of error were not properly before the Court of Appeals where they were based on oral orders which were not reduced to writing. The orders therefore did not exist.

2. Judgments— oral orders—not reduced to writing—motions not ruled upon

The trial court did not err by not reducing to writing its rulings on two motions where it was not clear that the court was ruling on those motions.

3. Judgment— order—delegation of drafting—guidance

Although plaintiff contended that the trial court erred by ordering defendant to draft a court order with insufficient guidance on conclusions or grounds, the court's acceptance of the proposed order as drafted manifested its agreement with the conclusions stated in the written order. Furthermore, the written order conformed with the oral judgment pronounced in open court.

4. Constitutional Law— North Carolina—government fees—trial by jury—issues of law only

The trial court did not deny plaintiff his North Carolina constitutional right to a trial by jury by ruling on a matter involving fees taken without legislative approval. The proper interpretation of statutory provisions presented only a question of law, not fact.

5. Trials— motions to continue—no abuse of discretion—no prejudice

The trial court did not abuse its discretion by granting defendant's motions to continue where sufficient grounds existed for granting the motions. Local rules were violated in the timing of its ruling, but plaintiff appeared at the hearing prepared to argue and was not prejudiced.

6. Judges— ex parte communication—calendaring motions to continue

There was no *ex parte* communication between the trial judge and defendant in the calendaring of defendant's motions to continue. Defendant's written notice to plaintiff and the trial court administrator's subsequent notice of hearing followed proper procedure.

7. Prisons and Prisoners— disciplinary fees—further legislative authority not needed

The trial court did not err by concluding that the Department of Correction did not have to first obtain legislative authority before instituting a disciplinary fee against inmates.

8. Administrative Law— agency authority—imposition of fees—inmates—specific statute controls general

It was evident from the statutory structure that the Legislature intended that N.C.G.S. § 12-3-1 operate as a general limitation on the rule-making powers of state agencies, but the particular statute addressing the Department of Correction's rule-making authority for prisoners, N.C.G.S. § 150B-1(d)(6), prevailed over the general statute.

9. Prisons and Prisoners— inmates—not members of the public

The phrase "to the public" in N.C.G.S. § 12-3-1, which limits the authority of agencies to raise fees, did not apply to Department of Correction disciplinary fees against inmates because inmates are removed from the community and are not members of the public.

10. Pleadings— judgment on—no factual issues

The trial court properly granted defendant's motion for judgment on the pleadings where the factual allegations were admitted in the pleadings and the trial court's conclusions of law were an accurate construction of the statutes at issue.

Appeal by plaintiff from judgment entered 24 July 2010 by Judge W. Erwin Spainhour in Anson County Superior Court. Heard in the Court of Appeals 21 February 2011.

Joseph Michael Griffith, pro se, plaintiff appellant.

Attorney General Roy Cooper, by Assistant Attorney General Yvonne B. Ricci, for North Carolina Department of Correction defendant appellee.

McCULLOUGH, Judge.

Plaintiff appeals from an order granting defendant's second motion for judgment on the pleadings and dismissing plaintiff's action. We affirm.

I. Background

The relevant facts and procedural background are as follows: On 30 June 2008, Joseph Michael Griffith ("plaintiff") filed a petition to sue as an indigent and proposed complaint in Anson County Superior Court. In the proposed complaint, plaintiff alleges his state constitutional and statutory rights were violated by defendants North Carolina Department of Correction ("NCDOC"), Secretary of Correction Theodis Beck, and Director of the Division of Prisons Boyd Bennett.[1] On 1 November 2000, defendant NCDOC implemented a ten dollar ($10.00) administrative fee for inmates whose disciplinary offenses result in a guilty disposition. Plaintiff claims that defendant NCDOC implemented this fee without first securing legislative approval in violation of N.C. Gen. Stat. § 12-3.1 and Article I, sections 8 and 19 of the North Carolina Constitution. Plaintiff's complaint asserts that defendant NCDOC has since illegally collected disciplinary fees and ought to account for and disgorge all such sums.

On 27 August 2009, defendant NCDOC filed an answer admitting the imposition of the fee, but denying plaintiff's allegations of illegality.

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1. Secretary of Correction Theodis Beck and Director of the Division of Prisons Boyd Bennett are not parties to this appeal.

Defendant NCDOC's answer further raised the affirmative defenses of failure to state a claim upon which relief can be granted pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), insufficiency of service of process, and sovereign immunity. Shortly thereafter, on 7 September 2009, plaintiff filed both a request for admissions and a request for documents. On 12 October 2009, defendant NCDOC filed a motion for judgment on the pleadings for insufficiency of service of process, contemporaneously with a motion for entry of a protective order asserting that defendant NCDOC is entitled to reasonable protection from plaintiff's documents request until such time as there is a ruling on defendant NCDOC's pending motion for judgment on the pleadings. Plaintiff responded by filing his opposition to defendant NCDOC's motion for judgment on the pleadings for insufficiency of service of process on 19 November 2009. The trial court scheduled defendant NCDOC's two motions for hearing on 30 November 2009.

However, on 23 November 2009, defendant NCDOC filed a motion to continue, stating that plaintiff had appealed the dismissal of a similar civil action in which plaintiff alleged that defendant NCDOC had illegally imposed inmate medical co-payment charges without first securing legislative approval as required by N.C. Gen. Stat. § 12-3.1. Defendant NCDOC contended that, due to the similarity of arguments between the present case and the case then pending before the Court of Appeals, the Court of Appeals' ruling in the similar case could affect the final disposition of the present case, and therefore the hearing in this matter should be continued until the related Court of Appeals ruling is issued. Defendant NCDOC distributed a copy of the motion to continue to plaintiff by U.S. mail on 18 November 2009. The trial court granted defendant NCDOC's motion to continue on 23 November 2009 by order signed by the Superior Court Administrator. Plaintiff filed his opposition to defendant NCDOC's motion to continue on 24 November 2009, one day after the motion was granted. The hearing on defendant NCDOC's two motions was rescheduled for 1 March 2010.

On 24 February 2010, defendant NCDOC filed a second motion to continue. On 16 February 2010, the Court of Appeals dismissed plaintiff's appeal in his related action for medical copayment charges for failure to file a timely notice of appeal. Subsequent to that decision, defendant NCDOC finalized its second motion for judgment on the pleadings for failure to state a claim for which relief could be granted, which defendant NCDOC filed contemporaneously with a supporting brief and its second motion to continue. Defendant NCDOC requested

the continuance so that all three of its dispositive motions in the present matter could be heard by the trial court on the same motions hearing date. Defendant NCDOC distributed a copy of its second motion to continue to plaintiff by U.S. mail on 22 February 2010. By order signed by the Superior Court Administrator, the trial court granted defendant NCDOC's second motion to continue on 24 February 2010.

On 1 March 2010, plaintiff filed a motion demanding a trial by jury, and on 2 March 2010, plaintiff filed his opposition to defendant NCDOC's second motion for judgment on the pleadings for failure to state a claim for which relief can be granted. On 10 March 2010, defendant NCDOC sent a notice of hearing of defendant NCDOC's motions to plaintiff. The language of the notice stated: "NOTICE IS HEREBY GIVEN that [the trial court] ordered [defendant NCDOC] to bring Defendant's motions for Entry of a Protective Order and Judgment on the Pleadings on for hearing before the presiding judge of the Superior Court of Anson County on 14 June 2010[.]" A Notice of Hearing was also sent by the Superior Court Administrator to plaintiff on 29 April 2010.

On 14 June 2010, the trial court heard argument on the substantive issues addressed in defendant NCDOC's second motion for judgment on the pleadings for failure to state a claim for which relief could be granted. At the same time, the trial court also heard argument for the same motion filed by defendant NCDOC in a second factually identical civil action filed by another inmate. At the conclusion of the hearing, the trial court granted defendant NCDOC's "motions," stating: "The motions of the Attorney General's Office in each of these cases are allowed." The trial court then directed defendant NCDOC, as the prevailing party, to prepare a draft order for the trial court's consideration. Defendant NCDOC drafted an order dismissing the complaint under each of the grounds alleged in defendant NCDOC's second motion for judgment on the pleadings for failure to state a claim for which relief could be granted. The trial court signed the order on 24 July 2010 and returned it by mail to defendant NCDOC. On 30 July 2010, defendant NCDOC mailed the signed order to the Clerk of Anson County Superior Court for filing and mailed a copy of the letter and signed order to plaintiff. Plaintiff appeals.

II. Oral orders

[1] By his first two assignments of error, plaintiff contends the trial court committed reversible error in "verbally" granting defendant

NCDOC's motions for judgment on the pleadings for insufficiency of service of process and entry of a protective order. These two "verbal orders," which plaintiff contends are error, are not properly before this Court.

"[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2009). " 'When [a trial court's] oral order is not reduced to writing, it is non-existent and thus cannot support an appeal.' " *Olson v. McMillian*, 144 N.C. App. 615, 619, 548 S.E.2d 571, 574 (2001) (quoting *Southern Furn. Hdwe., Inc. v. Branch Banking & Tr. Co.*, 136 N.C. App. 695, 702, 526 S.E.2d 197, 201 (2000) (citation omitted)). "The announcement of judgment in open court is the mere rendering of judgment, not the entry of judgment. The entry of judgment is the event which vests this Court with jurisdiction." *Worsham v. Richbourg's Sales & Rentals*, 124 N.C. App. 782, 784, 478 S.E.2d 649, 650 (1996) (citations omitted).

In the present case, plaintiff argues the trial court orally granted defendant NCDOC's motions for judgment on the pleadings for insufficiency of service of process and entry of a protective order when the trial court stated: "The motions are allowed. The motions of the Attorney General's Office in each of these cases are allowed." Notably, during the course of the hearing, the trial court heard arguments from defendant NCDOC on the substantive issues addressed in both defendant NCDOC's second motion for judgment on the pleadings in the present case, and the same dispositive motion filed in another action with identical facts and legal issues. Although it is unclear from the trial court's statement alone exactly which motions were being granted, in the context of the substantive arguments being heard by the trial court, it appears the trial court was granting defendant NCDOC's dispositive motions in each matter. Nevertheless, the trial court's 24 July 2010 order does not contain a ruling on defendant NCDOC's motions for judgment on the pleadings for insufficiency of service of process or entry of a protective order. Accordingly, because there is no written order granting or otherwise ruling on defendant NCDOC's motions for judgment on the pleadings for insufficiency of service of process or entry of a protective order, these two "verbal orders" are non-existent, and therefore, these two assignments of error are not properly before this Court.

[2] Similarly, by his third assignment of error, plaintiff contends the trial court committed prejudicial error in signing only one court order

granting defendant NCDOC's second motion for judgment on the pleadings and not drafting and signing the other two court orders that the court "verbally granted" at the hearing. Plaintiff argues that, because the trial court verbally stated defendant NCDOC's "motions" were granted, the trial court had a responsibility to ensure that all three motions before the court were also written for the record.

As stated above, oral orders of the trial court are "non-existent." *McMillian*, 144 N.C. App. at 619, 548 S.E.2d at 574. "The general rule is that, the mere ruling, decision, or opinion of the court, no judgment or final order being entered in accordance therewith, does not have the effect of a judgment, and is not reviewable by appeal or writ of error." *Munchak Corp. v. McDaniels*, 15 N.C. App. 145, 147-48, 189 S.E.2d 655, 657 (1972) (internal quotation marks and citation omitted). The trial court has no responsibility to reduce to writing an order which it did not actually render. In the present case, it is unclear from the trial court's use of the plural form "motions" whether the trial court was in fact granting defendant NCDOC's three motions as they relate to plaintiff's case, or whether the trial court was only granting the dispositive motions on the pleadings filed in each of the two related cases being heard at the same time before the trial court. However, the context of the hearing and the final written order do make clear what the trial court actually ruled on, which was defendant NCDOC's second motion for judgment on the pleadings for failure to state a claim for which relief can be granted. Therefore, this assignment of error is overruled.

III. Drafting of court order by prevailing party

[3] In his fourth assignment of error, plaintiff contends the trial court committed prejudicial error in ordering defendant NCDOC to draft the court order without giving any conclusions of law and/or specifying the grounds why defendant NCDOC's "motions" were being granted.

This Court has previously held:

> "[P]ursuant to the provisions of N.C. Gen. Stat. § 1A-1, Rule 58 of the Rules of Civil Procedure, after 'entry' of judgment in open court, a trial court retains the authority to approve the judgment and direct its prompt preparation and filing." . . . Nothing in [N.C. Gen. Stat. § 1A-1, Rule 58] or common practice precludes the trial court from directing the prevailing party to draft an order on its behalf. Instead, "[s]imilar procedures are routine in civil cases[.]"

In re J.B., 172 N.C. App. 1, 25, 616 S.E.2d 264, 279 (2005) (citations omitted). In the present case, the trial court ordered defendant NCDOC to draft the written order reflecting the trial court's ruling on the matter. Such order is proper under the Rules of Civil Procedure in North Carolina.

In addition, "[a] trial judge cannot be expected to enter in open court immediately after trial the detailed findings of fact and conclusions of law that are generally required for a final judgment. If the written judgment conforms in general terms with the oral entry, it is a valid judgment." *Morris v. Bailey*, 86 N.C. App. 378, 389, 358 S.E.2d 120, 127 (1987); *see also Edwards v. Taylor*, 182 N.C. App. 722, 727, 643 S.E.2d 51, 54 (2007). While the trial court did not specify the particular grounds or conclusions of law to be stated in the order, the trial court was free to modify or reject the proposed order drafted by defendant NCDOC if the trial court felt the proposed order did not reflect the trial court's entire ruling. However, the trial court accepted the proposed order as drafted, thereby manifesting the trial court's agreement with the conclusions of law stated in the written order. Further, the trial court entered its verbal order after hearing argument by the parties addressing the substantive issues in defendant NCDOC's second motion for judgment on the pleadings. Given the context in which the oral order was made during the hearing, we find that the written order of the trial court conforms with the oral judgment pronounced in open court. Accordingly, the trial court's actions were proper, and this assignment of error is overruled.

IV. Motion for trial by jury

[4] In his fifth assignment of error, plaintiff contends the trial court violated his due process rights under Article I, section 19 of the North Carolina Constitution by denying his motion for a trial by jury on the issue involved in this matter, which plaintiff alleges concerns the illegal taking of his property.

Our Supreme Court has held:

> Under the North Carolina Constitution, a party has a right to a jury trial in "all controversies at law respecting property." N.C. Const. art. I, § 25. This constitutional right to a jury trial . . . is not absolute, however. *N.C. Nat'l Bank v. Burnette*, 297 N.C. 524, 537, 256 S.E.2d 388, 396 (1979). The right "is premised upon a preliminary determination by the trial judge that there indeed exist genuine issues of fact . . . which require submission to the jury." *Id.*

Dockery v. Hocutt, 357 N.C. 210, 217, 581 S.E.2d 431, 436 (2003).

In the present case, plaintiff's claim alleges that defendant NCDOC has illegally collected disciplinary fees and that such action is an illegal taking of his property because defendant NCDOC implemented this fee without first securing legislative approval in violation of N.C. Gen. Stat. § 12-3.1. As such, plaintiff's claim centers on statutory construction of N.C. Gen. Stat. § 12-3.1, as well as any related statutory provisions, including those found in Chapter 150B—the Administrative Procedure Act ("APA"), that may govern defendant NCDOC's actions. Proper interpretation of statutory provisions presents a question of law, not fact. *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998); *see also Ford v. State of North Carolina*, 115 N.C. App. 556, 558, 445 S.E.2d 425, 427 (1994) ("The proper interpretation of APA statutory provisions, as with any statute, presents a question of law."). Because only questions of law were to be heard and determined in plaintiff's action, plaintiff had no right to a jury trial, as there existed no factual issues requiring submission to a jury. This assignment of error is thereby overruled.

V. *Ex parte* communications

[5] Plaintiff's sixth assignment of error is that the trial court committed prejudicial error in having *ex parte* communications with defendant NCDOC's counsel on three separate occasions.

The first such occasion alleged by plaintiff occurred when the trial court granted defendant NCDOC's first motion to continue on 23 November 2009. Plaintiff alleges this act was an *ex parte* communication because the trial court granted the motion to continue without having considered plaintiff's opposition motion filed on 24 November 2009, the day after the motion to continue was granted. A second similar occasion alleged by plaintiff occurred when the trial court granted defendant NCDOC's second motion to continue on 24 February 2010. Plaintiff alleges this act was an *ex parte* communication because the trial court granted the motion to continue before plaintiff received a copy of the motion on 25 February 2010, the day after the motion to continue was granted. Plaintiff equates receipt of the motion with service of the motion and argues that, because he was not "served" with the second motion to continue until the day after it was granted, the trial court's grant of the motion was an improper *ex parte* communication.

"[A] motion for continuance is 'ordinarily addressed to the sound discretion of the trial judge and not subject to review on appeal

absent an abuse of that discretion.' " *McIntosh v. McIntosh*, 184 N.C. App. 697, 701, 646 S.E.2d 820, 823 (2007) (quoting *State v. Parton*, 303 N.C. 55, 68, 277 S.E.2d 410, 419 (1981), *overruled on other grounds*, *State v. Freeman*, 314 N.C. 432, 437-38, 333 S.E.2d 743, 746-47 (1985)). This Court will find such an abuse of discretion only if "the decision was so arbitrary that it could not have been the result of a reasoned decision." *N.C. State Bar v. McLaurin*, 169 N.C. App. 144, 148, 609 S.E.2d 491, 494 (2005).

In the present case, we find the trial court did not abuse its discretion in granting both of defendant NCDOC's motions to continue. The first motion to continue was requested because a case with the same or similar legal issues was pending before this Court at the time, and the outcome of that case could have impacted the merits of the present case. Similarly, the second motion to continue was requested because this Court's decision in the related case was issued only a few days before the scheduled hearing date in the present case; and following this Court's decision in the related case, defendant NCDOC filed its second motion for judgment on the pleadings in the present case. Defendant NCDOC based its request for continuance on having one hearing for all three of defendant NCDOC's pending motions. We find that sufficient grounds existed to grant both motions for continuance, and therefore, the trial court did not abuse its discretion in granting the motions in the present case.

We note that pursuant to Rule 6.1 of the Local Rules of Practice for Judicial District 20-A, which serves as the local rules of procedure for Anson County Superior Courts, the trial court coordinator is designated as the appropriate judicial official who "shall rule upon all continuance requests . . . ." Local Rules of Practice, Case Management Plan for Superior Civil Cases, Judicial District 20-A, at 5 (2006). Therefore, the granting of the motions to continue by the Superior Court Administrator in the present case was proper pursuant to the local rules of procedure, contrary to plaintiff's assertion of impropriety.

We also note that, pursuant to Rule 6.3 of the Local Rules of Practice for Judicial District 20-A, a copy of a motion to continue must only be "distributed" to an unrepresented party before presentation of the motion to the appropriate judicial official. *Id.* at 6. Distribution occurs, *inter alia*, when the motion is deposited in the U.S. mail. *Id.* The date plaintiff received the copy of the motion is irrelevant under the local rules of procedure, and therefore, the record indicates that plaintiff was properly "served" with both

motions to continue in the present case when defendant NCDOC deposited a copy of the motions in the mail to plaintiff before filing the motions with the trial court.

However, also according to Rule 6.4 of the Local Rules of Practice for Judicial District 20-A, "[u]nrepresented parties shall have a period of three (3) working days following completion of distribution to communicate, by any means, objections to the motion for continuance to the moving party and the office of the Senior Resident Superior Court Judge or the office of his designee." *Id.* In the present case, the trial court granted defendant NCDOC's first motion to continue on 23 November 2009, on the third working day after defendant NCDOC deposited a copy of the motion in the mail to plaintiff on 18 November 2009. The trial court likewise granted defendant NCDOC's second motion to continue on 24 February 2010, on the second working day after defendant NCDOC deposited a copy of the motion in the mail to plaintiff on 22 February 2010. Therefore, while the trial court's decision to grant the motions to continue were proper under the circumstances of the present case, the trial court violated the local rules of procedure in ruling on the motions to continue without waiting three working days to receive any objections from plaintiff.

Despite such a violation of the local rules of procedure, plaintiff has made no showing of prejudice, as he appeared at the motions hearing and was prepared with his arguments on the rescheduled date. "[N]o error or defect in any ruling or order or in anything done or omitted by any of the parties is ground for granting a new trial or . . . for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right." N.C. Gen. Stat. § 1A-1, Rule 61 (2009). The appellant bears the burden of showing how the trial court's alleged error prejudiced the appellant. *Stott v. Nationwide Mut. Ins. Co.*, 183 N.C. App. 46, 50, 643 S.E.2d 653, 656 (2007). Plaintiff is unable to demonstrate any way in which the trial court's actions in continuing the hearing prejudiced his rights.

[6] Plaintiff alleges the third occasion on which the trial court had *ex parte* communications with defendant NCDOC occurred when the trial court "ordered" the hearing date for defendant NCDOC's motions for entry of protective order and judgment on the pleadings. Plaintiff alleges this was an *ex parte* communication because plaintiff was only served with the notice of hearing from defendant NCDOC and never received a copy of the referenced "order." However, the wording

appearing in the notice of hearing mailed by defendant NCDOC simply reflects defendant NCDOC's request for the superior court judge to calendar the hearing on defendant NCDOC's motions for the date and time reflected in the written notice of hearing. There is no actual written "order" made by the judge setting the hearing date, other than the court calendar. *See* Rules 5.1 and 5.2 of the Local Rules of Practice for Judicial District 20-A at 4-5. There is no evidence in the record that defendant NCDOC had any improper input into the setting of the trial date, other than through its proper motions to continue, and therefore, the trial court's decision on the court calendar and defendant NCDOC's written notice of hearing does not constitute an *ex parte* communication. Rather, defendant NCDOC's written notice of hearing to plaintiff and the trial court administrator's subsequent notice of hearing followed proper trial court procedure. *See* Rule 5 of the Local Rules of Practice for Judicial District 20-A at 5. Plaintiff is likewise unable to demonstrate any way in which the trial court's actions in setting and noticing the hearing prejudiced his rights. Therefore, this assignment of error must be overruled.

VI. Conclusion of law one

[7] In his seventh assignment of error, plaintiff contends the trial court erred in its conclusion of law one. Conclusion of law one states:

> [NCDOC] is exempt from the rule-making provisions of Article 2A of the Administrative Procedure Act ("APA") "with respect to matters relating solely to persons in its custody or under its supervision, including prisoners, probationers, and parolees." N.C. Gen. Stat. § 150B-1(d)(6) (2009). With respect to such persons, [NCDOC] is exempt from the prohibition against establishing fees by rule absent statutory authorization. *See* N.C. Gen. Stat. § 150B-19(5). [NCDOC] is similarly exempt from the requirement that it comply with N.C. Gen. Stat. § 12-3.1 before promulgating rules that establish a new fee or increase an existing fee. *See* N.C. Gen. Stat. § 150B-21.3(c1). The [NCDOC] Inmate Disciplinary Procedures and the collection of an administrative fee resulting from a guilty disposition relates solely to persons in [NCDOC]'s custody, such that [NCDOC] was not required to comply with N.C. Gen. Stat. § 12-3.1 before establishing the ten ($10.00) dollar administrative fee. *See* N.C. Gen. Stat. §§ 150B-1(d)(6), 150B-19(5), 150B-21.3(c1).

Plaintiff challenges the trial court's conclusion of law one as contrary to established law and argues the trial court improperly interpreted the statutes at issue.

This inquiry into statutory construction is a law-based inquiry and warrants *de novo* review. *Trayford v. N.C. Psychology Bd.*, 174 N.C. App. 118, 122, 619 S.E.2d 862, 865 (2005), *aff'd*, 360 N.C. 396, 627 S.E.2d 462 (2006). "Statutes on the same subject are to be reconciled if this can be done by giving effect to the fair and reasonable intendment of both acts." *Commercial Credit Corp. v. Robeson Motors*, 243 N.C. 326, 334, 90 S.E.2d 886, 892 (1956) (internal quotation marks and citation omitted). In addition:

> Statutory provisions must be read in context: Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole. Statutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each.

In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co., 161 N.C. App. 558, 560, 589 S.E.2d 179, 181 (2003) (internal-quotation marks and citations omitted).

In his complaint, plaintiff argues that defendant NCDOC's policy establishing a ten dollar ($10.00) administrative fee for disciplinary violations resulting in a guilty disposition violates N.C. Gen. Stat. § 12-3.1. This statute, found under Chapter 12 addressing statutory construction, is titled "Fees and charges by agencies," and provides:

> Only the General Assembly has the power to authorize an agency to establish or increase a fee or charge for the rendering of any service or fulfilling of any duty to the public. In the construction of a statute, *unless that construction would be inconsistent with the manifest intent of the General Assembly or repugnant to the context of the statute*, the legislative grant of authority to an agency to adopt rules shall not be construed as a grant of authority to the agency to establish by rule a fee or a charge for the rendering of any service or fulfilling of any duty to the public, unless the statute expressly provides for the grant of authority to establish a fee or charge for that specific service.

N.C. Gen. Stat. § 12-3.1(a) (2009) (emphasis added). The current version of the statute, amended before plaintiff filed the present action but after defendant NCDOC promulgated its fee policy, provides additional guidelines with which a state agency must comply in order to

seek authority for the imposition of an administrative fee, but the above language has remained unchanged. *See* N.C. Gen. Stat. § 12-3.1(a)(1997), *amended by* S.L. 2001-427, § 8(a), eff. Sept. 28, 2001; S.L. 2002-99, § 7(c), eff. Aug. 29, 2002; S.L. 2005-276, § 6.8(b), eff. July 1, 2005. The clear purpose of this statute is to eliminate any inherent power of state agencies to impose fees for rendering public services or fulfilling public duties that might be construed as part of the agency's rule-making power granted under the APA, found under Chapter 150B of the North Carolina General Statutes.

The APA itself expressly regulates the imposition of fees and charges by state agencies. Section 150B-19, titled "Restrictions on what can be adopted as a rule," found under Article 2A of the APA, provides: "An agency may not adopt a rule that does one or more of the following: . . . (5) Establishes a fee or other charge for providing a service in fulfillment of a duty unless a law specifically authorizes the agency to do so . . . ." N.C. Gen. Stat. § 150B-19(5)(2009). Section 150B-19(5) then enumerates certain exceptions from the prohibition against adopting rules which establish fees for public services. *Id.* The first part of section 12-3.1(a), as quoted above, simply reinforces this provision, emphasizing that the APA's grant of rule-making authority is not to be construed as a general authority to establish an administrative fee for the rendering of services or fulfillment of duties to the public. Notably, section 12-3.1(c) contains the same list of exceptions as found under section 150B-19(5). *See* N.C. Gen. Stat. § 12-3.1(c). As such, section 12-3.1 and section 150B-19(5) contain reciprocal provisions.

Further, section 150B-21.3(c1), also found under Article 2A of the APA, provides: "Notwithstanding any other provision of this section, a rule that establishes a new fee or increases an existing fee shall not become effective until the agency has complied with the requirements of [section] 12-3.1." N.C. Gen. Stat. § 150B-21.3(c1) (2009). Reading all three statutes *in pari materia*, it is clear that the intent of the legislature is to restrict state agencies from promulgating rules that charge fees for providing public services or fulfilling public duties without first obtaining an explicit grant of legislative authority to do so and complying with the proper approval procedures.

However, also under the APA, the legislature expressly provides: "Exemptions from Rule Making.—Article 2A of this Chapter does not apply to the following: . . . (6) The Department of Correction, with respect to matters relating solely to persons in its custody or under

its supervision, including prisoners, probationers, and parolees." N.C. Gen. Stat. § 150B-1(d)(6) (2009). The clear intent of the legislature, therefore, is to authorize defendant NCDOC to promulgate any rules, including those which establish fees, as they relate solely to prisoners, probationers, and parolees in NCDOC custody. Section 12-3.1 expressly commands this result, as requiring defendant NCDOC to first obtain further legislative authority to institute a fee as against prisoners pursuant to section 12-3.1(a) while simultaneously exempting NCDOC from doing the same under the APA would be "repugnant to the context of the statute." N.C. Gen. Stat. § 12-3.1(a). We perceive no conflict between section 12-3.1 and Chapter 150B, the APA. Construing these statutes *in pari materia*, we conclude that the trial court's conclusion of law one is without error.

VII. Conclusion of law two

[8] Plaintiff also assigns error to the trial court's conclusion of law two. Again, because this inquiry into statutory construction is a law-based inquiry, we review the trial court's conclusion of law two *de novo*. *Trayford*, 174 N.C. App. at 122, 619 S.E.2d at 865.

> Conclusion of law two states:
>
> The provision of the [NCDOC] Inmate Disciplinary Procedures that provides for the imposition of a ten ($10.00) dollar administrative fee for inmates whose disciplinary offenses result in a guilty disposition is neither a service rendered to the public nor is it [a] duty owed to the public. Accordingly, N.C. Gen. Stat. § 12-3.1 does not apply to the imposition of an inmate disciplinary administrative fee.

As we have stated previously, the first sentence of N.C. Gen. Stat. § 12-3.1(a) provides: "Only the General Assembly has the power to authorize an agency to establish or increase a fee or charge for the rendering of any service or fulfilling of any duty to the public." *Id.* Plaintiff argues this statute, by itself, prohibits defendant NCDOC's actions in the present case for two reasons: first, plaintiff argues the statute must be construed to establish that NCDOC may not "establish or increase a fee." Plaintiff reads the "or" connector in the statute as disjunctive and contends that each phrase is to be considered separately from the others, and that the phrase "to the public" only applies to duties owed by state agencies. Second, plaintiff contends that if the phrase "to the public" applies to the whole of the statute, the statute applies to fees charged against prisoners because prisoners

are members of "the public." Plaintiff's attempt at statutory construction is erroneous.

The "cardinal principle" of statutory construction is to "ensure accomplishment of the legislative intent." *L.C. Williams Oil Co. v. NAFCO Capital Corp.*, 130 N.C. App. 286, 289, 502 S.E.2d 415, 417 (1998). Accordingly, we must consider "the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish." *Hayes v. Fowler*, 123 N.C. App. 400, 404-05, 473 S.E.2d 442, 445 (1996) (internal quotation marks and citation omitted). "When the language of a statute is clear and without ambiguity, 'there is no room for judicial construction,' and the statute must be given effect in accordance with its plain and definite meaning." *Avco Financial Services v. Isbell*, 67 N.C. App. 341, 343, 312 S.E.2d 707, 708 (1984) (quoting *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980)). However, if a literal reading of the statutory language "yields absurd results . . . or contravenes clearly expressed legislative intent, 'the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.' " *Id.* (quoting *State v. Barksdale*, 181 N.C. 621, 625, 107 S.E. 505, 507 (1921)); *see also Kaminsky v. Sebile*, 140 N.C. App. 71, 76, 535 S.E.2d 109, 112-13 (2000). Further,

> [w]here one statute deals with a subject in detail with reference to a particular situation . . . and another statute deals with the same subject in general and comprehensive terms . . . , the particular statute will be construed as controlling in the particular situation unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto.

State v. Leeper, 59 N.C. App. 199, 202, 296 S.E.2d 7, 9 (1982).

Plaintiff demands that this Court read the statute literally and disjunctively and find that the statute commands that "only the General Assembly has the power to authorize an agency to establish or increase a fee." We conclude such a reading is contrary to the manifest intention of the legislature. As we have already stated, section 12-3.1 must be read *in pari materia* with the provisions of Chapter 150B, the APA. From the statutory structure, it is evident that the legislature intended for section 12-3.1, found under the chapter addressing general rules of statutory construction, to operate as a general limitation on the rule-making powers of state agencies which are found under Article 2A of Chapter 150B. Two separate provisions found under Chapter 150B further demonstrate that intent, specifically section 150B-19(5), which contains reciprocal provisions of

section 12-3.1, and section 150B-21.3(c1), which provides that "a rule that establishes a new fee or increases an existing fee shall not become effective until the agency has complied with the requirements of [section] 12 3.1." N.C. Gen. Stat. § 150B-21.3(c1). This last provision is strong evidence that section 12-3.1 only operates as a general limitation on the rule-making provisions of Article 2A under Chapter 150B, and cannot be read as an outright prohibition against an agency's authority to charge a fee in certain circumstances. Rather, section 150B-1(d)(6) unequivocally exempts defendant NCDOC from the rule-making provisions altogether, so long as the rules in question address "matters relating solely to persons in its custody or under its supervision[.]" N.C. Gen. Stat. § 150B-1(d)(6). As such, the particular statute addressing defendant NCDOC's rule-making authority for prisoners, which applies to the specific circumstances of the present case, controls over the general limitation on establishment of fees found under the statutory construction provisions of section 12-3.1. Plaintiff's strictly literal reading of the statute would produce absurd results contrary to legislative intent, and therefore must be disregarded.

[9] Moreover, the language of section 12-3.1 itself reveals the intent of the legislature to limit only the establishment or increasing of a fee to be charged for rendering public services or fulfilling public duties:

> [T]he legislative grant of authority to an agency to adopt rules shall not be construed as a grant of authority to the agency to establish by rule a fee or a charge for the rendering of any service or fulfilling of any duty to the public, *unless the statute expressly provides for the grant of authority to establish a fee or charge for that specific service.*

N.C. Gen. Stat. § 12-3.1(a) (emphasis added). From the language used, it is evident that the legislature intended the phrase "to the public" to apply to the entire statute, thereby limiting only the power of state agencies to charge fees for rendering public services or fulfilling public duties.

Plaintiff argues that, even if the statute is construed to apply only to services rendered to the public, the statute still applies to defendant NCDOC's actions because prisoners are members of "the public." While the term "public" is not defined in the statute, we must give the term its "natural and ordinary meaning." *Perkins v. Arkansas Trucking Servs., Inc.*, 351 N.C.634, 638, 528 S.E.2d 902, 904 (2000). "In

the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute." *Id.*

"Public" has been defined as "[t]he people of a nation or community as a whole." *Black's Law Dictionary* 1264 (8th ed. 2004). Both plaintiff and defendant NCDOC also recognize that "public" has been defined as "the body of the people at large." *Black's Law Dictionary* 1227 (6th ed. 1990). In addition, "public service" is defined as "[a] service provided or facilitated by the government for the general public's convenience and benefit." *Black's Law Dictionary* 1268 (8th ed. 2004). Prisoners are held under the custody of defendant NCDOC, and therefore are not part of the "people at large," "the general public," or the "community as a whole." Rather, by virtue of their confinement, prisoners are removed entirely from the community and are detained so that they are not "at large." Therefore, because prisoners are not members of the "public," section 12-3.1 is wholly inapplicable to the actions of defendant NCDOC as against those persons in its custody. Such a construction is entirely consistent with the statutory scheme of Chapter 150B which exempts defendant NCDOC from the rule-making provisions governing state agencies when the rules at issue concern only those persons in defendant NCDOC's custody. State agencies generally service the public at large, and defendant NCDOC is exempt from those regulations under the APA with respect to persons in its custody who necessarily are not members of the public. As such, the trial court's conclusion of law two is without error.

VIII. Second motion for judgment on the pleadings

[10] Plaintiff's final contention is that, because the trial court erred in its conclusions of law, the trial court committed reversible error in granting defendant NCDOC's second motion for judgment on the pleadings. We disagree.

" 'Judgment on the pleadings, pursuant to Rule 12(c), is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain.' " 508, 510 (2010) (quoting *Groves v. Community Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001)). This Court reviews *de novo* a trial court's grant or denial of a motion for judgment on the pleadings. *Id.*

In the present case, the factual allegations—the implementation of the disciplinary fee at issue—were admitted in the pleadings, and only questions of statutory construction remained. As we have previ-

ously stated, questions involving statutory construction are questions of law. *Flowe*, 349 N.C. at 523, 507 S.E.2d at 896. As discussed above, we find the trial court's conclusions of law to be an accurate construction of the statutes at issue in the present case. Accordingly, we hold the trial court properly granted defendant NCDOC's second motion for judgment on the pleadings. The trial court's order dismissing plaintiff's claim, therefore, must be affirmed.

IX. Conclusion

For the foregoing reasons, we affirm the trial court's order granting defendant NCDOC's second motion for judgment on the pleadings and dismissing plaintiff's action.

Affirmed.

Chief Judge MARTIN and Judge McGEE concur.

SPX CORPORATION, Plaintiff v. LIBERTY MUTUAL INSURANCE COMPANY, EMPLOYERS INSURANCE COMPANY OF WAUSAU, THE TRAVELERS INDEMNITY COMPANY, Defendants, and ACE PROPERTY AND CASUALTY INSURANCE COMPANY and CENTURY INDEMNITY COMPANY, Defendants

No. COA10-745

(Filed 5 April 2011)

1. Insurance— New York law—duty to pay defense costs

The trial court did not abuse its discretion by ruling that under New York law, an insurer has the duty to pay 100% of defense costs associated with every underlying asbestos claim in which the complaint alleged bodily injury or disease that potentially occurred during the period when the insured provided coverage.

2. Constitutional Law— right to trial—New York law—allocation of defense and indemnity obligations

The trial court did not err by ruling that under New York law, an insurer was not entitled to a trial to determine the appropriate method for allocating defense and indemnity obligations under equitable principles.

3. Insurance— choice of law—last act to make binding contract

The trial court did not err by holding that New York law, rather than Connecticut law, governed the application of defendant Traveler's policies. The last act to make a binding contract, receipt, and acceptance of the insurance policies, occurred in New York.

4. Insurance— New York law—payment of defense costs

The trial court did not abuse its discretion by applying New York law to require that defendant Travelers pay all of plaintiff SPX's defense costs.

5. Compromise and Settlement— oral settlement—settlement conference—slip of tongue or misnomer

The trial court did not err by enforcing an oral settlement. A slip of the tongue or misnomer cannot overcome statutory requirements and transform a settlement conference into a court-ordered mediation under N.C.G.S. § 7A-38.1.

6. Evidence— statements made at mediation—oral settlement agreement—invited error

The trial court did not err by considering statements made at mediation to find that an oral settlement agreement was reached despite a stipulation that all evidence produced at the mediation would be inadmissible. Having presented the trial court with evidence about what was said and done at the settlement conference, defendant Liberty may not now complain that the trial court considered that very evidence.

7. Trials— judge acting as fact finder—presumed to rely solely upon competent evidence

The trial court did not err by allegedly using its own personal knowledge from *ex parte* communications to resolve a disputed factual issue. Where competent and incompetent evidence is before a trial court, it is presumed that the court functioned as the finder of facts and relied solely upon the competent evidence.

8. Judges— motion to recuse—personal knowledge—waiver

The trial court did not err by refusing to recuse itself from resolving disputed factual issues where the trial judge had personal knowledge. A party may not argue its substantive point in the trial court with full knowledge of the alleged ground for disqualification, and then, upon losing on the merits, resort to a motion for recusal.

9. Stipulations— willful violation—settlement agreement—sanctions

The trial court did not err by imposing sanctions against defendant Liberty. Liberty willfully violated the stipulations it agreed to as part of a settlement agreement process, thereby frustrating the orderly and efficient resolution of the dispute.

10. Appeal and Error— cross-appeal—unnecessary determination

Although plaintiff SPX argued on conditional cross-appeal that the trial court erred by holding that defendant Liberty was entitled to a full and separate per occurrence deductible for each claim covered by its policies, this issue did not need to be considered because the Court of Appeals already affirmed the trial court's 13 March 2009 order.

Appeal by defendant Employers Insurance Company of Wausau from orders entered 2 October 2008 and 6 January 2010, by defendant The Travelers Indemnity Company from an order entered 26 May 2009, by defendant Liberty Mutual Insurance Company from an order entered 13 March 2009, and cross-appeal by plaintiff SPX Corporation from an order entered 20 November 2008 by Judge W. Erwin Spainhour in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 January 2011.

Robinson, Bradshaw & Hinson, P.A., by David C. Wright, III, and Covington & Burling, L.L.P., by Benjamin J. Razi, for plaintiff-appellee and cross-appellant SPX Corporation.

Poyner Spruill, L.L.P., by Steven B. Epstein, for defendant-appellant Liberty Mutual Insurance Company.

York, Williams & Lewis, L.L.P., by R. Gregory Lewis, and Zelle, Hofmann, Voelbel & Mason, L.L.P., by Rolf E. Gilbertson, for defendant-appellant Employers Insurance Company of Wausau.

Higgins Law Firm, by Sara W. Higgins, and Steptoe & Johnson, L.L.P., by John R. Casciano, for defendant-appellant The Travelers Insurance Company.

Pinto, Coates, Kyre & Brown, P.L.L.C., by David L. Brown, and Siegal & Brown, by Martin F. Siegal, for defendants-appellees Ace Property & Casualty Company and Century Indemnity Company.

BRYANT, Judge.

Where New York law requires that each insurer must defend its insured if there is an asserted occurrence which could be potentially covered by its policy, even if another carrier may also be responsible, the trial court does not abuse its discretion in so ordering. Where New York law provides that the appropriate method for allocating defense obligations may be determined without trial, the trial court does not err in granting summary judgment on that basis. Where the last act to make a binding contract occurred in New York, the trial court does not err in holding that the law of New York controls the interpretation of the contract. Where a superior court sits in a civil matter, it may encourage and pursue pretrial resolution process other than the specific court-ordered mediation process pursuant to N.C. Gen. Stat. § 7A-38.1. Where a party invites alleged error, it may not then argue that error on appeal. Where both competent and incompetent evidence is before a trial court, the trial court is assumed to rely solely upon the competent evidence and to disregard any incompetent evidence. Where a party argues its substantive point in the trial court with full knowledge of an alleged ground for disqualification, it may not, upon losing on the merits, resort to a motion for recusal. Where a party willfully violates the stipulations it has agreed to as part of a settlement agreement process, thereby frustrating the orderly and efficient resolution of the dispute, the trial court does not err in imposing sanctions.

Facts

General Railway Signal Company ("General Railway") was a New York corporation, founded in 1904, which manufactured railway signal equipment. In 1963, General Railway became a Delaware corporation and changed its named to General Signal Corporation ("GSX"). In 1976, GSX moved its corporate headquarters to Connecticut. In 1998, plaintiff SPX Corporation, ("SPX") acquired GSX and merged it into SPX in 2001.

Between the 1920s and 1980s, General Railway purportedly purchased and used various asbestos-containing parts and equipment in its manufacturing. As a result, General Railway has been implicated in approximately 151 asbestos bodily injury cases. There are thousands of additional asbestos bodily injury claims pending against the various other subsidiaries and predecessors of SPX. Defendant-appellant Employers Insurance Company of Wausau ("Wausau") insured General Railway under comprehensive general liability policies

between January 1950 and January 1963. Defendant-appellant Liberty Mutual Insurance Company ("Liberty") also provided liability policies to SPX. Defendants-appellees Ace Property & Casualty Company and Century Indemnity Company (collectively "Ace") provided insurance to SPX between 1967 and 1979. Defendant-appellant The Travelers Indemnity Company ("Travelers") is a Connecticut-based insurance company which issued seven one-year liability policies to GSX between April 1979 and April 1986.

Since 2003, Ace, Wausau, Travelers, Liberty and General Railway's other insurers have worked together under an informal claims handling agreement to pay 100% of the cost of defending and indemnifying each of General Railway's claims. SPX has been aware of this informal agreement and has tendered all asbestos bodily injury claims to lead carrier Ace in the expectation that ACE and the other carriers would implement the informal agreement.

However, on 13 June 2006, SPX commenced this declaratory judgment and breach of contract action, contending that it had the right to tender all of the claims to a single insurer and to demand that the chosen insurer pay 100% of the defense and indemnity costs. On 21 November 2006, the case was designated exceptional. On 21 May 2007, Century and ACE moved for summary judgment on the duty to defend and indemnify asbestos bodily injury claims against SPX. On 16 July 2007, SPX filed a cross-motion for summary judgment on ACE's duty to defend. On 14 August 2007, Wausau filed a joinder in ACE's motion for summary judgment. Following a hearing on 24 August 2007, the trial court entered an order on 6 March 2008 granting SPX's cross-motion for summary judgment and denying ACE's motion.

On 17 January 2008, Wausau moved for summary judgment on its duty to defend asbestos bodily injury claims brought against its insured, General Railway, a predecessor to SPX. On 5 March 2008, SPX filed a cross-motion for summary judgment against Wausau. Following a hearing on 7 May 2008, the trial court entered an order on 2 October 2008 granting SPX's cross-motion for summary judgment and denying Wausau's motion. On 15 August 2008, Liberty moved for partial summary judgment to establish that SPX was required to pay a specified deductible for each claim on each triggered Liberty policy; on 20 November 2008, the trial court granted that motion.

On 15 December 2008, Liberty and SPX participated in a mediation with Judge Spainhour serving as mediator. In preparation for the

mediation, counsel for Liberty and SPX executed a statement of various stipulations. The parties agreed, *inter alia*, that settlement conference memoranda were to be submitted confidentially and all offers and promises were inadmissible in any legal proceedings. After three days of mediation, SPX and Liberty believed they had reached a settlement agreement. Liberty's counsel understood the agreement to be conditional on the approval by Liberty's management of an annual cap on deductibles; SPX and its counsel apparently did not understand this contingency. The agreement was not reduced to writing, signed by the parties, or announced in open court. On 22 January 2009, Liberty informed SPX that its management would not approve the annual cap and, as a result, there was no agreement. At a 5 February 2009 status conference, SPX reported that Liberty had backed out of the settlement; Judge Spainhour stated that he believed representatives of Liberty had asserted they had authority to bind the company and approve the settlement. The trial court then entered a show cause order on that date, requiring Liberty to show cause why the settlement agreement should not be enforced and why the trial court should not order sanctions or other relief. Liberty sought reconsideration or vacation of the show cause order. The trial court denied these motions.

Following a 19 February 2009 hearing on the show cause order, on 13 March 2009, the trial court stated that it would order the settlement agreement be enforced and sanctioned Liberty by dismissing any defenses related to policy deductibles. On 5 March 2009, Liberty moved for reconsideration, arguing that the agreement was not enforceable because it was not reduced to writing or signed by all parties. At the close of a hearing on that motion, in which Judge Spainhour's role as a mediator in the attempted settlement process was debated, Liberty moved to disqualify Judge Spainhour for lack of impartiality based on his knowledge of confidential information at issue in the case which had been disclosed during the mediation. On 13 March 2009, the trial court entered a written order denying Liberty's motions for reconsideration and disqualification, enforcing the settlement agreement between SPX and Liberty, and sanctioning Liberty by dismissing any defenses related to policy deductibles and prohibiting Liberty from submitting any proof regarding deductibles in the matter as a result of Liberty's "improper negotiating conduct."

In March 2009, Travelers moved for partial summary judgment on the issue of proper allocation of defense costs for SPX's asbestos bodily injury claims. Travelers argued that Connecticut law applies to

the interpretation of its policies and that, under Connecticut law, Travelers is only required to pay a *pro rata* share of defense costs resulting from the asbestos bodily injury claims. In April of that year, SPX filed a cross-motion for summary judgment. By order of 26 May 2009, the trial court denied Travelers' motion for partial summary judgment and granted SPX's cross-motion for partial summary judgment.

On 20 October 2009, ACE filed a motion for summary judgment on Wausau's claim for contribution against other insurers of General Railway Signal Company, contending the method of allocation between insurers could be decided as a matter of law. Following a hearing on 18 November 2009, the trial court entered an order 6 January 2010 granting ACE's motion for summary judgment.

Also on 6 January 2010, the trial court entered a final judgment in the case. Defendant Wausau appeals from the 2 October 2008 and 6 January 2010 orders. Travelers appeals from the 26 May 2009 order. Liberty appeals from the 13 March 2009 order. SPX conditionally cross-appeals from the 20 November 2008 order granting partial summary judgment.

On appeal, Wausau argues the trial court erred by ruling that under New York law, an insurer (I) has a duty to pay 100% of defense costs associated with every underlying asbestos claim in which the complaint alleges bodily injury or disease that potentially occurred during the period when the insured provided coverage; and (II) is not entitled to a trial to determine the appropriate method for allocating defense and indemnity obligations using equitable principles. Travelers argues that the trial court erred in (III) holding that New York law, rather than Connecticut law, governs the application of its policies; and (IV) applying New York law to require that Travelers pay all of SPX's defense costs. Liberty brings forward five issues: the trial court erred in (V) enforcing an oral settlement reached; (VI) considering statements made at mediation to find that an oral settlement agreement was reached despite the stipulation that all evidence produced at the mediation would be inadmissible; (VII) using its own personal knowledge from *ex parte* communications to resolve a disputed factual issue; (VIII) refusing to recuse itself from resolving disputed factual issues about which the trial judge had personal knowledge; and (IX) imposing sanctions against Liberty. By a conditional cross-appeal, SPX argues that the trial court erred in (X) holding that Liberty Mutual was entitled to a full and separate per occurrence deductible for each claim covered by its policies.

Wausau's Appeal

I

[1] Wausau first argues that the trial court erred by ruling that under New York law,[1] an insurer has a duty to pay 100% of defense costs associated with every underlying asbestos claim in which the complaint alleges bodily injury or disease that potentially occurred during the period when the insurer provided coverage. We disagree.

We first address the proper standard of review on this issue. This Court reviews 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). Issues of contract interpretation and an insurer's contractual duty to its insured are also reviewed de novo on appeal. *Kessler v. Shimp*, 181 N.C. App. 753, 756, 640 S.E.2d 822, 824 (2007). However, allocation issues regarding indemnity and defense costs are made by courts using equitable principles. *Maryland Cas. Co. v. W.R. Grace and Co.*, 218 F.3d 204, 210 (2nd Cir. 2000) (applying New York law). On appeal, a trial court's decision to grant equitable relief is reviewed for abuse of discretion. *Roberts v. Madison County Realtors Ass'n*, 344 N.C. 394, 401, 474 S.E.2d 783, 788 (1996). Thus, we believe an abuse of discretion standard is appropriate here.

In 2007, Ace and SPX filed cross-motions for summary judgment on the issue of whether an insurer is obligated to pay 100% of defense costs associated with an asbestos bodily injury claim. By order entered 6 March 2008, the trial court applied New York law to grant SPX's motion for summary judgment, and deny Ace's motion, holding that the insurers were required to pay 100% of any defense costs, but that, if any insurer was required to pay more than its fair share of defense costs, it could seek contribution from the other insurers. After the trial court ruled on the motions from SPX and Ace, Wausau and SPX filed cross-motions for summary judgment on the issue of Wausau's duty to defend. Wausau contended that there was no justiciable controversy because SPX had never tendered 100% of the defense cost of any claim to Wausau. In an order entered 2 October 2008, the trial court rejected Wausau's argument and granted SPX's motion based on the same reasoning it had applied in the 6 March 2008 order on the cross-motions by Ace and SPX.

1. Neither SPX nor Wausau disputes the trial court's conclusion that the law of New York applies to the underlying dispute.

New York caselaw provides that

> an insurer's duty to defend . . . is exceedingly broad. An insurer must defend whenever the four corners of the complaint suggest —or the insurer has actual knowledge of facts establishing—a reasonable possibility of coverage. The duty is broader than the insurer's obligation to indemnify: [t]hough policy coverage is often denominated as liability insurance, where the insurer has made promises to defend it is clear that [the coverage] is, in fact, litigation insurance as well.

Cont'l Cas. Co. v. Rapid-American Corp., 609 N.E.2d 506, 509 (1993) (internal quotation marks and citations omitted). In *Rapid-American Corp.*, the New York Court of Appeals noted that "the duty to defend is broader than the duty to pay, requiring each insurer to defend if there is an asserted occurrence covered by its policy, and the insured should not be denied initial recourse to a carrier merely because another carrier may also be responsible." *Id.* at 514 (citations omitted). Based on this reasoning, the Court held that "[w]hen more than one policy is triggered by a claim, pro rata sharing of defense costs *may* be ordered, but *we perceive no error or unfairness in declining to order such sharing*, with the understanding that the insurer may later obtain contribution from other applicable policies." *Id.* (emphasis added). Thus, *Rapid-American Corp.* stands for the proposition that trial courts may either order that an individual insurer be required to pay 100% of any defense costs and later seek contribution from other applicable insurers, *or* order pro rata time-on-the-risk allocation of defense costs. *Id.*; *see also Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 774 N.E.2d 687, 694 (2002). In light of New York law, permitting either method of assigning and allocating defense costs, we see no abuse of discretion in the trial court's choice of method here. This argument is overruled.

In its motion for summary judgment, Wausau also contended that there was no justiciable controversy because SPX has never tendered a complete claim for defense costs to Wausau. We conclude that Wausau is judicially estopped from making this argument, having joined in and filed motions on both choice of law and the merits of the case in the trial court, eventually obtaining a 30 June 2008 ruling in its favor on the question of seeking contribution from other insurers for the cost of providing a defense for SPX.

Because

> the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle, the Court enumerated three factors that typically inform the decision whether to apply the doctrine in a particular case. First, a party's subsequent position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding might pose a threat to judicial integrity by leading to inconsistent court determinations or the perception that either the first or the second court was misled. Third, courts consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Whitacre P'ship v. BioSignia, Inc., 358 N.C. 1, 28-29, 591 S.E.2d 870, 888-89 (2004) (internal citations and quotation marks omitted). Here, the first two factors are fulfilled because Wausau sought and received a ruling in the matter on its right to contribution which necessarily requires that there was a matter to resolve. Likewise, it would clearly disadvantage SPX if Wausau were permitted to receive beneficial rulings on the merits of this case, but SPX were not. This argument is overruled.

II

[2] Wausau also argues that the trial court erred in granting summary judgment and thereby denying Wausau a trial to determine the appropriate method for allocating defense obligations. We disagree.

We consider a trial court's ruling on a motion for summary judgment de novo on appeal. *Builders Mut. Ins. Co.*, 361 N.C. at 88, 637 S.E.2d at 530. We note that Wausau cites three cases to show that summary judgment was improper here because the particular allocation scheme to be employed is determined by the facts of the case. However, in each of the cases cited, the method of allocation was determined on motions; none used a trial to resolve the issue. Indeed, Wausau does not cite any case in which New York courts have decided the method of allocation following a trial. In fact, in one of the cases cited by Wausau, the New York Court of Appeals, the highest appellate court of that state, has approved the determination of

allocation scheme on summary judgment. In *Consol. Edison Co. of N.Y.*, the trial court granted summary judgment based on a lack of justiciability, applying a *pro rata* time-on-the-risk allocation. 774 N.E.2d at 689. The New York Court of Appeals approved the allocation by the trial court without a trial, although it noted "that this conclusion does not foreclose *pro rata* allocation among insurers by other methods either in determining justiciability or at the damages stage of a trial." *Id.* at 695. The holding and language of this opinion make clear that a variety of methods may be employed to decide the proper allocation method. The trial court here did not err in following this precedent in deciding allocation on a summary judgment motion. This argument is overruled.

Travelers' Appeal

III

[3] Travelers first argues that the trial court erred in holding that New York law, rather than Connecticut law, governs the application of its policies. We disagree.

We review appeals from rulings on motions for summary judgment de novo. *Builders Mut. Ins. Co.*, 361 N.C. at 88, 637 S.E.2d at 530. SPX and all of the other insurers concede that New York law applies to this case. However, Travelers' contends that Connecticut law applies because General Signal moved its corporate headquarters from New York to Connecticut in 1976, several years before Travelers began providing coverage to General Signal. Travelers further notes that it is headquartered in Connecticut.

"With insurance contracts the principle of *lex loci contractus* mandates that the substantive law of the state where the last act to make a binding contract occurred, *usually delivery of the policy*, controls the interpretation of the contract." *Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428, 526 S.E.2d 463, 466 (2000) (emphasis added). Here, Travelers' policies were all delivered to and accepted by General Signal's designated insurance broker, J&H, which was located in New York City. J&H was employed by General Signal, not by the insurers, and was responsible for all insurance matters on behalf of General Signal, including determining necessary insurance levels and types; researching, soliciting and reviewing quotes; negotiating premiums; and receiving and accepting policies. Because receipt and acceptance of the policies, the last act to make a binding contract, occurred in New York, the law of that state controls the interpretation of the policies. This argument is overruled.

IV

[4] Travelers next argues that the trial court erred in applying New York law to require that Travelers pay 100% of SPX's defense costs. We disagree.

Having held *supra* that New York law applies in this matter, we reject Travelers' argument on this point for the reasons stated in our discussion of Wausau's appeal in issue I. In light of New York law, permitting either method of assigning and allocating defense costs, we see no abuse of discretion in the trial court's choice of method here. This argument is overruled.

Liberty's Appeal

V

[5] Liberty first argues that the trial court erred in enforcing an oral settlement agreement reached by the parties. We disagree.

Liberty contends that our general statutes preclude enforcement of a court-ordered mediated settlement unless it is reduced to writing and signed by the parties. *See* N.C. Gen. Stat. § 7A-38.1(l)(4) (2009) ("No settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties."). It is undisputed that the settlement agreement here was neither reduced to writing nor signed by the parties. Thus, Liberty argues that, if the mediation between SPX and Liberty was governed by § 7A-38.1, the 13 March 2009 order enforcing it was error. On the other hand, SPX asserts that the parties merely engaged in a settlement conference conducted by the trial court within its inherent authority to manage the cases before it. *See, e.g.*, N.C. Gen. Stat. 1A-1, Rule 16(a) ("[T]he judge may in his discretion direct the attorneys for the parties to appear before him for a conference to consider . . . [s]uch other matters as may aid in the disposition of the action."). "Questions regarding statutory interpretation are reviewed *de novo* under an error of law standard." *Price & Price Mech. of N.C., Inc. v. Miken Corp.*, 191 N.C. App. 177, 179, 661 S.E.2d 775, 777 (2008).

Section 7A-38.1 applies only to "a pretrial, court-ordered conference of the parties to a civil action and their representatives conducted by a mediator." N.C.G.S. § 7A-38.1(b)(1). Further, subsection (e) specifies which cases fall under the purview of the statute:

> (e) Cases selected for mediated settlement conferences.—The senior resident superior court judge of any participating district may

> order a mediated settlement conference for any superior court civil action pending in the district. The senior resident superior court judge may by local rule order all cases, not otherwise exempted by the Supreme Court rule, to mediated settlement conference.

N.C.G.S. § 7A-38.1(e). The record here contains no such order entered by the senior superior court judge of the twenty-sixth judicial district. Further, this statute goes on to make clear that the process authorized by its terms is only one possible route by which a trial court and parties may pursue pretrial resolution:

> (i) Promotion of other settlement procedures.—Nothing in this section is intended to preclude the use of other dispute resolution methods within the superior court. Parties to a superior court civil action are encouraged to select other available dispute resolution methods. The senior resident superior court judge, at the request of and with the consent of the parties, may order the parties to attend and participate in any other settlement procedure authorized by rules of the Supreme Court or by the local superior court rules, in lieu of attending a mediated settlement conference. Neutral third parties acting pursuant to this section shall be selected and compensated in accordance with such rules or pursuant to agreement of the parties. Nothing in this section shall prohibit the parties from participating in, or the court from ordering, other dispute resolution procedures, including arbitration to the extent authorized under State or federal law.

N.C.G.S. § 7A-38.1(i). Liberty notes numerous instances in which it, SPX, and the trial court referred to the process engaged in as a "court-ordered mediation," but we note that a slip of the tongue or misnomer cannot overcome statutory requirements and transform a settlement conference into a court-ordered mediation under § 7A-38.1. This argument is overruled.

VI

[6] Liberty next argues that the trial court erred in considering statements made at mediation to find that an oral settlement agreement was reached despite the stipulation that all evidence produced at the mediation would be inadmissible. We disagree.

Liberty contends that, if the settlement discussion conducted between the parties was not governed by N.C.G.S. § 7A-38.1, then it was governed by the stipulations entered into by the parties. Those stipulations included provisions that "the entire settlement confer-

ence [is to] be confidential" and that all "offers" and "promises" would be "inadmissible for any purposes in any legal proceeding." Thus, Liberty asserts that these stipulations should have prevented the trial court from considering the discussions that occurred during the settlement process in determining whether an oral agreement was actually reached. We review alleged errors of law de novo. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999).

Here, the record reveals that Liberty made no such arguments before the trial court, and, in fact, compelled the trial court to consider the very evidence it now objects to. At the hearing on the show cause order, Liberty presented affidavits and called witnesses to testify about what occurred during the settlement conference. We believe this is a clear instance of invited error.

Invited error has been defined as

> "a legal error that is not a cause for complaint because the error occurred through the fault of the party now complaining." The evidentiary scholars have provided similar definitions; e.g., "the party who induces an error can't take advantage of it on appeal", or more colloquially, "you can't complain about a result you caused."

> 21 Charles Alan Wright and Kenneth W. Graham, Jr., Federal Practice and Procedure § 5039.2, at 841 (2d ed. 2005) (footnotes omitted); *see also Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994) ("A party may not complain of action which he induced." (citations omitted)).

Boykin v. Wilson Med. Ctr., ––– N.C. App. –––, –––, 686 S.E.2d 913, 916 (2009), *disc. review denied*, 363 N.C. 853, S.E.2d (2010). Liberty, having presented the trial court with evidence about what was said and done at the settlement conference, may not now be heard to complain that the trial court considered that very evidence. This argument is overruled.

VII

[7] Liberty also argues that the trial court erred in using its own personal knowledge from *ex parte* communications to resolve a disputed factual issue. We disagree.

Liberty complains that the trial court resolved a disputed factual issue, namely whether Liberty informed Judge Spainhour or SPX that the settlement agreement was contingent upon approval by Liberty's management, based upon his own personal knowledge. Liberty

asserts that there is no authority for a trial court to rely on personal knowledge to resolve such issues and that doing so violates Canon 3(C) of the Code of Judicial Conduct (requiring that judges disqualify themselves if they have "personal knowledge of disputed evidentiary facts concerning the proceedings"). Contentions of errors of law by the trial court are reviewed de novo on appeal. *Falk Integrated Tech., Inc.*, 132 N.C. App. at 809, 513 S.E.2d at 574.

The 13 March 2009 order states that it is based on "the parties' briefs, the affidavits of record, the testimony of witnesses, and the arguments of counsel." As is well-established, "[w]here both competent and incompetent evidence is before the trial court, we assume that the trial court, when functioning as the finder of facts, relied solely upon the competent evidence and disregarded the incompetent evidence." *In re Cooke*, 37 N.C. App. 575, 579, 246 S.E.2d 801, 804 (1978); *see also In re Foreclosure of Brown*, 156 N.C. App. 477, 487, 577 S.E.2d 398, 405 (2003). This argument is overruled.

VIII

[8] Liberty also argues the trial court erred in refusing to recuse himself from resolving disputed factual issues about which he had personal knowledge. We disagree.

The denial of a motion for recusal is reviewed for abuse of discretion. *Roper v. Thomas*, 60 N.C. App. 64, 76, 298 S.E.2d 424, 431 (1982). On this issue, Liberty's brief merely states that it relies on its argument in issue VII, *supra*. Having overruled that argument, we likewise do so here. Further, we hold that a party may not argue its substantive point in the trial court with full knowledge of the alleged ground for disqualification, and then, upon losing on the merits, resort to a motion for recusal. *See Ex parte Steele*, 220 N.C. 685, 689, 18 S.E.2d 132, 135 (1942) (stating that "a failure to raise objection at the trial, when the party complaining had full knowledge of the existence of the disqualification, constitutes a waiver and estops him from thereafter urging the point as a defect in the proceeding.").

IX

[9] Finally, Liberty argues the trial court erred in imposing sanctions against Liberty. We disagree.

The trial court cited *Lomax v. Shaw*, 101 N.C. App. 560, 563, 400 S.E.2d 97, 98 (1991), in imposing sanctions on Liberty for inappropriate negotiating conduct. In that case, we considered an appeal where the

trial court struck a portion of the defendant's answer as a sanction for its refusal to execute a consent order. We held that the

> Superior Court judge was well within the bounds of the court's inherent authority to manage the case docket when he struck the defendants' answer. . . . In order to maintain an efficient and orderly system for calendaring and hearing cases in an increasingly congested justice system, the court must have inherent authority to impose sanctions for willful failure to comply with the applicable rules, no less local than statewide.

Id.

Here, the trial court noted that the stipulations executed prior to the settlement conference required the physical attendance of party representatives having the authority to settle the dispute or who could "promptly communicate during the conference with person having the decision-making authority to settle the action." Liberty violated this requirement because it did not ensure that those of its representatives present at the settlement conference were able to authorize a final settlement. Liberty agreed to the stipulations and yet now argues on appeal that its representatives were only able to make a contingent settlement offer. This willful violation of the very terms Liberty stipulated to has resulted in the exact harm warned of in *Lomax*; namely, frustration of the orderly and efficient resolution of the dispute between these parties and the resulting additional hearings, orders, and other proceedings. We see no error in the trial court's imposition of sanctions. This argument is overruled.

X

[10] In a conditional cross-appeal, SPX argues that the trial court erred in holding that Liberty Mutual was entitled to a full and separate per occurrence deductible for each claim covered by its policies. SPX contends that, in the event we were to vacate or reverse the trial court's 13 March 2009 order sanctioning Liberty by striking its deductibility defense, we should review the trial court's 20 November 2008 order granting partial summary judgment to Liberty regarding the deductibles. However, because we have affirmed the trial court's 13 March 2009 order (*see* issue IX, *supra*), we need not consider SPX's cross-appeal.

Affirmed.

Judges McGEE and BEASLEY concur.

BRENDA QUESINBERRY, PLAINTIFF v. GARY WAYNE QUESINBERRY, DEFENDANT

No. COA10-639

(Filed 5 April 2011)

1. Appeal and Error— timeliness of appeal—Rule 59 motion—pending issues

Defendant timely appealed an equitable distribution judgment where the original period was tolled by a Rule 59 motion, there were other claims pending after the Rule 59 motion was denied, and the notice of appeal was within thirty days from the court's order dismissing those claims.

2. Divorce— equitable distribution—subject matter jurisdiction

The trial court had subject matter jurisdiction to distribute items of property which defendant contended belonged to a business that was not joined to the action where defendant had stipulated that those assets were marital property.

3. Divorce— equitable distribution—marital property—date of valuation

There was no error in an equitable distribution action where the trial court did not expressly state in its judgment that marital property valuations were based on the date of separation, but the trial court's pretrial order reflected the parties' stipulation as to the separation and valuation date and the court referred to the pre-trial order in its equitable distribution judgment.

4. Divorce— equitable distribution—marital property—depreciation—credibility of defendant

The trial court did not abuse its discretion in an equitable distribution action by valuing an account at the amount stipulated by both parties as the date of separation amount despite defendant's unsupported testimony that the value had decreased. The credibility of evidence in an equitable distribution trial was for the trial court to determine.

5. Appeal and Error— preservation of issues—failure to argue

An issue regarding the valuation and distribution of certain property in an equitable distribution action was not preserved for appellate review where defendant did not argue that the court improperly accepted his oral stipulation as to the value of the trucks, did not direct the appellate court to any later objection to

his stipulation, and did not argue that the finding was not supported by competent evidence.

6. Divorce— equitable distribution—value of business

The trial court did not abuse its discretion in an equitable distribution action in its conclusion that defendant's unsupported assertions about the value of abusiness were not credible or relevant to the value of the business on the separation date.

7. Divorce— alimony—pleading

The trial court erred by dismissing defendant's claim for alimony where his pleading, read in its entirety, provided a sufficient basis to give plaintiff fair notice of the ground for the alimony claim.

Appeal by defendant from order entered 19 March 2008 by Judge Charles M. Neaves, Jr., and from orders entered 9 April 2009, 23 November 2009, 14 December 2009, and 15 February 2010, and judgments entered 18 June 2009 and 19 February 2010 by Judge Angela B. Puckett in Surry County District Court. Heard in the Court of Appeals 1 December 2010.

Randolph and Fischer, by J. Clark Fischer, for plaintiff-appellee.

Kenneth T. Davies, for defendant-appellant.

MARTIN, Chief Judge.

Plaintiff Brenda Quesinberry ("wife") and defendant Gary Wayne Quesinberry ("husband") were married on 7 May 1971 and separated on 9 February 2008. Two children were born of the marriage; both of whom had reached their majority prior to the date of separation.

Wife filed a Complaint for Equitable Distribution on 29 February 2008 in Surry County District Court seeking a greater than one-half share of the marital estate. Husband answered and counterclaimed seeking post-separation support and alimony, an unequal distribution of the marital estate in his favor, divorce from bed and board, and costs and attorney's fees. Wife moved to dismiss husband's claims for post-separation support and alimony pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). On 12 March 2009, husband voluntarily dismissed his claims for post-separation support and alimony and filed a separate motion for the same later that day. Wife moved to dismiss husband's motion pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1), (b)(4), (b)(5), and (b)(6).

The parties entered into a pre-trial agreement, which was adopted and entered by the court as its Pre-Trial Order on 13 January 2009, in which the parties "disclosed the existence of all property, both separate and marital," and stipulated as to which items were part of the marital estate and to the value of the property as of 9 February 2008, the date of separation. After a five-day hearing attended by both parties, on 18 June 2009, the trial court entered its Judgment of Equitable Distribution/Order ("equitable distribution judgment"). The court determined that an unequal division of the $4,031,099.61 marital estate was equitable, and awarded 45% or assets valued at $1,813,994.85 to wife, and 55% or assets valued at $2,217,104.75 to husband. One of the assets awarded to wife was "all [husband's] right, title and interest in Quesinberry's Garage and Wrecker Service, Inc."

On 29 June 2009, husband filed a motion pursuant to N.C.G.S. § 1A-1, Rule 59 asking the court to vacate its equitable distribution judgment and requesting a new trial in the matter. On 14 December 2009, the court denied husband's Rule 59 motion. On 15 February 2010, the court entered an order granting wife's motion to dismiss husband's claims for spousal support pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). On 10 March 2010, husband gave notice of appeal from seven of the trial court's orders and judgments, including the 18 June 2009 equitable distribution judgment and the 15 February 2010 order dismissing with prejudice husband's claims for spousal support.

I.

[1] Wife first contends husband failed to timely appeal from the court's 18 June 2009 equitable distribution judgment. Wife agrees that husband filed a timely motion pursuant to N.C.G.S. § 1A-1, Rule 59 after the court's judgment was entered, and concedes that such a motion tolls the period for taking appeal pursuant to Appellate Rule 3(c). *See* N.C.R. App. P. 3(c)(3) ("[I]f a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subdivisions (1) and (2) of this subsection (c)."). Wife argues that the tolling period ended thirty days after husband's Rule 59 motion was denied by the trial court on 14 December 2009, and so asserts that husband's 10 March 2010 notice

of appeal was not timely filed. However, at the time the court entered its order denying husband's Rule 59 motion, husband still had claims pending for post-separation support, alimony, and attorney's fees, which were not disposed of until the court entered its 15 February 2010 order. Thus, any appeal taken from the court's equitable distribution judgment before 15 February 2010 would have been interlocutory, since husband's claims for post-separation support, alimony, and attorney's fees were still pending at that time. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 ("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."), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950); *see*, *e.g.*, *McIntyre v. McIntyre*, 175 N.C. App. 558, 561-64, 623 S.E.2d 828, 831-32 (2006) (dismissing appeal from equitable distribution order as interlocutory while alimony claim remained pending); *Embler v. Embler*, 143 N.C. App. 162, 165-67, 545 S.E.2d 259, 262-63 (2001) (dismissing appeal from equitable distribution order as interlocutory while alimony claim remained pending). Since husband filed his notice of appeal on 10 March 2010, within the thirty-day period for taking appeal from the court's 15 February 2010 order dismissing his claims for alimony, post-separation support, and attorney's fees, we conclude that husband's appeal from the trial court's 18 June 2009 equitable distribution judgment is properly before us.

II.

[2] Husband first contends the trial court lacked subject matter jurisdiction to enter its equitable distribution judgment because it failed to join Quesinberry's Garage, Wrecker Service & Truck Sales, Inc. ("Quesinberry's Garage") to the action *ex mero motu*. Specifically, husband asserts for the first time on appeal that several items of property distributed to the parties in the court's equitable distribution judgment belonged to Quesinberry's Garage and, thus, could not have been distributed to the parties without the presence of the corporation in the action. Nevertheless, on 13 January 2009, the trial court entered its Pre-Trial Order, signed by both parties and their respective counsel, in which the parties stipulated that all of the assets included on the lengthy itemized list of property attached to the order were marital assets, with the exception of an alarm system and a 1955 Chevrolet, the disposition of which are not at issue on appeal. This list of stipulated marital assets included the eleven items that husband now contends are assets belonging to Quesinberry's Garage.

"A stipulation is a judicial admission." *Rickert v. Rickert*, 282 N.C. 373, 379, 193 S.E.2d 79, 83 (1972). " 'Such agreements and admissions are of frequent occurrence and of great value, as they dispense with proof and save time in the trial of causes. The courts recognize and enforce them as substitutes for legal proof, and there is no good reason why they should not.' " *Id.* at 380, 193 S.E.2d at 83 (quoting *Lumber Co. v. Lumber Co.*, 137 N.C. 431, 438, 49 S.E. 946, 949 (1905)); *see also Despathy v. Despathy*, 149 N.C. App. 660, 662, 562 S.E.2d 289, 291 (2002) ("An admission in a pleading or a stipulation admitting a material fact becomes a judicial admission in a case and eliminates the necessity of submitting an issue in regard thereto to the jury." (internal quotation marks omitted)). North Carolina courts encourage and "look with favor on stipulations, because they tend to simplify, shorten, or settle litigation as well as saving cost to the parties." *Rickert*, 282 N.C. at 379-80, 193 S.E.2d at 83.

In order to "insure that each party's rights are protected and to prevent fraud and overreaching on the part of either spouse," "[a]ny agreement entered into by parties regarding the distribution of their marital property should be reduced to writing, duly executed and acknowledged." *McIntosh v. McIntosh*, 74 N.C. App. 554, 556, 328 S.E.2d 600, 602 (1985). Additionally, oral stipulations that are not reduced to writing will be similarly sufficient to convey the parties' agreement regarding the distribution of their marital assets when it "affirmatively appear[s] in the record that the trial court made contemporaneous inquiries of the parties at the time the stipulations were entered into." *Id.* In such cases, "[i]t should appear that the court read the terms of the stipulations to the parties; that the parties understood the legal effects of their agreement and the terms of the agreement, and agreed to abide by those terms of their own free will." *Id.*

Husband does not argue that he did not understand the legal effect of his agreement or that the court improperly accepted the parties' written stipulations when the court entered its Pre-Trial Order. Nor does husband direct us to any place in the record where he later objected to his stipulation that these eleven assets are marital property, or where he asserted that legal title to these assets is held by Quesinberry's Garage. *See* N.C.R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). Therefore, since husband stipulated that these assets are marital property, we

conclude that husband's contention that the court lacked subject matter jurisdiction to distribute these marital assets without first joining Quesinberry's Garage to the action is without merit and we overrule this issue on appeal.

III.

[3] Husband next contends the trial court erred by "failing to find date of separation values for numerous marital properties" in its equitable distribution judgment. Husband specifically asserts the court failed to find "date of separation values" for eighteen marital assets. However, as reflected in the court's 13 January 2009 Pre-Trial Order, signed by both parties and parties' counsel, the parties stipulated that the date of valuation for all marital property subject to equitable distribution was 9 February 2008, which was also stipulated as the date of the parties' separation. Although the court referred to its Pre-Trial Order in its equitable distribution judgment, the trial court did not expressly reiterate in its judgment that all of the property valuations were based on the parties' date of separation of 9 February 2008. Although specifying the exact date of valuation in its equitable distribution judgment "might have been preferable," husband has not demonstrated that the trial court used an incorrect date in valuation. *See Patton v. Patton*, 78 N.C. App. 247, 256, 337 S.E.2d 607, 613 (1985) (citing *Gregory v. Lynch*, 271 N.C. 198, 203, 155 S.E.2d 488, 492 (1967) (stating that the burden of showing error falls to the party asserting the same)), *disc. review denied*, 316 N.C. 195, 341 S.E.2d 585, *rev'd in part on other grounds*, 318 N.C. 404, 348 S.E.2d 593 (1986), *appeal after remand*, 88 N.C. App. 715, 364 S.E.2d 700 (1988). In fact, the court's valuation for most of the items husband now challenges was taken either from one or both of the parties' own pre-trial stipulations regarding the value of the property, or from the parties' unchallenged oral stipulations as to the value of the property at trial. Thus, we conclude this argument is also without merit.

IV.

[4] In its equitable distribution judgment, the court found the following:

> 33. The Hartford AccountItem #41 on the attached spreadsheet, the testimony of [husband] was that the cashed this account out and that the date of separation value was $59,387.12. He used those funds in purchasing his new home, therefore the Court assigns the value of $59,387.12 to [husband].

Husband challenges the finding, contending the trial court erred by failing to find, as he had testified, that the value of this account had depreciated since the date of separation. We disagree.

"The credibility of the evidence in an equitable distribution trial is for the trial court." *Grasty v. Grasty*, 125 N.C. App. 736, 739, 482 S.E.2d 752, 754, *disc. review denied*, 346 N.C. 278, 487 S.E.2d 545 (1997). "The trial court, as the finder of fact in an equitable distribution case, has the right to believe all that a witness testified to, or to believe nothing that a witness testified to, or to believe part of the testimony and to disbelieve part of it." *Id.* (citation and internal quotation marks omitted).

In the present case, both parties agreed by stipulation in the Pre-Trial Order that the value of this account at the date of separation was $59,387.12. At the hearing, however, husband testified that the account "depreciated. It's went down [sic] in value. It's lost." Husband claimed that the account lost about $6,000 of its value within two months of the date of separation. Other than his testimony, husband did not present any evidence to support his contention. Since it was within the court's province to determine the credibility of husband's unsupported claims of diminution of the value of this account, we conclude that the trial court did not abuse its discretion by valuing the account at the amount stipulated by both parties in the Pre-Trial Order.

V.

[5] Husband next purports to challenge the trial court's Finding of Fact 66 in its equitable distribution judgment, in which the court found the following:

> 66. [T]he Court will move to Item #73 of the attached spreadsheet[, designated as "Trucks for Sell,"] which are trucks located on the property of Quesinberry Garage and Wrecker Service, Inc., there are a number of used trucks which are on the property for sale. The parties having agreed that [husband] could have those trucks for $10,000.00 and the Court hereby assigns it to [husband].

Husband does not argue the court improperly accepted his oral stipulation at trial as to the value of the trucks on the property, nor does husband direct us to any place in the record where he later objected to his stipulation. Husband also does not present argument to suggest that this finding is not supported by competent evidence. Instead, husband asserts that this finding of fact fails to account for wife's tes-

timony that two Peterbuilt trucks were sold post-separation, one for $9,000 and one for $27,000, and asserts that the court's finding does not account for wife's disposition of this property, which wife "put . . . into a business account for [Quesinberry's Garage.]" However, since this contention was not properly preserved for appellate review, we overrule this issue on appeal.

VI.

[6] Husband next challenges the trial court's valuation of Quesinberry's Garage in its equitable distribution judgment.

"In an equitable distribution proceeding, the trial court is to determine the net fair market value of the property based on the evidence offered by the parties." *Walter v. Walter*, 149 N.C. App. 723, 733, 561 S.E.2d 571, 577 (2002). "In valuing a marital interest in a business, the task of the trial court is to arrive at a date of separation value which reasonably approximates the net value of the business interest." *Offerman v. Offerman*, 137 N.C. App. 289, 292, 527 S.E.2d 684, 686 (2000) (internal quotation marks omitted). "[I]t is imperative that the trial court 'make specific findings regarding the value of a [business] and the existence and value of its goodwill, and should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied.' " *Locklear v. Locklear*, 92 N.C. App. 299, 301, 374 S.E.2d 406, 407 (1988) (quoting *Poore v. Poore*, 75 N.C. App. 414, 422, 331 S.E.2d 266, 272, *disc. review denied*, 314 N.C. 543, 335 S.E.2d 316 (1985)), *disc. review allowed*, 324 N.C. 336, 378 S.E.2d 794 (1989); *see also Offerman*, 137 N.C. App. at 293, 527 S.E.2d at 686 ("[T]he requirements and standard of review set forth [in *Poore*] apply to valuation of other business entities as well . . . ." (alterations in original) (internal quotation marks omitted)). "The purpose for the requirement of specific findings of fact that support the court's conclusion of law is to permit the appellate court on review to determine from the record whether the judgment—and the legal conclusions that underlie it—represent a correct application of the law." *Patton*, 318 N.C. at 406, 348 S.E.2d at 595 (internal quotation marks omitted). "On appeal, if it appears that the trial court reasonably approximated the net value of the [business] and its goodwill, if any, based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed." *Poore*, 75 N.C. App. at 422, 331 S.E.2d at 272. However, the trial court's "obligation to make specific findings regarding the value of any property classified as marital, including

any business owned by one of the parties to a marriage . . . *exists only when there is credible evidence supporting the value of the asset.*" *Grasty*, 125 N.C. App. at 738-39, 482 S.E.2d at 754 (emphasis added) (internal quotation marks omitted).

In the present case, the parties stipulated that Quesinberry's Garage is a marital asset. Based on the court's Pre-Trial Order, wife valued Quesinberry's Garage at $0.00, while husband indicated that the value of this asset was "TBD." In its equitable distribution judgment, the trial court made the following findings with respect to the valuation of Quesinberry's Garage:

54. [Husband] has contended that Quesinberry's Garage and Wrecker Service, Inc., has goodwill value and has tendered into evidence the corporate tax returns of Quesinberry's Garage and Wrecker Service, Inc., for 2005, 2006, and 2007. That the Court finds that the tax returns show that business suffered a significant loss for 2005 and 2006, in excess of $50,000.00 and a loss in 2007 of $6,000.00 since the date of separation [wife] has, with the parties' son operated the business. The Court assigns the corporate entity known as Quesinberry's Garage and Wrecker Service, Inc., to [wife].

55. The Court has been offered no evidence whatsoever where it can find that the goodwill of the business has any value whatsoever, other than simple name recognition.

In his brief, husband concedes that there were no remaining tangible assets of value associated with Quesinberry's Garage, and testified at the hearing that he did not have the business appraised to establish the value, if any, of the goodwill of the business. *See Poore*, 75 N.C. App. at 421, 331 S.E.2d at 271 ("The determination of the existence and value of goodwill is a question of fact and not of law, and should be made with the aid of expert testimony." (citation omitted)). However, husband asserts the trial court erred because its valuation "ignored" husband's testimony that the gross receipts from sometime at or after 1986 until sometime during or before 2001 were "close to a million dollars every year," and that the profits during those years averaged thirty-five percent. Nevertheless, since "[t]he trial court, as the finder of fact in an equitable distribution case, has the right to believe all that a witness testified to, or to believe nothing that a witness testified to, or to believe part of the testimony and to disbelieve part of it," *see Grasty*, 125 N.C. App. at 739, 482 S.E.2d at 754 (citation and internal quotation marks omitted), we find no error in the trial

court's determination that husband's unsupported assertions were not credible or relevant to its valuation of Quesinberry's Garage as of 9 February 2008. Husband provides no other legal support for his challenge to the trial court's valuation and distribution of Quesinberry's Garage; accordingly, we overrule husband's remaining assertions as to this issue.

VII.

[7] Finally, husband contends the trial court erred by dismissing with prejudice his claim for alimony pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). In this respect, we must agree.

Our review of a trial court's ruling with respect to a motion to dismiss made pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) is *de novo*. *See 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). "A motion to dismiss made pursuant to G.S. 1A-1, Rule 12(b)(6) tests the legal sufficiency of the complaint." *Harris v. NCNB Nat'l Bank of N.C.*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citing *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970)). "In order to withstand such a motion, the complaint must provide sufficient notice of the events and circumstances from which the claim arises, and must state allegations sufficient to satisfy the substantive elements of at least some recognized claim." *Id.* "The question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Id.* "The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Block v. Cty. of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000). "Such a lack of merit may consist of the disclosure of facts which will necessarily defeat the claim as well as where there is an absence of law or fact necessary to support a claim." *Harris*, 85 N.C. App. at 671, 355 S.E.2d at 840-41.

N.C.G.S. § 50-16.3A(a) provides, in part, that "[t]he court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors . . . ." N.C. Gen. Stat. § 50-16.3A(a) (2009). "To be a dependent spouse, one must be either actually substantially dependent upon the other spouse or substantially in need of maintenance

and support from the other spouse." *Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000) (internal quotation marks omitted). "A spouse is 'actually substantially dependent' if he or she is currently unable to meet his or her own maintenance and support." *Id.* (citing *Williams v. Williams*, 299 N.C. 174, 181-82, 261 S.E.2d 849, 854-55 (1980)); *see also Williams*, 299 N.C. at 180, 261 S.E.2d at 854 ("Th[e] term ['actually substantially dependent'] . . . implies that the spouse seeking alimony must have actual dependence on the other in order to maintain the standard of living in the manner to which that spouse became accustomed during the last several years prior to separation. . . . Thus, to qualify as a 'dependent spouse' . . . [who is 'actually substantially dependent,'] one must be actually without means of providing for his or her accustomed standard of living." (emphasis omitted)). "A spouse is 'substantially in need of maintenance' if he or she will be unable to meet his or her needs in the future, even if he or she is currently meeting those needs." *Barrett*, 140 N.C. App. at 371, 536 S.E.2d at 644-45 (citing *Williams*, 299 N.C. at 180-81, 261 S.E.2d at 855); *see also Williams*, 299 N.C. at 181-82, 261 S.E.2d at 855 (concluding that a person seeking to qualify as a "dependent spouse" who is "substantially in need" "requires only that the spouse seeking alimony establish that he or she would be unable to maintain his or her accustomed standard of living (established prior to separation) without financial contribution from the other"). "To be a supporting spouse, one must be the spouse upon whom the other spouse is either actually substantially dependent or substantially in need of maintenance and support. A surplus of income over expenses is sufficient in and of itself to warrant a supporting spouse classification." *Barrett*, 140 N.C. App. at 373, 536 S.E.2d at 645 (citation and internal quotation marks omitted).

While N.C.G.S. § 50-16.3A "provides no guidance for determining the sufficiency of the pleadings to support a claim for alimony," *Coleman v. Coleman*, 182 N.C. App. 25, 31, 641 S.E.2d 332, 337 (2007), a pleading or motion by which a party makes a claim for alimony "must comply" with N.C.G.S. § 1A-1, Rule 8 and "state the claim with sufficient particularity to give the court and the parties notice of what the party seeking alimony intends to prove in order to establish the party's right to relief and make a demand for judgment for that relief." 2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 9.62, at 433 (5th ed. 1999). "For actions filed after October 1, 1995, the law requires the moving party to prove only that the spouse is dependent, that the other spouse is supporting, and that an award of alimony is

equitable under all the relevant factors." *Id.* § 9.62, at 433-34. Accordingly, "[a]pplying Rule 8 to these elements, the pleading or motion should contain facts addressed to dependency, supporting spouse, and some of the economic and other facts that make an award of alimony equitable under the circumstances." *Id.* § 9.62, at 434. "The statement of the claim on dependent and supporting spouses should include facts that indicate that the petitioner has some shortfall between income and expenses that the other spouse is able to address or that the petitioner will experience such a shortfall." *Id.* (footnote omitted). If the petitioner "offers only the amount of the other spouse's income, the statement of the claim is insufficient on the element of dependent and supporting spouses. However, if the statement also includes factual allegations on the petitioner's needs and inability to meet them, then the statement should be sufficient." *Id.* (footnote omitted). "In sum, only in the rare case would a statement of a claim for alimony fail the notice requirements of Rule 8 . . . ." *Id.* § 9.62, at 435.

In his motion, husband included the following allegations:

7. That [husband] is a dependent spouse within the meaning and provisions of North Carolina General Statutes Section 50-16.1A *et seq.*; that [husband] is actually substantially dependent upon [wife] for his maintenance and support; that [husband] is in need of subsistence from [wife] to maintain a home for himself; that [husband] is without funds with which to subsist during the pendency of this action for but not limited to the following;

   a. That [husband] hereby incorporates by way of reference [husband]'s Affidavit of Monthly Needs and Expenses, filed on or about August 25, 2008, in which [husband] asserts that he is the [sic] need of financial support from [wife] specifically but not limited to his assertion that the only form of income that he receives is from Social Security Disability in the amount of $1950 per month. Further, [husband] asserts that his total needs and expenses as of said date is $4908.08 per month.

   b. That [husband] has been receiving Social Security Disability Benefits for some time as a result of work related injuries believed to be sustained during his employment with Quesinberry's Garage, Wrecker Service & Truck Sales, Inc, located at 1620 Holly Spring Rd, Mt. Airy, North Carolina

(hereinafter "Garage") during the course of the parties marriage and prior to the date of separation.

c. That up until the parties date of separation, [husband] was employed at "Garage" in a managerial capacity but did not directly receive significant income.

d. That specifically since the Order of Interim Distribution on March 10, 2008, [husband] has not received any compensation, direct or indirect as a result of the operation of the marital property considered "Garage."

e. That for some time after the date of separation, [husband] was unable to afford his own separate housing in that specifically he resided with the parties Daughter, Emily, her husband, and their three minor children.

f. That to date [husband] is in need of support from [wife] to maintain his accustomed standard of living established during the marriage.

8. That [wife] is a supporting spouse within the meaning and provisions of North Carolina General Statutes Section 50-16.1A *et seq*.; that [wife] is an able-bodied person capable of gainful employment; that [wife] should contribute to the support of [husband]; that [husband] is entitled to a substantial award of post separation support.

   a. That as a result of the aforementioned Interim Order, [wife] was granted the physical possession and operating authority of "Garage" and further granted full operating authority, without interference from [husband].

   b. That based upon information and belief and previous sworn testimony of [wife], [wife] does receive a significant income as a result of her employment and full operating authority of "Garage."

9. That the court base its award on the financial needs of the parties, considering the parties' accustomed standard of living, the present employment income and other recurring earnings of each party from any source, their income-earning abilities, the separate and marital debt service obligations, those expenses reasonably necessary to support each of the parties, and each party's respective legal obligations to support any other persons.

10. That the resources of [husband] are not adequate to meet his reasonable needs and [wife] has the ability to pay.

11. That at all times throughout the marriage, [husband] has been a faithful and dutiful husband to [wife]; that at no time during the marriage did [husband] commit any act of marital misconduct within the meaning and provisions of North Carolina General Statutes Section 50-16.1A; and that the conduct on the part of [wife] has been without adequate provocation on the part of [husband].

Upon reviewing these allegations, the trial court concluded the following: husband "has not put the Court on notice of any specific transactions or occurrences that demonstrate he is a dependent spouse and that [wife] is a dependent [sic] spouse"; husband "only substantially regurgitated the statutory language of the applicable statutes . . . in an attempt to demonstrate his status as a dependent spouse and [wife's] status as a supporting spouse"; and that husband's allegations "are insufficient to put the Court on notice that an award of . . . alimony would be equitable under the circumstances of this action." In support of its order dismissing husband's alimony claim with prejudice, the trial court relied upon *Manning v. Manning*, 20 N.C. App. 149, 201 S.E.2d 46 (1973), and *Coleman v. Coleman*, 182 N.C. App. 25, 641 S.E.2d 332 (2007). We find these cases distinguishable from the present case.

In *Manning*, the plaintiff-wife seeking alimony filed a complaint in which the allegations supporting her claim for alimony tracked almost verbatim the language of two of the ten subsections of the now-repealed N.C.G.S. § 50-16.2, which enumerated the then-ten grounds for an alimony claim. *Manning*, 20 N.C. App. at 154-55, 201 S.E.2d at 50. Upon review, this Court determined that "the complaint merely allege[d] that the defendant[-husband] treated the plaintiff [-wife] cruelly and offered indignities to her person, using the exact language of the alimony statute, but it d[id] not (as required by Rule 8(a)) refer to any 'transactions, occurrences, or series of transactions or occurrences, intended to be proved.' " *Id.* Because the complaint did not "mention any specific act of cruelty or indignity committed by the defendant[-husband]," and "d[id] not even indicate in what way defendant[-husband] was cruel to plaintiff[-wife] or offered her indignities," we speculated, "[f]or all the complaint shows, the alleged cruelty and alleged indignities may consist of nothing more than occasional nagging of the plaintiff[-wife] or pounding on a table." *Id.* at 155, 201

S.E.2d at 50. Thus, we concluded that "[s]uch a complaint does not give defendant[-husband] fair notice of plaintiff[-wife's] claim" and serves only as a "mere[] . . . assertion of a grievance." *Id.* (internal quotation marks omitted). *But cf. Ross v. Ross*, 33 N.C. App. 447, 455-56, 235 S.E.2d 405, 410-11 (1977) (concluding that plaintiff–wife's allegations "were sufficient to comply with the notice requirements of Rule 8" where plaintiff-wife alleged that defendant-husband "assaulted and beat her; that he cursed and used vulgar language toward her; that he threatened her physically; that he appropriated her personal assets; and that he forced her to abandon the home on 22 May 1975 and has since failed to provide for her").

Similarly, in *Coleman*, defendant-wife asserted in her answer to plaintiff-husband's complaint that he "had agreed to pay and had been paying certain household bills and debts of the parties," and asserted a counterclaim stating only that she was " 'request[ing] alimony payments from [p]laintiff[-husband] in the amount of $1500.00 per month.' " *Coleman*, 182 N.C. App. at 30-32, 641 S.E.2d at 337-38 (first alteration in original). Relying on *Manning*, this Court stated that a "bare request for $1,500 in monthly alimony payments provides no notice of any grounds upon which [defendant—wife] may be pursuing and entitled to alimony, such as her status as the dependent spouse." *Id.* at 31, 641 S.E.2d at 338. We determined that the allegations of the answer "were made to refute [plaintiff-husband's] allegation that there were 'no issues pending between the parties,' " and were not "adequate to put [plaintiff-husband] on notice that those allegations constituted 'the transactions, occurrences, or series of transactions or occurrences' intended to be proved by [defendant-wife] in support of her claim for alimony." *Id.* at 31-32, 641 S.E.2d at 338. "Without a sufficient indication in [defendant-wife's] counterclaim that [plaintiff-husband's] payment of certain household bills formed the basis for her contention that she was entitled to alimony, the pleading fail[ed] to make the connection between her bare assertion to a right to alimony" and the allegations in her responsive answer. *Id.* at 32, 641 S.E.2d at 338.

In the present case, husband alleged that he was in need of support from wife to "maintain his accustomed standard of living established during the marriage," but did not specifically allege what that standard of living entailed. Nevertheless, husband addressed the shortfall between his income and expenses, alleging that "for some time" during the course of the parties' marriage and prior to the date of separation, husband received and still currently receives $1,950.00 per month in

Social Security Disability Benefits and that his "total needs and expenses" require $4,908.08. He also alleged that he was employed at Quesinberry's Garage "up until the parties['] date of separation" and did not "directly receive significant income" as a result of his position, and that he similarly has not received any compensation from the operation of the family business since at least one month following the parties' separation. He further alleged that he resided with the parties' daughter "for some time" because he was "unable to afford his own separate housing." Husband also made allegations regarding wife's ability to address husband's income-expense shortfall by alleging that wife, unlike husband, was "an able-bodied person capable of gainful employment," has been in possession and control of the family business since at least one month following the parties' separation, and "does receive a significant income as a result of her employment and full operating authority of [Quesinberry's Garage]." While husband's allegation that wife's income is "significant" does not include any specific reference to the amount of wife's income, and husband failed to include any allegations regarding wife's expenses so as to show that she retains a surplus of income after meeting her expenses, we believe husband's pleading, when read in its entirety, provided a sufficient basis to give wife fair notice of the grounds for husband's claim for alimony. Thus, we reverse the trial court's 15 February 2010 order dismissing husband's claim for alimony with prejudice, and remand for further proceedings on this claim.

The remaining issues on appeal for which husband failed to present argument supported by persuasive or binding legal authority are deemed abandoned. *See* N.C.R. App. P. 28(a).

Affirmed in part; Reversed in part and Remanded.

Judges McGEE and ERVIN concur.

SAINE v. STATE

[210 N.C. App. 594 (2011)]

JASON R. SAINE AND DONALD REID, PLAINTIFFS v. STATE OF NORTH CAROLINA; BEVERLY PERDUE, GOVERNOR OF THE STATE OF NORTH CAROLINA, IN HER OFFICIAL CAPACITY; J. KEITH CRISCO, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF COMMERCE, IN HIS OFFICIAL CAPACITY; AND JOHNSON AND WALES UNIVERSITY, DEFENDANTS

No. COA10-832

(Filed 5 April 2011)

1. Taxation— General Assembly disbursement of funds—directly to private entity—not required to comply with statute

The General Assembly was not required to follow the statutory guidelines pertaining to the allocation of funds from the One North Carolina Fund as set out in N.C.G.S. § 143B-437.70, *et seq.* when it granted funds directly to Johnson and Wales University.

2. Taxation— General Assembly disbursement of funds—private entity—public purpose

The trial court did not err by granting defendants' motion to dismiss plaintiffs' claim that the General Assembly's allocation of funds to Johnson and Wales University did not serve a public purpose and that the Session Laws which provided such funds were unconstitutional. Plaintiffs failed to plead facts demonstrating that the motivation, aim, or intent of the legislation was not a public one.

3. Taxation— General Assembly disbursement of funds—private entity—not exclusive emoluments

The trial court did not err by granting defendants' motion to dismiss plaintiffs' claim that funds provided to Johnson and Wales University via five session laws constituted exclusive emoluments and were unconstitutional. Because the session laws served a public purpose, they were not providing exclusive emoluments and were, therefore, not unconstitutional on that ground.

4. Taxation— General Assembly disbursement of funds—private entity constitutional challenge—taxpayers lacked standing

The trial court properly dismissed count three of plaintiffs' complaint concerning the General Assembly's granting of funds to Johnson and Wales University. Plaintiffs failed to identify any class to which they belonged which could have been prejudiced by the session laws other than their status as taxpayers and, thus, plaintiffs did not have standing to bring their constitutional challenge.

Appeal by plaintiffs from order entered 4 March 2010 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 10 January 2011.

North Carolina Institute for Constitutional Law, by Robert F. Orr and Jeanette Doran, for plaintiffs-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Norma S. Harrell, for defendants-appellees State of North Carolina, Beverly Perdue, and J. Keith Crisco.

Nelson Mullins Riley & Scarborough LLP, by Reed Hollander, for defendant-appellee Johnson and Wales University.

HUNTER, Robert C., Judge.

Jason R. Saine and Donald Reid ("plaintiffs") appeal from the trial court's order granting the State of North Carolina, Beverly Perdue, J. Keith Crisco, and Johnson and Wales University's ("defendants") motion to dismiss the allegations in plaintiffs' complaint. After careful review, we affirm.

Background

In 2003, the General Assembly passed Session Law 2003-284, which was the first of five session laws allocating funds from the State's One North Carolina Fund to Johnson and Wales University, a private, non-profit university located in Charlotte, North Carolina.[1] Session Law 2003-284 granted $1,000,000.00 to Johnson and Wales for the 2003-2004 fiscal year and an additional $1,000,000.00 for the 2004-2005 fiscal year. The General Assembly stated in general terms that the allocation was meant "to provide financial assistance to Johnson and Wales University." The General Assembly further set out a more detailed purpose for the grant as follows:

> The General Assembly finds that institutions of higher education play an essential role in maintaining and strengthening the economic health of the State. As our economy evolves from its traditional manufacturing and agricultural base to a diverse structure, including many technology, information, and service-based businesses, innovative educational institutions are essential to pro-

1. At that time, the One North Carolina Fund was known as the One North Carolina Industrial Recruitment Competitive Fund. Session Law 2004-88, which became effective 30 June 2004, codified the parameters that currently exist for the One North Carolina Fund in N.C. Gen. Stat. § 143B-437.70, *et seq.* (2009).

> viding appropriate workforce preparation and training to maintain the State's viability as an attractive location for new and expanding businesses. Recruiting new educational institutions to the State to fulfill this role also benefits the State and local governments by providing new jobs, a stronger tax base, support for satellite businesses, and investment that will permanently enhance the infrastructure necessary to support long-term growth and prosperity. The General Assembly recognizes that the significant efforts by Johnson and Wales University to establish and expand in North Carolina are vital to a healthy and growing State economy. Providing incentives to support these activities is a critical opportunity for our State to address the possibly irreversible damage from the current economic recession and restructuring.

The General Assembly specified in the session law that the funds were to be used

> only for one or more of the following capital expenditures: (1) Installation or purchase of equipment for educational facilities in this State; (2) Structural repairs, improvements, or renovations of existing academic buildings in this State to be used for expansion; (3) Construction of or improvements to new or existing water, sewer, gas, or electric utility distribution lines or equipment for new or existing academic facilities in this State; [and] (4) Construction of new academic facilities in this State.

The General Assembly subsequently passed four additional session laws granting funds to Johnson and Wales from the One North Carolina Fund: Session Law 2005-276 allocated $1,000,000.00 for the 2005-2006 fiscal year; Session Law 2006-66 allocated $1,000,000.00 for the 2006-2007 fiscal year; Session Law 2007-323 allocated $2,000,000.00 by reference to The Joint Conference Committee Report on the Continuation, Expansion and Capital Budgets ("Committee Report") dated 27 July 2007; and Session Law 2008-107 allocated $1,500,000.00 by reference to the Committee Report dated 3 July 2008. Although the detailed purpose for the allocations as originally set out in Session Law 2003-284 was not repeated in the subsequent session laws, Session Laws 2005-276 and 2006-66 stated that the funds were allocated "[n]otwithstanding the provisions of G.S. 143B-437.71 . . . for the purpose of providing financial assistance to the University."[2] The Committee Reports referenced by Session Laws 2007-323 and 2008-

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2. N.C. Gen. Stat. § 143B-437.71 (2009) sets out, *inter alia*, how funds from the One North Carolina Fund must be utilized by local governments that receive the funds.

107 stated that the funds were to be paid “to Johnson and Wales University in Charlotte, a private university that specializes in the culinary and hospitality industries.” No conditions were placed on the use of the funds allocated by these four session laws.

On 16 September 2009, plaintiffs, who are tax-paying citizens of North Carolina, filed a Complaint and Petition for Declaratory Judgment alleging that the State had committed multiple constitutional violations by providing funds collected from the taxpayers of North Carolina to Johnson and Wales. Count one alleged that the allocation of funds violated Article I, § 32 of the North Carolina Constitution because the “private financial benefit” to Johnson and Wales constituted an exclusive and separate emolument. Count two alleged that the allocation of funds violated Article IV, § 2(1) of the North Carolina Constitution “in that the benefits, grants and/or subsidies provided to Johnson and Wales . . . are not for ‘public purposes only.’ ” Count three alleged that the allocation of funds violated Article I, § 19 of the North Carolina Constitution as plaintiffs’ equal protection rights were violated. Count Four alleged that the grants are ongoing and plaintiffs “are entitled to a declaration” that all future grants to Johnson and Wales are “unconstitutional and thus unlawful.”

On 16 November 2009, defendants filed a motion to dismiss plaintiffs’ claims pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. On 4 March 2010, after a hearing was conducted, the trial court issued a written order in which it granted defendants’ motion to dismiss. The trial court dismissed counts one, two, and four pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. The trial court dismissed count three pursuant to Rule 12(b)(1) for lack of standing. Plaintiffs timely appealed to this Court.

Standard of Review

The standard of review on a motion to dismiss under Rule 12(b)(6) is “whether, if all the plaintiff’s allegations are taken as true, the plaintiff is entitled to recover under some legal theory.” *Toomer v. Garrett*, 155 N.C. App. 462, 468, 574 S.E.2d 76, 83 (2002). “The standard of review on a motion to dismiss under Rule 12(b)(1) is *de novo*.” *Rowlette v. State*, 188 N.C. App. 712, 714, 656 S.E.2d 619, 621, *appeal dismissed and disc. review denied*, 362 N.C. 474, 666 S.E.2d 487 (2008).

Discussion

[1] As a preliminary matter, plaintiffs raise two issues that are not relevant to their constitutional claims. First, plaintiffs allege that certain members of the General Assembly and former Governor Mike Easley personally promised funds to Johnson and Wales. Any such promises do not bear on the constitutionality of the actions of the General Assembly in enacting the five session laws at issue.

Second, without relating the argument to their constitutional claims, plaintiffs repeatedly assert, and the State does not refute, that the General Assembly did not follow the statutory guidelines pertaining to the allocation of funds from the One North Carolina Fund as set out in N.C. Gen. Stat. § 143B-437.70, *et seq*.

N.C. Gen. Stat. § 143B-437.72 (2009) establishes the method by which the State disburses funds from the One North Carolina Fund as follows: "Funds may be disbursed from the One North Carolina Fund only in accordance with agreements entered into between the State and one or more local governments and between the local government and a grantee business." As stated *supra*, N.C. Gen. Stat. § 143B-437.71 sets out the purposes for which the funds must be used by the local government. In addition to listing four specific purposes, N.C. Gen. Stat. § 143B-437.71(b)(5) states that the funds may be used for "[a]ny other purposes specifically provided by an act of the General Assembly."

In the present case, the funds were granted directly to Johnson and Wales from the General Assembly as opposed to passing the funds through the local government with restrictions on how it may be used.[3] We must presume that when the legislature enacted the session laws at issue, it "acted with full knowledge of prior and existing law . . . ." *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 763 (1992). Moreover, although the General Assembly established a method for disbursement of funds, these statutes do not prevent the General Assembly from passing session laws that provide a direct grant of funds from the One North Carolina Fund to a business entity without restrictions so long as that action is constitutional. "The power of the General Assembly to pass all needful laws, except when barred by constitutional restrictions, is plenary[.]" *Town of Shelby v. Cleveland Mill & Power Co.*, 155 N.C. 196, ––, 71 S.E. 218, 219-20 (1911).

3. Session Laws 2005-276 and 2006-66 specifically stated that the grant was made "notwithstanding" N.C. Gen. Stat. § 143B-437.71.

> [I]t is firmly established that our State Constitution is not a grant of power. All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution.

State ex rel. Martin v. Preston, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989) (internal citation omitted). Accordingly, while a local government must abide by the statutes of the General Assembly, the General Assembly is not bound by its previous legislation. Having determined that the General Assembly was not bound by the statutes pertaining to the One North Carolina Fund, we now turn our focus to the substantive constitutional issues in this case.

I. Count Two—The Public Purpose Clause

[2] Plaintiffs allege that the allocation of funds to Johnson and Wales did not serve a public purpose and, therefore, the Session Laws which provided such funds are unconstitutional. The trial court dismissed this claim pursuant to Rule 12(b)(6). We first address whether the funds granted pursuant to Session Law 2003-284, which set out in detail the reason for its enactment, serves a public purpose.

Article V, § 2(1) of the North Carolina Constitution 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." "The power to appropriate money *from* the public treasury is no greater than the power to levy the tax which put the money in the treasury." *Mitchell v. Financing Authority*, 273 N.C. 137, 143, 159 S.E.2d 745, 749-50 (1968).

> In determining whether legislation serves a public purpose, *the presumption favors constitutionality.* Reasonable doubt must be resolved in favor of the validity of the act. The 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.

Maready v. City of Winston-Salem, 342 N.C. 708, 714, 467 S.E.2d 615, 619 (1996) (internal citations omitted) (emphasis added); *see Assurance Co. v. Gold, Comr. of Insurance*, 249 N.C. 461, 462-63, 106 S.E.2d 875, 876 (1959) ("When called upon to pass on the constitutionality of a statute, it is assumed that the Legislature has not trespassed on forbidden

territory delineated by the people by constitutional restrictions. Every presumption favors the validity of a statute.”).[4]

“The initial responsibility for determining what constitutes a public purpose rests with the legislature, and its determinations are entitled to great weight.” *Maready*, 342 N.C. at 714, 467 S.E.2d at 619. Nevertheless,

> [w]hile legislative declarations such as these are accorded great weight, ultimate responsibility for the public purpose determination rests with this Court. If an enactment is for a private purpose and therefore inconsistent with the fundamental law, it cannot be saved by legislative declarations to the contrary. It 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 (internal citation omitted).

Our Supreme Court has addressed what constitutes a public purpose on numerous occasions, but it has not specifically defined “public purpose”; rather, it has expressly declined to “confine public purpose by judicial definition[, leaving] ‘each case to be determined by its own peculiar circumstances as from time to time it arises.’ ” *Stanley, Edwards, Henderson v. Dept. Conservation & Development*, 284 N.C. 15, 33, 199 S.E.2d 641, 653 (1973) (quoting *Keeter v. Town of Lake Lure*, 264 N.C. 252, 264, 141 S.E.2d 634, 643 (1965)), *disapproved in part on other grounds by Madison Cablevision v. City of Morganton*, 325 N.C. 634, 648, 386 S.E.2d 200, 208 (1989).

> A slide-rule definition to determine public purpose for all time cannot be formulated; the concept expands with the population, economy, scientific knowledge, and changing conditions. As people are brought closer together in congested areas, the public welfare requires governmental operation of facilities which were once considered exclusively private enterprises, and necessitates the expenditure of tax funds for purposes which, in an earlier day, were not classified as public. Often public and private interests are so co-mingled that it is difficult to determine which predominates. It is clear, however, that for a use to be public its benefits must be in common and not for particular persons,

4. We recognize at the outset of our analysis that some of the cases cited herein pertain to the issuance of economic incentives to for-profit corporations, as opposed to grants given directly to a non-profit institution. Nevertheless, these cases relate directly to our application of the public purpose doctrine in this case.

> interests, or estates; the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity.

Mitchell, 273 N.C. at 144, 159 S.E.2d at 750 (internal citations omitted).

The term "public purpose" is not to be narrowly construed. *Briggs v. City*, 195 N.C. 223, 226, 141 S.E. 597, 599 (1928).

> Two guiding principles have been established for determining that a particular undertaking by a municipality [or the State] is for a public purpose: (1) it involves a reasonable connection with the convenience and necessity of the particular municipality [or the State]; and (2) the activity benefits the public generally, as opposed to special interests or persons[.] This has been our traditional test, and we continue to adhere to it.

Madison, 325 N.C. at 646, 386 S.E.2d at 207.[5] Whether an activity involves a reasonable connection to community needs may be evaluated "by determining how similar the activity is to others which this Court has held to be within the permissible realm of governmental action." *Maready*, 342 N.C. at 722, 467 S.E.2d at 624.

In the present case, the State set out in Session Law 2003-284 that, *inter alia*, "innovative educational institutions are essential to providing appropriate workforce preparation and training to maintain the State's viability as an attractive location for new and expanding businesses." Clearly, the General Assembly sought to increase educational opportunities for North Carolinians in an effort to diversify the skills of the State's workforce and thereby strengthen the State's economy. Johnson and Wales provides education in culinary arts, hospitality, and related fields. As the session law indicates, our State has moved away from "traditional manufacturing and agricultur[e] base[d]" industries and there is, therefore, a need for "innovative

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5. The *Madison Cablevision* test, as set out in that case, refers to an "undertaking by a municipality" to establish and maintain a cable television system. *Id.* However, the constitutionality of a State statute that permitted the municipality to operate a cable television system was at issue and was deemed to effectuate a public purpose. *Id.* at 652, 386 S.E.2d at 211. The *Madison Cablevision* test has since been applied in other cases to determine whether legislation enacted by the General Assembly is for a public purpose. *Maready*, 342 N.C. at 723-25, 467 S.E.2d at 624-26; *Blinson v. State*, 186 N.C. App. 328, 337, 651 S.E.2d 268, 275 (2007) (relying on *Maready's* application of the *Madison Cablevision* test and holding that the statute at issue was enacted for a public purpose). In other words, the test is not limited to actions of a city or municipality, but is equally applicable to legislation enacted by the General Assembly.

educational institutions" such as Johnson and Wales. Thus, the session law establishes an educational purpose as well as a fiscal purpose since "institutions of higher education play an essential role in maintaining and strengthening the economic health of the State." Session Law 2003-284.

Our Supreme Court has stated that providing State funds to a private educational institution constitutes a public purpose. In *Hughey v. Cloninger*, 297 N.C. 86, 95, 253 S.E.2d 898, 903-04 (1979) (*Hughey I*), the Court held that direct appropriation of funds by Gaston County to a private educational institution which taught dyslexic children was constitutionally permissible, but prohibited by statute in that particular situation. The Court reasoned:

> *[D]irect disbursement* of public funds to private entities is a constitutionally permissible *means* of accomplishing a public purpose provided there is statutory authority to make such appropriation. Had there been such statutory authority in this case the direct appropriation of funds by Gaston County to the Dyslexia School of North Carolina would have presented no "public purpose" difficulties as it is well established that both appropriations and expenditures of public funds for the education of the citizens of North Carolina are for a public purpose.

Id. at 95, 253 S.E.2d at 904.

We point out that *this Court* held that pursuant to Article V, § 2(1) of the North Carolina Constitution, the disbursement of taxpayer funds to a private entity was impermissible since it "constitute[d] a primary benefit to the private entity itself." *Hughey v. Cloninger*, 37 N.C. App. 107, 111-12, 245 S.E.2d 543, 547 (1978) (*Hughey II*). The Supreme Court held that, "[t]he constitutional problem under the public purpose doctrine perceived by the Court of Appeals is no longer present in view of the addition, effective 1 July 1973, of subsection (7) to Article V, Section 2 of the North Carolina Constitution." *Hughey I*, 297 N.C. at 95, 253 S.E.2d at 903. Article V, § 2(7) states: "The 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." The Supreme Court stated that Article V, § 2(7) allows for disbursement of taxpayer funds to private entities. *Hughey I*, 297 N.C. at 95, 253 S.E.2d at 903.

Plaintiffs in the present case cite only Article V, § 2(1) in their complaint; however, in determining whether the funds given to Johnson and Wales were for a public purpose, we must take into account Article V, § 2(7) and the Supreme Court's ruling in *Hughey I*. If the session laws at issue satisfy a public purpose, then they are constitutional under both Article V, §§ 2(1) and 2(7).

Plaintiffs attempt to distinguish *Hughey I*, arguing that the school in *Hughey* was performing a function of the government—to provide education to children—whereas in the present case Johnson and Wales is providing higher education to adults who meet the school's "entrance standards." However, *Hughey I* did not make that distinction. In fact, the Court made clear that the use of public funds to educate the "citizens of North Carolina" is for a public purpose. Arguably, providing dyslexic children an education has a more readily identifiable public purpose; however, that does not mean that supplementing adult education with taxpayer money can never serve a public purpose. To the contrary, education, even if provided by a private entity, may serve a public purpose. *Id.*

Our Supreme Court has further acknowledged the need to promote education generally and held that, "[s]ubject to constitutional limitations, methods to facilitate and achieve the public purpose of providing for the education or training of residents of this State in institutions of higher education or post-secondary schools are for determination by the General Assembly." *Education Assistance Authority v. Bank*, 276 N.C. 576, 587, 174 S.E.2d 551, 559 (1970) (holding that state revenue bonds used to make loans to adult students to further their education served a public purpose). This Court has aptly stated that, "[i]t is declared in both our Constitution and our statutes that the education of our citizens to their maximum capacities is the goal of our educational system, for education of our citizens is essential to good government, morality and a good economy." *Kiddie Korner v. Board of Education*, 55 N.C. App. 134, 145, 285 S.E.2d 110, 117 (1981) (holding that costs to the public school system incurred due to the operation of an after-school program did not violate the Public Purpose Clause).[6]

In addition to the educational benefits to North Carolinians, Session Law 2003-284 sets out a direct connection between education

6. Plaintiffs argue that if taxpayer money can be given to Johnson and Wales then the General Assembly is permitted to grant taxpayer money to any private educational institution it desires without limitation. We decline to engage in hypotheticals concerning what grants would not pass constitutional scrutiny.

and the economic prosperity of the State. In *Maready*, our Supreme Court held that, "[t]he expenditures [the statute at issue] 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." 342 N.C. at 724, 467 S.E.2d at 625. Session Law 2003-284 supports a very similar financial goal by increasing the diversity of our workforce and "permanently enhanc[ing] the infrastructure necessary to support long-term growth and prosperity." Session Law 2003-284. "Stimulation of the economy is an essential public and governmental purpose and the manner in which this purpose is to be accomplished is, within constitutional limits, exclusively a legislative decision . . . ." *Utilities Comm. v. Edmisten, Attorney General*, 294 N.C. 598, 610, 242 S.E.2d 862, 874 (1978).

Based on the foregoing, we hold that, in the present case, Session Law 2003-284 serves a "reasonable connection with the convenience and necessity of the [State,]" thereby satisfying the first prong of the *Madison Cablevision* test. *Madison Cablevision*, 325 N.C. at 646, 386 S.E.2d at 207. Truly, "[t]he people of North Carolina constitute our State's greatest resource." *Education Assistance Authority*, 276 N.C. at 587, 174 S.E.2d at 559. Not only does Session Law 2003-284 enhance educational opportunities for North Carolinians in fields of study that are unique to Johnson and Wales, there is also a correlation between this type of education and the stability of our State's economic infrastructure.

As to the second prong of the *Madison Cablevision* test, we further hold that Session Law 2003-284 benefits the public generally. Plaintiffs argue that the primary benefit is to Johnson and Wales and there is only an ancillary benefit to a few of the State's citizens who enroll in the university. This argument is without merit. "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*, 195 N.C. at 226, 141 S.E. at 599-600. "[A]n 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." *Maready*, 342 N.C. at 724, 467 S.E.2d at 625; *see Peacock v. Shinn*, 139 N.C. App. 487, 495, 533 S.E.2d 842, 848 (stating, "a private party ultimately conducts activities which, while providing incidental private benefit, serve a primary public goal"), *appeal dismissed and disc. review denied*, 353 N.C. 267, 546 S.E.2d 110 (2000). Educating North Carolinians cer-

tainly promotes the welfare of our State, particularly at a time when unemployment is high and many jobs that have historically not required education beyond a high school diploma, or its equivalent, are rapidly disappearing. Additionally, our State economy relies heavily on the tourism industry.[7] Johnson and Wales provides education in the related fields of culinary arts and hospitality. It is only logical to presume that the State benefits from the increased knowledge and specialized skills of those working in this sector of our economy.

Clearly, this Court cannot project the total impact of the grant to Johnson and Wales on the State. That is not our task.

> We look instead to whether the purpose of an act will promote the welfare of a state or a local government and its citizens, and do not engage in economic projections as to the potential monetary benefits resulting from the legislation. The latter analyses are for the General Assembly and the Executive Branch, which can also take into account non-monetary benefits.

Blinson, 186 N.C. App. at 341, 651 S.E.2d at 278 (internal citation and quotation marks omitted).

In sum, we hold that the two-prong test set out in *Madison Cablevision* has been satisfied and that Session Law 2003-284 serves a public purpose—providing funds to a private, non-profit university in order to assist in educating North Carolina citizens "[which] will permanently enhance the infrastructure necessary to support long-term growth and prosperity." As recognized supra, this Court is not bound to accept legislative "declarations" of the purpose behind this session law, *Maready*, 342 N.C. at 716, 467 S.E.2d at 620; however, we are persuaded that Session Law 2003-284 serves the public purpose set out by the General Assembly.

Regarding the other four session laws at issue, plaintiffs argue that, unlike Session Law 2003-284, the subsequent session laws did not state a purpose for their enactment nor did they set out any restrictions on how the funds could be used. Plaintiffs argue that the funds could be used at any Johnson and Wales satellite branch across the country and would, therefore, not assist any North Carolinian.

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7. In its report *What Does Tourism Mean to North Carolina's Economy? The Economic Contribution of Tourism in North Carolina*, the North Carolina Department of Commerce boasts that travel and tourism generate "$20.2 billion a year in total economic demand in North Carolina" and that "this economic activity sustains 362,052 jobs," available at http://www.nccommerce.com/en/Tourism Services/PromoteTravelAndTourism Industry/TourismResearch/ (last visited 23 March 2011).

First, the General Assembly did not recite the detailed public purpose set out in Session Law 2003-284 in the latter four session laws. Plaintiffs have not cited a case, nor have we found one, that requires the General Assembly to set forth a written purpose in this type of legislation.[8] Just as legislation "cannot be saved by legislative declarations[,]" *id.*, the absence of a declaration does not automatically render the legislation unconstitutional. This Court must still examine the intent behind the legislation in order to determine whether it serves a public purpose. *See Blinson*, 186 N.C. App. at 340-41, 651 S.E.2d at 277-78 (setting out the task of the judiciary under the public purpose doctrine). In the instant case, the General Assembly provided its rational for giving funds to Johnson and Wales in Session Law 2003-284, which aids our appellate review and guides us in determining the intent behind the other four session laws. We have reviewed the four session laws at issue and hold that the intent of the legislature was to continue to provide financial assistance to Johnson and Wales and that the session laws serve a public purpose—to promote education and economic stability in the State.

Second, while plaintiffs claim that the money was unrestricted and *could* be used outside of North Carolina, plaintiffs did not make any such assertions in their complaint.[9] We are required to accept as true plaintiffs' allegations in their complaint, *Toomer*, 155 N.C. App. at 468, 574 S.E.2d at 83; however, plaintiffs' bare assertions on appeal that the money could possibly be going outside of North Carolina are insufficient to create a claim for relief. Moreover, the Committee Reports referenced by Session Laws 2007-323 and 2008-107 stated that the funds were to be paid "to Johnson and Wales University *in Charlotte*, a private university that specializes in the culinary and hospitality industries." (Emphasis added.) Clearly, the legislature intended for the funds to be used *in Charlotte*. If the State feels that Johnson and Wales is violating the terms of the session laws, then the State *may* have a claim against Johnson and Wales, but any such violation does not render the session laws themselves unconstitutional.

"In short, to put forth a claim for relief, plaintiffs were required to plead facts demonstrating that the motivation, aim, or intent of the . . . [l]egislation . . . was not a public one." *Blinson*, 186 N.C. App. at 341,

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8. Still, we note that the better practice is to include the purpose in the legislation.

9. As stated *supra*, while the grant itself must be for a public purpose, the General Assembly is not required to place *any* restrictions on the funds it grants directly to an institution.

651 S.E.2d at 278. Plaintiffs in this case have failed to establish a claim upon which relief may be granted under the Public Purpose Clause. Consequently, we hold that the trial court properly granted defendants' motion to dismiss count two of plaintiffs' complaint pursuant to Rule 12(b)(6).

II. Count One—Exclusive Emoluments

[3] In a closely related argument, plaintiffs claim that the funds provided to Johnson and Wales via the five sessions laws constitutes exclusive emoluments and are, therefore, unconstitutional. Article I, § 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." "An emolument is defined as '[t]he profit arising from office, employment, or labor; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites.' " *Crump v. Snead*, 134 N.C. App. 353, 356, 517 S.E.2d 384, 387 (quoting *Black's Law Dictionary* 524 (6th ed. 1990)), *disc. review denied*, 351 N.C. 101, 541 S.E.2d 143 (1999).

"[I]n determining whether a benefit has been afforded in violation of article I, § 32, a court must determine whether the benefit was given in consideration of public services, intended to promote the general public welfare, or whether the benefit was given for a private purpose, benefitting an individual or select group." *Peacock*, 139 N.C. App. at 496, 533 S.E.2d at 848. In *Peacock*, the Court determined that since a public purpose was achieved through the agreement at issue, it could not, therefore, be providing an exclusive emolument. *Id.*; *accord Blinson*, 186 N.C. App. at 342, 651 S.E.2d at 278. Consequently, in the case *sub judice*, since the session laws served a public purpose they were not providing exclusive emoluments and were, therefore, not unconstitutional on that ground. The trial court properly granted defendants' motion to dismiss count one of plaintiffs' complaint pursuant to Rule 12(b)(6).

III. Count Three—Equal Protection

[4] Plaintiffs argue that the session laws at issue violated their rights to equal protection. Article I, § 19 of the North Carolina Constitution provides that "[n]o person shall be . . . deprived of his life, liberty, or property, but by the law of the land" or "denied the equal protection of the laws . . . ." Plaintiffs do not have standing to argue a violation of this constitutional provision. "[A] taxpayer has standing to bring an

action against appropriate government officials for the alleged misuse or misappropriation of public funds." *Goldston v. State*, 361 N.C. 26, 33, 637 S.E.2d 876, 881 (2006). " 'A taxpayer injuriously affected by a statute may generally attack its validity[;] [t]hus, he may attack a statute which . . . imposes on him in its enforcement an additional financial burden, however slight.' " *In re Appeal of Barbour*, 112 N.C. App. 368, 373, 436 S.E.2d 169, 173 (1993) (quoting *Stanley*, 284 N.C. at 29, 199 S.E.2d at 651). On the other hand, "[a] taxpayer, as such, does not have standing to attack the constitutionality of any and all legislation." *Nicholson v. State Education Assistance Authority*, 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969).

"If a person is attacking the statute on the basis that the statute is discriminatory, however, the person 'has no standing for that purpose unless he belongs to the class which is prejudiced by the statute.' " *Barbour*, 112 N.C. App. at 373, 436 S.E.2d at 173 (quoting *In re Appeal of Martin*, 286 N.C. 66, 75, 209 S.E.2d 766, 773 (1974)).

> Thus, the decisions of the Supreme Court and of this Court with respect to "taxpayer standing" differentiate between (1) actions challenging the constitutional validity of a statute on the grounds that it allows public funds to be dispersed for reasons other than a "public purpose," in which a taxpayer generally has standing, and (2) actions challenging the constitutional validity of a statute on the grounds that the statute discriminates among classes of persons, in which a taxpayer must show that he belongs to a class that receives prejudicial treatment.

Munger v. State, ––– N.C. App. –––, –––, 689 S.E.2d 230, 236 (2010), *disc. review improvidently allowed*, ––– N.C. –––, 705 S.E.2d 734 (2011).

In the present case, plaintiffs have failed to identify any class to which they belong which could be prejudiced by the session laws other than their status as taxpayers. Consequently, plaintiffs do not have standing to bring a constitutional challenge under Article 1, § 19 and the trial court properly dismissed count three pursuant to Rule 12(b)(1).

IV. Count Four—Declaratory Judgment

Because plaintiffs' constitutional arguments have failed and their claims were correctly dismissed, they have no grounds to seek a declaratory judgment. The trial court did not err in dismissing count four pursuant to Rule 12(b)(6).

Conclusion

Based on the foregoing discussion, plaintiffs' constitutional challenges to the five session laws which allocated funds to Johnson and Wales are without merit. Consequently, we affirm the trial court's order.

Affirmed.

Chief Judge MARTIN and Judge THIGPEN concur.

STATE OF NORTH CAROLINA v. RONNIE OLIVER

No. COA10-431

(Filed 5 April 2011)

1. Evidence— prior crimes or bad acts—substantially similar—no fundamental error

The trial court did not commit plain error in a first-degree statutory sexual offense, indecent liberties with a child, and crime against nature case by admitting evidence of defendant's prior bad acts. Some of the evidence was substantially similar to the acts of defendant toward the victim in the instant case and supported the purposes for which it was introduced. Admission of the remaining challenged evidence did not amount to fundamental error.

2. Evidence— admission of witness testimony—within the trial court's discretion—supported by the record

The trial court did not commit plain error in a first-degree statutory sexual offense, indecent liberties with a child, and crime against nature case by allowing the State to elicit allegedly misleading and irrelevant testimony from two witnesses. The trial court's decision was within its discretion and properly supported by the record.

3. Evidence— prior crimes or bad acts—pattern jury instruction—substantial conformity with defendant's request

The trial court did not commit plain error in a first-degree statutory sexual offense, indecent liberties with a child, and crime against nature case by failing to specifically instruct the jury that evidence admitted under Rule 404(b) could not be used

to prove defendant's character or that he acted in conformity therewith. The trial court followed the pattern jury instruction format and the jury instruction was in substantial conformity with defendant's request.

4. Jury— contact by member of public with juror—trial court's response—jurors capable of impartially rendering verdict—motion for mistrial properly denied

The trial court did not err in denying defendant's motion for a mistrial in a first-degree statutory sexual offense, indecent liberties with a child, and crime against nature case where there was contact by a member of the public with a juror. Given the trial court's response to the incident, as well as the lack of evidence tending to show the jurors were incapable of impartiality in rendering their verdict, the trial court's denial of defendant's motion was within the trial court's discretion.

5. Satellite-Based Monitoring— first-degree sexual offense—indecent liberties with a minor—not aggravated offenses

The trial court erred in ordering defendant to register as a sex offender and enroll in a satellite-based monitoring program for the rest of his natural life. A conviction for first-degree sexual offense, in violation of N.C.G.S. § 14-27.4(a)(1), and a conviction for taking indecent liberties with a minor, in violation of N.C.G.S. § 14-202.1, are not aggravated offenses as defined by N.C.G.S. § 14-208.6(1a). The matter was remanded for a new satellite-based monitoring hearing.

Appeal by defendant from judgment entered 27 August 2009 by Judge James W. Morgan in Cleveland County Superior Court. Heard in the Court of Appeals 16 November 2010.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III, and Kirby H. Smith, for defendant-appellant.

BRYANT, Judge.

Where a witness gives testimony of prior misconduct by defendant, and the testimony of the witness is similar to that of the victim, i.e. their descriptions of defendant's conduct leading up to and during a sexual assault, and where the trial court determines that undue

prejudice does not substantially outweigh the probative value of the testimony, there is no error in admitting the testimony. For the reasons stated herein, we affirm.

Facts

On 21 July 2008, defendant Ronnie Oliver was indicted on charges of first-degree statutory sexual offense, indecent liberties with a child, and crime against nature. On 25 August 2009, a trial before a jury commenced in Cleveland County Superior Court.

The evidence tends to show that in April 2003, defendant resided in the Town of Grover with Charlotte Kepel, a woman he had been dating. On weekends, Charlotte had custody of her two children, Catherine and Ted.[1] In April 2003, defendant was twenty-eight years old; Catherine turned ten. Catherine testified that after defendant moved in, he "[became] more like a father figure" until Catherine's tenth birthday. On that day, Catherine and defendant had been wrestling and "goof[ing] off" when defendant stated that he was going to take a shower. From the bathroom, defendant called Catherine to bring him a towel. Catherine testified that when she entered the bathroom, defendant was nude and masturbating. Defendant asked Catherine to remove her clothes. "[I]f you don't, I'm going to tell your mother and you're going to get in trouble and you're going to be grounded, you know." Catherine ran from the room but testified that defendant told her "that if I told anybody that he was going to kill me"; that "nobody would believe me, he'll go to jail and my mom will go to jail. So, I just kept it a secret." Over the following two weeks, defendant twice approached Catherine late at night, removed her clothes, and forced her to allow him to engage in sexual acts, including fellatio and digital penetration of her vagina. Defendant was charged with first-degree statutory sexual offense, indecent liberties with a child, and crime against nature for conduct on Catherine. Defendant was found guilty of all charges. The trial court entered judgment in accordance with the jury verdict and sentenced defendant to a term of 220 to 273 months active time, followed by thirty-six months of supervised probation. Defendant was also ordered to register as a sex offender and be placed under lifetime satellite-based monitoring. Defendant appeals.

On appeal, defendant raises the following issues: Did the trial court (I) commit plain error by admitting evidence of other bad acts;

1. Pseudonyms have been used to protect the identity of the minors.

(II) commit plain error by admitting the testimony of Kayla Gehring and Brittany Hammett; (III) err in instructing the jury; (IV) err in denying defendant's motion for a mistrial; and (V) err in ordering defendant to register as a sex offender and enroll in satellite-based monitoring.

I

[1] First, defendant argues the trial court committed plain error by admitting evidence of defendant's other bad acts. Specifically, defendant contends that Betsy Pall's testimony, as well as the testimony of Brittany Hammett, was not probative and was so dissimilar to the charges alleged by Catherine that the trial court violated Rule 404(b) in allowing the testimony.[2] We disagree.

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

State v. Cummings, 346 N.C. 291, 314, 488 S.E.2d 550, 563-64 (1997) (internal quotations and external citation omitted).

Under North Carolina Rules of Evidence, Rule 404(b),

> 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 Supreme Court has held that Rule 404(b) is

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2. We must note that defendant failed to preserve at trial the issue he now argues on appeal. Defendant's objection to the 404(b) evidence was based on his assertion that Brittany's testimony concerned acts that occurred after the acts testified to by Catherine and, as such, were not relevant to defendant's state of mind.

> a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (original emphasis). "In addition, 'the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity.' " *State v. Carpenter*, 361N.C. 382, 388, 646 S.E.2d 105, 110 (2007) (quoting *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002)). If the evidence meets these requirements, "the trial court must balance the danger of undue prejudice against the probative value of the evidence, pursuant to Rule 403." *Id.* at 388-89, 646 S.E.2d 110. However, "our decisions, both before and after the adoption of Rule 404(b), have been 'markedly liberal' in holding evidence of prior sex offenses 'admissible for one or more of the purposes listed [in the Rule] . . . .' " *Coffey*, 326 N.C. at 279, 389 S.E.2d at 54 (quoting 1 Brandis on North Carolina Evidence § 92 (3d ed. 1988)).

The State introduced several instances of prior acts based on Rule 404(b). Betsy Pall, a childhood friend of Catherine's testified that from the time she was ten until she reached twelve, defendant and Catherine's mother lived in the same apartment building as Betsy, her dad, and step-mom. Defendant worked with Betsy's dad. When Betsy was twelve, defendant and Charlotte moved away, but about a year later, defendant moved back alone. Betsy's father allowed defendant to stay in his home, while he helped defendant build a house nearby. When she was thirteen, her relationship with defendant changed. Late one night, she and defendant were wrestling and "roughhousing, and he grabbed my boob" but "I thought it was an accident, you know."

> Then later that year, ... we went to a horse sale. . . .We were there all day . . . . [M]y cousin [Sheri], who came with us,—she was about two years, a year, younger than me, I was thirteen. We were outside playing . . . . [Defendant] was watching, and [Sheri] and I were chasing each other around . . . . And [defendant] joined in, chasing me, and he again grabbed in inappropriate places, like he would grab my boob or my inner thigh, that type of thing.

Later that day, defendant, increasing his sexual attention toward Betsy, digitally penetrated her vagina. "He just whispered in my ear . . . no one would believe me if I said anything because I was letting it

happen, that it was my fault because I didn't—I wasn't screaming, and that I couldn't tell because again, no one would believe me." Later that same day, defendant drove Betsy home. While he drove, he exposed his penis and forced Betsy to masturbate him.

When she was fourteen, defendant was doing some handiwork in Betsy's house. At some point, all of the other adults in the house left.

> When I went down there [and realized we were alone . . .] I went to turn and leave, and he started to say again, you know, what we did wasn't right, that you can't tell, I'll tell your grandparents, they won't believe you, they'll believe me, I'm the adult, and that it was my fault because I hadn't done anything about it. . . .
>
> . . . He unzipped his pants and was exposing his penis, but . . . [I] told him if he didn't stop I was going to scream, that I was sick of it and that I would tell, that I didn't care if they believed me or not, that I wouldn't do anything else.

When Betsy was sixteen, her parents introduced her to Detective Tracy Curry who was investigating the allegations of sexual misconduct made by Catherine against defendant. Det. Curry asked Betsy if anything had ever happened between her and defendant, and she told him what happened. Before talking to Det. Curry, Betsy was unaware that anything had happened between defendant and Catherine: "I had no idea."

This other crimes evidence was introduced for the purpose of showing "common scheme or plan, identity, lack of mistake, motive and intent." The trial court properly allowed the evidence which was substantially similar to the acts of defendant toward the victim in the instant case and which supported the purposes for which it was introduced.

Both Catherine and Betsy testified that defendant had a strong personal relationship with one of their parents. Both testified that defendant used the threat of parental disbelief and disapproval to coerce submission and silence. Both testified that defendant initiated sexual conduct after wrestling or "roughhousing." Both testified that defendant digitally penetrated her vagina and that defendant forced her to masturbate him. The evidence indicated that the assault on Betsy was within two years of the assault on Catherine. The evidence also indicated a similar escalation of sexual acts toward each girl. We hold that defendant's conduct, as described by Betsy, was sufficiently similar to defendant's conduct, as described by Catherine. Such evidence was not unduly prejudicial and was of such probative value as

to not run afoul of Rule 404(b); therefore, the admission of Betsy's testimony did not amount to error, much less plain error.

Brittany Hammett, who was twenty years old at the time of trial, testified that defendant kissed her when she was thirteen. We hold that the admission of such testimony did not amount to "*fundamental* error, something so basic, so prejudicial, . . . that justice cannot have been done . . . ." *Cummings*, 346 N.C. at 314, 488 S.E.2d at 563. Accordingly, defendant's argument is overruled.

II

[2] Defendant next argues that the trial court committed plain error by allowing the State to elicit misleading and irrelevant testimony from Kayla Gehring and Brittany Hammett—particularly from Brittany who testified that she previously provided false statements. We disagree.

"Although a trial court's rulings on relevancy are not discretionary and we do not review them for an abuse of discretion, we give them great deference on appeal." *State v. Gant*, 178 N.C. App. 565, 573, 632 S.E.2d 258, 265 (2006) (citing *State v. Streckfuss*, 171 N.C. App. 81, 88, 614 S.E.2d 323, 328 (2005)). "A trial court has discretion whether or not to exclude evidence under Rule 403, and a trial court's determination will only be disturbed upon a showing of an abuse of that discretion." *Id.* (citing *State v. Campbell*, 359 N.C. 644, 674, 617 S.E.2d 1, 20 (2005), *cert. denied*, *Campbell v. North Carolina*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006)).

" '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 (2009). "All relevant evidence is admissible . . . . Evidence which is not relevant is not admissible." N.C. R. Evid. 402 (2009). "The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded." *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987) (citing *State v. Billups*, 301 N.C. 607, 272 S.E.2d 842 (1981); *State v. Cross*, 293 N.C. 296, 302, 237 S.E.2d 734, 739 (1977); N.C.G.S. § 15A-1443(a) (1983)). Further, it is defendant's burden to show prejudice from the admission of evidence. *See e.g. State v. Melvin*, 86 N.C. App. 291, 297, 357 S.E.2d 379, 383 (1987). Moreover, "[t]he State has the right to introduce evidence to rebut or explain evidence

elicited by defendant although the evidence would otherwise be incompetent or irrelevant." *State v. Cagle*, 346 N.C. 497, 505-06, 488 S.E.2d 535, 541 (1997) (quoting *State v. Johnston*, 344 N.C. 596, 605, 476 S.E.2d 289, 294 (1996)).

Defendant argues that it was error to allow Kayla and Brittany to testify about money given in exchange for a statement. On cross-examination of Catherine, defense counsel asked, "[d]o you have a problem with telling the truth?"; "Do you list yourself as being nineteen years old on [your MySpace page]?"; "Isn't it true that you paid or attempted to pay Kylie [sic] [Gehring] to make up stories on line?" In response, the trial court allowed the State to question Kayla and Brittany as to whether Kayla had been given or offered money to provide certain testimony. Kayla testified that she had not been given or offered money. Brittany, however, in a prior statement submitted to defendant's trial counsel, stated that Catherine gave money to Kayla in exchange for Kayla's statement to Det. Curry. At trial, Brittany recanted the prior statement made to defense counsel and testified under oath that she had made several false and conflicting statements prior to her trial testimony, including the statement that Catherine gave money to Kayla. Because defendant made Catherine's veracity an issue on cross-examination, the trial court's decision to allow the State to elicit, on rebuttal, testimony of Kayla and Brittany that Kayla was not given money by Catherine for her statement, was well within the trial court's discretion and properly supported by the record. Therefore, this argument is overruled.

III

[3] Next, although acknowledging that the trial court did follow the pattern jury instruction format, defendant nevertheless argues that the trial court erred in failing to specifically instruct the jury that evidence admitted under Rule 404(b) could not be used to prove defendant's character or that he acted in conformity therewith. We disagree.

Because defendant failed to object to the jury instruction, we review this contention for plain error. N.C. R. App. P. 10(a)(4); *see generally State v. Bowen*, 139 N.C. App. 18, 23, 533 S.E.2d 248, 251 (2000). "Under such an analysis, defendants must show that the instructions were erroneous and that absent the erroneous instructions, a jury probably would have returned a different verdict." *State v. Tirado*, 358 N.C. 551, 574, 599 S.E.2d 515, 531 (2004) (citing N.C. Gen. Stat. § 15A-1443(a) (2003)).

In *State v. Burr*, 341 N.C. 263, 461 S.E.2d 602 (1995), our Supreme Court addressed a similar argument. The defendant, Burr, requested an instruction in line with North Carolina Pattern Jury Instruction—Criminal 104.15[3], "to inform the [jurors] that they are not to consider such evidence as evidence of the defendant's character and limiting the purposes for which the jury may properly consider it." *Id.* at 292, 461 S.E.2d at 617. Pursuant to the request, the trial court instructed the jury that "the evidence of [the] defendant's prior misconduct . . . was admitted 'solely for the purpose of showing the identity of the person who committed the crime charged in this case, if it was committed,' and that they 'may consider it, only for the limited purpose for which it was received.' "*Id.* Though the trial court did not state "that the jury was not to consider the evidence as evidence of [the] defendant's bad character[,]" the Supreme Court held that the instruction was in substantial conformity with the defendant's request and overruled the assignment of error. *Id.* at 292, 461 S.E.2d at 617-18.

Here, the trial court stated the following, in regard to the evidence presented by Betsy:

> This evidence was received solely for the purpose of showing that the Defendant had a motive for the commission of the crime charged in this case, that the Defendant had the intent to commit the crime charged in this case, that there existed in the mind of the Defendant a plan, scheme, system or design involving the crime charged in this case, the absence of mistake and the absence of accident.

In light of *Burr*, where the defendant specifically requested an instruction containing the extra sentence that the jury not consider 404(b) evidence as evidence of bad character and where our Supreme Court held that the trial court properly limited the use of the evidence as it "was in substantial conformity with" defendant's requests, defendant cannot show plain error. *Id.* at 292, 461 S.E.2d at 617. This argument is overruled.

IV

[4] Next, defendant argues that the trial court erred in denying his motion for a mistrial. Defendant contends that contact by a member of the public with a juror violated defendant's constitutional rights to a fair trial and an impartial jury. We disagree.

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3. N.C.P.I.—Crim. 104.15 Evidence of similar acts or crimes. G.S. § 8C-1, Rule 404(b).

"In general, the trial court 'possesses broad discretionary powers' to conduct a fair and just trial." *State v. Garcell*, 363 N.C. 10, 44, 678 S.E.2d 618, 639 (2009) (citing *State v. Britt*, 285 N.C. 256, 272, 204 S.E.2d 817, 828 (1974)). However, under North Carolina General Statutes, section 15A-1061, "[t]he judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2009).

> "When there is a *substantial* reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial." *State v. Barts*, 316 N.C. 666, 683, 343 S.E.2d 828, 839 (1986) (emphasis added) (citations omitted). When error is alleged in this manner, it is typically because the possibility of some type of improper external contact involving a juror or jurors is brought to the trial court's attention. *See, e.g.*, *Hurst*, 360 N.C. at 186-87, 624 S.E.2d at 315-16 (in which a prospective alternate juror stated during *voir dire* he had read a newspaper article concerning the case in the jury room); *State v. Willis*, 332 N.C. 151, 172, 420 S.E.2d 158, 168 (1992) (in which the trial court learned " 'one of the family members of one of the parties may have talked to one of the jurors' ").

Garcell, 363 N.C. at 44, 678 S.E.2d at 639-40. " 'Mistrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict.' " *State v. Taylor*, 362 N.C. 514, 538, 669 S.E.2d 239, 260 (2008) (quoting *State v. Smith*, 320 N.C. 404, 418, 358 S.E.2d 329, 337 (1987)).

In *Taylor*, the trial court was made aware of a report that a person from the gallery followed a juror to the juror's vehicle and then followed the vehicle for some distance. *Id.* at 537, 669 S.E.2d at 260. The trial court separately inquired of the juror who was followed and a juror who witnessed the events as to whether either believed they could be fair and impartial in their duty. Both jurors stated that the person's actions had not affected the juror's ability to be impartial. Upon receiving information that the jurors had discussed the incident with the remaining jurors, the trial court made a general inquiry of the jury as to whether anyone felt the incident affected his or her ability to be impartial. All jurors responded that they could remain impartial. *Id.* The defendant made a motion for a mistrial, which the trial court

denied. Our Supreme Court noted the lack of evidence "tending to show the jurors were incapable of impartiality or were in fact partial in rendering their verdict." *Id.* at 538, 669 S.E.2d at 260. The Court concluded that the denial of the defendant's motion for a mistrial was within the trial court's discretion. *Id.*

Here, after the State presented its closing argument, the trial court allowed a ten minute recess. Outside of the courtroom, there was an exchange wherein a juror was approached by a young man who said, "Just quit, and I'll let you go home." Upon return to the courtroom, the trial court inquired as to who witnessed the incident. Six jurors indicated being a witness. The trial court examined each juror individually as to what he or she saw or heard and whether the juror would "be able to fairly consider the evidence that you've heard during your deliberations, or will anything that you saw or heard have some effect on that?" Each juror responded that the incident would have no effect on their ability to follow the trial court's instructions nor their review of the evidence. Defendant's motion for a mistrial was denied.

Given the trial court's response to the incident, as well as the lack of evidence tending to show the jurors were incapable of impartiality in rendering their verdict, we hold the trial court's denial of defendant's motion for a mistrial was within the trial court's discretion. *See id.* at 538, 669 S.E.2d at 260. Accordingly, defendant's argument is overruled.

V

[5] Next, defendant argues that the trial court erred in ordering him to register as a sex offender and enroll in a satellite-based monitoring program for the rest of his natural life. Defendant contends that (A) the North Carolina General Assembly made first-degree sex offense with a child by an adult a "reportable conviction" subjecting the offender to satellite-based monitoring for life only for offenses committed on or after 1 December 2008. Defendant also contends that (B) his convictions for indecent liberties with a child and crime against nature do not satisfy the statutory prerequisites necessary to subject him to satellite-based monitoring for the rest of his natural life. For the reasons stated below, we vacate the trial court's order compelling defendant to enroll in satellite-based monitoring for his natural life.

> This Court stated the standard of review for orders as to [satellite-based monitoring] in *State v. Kilby*: "[w]e review the trial court's findings of fact to determine whether they are supported

> by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." ––– N.C. App. –––, –––, 679 S.E.2d 430, 432 (2009) (quoting *State v. Garcia*, 358 N.C. 382, 391, 597 S.E.2d 724, 733 (2004) (citation, quotation marks, and brackets omitted), *cert. denied*, 543 U.S. 1156, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005)).

State v. Singleton, ––– N.C. App. –––, –––, 689 S.E.2d 562, 566 (2010).

Defendant argues that because first-degree sexual offense with a child by an adult under N.C. Gen. Stat. § 14-27.4A was not a "reportable conviction" subjecting an offender to satellite-based monitoring for offenses occurring prior to 1 December 2008, *see* 2008 N.C. Sess. Laws 117, when defendant's offenses occurred in 2003, the trial court erred in ordering defendant to enroll in satellite-based monitoring for life. However, defendant was convicted of first-degree sexual offense under N.C. Gen. Stat. § 14-27.4(a)(1). This offense has been a reportable conviction since 1 January 1996. *See* 1995 N.C. Sess. Law 545.

" 'Reportable conviction' means . . . [a] final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses . . . ." N.C. Gen. Stat. § 14-208.6(4)(a) (2009). Pursuant to N.C. Gen. Stat. '14-208.6(5), first-degree sexual offense (in violation of N.C. Gen. Stat. § 14-27.4) and taking indecent liberties with children (in violation of § 14-202.1) are sexually violent offenses. N.C.G.S. § 14-208.6(5) (2009).

> a) When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), during the sentencing phase, the district attorney shall present to the court any evidence that (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor.

N.C. Gen. Stat. § 14-208.40A(a) (2009). "[W]hen making a determination pursuant to N.C.G.S. § 14-208.40A, 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." *State v. Davison*, ––– N.C. App. –––, –––, 689 S.E.2d 510, 517 (2009), *disc. review denied*, ––– N.C. –––, ––– S.E.2d –––

(2010). The trial court found that the offense of first-degree sexual offense and taking indecent liberties with a child were aggravated offenses. "If the court finds that the offender . . . has committed an aggravated offense . . . the court shall order the offender to enroll in a satellite-based monitoring program for life." N.C.G.S. § 14-208.40A(c) (2009).

" 'Aggravated offense' means any criminal offense that includes . . . (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old." N.C.G.S. § 14-208.6(1a) (2009). However, a conviction for first-degree sexual offense under N.C.G.S. § 14- 27.4(a) requires that the victim be only under the age of 13. N.C.G.S. § 14-27.4(a)(1). Moreover, a conviction for taking indecent liberties with children, in violation of § 14-202.1, requires only that the victim be under the age of 16. N.C.G.S. § 14-202.1 (2009). As we must give effect to the plain meaning of a statute, when the language is clear and without ambiguity, we must conclude that a conviction for first-degree sexual offense, in violation of § 14-27.4(a)(1), and a conviction for taking indecent liberties with a minor, in violation of § 14- 202.1, are not aggravated offenses as defined by § 14-208.6(1a). *See State v. Santos* , —— N.C. App. ——, —— S.E.2d (2011) (COA 10-668) (heard 11 January 2011) (holding that "that the trial court erred when it determined that first-degree sexual offense was an aggravated offense."); *Davison*, —— N.C. App. ——, —— 689 S.E.2d 510 (taking indecent liberties with a minor is not an aggravated offense). Defendant was not classified as a sexually violent predator and is not a recidivist. The trial court did not indicate whether the offense involved the physical, mental, or sexual abuse of a minor. On appeal, the State concedes that the conviction for first-degree sexual offense with a child is not a violation of G.S. 14-27.2A or G.S. 14-27.4A. Therefore, we vacate the order compelling defendant to enroll in satellite-based monitoring for his natural life and remand the matter for a new satellite-based monitoring hearing. *See State v. King*, —— N.C. App. ——, 693 S.E.2d 168 (2010) (remanding for new SBM hearing).

No error in part; vacated in part; and remanded.

Judges STROUD and BEASLEY concur.

STATE OF NORTH CAROLINA v. DONTE DORRELL SNEED, DEFENDANT

No. COA10-189

(Filed: 5 April 2011)

Evidence—prior crimes or bad acts—reported stolen gun possessed by defendant

The trial court did not err in a robbery with a dangerous weapon, possession of stolen property, and misdemeanor fleeing to elude arrest with a motor vehicle case by admitting under N.C.G.S. § 8C-1, Rule 803(6) testimony that the National Crime Information database indicated a gun with the same serial number as the one possessed by defendant had been reported stolen in Florida. Even assuming *arguendo* that the remaining evidence challenged on appeal should have been excluded, defendant failed to demonstrate plain error.

Appeal by defendant from judgments entered 28 May 2009 by Judge Ripley E. Rand in Wake County Superior Court. Heard in the Court of Appeals 1 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Linda Kimbell, for the State.

Paul Y. K. Castle for defendant-appellant.

GEER, Judge.

Defendant Donte Dorrell Sneed appeals from his convictions of robbery with a dangerous weapon, possession of stolen property (a handgun), and misdemeanor fleeing to elude arrest with a motor vehicle. Defendant primarily argues that the trial court should have excluded as inadmissible hearsay several pieces of evidence indicating that the handgun had been stolen in South Miami, Florida. We hold that the trial court properly admitted, under Rule 803(6) of the Rules of Evidence, testimony that the National Crime Information Center ("NCIC") database indicated a gun with the same serial number as the one possessed by defendant had been reported stolen in South Miami, Florida. We further hold that even assuming, without deciding, that the remaining evidence challenged on appeal should have been excluded, defendant has failed to demonstrate plain error—that the jury would probably have reached a different verdict in the absence of the evidence.

Facts

The State's evidence tended to show the following facts. On 16 July 2008, William Gonzalez drove his light blue 1998 Nissan Sentra to an Exxon gas station on Atlantic Avenue in Raleigh, North Carolina. Mr. Gonzalez noticed defendant standing, in his words, "suspiciously" near the store entrance, watching him. According to the store manager, defendant had arrived at the store approximately five minutes before Mr. Gonzalez. When Mr. Gonzalez entered the store to prepay for his gas, defendant also entered the store. Mr. Gonzalez noticed that defendant was watching as Mr. Gonzalez opened his wallet, which contained approximately 400 U.S. dollars and 50 Mexican pesos.

After Mr. Gonzalez paid for his gas and returned to his car, defendant left the store. When Mr. Gonzalez finished pumping the gas and got into his car, defendant opened the passenger door, brandished a handgun, climbed into the car, and directed Mr. Gonzalez to drive. Mr. Gonzalez testified that he had never met defendant before that day.

While defendant pointed the gun at Mr. Gonzalez' stomach, even touching his rib cage with the gun, Mr. Gonzalez began driving down Millbrook Avenue. Mr. Gonzalez turned right on a familiar street and stopped the car suddenly in an attempt to cause defendant to drop his gun.

Defendant then ordered Mr. Gonzalez to hand over his wallet, which Mr. Gonzalez did. While pulling out his wallet, Mr. Gonzalez noticed defendant sweating. Because Mr. Gonzalez began to worry that defendant would actually hurt him, Mr. Gonzalez attempted to grab the gun, and the two men struggled. The gun fired, hitting the windshield.

Mr. Gonzalez was able to get out of the car and run towards a nearby veterinary clinic. Defendant then drove away in Mr. Gonzalez' car. Mr. Gonzalez hailed a taxi and unsuccessfully attempted to follow defendant. The taxi drove him home where Mr. Gonzalez called the police, reporting the incident and the vehicle tag number.

Later that day, Raleigh police officers went to the Exxon gas station and questioned Mr. Boone, the store manager working during the carjacking. Mr. Boone reviewed the surveillance video with the police officers. Police were able to reproduce photos from the surveillance video to assist with the investigation. These photos were used in a "bolo" or "be on the lookout for" e-mail distributed to all sworn personnel on 17 July 2008. The "bolo" included a photograph

of a vehicle similar to Mr. Gonzalez' car and a photo of defendant derived from the surveillance video.

On 18 July 2008, Raleigh Police Detective Goodwin notified Detective Rhodes that he had identified the person in the "bolo" as defendant. Detective Rhodes researched defendant's name in a police database and was able to obtain another photograph from the City County Bureau of Identification. Detective Rhodes used defendant's photo and photos of five other individuals to create a photographic lineup that another officer then presented to Mr. Gonzalez. Mr. Gonzalez was not, however, able to identify defendant in the photographic array.

On 26 July 2008, at approximately 9:45 a.m., Sergeant Rosa noticed a vehicle similar to Mr. Gonzalez' car in a driveway. The vehicle was the same make and model although a different color. Sergeant Rosa ran the license tags, which came back as registered to Mr. Gonzalez. Sergeant Rosa called for backup to conduct surveillance of the vehicle.

After several hours of surveillance, Sergeant Rosa and several of his officers were admitted into the home where the vehicle was parked. The home was being used as a boarding house where each bedroom was a separate residence. The officers went door to door, talking with the residents who were home and performing a security check of their rooms to ensure no one was hiding inside.

As a result of these interviews, the officers learned that Dorothy Moore owned the home. They asked Ms. Moore to come to the house to help with the investigation. The officers told her they were investigating a carjacking and asked if she had seen a light blue Nissan. She informed them that defendant lived in the house and that she had seen him driving a vehicle matching that description for the past 10 days.

Ms. Moore reported that defendant had parked the Sentra on the septic tank behind the house even after she instructed him not to do so. She had noticed a bullet hole in the windshield. When she asked defendant about the bullet hole, he told her the vehicle belonged to one of his girlfriends, and he did not know why there was a bullet hole in the windshield. The officers then determined that the tags from Mr. Gonzalez' vehicle had been switched with those of the Sentra in the front driveway. The owner of that Sentra also lived in the house; he did not know of the switch.

After interviewing Ms. Moore, the officers knocked on defendant's door, but received no answer. Ms. Moore gave them a key to the

room so that the officers could determine if anyone was inside. The officers found no one in the room, so they secured the room and guarded the door.

On 26 July 2008, at approximately 4:00 or 5:00 p.m., Officer Kellogg responded to a call about a light blue Nissan Sentra with a bullet hole in the windshield parked in a parking lot on Woodbend Drive. He was instructed to block the vehicle in the event defendant tried to leave the parking lot. While conducting a search of the area, the surveillance officers observed defendant walking toward the vehicle. Defendant returned to the car, and Officer Kellogg was unable to reach the parking lot in time to block defendant's exit. As defendant drove towards him, Officer Kellogg turned on his police lights. Defendant swerved to the right to avoid hitting Officer Kellogg and drove toward Six Forks Road.

Another officer in an unmarked vehicle moved in between defendant and Officer Kellogg. Then, Officer Mercer, a canine officer, who had been called to assist in locating defendant on foot, positioned his marked car for safety reasons between defendant and the unmarked police vehicle. Defendant nearly collided with several cars during the pursuit, forcing those vehicles to use evasive measures to avoid a collision. Officers Mercer and Kellogg testified that defendant was driving at approximately 60 to 80 miles per hour in a 45-mile-per-hour zone.

Defendant turned into a cul-de-sac, slammed on his brakes, and got out of the car. Officer Mercer and his dog pursued defendant on foot. Officer Mercer ordered defendant to halt, warning defendant he would release his dog. When defendant continued to run, Officer Mercer let his dog loose. While attempting to evade the dog, defendant slipped and fell to the ground. The dog then latched onto defendant's left leg.

Officer Mercer approached defendant with his weapon drawn and instructed defendant to turn onto his stomach and stretch out his arms. Instead of complying, defendant kicked at the dog, which was still holding onto his leg. Officer Mercer hostered his weapon and attempted to grab defendant's wrists. Defendant stood up, facing away from Officer Mercer, who then attempted to use his Taser on defendant. Before he could remove the Taser from its holster, defendant turned to face Officer Mercer, assuming a fighting position. Defendant reached toward his waistband with his right hand, leading Officer Mercer to believe defendant was reaching for a weapon.

Officer Mercer drew his pistol again and pointed it at defendant, ordering him to lie down and show his hands. Defendant did not

respond to this command and continued reaching toward his waist. Even after Sergeant Quick arrived and defendant was tackled to the ground, defendant continued to reach toward his waistband. Officer Mercer warned defendant not to pull his hands out from under his body or he would be shot. Officer Mercer, while holding defendant's wrist, felt a pistol in defendant's hand. Defendant finally relinquished control of the gun he was holding and began to pull his arm from underneath his body. Officer Mercer took control of the loaded weapon.

Defendant was handcuffed and placed in custody. Once in custody, an EMS crew looked at defendant's wounds from the dog and offered to transport him for treatment. When defendant refused to talk, the EMS crew bandaged him up, and the officers transported him to the police station for questioning.

The magazine clip was removed from defendant's gun, which was a nine millimeter handgun, and the gun was then turned over to Detective Rhodes, the lead detective in the case. Sergeant McLeod arrived on the scene and retrieved the items taken from defendant, including the gun, magazine clip, several rounds of ammunition, and a black backpack that contained clothing and various documents with the defendant's name on them. The gun was subsequently determined to have been stolen in South Miami, Florida.

The same day, Detective Rhodes searched defendant's residence pursuant to a search warrant. The search located 13 loose nine millimeter bullets, 30 unfired Remington nine millimeter bullets in the dresser, a pair of khaki shorts similar to those worn by the suspect in the surveillance video, a black backpack with a red design on the back of it, a black mask, and documentation bearing defendant's name.

Several days later, Ms. McBride, who lived on the same street as defendant, was out walking when she and her dog came upon a wallet. Ms. McBride called the police regarding the wallet. The police recovered the wallet, which turned out to belong to Mr. Gonzalez.

On 2 September 2008, defendant was indicted for (1) assault with a deadly weapon on a law enforcement officer, (2) robbery with a dangerous weapon, (3) possession of stolen property, (4) possession of a stolen motor vehicle, and (5) felonious speeding to elude arrest. At trial, defendant testified that his mother and siblings currently lived in Miami, Florida and that he had previously lived there himself. He had been in North Carolina for about two years as of the date of the trial, and Mr. Gonzalez had been a regular drug customer of his.

His explanation of the events leading up to his arrest are as follows. He testified that on 16 July 2008, he met Mr. Gonzalez at the Exxon station on Atlantic Avenue and Millbrook Road to complete a drug transaction. Defendant testified that he followed Mr. Gonzalez into the store, but acted like he did not know Mr. Gonzalez. As was their usual arrangement, Mr. Gonzalez, as partial payment for the drugs, would allow defendant to use his car. They drove away from the gas station and stopped nearby to complete the trade. Defendant testified that his gun was in his closet at home and that he did not have any gun with him on 16 July 2008. Mr. Gonzalez left the car and instructed defendant on when to return his vehicle later that same day.

Defendant testified that he did not return the vehicle on time because he loaned it to another friend who, in turn, did not return it to defendant on time. According to defendant, Mr. Gonzalez became furious after repeatedly calling defendant about the car and defendant's not answering the calls. Although the vehicle was returned to defendant the next day, defendant did not return the vehicle to Mr. Gonzalez. Defendant claimed that, during the car chase, he was driving approximately 35 miles per hour.

At the close of the evidence, the trial court allowed defendant's motion to dismiss the charge of assault with a deadly weapon on a law enforcement officer. The trial court instead charged the jury on the offense of attempted assault with a deadly weapon on a law enforcement officer, as well as on the other offenses with which defendant was charged.

The jury found defendant not guilty of attempted assault with a deadly weapon on a law enforcement officer, but found him guilty of (1) robbery with a dangerous weapon, (2) possession of stolen property, (3) possession of a stolen motor vehicle, and (4) misdemeanor fleeing to elude arrest with a motor vehicle. The trial court arrested judgment on the possession of a stolen motor vehicle charge. The court sentenced defendant to a presumptive-range term of 77 to 102 months imprisonment for the robbery with a dangerous weapon conviction and a consecutive presumptive-range term of eight to 10 months for the possession of stolen property and misdemeanor fleeing to elude arrest with motor vehicle convictions. Defendant timely appealed to this Court.

Discussion

On appeal, defendant challenges only the trial court's admission of evidence relating to whether the gun in defendant's possession was

stolen, including testimony regarding statements in a computer printout from the NCIC database identifying the gun as stolen, evidence relating to a South Miami Police Report regarding the theft of the gun, and testimony of a telephone conversation between Detective McLeod and Detective Lopez of the South Miami Police Department regarding the stolen gun. Because defendant did not object to the admission of any of this evidence at trial, he now argues its admission was plain error.

It is well settled that plain error

> "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)).[1]

I

With respect to the NCIC database testimony, Detective Rhodes testified that he was notified shortly after he arrived at the arrest scene that the handgun recovered from defendant's person had been checked against the NCIC database using its serial number and that the gun was listed as having been stolen in South Miami, Florida. He verified this information himself by using the serial number on the handgun to run his own search in the NCIC database with the same

1. With respect to the police report, defendant also argues that its admission violated his right to confrontation under the United States and North Carolina Constitutions. Defendant did not make this constitutional argument below. Although defendant argues that the State must prove that any error in admitting this report was harmless beyond a reasonable doubt, because defendant did not object on confrontation grounds at trial, our standard of review is plain error. *State v. Lemons*, 352 N.C. 87, 96, 530 S.E.2d 542, 547-48 (2000), *cert. denied*, 531 U.S. 1091, 148 L. Ed. 2d 698, 121 S. Ct. 813 (2001).

results—the NCIC database identified the gun as stolen in South Miami, Florida.

The State does not dispute that the information from the NCIC database constituted hearsay. The State argues, however, that the NCIC database falls within the hearsay exception set out in Rule 803(6) of the Rules of Evidence for records of regularly conducted business activity. Rule 803(6) defines such records as including:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, *all as shown by the testimony of the custodian or other qualified witness*, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(Emphasis added.)

The information in the NCIC database is a "database compilation, in any form" falling within Rule 803(6). Detective Rhodes testified that the NCIC database is a "database that's used nationwide that law enforcement agencies contact and enter items such as handguns, vehicles, license plates, different articles that have serial numbers on them that can be traced." Defendant does not dispute that information from the NCIC database could fall within the scope of Rule 803(6), but argues that the State failed to lay the necessary foundation for admission of the NCIC database evidence under that rule.

Defendant contends that the State was required to present testimony from a custodian of records for NCIC that (1) the information was regularly kept in the course of NCIC's business and (2) NCIC routinely makes such records in the course of conducting its business. According to defendant, Detective Rhodes, a detective with the Raleigh Police Department, was not qualified to testify that the requirements of Rule 803(6) were satisfied.

This Court addressed a similar issue in *State v. Windley*, 173 N.C. App. 187, 617 S.E.2d 682 (2005), *disc. review denied*, 360 N.C. 295, 629 S.E.2d 288, *cert. dismissed*, 360 N.C. 295, 629 S.E.2d 290 (2006).

In *Windley*, an officer with the Forsyth County Sheriff's Department testified as an expert in the field of latent fingerprint lifting and fingerprint identification. *Id.* at 193, 617 S.E.2d at 686. This Court described his testimony as follows:

> [The officer] testified he obtained several latent fingerprints at the Kernersville residence crime scene and compared them to fingerprints contained in a computer system database known as "AFIS" or "Automated Fingerprint Identification System." [The officer] stated [that] AFIS consists "of a known database of fingerprints of criminal arrest cards of people [who've] been arrested in the state." Using the database, [the officer] received a reference to defendant. [The officer] then compared one of the latent fingerprints he obtained at the crime scene to the actual fingerprint card containing defendant's fingerprints. [The officer] testified that such fingerprint cards were kept in the normal course of business in the police record files. According to [the officer], the fingerprint obtained from the door of the Kernersville residence matched the fingerprint card containing defendant's fingerprints.

Id. Although the defendant objected to the admission of the fingerprint card as a violation of his right to confrontation, the trial court concluded that it was admissible as a business record under Rule 803(6). *Windley*, 173 N.C. App. at 193-94, 617 S.E.2d at 686.

On appeal, this Court first pointed out that business records do not constitute testimonial evidence and, therefore, their admission does not violate confrontation rights. *Id.* at 194, 617 S.E.2d at 686. The Court then "conclude[d] the fingerprint card created upon defendant's arrest *and contained in the AFIS database* was a business record and therefore nontestimonial." *Id.* (emphasis added).

In this case, Detective Rhodes gave testimony regarding the NCIC database comparable to that of the officer in *Windley* regarding the AFIS database. Detective Rhodes described the NCIC database as entries from law enforcement officers used by law enforcement to trace stolen property. Detective Rhodes stated that he ran the serial number of the gun through the NCIC database and found that the gun with that serial number had been reported stolen. While Detective Rhodes did not explicitly state that the records were kept in the ordinary course of business, defendant does not dispute that the testimony of Detective Rhodes, if he were a qualified witness, was adequate to support that inference. Under *Windley*, Detective

Rhodes, who used the NCIC database in his regular course of business, was sufficiently qualified to lay the necessary foundation for admission of the NCIC information under Rule 803(6).

While our appellate courts have not previously specifically ruled on whether information obtained from the NCIC database falls under the business record exception to the hearsay rule, the Virginia Court of Appeals addressed the issue in *Cooper v. Commonwealth*, 54 Va. App. 558, 680 S.E.2d 361 (2009). In *Cooper*, when the Commonwealth attempted to present an NCIC report showing that a shotgun recovered from the defendant was reported stolen, the defendant objected on hearsay grounds. *Id.* at 564, 680 S.E.2d at 364. An officer testified that he reported the serial number on the gun to a dispatcher, who confirmed that the NCIC database indicated the gun had been stolen. *Id.* at 568, 680 S.E.2d at 366. Subsequently, a printed copy of the NCIC report was obtained. *Id.* at 569, 680 S.E.2d at 366.

The Virginia Court of Appeals held that even though a person with personal knowledge of the facts input into the NCIC database had not testified, admission of the NCIC report under the business records hearsay exception was proper because " 'evidence show[ed] the regularity of the preparation of the records and reliance on them by their preparers or those for whom they are prepared.' " *Id.* at 568, 680 S.E.2d at 366 (quoting *Frye v. Commonwealth*, 231 Va. 370, 387, 345 S.E.2d 267, 279-80 (1986) (upholding admission of NCIC report identifying defendant as escapee)).

Detective Rhodes' testimony was materially indistinguishable from that found sufficient in *Cooper*. While *Cooper* is not controlling, we believe that it and *Frye* are persuasive authority for the trial court's admission of Detective Rhodes' testimony that the NCIC database reported defendant's gun as having been stolen in South Miami, Florida. The rationale in *Cooper* and *Frye* dovetails with this Court's reasoning in *Windley*. Therefore, we hold that the admission of Detective Rhodes' testimony regarding the NCIC report was not plain error.[2]

II

We need not address the admissibility of the content of the police report from the South Miami Police Department or the admissibility

2. Defendant does not argue that the evidence was inadmissible under Rule 803(8), and we therefore express no opinion on that question. *See State v. Forte*, 360 N.C. 427, 436, 629 S.E.2d 137, 144 ("[W]e must determine whether these reports are admissible under Rule 803(8) before we can decide whether they are admissible as business records."), *cert. denied*, 549 U.S. 1021, 166 L. Ed. 2d 413, 127 S. Ct. 557 (2006).

of statements made by a detective with the South Miami Police Department. Even assuming, without deciding, that the trial court should have excluded that evidence, defendant has failed to demonstrate sufficient prejudice in light of the properly-admitted NCIC information and defendant's own testimony. "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).

On the issue of prejudice, defendant asserts that the only evidence the gun was stolen came from the improperly admitted hearsay evidence. He then argues:

> [I]f the trial court had ruled correctly on these evidentiary issues and had excluded the out-of-court statements in question — i.e., (a) the statements in the printout from the database of the National Crime Information Center, (b) the statements in the initial police report from the City of South Miami, Florida[] Police Department, and (c) the over-the-phone statements by Detective Lopez with that Florida police department —, [sic] then the jury might very well have reached a different verdict in regard to the possession of stolen property charge. In short, the trial court committed *plain error* in admitting these inadmissible hearsay statements.

The standard is not, however, whether "the jury might very well have reached a different verdict in regard to the possession of stolen property charge." For plain error, a defendant must demonstrate that the jury would probably have reached a different verdict on the possession of stolen goods charge in the absence of each piece of evidence. *Id.*

More particularly, given defendant's argument, the question is whether the evidence was such that the jury would probably conclude that the gun possessed by defendant was stolen in the absence of the police report and the telephone conversation with the Florida detective. Detective Rhodes testified regarding the serial number of the gun possessed by defendant. He explained how the NCIC database catalogues the serial numbers of guns and other pieces of property that have been reported stolen. In testimony that we have already held was admissible, Detective Rhodes told the jury that two separate searches of the NCIC database had indicated that a gun with

the same serial number as the gun possessed by defendant was reported stolen in South Miami, Florida.

In addition, defendant himself testified about how he obtained the handgun. He admitted that he purchased the gun in Miami in March 2008 on a street corner from someone he did not know. He claimed that he believed the seller's statement that the gun was not stolen even though he was purchasing the gun for only $100.00. On redirect examination, defendant was asked, "And you don't know whose gun it is, do you?" He responded, "No, sir." Additionally, defendant did not register the gun in either Florida or North Carolina.

The jury, therefore, had before it evidence that the NCIC database reported the gun as stolen in South Miami, that defendant admitted that he bought the gun on a Miami street corner from a stranger for $100.00, that he admitted not knowing who actually owned the gun, and that he did not register the gun. In light of this evidence, we do not believe that the jury would probably have found defendant not guilty of possession of stolen property (the gun) had the trial court excluded the Florida police report and the telephone conversation with the Florida detective.

No error.

Judges McGEE and CALABRIA concur.

S.T. WOOTEN CORPORATION F/K/A S.T. WOOTEN CONSTRUCTION CO., INC., PETITIONER V. BOARD OF ADJUSTMENT OF THE TOWN OF ZEBULON AND THE TOWN OF ZEBULON, RESPONDENTS

No. COA10-515

(Filed 5 April 2011)

Zoning— interpretation of zoning official—not timely appealed—binding

A statement by the Town's 2001 Planning Director in two letters that a proposed asphalt operation was a permitted use by right requiring only a general use permit was binding on the Town because the Town did not appeal the decision within the required thirty day period.

Appeal by Petitioner from order entered 8 March 2010 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 2 November 2010.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Lacy H. Reaves, Scott A. Miskimon, and J. Mitchell Armbruster, for Petitioner-Appellant.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Charles George, and Tobias S. Hampson, for Respondent-Appellees.

BEASLEY, Judge.

S.T. Wooten Corporation f/k/a S.T. Wooten Construction Co., Inc. (Petitioner) appeals the superior court's order affirming the decision of the Board of Adjustment of the Town of Zebulon (Board) requiring Petitioner to apply for and obtain a special use permit to operate a permanent asphalt plant on its property located within the jurisdiction of the Town of Zebulon (Town). The central issue presented in this appeal is whether a specific statement by the Town Planning Director—that, pursuant to the Town zoning code, the proposed asphalt operation is a permitted use by right requiring only a general use permit—is an order, decision, or determination of binding force. *See Raleigh Rescue Mission, Inc. v. Board of Adjust. of City of Raleigh (In re Appeal of Soc'y for Pres. of Historic Oakwood)*, 153 N.C. App. 737, 742-43, 571 S.E.2d 588, 591 (2002). For the reasons discussed herein, we conclude that the 2001 statement of the Planning Director is a determination of binding force, and, because no objection was made to that appealable decision in a timely manner, it is binding on the Town. Therefore, we reverse and remand to the Board for further remand to the Town to allow Petitioner's operation of the asphalt plant consistent with the Town's original, binding zoning interpretation that such was a permitted use, eliminating the need for a special use permit.

Petitioner owns a 63-acre parcel of land located at 901 W. Barbee Street (the Property) within the extraterritorial jurisdiction of the Town. The Property is zoned in the "Heavy Industrial" (IH) district, and Petitioner has operated a concrete plant thereon since 1978. In 2001, Petitioner's Staff Engineer, Richard Bowen, requested a zoning determination letter from Michael Frangos, the Town's Planning Director and Land Use Administrator (LUA) at the time, as to whether Petitioner's IH-zoned Property could be used as an asphalt plant. Mr. Frangos responded by letter dated 22 August 2001, confirming the

Town's extraterritorial jurisdiction over the IH-zoned Property and stating that an asphalt plant was a permitted use within the IH district:

> In accordance with § 152.129 [of the Town's Land Use Ordinance] Permitted Uses, ***clay, stone, concrete and cement processing and sale*** is a use permitted by right with only a General Use Permit issued by the Zoning Administrator. It is my interpretation, as such, that ***asphalt plants*** fall within this description or are similar enough to be grouped together and are therefore also permitted.

The letter also advised that "prior to any construction a site plan must be reviewed by the Zebulon Technical Review Committee and construction plans must be submitted along with an application in pursuit of a building permit." The Town never appealed Mr. Frangos' interpretation, and Petitioner proceeded to obtain air quality permits from the State of North Carolina. On 20 November 2001, a representative of engineering company ENSR Consulting and Engineering (NC), Inc. wrote a letter to Mr. Frangos on behalf of Petitioner, requesting that the Town "provide a zoning consistency determination" to the North Carolina Department of Environment and Natural Resources (NCDENR), Division of Air Quality. This written "Request for Zoning Consistency Determination" explained that Petitioner was "planning to permit three hot mix asphalt (HMA) plants at a site located on Barbee Street Extension in Zebulon" and sought, pursuant to statutory requirement, a determination that the proposed asphalt facility was consistent with the Town's zoning ordinance in effect. Mr. Frangos confirmed to NCDENR's Regional Air Quality Supervisor, by letter dated 3 December 2001,[1] that Petitioner's property is zoned IH and that the proposed asphalt facility was permitted as of right:

> Please accept this letter as confirmation that the Town of Zebulon has received copies of the permit applications for S.T. Wooten Asphalt Mixing Services, LLC . . . . The site at 901 Barbee Street Extended . . . is zoned IH, Heavy Industrial. Therefore such industrial uses and their appurtenant uses are permitted by right.

Also dated 3 December 2001, a "Zoning Consistency Determination" signed by Mr. Frangos, as "Planning/Zoning Director," verified that the proposed "Hot Mix Asphalt (HMA) Plant" was "consistent with applicable zoning and subdivision ordinances."

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1. The body of this letter, written on Town of Zebulon letterhead, indicates that copies of the letter were sent to Petitioner and Petitioner's engineering and consulting firm, ENSR.

According to Petitioner, over the next few years the company, in reliance on Mr. Frangos' 2001 zoning interpretation, obtained necessary state and local permits, including: (a) the requested air quality permits from NCDENR; (b) driveway permits from the North Carolina Department of Transportation (NCDOT); (c) all necessary building permits from Wake County; and (d) all necessary sedimentation and erosion control permits. Petitioner also spent over $300,000 improving the Property for the use of the asphalt plant, including subdividing the Property to separate the asphalt plant area from the concrete plant that had been in existence on the Barbee Street Property since 1978. Petitioner began using its Property for the operation of an asphalt plant when it was awarded an asphalt paving contract by the NCDOT on 29 April 2009. In connection therewith, Petitioner submitted to Wake County two commercial building permit applications—one for the portable asphalt plant itself and another for a portable office/lab trailer to be used on the Property—and a mechanical permit application for electrical work involved in the setup of a portable asphalt plant. On 27 May 2009, the Town of Zebulon Planning Department approved a zoning permit for a "Temporary Asphalt Plant" at the Property, specifying on the Zoning Permit Form that no change of use permit was required. The record also contains a certificate of occupancy issued on 4 June 2009, indicating that all permit requirements were met and occupancy was allowed. From June to October 2009, Petitioner operated a portable or temporary asphalt plant on the Property, and in September 2009, informed Mark A. Hetrick, the Town's Planning Director at that time, of its intention to replace the portable plant on the Property with a permanent asphalt plant.

On 1 October 2009, counsel for the Town notified Petitioner of Mr. Hetrick's determination that the "ultimate approval" of the proposed permanent site for an asphalt manufacturing plant was "still to be made by the Board of Commissioners by way of a Special Use Permit." Mr. Hetrick cited § 152.131 of the Town of Zebulon Land Use Ordinance, which is captioned "Permitted Uses and Specific Exclusions" and provides that

> whenever a use is proposed to be established which is not specifically listed in the table of permitted uses, but is similar to a permitted use in the district in which it is proposed to be established, then the Board of Adjustment is authorized to issue a conditional use permit . . . if it first finds that the use is indeed similar in nature to one or more of the permitted uses in that district. Provided however, that if the Land Use Administrator finds that

> the use, although similar to other uses in the district, will have a greater impact on the community, then the Board of Commissioners may issue a [special use] permit . . . .

Zebulon, N.C., Zebulon Land Use Ordinance (Zebulon Ordinance) § 152.131 (2008). Petitioner appealed Mr. Hetrick's decision requiring a special use permit to the Board of Adjustment on 23 October 2009, and on 17 December 2009, the Board held a hearing on the matter. At the conclusion of the hearing, the Board voted to affirm the 2009 interpretation and deny Petitioner's appeal by a unanimous vote. Petitioner timely filed a petition for a writ of certiorari to the superior court, and after considering the whole record of proceedings before the Board, reviewing the parties' submissions, and hearing arguments from counsel, the superior court affirmed the Board's decision. Petitioner appeals.

Our General Assembly has authorized judicial review of the decisions of a municipal board of adjustment, providing that "[e]very decision of the board shall be subject to review by . . . proceedings in the nature of certiorari." N.C. Gen. Stat. § 160A-388(e2) (2009). A trial court reviewing a board's decision should:

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

Wright v. Town of Matthews, 177 N.C. App. 1, 8, 627 S.E.2d 650, 656 (2006) (quoting *Knight v. Town of Knightdale*, 164 N.C. App. 766, 768, 596 S.E.2d 881, 883 (2004)). " 'If a petitioner contends the Board's decision was based on an error of law, 'de novo' review is proper. However, if the petitioner contends the Board's decision was not supported by the evidence or was arbitrary and capricious, then the reviewing court must apply the 'whole record' test.' " *Sun Suites Holdings, LLC v. Board of Aldermen of Town of Garner*, 139 N.C. App. 269, 272, 533 S.E.2d 525, 527-28 (2000) (quoting *JWL Invs., Inc. v. Guilford County Bd. of Adjust.*, 133 N.C. App. 426, 429, 515 S.E.2d 715, 717 (1999)). Upon further appeal to this Court from a superior court's review of a municipal board of adjustment's decision, "[t]he

scope of our review is the same as that of the trial court." *Fantasy World, Inc. v. Greensboro Bd. of Adjust.*, 162 N.C. App. 603, 609, 592 S.E.2d 205, 209 (2004). In this Court's examination of the superior court's order for errors of law, our "standard of review is limited to '(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.' " *Id.* (quoting *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 140 N.C. App. 99, 102-03, 535 S.E.2d 415, 417, (2000)).

Although Petitioner's Petition for Writ of Certiorari to the superior court alleged that the Board's decision was not supported by competent, material, and substantial evidence and was arbitrary and capricious, these arguments were not properly preserved for appeal. Rather, Petitioner raises two questions of law: (1) whether the Board is bound by the 2001 interpretation of the Zebulon Ordinance because the Town took no appeal therefrom; and (2) whether such interpretation created a common law vested right in Petitioner to operate an asphalt plant on the Property. Where the order affirming the Board's decision indicates that the superior court "conducted a *de novo* review of all legal issues and determined that the decision was not based on an error of law," and Petitioner does not contend that the superior court exercised an inappropriate scope of review, we consider only whether the de novo review was conducted properly. *See Fantasy World*, 162 N.C. App. at 609, 592 S.E.2d at 609-10 ("Questions of law are to be considered by both the superior court and by this Court *de novo*.").

We first address Petitioner's argument that Mr. Frangos' 2001 interpretation—that asphalt plants are a permitted use of right within the IH district—is binding on the Town because it was never appealed. As discussed below, because the LAU's interpretation of the zoning ordinance was a final decision, it was also appealable; therefore, we agree with Petitioner that Mr. Frangos' letter became a binding zoning determination to which the Town must adhere.

In addition to various specific duties, the Zebulon Ordinance authorizes the LUA to "[a]dvise applicants for development on the merits of proposed applications as well as procedures, rights and obligations under [the Zebulon Ordinance], . . . [m]ake interpretations on the provisions [therein], and appeal to the Board of Adjustment whenever he or she is unable to make certain determinations." Zebulon Ordinance § 152.025(A)-(B). Our General Statutes provide that

> the board of adjustment shall hear and decide appeals from and review any *order, requirement, decision, or determination* made by an administrative official charged with the enforcement of that ordinance. An appeal may be taken by any person aggrieved or by an officer, department, board, or bureau of the city.

N.C. Gen. Stat. § 160A-388(b) (2009) (emphasis added). The Zebulon Land Use Ordinance likewise provides that "[a]n appeal from any final order or decision of the Land Use Administrator may be taken to the Board of Adjustment by any person aggrieved." Zebulon Ordinance § 152.072(A)(1); *see also id.* § 152.024(A)(1) ("The Board of Adjustment shall hear and decide . . . [a]ppeals from any order, decision, requirement or interpretation made by the Land Use Administrator . . . ."). Pursuant to the Zebulon Ordinance, "[a]n appeal made 30 days after the date of the decision or order appealed from will be considered invalid." *Id.* § 152.072(B). Our case law has made clear that for this thirty-day clock to be triggered, "the order, decision, or determination of the administrative official must have some binding force or effect for there to be a right of appeal under [§] 160A-388(b)." *In re Historic Oakwood*, 153 N.C. App. at 742-43, 571 S.E.2d at 591. This Court explained:

> Where the decision has no binding effect, or is not "authoritative" or "a conclusion as to future action," it is merely the view, opinion, or belief of the administrative official. *See Midgette v. Pate*, 94 N.C. App. 498, 502-03, 380 S.E.2d 572, 575 (1989) (under section 160A-388(b)[.] "Once the municipal official has acted, *for example by granting or refusing a permit*, 'any person aggrieved' may appeal to the board of adjustment.") (emphasis added). We do not believe section 160A-388(b) sets forth an appellate process where no legal rights have been affected by the "order, decision . . . or determination" of the administrative official.

Id. at 743, 571 S.E.2d at 591.

The parties dispute the applicability of two seminal cases: while the Town attempts to analogize the instant facts to *In re Historic Oakwood*, Petitioner suggests that the case *sub judice* is more closely aligned with our recent decision in *Meier v. City of Charlotte*, ––– N.C. App. –––, 698 S.E.2d 704 (2010), where we distinguished the facts of *In re Historic Oakwood* from those involved there. *See Meier*, ––– N.C. App. at –––, 698 S.E.2d at 709-10 (noting that unlike *In re Historic Oakwood*, where the subject memorandum "had no binding force and was not appealable to the board of adjustment" because it

"did not affect any of the parties' legal rights and was nothing more than a 'response to a request' by the City Attorney," the pertinent language at issue in *Meier*, contained in a letter from the interim zoning administrator, was "clearly couched in determinative, rather than advisory, terms, compelling the conclusion that it is an 'order, decision, requirement, or determination' of the type that is subject to appeal" to the board of adjustment). After thorough comparison of these two cases and careful scrutiny of the letter Mr. Frangos wrote Petitioner, we are convinced that the 2001 interpretation is more similar to the actual "decision" rendered in *Meier* than the "advisory" response of *In re Historic Oakwood*.

In *In re Historic Oakwood*, the board of adjustment determined that the residential facility a charitable organization planned to build "fail[ed] to meet multi-family housing requirements because of its proposed use[,]" but this Court reversed the decision based on the board's lack of jurisdiction to hear the matter. *In re Historic Oakwood*, 153 N.C. App. at 738, 571 S.E.2d at 589. We considered a memorandum of opinion by a Zoning Inspector issued in response to an inquiry from a Deputy City Attorney as to the contentions of opposing parties in the construction of a multi-family building, where the dispute concerned local zoning provisions. No one contested that the Zoning Inspector was an appropriate administrator to render a binding order on the matter; however, we determined that the memorandum was not binding. Our Court stated that the Zoning Inspector was without decision-making power at the time he issued his memorandum; that the memorandum was advisory, as it was in response to the Deputy City Attorney's request; and that the memorandum did not affect any rights of the parties. *Id.* at 743, 571 S.E.2d at 591-92.

We distinguished *In re Historic Oakwood* from *Meier*, where an adjacent property owner asked the Zoning Administrator to determine whether a construction project complied with the zoning ordinance height requirements. Because of questions presented by both the property owner and the adjacent property owner, a hold was placed on a certificate of occupancy "until the zoning-related issues were resolved." *Id.* at ––, 698 S.E.2d at 706. The Administrator reviewed the construction site and the plans and architectural drawings concerning the structure's height and location before providing his final interpretation as to compliance with the zoning ordinance. Upon review, we held that the Administrator was exercising the authority delegated to him pursuant to the Charlotte zoning ordinance and thereby made a specific " 'order, requirement, decision, or determi-

nation within the meaning of . . . the Charlotte Code[,]" as it was a determination made by an official with the authority to provide an interpretation of a specific provision of the zoning ordinance and allowed the property owner to complete the project without the risk that the structure would later be found to be out of compliance. *Id.* at ——, 698 S.E.2d at 710. As such, the Zoning Administrator's letter "was subject to appeal to the Board of Adjustment." *Id.* at ——, 698 S.E.2d at 710.

Here, Petitioner, the landowner, specifically requested that the Planning Director interpret the Zebulon Ordinance and determine whether an asphalt plant was a permitted use. Mr. Frangos, in his capacity as Planning Director, rendered his interpretation of the zoning ordinance—that the area was zoned for Heavy Industrial and an asphalt plant was a permitted use. On at least two occasions—in the letter of 22 August 2001 and in the letter of 3 December 2001—Mr. Frangos clearly interpreted the Zebulon Ordinance to allow asphalt plants as a permitted use. Subsequently, and in accord with the Planning Director's interpretation, Petitioner made application for several permits necessary for the asphalt plant. While the record does not provide the circumstances that led to Petitioner's request, the evidence indicates that Petitioner relied on Mr. Frangos' letters as binding interpretations of the applicable zoning ordinance. Mr. Frangos, as the LUA/Planning Director, was expressly empowered by § 152.025(A)-(B) of the Zebulon Ordinance to provide formal interpretations of the zoning provisions therein, and such zoning interpretations by the LUA may be binding. Thus, unlike *In re Historic Oakwood*, where an advisory opinion was provided at the request of the City Attorney, Mr. Frangos exercised his explicit authority in providing a formal interpretation of the zoning ordinance to a landowner seeking such interpretation as it related specifically to its property.

Further, we cannot readily distinguish the facts in *Meier* from the instant case as it relates to whether certain language used by an LUA in interpreting an ordinance is binding. Like the interpretation in *Meier*, Mr. Frangos' 2001 interpretation was a determination that a certain use was permitted under the ordinance, and that the property owner, upon completion of a few items as set out in a letter, would be in compliance with the ordinance. The reasoning of the Court in *Meier*—distinguishing *In re Historic Oakwood* and concluding that the language used by the LUA was an "order, requirement, decision or determination" within the meaning of the Charlotte Code—is equally applicable to this appeal. "[U]nlike the memorandum at issue in *In re*

Historic Oakwood, [the letter here] involved a determination made by an official with the authority to provide definitive interpretations of the . . . zoning ordinance concerning the manner in which a specific provision of the zoning ordinance should be applied to a specific set of facts that was provided to parties with a clear interest in the outcome of a specific dispute." *Meier*, ––– N.C. App. at –––, 698 S.E.2d at 710. Here, Petitioner had an interest in the outcome of the request of a zoning consistency determination, and the letter it received was a clear exercise of the LUA's authority to evaluate and determine to what extent a proposed use complied with the ordinance.

In its brief, the Town emphasizes that portion of Frangos' 2001 letter following his interpretation of the asphalt plant as a permitted use, where the Planning Director reminded Petitioner that site plans, construction plans, and building permit applications must be submitted prior to any construction. The Town suggests that this extraneous guidance rendered the 2001 interpretation advisory, as no authorization was given for Petitioner to actually operate the asphalt plant, and non-appealable as without binding force. However, this Court readily disposed of a parallel argument in *Meier*, where the petitioner contended that treatment of the Zoning Administrator's letter "as an 'order, requirement, decision, or determination' for purposes of [appeal]" was precluded by a reference therein "to the necessity for a 'sealed survey indicating the distances from the structure to the property lines as well as the height of the structure' as a precondition for obtaining a certificate of occupancy." *Id.* at ––– n.3, 698 S.E.2d at 710 n.3. We separated the interpretation of binding force from the superfluous advice contained within the same letter, as the "[p]etitioner's argument overlook[ed] the difference between the purpose for which the interpretation set forth in the [Zoning Administrator's] letter was provided and the reason that the "sealed survey" was required as a precondition for the issuance of a certificate of occupancy:

> At bottom, the purpose of the "sealed survey" requirement was to ensure that the structure was completed in accordance with the site plans and architectural drawings provided in connection with the process that led to the issuance of the interpretation embodied in the . . . letter. In other words, the purpose of the "sealed survey" requirement was to ensure that the structure that [the developer] completed had been constructed consistently with the representations that [it] had made. Nothing about the inclusion of the "sealed survey" requirement . . . suggest[ed] that the Planning Department reserved the right to alter the interpretation of the

> relevant provisions of the zoning ordinance as set out in the [Zoning Administrator's] letter following receipt of the "sealed survey."

Id. In the same vein, the fact that Mr. Frangos' letter mentioned that a building permit would be needed before Petitioner could begin construction of an asphalt plant, as expressly required in the Zebulon Ordinance, does not convert his unequivocal, zoning interpretation into an advisory opinion. This guidance to an "applicant[] for development on the . . . procedures, rights and obligations under the [ordinance]," Zebulon Ordinance § 152.025(A), which the LUA was explicitly authorized to provide, contains no intimation "that the Planning Department reserved the right to alter the interpretation of the [applicable permitted use] provisions of the zoning ordinance as set out [above] in [Mr. Fragos'] letter following receipt of the [site plans, construction plans, and building permit application]." Rather, Frangos, the LUA in 2001, made a lawful and binding determination that the asphalt plant was a permissible use and such use did not violate the Town of Zebulon Zoning Ordinance; his advice as to a different aspect of the ordinance did not make the preceding formal interpretation on a separate issue advisory; and there is nothing in the record to indicate a change to applicable provisions of the ordinance from 2001 to 2009.

While a review of our case law reveals no set of facts exactly like these in the instant case—where a LUA with statutory authority to bind the town does so and there is no objection by the town within the required 30-day statutory period—this Court's opinion in *City of Winston-Salem v. Concrete Co.*, 47 N.C. App. 405, 267 S.E.2d 569 (1980) provides further guidance. The central issue in that case was whether a zoning compliance determination had been made in 1970 which then affected the propriety of a 1976 zoning determination that the property was in violation of the ordinance. There, the Court acknowledged settled law that a town "cannot be estopped to enforce a zoning ordinance against a violator due to the conduct of a zoning official in encouraging or permitting the violation." *Id.* at 414, 267 S.E.2d at 575. However, the Court went on to grant the defendant a new trial based on the trial court's charge to the jury—a proper instruction on estoppel followed by an inaccurate statement as to the issues—deeming it prejudicial to the defendant. *Id.* at 417-18, 267 S.E.2d at 577. In *City of Winston-Salem*, because the question of "whether the zoning official with the power to do so made a determination in [one year] contrary to the determination made [several years later]" was before the jury, the answer to that question would

determine whether the city was entitled to enforce the ordinance by injunction. So, it would seem we have a similar situation here. In the instant case, the Town of Zebulon has made a prior determination through its LUA that the use of Petitioner's property for an asphalt plant is permissible. Because that prior determination was lawful and not in violation of the ordinance, the Town should not now be allowed to enforce a new interpretation of the same ordinance by injunction or otherwise.

It is clear that a Town's appeal of a decision of its LUA may be procedurally awkward. Is it plausible to believe that the LUA would issue an opinion and then advise the Town to challenge his own interpretation through an appeal to the Board of Adjustment? (Indeed, the Town's counsel explained to the Board that "there really would not have been a reason for the [T]own to appeal it because the [T]own's planning director at the time was the one issuing the opinion.") Yet, awkward procedure notwithstanding, the statute provides for a right to appeal by the Town, and makes no exceptions to that right.[2] Because no appeal was taken from the initial 2001 decision, the window for appealing the decision has long since closed, the matter deemed settled, and the 2001 interpretation became a binding zoning determination that Petitioner may operate an asphalt plant on the Property as a permitted use. Thus, neither did the Town have authority to render a contrary decision or collaterally attack the 2001 interpretation, nor did the Board of Adjustment have jurisdiction to review the issue. As such, we need not review Petitioner's alternative contention that it had obtained common law vested rights to operate an asphalt plant without a special use permit. The judgment of the trial court should be reversed and remanded for further remand to the Board to reverse LUA Hetrick's decision that Petitioners needed a special use permit to operate the asphalt plant and to allow the original permitted use for the IH-zoned Property.

Reversed and remanded.

Judges McGEE and BRYANT concur.

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2. *See* N.C. Gen. Stat. § 160A-388(b) (setting out the avenue of appeals from, e.g. LUA decisions by persons aggrieved or city boards, departments, etc., and specifying that "appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of that ordinance . . . may be taken by any person aggrieved or by an officer, department, board, or bureau of the city"); *see also* Zebulon Code § 152.025(A)-(B) (authorizing the LUA to "make interpretations on the provisions of [the zoning ordinance], and appeal to the Board of Adjustment whenever he or she is unable to make certain determinations").

STATE OF NORTH CAROLINA v. ANTONIO DONNELL NEAL, Defendant

No. COA10-210

(Filed 5 April 2011)

Search and Seizure— consent—material conflict in evidence—written findings required

A conviction on cocaine charges was remanded where the trial court did not make written findings about whether a promise was made to defendant to obtain his consent for a search of his apartment.

Appeal by defendant from judgment entered 16 September 2009 by Judge Calvin E. Murphy in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 September 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Lars F. Nance, for the State.

Guy J. Loranger for defendant-appellant.

GEER, Judge.

Defendant Antonio Donnell Neal appeals from his conviction of (1) felony trafficking in more than 28 grams but less than 200 grams of cocaine by possession and (2) misdemeanor possession of drug paraphernalia. The trial court orally denied defendant's motion to suppress evidence seized from his apartment. In doing so, the trial court failed to comply with N.C. Gen. Stat. § 15A-977(f) (2009) and its requirement that a trial court enter a written order with findings of fact resolving a material conflict in the evidence as to whether any promise was made to induce defendant's consent to the search. We, therefore, remand to the trial court for the limited purpose of making the necessary findings of fact and reconsidering its conclusions of law in light of those findings.

Facts

On 27 March 2006, defendant was indicted for (1) trafficking in more than 28 grams but less than 200 grams of cocaine by possession and (2) possession of drug paraphernalia. Prior to trial, defendant filed a motion to suppress any evidence seized by law enforcement officials after a search of his apartment on 17 March 2006 on the

grounds that the search violated the Fourth and Fourteenth Amendments to the United States Constitution.

During the course of the hearing before the trial court on the motion to suppress, the State presented the testimony of Officers Brian Scharf and James Gilliland of the Charlotte-Mecklenburg Police Department. According to the officers, on 16 March 2006, they began surveillance of a unit in the Beacon Ridge apartment complex. They were looking for Antonio Boone who had an outstanding arrest warrant for assault with a deadly weapon. Officer Scharf, the lead investigator in Mr. Boone's case, had received a Crimestoppers tip that Mr. Boone was staying at the apartment, which was defendant's residence. At the time, the officers were not looking for defendant for any reason other than to locate Mr. Boone.

During the surveillance, defendant left his apartment and drove to a Charlotte Housing Authority ("CHA") property. The officers followed defendant and saw him enter a CHA apartment and leave after 10 to 15 minutes. The officers then checked a CHA ban list and learned that defendant had been banned from CHA property. Based on this information, the officers obtained a warrant for defendant's arrest for second degree trespassing.

Officers Scharf and Gilliland returned to Beacon Ridge with the warrant on 17 March 2006 and resumed their surveillance of defendant's apartment. After arriving, they saw defendant leave the apartment and start to drive away in his vehicle. The officers stopped the vehicle in the parking lot around the corner of the apartment building.

Upon making the stop, the officers directed defendant to get out of his car, placed him in handcuffs, and informed him that there was a warrant for his arrest. Officer Scharf told defendant that they were looking for Mr. Boone and asked whether Mr. Boone was inside the apartment. Defendant nodded his head "yes." The officer also asked if there were any weapons in the apartment, and defendant said there might be a gun. At that point, Officer Scharf asked defendant for consent to search the apartment for Mr. Boone and any weapons that might be inside, and defendant orally gave consent. Both officers testified that they did not draw a firearm or make any threats or promises to gain defendant's consent to the search of his apartment.

The officers called for backup, including a SWAT team. While they waited for backup to arrive, Officer Gilliland watched the front of the apartment, and Officer Scharf waited with defendant. After

backup arrived, the officers put defendant in another officer's patrol car. Officer Scharf then took a position at the front of the apartment, and Officer Gilliland took a position at the back. After a few minutes, and before the SWAT team arrived, Mr. Boone exited the front door of the apartment. Officer Scharf placed Mr. Boone under arrest and canceled the SWAT team call. Afterwards, Officer Scharf again asked defendant if he could search his apartment for weapons, and defendant again gave oral consent for the search.

Once the officers entered the apartment, Officer Gilliland discovered, in the bedroom, a plastic molding gun box, marijuana, and a marijuana bong. In the bedroom closet, he also found a locked safe that was big enough to hold a gun. The officers opened the safe using the safe key on defendant's key chain. The safe contained $1,080.00 in cash, digital scales, and a purple Crown Royal bag that contained a "large quantity" of what the officers believed to be crack cocaine. The officers then arrested defendant based on what they had found in the safe.

The officers subsequently transported defendant to the Law Enforcement Center. Officer Scharf read defendant his *Miranda* rights, and defendant signed a written waiver of those rights. Officer Scharf then interviewed defendant, and, at the close of the interview, defendant signed a written statement that Officer Scharf had prepared. The statement indicated that defendant had given Officer Scharf consent to search his apartment.

Defendant's testimony at the hearing on the motion to suppress conflicted with that of the officers, particularly concerning whether the officers made any promises to him. He testified that after he was stopped, Officer Scharf "said if I just, you know, let him know where Antonio Boone was, that he'd strike the trespass warrant he had for me." According to defendant, after Mr. Boone was arrested, Officer Scharf "again . . . said if I let them search the house he'd strike the trespass warrants on me. So I let him search the house at that point." Defendant emphasized that his consent "was based on" Officer Scharf's representation that he would strike the trespass warrant.

At the close of the evidence, the trial court denied defendant's motion to suppress. The court did not enter a written order, but orally made the following findings of fact from the bench:

> That on or about March 16th, 2006, Officer Brian Scharf and James Gilliland conducted a surveillance of 1524 Beacon Ridge Road because they had previously received a report through

Crimestoppers that Mr. Boone, Antonio Boone, was living in that apartment complex. They were searching for Mr. Boone because there was an outstanding warrant for his arrest for a serious assault charge.

At that time the officers had no information about the defendant, Antonio Neal, or were they searching for him, and did not have any outstanding warrant for his arrest.

Part of the tip received through Crimestoppers was that Antonio Boone had a friend by the name of Antonio Neal, where he, Mr. Boone, might be staying.

To investigate the matter Officers Scharf and Gilliland set up surveillance at 1524 Apartment 810 Beacon Ridge Road to investigate the validity of the information that they had received through Crimestoppers.

That through investigation Officer Scharf determined that Antonio Neal lived at 810, in Apartment 810 of the Beacon Ridge Road Apartments. That the officers were not looking for Mr. Neal for any reason other than to locate Antonio Boone.

That on or about the 16th day of March 2006, while conducting surveillance at the apartment complex, Officer Scharf observed Mr. Neal leave his apartment and enter a vehicle, and followed him to Boulevard Homes, known to the officers to be a Charlotte Housing Authority property.

That thereafter Sergeant Scharf then checked the ban list for Charlotte Housing Authority properties and found that an individual bearing the name of Antonio Donnell Neal, black male, date of birth October 19, 1978, had been banned from Charlotte Housing Authority property.

Having observed Mr. Neal on what the officers believed to be Charlotte Housing Authority property, they obtained a warrant for his arrest. On the following day, on the 17th of March 2006, went [sic] back to Mr. Neal's address, arrested him for trespass and asked him about Mr. Boone.

Officer Scharf also wanted to search the residence for Mr. Boone. He conceded he was not sure that Mr. Boone was indeed in the residence.

On that date, March 17th, Officer Scharf, accompanied by Officer Gilliland, observed the defendant exit his apartment and enter a vehicle parked nearby.

When the defendant pulled around the corner of the building, Officer Scharf and Officer Gilliland stopped the vehicle and arrested the defendant on the outstanding trespassing warrant.

Officer Scharf spoke with the defendant about Antonio Boone, and asked if there was anyone else in the apartment; that Antonio Boone was wanted. The officers did not explain what the charge was, and asked Mr. Neal, the defendant, if Antonio Boone was inside the apartment.

The defendant did not respond audibly, but shook his head, quote yes, closed quote. Officer Scharf asked the defendant if he could search the apartment for Antonio Boone and for a weapon.

Officer Scharf did not question the defendant about drugs at that point because he was specifically looking for firearms due to the nature of the charge against Mr. Boone.

After the defendant was placed under arrest for the trespassing warrants, the officers sought to call backup, including the SWAT team. And before the SWAT team arrived, another officer, uniformed officer arrived and took custody of the defendant.

Then Officer Scharf and Officer Gilliland then set up surveillance on the apartment. Before the SWAT team could arrive, Officer Scharf observed Mr. Boone coming out of the apartment and immediately arrested him.

That thereafter they obtained the defendant's consent to search the apartment for guns, Officer Scharf and Officer— correction. Having obtained the defendant's consent to search the apartment for guns, Officer Gilliland conducted a search of the interior of the one bedroom apartment.

During the search Officer Gilliland noticed a plastic molded gun box in the bedroom, but the gun was not inside. Upon further search of the closet area, Officer Gilliland located a safe approximately two feet by two feet in dimension. He continued his search, but did not find anything else of interest.

Officer Gilliland advised Officer Scharf that there was a locked safe in the bedroom. Officer Scharf had possession of the defendant's keys, and noticed that there was a safe key on the chain.

Officer Scharf then used the key to open the safe, and discovered inside a purple Crown Royal — inside a purple Crown Royal bag, a quantity of what he believed to be cocaine, and cash and scales.

Thereafter the defendant was transported to the Law Enforcement Center where he was taken to an interview room approximately six feet by six feet in dimension. The room was equipped with shackles.

The officers had weapons, but did not draw them. They did not threaten the defendant, nor make any promises to him to get him to waive his Miranda rights. The defendant was advised of his rights and waived them in writing.

After obtaining a waiver — strike that. While in the interview room the defendant was not promised anything to induce him to make a statement. He was not threatened in any way, nor was any evidence of either intimidation directed toward him either to obtain the waiver of his Miranda rights or to make his written statement.

During the course of the interview the defendant signed a written statement that was prepared for him by Officer Scharf. That statement was signed by the defendant on March 17th, 2006.

In his statement, which has been marked as State's Exhibit Number 2, the defendant adopts what has been written by Officer Scharf indicating that he gave Officer Scharf permission to search his residence located at 1524, number 810, Beacon Ridge Road, and that he gave Officer Scharf permission to write the statement for him.

During the course of the interview at the Law Enforcement Center, the defendant and Officer Scharf and Officer Gilliland, who had heard only a portion of the interview or was actually present in the interview room, [sic] that the search that was conducted of the defendant's apartment was confined to where a weapon reasonably might be kept.

That the officer testified, and the officer agrees and the defendant agrees, that the defendant was cooperative at all times during the defendant's interaction with the officers.

The Court further finds that the defendant was not the objective of the original investigation. That investigation having been focused on Antonio Boone.

> During his direct testimony, the defendant acknowledges that he gave the officer consent to search his apartment, but did so because he was under arrest at the time and Officer Scharf indicated he would strike the trespassing warrant if he gave such consent to search.
>
> Based upon the foregoing findings of fact the Court concludes that in the totality of the circumstances the consent to search the defendant's apartment was knowingly, voluntarily and freely given.
>
> And that the statement that the defendant subsequently gave to the officers was given freely, voluntarily and understandingly, without coercion or promise of award or under any duress.

The court then stated: "Based upon those findings and conclusions the Court denies the defendant's motion to suppress the evidence and the statement given in the case." After making its ruling, the court then noted some concerns it had, including concern about the CHA ban list, a concern that the court said had "been satisfied." The trial court, however, further noted that it "was also concerned about the dismissal of the underlying second degree trespass charge as the defendant testified the officers—or Officer Scharf promised him that that would be dismissed or it would otherwise be disposed of. But there is insufficient evidence provided to the Court to make an independent determination for the basis of the dismissal."

Defendant's case proceeded to trial. The State presented the testimony of Officers Scharf and Gilliland as part of its case in chief. The officers explained to the jury the circumstances leading to their search of defendant's apartment, which had yielded the digital scales and cocaine.

During Officer Scharf's testimony, the State admitted, over defendant's objection, a Charlotte-Mecklenburg Police Department property report listing some of the evidence seized from defendant's apartment, including the digital scales, the Crown Royal bag, the gun box, and the marijuana bong. The State also admitted, without objection from defendant, the items seized from defendant's apartment, including the scales and the cocaine. In addition, when Officer Scharf was discussing the property bag of evidence, a small packet of untested material, which the officer believed to be cocaine, was discovered in the bag. Through its questioning of the officer, the State suggested that the packet had been inside the marijuana bong, which had bro-

ken into pieces in the property bag. Defendant did not object to the testimony about this packet. In addition, forensic chemist Ann Charlesworth testified that the substance seized from defendant's apartment was 33.45 grams of cocaine.

Defendant offered no evidence on his own behalf, and the jury found defendant guilty of both (1) felony trafficking in more than 28 grams but less than 200 grams of cocaine by possession and (2) misdemeanor possession of drug paraphernalia. The trial court consolidated the convictions for sentencing and imposed a term of 35 to 42 months imprisonment and ordered defendant to pay a $50,000.00 fine. Defendant timely appealed to this Court.

Discussion

Defendant argues that the trial court erred in denying his motion to suppress the evidence of the scales and cocaine seized at his apartment, as well as in later admitting this evidence during trial. Because defendant did not object at trial to the admission of the evidence and testimony regarding the evidence, he failed to preserve this issue for appeal. *See State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000) (holding pretrial motion to suppress is not sufficient to preserve for appeal question of admissibility of evidence where defendant does not also object at time evidence is offered at trial), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305, 121 S. Ct. 1379, 1380 (2001). Defendant, therefore, asks that this Court review the issue for plain error.

Defendant first contends that the trial court violated N.C. Gen. Stat. § 15A-977(f) by failing to enter a written order on the motion to suppress that included findings of fact resolving all material conflicts in the evidence. N.C. Gen. Stat. § 15A-977(f) provides that in ruling on a motion to suppress, "[t]he judge must set forth in the record his findings of facts and conclusions of law." "This statute has been interpreted as mandating a written order 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). If both of these criteria are met, the necessary findings of fact are implied from the denial of the motion to suppress. *Id.*

Here, the trial court announced its rationale for the denial of the motion to suppress from the bench. Defendant contends, however, that a written order was nonetheless required because there was a material conflict in the evidence regarding whether Officer Scharf promised

defendant that he would drop the trespass warrant in exchange for defendant's consent to the officers' searching his apartment.

Defendant, on the one hand, testified that Officer Scharf "said if [defendant] let them search the house he'd strike the trespass warrants . . . ." Officer Scharf, on the other hand, explicitly stated that at no time during his contact with defendant did he make any promises to him. The trial court recognized this conflict, but stated that it believed "there is insufficient evidence" for the court to resolve the conflict.

Defendant's testimony was, however, sufficient standing alone to require the trial court to resolve the conflict (assuming the conflict was material to the motion to suppress). *See State v. Biggs*, 289 N.C. 522, 531, 223 S.E.2d 371, 377 (1976) ("In the present case the police officers testified that defendant waived his right to presence of counsel. Defendant testified that he did not. Under these circumstances it was incumbent upon the judge to make an express finding in this regard, and his failure to do so rendered the admission of defendant's inculpatory statements to [the officers] erroneous."); *State v. Smith*, 135 N.C. App. 377, 380, 520 S.E.2d 310, 312 (1999) (holding evidence as to whether defendant consented to search was conflicting when two detectives testified that defendant consented to search of room, while defendant testified that detectives neither requested nor received his permission to search room). Defendant was not required to present any evidence apart from his own testimony. It was then up to the trial court to decide whom to believe: defendant or the officers.

The key question remains, however, whether this conflict was material. The Fourth Amendment prohibits unreasonable searches and seizures. In *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997), the Supreme Court explained:

> "It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586, 63 L. Ed. 2d 639, 651[, 100 S. Ct. 1371, 1380] (1980). Consent, however, has long been recognized as a special situation excepted from the warrant requirement, and a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given. . . . For the warrantless, consensual search to pass muster under the Fourth Amendment, consent must be given and the consent must be voluntary. . . . Whether the consent is voluntary is to be determined from the totality of the circumstances.

See also N.C. Gen. Stat. § 15A-221 (2009) (authorizing warrantless search where voluntary consent is given). The burden is upon the State to prove the validity of consent, "the presumption being against the waiver of fundamental constitutional rights." *State v. Vestal*, 278 N.C. 561, 579, 180 S.E.2d 755, 767 (1971).

Here, there is no dispute that defendant consented to the search. The issue is whether, considering the totality of the circumstances, that consent was voluntary. Our Supreme Court has expressly held that a trial court deciding the voluntariness of a defendant's consent must consider whether the defendant "was threatened or offered any promises or inducements in exchange for his consent to search." *State v. Austin*, 320 N.C. 276, 291, 357 S.E.2d 641, 650, *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224, 108 S. Ct. 267 (1987). *See also State v. Weavil*, 59 N.C. App. 708, 711, 297 S.E.2d 772, 774 (1982) (holding motion to suppress properly denied when, *inter alia*, there was no evidence that defendant was "coerced by threats, promises or show of force").

In *State v. Fuqua*, 269 N.C. 223, 228, 152 S.E.2d 68, 72 (1967), the defendant was told by a police officer that the officer would testify as to the defendant's cooperation if the defendant would give a statement. The Supreme Court held that such a statement by a person in authority gave the defendant a clear hope for lighter punishment if he confessed, which rendered his confession involuntary and inadmissible. *Id.* In *State v. Williams*, 314 N.C. 337, 343, 333 S.E.2d 708, 713 (1985) (internal quotation marks omitted), this Court held that the principles set out in *Fuqua* were applicable in deciding whether a defendant's consent to a search of his automobile was "given freely, voluntarily, and understandingly" or whether it was "instead the product of promises and inducements of hope." Although the Court ultimately distinguished the facts in *Williams* from those in *Fuqua*, the Court's analysis and decision indicate that the issue whether there was a promise or inducement is material to whether a defendant's consent to a search was voluntary. *Id.* at 346-47, 333 S.E.2d at 715 (holding that once trial court resolved conflicts in voir dire testimony against defendant, its findings supported conclusion that officer did not make promise that was sufficient to render consent involuntary).

In light of these cases, we conclude that the conflict in the evidence as to whether the officers obtained defendant's consent by promising to drop the trespass charge was a material conflict. Consequently, the trial court violated N.C. Gen. Stat. § 15A-977(f) by

failing to enter a written order setting out findings of fact resolving the material conflict in the evidence. "For this reason, we cannot determine as a matter of law whether or not the evidence seized violated defendant's Fourth Amendment rights." *Smith*, 135 N.C. App. at 380, 520 S.E.2d at 312.

In *State v. Grogan*, 40 N.C. App. 371, 375-76, 253 S.E.2d 20, 23-24 (1979), when the trial court failed to make the necessary findings regarding the defendant's motion to suppress, and, on appeal, this Court was "unable to say that the introduction of the evidence sought to be suppressed . . . was harmless," the Court remanded for findings of fact. Here, the State would have had no evidence to support the charges in the absence of the evidence obtained in the search—specifically the cocaine and the scales. Since we cannot say that admission of the evidence in this case would not have had a probable effect on the verdict, we must, as in *Smith*, remand for the trial court to enter a written order with findings of fact and conclusions of law.

The State makes a curious argument that defendant waived any right to have written findings of fact. The State cites *Elliott v. Estate of Elliott*, 163 N.C. App. 577, 596 S.E.2d 819, *cert. denied*, 358 N.C. 731, 601 S.E.2d 530 (2004), and argues that "when a record does not reveal a request for the trial judge to make findings of fact and conclusion [sic] of law an assignment of error asserting that the trial court failed to make those findings and conclusions is properly overruled." As *Elliott* was applying Rule 52(a)(2) of the Rules of Civil Procedure, and this case is, of course, a criminal case, we fail to see how *Elliott* has any relevance. N.C. Gen. Stat. § 15A-977(f) and the precedent under that statute are controlling.

The State also relies upon *State v. Marsh*, 187 N.C. App. 235, 239, 652 S.E.2d 744, 746 (2007), *overruled in part on other grounds by State v. Tanner*, 364 N.C. 229, 695 S.E.2d 97 (2010), in which the defendant challenged the sufficiency of the trial court's findings of fact under N.C. Gen. Stat. § 15A-977(f). In *Marsh*, however, the Court was not addressing the complete absence of a written order, but rather was reviewing an order with "cursory" findings. This Court concluded that those findings were, "under the circumstances of [that] case, adequate" to support the trial court's order denying the defendant's motion to suppress. *Id.* Here, by contrast, "the circumstances" involved a material conflict in the evidence that, *Williams* holds, necessitated a written order with findings of fact resolving the conflict.

Although defendant claims that he is entitled to a new trial as a result of the trial court's omission, we disagree. Defendant relies on *Biggs*, 289 N.C. at 531, 223 S.E.2d at 377, in which the Supreme Court ordered a new trial after concluding that the trial court erred in admitting the defendant's statements to officers without first resolving a conflict in the evidence regarding whether the defendant had waived his right to counsel. Subsequent to *Biggs*, however, the Supreme Court held in *State v. Booker*, 306 N.C. 302, 312-13, 293 S.E.2d 78, 84 (1982), that a trial court's "failure to find facts resolving the conflicting voir dire testimony was prejudicial error requiring remand to the superior court for proper findings and a determination upon such findings of whether the inculpatory statement made to police officers by defendant during his custodial interrogation was voluntarily and understandingly made." In explaining its mandate, the Court observed: "Where there is prejudicial error in the trial court involving an issue or matter not fully determined by that court, the reviewing court may remand the cause to the trial court for appropriate proceedings to determine the issue or matter without ordering a new trial." *Id.* at 313, 293 S.E.2d at 84. Because, in *Booker*, the Court found no other prejudicial error apart from the inadequate findings as to voluntariness, the Court deemed it unnecessary to order a new trial. *Id.*

Based on *Booker*, we hold that the trial court's failure to make written findings does not require remand for a new trial, but remand for further findings of fact. *See also State v. Baker*, 208 N.C. App. 376, 387, 702 S.E.2d 825, 832-33 (2010) (remanding for findings where court failed to make findings resolving material conflict in evidence as to whether reasonable person in defendant's position would not have felt free to leave); *Smith*, 135 N.C. App. at 380, 520 S.E.2d at 312 (remanding for findings where court failed to make findings resolving material conflict in evidence as to whether defendant voluntarily consented to search of his room).

Accordingly, we remand for further findings of fact that resolve the material conflict in the evidence regarding whether a promise was made to defendant in order to obtain his consent to search his apartment. After the trial court makes the necessary findings, it must make appropriate conclusions of law based on those findings. If the trial court determines that the motion to suppress was properly denied, then defendant would not be entitled to a new trial because there would have been no error in the admission of the evidence, and his convictions would stand. If, however, the court determines that the

motion to suppress should have been granted, defendant would be entitled to a new trial.

Remanded.

Judges McGEE and CALABRIA concur.

BUILDERS MUTUAL INSURANCE COMPANY, PLAINTIFF v. HENRY A. MITCHELL, JR., EXECUTOR OF THE ESTATE OF CHARLES CECIL McKINNEY AND HENRY A. MITCHELL, JR., AS TRUSTEE UNDER THE REVOCABLE DECLARATION OF TRUST MADE BY CHARLES C. McKINNEY DATED AUGUST 21, 2001, AS AMENDED AND RESTATED MARCH 21, 2007 AND AS FURTHER AMENDED, UMSTEAD CONSTRUCTION, INC., UMSTEAD CONSTRUCTION GROUP, INC., GARRY K. UMSTEAD, INDIVIDUALLY, KENNETH STEPHENS, VENTERS CONSTRUCTION INC., AND MARYLAND CASUALTY COMPANY, DEFENDANTS

No. COA10-553

(Filed 5 April 2011)

1. Insurance— home construction—issue of fact—defective workmanship or damaging repairs

The trial court should not have granted summary judgment for an insurance company on the issue of whether a policy covered construction defects where there was an issue of fact as to whether some of the damages were the result of faulty workmanship, which would not be covered, or the result of attempted repairs.

2. Insurance— home repairs—exclusion

An insurance exclusion for "your work" would not apply to damages from repair attempts to previously undamaged portions of a house. Such damages would indicate an accident and thus an occurrence covered by the policy.

3. Insurance— defective home construction and repair—date of injury—issue of fact

Whether the date of damages to a house from faulty construction and attempts to repair the defects occurred during an insurer's coverage period was a genuine issue of material fact and should not have been resolved by summary judgment.

4. Insurance— duty to defend—multiple claims

An insurance company had a duty to defend claims for defective construction of a house and damaging repairs where the complaint alleged damages that may be covered by the policy. Where there were multiple claims, the duty to defend was triggered if some may be covered even if others were not.

Appeal by Builders Mutual Insurance Company from judgment entered 22 December 2009 by Judge W. Allen Cobb in New Hanover County Superior Court. Heard in the Court of Appeals 17 November 2010.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Steven C. Lawrence, Attorney for Plaintiff-appellant

Dean & Gibson, PLLC, by Payton D. Hoover, Attorney for Defendant-appellee.

HUNTER, JR., Robert N., Judge.

Charles McKinney, a homeowner, filed an action against Umstead Construction, Inc., ("Umstead") seeking damages arising from faulty repair of his home. Plaintiff Builders Mutual Insurance Company ("BMI"), Umstead's commercial general liability ("CGL") insurer, defended and settled by paying damages following mediation. BMI subsequently filed for declaratory judgment seeking indemnity from Defendant Maryland Casualty Company ("Maryland Casualty"), a previous CGL insurer, for a portion of the settlement and defense costs. The trial court granted summary judgment for Defendant. Plaintiff appeals.

I. Factual and Procedural Background

Charles McKinney owned a home on Figure Eight Island. The home had been constructed by Clancy & Theys Construction Company and completed on or about 15 September 1992. Due to the initial poor workmanship, the McKinney home, after some time, experienced water drainage and rot, resulting in damages to the home's interior, marble terraces, and decks. Umstead, the insured, agreed with McKinney to assess and repair the damages. Umstead began its repair work in February 2000 and continued work until December 2005. At that time, McKinney fired Umstead after discovering the work was not being performed in a workmanlike manner and McKinney was being overbilled.

Umstead had been paid more than $4,300,000.00 at the time it was dismissed. Following this termination, McKinney hired Nick Garret Development, Inc., ("NGDI") to finish the original repairs started by Umstead. NGDI discovered that the defects had not been corrected and the attempted repairs had caused additional damage. For example, water drainage resulted in additional interior and exterior damages.

McKinney filed a complaint on or about 16 February 2007 against Umstead and its subcontractors alleging breach of contract, breach of express and implied warranties, negligence, wilful/negligent misrepresentation, unfair and deceptive trade practices, and fraud ("McKinney Case"). BMI defended Umstead under a reservation of rights, retaining its right to deny coverage depending on information discovered in the case.

Prior to the resolution of the McKinney case, BMI filed a complaint for declaratory judgment against interested parties, including Maryland Casualty.[1] Maryland Casualty's Commercial General Liability ("CGL") policy covered Umstead from 1 March 2000 to 1 March 2003. BMI's policy then covered Umstead from 1 March 2003 to 1 March 2006. Following mediation of the McKinney case, BMI paid a settlement. Maryland Casualty was represented by counsel at the mediation, but did not contribute to the settlement or to the defense of Umstead.

Maryland Casualty moved for summary judgment in the declaratory action against BMI. BMI responded with its own motion for summary judgment, seeking contribution of one-half of the defense costs and one-half of the settlement of the McKinney case. On 22 December 2009, the trial court granted summary judgment in favor of Maryland Casualty and dismissed the case with prejudice. The trial court found Maryland Casualty did not have a duty to defend Umstead and was not liable in the underlying case. After filing notice of appeal, BMI filed a motion for relief from summary judgment, pursuant to Rule 60(b) of the Rules of Civil Procedure, which was denied by the trial court on 4 April 2010.

II. Jurisdiction and Standard of Review

Plaintiff BMI appeals from the 22 December 2009 order for summary judgment and from the subsequent 4 April 2010 order dismissing

1. BMI's Complaint was originally filed incorrectly against Zurich American Insurance. Upon motion by BMI, the trial court ordered that the Complaint be amended to substitute Maryland Casualty for Zurich American Insurance.

its Rule 60(b) motion. We have jurisdiction. *See* N.C. Gen. Stat. § 1-277 (2009) (granting an appeal from final orders of superior court); N.C. Gen. Stat. § 7A-27(b) (2009) (stating appeal shall be to this Court).

The "liability of an insurance company under its policy . . . [is] a proper subject for a declaratory judgment." *Nationwide Mut. Ins. Co. v. Aetna Casualty and Surety Co.*, 1 N.C. App. 9, 12, 159 S.E.2d 258, 271 (1968). Summary judgment shall be granted 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 (2009). An order granting summary judgment is reviewed *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). The insured "has the burden of bringing itself within the insuring language of the policy." *Hobson Const. Co. v. Great Am. Ins. Co.*, 71 N.C. App. 586, 590, 322 S.E.2d 632, 635 (1984). If it is "determined that the insuring language embraces the particular claim or injury, the burden then shifts to the insurer to prove that a policy exclusion excepts the particular injury from coverage." *Id.*

III. Argument

A. Policy Coverage for "Property Damage"

[1] The Maryland Casualty policy covering Umstead provided coverage for "property damage" caused by an "occurrence." An "occurrence" is defined by the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." As "accident" is not defined in the policy, we turn to the ordinary usage of the word, which has been construed by our Supreme Court to mean "an unforeseen event, occur[r]ing without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence." *Tayloe v. Indemnity Co.*, 257 N.C. 626, 627, 127 S.E.2d 238, 239-40 (1962) (internal quotation marks omitted).

Maryland Casualty argues that all of McKinney's alleged damages fell outside the scope of its coverage, as they were the result of faulty workmanship and not an "occurrence" under the policy. We find there were material facts at issue that must be decided to determine whether there was an "occurrence" covered by the policy, so summary judgment was inappropriate in this case.

It is true that "a claim for faulty workmanship, in and of itself, is not an occurrence under a commercial general liability policy." 9A Couch on Insurance 3d § 129:4; *see also Prod. Sys., Inc., v. Amerisure Ins. Co.*, 167 N.C. App. 601, 607, 605 S.E.2d 663, 666 (2004) (" '[D]amages based solely on shoddy workmanship . . . are not "property damage" within the meaning of a standard form CGL policy.' " (quoting *Wm. C. Vick Constr. Co. v. Pennsylvania Nat. Mut.*, 52 F. Supp. 2d 569, 582 (E.D.N.C. 1999))). There is no coverage for "repairs to property necessitated by an insured's failure to properly construct the property to begin with." *Prod. Sys., Inc.*, 167 N.C. App. at 607, 605 S.E.2d at 666. Faulty workmanship is not included in the standard definition of "property damage" because "a failure of workmanship does not involve the fortuity required to constitute an accident." 9A Couch on Insurance 3d § 129:4. Liability insurance is not intended to act as a performance bond. *W. World Ins. Co. v. Carrington*, 90 N.C. App. 520, 523, 369 S.E.2d 128, 130 (1988) ("Since the quality of the insured's work is a 'business risk' which is solely within his own control, liability insurance generally does not provide coverage for claims arising out of the failure of the insured's product or work to meet the quality or specifications for which the insured may be liable as a matter of contract."). Thus, for any damages regarding the cost of repairing the faulty workmanship itself, the Maryland Casualty policy would not apply, because the damages for such repair costs would not constitute "property damage" as defined by the policy. However, we agree with BMI that McKinney's claims were not limited to costs associated only with repairs to the faulty workmanship itself.

An "occurrence" as defined by a CGL policy *can* be "an accident caused by or resulting from faulty workmanship *including damage to any property other than the work product*." 9A Couch on Insurance 3d § 129:4 (emphasis added). The distinction is that the damage must be to property "other than the work product." *Id.* The trial court in the present case relied on *Prod. Sys., Inc.*, which found no "property damage" where the only damage was "repair of defects in, or caused by, the faulty workmanship in the initial construction." 167 N.C. App. at 607, 605 S.E.2d at 667. A close reading of *Prod. Sys., Inc.*, however, allows for coverage where the property damaged was not part of the work product itself.

We have explained that our courts have interpreted "property damage" to mean "damage to property that was *previously undamaged* and *not* the expense of repairing property or completing a project that was not done correctly or according to contract in the first

instance." *Id.* at 606, 605 S.E.2d at 666. Whether damage to previously undamaged property is covered depends on whether the damage was an "accident" under the ordinary meaning of the word.

H. Randy Waters, who was hired from NGDI to evaluate the work done by Umstead, provided an affidavit as part of BMI's response and submission in opposition to Maryland Casualty's motion for summary judgment. His affidavit included evidence of at least two instances where damage was done to previously undamaged portions of the home, which had been completed by Clancy & Theys and were not part of the work product of Umstead. In discussing the water intrusion from problems with the roof and gutter system, Waters stated that "[t]he water damage resulting from Umstead Construction, Inc.'s work resulted in damage to interior components of the home that had not been previously damaged." He also stated that NGDI was "required to replace interior tile, carpeting, shelving, trim and bathroom accessories and paint, which had been damaged as a result of water leakage and Umstead's failure to protect these components from physical damage during construction."

In both of these instances, the property damaged was previously undamaged and was not a part of the work product of Umstead. The credibility, expertise, and knowledge of Waters, which was questioned by Maryland Casualty, cannot be settled by summary judgment. For purposes of summary judgment, we must assume the facts in Waters' affidavit are true. *See Collingwood v. General Elec. Real Estate Equities*, *Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) ("All inferences of fact from the proofs offered at [a summary judgment] hearing must be drawn against the movant and in favor of the party opposing the motion.").

In *Iowa Mutual Ins. v. Fred M. Simmons*, *Inc.*, our Supreme Court examined the definition of "accident" in the context of water damage to interior portions of a building. 258 N.C. 69, 128 S.E.2d 19 (1962). There, a company which contracted to re-roof an office building removed the roof and, when it began to rain, immediately covered the uncovered roof with a waterproof covering, putting down heavy material to keep the cover in place. *Id.* at 71, 128 S.E.2d at 20. Nevertheless, some rain did seep in and cause damage to the inside of the building, which was previously undamaged. *Id.* In determining that the damage might be an "accident," the Court made it clear that whether the damage was caused by the insured's negligence was not relevant to determining coverage. *See id.* at 78, 128 S.E.2d at 25. ("To

adopt the narrow view that the term 'accident' in liability policies of insurance, as in the policy here, necessarily excludes negligence would mean that in most, if not all, cases the insurer would be free of coverage and the policy would be rendered meaningless."). The parties disagreed about whether the damage was an "accident." The Court ultimately found that "this is such an issue of fact as should be determined by a jury under proper instructions of the court." *Id.* at 79, 128 S.E.2d at 26.

In this case, Mr. Waters' affidavit alleges that Umstead's work on the roof and gutter system caused damage to previously undamaged portions of the home. It also alleges that Umstead's failure to protect previously undamaged portions of the home resulted in damages to interior property. Either of these may indicate an "accident" happened and thus there was an "occurrence" covered by the policy.

The fact that the accident may have arisen from Umstead's negligence does not prohibit coverage. There is no indication that Umstead intended or expected this damage. *See Waste Mgmt. of Carolina, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 696, 340 S.E.2d 374, 380 (1986) ("Whether events are 'accidental' and constitute an 'occurrence' depends upon whether they were expected or intended from the point of view of the insured."). The extent and nature of the damage to previously undamaged property is a genuine issue of material fact that is properly decided by a jury. Having alleged sufficient facts to put some of the damages within the coverage of the policy, the burden shifts to the insurance company to prove an exclusion applies. *Hobson Const. Co.*, 71 N.C. App. at 590, 322 S.E.2d at 635.

B. Exclusions

[2] Maryland Casualty claims the "your work" exclusion would apply to all of the damage alleged, as the damage was a result of Umstead's work. "Your work" is defined by the policy to be "[w]ork or operations performed by [the insured] or on [the insured's] behalf" and also includes "[m]aterials, parts or equipment furnished in connection with such work or operations." Although this would exclude Umstead's faulty workmanship itself from coverage, it would not exclude damage to the completed, undamaged work of Clancy & Theys that was not the subject of Umstead's repairs.

It is unclear which exclusion Maryland Casualty is claiming applies in this case. The exclusions listed in section I.A.2.j(5) and (6) of Maryland Casualty's insurance policy covering Umstead concern

"that particular part of" property on which the insured is working. The words "particular part of" limit these exclusions to the work itself. Section I.A.2.k of the policy excludes " '[p]roperty damage' to 'your product' arising out of it or any part of it." This provision only applies to "your product," which is the work of the insured. Section I.A.2.l of the policy excludes " '[p]roperty damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.' " Again, this only applies to damage to "your work." None of these exclusions apply to previously undamaged property that is not part of the insured's work product.

In *W. World Ins. Co.*, the Court found that a work product exclusion applied, but only after drawing a distinction between the case before the Court, where the only claim was for costs to replace the defective work, and other cases where the damages involved costs other than those for repairing or replacing the work product. 90 N.C. App. 520, 369 S.E.2d 128.

Maryland Casualty seeks a definition of "your work" that would include all damage arising out of Umstead's work, even damage to property other than the work product itself. This reading would be too broad. Waters' statements refer to damages done to property other than Umstead's work as defined by the policy. Maryland Casualty has not met its burden of showing the applicability of an exclusion. *See Nationwide Mut. Fire Ins. Co. v. Allen*, 68 N.C. App. 184, 188, 314 S.E.2d 552, 554 (1984) ("Once it has been determined that the insuring language embraces the particular claim or injury, the burden then shifts to the insurance company to prove a policy exclusion excepts the particular injury from coverage."). Whether this damage occurred and the extent of such damage are genuine issues of material fact to be decided at trial.

C. Period of Coverage

[3] The trial court found Maryland Casualty was not liable under the holding in *Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 524 S.E.2d 558 (2000). "[W]here the date of the injury-in-fact can be known with certainty, the insurance policy or policies on the risk on that date are triggered." *Id.* at 303, 524 S.E.2d at 564. Maryland Casualty argues that the date of the injury-in-fact in this case cannot be known with certainty, and thus the injury-in-fact test is not the appropriate standard. Whether the date can be known with certainty is a genuine issue of material fact and should not have been resolved by summary judgment.

Waters' affidavit alleges damages that happened during the Maryland Casualty coverage period. Waters first states, "Regarding the time frame within which damage would have occurred[,] . . . our investigation indicated that damage began occurring to the home at the time that certain work was performed that allowed water intrusion into the home, including work related to the roof and sheathing, and the internal roof/gutter drainage system of the home." His affidavit then details the timeline for the work performed on the roof and gutter system from June 2000 through January 2003. He goes on to explain that "[w]ater intrusion damage would have begun at the time of the first significant rain after the original work was performed by Umstead Construction on siding, exterior trim, roofing and gutter drainage, doors and windows, and would have continued through the time that we completed our repairs and reconstruction." The inference could be drawn that water damage caused by the roofing problems occurred during the Maryland Casualty Period, as Umstead's original work on the roofing and gutter systems was first performed during that period.

In addition, Waters stated that "approximately two-thirds (2/3) to 70% of the damages would have more likely than not occurred between early 2000 and February 28, 2003, although the continuation of water intrusion based upon improper work on the roofing, gutter and drainage system which was performed prior to February 28, 2003, would have continued until we eventually corrected the defective work after we began work on the project in 2006." Whether these statements establish a date that can be "known with certainty" is a matter of fact for trial and not appropriate for summary judgment.[2]

D. Duty to Defend

[4] The trial court found that Maryland Casualty had no duty to defend. Because the Complaint alleged damages that may be covered by the policy, we hold that Maryland Casualty did have a duty to defend Umstead in the McKinney case.

The duty to defend is broad and is independent of the duty to pay. *Waste Mgmt. of Carolina, Inc. v. Peerless Ins. Co.*, 315 N.C. at 691, 340 S.E.2d at 377 (1986) ("When the pleadings state facts demon-

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2. BMI argues that since the affidavit indicates between two-thirds and seventy percent of the damage was done during Maryland Casualty's period, their request for one-half of the settlement amount and defense costs eliminates any issue of fact. We disagree and conclude that the proportion of damage attributable to the Maryland Casualty coverage period is an issue of fact for the jury.

strating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable.").

"Although the insurer's duty to defend an action is generally determined by the pleadings, facts learned from the insured and facts discoverable by reasonable investigation may also be considered." *Duke Univ. v. St. Paul Fire & Marine Ins. Co.*, 96 N.C. App. 635, 638, 386 S.E.2d 762, 764 (1990). There is a duty to defend "[w]here the insurer knows or could reasonably ascertain facts that, if proven, would be covered by its policy." *Waste Mgmt. of Carolinas, Inc.*, 315 N.C. at 691-92, 340 S.E.2d at 377-78. This is true even where the facts appear to be outside coverage or within a policy exception. *Id.* If the insurer fails to defend, it is "at his own peril: if the evidence subsequently presented at trial reveals that the events are covered, the insurer will be responsible for the cost of the defense." *Id.* In *Waste Mgmt. of Carolinas, Inc.*, the Court noted that "the modern acceptance of notice pleading and of the plasticity of pleadings in general imposes upon the insurer a duty to investigate and evaluate facts expressed or implied in the third-party complaint as well as facts learned from the insured and from other sources." *Id.*

Any doubt as to coverage is to be resolved in favor of the insured. *Id.* at 693, 340 S.E.2d at 378. "If the claim is within the coverage of the policy, the insurer's refusal to defend is unjustified even if it is based upon an honest but mistaken belief that the claim is not covered." *Duke Univ.*, 96 N.C. App. at 637, 386 S.E.2d at 764.

As discussed above, there are facts alleged which, if true, point to "property damage" as defined by the policy. The Complaint by McKinney alleged that, "[d]ue to [Umstead's] conduct, as described herein, [McKinney has] suffered damages to [his] home including, but not limited to, excessive moisture levels within the walls and exterior and interior wood and interior and exterior damages, all of which has resulted in substantial diminution in the value of [his] home." These damages were alleged to result from a list of defects including "improper or inadequate installation of roof materials including flashing" and "improper and inadequate installation of the gutter system." McKinney's request for damages included "all other costs necessary to completely repair Plaintiff's house (including interior damage and landscaping) or in the alternative, the diminution in value of Plaintiff's house." Although the Complaint did not specifically allege damage to previously undamaged portions of the home, the interior damage alleged and substantial diminution in value both suggest

damage to previously undamaged portions of the home. Where, as here, there are multiple claims, if some of the claims may be covered, even if others are not, the duty to defend is triggered. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 735, 504 S.E.2d 574, 578 (1998). With a quick look at the invoices from Umstead, Maryland Casualty would have seen that the roof and gutter damages may have occurred during their period of coverage. There was a duty to defend, which is independent of the duty to pay, and Maryland Casualty should have defended the underlying action.

IV. Conclusion

There is a genuine issue of material fact as to whether there was "property damage" as defined by the policy, because there are allegations of damage to previously undamaged property that could constitute an "accident" and thus an "occurrence" under the policy. These allegations would not be prohibited by the "your work" exclusion, since they are not damages to the work product itself. There is also a genuine issue of material fact as to whether the damage occurred during Defendant's period of coverage. As such, summary judgment was inappropriate, and the case should be remanded for determinations of fact on these issues. In addition, Defendant had a duty to defend based on the allegations of the Complaint, facts Defendant knew or should have known, and the broad definition of the duty as set forth in our case law. We therefore reverse and remand to the trial court for further proceedings in accordance with this opinion.

Reversed and Remanded.

Judges STEELMAN and STEPHENS concur.

APAC-ATLANTIC, INC., PETITIONER v. CITY OF SALISBURY, CITY OF SALISBURY ZONING BOARD OF ADJUSTMENT, AND DAVID PHILLIPS, IN HIS CAPACITY AS ZONING ADMINISTRATOR, RESPONDENTS

No. COA10-591

(Filed 5 April 2011)

Zoning— denial of site plan renovation—impermissible expansion or enlargement of nonconforming use

The superior court did not err by concluding that a city zoning board of adjustment correctly interpreted section 13.3(C) of a land zoning ordinance in denying approval of petitioner's site plan for renovation of its asphalt plant. An increase in the scope, scale, or extent of a nonconforming use, namely the new equipment expanding plaintiff plant's maximum operating capacity, constituted an impermissible expansion or enlargement of the non-conforming use.

Appeal by petitioner from order entered 3 December 2009 by Judge Lindsay R. Davis Jr. in Rowan County Superior Court. Heard in the Court of Appeals 1 December 2010.

Nexsen Pruet, PLLC, by M. Jay DeVaney, Eric H. Biesecker, and Brian T. Pearce, for petitioner-appellant.

Brooks Pierce McLendon Humphrey & Leonard, LLP, by Darrell A. Fruth and V. Randall Tinsley, for respondents-appellees.

MARTIN, Chief Judge.

Petitioner APAC-Atlantic, Inc. appeals from the superior court's order affirming the decision of respondent City of Salisbury Zoning Board of Adjustment ("the Board") to deny approval of petitioner's site plan for renovation of its asphalt plant. The following evidence was presented at the Board meeting.

Petitioner operates a hot-mix asphalt plant on its property located at 1831 Jake Alexander Boulevard West in Salisbury, North Carolina. In March 2001, petitioner's property was re-zoned from Heavy Industrial (M-2) to General Business (B-6). Petitioner's property is also located within a General Development-A Overlay district (GD-A). The re-zoning made petitioner's use of the property as an asphalt plant a non-conforming use pursuant to section 4.02 of the then-applicable City of Salisbury Zoning Ordinance ("the Zoning Ordinance").

In March 2007, petitioner sought approval to modify its facility and requested a zoning interpretation from David Phillips, the City of Salisbury Zoning Administrator. Petitioner's proposed renovations to its facility include replacement of the bag house, the materials silos, and the conveyer system. Currently, petitioner's plant operates as an "old batch plant" which "mixes up one batch of hot mix at a time." The proposed renovations involve replacing batch equipment with continuous equipment which would "maintain[] a continuous flow of asphalt throughout the operating period." In a letter dated 28 March 2007, the Zoning Administrator provided an interpretation of section 7.01 of the Zoning Ordinance, which governed non-conforming uses of property, and, based on the application of the ordinance to the information before him, allowed petitioner to "proceed with the design of the facility." In August 2007, as was required by sections 16.02 and 16.03 of the Zoning Ordinance, petitioner submitted a site plan describing its proposed modifications for approval by the Zoning Administrator.[1] By letter dated 19 December 2007, the Zoning Administrator interpreted section 7.01 of the Zoning Ordinance and denied petitioner's request for approval of the site plan.

In December 2007, the City of Salisbury enacted the Land Development Ordinance ("the LDO"), which, effective 1 January 2008, replaced the Zoning Ordinance. Section 13 of the LDO regulates non-conforming uses of property. Section 13.1, titled "Purpose and Applicability," provides, in relevant part that,

> [m]any nonconformities may continue, but the provisions of this section are intended and designed to limit substantial investment in nonconformities and to bring about eventual elimination and/or lessen their impact upon surrounding conforming uses in order to preserve the integrity of the area in which it is located.

City of Salisbury, N.C., Land Development Ordinance, § 13.1 (2008).[2] Section 13.3, titled "Nonconforming Uses," provides, in relevant part that,

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1. The record indicates that section 16.02 of the Zoning Ordinance provided that a permit for excavation, construction, or alteration shall not be valid until the zoning administrator has certified that the plans, specifications or intended use conform to the provisions of the Zoning Ordinance.

2. A non-conforming use is defined as "[a] use which was once a permitted use on a parcel of land or within a structure but which is now not a permitted use of that parcel or structure . . . ." LDO § 18. A permitted use is defined as "[a] use permitted in a given district as a permitted use and so authorized by being listed, or referenced as a permitted use, by district . . . ." LDO § 18.

B. A nonconforming use shall not be expanded, changed or enlarged, nor shall such a nonconforming use be enlarged by additions to the structure in which the nonconforming use is located (either attached or detached). Any occupation of additional lands beyond the boundaries of the lot on which the nonconforming use is located is prohibited.

C. A nonconforming use may make necessary alterations to enhance the health, safety, and general welfare of the community by mitigating environmental impacts to air, ground, or water quality; however, these necessary alterations shall not expand or enlarge the nonconforming use.

LDO § 13.3(B)-(C).

By letter dated 20 March 2008, petitioner requested review by the Board of the Zoning Administrator's decision and submitted the required application and fee. However, in April 2008, the Zoning Administrator informed petitioner that it would need to resubmit its site plan in order to be heard at the Board's May 2008 meeting. Petitioner complied with the Zoning Administrator's instruction by letter dated 7 April 2008 and, by letter dated 18 April 2008, the Zoning Administrator again denied approval of the site plan based on the same grounds as those cited in his 19 December 2007 letter. The Board heard petitioner's appeal at its 12 May 2008 meeting, concluded that the LDO governed the appeal, applied the provisions of the LDO, and affirmed the Zoning Administrator's decision.

In July, the Board issued a written decision documenting its 12 May 2008 decision, within which it concluded the following, in relevant part:

7. . . . [T]he Proposed Modifications would "change" the Applicant's non-conforming use at the facility in violation of Section 13.3(B) of the LDO. The evidence showed that the Proposed Modifications would change the use in at least the following ways:

(a) the process used to make asphalt would change from a batch process to a continuous process,

(b) the maximum operating capacity of the plant would change, and

(c) the capacity to recycle asphalt would change.

8. . . . [T]he Proposed Modifications do not meet the requirements of Section 13.3(C) of the LDO for each of the following independent reasons:

(a) The Applicant has failed to demonstrate that alterations in the Proposed Modifications are "necessary." In particular, the Applicant has not identified any Federal, State, or local rule, regulation or other requirement mandating the Proposed Modifications;

(b) The Proposed Modifications would impermissibly "expand" or "enlarge" the Applicant's non-conforming use at the facility in that the Proposed Amendments would:

i. expand the maximum operating capacity of the plant;

ii. expand the capacity of the plant to recycle asphalt;

iii. enlarge the commercial viabilityof the plant by reducing future operating costs.

In August 2008, petitioner filed a petition for writ of certiorari to Rowan County Superior Court, requesting review of the Board's decision pursuant to N.C.G.S. § 160A-388(e2). In November 2009, the superior court conducted a hearing where it heard testimony and arguments from counsel and, on 3 December 2009, entered an order and memorandum of decision affirming the Board's decision. Petitioner appeals from that order.

"When a superior court grants certiorari to review the decision of a board of adjustment, the superior court sits as an appellate court, and not as a trier of facts." *Overton v. Camden Cty.*, 155 N.C. App. 391, 393, 574 S.E.2d 157, 159 (2002) (internal quotation marks omitted); *see* N.C. Gen. Stat. § 160A-388(e2) (2009) (providing for appellate review of zoning board of adjustment decisions in the superior court). The superior court's review is limited to determinations of whether (1) the Board committed any errors of law; (2) the Board followed lawful procedure; (3) the petitioner was afforded appropriate due process; (4) the Board's decision was supported by competent evidence in the whole record; and (5) the Board's decision was arbitrary and capricious. *Overton*, 155 N.C. App. at 393, 574 S.E.2d at 159. "If a petitioner contends the Board's decision was based on an error of law, 'de novo' review is proper. However, if the petitioner contends the Board's decision was not supported by the evidence or was arbi-

trary and capricious, then the reviewing court must apply the 'whole record' test." *Four Seasons Mgmt. Servs., Inc. v. Town of Wrightsville Beach*, — N.C. App. —, —, 695 S.E.2d 456, 462 (2010). In applying the whole record test, "[t]he trial court examines the whole record to determine whether the agency's decision is supported by competent, material, and substantial evidence." *Cumulus Broadcasting, LLC v. Hoke Cty. Bd. of Comm'rs*, 180 N.C. App. 424, 426, 638 S.E.2d 12, 15 (2006). "[T]he trial court may not weigh the evidence presented to the agency or substitute its own judgment for that of the agency." *Id.* (internal quotation marks omitted). "[W]hen sitting as an appellate court to review a [decision of a quasi-judicial body], [the trial court] must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review." *Four Seasons*, — N.C. App. at —, 695 S.E.2d 462-63 (alterations in original) (internal quotation marks omitted). "An appellate court's review of the trial court's zoning board determination is limited to determining whether the superior court applied the correct standard of review, and to determin[ing] whether the superior court correctly applied that standard." *Overton*, 155 N.C. App. at 393-94, 574 S.E.2d at 160. Finally, we note that "[n]onconforming uses . . . are not favored under the public policy of North Carolina." *Jirtle v. Bd. of Adjustment for Biscoe*, 175 N.C. App. 178, 181, 622 S.E.2d 713, 715 (2005). "In accordance with this policy, zoning ordinances are strictly construed against indefinite continuation of non-conforming uses." *Huntington Props., LLC v. Currituck Cty.*, 153 N.C. App. 218, 223, 569 S.E.2d 695, 700 (2002) (internal quotation marks omitted).

In its petition for writ of certiorari to the superior court, petitioner contended the Board erred by concluding that the new equipment would expand or enlarge the non-conforming use of the property. The superior court's order states that it applied "de novo and 'whole record' review" to the Board's "determinations regarding 'expansion' and 'enlargement' " because those determinations were "based on [the Board's] interpretation of the language of the LDO and [the Board's] factual determinations regarding the effects of the proposed modifications." We agree with the superior court that application of whole record and de novo review to separate components of the Board's decision that the proposed modifications would expand or enlarge the non-conforming use was appropriate. *See generally Land v. Village of Wesley Chapel*, — N.C. App. —, —, 697 S.E.2d 458, 461 (2010) (noting that a court may properly employ both de novo and the whole record test in a specific case so long as the stand-

ards are applied separately to discrete issues); *Malloy v. Zoning Bd. of Adjustment of Asheville*, 155 N.C. App. 628, 630, 573 S.E.2d 760, 762 (2002) (applying whole record and de novo review to the Board's determinations that a new tank was a "structure" as defined in the applicable ordinance). Thus, we proceed to determine whether the superior court correctly applied these standards.

On appeal to this Court, petitioner contends the superior court erred in concluding that the Board correctly interpreted section 13.3(C) of the LDO. We disagree.

Petitioner contends the Board erred by concluding that the proposed modifications would expand or enlarge the non-conforming use pursuant to section 13.3(C) by expanding the maximum operating capacity of the plant. Testimony from the Board meeting indicated that the current permitted production capacity of the plant is 180 tons of asphalt per hour and that the permitted production capacity of the plant with the new equipment would be 300 tons of asphalt per hour. Larry Brickey, President of Thompson-Arthur, a division of APAC-Atlantic, Inc., testified that this increase would allow the plant to run at capacity with shorter hours.

Our Courts have consistently recognized that an increase in the scope, the scale, or the extent of a non-conforming use constitutes an enlargement of a non-conforming use. *See In re O'Neal*, 243 N.C. 714, 723, 92 S.E.2d 189, 195 (1956); *Malloy*, 155 N.C. App. at 632, 573 S.E.2d at 763; *Huntington*, 153 N.C. App. at 227, 569 S.E.2d at 702; *Kirkpatrick v. Village Council for Pinehurst*, 138 N.C. App. 79, 86, 530 S.E.2d 338, 343 (2000). In *Kirkpatrick*, this Court held that the construction of additional campsites within the geographic area of an existing campground, a non-conforming use, impermissibly enlarged the scope of the non-conforming use under the applicable ordinance. *Id.* at 87, 530 S.E.2d at 343. Similarly, in *O'Neal*, our Supreme Court held that an ordinance providing that a non-conforming use shall not be "enlarged or extended" confined the non-conforming use "to its then scale of operation." 243 N.C. at 723, 92 S.E.2d at 195. In *O'Neal*, evidence indicated that a proposed new nursing home would only have the capacity to accommodate twenty-four patients while the petitioner's current facility had previously accommodated up to twenty-seven patients. *Id.* at 717, 92 S.E.2d at 191. Under those circumstances, the Court held that construction of a new facility was not prohibited so long as "the size of the new facility and the scale of its operation . . . conform[ed] substantially to the nonconforming use existent when the . . . ordinance was adopted." *Id.* at 723, 92 S.E.2d at 195.

In the present case, the Board found that the new equipment would expand the plant's operating capacity. On appeal, petitioner does not dispute this finding. Petitioner only contends the Board's conclusion was erroneous because market demand, not operating capacity, controls the amount of asphalt the plant produces and there is no evidence that market demand would increase as a result of the proposed modifications. However, under our prior holdings, renovations resulting in the capacity for an expansion in the scope of the non-conforming use constituted an impermissible enlargement of a non-conforming use, *Kirkpatrick*, 138 N.C. App. at 87, 530 S.E.2d at 343, and the construction of a new building was permissible only where the new building would "*provide facilities* for the operation of a nursing home on substantially the same scale," *O'Neal*, 243 N.C. at 724, 92 S.E.2d at 196 (emphasis added). Here, at least one result of the proposed modifications would be an expanded capacity to produce asphalt. Therefore, in accordance with the rationale articulated in *Kirkpatrick* and *O'Neal*, an enlargement or expansion in the plant's maximum operating capacity constitutes an impermissible enlargement or expansion of the applicant's non-conforming use.

Petitioner also asserts that the whole record lacks competent, material, and substantial evidence to support the Board's finding that the new equipment would enlarge the commercial viability of the plant by reducing future operating costs. Petitioner contends the plant's commercial viability "depends on many unanswered questions." Petitioner claims "the only thing addressed at the hearing was the longevity of the current equipment" and, on this subject, directs our attention to testimony that the current equipment could continue in service "indefinitely" or "for the next fifty years with only very little maintenance." Alternatively, petitioner makes various assertions which essentially suggest that by considering the effect of the proposed modifications on the plant's commercial viability, the Board misinterpreted the ordinance. We disagree.

Under whole record review, "the trial court may not weigh the evidence presented to the agency or substitute its own judgment for that of the agency." *Bellsouth Carolinas PCS, L.P. v. Henderson Cty. Zoning Bd. of Adjustment*, 174 N.C. App. 574, 576, 621 S.E.2d 270, 272 (2005). The trial court's review is limited to determining "whether the Board's findings are supported by substantial evidence contained in the whole record." *Malloy*, 155 N.C. App. at 630, 573 S.E.2d at 762. Upon our review of the whole record in this case, we find substantial evidence to support the Board's finding that the proposed modifica-

tions would "enlarge the commercial viability of the plant by reducing future operating costs."

Malcolm Swanson, Engineering Department Head at Astec, Inc., an asphalt plant manufacturer, testified that "technology has advanced to the point where now . . . as manufacturers of asphalt plants, we build only about 2% batch plants" and that "it really is equipment whose day has passed as far as efficiencies and emissions are concerned." He testified that the new equipment would "reduce[] material costs," including fuel, which, with the current equipment, is lost between batches. He testified that

> [i]t's characteristic of a batch plant to operate for short periods of time. Each start/stop cycle has a warm-up involved and [a] certain amount of wasted material involved, so when you eliminate that you eliminate a certain amount of wasted energy. Also, heat loss is an important factor in affecting the amount of fuel that's used by a process. . . . [H]eat loss, of course, corresponds to extra fuel usage . . . . Overall, fuel consumption would be expected to be reduced by about 35% . . . .

He described the new equipment as "state-of-the[-]art" and the current equipment as "1953[,] vintage equipment." Additionally, Mr. Brickey testified that the new equipment would enable the plant to handle orders more efficiently and that "you're going to save fuel, you are going to have better operational costs, and you are going to recoup those costs over time." In sum, the testimony indicates the new equipment would significantly decrease operating costs and enable the plant to operate more efficiently. This testimony was sufficient to support a finding that the new equipment would enlarge the plant's commercial viability. Petitioner's brief merely lists additional factors not discussed at the Board meeting that could potentially affect the plant's commercial viability. In doing so, petitioner asks this Court to re-weigh the evidence presented to the Board. We are not permitted to do so. Furthermore, there is no merit to petitioner's contention that the Board misinterpreted the ordinance by considering the plant's commercial viability. Because "one of the functions of a Board of Adjustment is to interpret local zoning ordinances," we must "give some deference to the Board's interpretation of its own City Code." *CG&T Corp. v. Bd. of Adjustment of Wilmington*, 105 N.C. App. 32, 39, 411 S.E.2d 655, 659 (1992); *see also Four Seasons*, ___ N.C. App. at ___, 695 S.E.2d at 463; *Whiteco Outdoor Adver. v. Johnston Cty. Bd. of Adjustment*, 132 N.C. App. 465, 470, 513 S.E.2d 70, 74 (1999). In the present case, the Board did not err by

considering the plant's commercial viability in concluding that the proposed modifications would expand or enlarge the non-conforming use.

Petitioner also contends the Board misinterpreted section 13.3(C) of the LDO by concluding that the proposed modifications would expand or enlarge the applicant's non-conforming use of the property based on a finding that the proposed modifications would "expand the capacity of the plant to recycle asphalt." Petitioner suggests the plant's capacity to recycle asphalt was irrelevant under section 13.3(C) because recycled asphalt is a "raw material used in the production of asphalt" and "the non-conforming use in this case . . . is the production of asphalt, not the use of recycled asphalt." Petitioner cites no legal authority in support of its assertion as is required by Appellate Rule 28(b)(6). *See* N.C.R. App. P. 28(b)(6); *Rabon v. Hopkins*, — N.C. App. —, —, 703 S.E.2d 181, 189 (2010) ("Defendants' argument . . . cites absolutely no legal authority in violation of Appellate Rule 28(b)(6)."). Moreover, we disagree that an expanded capacity to recycle asphalt was irrelevant to the Board's decision. Mr. Swanson testified at the Board meeting that petitioner's current equipment is only capable of using about 15% recycled materials, that the proposed equipment would be capable of using up to 50% recycled materials, and that the capability of the new equipment to use more recycled materials would reduce costs. Under the circumstances of this case, we disagree with petitioner that a reduction in the plant's materials costs was irrelevant to the Board's conclusion that the modifications would expand or enlarge the applicant's non-conforming use.

Petitioner also argues that the superior court erred by concluding that the Board did not improperly impose additional requirements from section 13.1 of the LDO, the "Purpose and Applicability" statement, in its conclusions of law. For this argument, petitioner relies only on *Guilford Financial Services, LLC v. City of Brevard*, 150 N.C. App. 1, 563 S.E.2d 27 (2002) (Tyson, J., concurring in part and dissenting in part), *rev'd for reasons in dissent*, 356 N.C. 655, 656, 576 S.E.2d 325 (2003). Because the duplexes proposed in *Guilford* were expressly permitted by the ordinance and complied with the minimum lot area requirement, the Board erred by denying a permit on the basis of the term "unconcentrated" in a statement of purpose providing that the residential district was "established to protect areas in which the principal use of the land is for medium density single and *unconcentrated* two-family dwellings." *Id.* at 15, 17, 563 S.E.2d at 36-37 (emphasis added). Thus, "a generalized statement of intent of the specifications that follow cannot be used as a basis to

reject a permit that meets all the requirements." *Id.* at 15, 563 S.E.2d at 36 (internal quotation marks omitted).

In contrast, in the present case, the Board concluded that sections 13.3(B) and (C) of the LDO precluded the proposed modifications because the modifications would "change" the non-conforming use in violation of section 13.3(B); were not "necessary" under section 13.3(C); and would "expand" or "enlarge" the non-conforming use in violation of section 13.3(C). In numbered paragraphs following those conclusions, the Board stated that it "considered the[] factors [of section 13.1] when reaching the above Conclusions of Law." Because the Board affirmed the denial of the site plan on the basis that the modifications violated sections 13.3(B) and (C) of the LDO and its order demonstrates that, in reaching those conclusions, it merely considered the stated purposes in section 13.1 of the LDO, the Board did not err. *See Kirkpatrick*, 138 N.C. App. at 85-86, 530 S.E.2d at 342 (noting the Board's interpretation of its ordinance was "in accordance with the stated intent of the ordinance 'not to encourage . . . continued [nonconforming] use, and to prohibit any further nonconformance or expansion thereof' " (alterations in original)).

Finally, petitioner contends section 13.3(C) is an exception to 13.3(B) and permits the proposed modifications. We disagree.

Section 13.3(B) provides that "[a] nonconforming use shall not be expanded, changed or enlarged." LDO § 13.3(B). Section 13.3(C) provides that "[a] nonconforming use may make necessary alterations to enhance the health, safety, and general welfare of the community by mitigating environmental impacts to air, ground, or water quality; *however, these necessary alterations shall not expand or enlarge the nonconforming use.*" LDO § 13.3(C) (emphasis added). Even accepting that petitioner's suggestion that section 13.3(C) permits changes to non-conforming uses as an exception to 13.3(B) has merit, such changes would nevertheless be impermissible under section 13.3(C) if those changes would "expand or enlarge the nonconforming use." Thus, due to our prior conclusion that the Board did not err by concluding that the proposed modifications constitute an expansion or enlargement of the applicant's non-conforming use, the proposed modifications would be impermissible.

Affirmed.

Judges McGEE and ERVIN concur.

[210 N.C. App. 678 (2011)]

MARY E. DAFFORD, PLAINTIFF v. JP STEAKHOUSE LLC, AND SAGEBRUSH OF NORTH CAROLINA LLC, DEFENDANT

No. COA10-101

(Filed 5 April 2011)

1. Appeal and Error— violation of appellate rules—plaintiff's violations nonjurisdictional—defendant's counsel taxed printing costs

Although plaintiff's brief did not strictly comply with the relevant provisions of N.C. R. App. P. 28, those deficiencies constituted a violation of nonjurisdictional requirements that did not lead to dismissal of the appeal. Defendant's single-spaced brief violated N.C. R. App. P. 26(g)(1). Pursuant to N.C. R. App. P. 34, the Court of Appeals sanctioned defendant's counsel by requiring that they pay the printing costs of the appeal.

2. Negligence— damages—denial of motion for new trial—no abuse of discretion

The trial court did not abuse its discretion in failing to grant plaintiff's motion for a new trial in a negligence case on the issue of damages based on plaintiff's claim that the jury entered into a compromise verdict. Plaintiff's evidence of damages was disputed and the jury may award damages based on the evidence they find credible and may disregard the evidence they do not find credible.

3. Appeal and Error— liability—denial of motion of directed verdict—moot

Plaintiff's argument that the trial court erred by denying her motion for a directed verdict as to defendant's liability in a negligence case was not addressed by the Court of Appeals. The issue was moot as the jury found that defendant was negligent.

4. Appeal and Error— denial of petition for costs—no written order

The Court of Appeals did not address plaintiff's argument that the trial court erred by denying her petition for costs as there was no written order entered regarding plaintiff's petition.

Appeal by plaintiff from judgment entered 31 August 2009 and order entered 8 October 2009 by Judge Franklin F. Lanier in Superior Court, Harnett County. Heard in the Court of Appeals 30 August 2010.

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

Allen, Kopet and Associates, PLLC, by Stephen F. Dimmick and Scott J. Lasso, for defendant-appellees.

STROUD, Judge.

Plaintiff slipped on "a dollop of creamy, yellow. . . . unattended butter" on the floor of defendants' restaurant; due to injuries sustained in her fall, plaintiff filed a complaint against defendants for negligence. After trial of plaintiff's claim, the jury found that plaintiff was injured by defendants' negligence and that she should recover $4,635.70 for her injuries. Plaintiff filed a motion for a new trial[1] and a "PETITION FOR COSTS[;]" the trial court denied both. Plaintiff appeals the trial court's judgment awarding her $4,635.70, the trial court order denying her request for a new trial, and the trial court's denial of her "PETITION FOR COSTS[.]" For the reasons stated below, we affirm the trial court's judgment awarding damages and order denying a new trial; we dismiss plaintiff's appeal as to the trial court's denial of plaintiff's "PETITION FOR COSTS[.]"

I. Appellate Procedure Rules Violations

[1] Defendants first direct our attention to numerous appellate rule violations on the part of plaintiff. However, defendants themselves have both cited the wrong version of the Rules of Appellate Procedure and committed an appellate rule violation. The North Carolina Rules of Appellate Procedure were revised in 2009, and the revisions are effective for all "appeals filed on or after 1 October 2009." *Latta v. Rainey*, ––– N.C. App. –––, –––, 689 S.E.2d 898, 905 n.4 (2010). Plaintiff's "NOTICE OF APPEAL" was filed 9 November 2009, and thus this case is subject to the newest version of the Rules of Appellate Procedure. *See id.* It appears that neither party proceeded under the revised rules. We will address the errors committed by both parties.

1. On or about 30 July 2009, plaintiff filed a "MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE MOTION FOR NEW TRIAL (Rules 50(b) and 59(a)(6))[.]" The record also contains a 21 September 2009 AMOTION TO SET ASIDE JURY VERDICT AND GRANT NEW TRIAL[;]" however, it does not appear from the record that the 21 September 2009 motion was ever filed or served. On appeal, plaintiff has only addressed her motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, and thus we will only refer to plaintiff's 31 July 2009 motion for a new trial which the record shows was filed and served.

As to plaintiff's appeal, defendant's brief first addresses the fact that plaintiff has abandoned several of her "Assignments of Error" and that her "Assignments of Error" fail to give "clear and specific record or transcript references." However, neither "assignments of error" nor "clear and specific" references for assignments of error are required under the revised rules. In lieu of assignments of error, Rule 10(b) now provides that

> [p]roposed issues that the appellant intends to present on appeal shall be stated without argument at the conclusion of the record on appeal in a numbered list. Proposed issues on appeal are to facilitate the preparation of the record on appeal and shall not limit the scope of the issues presented on appeal in an appellant's brief.

N.C.R. App. P. 10(b).

Defendants also raise a more serious and substantive rule violation by plaintiff as to the content of the notice of appeal. Rule 3(d) states that "[t]he notice of appeal required to be filed and served by subsection (a) of this rule . . . shall designate the judgment or order from which appeal is taken[.]" N.C.R. App. P. 3(d). Rule 3(d) was not substantively changed by the revisions. Plaintiff's notice of appeal, filed on 9 November 2009, gives notice of appeal "from: 1) the Final Order entered on 8 October 2009 in the Superior Court of Harnett County awarding a judgment to the Plaintiff and against Defendants for damages; and 2) all other Orders entered in the Superior Court of Harnett County[.]" However, the judgment which ordered that plaintiff receive a monetary award was entered on 31 August 2009; the order denying plaintiff's motion for a new trial was entered on 8 October 2009. Thus, plaintiff described the 31 August 2009 judgment but gave the date for the 8 October 2009 order in the notice of appeal. The additional language in the notice of appeal as to "all other Orders entered" by the trial court fails to "designate the judgment or order from which appeal is taken[.]" N.C.R. App. P. 3(d).

Furthermore, in plaintiff's brief, she states that she appeals from

> the denial of the Court to enter Judgment on the issue of liability during the trial of this matter at the close of all evidence . . .; the Denial of Plaintiff's Motion for Costs, dated 23 July 2009, . . .; the denial of the Court to grant Plaintiff's Motion for Judgement [sic] Notwithstanding the Verdict or in the Alternative to Award a New Trial, filed 9 October 2009[.]

Thus, considering plaintiff's notice of appeal and plaintiff's brief, we, like defendants, have had some difficulty discerning the precise rulings from which plaintiff is attempting to appeal.

Compliance with Rule 3 is required for this Court to have jurisdiction to consider plaintiff's appeal. *See Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) ("In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure.") However,

> we may liberally construe a notice of appeal in one of two ways to determine whether it provides jurisdiction. . . . First, a mistake in designating the judgment or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake. Second, if a party technically fails to comply with procedural requirements in filing papers with the court, the court may determine that the party complied with the rule if the party accomplishes the functional equivalent of the requirement.
>
> Mistakes by appellants in following all the subparts of Appellate Procedure Rule 3(d) have not always been fatal to an appeal. For example, Rule 3(d) requires the appellant to designate the judgment or order from which appeal is taken. In *Strauss v. Hunt*, 140 N.C. App. 345, 350-51, 536 S.E.2d 636, 640 (2000), however, the appellant omitted an earlier trial court order and referred only to a later order in her notice of appeal, but the Court of Appeals found it could fairly infer her intent to appeal from the earlier order. Although defendant referred only to the 11 June 1999 order in her notice of appeal, we conclude the notice fairly inferred her intent to appeal from the 21 April 1999 order, and did not mislead the plaintiff. Similarly, in *Evans v. Evans*, 169 N.C. App. 358, 363, 610 S.E.2d 264, 269 (2005), the defendant gave notice she appealed an order denying Defendant's claim for child custody and child support, but omitted from the notice of appeal the post-separation support and divorce from bed and board. The Court of Appeals nevertheless found jurisdiction over the post-separation support and divorce from bed and board, concluding it is readily apparent that defendant is appealing from the order dated 18 December 2001 which addresses not only child custody

and support but also post-separation support and divorce from bed and board.

Stephenson v. Bartlett, 177 N.C. App. 241-42, 628 S.E.2d 442, 443-44 (citations, quotation marks, and brackets omitted), *disc. review denied*, 360 N.C. 544, 635 S.E.2d 58 (2006).

Based upon *Stephenson*, we therefore consider whether plaintiff's "intent to appeal from a specific judgment can be fairly inferred from the notice and [whether] the appellee [was] misled by the mistake." *Stephenson* at 241, 628 S.E.2d at 443. Plaintiff's notice of appeal, although confusing, does identify both the judgment awarding damages entered on 31 August 2009 and the order denying plaintiff's motion for a new trial entered on 8 October 2009. However, in addition, in her brief, plaintiff claims also to be appealing from "the Denial of Plaintiff's Motion for Costs, dated 23 July 2009[.]"

Prior cases have determined that where the substantive issues are identified in the notice of appeal, the appellee is not "misled by the mistake." *Id.*; *see, e.g.*, *Strauss v. Hunt*, 140 N.C. App. 345, 350, 536 S.E.2d 636, 640 (2000) ("The 11 June 1999 order referenced in the notice of appeal is the order which denied defendant's motion to alter or amend the 21 April 1999 order. Defendant's motion was based on the same grounds as the two disputed assignments of error—that the court's 21 April 1999 order was in error. It can thus be plainly inferred that defendant intended to appeal the 21 April 1999 order. As plaintiff also knew the substance of defendant's motion to alter or amend, we conclude plaintiff was not misled by this pro se appellant's failure to cite the 21 April 1999 order in her notice of appeal."). Here, the rulings from which plaintiff claims to have appealed do not all raise the same issues. Plaintiff's appeal from the judgment raises the issues of the trial court's denial of plaintiff's motion for directed verdict on the issue of liability.[2] The appeal from both the judgment awarding money and the order denying plaintiff's motion for a new trial put defendant on notice that plaintiff was appealing the damages awarded by the jury.

Plaintiff's purported appeal of the trial court's denial of her "PETITION FOR COSTS" presents legal issues different from either liability or the damages awarded by the jury, as it was based upon dif-

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2. Plaintiff was obviously not contesting the outcome of the liability portion of the trial as defendants were found to be liable, but plaintiff was claiming that a directed verdict should have been granted on liability and that the trial court's failure to do so affected the outcome on the issue of damages.

ferent statutory grounds and was filed and heard separately from the other post-trial motions. However, no written order was ever filed as a result of the hearing on the petition for costs. In the record on appeal, the parties entered into a "STIPULATION AND AGREEMENT OF COUNSEL" which provides that the trial court "in open court denied the petition of Plaintiff's counsel. Counsel for the Plaintiff and counsel for the Defendant submitted proposed orders that were not executed by the presiding judge and thus no written order was made a part of the Record." Yet plaintiff cannot appeal from and this Court cannot consider an order which has not been entered. *See Munchak Corp. v. McDaniels*, 15 N.C. App. 145, 147-48, 189 S.E.2d 655, 657 (1972) ("The general rule is that, the mere ruling, decision, or opinion of the court, no judgment or final order being entered in accordance therewith, does not have the effect of a judgment, and is not reviewable by appeal or writ of error. As to oral opinions it is said that, a mere oral order or decision which has never been expressed in a written order or judgment cannot, under most authorities, support an appeal or writ of error. There is case authority in North Carolina for this rule. In *Taylor v. Bostic*, 93 N.C. 415 (1885) the trial court entered a written statement of his opinion, but no order or judgment was entered. The North Carolina Supreme Court held that the appeal was premature, there being no judgment and therefore no question of law presented from which appeal could be taken." (citations, quotation marks, and brackets omitted)). We therefore conclude that the trial court's oral denial of plaintiff's petition for costs is not reviewable at this time, although the trial court's ruling on plaintiff's petition for costs would be subject to appeal and review after the trial court's entry of a written order.

Defendants also note that plaintiff's brief fails to state a "specific statutory basis for the plaintiff's appeal[,]" "offer proper citations to the record[,]" and provide proper standards of review for each argument pursuant to North Carolina Rule of Appellate Procedure 28(b)(4)-(6). *See* N.C.R. App. P. 28(b)(4)-(6). However, plaintiff's failure to comply with North Carolina Rule of Appellate Procedure 28(b)(4)-(6) is not fatal to plaintiff's appeal. *See Blackburn v. Carbone*, ––– N.C. App. –––, –––, 703 S.E.2d 788, 791 n.1 (2010) ("Plaintiff allegedly violated various provisions of the North Carolina Rules of Appellate Procedure, including . . . 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) . . . . 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." (citation and quotation marks omitted)); *In re Williams*, — N.C. App. —, —, 701 S.E.2d 399, 401 n.2 (2010) ("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. . . . 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."); *Mosteller v. Duke Energy Corp.*, — N.C. App. —, —, 698 S.E.2d 424, 430 (2010) ("We agree with defendant that portions of plaintiff's statement of the facts in her brief violate N.C.R. App. P. 28(b)(5), in that it includes facts without supporting references to pages in the record on appeal or exhibits. However, only in the most egregious instances of nonjurisdictional default will dismissal of the appeal be appropriate." (citation and quotation marks omitted)).

As to defendants' rule violation, both the revised and former versions of the Rules of Appellate Procedure provide that in the briefs "[t]he body of text shall be presented with double spacing between each line of text." N.C.R. App. P. 26(g)(1). Yet defendants' brief is single-spaced. We find it odd that defendants would raise plaintiff's appellate rule violations via a brief that so blatantly fails to comply with such a basic requirement of the appellate rules. We admonish defendants to comply with the Rules of Appellate Procedure, and pursuant to Rule 34, we sanction defendants' counsel by requiring that they pay the printing costs of this appeal and instruct the Clerk of this Court to enter such an order. *See State v. Riley*, 167 N.C. App. 346, 347-48, 605 S.E.2d 212, 214 (2004) ("Before addressing defendant's arguments, we note that defendant's brief is single-spaced, contrary to the requirements of Appellate Rule 26(g). The Rules have contained this requirement since 1988. The Rules are mandatory, and serve particular purposes; this Rule facilitates the reading and comprehension of large numbers of legal documents by members of the Court and staff. Because of this very obvious violation of Rule 26(g), we enter as a sanction that defendant's counsel pay the printing costs of this appeal, and instruct the Clerk of this Court to enter an order accordingly.")

II. Denial of Motion for a New Trial

[2] Plaintiff first argues that the trial court erred in failing to grant her motion for a new trial on the issue of damages pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(a)(7) because "the verdict was inconsistent, and the circumstances so strongly suggest it was reached as a compromise[.]"[3] (Original in all caps.); *see* N.C. Gen. Stat. § 1A-1, Rule 59(a)(7) ("A new trial may be granted to all or any of the parties and on all or part of the issues for . . . [i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law[.]"). Despite plaintiff's description of the verdict as "inconsistent[,]" (original in all caps), plaintiff is not arguing that the jury's answers to issues presented to it were contradictory in any way; instead, plaintiff argues that as defendants' liability for negligence was "undisputed" and plaintiff's evidence of her damages was "uncontroverted[,]" the jury must have entered a verdict by compromise as they found liability for negligence on the part of defendants, but awarded her far less than her "uncontroverted" damages.

This Court reviews a trial court's order on a motion for new trial for abuse of discretion. *See Estate of Smith v. Underwood*, 127 N.C. App. 1, 12, 487 S.E.2d 807, 814, *disc. review denied*, 347 N.C. 398, 494 S.E.2d 410 (1997).

> A motion for a new trial on the grounds of inadequate damages is addressed to the sound discretion of the trial court. Reversal on any ground should be limited to those exceptional cases where an abuse of discretion is clearly shown. An appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice.

Id. (citations, quotation marks, ellipses, and brackets omitted).

In support of plaintiff's argument that the amount of damages was inadequate such that she is entitled to a new trial, plaintiff cites to *Robertson v. Stanley*, 285 N.C. 561, 206 S.E.2d 190 (1974) and *Wilkinson v. Cruz*, 328 N.C. 561, 402 S.E.2d 408 (1991); however, neither *Robertson* nor *Wilkinson* are controlling of this case. In

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3. As a result of the fact that a claim for attorney's fees pursuant to N.C. Gen. Stat. § 6-21.5 is not part of plaintiff's "underlying substantive claim," *Bumpers v. Community Bank of Northern Virginia*, 364 N.C. 195, 200, 695 S.E.2d 442, 446 (2010), the fact that plaintiff's attorney's fee claim has not been resolved in the court below does not deprive us of the ability to decide the remainder of plaintiff's arguments on appeal.

Robertson, causation and medical expenses were stipulated to in the trial before the jury. *See Robertson* at 564, 206 S.E.2d at 192 ("In the consolidated trial of the actions—one by the father for medical expenses and the other by the son for personal injuries—the following was stipulated by counsel and read to the jury: 'In addition to the other stipulations contained herein, the parties stipulate and agree with respect to the following undisputed facts . . . . That at the time of the accident, said Douglas Wayne Robertson was struck by an automobile being operated by the defendant. As a result of the accident, Douglas Wayne Robertson suffered a dislocation of his right sternoclavicular joint which resulted in his hospitalization on three occasions and caused George Dillard Robertson [his father] to incur expenses in the amount of one thousand nine hundred and seventy dollars.' This judicial admission conclusively established in both cases the amount of medical expense incurred by the father and that the injury suffered by the son was the proximate result of being struck by defendant's automobile. This left for jury determination the questions of negligence, contributory negligence, and the amount of damages, if any, Douglas Wayne Robertson, the minor son, was entitled to recover."). In *Wilkinson*, the Supreme Court *per curiam* reversed the Court of Appeals decision without explanation save that their decision was based on Robertson. *Wilkinson* at 568, 402 S.E.2d at 408.

Here, unlike *Robertson*, plaintiff's evidence was controverted by defendants. Defendants contested both the cause of plaintiff's alleged injuries and whether her medical expenses were related to injuries caused by her fall. Plaintiff's alleged injuries included a trapezium fracture, carpal tunnel syndrome, a rotator cuff tear, and a scapholunate ligament tear. Dr. George Edwards, a medical expert witness, testified that there was "less than a 50 percent chance" that plaintiff had a trapezium fracture at all; her carpal tunnel syndrome and scapholunate tear were not caused by her fall; and her rotator cuff tear did not have "anything to do with the injury, primarily because of the lack of symptoms at the time of the injury." Upon review of the testimony and medical records, it is clear that plaintiff's evidence was disputed.

As support for her theory that the jury entered into a compromise verdict, plaintiff argues that the jury's verdict was calculated as follows:

Betsy Johnson Emergency Room	$1,532.70
Cape Fear Valley Hospital	$1,053.00
Carolina Regional Radiology	$2,050.00
Total	$4,635.70

Although plaintiff characterizes the possible method of calculation of damages by the jury as indicating a compromise, plaintiff's calculation may actually demonstrate that the jury based its verdict on the evidence. If plaintiff is correct, then the jury's verdict seems to indicate that they believed that plaintiff sustained injuries in the fall, and therefore, awarded her damages for her initial evaluation and treatment after the fall, but they rejected plaintiff's claim that her further medical expenses were related to her fall. However, whether plaintiff's calculation is correct or not is irrelevant since the jury, as the trier of fact, may award damages based on the evidence they find credible and may disregard the evidence they did not find credible. *Delta Environmental Consultants of N.C. v. Wysong & Miles Co.*, 132 N.C. App. 160, 171, 510 S.E.2d 690, 697 ("Generally, the trier of fact, in this case the jury, must resolve issues of credibility and determine the relative strength of competing evidence."), *disc. review denied*, 350 N.C. 379, 536 S.E.2d 70 (1999). We thus conclude that the trial court did not abuse its discretion in denying plaintiff's motion for a new trial pursuant to Rule 59(a)(7). This argument is overruled.

III. Denial of Motion for a Directed Verdict

[3] Plaintiff also appeals the trial court's denial of her motion for a directed verdict as to defendants' liability. Plaintiff argues that because the trial court did not grant a directed verdict as to defendant's negligence, the jury became "distracted" by the negligence issue and this caused them to compromise as to damages. This seems to be just another way of stating plaintiff's first argument that the jury improperly entered a compromise verdict. However, the jury did find that defendants were negligent in causing plaintiff's injury, and thus this issue is moot as even if we were to agree with plaintiff that the trial court should have granted a directed verdict as to defendant's negligence, this would have no effect on the result. *Roberts v. Madison County Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) ("A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.") The jury did find defendants negligent, and as discussed above, the trial court did not err by its denial of plaintiff's motion for new trial as to damages. This argument is overruled.

IV. Petition for Costs

[4] We will not address plaintiff's last argument as to the trial court's denial of her "PETITION FOR COSTS" as there was no written order entered regarding plaintiff's petition.

V. Conclusion

For the reasons previously stated, we affirm the trial court's 31 August 2009 judgment and 8 October 2009 order.

AFFIRMED IN PART; DISMISSED IN PART.

Chief Judge MARTIN and Judge ERVIN concur.

RICARDO DIAZ, EMPLOYEE, PLAINTIFF v. JERRY MARK SMITH, D/B/A SMITH'S HOME REPAIR, EMPLOYER, TRAVELERS INDEMNITY COMPANY, CARRIER, DEFENDANTS

No. COA10-694

(Filed 5 April 2011)

1. **Parties— aggrieved party—employee awarded all claimed workers' compensation benefits**

   Plaintiff employee was an aggrieved party in a workers' compensation case even though he was awarded all workers' compensation benefits that he claimed because the award affected his ability to collect his monetary benefits and all but negated his ability to receive further treatment.

2. **Workers' Compensation— requirements for cancellation of policy—power of attorney**

   The Industrial Commission erred in a workers' compensation case by concluding that defendant's policy was effectively and properly cancelled under a power of attorney held by a third party and in accordance with N.C.G.S. § 58-35-85. The case was reversed and remanded to the Commission for further proceedings to determine whether defendant insurance carrier complied with N.C.G.S. § 58-36-105.

Appeal by plaintiff from opinion and award entered 19 March 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 January 2011.

The Olive Law Firm, PA, by Juan A. Sanchez, for plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Kelli A. Burns and M. Duane Jones, for defendant-appellee Travelers Indemnity Company.

HUNTER, Robert C., Judge.

Plaintiff Ricardo Diaz appeals from the Industrial Commission's opinion and award in which it awarded plaintiff workers' compensation benefits, but concluded that defendant-employer Jerry Mark Smith's workers' compensation insurance policy had been effectively cancelled by defendant-carrier Travelers Indemnity Company. We agree with plaintiff's contention that the Commission applied the notice requirements of the incorrect statute in determining whether Smith's insurance policy was properly cancelled. Accordingly, the Commission's opinion and award is reversed and remanded.

Facts

Smith began Smith's Home Repair in the summer of 2006. After submitting an application with the North Carolina Rate Bureau, Smith obtained a workers' compensation insurance policy with Travelers as an assigned risk policy. Because Smith could not afford to pay his premium in full, he financed the premium through a third party known as Monthly Payment Plan, Inc. ("MPP"). MPP's financing agreement included a power of attorney provision authorizing MPP to cancel Smith's policy if he failed to make timely payments. Smith signed neither the Travelers' policy nor the MPP financing agreement; both were signed in Smith's name by his insurance agent, David Cantwell. An acknowledgment page, not normally contained in "regular policies," was included at the end of Smith's policy with Travelers, notifying him that, pursuant to the power of attorney clause in the financing agreement, MPP could cancel his policy for non-payment.

In November 2006, MPP cancelled Smith's policy for non-payment of premiums. The policy was reinstated, however, after MPP received Smith's monthly premium payment. After Smith failed to make his premium payment for January 2007, MPP sent Smith a letter dated 2 January 2007, titled "Ten Day Notice," advising Smith that "unless payment is made within ten days from the date of th[e] letter," his workers' compensation policy would be "cancelled through the use of [the] power of attorney that [he] signed." MPP sent copies of this letter by regular mail to Smith's correct address in Asheville, North Carolina, as well as to Cantwell's office. Both Smith and Cantwell received their respective copy of the letter.

After MPP did not receive payment from Smith, MPP sent a "Notice of Cancellation" letter, dated 15 January 2007, notifying Smith of MPP's intent to cancel his policy through the power of attorney provision in the finance agreement. Copies of this notice were sent to Smith's address and Cantwell's; both received the notice. A copy of the notice of intent also was sent to Travelers, notifying the insurer of MPP's intent to cancel Smith's policy through its power of attorney.

By certified mail, Traveler's sent a letter headed "Notice of Cancellation—Nonpayment of Premium Financed Policy," explaining that MPP had "exercised its right to cancel th[e] policy as provided in its agreement with [Smith], due to [Smith]'s delinquent payment status." Although the notice of cancellation stated that it was "issue[d]" on 1 February 2007, it back-dated the cancellation to be effective 25 January 2007. Travelers' notice of cancellation was sent to Smith at the last known address in its file, which was not Smith's then-current address. Smith did not receive the notice; the certified letter was returned undelivered to Travelers on 12 February 2007.

After conducting an audit on 5 March 2007, Travelers returned $317.00 in unearned premiums to MPP. MPP issued Smith a refund check of $225.00. Plaintiff cashed the check without contacting anyone but his insurance agent for an explanation of the refund.

Plaintiff began working for Smith around 17 April 2007 as a framer and roofer, working approximately 40 hours a week at $10.00 an hour. On 20 July 2007, plaintiff fell off the roof on which he was working and injured his left arm. Plaintiff was seen in Mission Hospital's emergency room, where x-rays showed that he had fractured his left humerus and dislocated his left elbow. His elbow was splinted and reduced. On 1 August 2007, plaintiff underwent "open reduction, internal fixation of the humerus, and exploration of the radial nerve."

Plaintiff was released by his doctor to return to sedentary work, without any use of his left arm, on 17 September 2007. On that day, plaintiff filed his claim for workers' compensation benefits. Defendants denied plaintiff's claim "for lack of coverage" on 28 September 2007. Plaintiff did not return to work until 3 January 2008, when he started working for another employer at the same or greater average weekly wage. Plaintiff's doctor assigned a 20% permanent partial impairment rating to his left arm, with lifting restrictions of no more than 40 pounds with his left arm.

After conducting an evidentiary hearing on plaintiff's claim on 29 May 2008, the deputy commissioner entered an opinion and award on 23 December 2008, in which he concluded that plaintiff had sustained a compensable injury on 20 July 2007, and, as a result, was entitled to disability as well as ongoing medical benefits. The deputy commissioner also determined that Travelers had failed to comply with the notice requirements of N.C. Gen. Stat. § 58-36-105 (2009) in attempting to cancel Smith's workers' compensation policy. Thus, the deputy commissioner concluded, Travelers' cancellation was ineffective and the policy was "in full effect" on 20 July 2007.

Defendants appealed to the Full Commission, which issued an amended opinion and award on 19 March 2010, in which the Commission upheld the deputy commissioner's conclusion that plaintiff was entitled to disability and medical benefits as a result his compensable injury. The Commission ruled, however, that N.C. Gen. Stat. § 58-36-105 did not govern the cancellation of Smith's policy and that "Defendant Smith's policy was effectively and properly cancelled pursuant to the power of attorney held by MPP and in accordance with § 58-35-85." Based on this determination, the Commission held that Smith, not Travelers, was liable for plaintiff's benefits. Plaintiff timely appealed to this Court.

I

[1] Before reaching plaintiff's argument for reversal of the Commission's opinion and award, we address Travelers' contention that plaintiff, as he was awarded all workers' compensation benefits that he claimed, is not a "party aggrieved" by the Commission's decision. The Workers' Compensation Act provides that an appeal from an opinion and award of the Industrial Commission is subject to the "same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions." N.C. Gen. Stat. § 97-86 (2009); *Ratchford v. C.C. Mangum, Inc.*, 150 N.C. App. 197, 199, 564 S.E.2d 245, 247 (2002). Under N.C. Gen. Stat. § 1-271 (2009), " '[a]ny party aggrieved' is entitled to appeal in a civil action." *Moody v. Sears Roebuck & Co.*, 191 N.C. App. 256, 262-63, 664 S.E.2d 569, 574 (2008). A "party aggrieved" is one whose legal rights have been denied or directly and injuriously affected by the action of the trial tribunal. *Selective Ins. Co. v. Mid-Carolina Insulation Co.*, 126 N.C. App. 217, 219, 484 S.E.2d 443, 445 (1997). If the party seeking appeal is not an aggrieved party, the party lacks standing to challenge the lower tribunal's action and any attempted appeal must be dis-

missed. *Culton v. Culton*, 327 N.C. 624, 626, 398 S.E.2d 323, 325 (1990), *superseded by statute on other grounds as recognized in In re J.A.A.*, 175 N.C. App. 66, 72-73, 623 S.E.2d 45, 49 (2005).

Generally, when an employee has been awarded the benefits to which he or she claimed entitlement under the Workers' Compensation Act, the employee is not aggrieved and lacks standing to appeal the Industrial Commission's decision. *See Henke v. First Colony Builders, Inc.*, 126 N.C. App. 703, 705, 486 S.E.2d 431, 432 (concluding claimant, who had been "granted workers' compensation benefits, as well as attorney's fees" was not aggrieved by Commission's denial of request for interest to be included in payment to her attorney as "[p]laintiff suffer[ed] no direct legal injury in the denial of interest payments to her attorney"), *appeal dismissed, disc. review denied, and cert. denied*, 347 N.C. 266, 493 S.E.2d 455 (1997). Plaintiff acknowledges that the Commission's decision awards him all the benefits he requested, but contends that he is a "party aggrieved" in that "[t]he decision by the Full Commission adversely affects [his] ability to collect his monetary benefits and all but negates his ability to receive further treatment."

Although the parties fail to point to any North Carolina authority—and we have found none—directly on point, other appellate courts that have addressed this issue have held that an employee is "aggrieved" by a workers' compensation tribunal's determination regarding workers' compensation insurance coverage. *See, e.g.*, *Shope v. Workmen's Comp. Appeals Bd.*, 21 Cal. App. 3d 774, 777, 98 Cal. Rptr. 768, 770 (1971) ("Petitioner was affected by the decision of the Board determining that he had no recovery against Carrier and that he would have to look for recompense to an employer who was no longer in business and whose financial ability to pay the award was problematical. We, therefore, hold that petitioner has standing to have this court review the Board's determination as to the insurance coverage."); *Associated Theaters v. Industrial Acc. Commission*, 57 Cal. App. 105, 107, 206 P. 665, 666 (1922) (holding that employee was a "party aggrieved" entitled to seek review of industrial accident commission's determination that employee's injury was outside the scope of employer's insurance coverage and thus could recover only from employer); *In re Hughes*, 273 P.2d 450, 454 (Okla. 1954) (holding that where benefits for injuries to employee was awarded against employer by an order of the state's industrial commission relieving insurer from liability and there was a possibility that employer would not be able to satisfy award due to lack of assets, employee was a

"party aggrieved" with standing to challenge order). Although not controlling, *see Morton Bldgs., Inc. v. Tolson*, 172 N.C. App. 119, 127, 615 S.E.2d 906, 912 (2005) ("[W]hile decisions from other jurisdictions may be instructive, they are not binding on the courts of this State."), we find these authorities persuasive and conclude that plaintiff is a "party aggrieved" by the Commission's determination that Smith's workers' compensation insurance was properly cancelled.

This conclusion is, moreover, consistent with the long-standing principle that courts "must construe the Work[ers'] Compensation Act liberally so as to effectuate its human purpose of providing compensation for injured employees." *Roper v. J.P. Stevens & Co.*, 65 N.C. App. 69, 73, 308 S.E.2d 485, 488 (1983), *disc. review denied*, 310 N.C. 309, 312 S.E.2d 652 (1984); *see also Hughes*, 273 P.2d at 454 ("We think that, under the proper interpretation of our Workmen's Compensation Law, which we are bound to liberally construe in favor of the employee, when the protection of industrial insurance contemplated in the Act is denied such employee by a final order of the State Industrial Commission he certainly is an 'aggrieved' party. . . .").

II

[2] Turning to plaintiff's contention on appeal, he argues that the Commission erroneously applied N.C. Gen. Stat. § 58-35-85 (2009), which provides the procedures for cancelling an insurance policy financed by a premium finance agreement, in determining whether Smith's workers' compensation insurance policy was effectively cancelled. Plaintiff contends that the procedures set out in N.C. Gen. Stat. § 58-36-105 for cancelling workers' compensation insurance policies governed the cancellation of Smith's insurance policy. Because, plaintiff argues, Travelers failed to follow N.C. Gen. Stat. § 58-36-105's requirements in cancelling Smith's policy, the cancellation was ineffective and Smith's workers' compensation policy was in effect on the date of his compensable injury.

Issues involving statutory interpretation are questions of law, reviewed de novo on appeal. *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009); *see also Oxendine v. TWL, Inc.*, 184 N.C. App. 162, 164, 645 S.E.2d 864, 865 (2007) (reviewing de novo determination of which of two competing statutes controlled in workers' compensation case).

N.C. Gen. Stat. § 58-36-105, titled "Certain workers' compensation insurance policy cancellations prohibited," provides in pertinent part:

> (a) No policy of workers' compensation insurance or employers' liability insurance written in connection with a policy of workers' compensation insurance shall be cancelled by the insurer before the expiration of the term or anniversary date stated in the policy and without the prior written consent of the insured, except for any one of the following reasons:
>
> > (1) Nonpayment of premium in accordance with the policy terms.
>
> . . . .
>
> (b) Any cancellation permitted by subsection (a) of this section is not effective unless written notice of cancellation has been given by registered or certified mail, return receipt requested, to the insured not less than 15 days before the proposed effective date of cancellation. . . . Whenever notice of intention to cancel is required to be given by registered or certified mail, no cancellation by the insurer shall be effective unless and until such method is employed and completed. . . .

N.C. Gen. Stat. § 58-36-105(a)-(b). N.C. Gen. Stat. § 58-35-85 sets out the procedure for cancellation of an insurance policy by an insurance premium finance company:

> When an insurance premium finance agreement contains a power of attorney or other authority enabling the insurance premium finance company to cancel any insurance contract or contracts listed in the agreement, the insurance contract or contracts shall not be cancelled unless the cancellation is effectuated in accordance with the following provisions:
>
> > (1) Not less than 10 days' written notice is sent by personal delivery, first-class mail, electronic mail, or facsimile transmission to the last known address of the insured or insureds shown on the insurance premium finance agreement of the intentof the insurance premium finance company to cancel his or their insurance contract or contracts unless the defaulted installment payment is received. Notification thereof shall also be provided to the insurance agent.
> >
> > (2) After expiration of the 10-day period, the insurance premium finance company shall send the insurer a request for cancellation and shall send notice of the requested cancellation to the insured by personal delivery, first-class mail, electronic mail, electronic transmission, or facsimile transmis-

sion at his last known address as shown on the records of the insurance premium finance company and to the agent. . . .

(3) Upon receipt of a copy of the request for cancellation notice by the insurer, the insurance contract shall be cancelled with the same force and effect as if the request for cancellation had been submitted by the insured, without requiring the return of the insurance contract or contracts.

(4) All statutory, regulatory, and contractual restrictions providing that the insured may not cancel the insurance contract unless the insurer first satisfies the restrictions by giving a prescribed notice to a governmental agency, the insurance carrier, an individual, or a person designated to receive the notice for said governmental agency, insurance carrier, or individual shall apply where cancellation is effected under the provisions of this section.

N.C. Gen. Stat. § 58-35-85(1)-(4).

While the title to N.C. Gen. Stat. § 58-36-105 explicitly provides that the statute applies to workers' compensation insurance policies, this Court, in *Graves v. ABC Roofing Company*, 55 N.C. App. 252, 253-55, 284 S.E.2d 718, 718-19 (1981), held that N.C. Gen. Stat. § 58-35-85's predecessor, N.C. Gen. Stat. § 58-60, applied to workers' compensation policies as well. Thus, both N.C. Gen. Stat. § 58-36-105 and N.C. Gen. Stat. § 58-35-85 appear to be applicable in this case. The Supreme Court has set out the principles of statutory construction applicable when two statutes overlap:

"Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, . . . unless it appears that the legislature intended to make the general act controlling; and this is true *a fortiori* when the special act is later in point of time, although the rule is applicable without regard to the respective dates of passage."

National Food Stores v. Board of Alcoholic Control, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966) (quoting 82 C.J.S. *Statutes* § 369 (1953)).

Plaintiff contends, and we agree, that N.C. Gen. Stat. § 58-35-85 deals with the cancellation of insurance policies in more "general and comprehensive terms" than N.C. Gen. Stat. § 58-36-105, as it applies to any insurance policy financed through a premium finance agreement that includes a power of attorney provision—irrespective of whether it is, for example, a life, automobile, homeowners', or workers' compensation insurance policy. N.C. Gen. Stat. § 58-36-105, in contrast, specifically, and "in a more minute and definite way," addresses the cancellation of workers' compensation insurance policies. *See Oxendine*, 184 N.C. App. at 166, 645 S.E.2d at 866 (holding § 58-36-105, which "applies specifically to workers' compensation insurance," controlled over more general statute providing that fraudulent misrepresentations in "any application for a policy of insurance" may preclude recovery).

Travelers nonetheless points to this Court's holding in *Graves*, 55 N.C. App. at 255, 284 S.E.2d at 719, that the insurer "failed to follow the procedure[s]" set out in N.C. Gen. Stat. § 58-60—the predecessor statute to N.C. Gen. Stat. § 58-35-85—in cancelling the insured's workers' compensation insurance and thus the insured's policy was in effect at the time of the employee's compensable injury. *Graves*, however, was decided in 1981, 20 years before N.C. Gen. Stat. § 58-36-105's enactment in 2001. *See* 2001 N.C. Sess. Laws 241 § 2. Consistent with well-established principles of statutory interpretation, we presume that the General Assembly was aware in 2001 of N.C. Gen. Stat. § 58-35-85's applicability to workers' compensation insurance policies in light of *Graves'* holding, and that the legislature's failure to include any reference to N.C. Gen. Stat. § 58-35-85, to premium finance agreements, or to power of attorney provisions in the language of N.C. Gen. Stat. § 58-36-105 was purposeful. *See State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 763 (1992) (explaining that "[t]o ascertain legislative intent," courts must "presume that the legislature acted with full knowledge of prior and existing law and its construction by the courts").

We hold, therefore, that the Commission erred in concluding that "Defendant Smith's policy was effectively and properly cancelled pursuant to the power of attorney held by MPP and in accordance with § 58-35-85." Travelers makes no argument in its brief that if, as we have held, N.C. Gen. Stat. § 58-36-105 is controlling, Travelers complied with that statute's requirements in cancelling Smith's workers' compensation insurance policy. Nor did the Commission, having ruled that N.C. Gen. Stat. § 58-35-85 was the governing statute,

address whether Travelers complied with N.C. Gen. Stat. § 58-36-105. We, therefore, reverse and remand this case to the Commission for further proceedings to determine whether Travelers complied with N.C. Gen. Stat. § 58-36-105 in attempting to cancel Smith's workers' compensation insurance policy.

Reversed and remanded.

Chief Judge MARTIN and Judge THIGPEN concur.

STATE OF NORTH CAROLINA v. THADDIUS RAEFIELD WRIGHT

No. COA10-794

(Filed 5 April 2011)

1. Criminal Law— defenses—withdrawal—completion of assigned task

The trial court did not err by refusing defendant's requested instruction on the defense of withdrawal in a prosecution for first-degree burglary and assault with intent to kill inflicting serious injury where defendant completed his assigned task when he kicked the victim's door even though he expressed some hesitancy before doing so and even though he left the scene after kicking the door.

2. Criminal Law— failure to give final not guilty mandate—not plain error

The trial court's failure to give the final not guilty mandate in a burglary and assault prosecution did not rise to plain error.

Appeal by defendant from judgment entered 23 November 2009 by Judge Cressie Thigpen, Jr. in Durham County Superior Court. Heard in the Court of Appeals 15 December 2010.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for defendant-appellant.

STEELMAN, Judge.

Where the evidence presented at trial tended to show that defendant completed his assigned task in the home invasion and failed to renounce the common purpose or indicate that he did not intend to participate in the crime any further, the trial court did not err in denying his request to instruct the jury on the defense of withdrawal. Where defendant failed to contend that the trial court's jury instructions amounted to plain error, this issue has been waived and is dismissed.

I. Factual and Procedural Background

On 16 November 2004 at approximately 7:00 p.m., Thaddius Wright (defendant), Jarrett Bishop (Bishop), and Jarrett Thompson (Thompson) were driving around Durham, smoking marijuana. When the men stopped for gas, Thompson stated that he was planning to attack Ruben Garnett (Garnett). The plan was to drive to his apartment, kick the door in, find him, beat him up, and then shoot him. Defendant stated that he did not want to "get a murder charge," but Bishop and Thompson convinced him to kick in the door and then they would attack Garnett.

Defendant's version of the events that occurred next is as follows: when they arrived at Garnett's apartment at approximately 4:30 a.m., Bishop and Thompson exited the vehicle and retrieved guns from underneath the hood of the vehicle. The three men put on gloves and walked up to the glass storm door of Garnett's apartment. Defendant opened the door and stated that he did not want to go through with it. Thompson stated, "Come on man, ain't nobody coming. You ain't got to do nothing, just kick the door." Defendant kicked the door twice. Defendant then panicked and ran back to the vehicle. Defendant heard gunshots coming from the apartment. Approximately one minute later, Bishop and Thompson returned to the vehicle and stated, "[W]e got him."

Garnett lived in the apartment with his cousin, Demoris Wall, and his cousin's girlfriend, Akeisha Judd (Judd). Garnett and Judd were awakened by the kicks at the front door and someone yelling "police." Garnett put a pair of pants on and was walking towards the front door when the door was kicked open. He was shot four or five times in the stomach, groin, and leg. After he was shot, Garnett played dead. Judd called 911.

Officer Douglas Rausch (Officer Rausch) responded to a home invasion call. As he was driving to the apartment, Officer Rausch observed a vehicle drive past him coming out of the area of the apartments. Officer

Rausch turned around and began to follow the vehicle. A high speed chase ensued. The chase lasted almost an hour, moving from Durham County into Orange County. The chase ended when the vehicle crashed into a van. Bishop, Thompson, and defendant were arrested.

Defendant was charged with felonious speeding to elude arrest, cruelty to animals,[1] assault with a deadly weapon with intent to kill inflicting serious injury, and first-degree burglary. Defendant was originally tried by a jury on 23 October 2006. Defendant was found guilty of assault with a deadly weapon with intent to kill inflicting serious injury and first-degree burglary, but acquitted of the felonious speeding to elude arrest and animal cruelty charges. Defendant appealed. On 18 March 2008, this Court reversed defendant's convictions and ordered a new trial based upon error by the trial court in denying defendant's *Batson* challenge to the exercise of peremptory challenges by the prosecutor. *State v. Wright*, 189 N.C. App. 346, 354, 658 S.E.2d 60, 65, *disc. review denied*, ––– N.C. –––, 667 S.E.2d 280 (2008).

On 16 November 2009, defendant was re-tried on the charges of assault with a deadly weapon with intent to kill inflicting serious injury and first-degree burglary. On 20 November 2009, the jury found defendant guilty of each charge. The trial court found defendant to be a prior record level IV for felony sentencing purposes. The trial court consolidated both convictions into one judgment and sentenced defendant to 116 to 149 months imprisonment.

Defendant appeals.

II. Defense of Withdrawal

[1] In his first argument, defendant contends that the trial court erred by denying his request that the jury be instructed on the defense of withdrawal. We disagree.

A. Standard of Review

"A trial court must give a requested instruction that is a correct statement of the law and is supported by the evidence. The trial court need not give the requested instruction verbatim, however; an instruction that gives the substance of the requested instructions is sufficient." *State v. Connor*, 345 N.C. 319, 328, 480 S.E.2d 626, 629 (internal citations omitted), *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997). Where the defendant's requested instruction is not sup-

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1. During the incident, Garnett's dog was killed by two stray bullets.

ported by the evidence, the trial court may properly refuse to give it. *State v. Rose*, 323 N.C. 455, 459, 373 S.E.2d 426, 429 (1988).

B. Analysis

Defendant was tried for first-degree burglary and assault with a deadly weapon with intent to kill inflicting serious injury under the theory of acting in concert.

> If "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof."

State v. Erlewine, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991) (quotation and alteration omitted). Once an individual has joined in a purpose to commit a crime, it is possible for him to withdraw under certain circumstances:

> Where the perpetration of a felony has been entered on, one who had aided or encouraged its commission cannot escape criminal responsibility by quietly withdrawing from the scene. The influence and effect of his aiding or encouraging continues until he renounces the common purpose and makes it plain to the others that he has done so and that he does not intend to participate further.

State v. Spears, 268 N.C. 303, 310, 150 S.E.2d 499, 504 (1966) (citations omitted); *State v. Wilson*, 354 N.C. 493, 507-08, 556 S.E.2d 272, 282 (2001), *disavowed in part by State v. Millsaps*, 356 N.C. 556, 567, 572 S.E.2d 767, 775 (2002). Any withdrawal by a defendant may not be done silently in his own mind without any outward manifestation or communication to the other perpetrators. *Wilson*, 354 N.C. at 508, 556 S.E.2d at 282.

In the instant case, defendant submitted a written request for a jury instruction on withdrawal to the trial court. Defendant argues that he "renounced the common purpose and made it clear to Bishop and Thompson that he did not plan to participate any further." Defendant's argument is misplaced.

In his statement to the police, defendant stated:

> It was previously decided that I would open the door. I went to the house (1422 Wyldewood, Apt. C1) and opened the glass storm

> door. I stepped to the side and said that I did not want to do this but Jarrett (Thompson) said, Come on man, ain't nobody coming. You ain't got to do nothing, just kick the door. So I kicked the door two times but it didn't open. It just cracked. I panicked and ran back to the car. I was running. I turned around and I saw the door open. I heard a kicking sound before I turned around.

Defendant was waiting in the vehicle when he heard gunshots coming from inside of the residence. Bishop and Thompson returned to the vehicle and stated, "[W]e got him."

By his own statement, defendant completed his role in the home invasion as previously agreed upon with Bishop and Thompson. Defendant exited the vehicle, put on a pair of rubber gloves, walked up to the storm door, opened it, and kicked the door twice. The fact that he expressed some hesitancy to participate in the crime before he kicked the door is of no consequence. *See State v. Martin*, 309 N.C. 465, 481, 308 S.E.2d 277, 287 (1983) (holding that the defendants' hesitancy to participate in the robbery did not constitute a withdrawal where they subsequently agreed that the other individuals would enter the store while they sat outside the premises or circled the block waiting for them to commit the crimes). Defendant did not cease his participation in the crime, but rather completed his assigned task.

Defendant also argues that he communicated his withdrawal by physically leaving the scene and returning to the getaway vehicle for the remainder of the incident. We note again, that at that particular time, defendant had joined the common purpose and completed his role in the crime. Further, defendant failed to verbally communicate any intent to withdraw to Bishop and Thompson when he returned to the vehicle.

Because there was no evidence to support the requested instruction on withdrawal, the trial court did not err by denying defendant's request. *Rose*, 323 N.C. at 459, 373 S.E.2d at 429.

This argument is without merit.

III. Jury Instructions

[2] In his second argument, defendant contends that the trial court erred in its jury instructions on first-degree burglary because it failed to instruct jurors of their duty to return a verdict of not guilty if the State failed to meet their burden beyond a reasonable doubt. We disagree.

A. Preservation of Error

Defendant failed to object to the trial court's instructions on first-degree burglary. Generally, when a defendant fails to object to the jury instruction at trial, his challenge is subject only to plain error review. *State v. Maready*, 362 N.C. 614, 621, 669 S.E.2d 564, 568 (2008). However, our Supreme Court has created certain exceptions to this rule. In *State v. Keel*, 333 N.C. 52, 423 S.E.2d 458 (1992), the Court held that where the trial court agreed to give a specific instruction requested by the State, and defense counsel had no objection, that the issue was preserved for appeal under Rule 10(b)(2) of the Rules of Appellate Procedure. *Id.* at 56-57, 423 S.E.2d at 461. The Court reasoned:

> Because the State requested this instruction, and the trial court agreed to give it, the defendant's counsel had no reason to make his own request for this instruction. The State's request, approved by the defendant and agreed to by the trial court, satisfied the requirements of Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure and preserved this question for review on appeal.

Id. (citations omitted). To the contrary, where a party makes a *general* request, without giving specific suggested language, and the defendant fails to object to the instruction given, the issue is not preserved for appeal and is reviewed only for plain error. *State v. Allen*, 339 N.C. 545, 554-55, 453 S.E.2d 150, 155 (1995), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 676, 483 S.E.2d 396, 414 (1997). This is because the trial court "never had the opportunity to cure any perceived errors in the instructions" and "[u]nder these circumstances, the spirit and purpose of Rule 10(b)(2) are not met." *Id.*

In the instant case, the trial court advised counsel of the pattern jury instructions it intended to give to the jury. Neither the State nor defense counsel made a specific request for jury instructions on first-degree burglary. Further, defendant failed to object to the instruction when it was read to the jury. After the trial court charged the jury, both the State and defense counsel were asked whether they had "any requests for any additions or deletions or modifications to the jury instructions" pursuant to Rule 21 of the General Rules of Practice for the Superior and District Courts. Defense counsel replied, "Nothing from the defense, Your Honor." Therefore, defendant's assignment of error is subject only to plain error review on appeal.

> Plain error has been defined as " '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice can-

> not have been done.' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (citation omitted), *cert. denied*, 459 U.S. 1018, 103 S. Ct. 381, 74 L. Ed. 2d 513 (1982)). "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 378-79.

Maready, 362 N.C. at 621, 669 S.E.2d at 568.

B. Analysis

Rule 10 of the North Carolina Rules of Appellate Procedure provides that "[i]n criminal cases, an issue that was not preserved by objection noted at trial . . . may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4) (2010). Defendant failed to "specifically and distinctly" contend that the trial court's jury instructions on first-degree burglary amounted to plain error. Therefore, this issue has been waived on appeal and is dismissed. *State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, —— U.S. ——, 172 L. Ed. 2d 58 (2008).

Even assuming *arguendo* that counsel had properly preserved this issue for appeal, the trial court's jury instructions do not rise to the level of plain error. "It is well established that 'the trial court's charge to the jury must be construed contextually and isolated portions of it will not be held prejudicial error when the charge as a whole is correct.' " *State v. Hornsby*, 152 N.C. App. 358, 367, 567 S.E.2d 449, 456 (2002) (quotation omitted), *disc. review denied*, 356 N.C. 685, 578 S.E.2d 316 (2003). The trial court instructed the jury on first-degree burglary as follows:

> The defendant has been charged with first-degree burglary, which is breaking and entering the occupied dwelling house or sleeping apartment of another without his consent in the nighttime with the intent to commit murder.
>
> For you to find the defendant guilty of this offense, the State must prove six things beyond a reasonable doubt.
>
> First, that there was a breaking and an entering—and an entry by the defendant.

Second, that it was a dwelling house or sleeping apartment that was broken into and entered.

Third, that the breaking and entering was during the nighttime.

Fourth, that at the time of the breaking and entering, the dwelling house or sleeping apartment was occupied.

Fifth, that the owner or tenant did not consent to the breaking and entering.

And, sixth, that at the time of the breaking and entering, the defendant intended to commit murder within the dwelling house or sleeping apartment.

Murder is the killing of another living human being with malice.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant broke into and entered an occupied dwelling house or sleeping apartment without the owner's or tenant's consent during the nighttime, and at that time intended to commit a murder therein, it would be your duty to return a verdict of guilty of first-degree burglary.

If you do not so find or have a reasonable doubt as to one or more of these things, *you will not return a verdict of guilty of first-degree burglary.*

(Emphasis added.)

It appears the trial court utilized N.C.P.I.—Crim. 214.10 to charge the jury on first-degree burglary. This instruction includes instructions for the lesser offenses of second-degree burglary, felonious breaking and entering, and nonfelonious breaking and entering. Because none of the lesser-included offenses were applicable in this case, the trial court stopped the instruction after giving the mandate for first-degree burglary. However, the trial court failed to add at the end of the mandate that "it would be your duty to return a verdict of not guilty." We have held that the failure to give the final not guilty mandate constitutes error. *State v. McHone*, 174 N.C. App. 289, 297, 620 S.E.2d 903, 909 (2005), *disc. review denied*, 362 N.C. 368, 628 S.E.2d 9 (2006).

Defendant cites *McHone* for the proposition that "[t]elling the jury 'not to return a verdict of guilty' . . . does not comport with the necessity of instructing the jury that it must or would return a verdict

of not guilty" if the State failed to meet their burden beyond a reasonable doubt. *Id.* at 297, 620 S.E.2d at 909 (emphasis omitted).

In *McHone*, this Court considered three different factors in determining whether the trial court committed plain error in its instructions to the jury, none of which are present in this case. First, this Court considered the jury instructions on first-degree murder in their entirety. In *McHone*, the defendant was tried for first-degree murder under two theories: premeditation and deliberation, and the felony murder rule. *Id.* The trial judge instructed the jury that if it did not find the requisite malice, premeditation, and deliberation, it " 'would not return a verdict of guilty of first-degree murder on the basis of malice, premeditation, and deliberation' and must then consider whether the killing was done consistent with the requirements of the felony murder rule." *Id.* The trial court also instructed the jury that they would not return a verdict of guilty of first-degree murder under the felony murder rule if the State failed to meet one or more elements of felony murder. *Id.* The trial court failed to provide a not guilty mandate at the close of its instructions for murder. *Id.* This Court held that "[t]he instruction, then, in the absence of a final not guilty mandate, essentially pitted one theory of first degree murder against the other, and impermissibly suggested that the jury should find that the killing was perpetrated by defendant on the basis of at least one of the theories." *Id.*

Second, this Court considered the content and form of the first-degree murder verdict sheet. *Id.* The verdict sheet only provided a space for an answer to "Guilty of first-degree murder?" *Id.* The verdict sheet did not provide an option for "not guilty." *Id.* at 298, 620 S.E.2d at 909. We noted that the trial court had once again failed to inform the jury that it was authorized to return a not guilty verdict. *Id.*

Third, this Court considered the instructions and verdict sheet for the other charge in that case, armed robbery and its lesser-included offense larceny. *Id.* After instructing the jury on the elements of these crimes, the trial court did provide a not guilty mandate as to these offenses. *Id.* We also noted that the content and form of the verdict sheet on these offenses included a space for a not guilty verdict. *Id.* We stated that the presence of a not guilty final mandate and the content of the verdict sheet "likely reinforced the suggestion that defendant must have been guilty of first degree murder on some basis[.]" *Id.*

In *McHone*, this Court's plain error analysis centered upon the fact that the trial court "impermissibly suggested that the defendant must have been guilty of first degree murder on some basis." *Id.* at 299, 620 S.E.2d at 910. This Court concluded that the jury instructions in that case constituted plain error. *Id.* This conclusion was "based not only on the importance of the jury receiving a not guilty mandate from the presiding judge, *but also on the form and content of the particular verdict sheets utilized in this case.*" *Id.* (emphasis added).

In the instant case, there was nothing that would support the proposition that the trial court impermissibly suggested that defendant must be guilty of first-degree burglary. The trial court gave the jury a choice of returning a verdict of guilty of first-degree burglary or not returning a verdict of guilty of first-degree burglary if they had a reasonable doubt as to one or more of the elements of the crime. There were no alternative theories that the jury could consider or lesser-included offenses. The verdict sheet for first-degree burglary provided a space for the jury to check "Guilty of First Degree Burglary" or "Not Guilty." Likewise, the verdict sheet for the other offense in this case also included a space for a verdict of guilty or not guilty.

While it was error for the trial court to fail to deliver the final not guilty mandate, this error does not rise to the level of plain error.

NO ERROR IN PART; DISMISSED IN PART.

Judges STEPHENS and HUNTER, JR. concur.

PENNY FOX, PLAINTIFF-APPELLANT v. SARA LEE CORPORATION AND JOHN ZIEKLE DEFENDANTS-APPELLEES

No. COA10-341

(Filed 5 April 2011)

Statutes of Limitation and Repose— emotional distress claim —nervous breakdown—tolling of limitations period

A dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) based on the statute of limitations was reversed where plaintiff alleged that she had been sexually assaulted at work in August of 2005, that she had a complete nervous breakdown a month later and was unable to manage her affairs from September of 2005 until

February of 2007, and she filed her complaint in September of 2009. Plaintiff's argument on appeal focused only on the dismissal of her claims of intentional and negligent infliction of emotional distress, which are governed by a three-year statute of limitations with a provision that a person who is under a disability at the time the cause of action accrued may bring the action within the limitations period after the disability is removed. The cause of action accrued when plaintiff suffered emotional distress rather than when the harassment occurred, and plaintiff sufficiently alleged that she was mentally incompetent when she suffered the emotional distress.

Appeal by Plaintiff from order entered 21 January 2010 by Judge James M. Webb in Superior Court, Forsyth County. Heard in the Court of Appeals 12 October 2010.

Stephen A. Boyce for Plaintiff-Appellant.

Constangy, Brooks & Smith, LLP, by Robin E. Shea, for Defendant-Appellee Sara Lee Corporation.

McGEE, Judge.

Penny Fox (Plaintiff) filed a complaint against Sara Lee Corporation (Sara Lee) and John Ziekle (Mr. Ziekle) (collectively, Defendants) on 24 September 2009. In her complaint, Plaintiff alleged that she had been an employee at Sara Lee, and that Mr. Ziekle had been a co-worker. Plaintiff contended that she had been sexually assaulted by Mr. Ziekle and, as a result, suffered severe mental health problems that led to the loss of her job with Sara Lee. Plaintiff asserted claims of assault, battery, false imprisonment, intentional infliction of emotional distress and negligence, and sought damages. Sara Lee filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), contending that all of Plaintiff's claims were barred by the statute of limitations. In an order entered 21 January 2010, the trial court granted Sara Lee's motion and dismissed Plaintiff's complaint in its entirety with prejudice. Plaintiff appeals.

Plaintiff's Issues on Appeal

Plaintiff's notice of appeal states that Plaintiff appeals "from the [o]rder entered . . . dismissing . . . Plaintiff's [c]omplaint on the grounds that her claims are barred by the applicable statutes of limitation and that . . . Plaintiff is not entitled to tolling." However, in

Plaintiff's brief, she states: "Plaintiff now appeals the dismissal of her claims of intentional and negligent infliction of emotional distress against Sara Lee Corporation." Plaintiff's arguments on appeal focus solely on her claims for emotional distress and, therefore, she has abandoned her appeal from the trial court's order dismissing her claims for assault, battery, and false imprisonment. N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

Thus, Plaintiff's sole issue on appeal is whether the trial court properly granted Sara Lee's motion to dismiss Plaintiff's claims based on emotional distress. Plaintiff alleged in her complaint that (1) she was sexually molested on 24 August 2005; (2) she reported the molestation to her supervisor; and (3) she had "a complete nervous breakdown." Plaintiff contended that, "[f]rom September, 2005 until February, 2007, [she] was unable to manage her own affairs." Plaintiff contends in her brief that the trial court erred in dismissing her complaint because the trial court incorrectly determined that her claims were barred by the statute of limitations. Specifically, Plaintiff argues that her complaint sufficiently alleged that her

> severe emotional distress manifested itself at the time of her nervous breakdown, which also rendered her unable to manage her own affairs, making her disabled. Therefore, her cause of action accrued at the same time she became disabled. This disability also tolled the limitations period until . . . her health sufficiently improved for her to manage her own affairs.

Standard of Review

" 'A Rule 12(b)(6) motion tests the legal sufficiency of the pleading.' " *Carlisle v. Keith*, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (citation omitted). In ruling on a motion to dismiss pursuant N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), a trial court must determine whether " 'the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.' " *Carlisle*, 169 N.C. App. at 681, 614 S.E.2d at 547 (citation omitted). " 'When considering a 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery.' " *Id.* (citation omitted). Pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), a motion to dismiss may be an appropriate method of asserting that the statute of limitations has expired for a given cause of action. *Carlisle*, 169 N.C. App. at 681, 614 S.E.2d at 547. "[D]ismissal of an

action on the pleadings based on a plea in bar of the statute of limitations is proper only when 'all the facts necessary to establish the plea in bar . . . are either alleged or admitted in the plaintiff's pleadings, construing plaintiff's pleadings liberally in' " favor of the plaintiff. *Russell v. Adams*, 125 N.C. App. 637, 641, 482 S.E.2d 30, 33 (1997) (citation omitted).

Statute of Limitations

The parties agree that Plaintiff's claims in this case are governed by a three-year statute of limitations. *See Id.* at 640, 482 S.E.2d at 33 ("Causes of action for emotional distress, both intentional and negligent, are governed by the three-year statute of limitation provisions of N.C. Gen. Stat. § 1-52(5)[.]"). However, N.C. Gen. Stat. § 1-17(a) (2009) provides, in pertinent part, that a "person entitled to commence an action who is under a disability at the time the cause of action accrued may bring his or her action within the [applicable statute of limitations], after the disability is removed[.]" For the purposes of N.C.G.S. § 1-17(a), "a person is under a disability if the person . . . is incompetent as defined in G.S. § 35A-1101(7) or (8)." N.C.G.S. § 1-17(a)(3). N.C. Gen. Stat. § 35A-1101(7) (2009) provides the following definition of "incompetent adult":

> "Incompetent adult" means an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

Plaintiff asserts that her "severe emotional distress was not manifest and the tort was not complete until the nervous breakdown; the same nervous breakdown that disabled . . . Plaintiff and tolled the limitations period." Sara Lee counters that Plaintiff's "claims accrued immediately" and that, when the claims accrued, Plaintiff "was not disabled or incompetent." Thus, there are two fundamental issues before us: (1) whether Plaintiff's complaint contained allegations sufficient to allege she was an "incompetent adult[;]" and (2) whether Plaintiff's claims accrued before, or concurrently with, the onset of Plaintiff's alleged disability.

As to both of these questions, we find significant guidance from our Court's decisions in *Soderlund v. N.C. School of the Arts*, 125 N.C. App. 386, 481 S.E.2d 336 (1997) (*Soderlund I)* and *Soderlund v. Kuch*,

143 N.C. App. 361, 546 S.E.2d 632 (2001) (*Soderlund II*). The facts giving rise to the dispute in *Soderlund I* and *Soderlund II* involve the sexual harassment and abuse of a teenage plaintiff by educators at the North Carolina School of the Arts (NCSA) while the teenage plaintiff was a student there. *Soderlund I*, 125 N.C. App. at 387, 481 S.E.2d at 337. The plaintiff left NCSA in 1984, and he attained the age of majority in 1986. *Soderlund II*, 143 N.C. App. at 364, 546 S.E.2d at 635. The plaintiff alleged that he suffered extreme guilt and shame and that he was diagnosed with post-traumatic stress disorder (PTSD) in 1993 that was "directly caused by defendants' actions." *Soderlund I*, 125 N.C. App. at 389, 481 S.E.2d at 338. In *Soderlund I*, this Court noted that:

> The psychologist determined that until plaintiff told his mother about defendants' actions and the diagnosis was made, plaintiff had not realized nor was he capable of understanding, the effect and consequences of defendants' conduct, the connection between their conduct and his mental illness, or the fact that he had a cause of action against them.

Id. The plaintiff filed his complaint in 1995 naming as defendants, *inter alia*, the teachers who had allegedly harassed him as well as NCSA. *Id.*

Pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1), (2) and (6), the defendants filed motions to dismiss, arguing that the statute of limitations had expired as to the plaintiff's claims. *Soderlund I*, 125 N.C. App. at 389, 481 S.E.2d at 338. The trial court granted the defendants' motions to dismiss. *Id.* The plaintiff appealed and the issue of whether the trial court properly granted the defendants' motions to dismiss was determined by this Court in *Soderlund I*. Our Court summarized the plaintiff's position, stating that he

> alleged in his complaint and argues on appeal that his mental illness rendered him incompetent as defined by N.C. Gen. Stat. § 35A-1101(7) (1995) and therefore tolled the applicable statute of limitations in accordance with N.C. Gen. Stat. § 1-17(a)(3) (1996). "Incompetent adult" is defined by N.C. Gen. Stat. § 35A-1101(7) as "an adult or emancipated minor who lacks sufficient capacity to manage his own affairs or to make or communicate important decisions concerning his person, family, or property whether such lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition."

Id. at 389-90, 481 S.E.2d at 338. The plaintiff's PTSD in *Soderlund I* was allegedly caused by the defendants' sexual abuse and harassment of the plaintiff. *See Id.* Our Court reversed the trial court's order granting the defendants' motions to dismiss, and our Court's ruling was summarized aptly in *Soderlund II*:

> In our previous opinion, this Court found that defendants had sufficient notice from the allegations in plaintiff's complaint that he may have been prevented from filing his claims due to his alleged incompetence, as defined in N.C. Gen. Stat. § 35A-1101(7) (1999). . . . Therefore, we reversed the trial court's dismissal and remanded the case for a determination of whether plaintiff's condition rose to the level of incompetence as defined in § 35A-1101(7), thus tolling the applicable statute of limitations.

Soderlund II, 143 N.C. App. at 365, 546 S.E.2d at 635 (citation omitted).

On remand of *Soderlund I*, the trial court conducted discovery as ordered by this Court. The defendants then filed a motion for summary judgment, which the trial court granted. The plaintiff appealed the trial court's order. *Id.* This Court stated in *Soderlund II*:

> With respect to the applicability of the statute of limitations and the existence of all necessary elements of both intentional and negligent infliction of emotional distress, the trial court found that plaintiff's claim lacked a genuine issue of material fact. In finding no genuine issue of material fact as to the statute of limitations, we conclude that [the trial court] was necessarily ruling that plaintiff's alleged incompetence did not rise to the level of incompetence, as defined in § 35A-1101(7), necessary to toll the statute of limitations. [The trial court] thereby dismissed plaintiff's claims with prejudice, and plaintiff now appeals to this Court.

Id. at 365, 546 S.E.2d at 635-36.

In *Soderlund II*, the first of the plaintiff's arguments on appeal focused on whether the trial court erred in determining when the cause of action for emotional distress accrued. *Id.* at 366, 546 S.E.2d at 636. The plaintiff argued that his emotional distress claim accrued either after a conversation with his mother in 1992 or after he received a PTSD diagnosis in 1993 and thus the three-year statute of limitations had not run at the time he filed his complaint in 1995. *Id.* We noted that, "[s]ometimes, causes of action for emotional distress 'take years to manifest the severe emotional results required to com-

plete the tort.' However, that is not the case *sub judice*." *Id.* at 367, 546 S.E.2d at 637 (citation omitted). This Court further stated:

> By [plaintiff's] own admission, he manifested signs of "severe emotional distress"—"shame," "confusion," alcohol abuse, inability "to form healthy relationships," inability to "lead a normal life," "several mental breakdowns," and "contemplat[ion of] suicide"—following his 1986 departure from NCSA and for the next seven years of his life. Based on this evidence, it is clear that plaintiff's "severe emotional distress" and PTSD diagnosis could have been "*generally recognized and diagnosed by professionals trained to do so*," at that time.

Id. at 368, 546 S.E.2d at 637 (emphasis in original).

This Court then addressed the plaintiff's alternative argument that "the trial court erred in not tolling the applicable statute of limitations due to plaintiff's alleged incompetence as defined in N.C. Gen. Stat. § 35A-1101(7)." *Id.* at 372, 546 S.E.2d at 640. We held that the plaintiff had failed to show that his emotional distress rose to the level of incompetence and therefore rejected his assignment of error. *Id.* In so holding, however, this Court conducted the following analysis:

> [The] [p]laintiff's only allegation regarding his incompetency is that his mental condition "cause[d] him to be incapable of understanding his legal rights, making or communicating important decisions about those rights or bringing a lawsuit. . . ." As stated above, the term "affairs" in § 35A-1101(7) encompasses more than just one transaction. *See id.* Moreover, evidence presented during discovery showed that since leaving NCSA in 1986, plaintiff arranged for places to live, signed leases, cooked, went shopping, held several jobs, attended college at two institutions, obtained and renewed driver's licenses from three states, drove vehicles, owned farmland, traveled and lived in foreign countries, produced a ballet, and created music. The evidence is sufficient to show that plaintiff could and did manage his own affairs and make important decisions concerning his person and property after his 1986 departure from NCSA. Thus, we hold plaintiff was not incompetent as per § 35A-1101(7), and plaintiff's mental condition did not warrant tolling the three-year statute of limitations of § 1-52(5).

Id. at 373, 546 S.E.2d at 640. Thus, our Court's determination that the plaintiff's mental condition did not rise to the level of incompetence under N.C.G.S. § 35A-1101(7) resulted from our determination that

there was evidence that the plaintiff "could and did manage his own affairs and make important decisions concerning his person and property after" suffering the alleged abuse and leaving NCSA. *Id.*

Incompetence Under N.C.G.S. § 35A-1101(7)

We first address whether Plaintiff's complaint contained allegations sufficient to allege that she was an "incompetent adult." Plaintiff's complaint contained the following allegations:

> 14. The next day, . . . Plaintiff, the department manager, and . . . Plaintiff's co-worker attended an off-site meeting. . . . Plaintiff was a nervous wreck and [did] not remember what happened that day.
>
> 15. On August 26, 2005, . . . Plaintiff went to the human resources office and reported Ziekle and the August 24 incident to a human resources director.
>
> . . . .
>
> 18. The human resources director then referred . . . Plaintiff to the Sara Lee employee assistance provider (Horizon Care) for mental health treatment. Plaintiff's psychiatrist recommended that Plaintiff be placed on medical leave. Sara Lee Corporation approved the medical leave. Sara Lee Corporation knew that . . . *Plaintiff's mental health prevented her from working or managing her own affairs*.
>
> 19. . . . Plaintiff's mental health began to rapidly deteriorate. She had a complete nervous breakdown. *Under psychiatric care*, . . . *Plaintiff was unable to mentally function and could not leave her house by herself*.
>
> . . . .
>
> 27. From September, 2005 until February 2007, . . . Plaintiff's poor mental health, which was caused by . . . Defendants' conduct, prevented . . . Plaintiff from working, managing her own affairs, coping with daily life, or going about by herself. During much of this time, . . . Plaintiff was obliged to live with her parents because she could not manage by herself.

(Emphasis added). Plaintiff specifically alleged that she was under psychiatric care, could not leave her house by herself, and was "unable to mentally function[.]" Further, Plaintiff alleged that Sara Lee was aware that Plaintiff's condition "prevented her from working or managing her own affairs." We hold that Plaintiff's pleadings were sufficient to put Defendants on notice that Plaintiff was prevented

from filing her complaint due to her mental condition. *See Soderlund I*, 125 N.C. App. at 391, 481 S.E.2d at 339 ("defendants had sufficient notice from the allegations in plaintiff's complaint that he may have been prevented from filing his claims due to mental disability").

Accrual of Plaintiff's Cause of Action

We next address whether Plaintiff's complaint sufficiently alleged that she was incompetent at the time her cause of action accrued. Ordinarily, a " 'cause of action accrues when the wrong is complete, even though the injured party did not then know the wrong had been committed.' " *Housecalls Home Health Care, Inc. v. State*, ––– N.C. App. –––, –––, 682 S.E.2d 741, 744 (2009) (citation omitted). However,

> severe emotional distress is an essential element of both negligent and intentional emotional distress claims, [and] the three-year period of time for these claims does not begin to run (accrue) until the "conduct of the defendant causes extreme emotional distress." In other words, these claims do not accrue until the plaintiff "becomes aware or should reasonably have become aware of the existence of the injury."

Russell, 125 N.C. App. at 641, 482 S.E.2d at 33 (internal citations omitted).

Sara Lee contends that Plaintiff alleged that "she was fully competent when the alleged sexual harassment occurred and for approximately a month afterward, and that she made prompt and timely complaints to management." However, Sara Lee's argument ignores the fact that Plaintiff's causes of action based on emotional distress did not accrue at the time the alleged sexual harassment occurred. Rather, Plaintiff's causes of action based on emotional distress did not accrue until Plaintiff actually suffered emotional distress. *Russell*, 125 N.C. App. at 641, 482 S.E.2d at 33. We thus review Plaintiff's complaint to determine when Plaintiff alleged she had suffered emotional distress.

Our Supreme Court has held that, in the context of an emotional distress action, "the term 'severe emotional distress' means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). Construing Plaintiff's complaint liberally in favor of Plaintiff, *Russell*, 125 N.C. App. at 641, 482 S.E.2d at 33, we find that Plaintiff alleged she was a

nervous wreck the day after the assault. Sara Lee insists that Plaintiff's causes of action accrued at that time, based on Plaintiff's allegation of being a "nervous wreck." However, Sara Lee cites no cases, and we are not aware of any, which stand for the proposition that a plaintiff's being a "nervous wreck" supports a claim for severe emotional distress under the definition provided by *Johnson*.

Plaintiff next alleged that, after reporting the incident to Sara Lee's human resources director, Plaintiff was referred to a psychiatrist. Plaintiff's psychiatrist "recommended that Plaintiff be placed on medical leave." Plaintiff also stated that her "mental health began to rapidly deteriorate. She had a complete nervous breakdown."

Thus, Plaintiff's allegations, construed liberally in her favor, suggest that she had been placed on medical leave, had "a complete nervous breakdown[,]" and became unable to manage her affairs, all at around the same time. We hold that Plaintiff's complaint sufficiently alleged that she was mentally incompetent, either concurrently with, or before, she suffered "severe emotional distress." Thus, Plaintiff's complaint was sufficient to place Defendants on notice that Plaintiff was under a disability when her causes of action accrued, thereby tolling the statute of limitations.

We stress that we are reviewing the trial court's ruling on Sara Lee's N.C.G.S. § 1A-1, Rule 12(b)(6) motion and, therefore, it is not the role of this Court to determine whether Plaintiff was actually incompetent. Rather, as in *Soderlund I*, our review is to determine whether Plaintiff's complaint was sufficient to put Defendants on notice that Plaintiff was rendered mentally incompetent as a result of Defendants' actions and, therefore, was incompetent when her causes of action accrued. As stated above, we hold that Plaintiff's complaint sufficiently alleged that: (1) Plaintiff became an "incompetent adult" for the purposes of tolling the statute of limitations; and (2) Plaintiff was under a disability at the time she suffered the severe emotional distress which caused her claims to accrue. Therefore, we reverse the trial court's order granting Sara Lee's N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss as to Plaintiff's claims for emotional distress and remand to the trial court.

Affirmed in part; reversed in part and remanded.

Judges HUNTER, JR. and BEASLEY concur.

LAZONA GALE SPEARS, Employee, Plaintiff v. BETSY JOHNSON MEMORIAL HOSPITAL, Employer, N.C. GUARANTY ASSOCIATION, Successor to RELIANCE INSURANCE COMPANY, Carrier, Defendants

No. COA10-580

(Filed: 5 April 2011)

1. Workers' Compensation— commissioners—qualified to sit on Full Commission—neither adjudicated claim in the first instance

Two commissioners who participated in the Full Industrial Commission's decision to affirm the deputy commissioner's initial decision in plaintiff's workers' compensation case were qualified to sit on the Full Commission in the present case. Neither commissioner adjudicated plaintiff's claim "in the first instance" under N.C.G.S. § 97-84.

2. Workers' Compensation— denial of motion to set aside prior decision—failed to raise issue—denial proper

The Industrial Commission did not abuse its discretion in denying plaintiff's motion to set aside its prior decision based on allegations that defendants committed fraud on the Commission. Plaintiff had the opportunity in the prior proceedings to raise her concerns, and failed to do so.

3. Collateral Estoppel and Res Judicata— workers' compensation—prior opinion and award—issue decided—final decision

The Industrial Commission did not err in concluding that the doctrine of *res judicata* precluded plaintiff from claiming that certain medical conditions were related to her 4 January accident. Plaintiff failed to appeal the Commission's determination in its prior opinion and award that certain medical conditions were not related to the 4 January accident, and that decision became final.

4. Workers' Compensation— claim for modification of prior award—properly denied

The Industrial Commission properly denied plaintiff's claim for modification of her prior award. The Commission's conclusion that plaintiff did not satisfy her burden of proving a change of condition under N.C.G.S. § 97-47 was supported by the Commission's findings and the evidence upon which they were based.

Appeal by plaintiff from opinion and award entered 21 December 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 November 2010.

Lazona Gale Spears, pro se, plaintiff-appellant.

Young Moore and Henderson P.A., by Jeffrey T. Linder and Julia E. Dixon, for defendants-appellees.

HUNTER, Robert C., Judge.

In plaintiff Lazona Gale Spears' prior appeal, this Court affirmed the Industrial Commission's opinion and award in which it concluded that plaintiff had failed to establish that all of the medical conditions that she claimed were causally related to her compensable injury were, in fact, related to the injury. *See Spears v. Betsy Johnson Mem'l Hosp.*, 177 N.C. App. 148, 627 S.E.2d 684, 2006 N.C. App. LEXIS 2600, 2006 WL 851795 (2006) (unpublished). Plaintiff subsequently filed with the Commission (1) a motion to set aside its prior decision, alleging that defendant-employer Betsy Johnson Memorial Hospital and defendant-carrier N.C. Guaranty Association committed fraud on the Commission in order to obtain a favorable outcome in the prior matter, and (2) a motion to modify the prior award based on a change of condition. After careful review, we affirm the Commission's decision denying her motion to set aside its prior decision and concluding that plaintiff failed to establish a change of condition warranting modification of her award.

Factual and Procedural History

The underlying facts regarding plaintiff's injury and treatment are set out in greater detail in this Court's prior opinion in this case. *See id.* at *5-9, 2006 WL 851795 at *2-4. Pertinent to this appeal, on 4 January 2000, plaintiff, who was a registered nurse at the time, was working as the Health and Infection Control Coordinator at the Hospital. On that date, plaintiff was involved in a physical altercation with a coworker and sustained an admittedly compensable injury when the coworker forcibly pushed her as she was standing up from her chair. On 19 February 2001, plaintiff was terminated for poor work performance unrelated to her compensable injury.

Plaintiff's claim was originally heard by Deputy Commissioner Philip A. Baddour, III on 19 August 2002, and at the time of the hearing, plaintiff had treated with her family physician, Dr. Linda Robinson, neurologist Dr. Nailesh Dave, neurologist Dr. Pamela

Whitney, and Dr. Robert C. Jacobson. The following medical conditions were discussed in the medical records and testimony in the evidentiary record before Deputy Commissioner Baddour: hypertension, nerve palsy, Bell's palsy, peripheral neuropathy, reflex sympathetic dystrophy ("RSD"), facial nerve palsy/neuropathy, chronic pain, myofascial pain syndrome, depression, facial weakness, eyelid drooping (ptosis), chronic myalgia/myositis, cervical brachial syndrome, and problems with concentration, imbalance, speech, swallowing, and stress. Deputy Commissioner Baddour issued his opinion and award on 29 August 2003, finding that plaintiff's neck pain and headaches, which were diagnosed as occipital neuralgia, were causally related to her 4 January 2000 injury, but that plaintiff's "other medical conditions" were not related to the injury. Deputy Commissioner Baddour concluded that (1) plaintiff was entitled to temporary total disability compensation for work that she missed prior to her termination; (2) plaintiff failed to establish that she was totally disabled after her termination; and (3) defendants were responsible for paying for medical treatment for plaintiff's "headache and neck pain conditions."

Plaintiff appealed to the Full Commission, which, in an opinion and awarded entered 14 February 2005, affirmed with minor modifications Deputy Commissioner Baddour's award. While the Commission quoted most of Deputy Commissioner Baddour's findings of fact "verbatim," it made the additional finding that plaintiff, despite her compensable headaches and neck pain, had wage-earning capacity as she was capable of sedentary work. Plaintiff appealed the Commission's 14 February 2005 decision to this Court. In an unpublished opinion filed 4 April 2006, this Court affirmed the Commission's decision, noting that plaintiff had failed to assign error to any of the Commission's findings of fact and that these uncontested findings were sufficient to support the Commission's conclusions of law. *Id.* at *11, 2006 WL 851795 at *4. That decision was not appealed to the Supreme Court.

On 9 February 2007, plaintiff, proceeding *pro se*, filed a Form 33, requesting (1) a hearing on issues concerning her 4 January 2000 injury; (2) setting aside the Full Commission's 2005 decision; and (3) entering default judgment against defendants. Defendants moved to dismiss plaintiff's Form 33, and after conducting a hearing on 23 August 2007, Deputy Commissioner Ronnie E. Rowell entered an opinion and award on 22 January 2008, in which he determined that plaintiff's Form 33 should be treated as a motion for modification of her prior award based on a change of condition and that plaintiff's

claim was not time-barred. Accordingly, Deputy Commissioner Rowell denied defendants' motion to dismiss. Deputy Commissioner Rowell additionally found that defendants, after the expiration of the period for appealing from this Court's prior decision, had failed to pay plaintiff the temporary total disability compensation ordered by the Full Commission. Consequently, Deputy Commissioner Rowell ordered defendants to make a lump sum payment to plaintiff plus a 10% late payment penalty. He also ordered defendants to pay for all of plaintiff's medical expenses incurred as a result of her compensable 4 January 2000 injury.

After a hearing on 23 April 2008, Deputy Commissioner Robert J. Harris entered an opinion and award on 21 April 2009, in which he denied plaintiff's motion to set aside the Commission's 2005 decision, her motion for default judgment, and her claim for change in condition. After Deputy Commissioner Harris denied plaintiff's motion for reconsideration, plaintiff appealed to the Full Commission. In an opinion and award entered 21 December 2009, the Commission affirmed, with minor modifications, Deputy Commissioner Harris' decision. Plaintiff subsequently filed a motion for reconsideration, which was denied by order entered 30 March 2010. Plaintiff timely appealed to this Court.

I

[1] Plaintiff first argues that the Workers' Compensation Act "does not allow Commissioners who heard the case before to hear it again." Because Commissioners Laura K. Mavretic and Christopher Scott participated in the 14 February 2005 decision, plaintiff contends that they were "not qualified to sit on the Full Commission in this case." As a threshold matter, we note that plaintiff failed to preserve this contention for appellate review by not raising the issue before the Industrial Commission. See *Poe v. Raleigh/Durham Airport Authority*, 121 N.C. App. 117, 126, 464 S.E.2d 689, 694 (1995) ("Notably, plaintiff poses this collateral attack for the first time on appeal; plaintiff failed to raise any objection to the panel's composition at the Full Commission level.").

In any event, issues involving statutory interpretation "are questions of law, which are reviewed *de novo* by an appellate court." *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 559, 589 S.E.2d 179, 180 (2003). Plaintiff misconstrues the provisions of the Workers' Compensation Act setting out the procedures

for the initial adjudication of a workers' compensation claim and the procedures regarding the Full Commission's review of that decision. N.C. Gen. Stat. § 97-84 (2009), titled "Determination of disputes by Commission or deputy," provides:

> The Commission or any of its members shall hear the parties at issue and their representatives and witnesses, and shall determine the dispute in a summary manner. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings, within 180 days of the close of the hearing record unless time is extended for good cause by the Commission, and a copy of the award shall immediately be sent to the parties in dispute. The parties may be heard by a deputy, in which event the hearing shall be conducted in the same way and manner prescribed for hearings which are conducted by a member of the Industrial Commission, and said deputy shall proceed to a complete determination of the matters in dispute, file his written opinion within 180 days of the close of the hearing record unless time is extended for good cause by the Commission, and the deputy shall cause to be issued an award pursuant to such determination.

N.C. Gen. Stat. § 97-85 (2009), in turn, addresses the Full Commission's "[r]eview" of the initial award:

> If application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award: Provided, however, *when application is made for review of an award, and such an award has been heard and determined by a commissioner of the North Carolina Industrial Commission, the commissioner who heard and determined the dispute in the first instance, as specified by G.S. 97-84, shall be disqualified from sitting with the full Commission on the review of such award*, and the chairman of the Industrial Commission shall designate a deputy commissioner to take such commissioner's place in the review of the particular award. The deputy commissioner so designated, along with the two other commissioners, shall compose the full Commission upon review. . . .

(Emphasis added.) Read *in pari materia*, the two provisions establish that when, pursuant to N.C. Gen. Stat. § 97-84, a member of the Full Commission "hear[s] and determine[s] the dispute in the first instance," that commissioner is disqualified from participating in the Full Commission's review of the initial decision. Thus, contrary to plaintiff's contention, N.C. Gen. Stat. § 97-85 merely provides that the initial fact-finder does not participate in the review of those factual determinations. As neither Commissioner Mavretic nor Commissioner Scott adjudicated plaintiff's claim "in the first instance" under N.C. Gen. Stat. § 97-84, they are not disqualified pursuant to N.C. Gen. Stat. § 97-85 from sitting on the Full Commission's review of the deputy commissioner's decision. Plaintiff's argument is overruled.

II

[2] Plaintiff next claims that defendants committed fraud on the Commission in order to obtain a favorable outcome with respect to the Commission's 14 February 2005 opinion and award. Thus, plaintiff contends, the Commission should have granted her motion to set aside that decision.

Although both plaintiff and defendants base their arguments on the assumption that Rule 60(b) of the Rules of Civil Procedure authorizes plaintiff's motion to set aside the Commission's decision, "[t]he Rules of Civil Procedure are not strictly applicable to proceedings under the Workers' Compensation Act . . . ." *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985). The Industrial Commission nevertheless has the "inherent power, analogous to that conferred on courts by Rule 60(b)(6), in the exercise of supervision over its own judgments to set aside a former judgment when the paramount interest in achieving a just and proper determination of a claim requires it[.]" *Id.* at 129, 337 S.E.2d at 478. The denial of a motion to set aside a prior judgment procured by "fraud on the court" is reviewed for abuse of discretion. *Purcell Int'l Textile Grp., Inc. v. Algemene AFW N.V.*, 185 N.C. App. 135, 138, 647 S.E.2d 667, 670 (reviewing denial of Rule 60(b)(6) motion for relief from judgment allegedly procured by "fraud on the court" for abuse of discretion), *disc. review denied*, 362 N.C. 88, 655 S.E.2d 840 (2007). The Commission may be reversed for abuse of discretion only upon a showing that its ruling is "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

As the First Circuit has explained, a "fraud on the court" or tribunal

> occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense.

Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989).

Here, plaintiff premises her motion for relief on allegations that defendants "tamper[ed]" with or removed evidence from the record developed before Deputy Commissioner Baddour, made "intentional misrepresentations" of fact during the proceedings, and "collu[ded]" with Deputy Commissioner Baddour to "write a false story." Plaintiff fails to explain, however, why she did not raise these extremely serious concerns on appeal to the Full Commission during the 2002-05 proceedings or on appeal to this Court in 2006. *See M.W. Zack Metal Co. v. International Nav. Corp. of Monrovia*, 675 F.2d 525, 529 (2d Cir.) (holding plaintiff could not seek relief from judgments based on "fraud allegedly perpetrated on . . . various courts" where plaintiff "had an opportunity to raise these fraud claims in the courts in which they occurred"), *cert. denied*, 459 U.S. 1037, 74 L. Ed. 2d 604 (1982). As plaintiff had the opportunity in the prior proceedings to present her concerns, and failed to do so, the Commission did not abuse its discretion in denying her motion to set aside its prior decision.

III

[3] Plaintiff next contends that the Commission erred in concluding that because she failed to appeal the Commission's determination in its 2005 opinion and award that certain medical conditions were not related to the 4 January 2000 accident, that decision became final, and the doctrine of *res judicata* precludes plaintiff from now claiming that those conditions are related to the incident. Specifically, the Commission concluded that "[p]laintiff is barred by the doctrine of *res judicata* from now claiming that the following conditions are compensable: myofascial pain syndrome, chronic myalgia/myositis, cervical brachial syndrome, facial pain/weakness, eyelid drooping (ptosis), nerve palsies, Bell's palsy, peripheral neuropathy, depression, concentration issues and RSD in her face and right upper extremity." We note that plaintiff fails to cite any authority supportive of her contention that the Commission "misappl[ied]" the doctrine of

res judicata, but, rather, simply points to evidence that she claims shows that the various medical conditions are, in fact, related to the 4 January 2000 accident.

It is well-established that "[t]he doctrine of *res judicata* precludes relitigation of final orders of the Full Commission and orders of a deputy commissioner which have not been appealed to the Full Commission." *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 138, 502 S.E.2d 58, 61, *disc. review denied*, 349 N.C. 228, 515 S.E.2d 700 (1998). The essential elements of *res judicata* are: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in the prior suit and the current suit; and (3) an identity of parties or their privies in both suits. *Hogan*, 315 N.C. at 135, 337 S.E.2d at 482. Whether the doctrine of *res judicata* operates to bar a cause of action is a question of law reviewed de novo on appeal. *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 679, 657 S.E.2d 55, 62, *disc. review denied*, 362 N.C. 679, 669 S.E.2d 741 (2008).

Here, it is undisputed that both workers' compensation actions involve the same parties and that the Commission's 2005 decision became a final award when plaintiff failed to appeal this Court's decision affirming the Commission's opinion and award. With respect to the second element, the parties' pre-trial agreement provided that "the issues for determination at the hearing" before Deputy Commissioner Baddour included "whether plaintiff's various medical conditions are causally related to [the 4 January 2000] accident[.]" Deputy Commissioner Baddour and, on review, the Full Commission determined that, while plaintiff had established that her "headaches, diagnosed as occipital neuralgia, and neck pain are causally related to her accident at work on January 4, 2000[,]" she had "failed to establish . . . that her other medical conditions are causally related to her accident at work on January 4, 2000."

The evidentiary record before Deputy Commissioner Baddour and the Commission shows that the "other medical conditions" addressed in medical records and testimony were: hypertension, nerve palsy, Bell's palsy, peripheral neuropathy, RSD, facial nerve palsy/neuropathy, chronic pain, myofascial pain syndrome, depression, facial weakness, eyelid drooping (ptosis), chronic myalgia/myositis, cervical brachial syndrome, and problems with concentration, imbalance, speech, swallowing, and stress. As these conditions were previously ruled to be unrelated to plaintiff's accident, and plaintiff did not appeal that determination, it became final and now

bars plaintiff from claiming that they are related to the 4 January 2000 accident.

IV

[4] Plaintiff also argues that the Commission erroneously concluded that she had not met her burden of "show[ing] that she has suffered a change of condition" entitling her to modification of her prior award. Our review of plaintiff's contention is frustrated by her failure to adequately brief the issue. Significantly, plaintiff fails to cite to, much less discuss, N.C. Gen. Stat. § 97-47 (2009), the statute providing the Industrial Commission with the authority to review and modify prior awards "on the grounds of a change in condition." Nor does plaintiff set out, through the citation of relevant caselaw, the general principles of law regarding what constitutes a "change in condition" warranting modification under N.C. Gen. Stat. § 97-47 and how such a change in condition may be established. Moreover, despite abundant caselaw on the issue, plaintiff does not point to a single appellate decision finding a change of condition based on evidence similar to the evidence produced in this case. In short, plaintiff simply points to the evidence that she contends supports her claim, without any meaningful application of the law to the evidence. In any event, we conclude that the Commission's conclusion that plaintiff did not satisfy her burden of proving a change of condition under N.C. Gen. Stat. § 97-47 is supported by the Commission's findings and the evidence upon which they are based. The Commission, therefore, properly denied plaintiff's claim for modification of her prior award.

V

In her brief, plaintiff presents additional arguments that are, frankly, difficult for this Court to follow. To the extent that we understand plaintiff's arguments, we have reviewed them and find them to be without merit. The Commission's opinion and award is affirmed.

Affirmed.

Judges CALABRIA and ELMORE concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER JAMES WOODARD

No. COA10-1172

(Filed 5 April 2011)

1. Appeal and Error— preservation of issues—failure to raise constitutional issue at trial

Although defendant contended that the trial court violated his constitutional rights by requiring him to wear prison clothing during the jury selection and first day of trial, defendant failed to preserve this issue for appeal by not raising it at trial.

2. Evidence— prior crimes or bad acts—broke into another pharmacy to obtain drugs

The trial court did not abuse its discretion in a drugs case by allowing the State to admit evidence allegedly in violation of N.C.G.S. § 8C-1, Rules 404(b) and 403 including that defendant and his coparticipants broke into another pharmacy but were unable to obtain narcotics. The evidence was sufficiently similar and the jury was specifically instructed to consider the testimony for the limited purpose of motive, plan, opportunity, intent, preparation, knowledge, and/or identity with regard to the current offenses.

3. Burglary and Unlawful Breaking or Entering—felonious breaking and entering—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of felonious breaking and entering. The State provided sufficient evidence that defendant broke into a drugstore with the intention of stealing narcotics.

4. Larceny— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of larceny. The State provided sufficient evidence that defendant broke into a drugstore, took pills, and carried the pills away without consent with the intent to deprive the drugstore of the pills permanently.

5. Drugs— trafficking opium by possession and transportation—motion to dismiss—sufficiency of evidence—identity—weight

The trial court did not err by denying defendant's motion to dismiss the charge of trafficking opium by possession and trans-

portation. Contrary to defendant's assertion, the State was not required to conduct a chemical analysis on the controlled substance in order to sustain a conviction under N.C.G.S. § 90-5(h)(4). A pharmacist's identification of the stolen drugs as more than 28 grams of opium derivative hydrocodone acetaminophen was sufficient evidence of identity and weight of the stolen drugs.

Appeal by defendant from judgments entered 28 April 2010 by Judge James U. Downs in Avery County Superior Court. Heard in the Court of Appeals 21 February 2011.

Attorney General Roy Cooper, by Assistant Attorney General Allison A. Angell, for the State.

Mary March Exum for defendant appellant.

McCULLOUGH, Judge.

Christopher James Woodard ("defendant") appeals from judgments based on his convictions for trafficking more than 28 grams of opium by possession, trafficking opium by transportation, felony breaking and entering, felony larceny, and felony possession of stolen goods. For reasons discussed herein, we find no error.

I. Background

In July of 2009, defendant was indicted for the following charges: (1) trafficking more than 28 grams of opium by possession under N.C. Gen. Stat. § 90-95(h)(4); (2) trafficking more than 28 grams of opium by transportation under N.C. Gen. Stat. § 90-95(h)(4); (3) felonious breaking and entering under N.C. Gen. Stat. § 14-54(a); (4) felonious larceny under N.C. Gen. Stat. § 14-72(b)(2); and (5) felonious possession of stolen goods under N.C. Gen. Stat. § 14-71.1.

At trial, Detective Frank Catalano ("Detective Catalano") of the Avery County Sheriff's Office testified that on 22 March 2009, he arrived at Crossnore Drugstore in Crossnore to investigate a break-in. A window at Crossnore Drugstore had been broken and he recovered bottles of pills that were lying in the parking lot. William Martin ("Mr. Martin"), a pharmacist at Crossnore Drugstore, arrived at the scene and gave Detective Catalano a list of missing inventory. Approximately 4,000 to 5,000 pills had been stolen, with a total monetary loss of over $31,000.00.

Upon investigation, Detective Catalano had arrest warrants issued for Christopher Hensley ("Mr. Hensley"), Patrick McDaniel ("Mr. McDaniel"), and defendant for charges relating to the break-in at Crossnore Drugstore. Mr. Hensley took Detective Catalano and Detective Danny Phillips ("Detective Phillips") to Burkemont Mountain, where he directed them to a large pile of prescription pill bottles buried three feet underground. Detective Catalano and Detective Phillips collected the pills and spent several hours counting them.

Mr. Martin testified that approximately 2,600 pills of hydrocodone, an opium derivative, were stolen from Crossnore Drugstore. He identified the pill bottles presented by the State as belonging to Crossnore Drugstore by looking at the account numbers on the bottles.

Mr. Hensley testified that on the night of the break-in, he drove defendant and Mr. McDaniel to Crossnore Drugstore at approximately 1:00 a.m. so that they could steal narcotics. Mr. Hensley remained in the car while defendant and Mr. McDaniel smashed in the front window and went inside. About one minute later, defendant and Mr. McDaniel returned to the car with two large black trash bags filled with pills. Mr. Hensley drove them to Mr. McDaniel's house where they split up the hydrocodone three ways and buried the remaining pills at Burkemont Mountain.

Mr. Hensley said that a few days before breaking into Crossnore Drugstore, he, defendant, and Mr. McDaniel broke into a pharmacy in Mitchell County around 1:00 a.m. with the intention of stealing narcotics, but were unable to do so. The trial court allowed his testimony over defendant's objection.

After the State presented its evidence, defendant moved for dismissal of all charges on grounds of insufficient evidence, which the trial court denied. The trial court also denied defendant's renewed motion to dismiss at the close of evidence. On 28 April 2010, the jury found defendant guilty of all charges. Defendant appeals.

II. Analysis

A. Defendant's Constitutional Rights

[1] Defendant argues that the trial court violated his rights under the United States and North Carolina Constitutions and N.C. Gen. Stat. § 15-176 by requiring him to wear prison clothing during the jury selection and first day of trial. Defendant also contends that the trial

court violated his due process rights by coaching the Assistant District Attorney during her direct examination of Mr. Martin. Because such issues were not properly preserved for appeal, we will not address them.

Defendant did not object to either of these alleged errors during trial. Generally, a purported error, even one of constitutional magnitude, that is not raised and ruled upon in the trial court is waived and will not be considered on appeal. *State v. Smith*, 352 N.C. 531, 557-58, 532 S.E.2d 773, 790 (2000), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001). Rule 10(c)(4) of the North Carolina Rules of Appellate Procedure permits us to review an alleged error not properly preserved at trial if the defendant specifically and distinctly contends that it amounted to plain error. N.C. R. App. P. 10(c)(4) (2010). However, plain error review does not apply here as it is " 'limited to errors in a trial court's jury instructions or a trial court's rulings on admissibility of evidence.' " *In re W.R.*, 363 N.C. 244, 247, 675 S.E.2d 342, 344 (2009) (quoting *State v. Golphin*, 352 N.C. 364, 460, 533 S.E.2d 168, 230-31 (2000)).

B. Mr. Hensley's Testimony

[2] Defendant alleges that the trial court improperly allowed the State to admit evidence in violation of Rules 404(b) and 403 of the North Carolina Rules of Evidence. Mr. Hensley testified that a few days before they broke into Crossnore Drugstore, he, defendant, and Mr. McDaniel broke into a pharmacy in Mitchell County around 1:00 a.m. but were unable to obtain any narcotics. The trial court permitted the testimony over defendant's objection and concluded that

> the circumstances surrounding the events occurring, allegedly occurring in Mitchell County sometime prior to the events . . . complained of [at Crossnore Pharmacy] were so similar in time and circumstances and other surrounding matters that the Court deems that the admissibility far outweighs any prejudice that they might have with regard to the defendant[.]

We review a trial court's decision to admit evidence under Rules 404(b) for an abuse of discretion. *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907, *appeal dismissed and disc. review denied*, 360 N.C. 653, 637 S.E.2d 192 (2006). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986).

Defendant argues that Mr. Hensley's testimony was inadmissible character evidence that was unfairly prejudicial. Rule 404(b) of the North Carolina Rules of Evidence provides 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. 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).

Under Rule 403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2009). "[T]he ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of [Rule 403]." *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988).

Evidence of other crimes is admissible "as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *State v. Aldridge*, 139 N.C. App. 706, 714, 534 S.E.2d 629, 635, *appeal dismissed and disc. review denied*, 353 N.C. 269, 546 S.E.2d 114 (2000). Such evidence can be admitted " 'if it tends to show the existence of a plan or design to commit the offense charged, or to accomplish a goal of which the offense charged is a part or toward which it is a step.' " *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 892 (1991) (citation omitted). There must be a concurrence of common features. *Id.*

In the present case, the evidence that defendant broke into a pharmacy in Mitchell County is sufficiently similar to the break-in at Crossnore Drugstore. The incidents were only a few days apart and both involved defendant, Mr. Hensley, and Mr. McDaniel. Both events took place around 1:00 a.m. for the purpose of stealing narcotics. Furthermore, the trial court specifically instructed the jury to only consider the testimony for the limited purpose of "motive, plan, opportunity, intent, preparation, knowledge and/or identity with regard to the offenses charged here." The trial court did not abuse its discretion in admitting the testimony.

C. Motion to Dismiss

Defendant argues that the trial court erred by denying his motion to dismiss the charges against him for insufficient evidence. We find no error in the denying of the motion to dismiss the charges of felony breaking and entering, felony larceny, and trafficking opium by possession and trafficking opium by transportation. We will not address the denial of the motion to dismiss the felonious possession of stolen goods as the trial court arrested judgment on this charge and neither party now contends this to be error. *State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 131 (1990) ("A court is free to arrest judgment in a proper case on its own motion . . . .").

We review the denial of a motion to dismiss for insufficient evidence *de novo*. *State v. Rouse*, 198 N.C. App. 378, 381, 679 S.E.2d 520, 523 (2009). When ruling on a motion to dismiss, a trial court must determine whether there is substantial evidence of each essential element of the offenses charged. *State v. Roddey*, 110 N.C. App. 810, 812, 431 S.E.2d 245, 247 (1993). "If, viewed in the light most favorable to the State, the evidence is such that a jury could reasonably infer that defendant is guilty, the motion must be denied." *State v. Williams*, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620-21 (2002).

[3] The elements of felonious breaking and entering are (1) the breaking or entering (2) of any building (3) with the intent to commit a felony or larceny. N.C. Gen. Stat. § 14-54(a) (2009). The State provided evidence of each element through Mr. Hensley's testimony that defendant broke into Crossnore Drugstore with the intention of stealing narcotics.

[4] To be convicted of larceny, "there must be substantial evidence showing that the defendant: (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently." *State v. Sluka*, 107 N.C. App. 200, 204, 419 S.E.2d 200, 203 (1992). The crime of larceny is a felony if it is committed pursuant to a breaking or entering. N.C. Gen. Stat. § 14-72(b)(2) (2009). Sufficient evidence was presented at trial through Mr. Hensley's testimony to permit a jury to find that defendant took pills from the Crossnore Drugstore; carried the pills away; without consent; with the intent to deprive Crossnore Drugstore of the pills permanently; and that the pills were taken pursuant to a breaking or entering.

[5] Defendant also contends that the trial court erred by failing to dismiss the charges for trafficking opium, because the State did not

provide a chemical analysis of the pills introduced into evidence. We disagree.

To be convicted of trafficking more than 28 grams of opium, the State is required to prove that defendant: (1) possessed or transported an opium derivative; and (2) the opium derivative weighed twenty-eight grams or more. N.C. Gen. Stat. § 90-95(h)(4)(c) (2009). The State bears the burden of establishing the identity of any controlled substance that is the basis of the prosecution. *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010).

In *State v. Llamas-Hernandez*, our Supreme Court concluded that the visual identification by two police officers that a particular substance was cocaine was not reliable and that the identification of a controlled substance must be shown by chemical analysis. *State v. Llamas-Hernandez*, 363 N.C. 8, 673 S.E.2d 658 (2009) (reversing for reasons stated in the dissenting opinion of our Court, 189 N.C. App. 640, 652-54, 659 S.E.2d 79, 86-88 (2008)). Similarly, in *Ward*, the defendant's convictions were based upon the visual examination of pills by a forensic chemist, the State's expert witness. *Ward*, 364 N.C. at 136-37, 694 S.E.2d at 740. Our Supreme Court held that an expert witness's visual identification of an alleged controlled substance "is not sufficiently reliable for criminal prosecutions[.]" *Id.* at 147, 694 S.E.2d at 747. "Unless the State establishes before the trial court that *another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt*, some form of scientifically valid chemical analysis is required." *Id.* (emphasis added).

Hydrocodone, an opium derivative, is a controlled substance that is defined in terms of its chemical composition. N.C. Gen. Stat. § 90-91(d)(7) (2009).

The State is not required, as defendant suggests, to conduct a chemical analysis on a controlled substance in order to sustain a conviction under N.C. Gen. Stat. § 90-95(h)(4), provided that the State has established "the identity of the controlled substance beyond a reasonable doubt" by "another method of identification." *See Ward*, 364 N.C. at 147, 694 S.E.2d at 747. In our opinion, in the present case, the State's evidence sufficiently established the identity of the stolen drugs by another method.

Here, William Martin, the pharmacist manager at Crossnore Drugstore—which was the pharmacy from which the drugs were

stolen—testified on behalf of the State. Mr. Martin, who has been a pharmacist for thirty-five years, testified that 2,691 tablets of hydrocodone acetaminophen, an opium derivative, were stolen from the pharmacy on 22 March 2009. Mr. Martin testified that he kept "a perpetual inventory of all of [the pharmacy's] drug items," inventoried "by strength and item number[,] and as new items come in, [those items are] added to that inventory automatically through a computer system and as things are dispensed they're taken away from the inventory by quantity." Through this process, Mr. Martin testified that he could account for the type and quantity of every item in his pharmacy inventory throughout the day, every day. Accordingly, Mr. Martin was able to identify which pill bottles were stolen from the pharmacy on 22 March by examining his inventory against the remaining bottles, because each bottle had "a sticker on it from [the pharmacy's] distributor that identifies the item, the date it was purchased and a partial of [the pharmacy's] account number on that sticker." These stickers, which were on every pill bottle delivered to the pharmacy, aided Mr. Martin in determining that 2,691 tablets of hydrocodone acetaminophen were stolen. Mr. Martin further testified, based on his experience and knowledge as a pharmacist, that the weight of the stolen 2,691 pill tablets was approximately 1,472 grams. Based on Mr. Martin's thirty-five years of experience dispensing the same drugs that were stolen from the Crossnore Drugstore, and based on Mr. Martin's unchallenged and uncontroverted testimony regarding his detailed pharmacy inventory tracking process, we are persuaded that Mr. Martin's identification of the stolen drugs as more than 28 grams of opium derivative hydrocodone acetaminophen was sufficient evidence to establish the identity and weight of the stolen drugs and was not analogous to the visual identifications found to be insufficient in *Ward* and *Llamas–Hernandez*. Because the State offered evidence that was "sufficient to establish the identity of the controlled substance beyond a reasonable doubt," the State was not required to additionally perform "some form of scientifically valid chemical analysis" in order to establish that defendant "transport[ed] or possesse[d] . . . opium or opiate" in violation of N.C. Gen. Stat. § 90-95(h)(4). *See Ward*, 364 N.C. at 147, 694 S.E.2d at 747. Accordingly, we conclude that the trial court did not err by denying defendant's motions to dismiss the charges of trafficking opium by possession and by transportation because the evidence presented, taken in the light most favorable to the State, was sufficient to sustain defendant's convictions under N.C. Gen. Stat. § 90-95(h)(4).

As we have found that the trial court did not err indenying defendant's motion to dismiss the felonious breaking and entering charge, the felony larceny charge, and the trafficking opium by possession and trafficking opium by transportation charges, we conclude that defendant received a fair trial free of any prejudicial error.

No error.

Chief Judge MARTIN and Judge McGEE concur.

GARY L. SHEPHERD, EMPLOYEE, PLAINTIFF v. NATIONAL FEDERATION, EMPLOYER, PMA INSURANCE GROUP, CARRIER, DEFENDANTS

No. COA10-638

(Filed 5 April 2011)

1. Appeal and Error— stay pending appeal—mediated settlement agreement—"other matter" not covered by stay

A decision of the Industrial Commission in a workers' compensation case was remanded where the Commission decided that a mediated settlement was outside its jurisdiction because the underlying case was on appeal. N.C.G.S. § 1-294 defines the scope of an appeal stay to exclude other matters not affected by the judgment appealed from; and the Industrial Commission had jurisdiction as an administrative agency to make administrative decisions about the parties' mediated settlement agreement.

Appeal by defendants from order entered 3 February 2010 by Pamela T. Young, Chair, on behalf of the Full Commission. Heard in the Court of Appeals 17 November 2010.

Gary L. Shepherd, plaintiff, pro se.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones, for defendants.

ELMORE, Judge.

National Federation (defendant-employer) and PMA Insurance Group (defendant-carrier; together, defendants) appeal an order by the Full Commission vacating a 19 July 2009 Opinion and Award for

lack of subject matter jurisdiction. Because we hold that the Full Commission erred by concluding that the Industrial Commission lacked jurisdiction to enter the 19 July 2009 Opinion and Award, we reverse the Full Commission's order and remand to the Full Commission.

I. Background

This case is on appeal from the Industrial Commission for the second time. The first time, we affirmed an opinion and award issued by the Full Commission. *Shepherd v. Nat'l Fed'n of Indep. Buss.*, 2008 N.C. App. Lexis 24 (Jan. 15, 2008). Our first opinion contains a more complete factual history of the underlying workers' compensation matter, which is of limited relevance to the current appeal. Of relevance is that plaintiff was an employee of defendant-employer on 23 May 2003, when he suffered a compensable injury. *Id.* at *12. Defendants denied plaintiff's claim for wage loss. *Id.* at *4. Plaintiff appealed, and, on 24 September 2005, Deputy Commissioner John B. DeLuca issued an opinion and award in favor of plaintiff. *Id.* Defendants appealed to the Full Commission, which affirmed Deputy Commissioner DeLuca's opinion and award on 22 August 2006. *Id.* Defendants then appealed to this Court, which heard the case on 29 August 2007 and affirmed the Full Commission's opinion and award on 15 January 2008. *Id.* at *1, *12.

However, while defendants' appeal was pending at this Court, the parties participated in voluntary mediation through the Appellate Mediation Program. On 22 May 2007, the parties met and mediated the matter during a mediated settlement conference with Steve Sizemore serving as the mediator. At the mediation, the parties entered into and executed a mediated settlement agreement. Both attorneys signed the mediated settlement agreement. Plaintiff also signed the mediated settlement agreement. Under the mediated settlement agreement, the parties agreed that defendants would pay plaintiff the total sum of $50,000.00, and, in consideration of that payment, plaintiff would execute "a standard Compromise Settlement Agreement and Release that complies with N.C.G.S. 97-17." The mediated settlement agreement also included the following contingency clause:

> Other: plaintiff is a current Medicare recipient; as such, the parties understand an MSA [Medicare Set-Aside Agreement] is required; defendants shall obtain a revised MSA, and, in the event said revised MSA is for an amount which defendants agree is accept-

able, defendants shall fund a guaranteed MSA; however, in the event said MSA is beyond the amount defendants are willing to pay, this settlement agreement is voidable by defendants; in addition, plaintiff agrees to be fully responsible for any Medicare lien, which is represented to be no more than $14,620; the parties agree if plaintiff is unable to get said Medicare lien reduced by 1/3, this agreement is voidable by plaintiff.

Defendants drafted an Agreement for Compromise Settlement and Release (clincher agreement) for the parties to sign and submit to the Industrial Commission. However, plaintiff refused to sign the clincher agreement. Defendants obtained a revised MSA in the amount of $18,106.00, which they agreed to fund. Defendants also agreed to be responsible for the full amount of the Medicare lien, not to exceed $15,000.00, "[i]n an effort to finalize the agreement[.]" Plaintiff continued to refuse to sign the clincher agreement. Plaintiff's attorney, apparently, could not persuade plaintiff to sign the clincher agreement or otherwise honor the mediated settlement agreement, and the Industrial Commission allowed her to withdraw from representation. Plaintiff continued *pro se*.

On 13 December 2007, defendants filed a motion in the Industrial Commission to enforce the mediated settlement agreement. On 8 April 2008, Executive Secretary Tracey H. Weaver denied defendants' motion because, "[w]ithout the consent of a plaintiff for review and approval of the Compromise Settlement Agreement, a hearing is required to establish the information required for a potential approval of the Mediated Settlement Agreement as a final settlement in this case." Both parties requested a hearing because they had failed to reach an agreement in regard to compensation. Plaintiff asserted that they had been unable to reach an agreement because "[d]efendants continue to defy the orders of the Courts and the Industrial Commission[.]" Defendants asserted that plaintiff had executed a mediated settlement agreement but refused to sign the clincher agreement, and they "wish[ed] to enforce the agreement." Defendants maintained that they had settled the claim.

On 21 October 2008, Deputy Commissioner Kim Ledford heard defendants' motion to enforce the mediated settlement agreement. Deputy Commissioner Ledford entered an order on 3 December 2008, ordering defendant "to pay all medical bills up to the amount of $12,633.22[,] which is set forth in the Mediated Settlement Agreement[.]" Deputy Commissioner Ledford also invited the parties to submit additional records.

On 17 June 2009, Deputy Commissioner Ledford entered her opinion and award. She identified the following two issues in the opinion and award: (1) "Whether the mediated settlement agreement executed by the parties at the mediation occurring on May 22, 2007[,] should be enforced[,]" and (2) "If the mediated settlement agreement is not subject to enforcement, what other benefits, if any, is [p]laintiff entitled to receive?"

Deputy Commissioner Ledford found, as fact, that the parties had fulfilled both contingencies set out in the mediated settlement agreement. She also found "no evidence of a mistake related to the knowledge of the parties at the time of the mediation," no credible evidence that "[p]laintiff was mislead [*sic*] or unduly pressured to sign the Mediation Agreement[,]" and that "[p]laintiff knowingly entered into an agreement at mediation to compromise and finally settle his workers' compensation claim related to the May 23, 2003[,] injury by accident." Deputy Commissioner Ledford concluded, as a matter of law, that "the Mediation Agreement as reduced to the Compromise Settlement Agreement, which fulfilled all the contingencies of the Mediation Agreement and actually went beyond those contingencies in Plaintiff's favor, is deemed to meet the requirements of valid contract, such that the same is enforceable." Deputy Commissioner Ledford ordered plaintiff to comply with the mediation settlement agreement, "as reduced to the Compromise Settlement Agreement[.]" She also ordered defendants to pay plaintiff's outstanding medical expenses, up to $12,633.22; to fund plaintiff's MSA in the amount of $18,106.00; to pay plaintiff's Medicare lien, up to $15,000.00; to pay plaintiff $50,000.00, less $12,500.00 approved as attorney fees for plaintiff's former attorney; and to pay plaintiff's attorney's fees, in the amount of $12,500.00, and costs.

On 13 July 2009, plaintiff appealed Deputy Commissioner Ledford's opinion and award to the Full Commission. The Full Commission reviewed the matter on 2 December 2009 and issued an order on 3 February 2010. The Full Commission set out some of the procedural history of the case, but it did not make separate findings of fact or conclusions of law. Instead, it reached the following conclusion:

> Upon review of the above procedural circumstances of the case, the Full Commission concludes that once the Court of Appeals rendered its January 15, 2008[,] decision on the merits of the case, the Industrial Commission did not have jurisdiction over a Mediated Settlement Agreement formed by the parties while the case was pending before the Court of Appeals.

Based on that reasoning, the Full Commission vacated Deputy Commissioner Ledford's opinion and award as null and void.

Defendants now appeal, arguing that the Full Commission erred by concluding that the Industrial Commission did not have jurisdiction over the mediated settlement agreement. We agree.

II. Arguments

A. Standard of Review

> As a general rule, the Commission's findings of fact are conclusive on appeal if supported by any competent evidence. It is well settled, however, that the Commission's findings of jurisdictional fact are *not* conclusive on appeal, even if supported by competent evidence. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record.
>
> . . . When . . . the appellate court reviews findings of jurisdictional fact entered by the Commission, . . . the reviewing court [must] make its own independent findings of . . . jurisdictional fact from its consideration of all the evidence in the record.

Perkins v. Arkansas Trucking Servs., Inc., 351 N.C. 634, 637, 528 S.E.2d 902, 903-04 (2000) (quotations, citations, and alteration omitted).

B. The Industrial Commission had jurisdiction over the mediated settlement agreement.

"The North Carolina Workers' Compensation Act permits parties to enter into settlement agreements, subject to approval by the Commission, 'so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of [the Act].' " *Roberts v. Century Contrs's, Inc.*, 162 N.C. App. 688, 691, 592 S.E.2d 215, 218 (2004) (quoting N.C. Gen. Stat. § 97-17(a)). Subsection 97-17(a) of our General Statutes further provides:

> A copy of a settlement agreement shall be filed by the employer with and approved by the Commission. No party to any agreement for compensation approved by the Commission shall deny the truth of the matters contained in the settlement agreement, unless the party is able to show to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake, in which event the Commission may set aside the agreement. Except as provided in

> this subsection, the decision of the Commission to approve a settlement agreement is final and is not subject to review or collateral attack.

N.C. Gen. Stat. § 97-17(a) (2009).

General Statute section 1-294 defines the scope of a stay when a matter is pending on appeal from a court, and it applies to appeals taken from the Full Commission. N.C. Gen. Stat. § 1-294 (2009); *Roberts*, 162 N.C. App. at 695, 592 S.E.2d at 220. Section 1-294 states, in relevant part:

> When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

N.C. Gen. Stat. § 1-294 (2009). Although "[a]n appeal to this Court divests the Industrial Commission of jurisdiction to issue opinions and awards[,]" *Roberts*, 162 N.C. App. at 695, 592 S.E.2d at 220 (citations omitted), it does not divest the Industrial Commission of jurisdiction to "proceed upon any other matter included in the action and not affected by the judgment appealed from[,]" N.C. Gen. Stat. § 1-294 (2009). Otherwise, there would be no means for the Industrial Commission to carry out its administrative tasks, including those set out by N.C. Gen. Stat. § 97-17(a):

> The Industrial Commission is primarily an administrative agency of the State, and its jurisdiction as an administrative agency is a continuing one. The Industrial Commission acts in a judicial capacity only in respect to a controversy between an employer and employee. The existence of such a controversy, or an appeal from the determination of such a controversy, does not operate to divest the Commission of its administrative powers. Obviously, an appeal of an award of the Industrial Commission does not suspend that agency's authority to accept notification of an employee's decision to select his own doctor; neither does an appeal deprive the Commission of its *jurisdiction* to accept the submission of a claim. It may well be that the determination of the particular claim will be delayed until the outcome of the appeal. Nevertheless, the Commission has jurisdiction to receive the claim and is, in fact, the only agency vested with that jurisdiction.

Schofield v. Tea Co., 299 N.C. 582, 593-94, 264 S.E.2d 56, 64 (1980), *superceded by statute on other grounds as stated in Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 208, 472 S.E.2d 382, 387 (1996).

Here, the parties participated in voluntary mediation through this Court's mediation program while defendants' appeal to this Court was pending. They reached an agreement independent of the opinion and award that was pending on appeal. Plaintiff's counsel asked this Court to hold the appeal in abeyance until plaintiff could sort out the Medicare lien. Plaintiff did not attempt to sort out the Medicare lien, and this Court heard plaintiff's appeal and issued an opinion, presumably because the matter had not been fully "settled" in mediation; the parties left contingencies in the mediated settlement agreement, and plaintiff refused to sign the clincher agreement. Because plaintiff refused to sign the clincher agreement, defendants could not submit it to the Industrial Commission for review and approval, as required by N.C. Gen. Stat. § 97-17(a). *See, e.g.*, *Smythe v. Waffle House*, 170 N.C. App. 361, 364, 612 S.E.2d 345, 348 (2005) ("The Industrial Commission must review all compromise settlement agreements to make sure they comply with the Workers' Compensation Act and the Rules of the Industrial Commission, and to ensure that they are fair and reasonable."). Accordingly, defendants moved the Industrial Commission to enforce the mediated settlement agreement in the absence of a clincher agreement, which request Deputy Commissioner Ledford properly heard.

The Industrial Commission was not divested of jurisdiction to consider the parties' mediated settlement agreement simply because an opinion and award was pending at this Court; the Industrial Commission had jurisdiction as an administrative agency to make administrative decisions about the parties' mediated settlement agreement. The Full Commission erred by concluding otherwise. The Full Commission should have considered the merits of plaintiff's appeal from Deputy Commissioner Ledford's order, and it should have fully reviewed Deputy Commissioner Ledford's order and issued its own order on the merits.

Because the Full Commission did not review the merits of the order below, we do not consider defendants' additional arguments that the Full Commission erred by not concluding that the mediated settlement agreement was an enforceable agreement and the mediated settlement agreement was "fair and just." The Full Commission made

no findings or conclusions about the mediated settlement agreement except that it was outside the Industrial Commission's jurisdiction; the scope of our review does not extend as far as defendants' arguments would require. *See*, *e.g.*, *id.* ("[W]hen the findings are insufficient to determine the rights of the parties, the court may remand to the Industrial Commission for additional findings.") (quotations and citation omitted; alteration in original).

III. Conclusion

We remand to the Full Commission to consider plaintiff's appeal on the merits. We advise the Full Commission that its 22 August 2006 opinion and award, affirmed by this Court on 15 January 2008, will govern the relationship between the parties if the Full Commission does not enforce the mediated settlement agreement.

Reversed and remanded.

Judges HUNTER, Robert C., and CALABRIA concur.

RONALD J. WELLIKOFF AND SUZIE WELLIKOFF, PLAINTIFFS V. PROGRESS DEVELOPMENT CORP., NORTH CAROLINA DREAM LAND, LLC, D/B/A COLDWELL BANKER-HORN REAL ESTATE, WALKE REALTY, INC., D/B/A COLDWELL BANKER-HORN REAL ESTATE, DONNY L. SCOTT, KAREN E. KELLY AND NANCY PETERSON, DEFENDANTS

No. COA10-1232

(Filed 5 April 2011)

1. Appeal and Error— no notice of appeal — dismissed

Plaintiffs' argument that the trial court erred by failing to make findings of fact supporting its order of dismissal in a breach of contract case was dismissed. Plaintiffs' notice of appeal did not provide notice from the trial court's order of dismissal.

2. Contracts— breach of contract—conclusion of law—supported by the evidence

The trial court did not err in a breach of contract case by failing to make sufficient findings of fact to support its challenged conclusion of law. The conclusion of law was sufficiently supported by the factual findings.

3. Contracts— breach of contract—finding of fact—unlicensed contractor

There was conflicting evidence in the record to support the trial court's finding of fact in a breach of contract case that the parties did not discuss whether defendant Scott was a licensed contractor. The case was remanded for more detailed factual findings.

4. Contracts— breach of contract—conclusion of law—finding of fact—unlicensed contractor

The trial court erred in its conclusion of law, which was actually a finding of fact, that there was no evidence that plaintiff would not have contracted with defendants had he known that they did not have a general contractor's license. The evidence was conflicting and the matter was remanded for more detailed findings.

Appeal by plaintiff from judgment entered 26 February 2010 by Judge Dennis J. Winner in Henderson County Superior Court. Heard in the Court of Appeals 21 February 2011.

Karolyi-Reynolds, PLLC, by James O. Reynolds, for plaintiff appellant.

Fisher Stark, P.A., by W. Perry Fisher, II, and Jean P. Kim for Progress Development Corp. and Donny L. Scott defendant appellees.

Delbert Lee Walke, Jr., pro se, Walke Realty, Inc., defendant appellee.

McCULLOUGH, Judge.

Plaintiff appeals an order and judgment of the trial court that dismissed his claims against defendants. We dismiss in part, affirm in part, and remand in part.

I. Background

On 5 November 2008, plaintiffs Ronald J. Wellikoff ("plaintiff") and his wife, Suzie Wellikoff brought this action against defendants.[1] Defendant Progress Development Corp. (APDC") previously performed grading services for plaintiff. Defendants Donny L. Scott

1. In its judgment, the trial court concluded that Suzie Wellikoff had no involvement in this transaction. Accordingly, all references to plaintiff refer only to Ronald J. Wellikoff.

("Scott") and Karen E. Kelly ("Kelly") were alleged to be agents of PDC. Defendant Nancy Peterson ("Peterson") is a licensed real estate broker that had previously contracted with plaintiff through defendant Walke Realty, Inc. ("Walke Realty") and later through defendant North Carolina Dream Land, LLC, d/b/a Coldwell Banker-Horn Real Estate ("Coldwell Banker").[2]

In his complaint, plaintiff claimed damages against PDC, Scott, and Kelly for breach of contract, unfair and deceptive trade practices, and performing grading services for a value in excess of thirty-thousand dollars ($30,000.00) without a general contractor's license, in violation of N.C. Gen. Stat. § 87-1. Plaintiff alleged breach of fiduciary duty against Peterson and Walke Realty, and Coldwell Banker.

Trial was held without a jury on 10 February 2010. At trial, the evidence tended to show the following: on 22 September 2006, plaintiff entered into an Exclusive Right to Sell Listing Agreement with Peterson through Walke Realty to sell real property that he owned in Lake Lure, North Carolina (the "property"). That agreement was terminated and on 7 December 2006, plaintiff entered into a subsequent Exclusive Right to Sell Listing Agreement with Peterson through Coldwell Banker.

Peterson suggested that plaintiff put a driveway on the property in order to enhance its sales potential and recommended Scott to perform the work involved. On 18 September 2006, Scott, on behalf of PDC, and plaintiff executed a contract for PDC to build and apply gravel to a driveway on plaintiff's property for the price of forty-four thousand eight hundred dollars ($44,800.00). The contract provided in relevant part:

> Any alteration or deviation from the above specifications, including but not limited to any such alterations of deviation involving additional material and/or labor costs, will be executed only upon written order for same, signed by Owner and Contractor . . . .
>
> * * * *
>
> 3. To the extent required by law all work shall be performed by individuals duly licensed and authorized by law to perform said work.
>
> * * * *

2. Plaintiff voluntarily dismissed the claims against Coldwell Banker.

6. All change orders shall be in writing and signed both by Owner and Contractor, and shall be incorporated in, and become part of the contract.

* * * *

13. In the event the Contractor unearths rock outcroppings, underground streams, or any unseen obstacle, the owner will pay all cost associated with the removal of the obstacle and extra work caused by these obstacles.

14. The driveway shall not exceed 17% grade change from the road to the house pad.

Plaintiff testified that he hired Scott to construct the driveway on his property because Peterson and Scott had both represented that Scott was licensed and insured. Scott stated that prior to executing the contract with plaintiff, he informed plaintiff that he did not have his general contractor's license in North Carolina and Peterson testified that she witnessed Scott make that disclosure.

After Scott started working on plaintiff's property, he encountered significant rock outcroppings on the original route of the driveway. When Scott told plaintiff about the rock outcroppings, he gave plaintiff the option of constructing an alternative steeper route for the driveway so that plaintiff could avoid the additional expense and plaintiff agreed. Plaintiff claimed that there were never any discussions about the rock outcroppings or changing the contract.

When plaintiff had Peterson inspect the driveway, Peterson told him that the driveway was "an easy drive[.]" The grade of the driveway constructed on plaintiff's property exceeds a 17% grade for all but the first 20 feet and has a grade as high as 29.06% in one section. Plaintiff claims that he cannot drive up the driveway because it is too steep.

At the close of plaintiff's evidence, the trial court dismissed plaintiff's claims against Kelly, Peterson, and Walke, pursuant to N.C. R. Civ. P. 41. The trial court entered judgment on 26 February 2010 and dismissed plaintiff's claims against the remaining defendants. The trial court made the following relevant findings of fact:

1. On September 18, 2006, [plaintiff] and [PDC] entered into the contract attached to the Complaint.

2. At the time of the contract entry and at all relevant times thereafter, neither [PDC] nor its owner, [Scott], were licensed

as general contractors in North Carolina. Scott failed to inform [plaintiff] of that fact during the contract negotiation but, did not assert to [plaintiff] that he or [PDC] were licensed.

3. Within a reasonable period of time after execution of the contract . . . [PDC] ran into a substantial rock formations [sic] . . . . [Scott] showed [plaintiff] the rock outcroppings and proposed to him a different route for the driveway so the rock would not have to be blasted . . . . [Plaintiff] agreed to the change proposed by [Scott]. Although nothing was discussed with respect to any change in the 17% maximum grade, [plaintiff] was shown the route of the proposed driveway which, in fact, included grades in excess of 17%.

From its factual findings, the trial court made the following conclusions of law:

1. [Scott] was the disclosed agent of [PDC] and therefore as to any breach of contract by [PDC], Scott would not be liable. However, if the failure to disclose that neither he nor [PDC] were licensed general contractors is a violation of N.C.G.S. § 75 he would be liable for said violation.

2. The agreement of [plaintiff] to the change route in the drive way is a novation of the original contract and since he agreed to said route and the route contained greater than 17% elevation gain at some points, he cannot complain that the drive way as constructed exceeded that grade as provided by the original contract and it is not a breach of the novated contract.

3. The failure of Scott to tell [plaintiff] that he was an unlicensed general contractor is a violation of § 75, however, there is no evidence that [plaintiff] would not have contracted with [PDC] [PDC] had he known that they did not have a general contractor's license. Therefore, there is no credible evidence that [plaintiff] was damaged by the failed disclosure.

Plaintiff filed notice of appeal on 17 March 2010.

I. Order of Dismissal

[1] Plaintiff contends that the trial court erred by failing to make findings of fact supporting its order of dismissal in favor of Walke Realty and Peterson. We dismiss this assignment of error, as it was not properly preserved for appeal.

Proper notice of appeal requires that a party "shall designate the judgment or order from which appeal is taken[.]" N.C. R. App. P. 3(d) (2011). ' "Without proper notice of appeal, this Court acquires no jurisdiction.' " *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) (citation omitted). Plaintiff's notice of appeal only referenced appealing the judgment entered on 26 February 2010, and did not provide notice to appeal the trial court's order of dismissal against Walke Realty and Peterson. We dismiss this assignment of error, as the order of dismissal is not properly before this Court for review.

II. Judgment

Plaintiff assigns error to some of the factual findings and conclusions of law made by the trial court in its judgment. We affirm in part and remand in part.

"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 Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). If the factual findings are supported by competent evidence, such findings are conclusive on appeal, even if there is evidence to the contrary. *Lagies v. Myers*, 142 N.C. App. 239, 246, 542 S.E.2d 336, 341, *disc. review denied*, 353 N.C. 526, 549 S.E.2d 218, 218-19 (2001). We review the trial court's conclusions of law *de novo*. *Shear*, 107 N.C. App. at 160, 418 S.E.2d at 845.

A. Conclusion of Law 2

[2] Plaintiff argues that the trial court erred by failing to make sufficient findings of fact to support its conclusion that "since [plaintiff] agreed to said route and the route contained greater than 17% elevation gain . . . [plaintiff] cannot complain that the driveway as constructed exceeded that grade as provided by the original contract and it is not a breach of the novated contract." We disagree.

This conclusion of law is supported by the factual finding that after PDC and Scott ran into substantial rock formations, plaintiff and Scott agreed on an alternative steeper route for the driveway. Although the trial court found that the parties did not specifically discuss the grade of the new driveway, there is competent evidence to support its conclusion that the contractual provision regarding the

grade of the driveway was no longer applicable, because the parties had entered into a new agreement.

Plaintiff also contends that the trial court's conclusion that there was a novation of the contract was erroneous, because the contract specifically provides that it can only be modified by writing. However, this Court has held that:

> "provisions of a written contract may be modified or waived by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived. This principle has been sustained even where the instrument provides for any modification of the contract to be in writing."

Inland Constr. Co. v. Cameron Park II, Ltd., LLC, 181 N.C. App. 573, 577, 640 S.E.2d 415, 418 (2007) (quoting *Graham and Son, Inc. v. Board of Education*, 25 N.C. App. 163, 167, 212 S.E.2d 542, 544-45, *cert. denied*, 287 N.C. 465, 215 S.E.2d 623 (1975)). We affirm the conclusion of law, as it is sufficiently supported by the factual findings.

B. Factual Finding 2

[3] Plaintiff contends that the trial court erred in finding that during the contract negotiations, Scott failed to tell plaintiff he was not licensed, but did not represent to plaintiff that he was licensed. It was uncontested that Scott and PDC did not have a general contractor's license. Plaintiff's testimony, as well as the provisions of the contract, provided evidence that Scott told plaintiff he had a general contractor's license. However, Scott and Peterson's testimony that Scott specifically told plaintiff that he was not licensed contradicts that evidence.

Nevertheless, there is no evidence in the record that supports the factual finding that the parties did not discuss whether Scott was licensed. While it is possible that the trial court decided to discredit the testimony of all of the parties, it is unclear why the trial made this finding. We remand to the trial court for more detailed factual findings.

C. Conclusion of Law 3

[4] Plaintiff also contends that the trial court erred in its conclusion that "there is *no evidence* that [plaintiff] would not have contracted with [PDC] had he known that they did not have a general contractor's license." (Emphasis added.) Plaintiff argues that the above conclusion of law is really a factual finding that is unsupported by the evidence.

At trial, plaintiff provided evidence that he choose Scott to construct the driveway because he thought that Scott was a licensed general contractor. Plaintiff testified that he hired Scott because "[Peterson] recommended that I go with him because he was the most reliable. He was licensed. He was insured." Plaintiff admits that this finding could be supported if the trial court had determined that there was "no *credible* evidence" that plaintiff would not have contracted with PDC and Scott if he had known that they were not licensed. However, because plaintiff did provide evidence that he would not have contracted with PDC and Scott if he had known that they did not have a general contractor's license, the trial court's finding that there was "no evidence" of such cannot stand. We remand to the trial court for adequate factual findings.

Dismissed in part, affirmed in part, remanded in part.

Chief Judge MARTIN and Judge McGEE concur.

IN THE MATTER OF K.L.D

No. COA10-679

(Filed 5 April 2011)

Juveniles— delinquency—permissible range of statutory dispositions

The trial court did not abuse its discretion in a juvenile delinquency case arising out of simple assault and sexual battery by entering a Level 2 intermediate disposition without considering a Level 1 community disposition because it was within the range of statutorily permissible dispositions.

Appeal by juvenile from order entered 7 January 2010 by Judge Carol A. Jones Wilson in Sampson County District Court. Heard in the Court of Appeals 23 February 2011.

Attorney General Roy Cooper, by Assistant Attorney General Judith Tillman, for the State.

Anna S. Lucas for juvenile-appellant.

BRYANT, Judge.

IN RE K.L.D.

[210 N.C. App. 747 (2011)]

Where the juvenile court's disposition order was within the range of statutorily permissible dispositions and was not manifestly unsupported by reason, we affirm the order.

An adjudication hearing on this matter was commenced 6 January 2010. The evidence presented indicates that Jessica[1], who was thirteen at the time of adjudication hearing, rode the bus to her middle school between November 2008 and January 2009. Jessica testified that the bus would pick her up around 6:30 a.m. Usually, two other girls and sometimes a thirteen year old boy named Alex Tucker were already on the bus. At the next stop, another girl would get on followed by Scott Terrell and K.L.D. Scott and K.L.D. were fifteen and fourteen, respectively, at the time of the hearing. Jessica had known Scott and K.L.D. since elementary school but did not consider them her friends. Jessica testified that Alex, Scott, and K.L.D. harassed her on the school bus between November 2008 and January 2009, each grabbing her on various occasions. K.L.D. would touch her vaginal area on the outside of her clothes and her breasts inside of her clothes, and he would try to kiss her. Jessica testified that she was "grossed out and freaked out" by the boys' conduct, and she never gave any of them permission to touch her.

Jessica eventually told her sister about the behavior, and her sister, in turn, informed their father. On 24 February 2009, Jessica's father filed a report with the Sampson County Sheriff's Department. K.L.D. was charged with one count of sexual battery and one count of simple assault. At K.L.D.'s adjudication hearing, Scott incriminated himself, testifying, in substance, that between November 2008 and January 2009, he sometimes sat near Jessica on the ride to school and that sometimes "[he] would touch her breasts." K.L.D. did not testify. K.L.D. was adjudicated delinquent as a result of the allegations of sexual battery and simple assault on Jessica between November 2008 and January 2009.

K.L.D. had a prior record which indicated that he had previously been adjudicated delinquent. The prior adjudication resulted from a 1 May 2008 incident also on a Sampson County school bus. Three juvenile petitions for simple assault on three female victims had been filed. The allegations in those petitions included "attempting to put his hands down the victims [sic] shirt," "grabbing the victim [sic] head in [sic] pulling toward his private part," and "touching the victims [sic]

1. Pseudonyms have been used to protect the identities of all the juveniles, and initials have been used for juvenile delinquent pursuant to N.C. R. App. P. 3.1(b).

butt and grabbing her in [sic] making her sit on his lap." Two of the petitions were dismissed; however, K.L.D. was found responsible for one allegation of simple assault.

In the current matter, after the trial court found K.L.D. responsible for the acts of sexual battery and simple assault on Jessica and adjudicated him delinquent, it considered K.L.D.'s prior record at disposition. In its disposition order, the court made the following findings of fact: K.L.D.'s delinquency history level was low; and the court received and considered a predisposition report, risk assessment, and needs assessment. In the risk assessment, K.L.D. was determined to be of medium risk; in his needs assessment, K.L.D. was determined to require medium needs. Based on the findings of fact, the court concluded that "[t]he Court is required to order a Level 2 disposition (*and also may order any Level 1 disposition*)." The court imposed a Level 2 disposition ordering that K.L.D. participate in a wilderness program, be confined for fourteen days at an approved detention facility, perform fifty hours of community service, be placed on supervised probation for a period of twelve months, adhere to a curfew of 5 p.m. to 8 a.m., abstain from associating with any person deemed inappropriate by the judge, the court counselor, or parent, not use a computer unless supervised, and have no contact with Jessica. K.L.D. appeals.

On appeal, K.L.D. contends the trial court erred by concluding that it was required to enter a Level 2 intermediate disposition without considering a Level 1 community disposition. We disagree.

The decision to impose a statutorily permissible disposition is vested in the discretion of the juvenile court and will not be disturbed absent clear evidence that the decision was manifestly unsupported by reason. *In re N.B.*, 167 N.C. App. 305, 605 S.E.2d 488 (2004).

Under our North Carolina Juvenile Code, "[t]he purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction, including the protection of the public." N.C. Gen. Stat. § 7B-2500 (2009). In selecting from a statutorily authorized disposition, the court shall consider the following factors:

(1) The seriousness of the offense;

(2) The need to hold the juvenile accountable;

(3) The importance of protecting the public safety;

> (4) The degree of culpability indicated by the circumstances of the particular case; and
>
> (5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c) (2009). Pursuant to N.C. Gen. Stat. § 7B-2508, the range of permissible dispositions is limited by the juvenile's offense classification and delinquency history. N.C.G.S. § 7B-2508 (2009).

> If a juvenile is adjudicated of more than one offense during a session of juvenile court, the court shall consolidate the offenses for disposition and impose a single disposition for the consolidated offenses. The disposition shall be specified for the class of offense and delinquency history level of the most serious offense.

N.C.G.S. § 7B-2508(h) (2009). Where a juvenile has been found to be responsible for the allegations amounting to an A1 misdemeanor, the offense classification is "serious." N.C.G.S. § 7B-2508(a)(2) (2009). Sexual battery is a class A1 misdemeanor. N.C. Gen. Stat. § 14-27.5A (2009). Where a juvenile has been found to be responsible for the allegations amounting to a Class 1, 2, or 3 misdemeanor, the offense classification is "minor." N.C.G.S. § 7B-2508(a)(3). Simple assault is a class 2 misdemeanor. N.C. Gen. Stat. § 14-33(a) (2009).

"The delinquency history level for a delinquent juvenile is determined by calculating the sum of the points assigned to each of the juvenile's prior adjudications . . . ." N.C. Gen. Stat. § 7B-2507(a) (2009). "For each prior adjudication of a Class 1, 2, or 3 misdemeanor offense, 1 point." N.C. Gen. Stat. § 7B-2507(b)(3) (2009). A total of 1 point for prior offenses correlates to a delinquency history level of "low." N.C.G.S. § 7B-2507(c)(1) (2009). K.L.D. was previously adjudicated delinquent for the prior offense of simple assault—a class 2 misdemeanor, and as a result, K.L.D. had 1 point for prior offenses. This correlated to a delinquency history level of low.

Under N.C.G.S. § 7B-2508(f), the combination of a serious offense with a low delinquency history level yields an authorized disposition of Level 1 or Level 2. N.C.G.S. § 7B-2508(f) (2009). Under a Level 1 disposition, a community disposition, "[a] court . . . may provide for evaluation and treatment under G.S. 7B-2502 and for any of the dispositional alternatives contained in subdivisions (1) through (13) and (16) of G.S. 7B-2506." N.C.G.S. § 7B-2508(c). Under a Level 2 disposition, an intermediate disposition,

> [a] court . . . may provide for evaluation and treatment under G.S. 7B-2502 and for any of the dispositional alternatives contained in subdivisions (1) through (23) of G.S. 7B-2506, but shall provide for at least one of the intermediate dispositions authorized in subdivisions (13) through (23) of G.S. 7B-2506.

N.C.G.S. § 7B-2508(d).

Under N.C.G.S. § 7B-2506, dispositions 13 through 23 include, the following:

> (13) Order the juvenile to cooperate with placement in a wilderness program.
>
> . . .
>
> (20) Order that the juvenile be confined in an approved juvenile detention facility for a term of up to 14 24-hour periods, which confinement shall not be imposed consecutively with intermittent confinement pursuant to subdivision (12) of this section at the same dispositional hearing. The timing of this confinement shall be determined by the court in its discretion.
>
> . . .
>
> (23) Order the juvenile to perform up to 200 hours supervised community service consistent with the juvenile's age, skill, and ability, specifying the nature of work and the number of hours required. The work shall be related to the seriousness of the juvenile's offense.

N.C.G.S. § 7B-2506 (2009).

> The dispositional hearing may be informal, and the court may consider written reports or other evidence concerning the needs of the juvenile. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.

N.C.G.S. § 7B-2501(a) (2009).

Here, the record included three prior juvenile petitions for simple assault on female victims other than Jessica. The victims alleged that K.L.D. "attempt[ed] to put his hands down the victims [sic] shirt," "grabb[ed] the victim [sic] head in [sic] pull[ed] toward his private part," and "touch[ed] the victims [sic] butt and grabb[ed] her in [sic]

ma[de] her sit on his lap." As a result, K.L.D. was adjudicated delinquent on one count of simple assault, and the other two counts were dismissed, resulting in a 1 point, low delinquency history level.

However, in the instant case, after K.L.D. was adjudicated a delinquent as to simple assault and sexual battery, the court could properly authorize a Level 1 or Level 2 disposition pursuant to § 7B-2508(f), because K.L.D. now had a serious offense combined with a low delinquency level. Therefore, the Level 2 intermediate disposition ordered by the court—that K.L.D. participate in a wilderness program, submit to intermittent confinement by spending fourteen days in an approved detention facility, and perform fifty hours of community service—was within the range of statutorily permissible dispositions. Because the court's decision was clearly not manifestly unsupported by reason and because it was an appropriate decision within the discretion of the trial court, it shall remain undisturbed.

Affirmed.

Judges ELMORE and GEER concur.

IN THE MATTER OF: THE APPEAL OF: MARATHON HOLDINGS, LLC, PROPERTY BY THE 2007 WAKE COUNTY BOARD OF COUNTY COMMISSIONERS

IN THE MATTER OF: THE APPEAL OF: MARATHON HOLDINGS, LLC, FROM THE DECISION OF THE WAKE COUNTY BOARD OF COUNTY COMMISSIONERS CONCERNING TAXATION OF TANGIBLE PERSONAL PROPERTY FOR TAX YEAR 2005

IN THE MATTER OF: THE APPEAL OF: MARATHON HOLDINGS, LLC, FROM THE DECISION OF THE WAKE COUNTY BOARD OF COUNTY COMMISSIONERS CONCERNING TAXATION OF TANGIBLE PERSONAL PROPERTY FOR TAX YEAR 2008

No. COA10-1275

(Filed 5 April 2011)

1. Taxes— North Carolina Property Tax Commission—valuation of airplanes—denial of motion to permit testimony of Commission member—properly denied

The North Carolina Property Tax Commission did not err in an appeal from the valuation of three airplanes belonging to taxpayer by denying taxpayer's motion to permit the testimony of a Commission staff member. 17 N.C.A.C. 11.0219 does not require

the Commission to make findings in denying a motion to permit testimony from a staff member and the testimony sought was not necessary to prevent manifest injustice to taxpayer.

2. Taxes—North Carolina Property Tax Commission—constitutional challenges—valuation of airplanes—no contention that decision not supported by substantial evidence

Taxpayer's argument in an appeal from the North Carolina Property Tax Commission concerning the valuation of three of taxpayer's airplanes that N.C.G.S. § 105-274(a) violates the uniformity requirements of the North Carolina Constitution and the equal protection clause of the United States Constitution was overruled. Taxpayer did not contend that any portion of the Commission's decision was not supported by substantial evidence or otherwise unlawful in any specific way.

Appeal by Taxpayer from final decisions entered 20 April 2010 by the Property Tax Commission sitting as the State Board of Equalization and Review. Heard in the Court of Appeals 8 March 2011.

Yates, McLamb, & Weyher, LLP, by T. Carlton Younger, III, for Taxpayer.

Office of the Wake County Attorney, by Assistant County Attorney Lucy Chavis and Deputy County Attorney Roger A. Askew, for Wake County.

STEPHENS, Judge.

After receiving tax notices from the Wake County Revenue Department ("the Revenue Department") for three aircraft, Taxpayer Marathon Holdings, LLC, filed applications with the Wake County Board of Equalization and Review ("the County Board") appealing the valuations on 17 July 2008 (08 PTC 473), 13 December 2007 (08 PTC 032), and 14 May 2009 (09 PTC 308). The County Board affirmed the decision of the Revenue Department, and Taxpayer filed applications for hearings before the Property Tax Commission ("the Commission"), sitting as the State Board of Equalization and Review. Taxpayer asserted that the relevant taxation statute was unconstitutional. On 19 March 2010, the Commission held a hearing on the matters. Prior to the proceedings, Taxpayer filed a motion to permit testimony from Kirk Boone, a Commission staff member. The Commission heard and denied the motion before the hearing. On 20 April 2010, the Commission issued its final agency decisions upholding the County

Board's decisions in all three matters. Taxpayer appeals the final agency decisions, arguing that (I) the Commission erred in denying its motion to permit Boone's testimony, and (II) N.C. Gen. Stat. § 105-274(a) violates the uniformity requirements of the North Carolina Constitution and the equal protection clause of the United States Constitution. For the reasons discussed herein, we affirm the Commission's decisions.

Standard of Review

Our General Statutes provide for appeal from Commission decisions to this Court as follows:

> (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:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the Commission; or
>
> (3) Made upon unlawful proceedings; or
>
> (4) Affected by other errors of law; or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2 (2009). As this Court has noted:

> "The duties of the [Property Tax] Commission are quasi-judicial in nature and require the exercise of judgment and discretion." *In re Appeal of Interstate Income Fund I*, 126 N.C. App. 162, 164, 484 S.E.2d 450, 451 (1997) (citing *In re Appeal of Amp, Inc.*, 287 N.C. 547, 561, 215 S.E.2d 752, 761 (1975)). The Commission has the authority and responsibility "to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and

> circumstantial evidence." *Id.* (quoting *In re McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 126-27 (1981)).

In re Philip Morris U.S.A., 130 N.C. App. 529, 532, 503 S.E.2d 679, 681, *cert. denied*, 349 N.C. 359, 525 S.E.2d 456 (1998). The function of an "appellate court is to decide all relevant questions of law and interpret constitutional and statutory provisions to determine whether the decision of the Commission is, *inter alia*, affected by errors of law." *MAO/Pines Association, Ltd. v. New Hanover County Board of Equalization*, 116 N.C. App. 551, 556, 449 S.E.2d 196, 200 (1994) (citing N.C. Gen. Stat. § 105-345.2). In reviewing final agency decisions from the Commission, we apply the whole record test, under which we may not

> replace the [Commission's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo* (citation omitted). On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the [Commission's] decision, to take into account whatever in the record fairly detracts from the weight of the [Commission's] evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the [Commission's] result, without taking into account the contradictory evidence or evidence from which conflicting inferences could be drawn (citation omitted).

In re McElwee, 304 N.C. at 87-88, 283 S.E.2d at 127. "If the Commission's decision, considered in the light of the foregoing rules, is supported by substantial evidence, it cannot be overturned." *In re Philip Morris U.S.A.*, 130 N.C. App. at 533, 503 S.E.2d at 682.

Denial of Motion

[1] Taxpayer first argues that the Commission erred in denying its motion to permit Boone's testimony. We disagree.

Section 105-345.1(a) provides: "On appeal the court shall review the record and the exceptions and assignments of error in accordance with the rules of appellate procedure, and any alleged irregularities in procedures before the Property Tax Commission, not shown in the record, shall be considered under the rules of appellate procedure." As Taxpayer concedes, the Commission's Rule 17 N.C.A.C. 11.0219 provides that "[n]o member of the staff of the Commission may be called as a witness in a proceeding before the Commission unless the

Commission shall first find that the testimony of a staff member is necessary to prevent manifest injustice to a party." 17 N.C.A.C. 11.0219 (2010). However, Taxpayer contends that the Commission erred in summarily denying its motion "without comment or explanation" and asserts that the Commission should have undertaken inquiry or attempted to make findings in response to the motion. Taxpayer acknowledges that there is no case in this State holding that the Commission must make findings when denying such a motion and we agree. We further note that the plain language of the Commission's rule does not require it to make findings in ruling on such a motion. At most, it suggests that a finding of necessity is required before it allows a staff member to be called as a witness. Here, the Commission did not permit a staff member to be called and, thus, no finding regarding necessity would be required. Nor does the Rule specify any set amount of time the Commission must spend considering such a motion.

In oral argument before the Commission on the motion, Taxpayer asserted that, because Boone taught classes across the State to county tax assessors, he could testify that the tax statutes were applied inconsistently from county to county, thus supporting Taxpayer's equal protection argument. In response, Deputy County Attorney Shelley T. Eason stated that Boone's teaching experience did not provide Boone with any first-hand knowledge about how counties handled property valuation and taxation. The Commission then recessed for five minutes to consider the motion before going back on the record to deny it. This recess indicates that the decision here, while quick, was not "summary," as the Commission did consider Taxpayer's motion.

We also note that the Commission's Rule 17 N.C.A.C. 11.0218 permits parties to engage in discovery to develop and present relevant evidence at hearings. Thus, Taxpayer could have used this rule to depose or subpoena tax assessors from various counties in the State to develop evidence about the consistency of tax valuation across the State such as that Taxpayer contended Boone could provide. Where Taxpayer failed to avail itself of the opportunity to obtain the same or similar evidence as Boone could provide, we do not believe that Boone's testimony was necessary to prevent manifest injustice to Taxpayer.

In sum, we do not read 17 N.C.A.C. 11.0219 as requiring the Commission to make findings in denying a motion to permit testi-

mony from a staff member. We conclude that the testimony sought was not necessary to prevent manifest injustice to Taxpayer. This argument is overruled.

Constitutionality of Taxation Statute

[2] Taxpayer also argues that N.C. Gen. Stat. § 105-274(a) violates the uniformity requirements of the North Carolina Constitution and the equal protection clause of the United States Constitution. However, in its brief, Taxpayer states that it raises this issue in "preservation," and that the issue "may only be fully considered, analyzed, and argued following the proffered testimony of" Commission staff member Boone. Perhaps for this reason, this portion of Taxpayer's brief lacks any citations to authority or argument as required by Rule 28(b)(6) of our Rules of Appellate Procedure. Taxpayer does not contend that any portion of the Commission's decision is not supported by substantial evidence or otherwise unlawful in any specific way, and accordingly, we affirm. *See In re Philip Morris U.S.A.*, 130 N.C. App. at 533, 503 S.E.2d at 682.

Affirmed.

Judges ERVIN and BEASLEY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS
(FILED 5 APRIL 2011)

ENGELL v. BAYSIDE REALTY, INC. No. 10-698	Dare (07CVS20)	Dismissed
ESPINOSA CONSTR., LLC v. GIBBS No. 10-759	Madison (08CVD326)	Affirmed
HENRY JAMES BAR-BEQUE, INC. v. GILMORE No. 10-729	Guilford (08CVS7912)	Affirmed
IN RE A.C.N.B. No. 10-1397	Iredell (08JT74)	Affirmed
IN RE A.C.R. No. 10-1365	Yancey (09J18-19)	Affirmed in part; reversed and remanded in part
IN RE A.M.B. No. 10-1208	Randolph (07JT123)	Affirmed
IN RE B.G.C. No. 10-1326	Buncombe (08JT416-417)	Affirmed
IN RE C.R.C. No. 10-1297	Gaston (07JT162-163)	Affirmed
IN RE C.W. No. 10-1425	New Hanover (09JT49-50)	Affirmed
IN RE ESTATE OF SLICK No. 10-774	Forsyth (07E920)	Affirmed
IN RE J.B. No. 10-1127	New Hanover (08JA99)	Affirmed in part; Remanded in part
IN RE M.R.L., III No. 10-1153	Haywood (09JT30)	Affirmed
IN RE P.C.L. No. 10-1139	Stokes (08JT17) (08JT18) (08JT19) (09JT13)	Affirmed
IN RE T.A.D. No. 10-1345	Burke (04J150-151)	Affirmed

JI v. GASKINS No. 10-492	Wake (08CVS21972)	Dismissed
LONG v. GATEWAY COMMUNITIES, LLC No. 10-599	Mecklenburg (09CVS4268)	Affirmed
MAURO v. MOONEY No. 10-856	Henderson (08CVS141)	Affirmed
MULLIS v. SOUTHEAST RENAL ASSOCS. No. 10-763	Mecklenburg (08CVS16073)	Dismissed
REID v. HOSPIRA, INC. No. 10-895	Indus. Comm. (823914)	Affirmed
STATE v. BONDS No. 10-562	Catawba (08CRS51599-600)	No Error
STATE v. BORDEAUX No. 10-712	Edgecombe (08CRS53260)	No Error
STATE v. CODY No. 10-961	Guilford (07CRS109840) (07CRS109843)	No Error
STATE v. CZYZEWSKI No. 10-1035	Greene (06CRS50039)	Vacated
STATE v. HAYES No. 10-656	Craven (08CRS1520)	No Error
STATE v. HEMPHILL No. 10-603	Transylvania (09CRS1306) (09CRS51147-48)	No Prejudicial Error
STATE v. KALEY No. 10-1124	Guilford (09CRS80644) (09CRS80647) (09CRS80648-49)	No Error
STATE v. MAYNARD No. 10-134	Davidson (08CRS51433-36)	No Error
STATE v. PAYTON No. 10-804	Mecklenburg (06CRS213297-98)	Affirmed
STATE v. POTEAT No. 10-934	Lincoln (07CRS50220)	No Error

STATE v. RIPPY No. 10-482	Rutherford (08CRS110)	No Error
STATE v. SEALY No. 10-1060	Moore (08CRS5590) (09CRS3491)	No Error
STATE v. SMITH No. 10-998	Buncombe (09CRS304) (09CRS323) (09CRS55530-31) (09CRS55533-35)	No error in part; dismissed without prejudice in part, remanded for correction of clerical error
STATE v. TRUESDALE No. 10-262	Cumberland (05CRS64176)	No Error
STEELE v. SURRY CNTY. No. 10-607	Indus. Comm. (786901)	Affirmed
TAYLOR v. SANDBANK No. 10-561	Guilford (09CVS7216)	Reversed
TUCKER v. FAYETTEVILLE STATE UNIV. No. 10-726	Cumberland (09CVS12084)	Reversed and Remanded
WRIGHT v. OAKLEY No. 10-1271	Rowan (08CVS4035)	Dismissed

PRESENTATION OF THE PORTRAIT OF

SIDNEY S. EAGLES, JR.

Chief Judge

COURT OF APPEALS OF NORTH CAROLINA
1983-2004

September 19, 2013

IN THE MATTER OF THE PORTRAIT OF

THE HONORABLE CHIEF JUDGE SIDNEY S. EAGLES, JR.

Transcript of proceedings in the North Carolina Court of Appeals at the ceremonial session held beginning at 10:00 AM on Thursday, September 19, 2013, the Honorable John C. Martin, Chief Judge, presiding.

THE MARSHALL: All rise. The Honorables the Chief Judge and Judges of the Court of Appeals of the State of North Carolina. Oh, yes. Oh, yes. Oh, yes. The Court of Appeals is now in ceremonial session. God save the State and this Honorable Court. Would you please be seated.

CHIEF JUDGE MARTIN: Good morning, ladies and gentlemen. Welcome to the North Carolina Court of Appeals. We are convened this morning in ceremonial session for the very special occasion of receiving the portrait of the Honorable Sidney S. Eagles, Jr., who served on this Court from January 1st, 1983 until his retirement on January 31st, 2004. Judge Eagles served as the Seventh Chief Judge of the Court from May 1st, 1998 until his retirement. On behalf of the Court and Chief Judge Eagles and his entire family, thank all of you for being here this morning for this very special occasion.

The Court recognizes the Reverend David Mallory, Senior Minister at the Hillyer Memorial Christian Church, for our invocation. Reverend Mallory.

REVEREND MALLORY: Please bow your heads. Praise God.

We've gathered on this special occasion to give you praise and thanksgiving for the many ways that you shape and form our lives. We praise you, God, for the systems that seek to apply justice to the inequities of our world. We give thanks for the servants who make their life calling in pursuit of that justice.

Lord, we come today to recognize one of those servants, Sidney S. Eagles, Jr., for his many years of dedication. As his portrait hangs in this hall, may his legacy be one of wise discernment and trusted integrity. May his passion for compromise and peaceful resolution be an example for each of us to follow.

God, remind us all of the responsibilities we have to uphold the standards of fairness and equality. Give us the courage and wisdom and determination that we might speak the word of truth among all the noise and confusions. Shape us and form us that we might be the world of peace and beauty that you have created. Amen.

CHIEF JUDGE MARTIN: We particularly want to welcome this morning the members of Judge Eagles's family. His wife Rachel is here, his daughter Virginia, his daughter Judge Margaret Eagles and her husband Trey Flowers, and their son Charles Thornton Eagles Flowers, better known as Charlie. And Charlie's got on some really fine looking shoes.

We're also pleased and honored to have with us this morning some of our spouses. My wife Margaret is here. Judge Bryant's husband Steve Douglas is here. Judge Hunter's wife Susan, Judge McCullough's wife Lucci, and Judge Dillon's wife Ann. Welcome to all of you.

We're also delighted to welcome back a number of our former colleagues on the Court: Chief Judge Gerald Arnold and his wife Sue, Judge James Carson, Judge Maurice Braswell, Judge Donald Smith, Judge K. Edward Greene, Judge Loretta Biggs, Judge Albert Thomas and his wife Georgia, Judge Alan Thornburg, and Judge John Arrowood. Thank you all for coming

From the North Carolina Supreme Court, we welcome Chief Justice Sarah Parker, Associate Justices Mark Martin, Robert Edmunds, Robin Hudson, Barbara Jackson, and Cheri Beasley. Thank you all for coming.

We're delighted that several former members of the Supreme Court have joined us, as well: Chief Justice Rhoda Billings and her husband Don, Chief Justice Burley Mitchell and his wife Lou, Chief Justice Henry Frye, Justice Willis Whichard and his wife Leona, Justice Robert Orr is here and Justice Patricia Timmons-Goodson. Thank you all for coming.

Justice Mitchell, Justice Whichard, Justice Orr, and Justice Timmons-Goodson are also former members of this Court.

We're pleased that Mrs. Christie Cameron Roeder, the Clerk of the Supreme Court is here. From the Superior Court, we welcome Judge Donald Stephens. Thank you for coming.

From the Federal bench, we're pleased to welcome Senior United States District Court Judge Earl Britt and his wife Judy. Thank you.

We're also very pleased and honored that former North Carolina Attorney General and United States Senator Robert Morgan and Mrs. Morgan are with us, as well as their daughter Margaret Holmes. Thank you.

I also want to especially recognize Judge Eagles's long-time assistant Betty Tippette, who served with him the entire time that he

served on the Court, and she is here with us today, and of course, everyone here is our special guest, and we thank you all for being here.

Judge Russell Walker was to have made remarks but he has been delayed and is not here. We will hope that he comes soon. In his absence, Judge Eagles, do you have something you would like to say?

JUDGE EAGLES: I've been accused of doing all sorts of things in order to have an opportunity to speak, but I'm not responsible for this. [LAUGHTER]

CHIEF JUDGE MARTIN: Well, I see Mr. James Van Camp in the courtroom, who has known Judge Eagles for about as long as anybody, except maybe me, and maybe longer than I have. I know you're not prepared to do this, Jim.

MR. VAN CAMP: No, Your Honor, but this is rather unusual, especially at this auspicious gathering or group of people, but I can say a few words.

CHIEF JUDGE MARTIN: Would you, please?

[Mr. Van Camp came forward and addressed the audience.]

MR. VAN CAMP: Thank you, I think. Sid Eagles and I go back to law school. He was a little ahead of me. He was a great student. He has become—became a great attorney and a great judicial leader of this Court for our State and I had the wonderful experience of being on the Criminal Code Commission with Sid and Leon Corbett. Someone said "You should write a book," which Sid co-authored, and of which I am accused of being a co-author, but I never showed up for any of the drafting sessions because I was always some place else, but—

JUDGE EAGLES: But on the way.

MR. VAN CAMP: But on the way. [LAUGHTER.] Sid and I spent almost twenty years on the Criminal Code Commission, along with Judge Billings—Justice Billings and other great lawyers, and we worked the last weekend of every month for ten years doing criminal law drafting, with Professor Corbett.

At any rate, this occasion is good news and bad news. I have not seen the portrait. The good news is he's had a portrait of himself done, which is a great—a great honor for him, and that will be here for eternity. The bad news is that it may look like him.

But at any rate, Judge Eagles, congratulations from all of us, and as a stand-in for Judge Walker, I hope I did some good. Rachel, it's always good to see you. And thank you, so much. Thank you, Your Honor.

CHIEF JUDGE MARTIN: Thank you, sir.

[Applause. Mr. Van Camp returned and took his seat in the audience.]

CHIEF JUDGE MARTIN: Mr. Corbett, do you have anything you'd like to add?

MR. LEON CORBETT: Your Honor, Sid and I go back to days at Wake Forest. He was in ROTC, and I was, too, but he was the Air Force. But he came, after his service, back home to North Carolina. As I was leaving Raleigh, I contacted Sid, and so that was his entry, I guess, to service in State government.

And after that, he spent time with this man here, Robert Morgan, and organized the Criminal Code Commission which is responsible, as Jim said, for all of our criminal procedure laws. And he's practiced law and been in and out of the legislative process and appeared in all these courts. So I guess you'd have to say that he has done all that you could do within the legal profession. And so we're all indebted to him for helping to shape, in many ways, the laws that we live under today.

Jim said something about the portrait. I hope it doesn't get quite the same comment that my portrait at Wake Forest got, and I asked somebody on the development staff, "Do you think it looks like me?" And she said, "No. I think it looks nice." [LAUGHTER.]

CHIEF JUDGE MARTIN: The Court recognizes Judge Maurice Braswell.

JUDGE BRASWELL: Your Honor, Judge Eagles and I had the privilege of running in politics statewide in the same year of '82 and each won our seat. Here in this room in 1984, there was a civil trial from Western Piedmont of North Carolina that involved cows that would no longer give down their milk. It seems that there was some sort of electrical shortage in their wiring that led to their inability, and a lawsuit arose out of it.

Here in this building, in this room, counsel for the plaintiff stood up, who was the loser in the lower court, and he said, "If Your Honor please, we ask for an udder trial." [LAUGHTER.]

Congratulations to Judge Eagles, and I welcome him to the udder trial of life. Enjoy it.

CHIEF JUDGE MARTIN: And I know I may get in great difficulty with what I'm about to do, but Chief Judge Gerald Arnold preceded Judge Eagles as Chief Judge, and I would call upon Chief Judge Arnold for such remarks as he might like to make.

[Chief Judge Arnold came forward and faced the audience]

CHIEF JUDGE GERALD ARNOLD: Chief Judge Martin, members of the Court, distinguished and much admired ladies and gentlemen.

I can't wait to hear what I've got to say. [LAUGHTER.] First, I was Chief Judge before Judge Eagles but I want it understood that I was not responsible for him, though I wished I had been at times.

Judge Braswell mentioned the "udder trial" and I think that there may have been some malpractice action as a result of that case later on after I left the Court, for all I know there is still litigation going on in that case, so even an "udder trial" might not have ended the matter.

Judge Eagles, while I don't go back to Wake Forest with you, certainly I remember our days together when I was in the legislature and you and Senator Morgan were keeping me on the right road over on Jones Street. I have always appreciated that we became good friends during that time, when you were in the AG's office and did so much bill drafting.

I would simply like to say this: I'm delighted that they are hanging your portrait. When you look around at the portraits hanging up around us they're all dead, . . . except for me! And a lot of folks think that I'm dead. [LAUGHTER] Of course, some of them thought I was dead when I was here on the Court, too. [LAUGHTER.]

So I'll say this, let them hang you here, with the living and the dead, let them hang you, high and handsome, here in these hallowed halls.

I am delighted that you called on me to say these few words on behalf of Judge Eagles. I know of nobody better than Judge Eagles who has better exemplified that old Quaker Proverb that goes something like this: "I shall pass this way but once, if there be any act of kindness, any good thing that I may do, let me not neglect nor defer it, for I shall not pass this way again." Judge Eagles, I pay you my highest compliment.

[Applause. Chief Judge Arnold returned and took his seat in the audience.]

CHIEF JUDGE MARTIN: I think we could probably go all the way around the courtroom, particularly with Judge Eagles's former clerks and Ms. Tippette and others to talk about their experiences with him, but perhaps we will save that for another time. This is probably the most unusual ceremonial session over which I have presided in the last ten years, but let me say that probably it is one of the most mean-

ingful. Thank you Jim and Leon, Gerald, Maurice. You all have made it meaningful, I'm sure, for Judge Eagles, and for this Court, as well.

JUDGE RUSSELL G. WALKER, JR: Most of the portraits in this room were presented after these giants of the judiciary had passed from the scene. Being able to take part in this ceremony with Sid and his family is a special privilege.

I have known Sid Eagles for just over 44 years though I have known of him for 51 so let me start there. When I entered Wake Forest College in the Fall of 1962 Sid was a second-year law student. I knew of him in his role as the Dorm Counselor to be respected, feared and avoided at all costs. In this I was successful and so only saw him from a distance. Others were not so blessed. In fact in the 1963 yearbook, The Howler, you will find him prominently mentioned on the page devoted to Pi Kappa Alpha where the brothers note with glee that their house parties became much more fun when he moved from their dorm!

In September 1969 I finally came face to face with Sid when I, along with Jim Blackburn, Ted Eatman, Burley Mitchell, and Howard Satisky, reported for work in the NC Department of Justice. As I recall our orientation included a series of presentations from the heads of the various internal divisions of the Department of Justice with the goal of finding the one to which we would be assigned. Sid was in charge of the week and, fresh from his service in the Air Force and retaining more than a bit of military bearing along with a yardstick for a "swagger stick", he made a strong impression as he spread pearls of wisdom before us to assure that we made a smooth transition into the largest law firm in NC.

In early 1970 Robert Morgan made his decision to give Sid responsibility for organizing the new Criminal Code Revision Commission. That in turn gave me the opportunity to assume responsibility for the work of the General Statues Commission under Sid's careful tutelage and there began a great friendship. We worked together in the AG's Legislative Drafting Division during the 1971 and 1973 sessions of the General Assembly and over the years traveled to meetings of the NCCUSL and the NCBA with our wives and growing families. We were often the focus of attention when we four brunette parents appeared at functions with our total of five red haired children.

Our divergent careers brought us both to robe-wearing positions in the General Court of Justice during 1982. I to a court where I could help generate his work-load and he to a court where he could continue to "grade my papers." Over the years I am sure that there were

reversible errors coming from my court and I am also sure that, if he authored the opinion, I was fairly and mercifully chastised.

Sid's service to our nation, our state, our profession and to this Court has been exemplary. His friendship, support and advice have been and continue to be cherished blessings. Thank you, Sid, for you service and for showing us how to be a friend.

CHIEF JUDGE MARTIN: Now for the moment for which we've all been waiting. I would ask Virginia and Margaret and Charlie to unveil the portrait for us. You can come inside the bar if you'd like.

[Virginia Eagles, Judge Margaret Eagles, and Charlie Flowers came forward and unveiled the portrait to applause.]

CHIEF JUDGE MARTIN: Chief Judge Eagles, on behalf of the Court, we accept this portrait with our gratitude not only for the painting, which we will proudly display on the walls of this courtroom, but also for your many years of service and leadership to this Court.

With this portrait, the Court now has the portrait of every person who has served as Chief Judge.

We are truly honored by this generous gift from you and your family, Judge Eagles, and by the opportunity to follow the example that you set for us by your service on this Court. Thank you.

I would also like to recognize and thank the artist, Craig Green, who is here with us today with his wife. Mrs. Green is the daughter of David Britt, who was one of the original members of this Court, and his portrait hangs immediately outside this courtroom.

Mr. Green, you have certainly captured Judge Eagles's likeness on the canvas, and I am told that the image looks so much like him that the Eagles's family dog Max barks at it.

A record of these proceedings will be included in the minutes of the Court and printed in the North Carolina Court of Appeals reports. I am sure this will be a most interesting report.

The firm of Smith Moore Leatherwood will host a reception in the gallery outside the courtroom in order that members of the Court and all present here will have an opportunity to greet Judge Eagles and his family. Members of the Court look forward to greeting you there also.

Marshall, will you please adjourn court.

THE MARSHALL: This ceremonial session of the North Carolina Court of Appeals is adjourned.

APPENDIX

RULES OF THE APPELLATE PROCEDURE

IN THE SUPREME COURT OF NORTH CAROLINA

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ORDER ADOPTING AMENDMENTS TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Amendment to Rule 28(h)

Rule 28(h) of the North Carolina Rules of Appellate Procedure is hereby stricken and rewritten as follows:

(h) **Reply Briefs**. Within fourteen days after an appellee's brief has been served on an appellant, the appellant may file and serve a reply brief, subject to the length limitations set forth in Rule 28(j). Any reply brief which an appellant elects to file shall be limited to a concise rebuttal of arguments set out in the appellee's brief and shall not reiterate arguments set forth in the appellant's principal brief. Upon motion of the appellant, the Court may extend the length limitations on such a reply brief to permit the appellant to address new or additional issues presented for the first time in the appellee's brief. Otherwise, motions to extend reply brief length limitations or to extend the time to file a reply brief are disfavored.

Amendments to Rule 13(a)

The last sentence of Rule 13(a)(1) of the North Carolina Rules of Appellate Procedure is hereby amended as follows:

. . . ~~If permitted by Rule 28(h), the appellant may serve and file a reply brief as provided in that rule~~. An appellant may file and serve a reply brief as provided in Rule 28(h).

The last sentence of Rule 13(a)(2) is hereby amended to read as follows:

. . . ~~If permitted by Rule 28(h), the appellant may serve and file areply brief as provided in that rule, except that reply briefs filed pursuant to Rule 28(h)(2) or (h)(3) shall be filed and served within twenty-one days after service of the appellee's brief.~~ An appellant may file and serve a reply brief as provided in Rule 28(h).

Amendment to Rule 14(d)(1)

The last sentence of the first paragraph of Rule 14(d)(1) of the North Carolina Rules of Appellate Procedure is hereby amended as follows:

. . . ~~If permitted by Rule 28(h), the appellant may serve and file areply brief as provided in that rule~~. An appellant may file and serve a reply brief as provided in Rule 28(h).

Amendment to Rule 15(g)(2)

The last sentence of Rule 15(g)(2) of the North Carolina Rules of Appellate Procedure is hereby amended to read as follows:

. . . ~~If permitted by Rule 28(h), the appellant may serve and file a reply brief as provided in that rule~~. An appellant may file and serve a reply brief as provided in Rule 28(h).

Amendment to Rule 28(j)(2)(A)

The second sentence of Rule 28(j)(2)(A) of the North Carolina Rules of Appellate Procedure is amended to read as follows:

. . . ~~The page limit for a reply brief permitted by Rule 28(h)(1), (2), or (3) is fifteen pages, and the page limit for a reply brief permitted by Rule 28(h)(4) is twelve pages.~~ The page limit for a reply brief is fifteen pages.

Amendment to Rule 28(j)(2)(B)

The second sentence of Rule 28(j)(2)(B) of the North Carolina Rules of Appellate Procedure is hereby amended to read as follows:

~~A reply brief permitted by Rule 28(h)(1), (2), or (3) may contain no more than 3,750 words, and a reply brief permitted by Rule 28(h)(4) may contain no more than 3,000 words.~~ A reply brief may contain no more than 3,750 words.

Amendment to Rule 27(b)

Rule 27(b) of the North Carolina Rules of Appellate Procedure is hereby amended to read as follows:

(b) **Additional Time After Service ~~by Mail~~**. Except as to filing of notice of appeal pursuant to Rule 3(c), whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper and the notice or paper is served by mail, or by electronic mail if allowed by these rules, three days shall be added to the prescribed period.

Amendment to Rule 9(d)

Rule 9 (d) of the North Carolina Rules of Appellate Procedure is hereby stricken and rewritten as follows:

(d) **Exhibits**.

Any exhibit filed, served, submitted for consideration, admitted, or made the subject of an offer of proof may be made a part of the record on appeal if a party believes that its inclusion is necessary to understand an issue on appeal.

(1) Documentary Exhibits Included in the Printed Record on Appeal. A party may include a documentary exhibit in the printed record on appeal if it is of a size and nature to make inclusion possible without impairing the legibility or original significance of the exhibit.

(2) Exhibits Not Included in the Printed Record on Appeal. A documentary exhibit that is not included in the printed record on appeal can be made a part of the record on appeal by filing three copies with the clerk of the appellate court. The three copies shall be paginated. If multiple exhibits are filed, an index must be included in the filing. Copies that impair the legibility or original significance of the exhibit may not be filed. An exhibit that is a tangible object or is an exhibit that cannot be copied without impairing its legibility or original significance can be made a part of the record on appeal by having it delivered by the clerk of superior court to the clerk of the appellate court. When a party files a written request with the clerk of superior court that the exhibit be delivered to the appellate court, the clerk must promptly have the exhibit delivered to the appellate court in a manner that ensures its security and availability for use in further trial proceedings. The party requesting delivery of the exhibit to the appellate court shall not be required to move in the appellate court for delivery of the exhibit.

(3) Exclusion of Social Security Numbers from Exhibits. Social security numbers must be deleted or redacted from copies of exhibits.

(4) Removal of Exhibits from Appellate Court. All models, diagrams, and exhibits of material placed in the custody of the clerk of the appellate court must be taken away by the parties within ninety days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the clerk. When this is not done, the clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the clerk shall destroy them, or make such other disposition of them as to the clerk may seem best.

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on 15 April 2013.

These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments also shall be published as quickly as practicable

on the North Carolina Judicial Branch of Government Home Page (http://www.nccourts.org/).

s/Beasley, J.
For the Court

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ZONING

ABUSE OF PROCESS

Civil action—temporary restraining order—motion in the cause—criminal action—information for arrest warrant—The trial court erred by dismissing plaintiff wife's claim for abuse of process in the civil action because plaintiff properly alleged that defendant husband's attorney did not obtain a temporary restraining order or file a motion in the cause for regular and legitimate functions, but instead provided knowingly false information to the trial court in order to use these processes to gain an advantage over plaintiff in a collateral matter. However, the trial court did not err by dismissing plaintiff wife's claim for abuse of process in the criminal action because the attorney's actions in providing information and assistance to execute the arrest warrant against plaintiff after it had been issued did not constitute an improper act. **Chidnese v. Chidnese, 299.**

ADMINISTRATIVE LAW

Agency authority—imposition of fees—inmates—specific statute controls general—It was evident from the statutory structure that the Legislature intended that N.C.G.S. § 12-3-1 operate as a general limitation on the rule-making powers of state agencies, but the particular statute addressing the Department of Correction's rule-making authority for prisoners, N.C.G.S. § 150B-1(d)(6), prevailed over the general statute. **Griffith v. N.C. Dep't of Corr., 544.**

APPEAL AND ERROR

Appealability—failure to give notice of appeal from judgment—The Court of Appeals dismissed defendant's appeal in a felonious breaking or entering, felonious larceny, felonious possession of stolen goods, and misdemeanor larceny case based on lack of jurisdiction caused by defendant's failure to note an appeal from the trial court's judgment as required by N.C. R. App. P. 4. **State v. Hughes, 482.**

Cross-appeal—unnecessary determination—Although plaintiff SPX argued on conditional cross-appeal that the trial court erred by holding that defendant Liberty was entitled to a full and separate per occurrence deductible for each claim covered by its policies, this issue did not need to be considered because the Court of Appeals already affirmed the trial court's 13 March 2009 order. **SPX Corp v. Liberty Mut. Ins. Co. 562.,**

Denial of petition for costs—no written order—The Court of Appeals did not address plaintiff's argument that the trial court erred by denying her petition for costs as there was no written order entered regarding plaintiff's petition. **Dafford v. J.P. Steakhouse, LLC, 678.**

Interlocutory orders and appeals—condemnation proceeding—substantial right affected—Plaintiff's appeal from the trial court's interlocutory order regarding her claim for adverse possession in a condemnation proceeding affected a substantial right and was immediately appealable. **City of Charlotte v. Williams, 257.**

Interlocutory orders and appeals—Industrial Commission—appeal dismissed—Defendants' appeal from an opinion and award by the Full Commission awarding temporary total disability benefits, temporary partial disability benefits, past and future medical expenses, costs, and attorney fees to plaintiff was dismissed as interlocutory. The opinion and award on its face contemplated further proceedings to resolve the amount of plaintiff's wage loss benefits. **Evans v. Hendrick Auto. Grp., 247.**

APPEAL AND ERROR—Continued

Interlocutory orders and appeals—merged into final order—timely appeal—The Court of Appeals had jurisdiction over a custody case where the trial court's 6 March order did not determine all of the issues, those issues were determined by an order on 20 May, and defendant's appeal on 6 June was timely. The original order became part of a final order on 20 May. **Peters v. Pennington, 1.**

Interlocutory orders and appeals—prior action pending—compulsory counterclaim—immediately appealable—Defendants' appeal from the trial court's interlocutory order denying their motion to dismiss in a wrongful termination case was considered by the Court of Appeals. The refusal to abate an action on grounds of a prior action pending and the denial of a motion to dismiss pursuant to Rule 13(a) relating to compulsory counterclaims were immediately appealable. **Townsend v. Shook, 462.**

Interlocutory orders and appeals—Rule 54(b) certification—Although plaintiff wife appealed from the trial court's interlocutory order dismissing plaintiff's claims only against defendant husband's attorney, the order included an N.C.G.S. § 1A-1, Rule 54(b) certification that there was no just reason to delay plaintiff's appeal. **Chidnese v. Chidnese, 299.**

Interlocutory orders and appeals—Rule 54(b) certification—failure to exhaust administrative remedies—An appeal from a partial summary judgment involving workers' compensation insurance rates was dismissed as not being from a final order, despite the trial court's Rule 54(b) certification. Defendant had not exhausted its administrative remedies and the issue upon which summary judgment was not granted was directly related to the other issues. **The Travelers Indem. Co. v. Wall, Wall & Knudson, Ltd., 265.**

Interlocutory orders and appeals—statute not applicable—no substantial right affected—Defendant's appeal from the trial court's denial of his motion to dismiss plaintiffs negligence complaint was dismissed. Because N.C.G.S. § 162-16 governs only a method of personal service of process upon a sheriff and does not establish the sole method of service of process upon a sheriff, N.C.G.S. § 162-16 was not applicable to service in this case, so defendant's appeal was from an interlocutory order. Furthermore, defendant's motion to dismiss based on a statute of limitations did not affect a substantial right and was therefore not immediately appealable. **Webb v. Price, 261.**

Invited error—cross-examination question—answer repeated by counsel—There was no plain error in an indecent liberties prosecution where defense counsel on cross-examination elicited an answer that "something must have happened" and then repeated the testimony and invited the witness to give her opinion again. **State v. Carter, 156.**

Liability—denial of motion of directed verdict—moot—Plaintiff's argument that the trial court erred by denying her motion for a directed verdict as to defendant's liability in a negligence case was not addressed by the Court of Appeals. The issue was moot as the jury found that defendant was negligent. **Dafford v. J.P. Steakhouse, LLC, 678.**

Mootness—child visitation—child reaching majority—A child visitation issue was not addressed where the child had reached majority and was no longer subject to any visitation agreement between his parents. **Robinson v. Robinson, 319.**

APPEAL AND ERROR—Continued

No notice of appeal — dismissed—Plaintiffs' argument that the trial court erred by failing to make findings of fact supporting its order of dismissal in a breach of contract case was dismissed. Plaintiffs' notice of appeal did not provide notice from the trial court's order of dismissal. **Wellikoff v. Progress Dev. Corp., 740.**

Preservation of issues—constitutional errors—not raised at trial—Defendant's argument that he was denied his right to a fair trial guaranteed by the Fifth Amendment to the United States Constitution and Article I of the North Carolina Constitution by the admission of a witness's testimony was not properly before the Court of Appeals and was not addressed. Because defendant did not raise this constitutional issue at trial, he failed to preserve it for appellate review. **State v. Banks, 30.**

Preservation of issues—constitutional issue—not raised at trial—Defendant's argument that at least one of his four convictions in a multiple assault case must be arrested because entry of judgment on all four violated due process was dismissed. Defendant failed to raise the constitutional issue at trial and, thus, failed to preserve the issue for appellate review. **State v. Wright, 52.**

Preservation of issues—failure to argue—An issue regarding the valuation and distribution of certain property in an equitable distribution action was not preserved for appellate review where defendant did not argue that the court improperly accepted his oral stipulation as to the value of the trucks, did not direct the appellate court to any later objection to his stipulation, and did not argue that the finding was not supported by competent evidence. **Quesinberry v. Quesinberry, 578.**

Preservation of issues—failure to raise constitutional issue at trial—Although defendant contended that the trial court violated his constitutional rights by requiring him to wear prison clothing during the jury selection and first day of trial, defendant failed to preserve this issue for appeal by not raising it at trial. **State v. Woodard, 725.**

Preservation of issues—imposition of restitution—no objection required—Defendant did not fail to preserve for appellate review the issue of whether the State failed to present evidence to support the amounts of restitution ordered in an assault with a deadly weapon inflicting serious injury case. No objection was required to preserve for appellate review issues concerning the imposition of restitution. **State v. Smith, 439.**

Preservation of issues—objection at trial—not different from argument on appeal—Defendant preserved for appeal the question of whether the trial court should have dismissed one of two conspiracy charges where defendant moved at trial to dismiss all charges, including both conspiracy charges. Although the State contended that this was a different argument from that argued at trial, defendant argued on appeal that there was evidence of only one agreement. **State v. Lawrence, 73.**

Preservation of issues—sentencing—Defendant's appeal of the issue of whether he was properly sentenced as an habitual offender for trafficking in opium was cognizable even though he did not object at trial. **State v. Eaton, 142.**

APPEAL AND ERROR—Continued

Record—applicable law—prior and subsequent zoning ordinances—An appeal from a zoning decision was dismissed where the record did not permit determination of whether a prior or a subsequent zoning ordinance was applicable to the development plans in question. **CRLP Durham LP v. Durham City/Cnty Bd. of Adjust., 203.**

Record—social security numbers—Although sanctions were not imposed, counsel were cautioned against including social security numbers in the record on appeal. **Lamm v. Lamm, 181.**

Sentencing—issues not addressed—new trial—The Court of Appeals declined to address defendant's arguments with respect to his criminal sentence in a sexual offense with a child and statutory rape case where defendant was given a new trial. **State v. Towe, 430.**

Stay pending appeal—mediated settlement agreement—"other matter" not covered by stay—A decision of the Industrial Commission in a workers' compensation case was remanded where the Commission decided that a mediated settlement was outside its jurisdiction because the underlying case was on appeal. N.C.G.S. § 1-294 defines the scope of an appeal stay to exclude other matters not affected by the judgment appealed from; and the Industrial Commission had jurisdiction as an administrative agency to make administrative decisions about the parties' mediated settlement agreement. **Shepard v. Nat'l Fed'n, 733.**

Timeliness of appeal—Rule 59 motion—pending issues—Defendant timely appealed an equitable distribution judgment where the original period was tolled by a Rule 59 motion, there were other claims pending after the Rule 59 motion was denied, and the notice of appeal was within thirty days from the court's order dismissing those claims. **Quesinberry v. Quesinberry, 578.**

Violation of appellate rules—plaintiff's violations nonjurisdictional—defendant's counsel taxed printing costs—Although plaintiff's brief did not strictly comply with the relevant provisions of N.C. R. App. P. 28, those deficiencies constituted a violation of nonjurisdictional requirements that did not lead to dismissal of the appeal. Defendant's single-spaced brief violated N.C. R. App. P. 26(g)(1). Pursuant to N.C. R. App. P. 34, the Court of Appeals sanctioned defendant's counsel by requiring that they pay the printing costs of the appeal. **Dafford v. J.P. Steakhouse, LLC, 678.**

ASSAULT

Deadly weapon inflicting serious injury—lesser-included offense—peremptory instruction—no error—The trial court did not commit plain error in an assault with a deadly weapon inflicting serious injury case by failing to instruct the jury on the lesser-included offense of assault with a deadly weapon. The trial court's peremptory instruction to the jury that the victim's injuries were serious was correct. **State v. Smith, 439.**

Deadly weapon inflicting serious injury—peremptory instruction—serious injury—no error—The trial court did not commit error or plain error in an assault with a deadly weapon inflicting serious injury case by giving a peremptory instruction to the jury that multiple gunshot wounds in the upper body constituted a serious injury. The victim required emergency surgery; was left with scars on his chest, shoulder, back, and neck; and testified that a bullet remained in his neck and that it caused him continuing pain. **State v. Smith, 439.**

ASSAULT—Continued

Lesser-included offenses not submitted—no error—The trial court did not commit plain error in a multiple assault case by failing to submit lesser-included offenses to the jury. Evidence of defendant's intent to kill was sufficient to support the assault with a deadly weapon with intent to kill inflicting serious injury charge and evidence of the victim's serious injury was sufficient to support the assault with a deadly weapon inflicting serious injury charge. **State v. Wright, 52.**

Secret assault—insufficient evidence—motion to dismiss improperly denied—The trial court erred in denying defendant's motion to dismiss the charge of secret assault where there was insufficient evidence that the assault was committed in a secret manner. **State v. Wright, 52.**

ATTORNEY FEES

Child custody—court's observation of attorney—The trial court did not err in its award of attorney fees in a child custody case where the court had ample opportunity to observe the attorney whose fees were questioned and to judge her reputation for diligence and competence. **Peters v. Pennington, 1.**

Child custody—factors—The award of attorney fees in a child custody case was supported by the complexity of the case, the difficulty of litigation-related issues, and the results obtained. **Peters v. Pennington, 1.**

Combined domestic action—fees not allocated—underlying issues unresolved—remanded—An award of attorney fees in a combined action for equitable distribution, alimony, and child support was vacated and remanded where there were no findings attributing the fees to the underlying actions (attorney fees are not recoverable in equitable distribution actions), and underlying issues involving child support were remanded for further action. **Robinson v. Robinson, 319.**

Payment on a schedule—interest—The trial court did not abuse its discretion when awarding attorney fees in a child custody case by requiring payment on a schedule since defendant was free to satisfy the judgment early. However, the portion of the order imposing interest was vacated. **Peters v. Pennington, 1.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Attempted—instructions—omitted portion subsequently included—There was no plain error in an instruction on attempted felonious breaking and entering where the trial court initially omitted the part of the instruction concerning an overt act, but later included the missing portion of the instruction and repeated it for the second count of the offense. **State v. Lawrence, 73.**

Attempted—no entrance onto property—evidence sufficient—There was sufficient evidence of attempted breaking and entering to survive a motion to dismiss even though defendant and his coconspirators did not enter the intended victim's property. The evidence showed that defendant had the specific intent to break and enter, that defendant was to be the "muscle" when the group intercepted the intended victim outside her home, forced her inside, and robbed her. **State v. Lawrence, 73.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING—Continued

Felonious breaking and entering—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of felonious breaking and entering. The State provided sufficient evidence that defendant broke into a drugstore with the intention of stealing narcotics. **State v. Woodard, 725.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Permanency planning—findings of fact—custody with father—termination of juvenile court jurisdiction—no further presentation of evidence—The trial court erred on remand in a permanency planning proceeding by failing to follow the Court of Appeals' mandate to make findings of fact addressing the factors set out in N.C.G.S. § 7B-907(b). The statute was applicable even though the juvenile was placed in his biological father's home because the juvenile was not returned to the home from which he was removed. The trial court was ordered to make appropriate findings of fact if it found that termination of the juvenile court's jurisdiction was proper. Further, the trial court did not err in refusing to allow respondent to present evidence after remand as the matter was within the discretion of the trial court. **In re J.M.D., 420.**

CHILD CUSTODY AND SUPPORT

Allocation of physical and legal custody—medical decision making—no error—The trial court did not abuse its discretion in a child custody case by allocating to plaintiff permanent sole physical and legal custody with the exception of temporary custody related to medical decision making, which was shared. The portion of the order indicating that the medical decision-making provision could be modified if plaintiff demonstrated responsibility would require a substantial change in circumstances, as would a similar provision on visitation. **Peters v. Pennington, 1.**

Custody—best interests analysis—change of circumstances not found—The trial court in a child custody case correctly proceeded directly to the best interests analysis without finding a substantial change in circumstances where a prior consent order dealt with narrow matters and did not incorporate the separation agreement. It was not necessary to decide whether the consent order could constitute a final custody order since its issues were not at the crux of the appeal. **Peters v. Pennington, 1.**

Custody change—findings—inferences supported by evidence—Disputed findings by the trial court in a child custody action were inferences supported by the evidence, and the findings supported the conclusions. **Lamm v. Lamm, 181.**

Custody change—single conclusion—sufficient—The trial court's single conclusion in a child custody case reached all three of the required legal conclusions for modifying a child custody order. The court's conclusion clearly stated that substantial changes in circumstances had occurred, that these substantial changes affected the minor child, and that these substantial changes warranted a modification of the existing custody order because they affected the best interests of the child. **Lamm v. Lamm, 181.**

Damage to child—ultimate conclusion—supported by findings—There were ample unchallenged findings of fact in a child custody dispute to support

CHILD CUSTODY AND SUPPORT—Continued

the trial court's ultimate factual conclusion that defendant caused physical and psychological damage to her child. **Peters v. Pennington, 1.**

Mental or emotional harm to child—expert testimony not required—District court judges have the training and experience to make causal decisions regarding child custody and expert testimony is not required to determine the cause of mental or emotional harm to the children. The trial court's conclusion here was supported by the findings and evidence, except that a finding that DSS substantiated allegations of abuse. The evidence indicated that DSS substantiated neglect but not abuse. **Peters v. Pennington, 1.**

Modification of custody order—findings of fact support conclusions of law—The trial court did not err in a child custody case by modifying a custody order to grant joint custody of the child to both parties with primary custody to defendant. As plaintiff did not challenge any of the trial court's findings of fact, they were binding on appeal. Moreover, the findings supported the conclusions of law that there had been a substantial change in circumstances affecting the welfare of the child and that it was in the best interest of the child that defendant be granted primary custody. **Pass v. Beck, 192.**

Mother required to accept court's conclusion—belief rather than behavior—The trial court abused its discretion in a child custody case by requiring defendant to accept as true the court's conclusion that she harmed her children. This requirement mandates that defendant and the therapist attain a standard based upon defendant's beliefs rather than her behavior. **Peters v. Pennington, 1.**

Plaintiff's income—finding supported by evidence—There was no merit in a child support action to plaintiff's challenge to a finding concerning his income where the finding was supported by the evidence. The court had before it plaintiff's tax filing, his company's profit and loss statement, and defendant's testimony. **Robinson v. Robinson, 319.**

Retroactive—actual expenditures—findings required—An order of retroactive child support was reversed and remanded where it contained no findings as to the actual expenditures made for the benefit of the minor children during the relevant time. **Robinson v. Robinson, 319.**

Uninsured therapy costs—support rather than costs—The trial court did not err in a child custody case by taxing defendant with the children's uninsured therapy costs as "equitable" costs. Uninsured therapy expenses are not taxable costs but are awarded pursuant to the court's ability to structure child support. **Peters v. Pennington, 1.**

CHILD VISITATION

Therapeutic visitation—controlled by therapists—The trial court did not err by authorizing therapeutic visitation between defendant and her children to be controlled by therapists. This arrangement did not present the problems inherent in custodian-controlled visitation because neutral decision makers, who were in the best position to evaluate the mental condition of defendant and the children, had the authority to craft the details of an elastic treatment and visitation program. **Peters v. Pennington, 1.**

CHILD VISITATION—Continued

Visitation restricted—clear, cogent, and convincing standard—not required—The trial court was not required to apply the clear, cogent and convincing evidentiary standard when restricting defendant's visitation with her children in a custody case because the court did not prohibit all visitation or contact. **Peters v. Pennington, 1.**

CITIES AND TOWNS

Condemnation proceedings—adverse possession—inadequate findings and conclusions—The trial court erred in a condemnation proceeding by failing to make adequate findings and conclusions regarding plaintiff's adverse possession claim following its hearing on her motion. **City of Charlotte v. Williams, 257.**

CIVIL PROCEDURE

Motion for partial summary judgment—proper legal standard—The trial court did not apply an incorrect legal standard when ruling on defendants' motion for partial summary judgment. While the trial court did not specifically state that defendants had first met their burden to show the lack of a triable issue of fact, it was implicit in the trial court's statement that it heard the arguments of counsel and then considered plaintiff's forecast of evidence. **George v. Greyhound Lines, Inc., 388.**

Summary judgment—uncontested findings must be clearly delineated— An order granting summary judgment should not include findings of fact. If the trial court chooses to recite uncontested findings of fact, they should be clearly denominated as such. **Winston v. Livingstone Coll., Inc., 486.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Workers' compensation—prior opinion and award—issue decided—final decision—The Industrial Commission did not err in concluding that the doctrine of res judicata precluded plaintiff from claiming that certain medical conditions were related to her 4 January accident. Plaintiff failed to appeal the Commission's determination in its prior opinion and award that certain medical conditions were not related to the 4 January accident, and that decision became final. **Spears v. Betsy Johnson Mem. Hosp., 716.**

COMPROMISE AND SETTLEMENT

Oral settlement—settlement conference—slip of tongue or misnomer— The trial court did not err by enforcing an oral settlement. A slip of the tongue or misnomer cannot overcome statutory requirements and transform a settlement conference into a court-ordered mediation under N.C.G.S. § 7A-38.1. **SPX Corp v. Liberty Mut. Ins. Co., 562.**

CONSPIRACY

Attempted robberies—one rather than two conspiracies—There was evidence of only one conspiracy rather than two, and one of two convictions was vacated, where the time intervals, participants, objective, and number of meetings indicated only one conspiracy. **State v. Lawrence, 73.**

CONSTITUTIONAL LAW

Due process—motion for new trial—failure to give notice of hearing— The trial court's order in a summary ejectment case was reversed and remanded for further proceedings because defendants' due process rights were violated when they did not receive notice of the hearing on their motion for a new trial. **Otto v. Certo, 468.**

Effective assistance of counsel—counsel's performance not deficient— Defendant in a first-degree kidnapping case did not receive ineffective assistance of counsel during the trial. Defense counsel's performance was not deficient and although the trial court's kidnapping instruction was erroneous, the error was not prejudicial. **State v. Boozer, 371.**

Effective assistance of counsel—no different result—Defendant's trial counsel in an assault with a deadly weapon inflicting serious injury case did not provide ineffective assistance of counsel. Even assuming arguendo that defendant's counsel made errors at trial, there was no reasonable probability the result of the proceeding would have been different absent the alleged errors. **State v. Smith, 439.**

Effective assistance of counsel—no prejudicial error—Defendant's argument that he was denied effective assistance of counsel in a first-degree murder trial was overruled. Defendant failed to show that any error of counsel was prejudicial to his defense so as to deprive defendant of a fair trial. **State v. Banks, 30.**

Effective assistance of counsel—not moving to strike statement by witness—Defendant's counsel was not ineffective in an indecent liberties prosecution when he did not move to strike a statement by a witness that "something must have happened." **State v. Carter, 156.**

North Carolina—government fees—trial by jury—issues of law only—The trial court did not deny plaintiff his North Carolina constitutional right to a trial by jury by ruling on a matter involving fees taken without legislative approval. The proper interpretation of statutory provisions presented only a question of law, not fact. **Griffith v. N.C. Dep't of Corr., 544.**

Right to fair trial—objections sustained—no prejudice—Defendant's argument that his constitutional right to a fair trial was denied by the prosecutor's cross-examination of defendant using a witness's pretrial statement was overruled. Because defendant's objections to all three questions were sustained, he cannot demonstrate prejudice arising from these questions. **State v. Banks, 30.**

Right to trial—New York law—allocation of defense and indemnity obligations—The trial court did not err by ruling that under New York law, an insurer was not entitled to a trial to determine the appropriate method for allocating defense and indemnity obligations under equitable principles. **SPX Corp. v. Liberty Mut. Ins. Co., 562.**

State testing of material evidence—evidence made available to defendant for testing—denial of motion to continue—no error—Defendant's argument that he was entitled to a new trial because the State Bureau of Investigation Crime Lab refused to test material evidence in violation of the Sixth and Fourteenth Amendments was overruled. Police do not have a constitutional duty to perform any particular tests on crime scene evidence and the evidence at issue

CONSTITUTIONAL LAW—Continued

was made available to defendant for independent testing. The trial court did not err by denying defendant's motion to continue to test the evidence where defendant had six months to prepare for trial and to obtain independent testing, but waited until the morning trial was scheduled to begin to file his motion. **State v. Wright, 52.**

CONSTRUCTION CLAIMS

Delay damages—concurrent delay—partial responsibility—The trial court erred in a construction claims case by overruling defendant EDCI's exceptions to the referee's determination that EDCI was not entitled to recover delay damages from plaintiff CCI for a 12.5 week delay at the end of the project based on the principle of concurrent delay because EDCI was found to be not responsible for any portion of the delay. However, there was no authority supporting the proposition that CCI was fully liable for EDCI's delay damages despite being only partially responsible for the delay. **Cleveland Constr., Inc. v. Ellis-Don Constr., Inc., 522.**

Delay and disruption—cost sharing—doctrine of implication of unexpressed terms—customary practice—The trial court did not err in a construction claims case by overruling its exception to the referee's requirement that plaintiff CCI share the costs defendant EDCI incurred in pursuing CCI's delay and disruption claims against the owner and designers of the project based on the doctrine of implication of unexpressed terms. There was no evidence regarding the existence of a customary practice in the construction industry concerning the sharing of recovery costs or CCI's actual or constructive knowledge of such a custom. **Cleveland Constr., Inc. v. Ellis-Don Constr., Inc., 522.**

CONTRACTS

Breach of contract—conclusion of law—finding of fact—unlicensed contractor—The trial court erred in its conclusion of law, which was actually a finding of fact, that there was no evidence that plaintiff would not have contracted with defendants had he known that they did not have a general contractor's license. The evidence was conflicting and the matter was remanded for more detailed findings. **Wellikoff v. Progress Dev. Corp., 740.**

Breach of contract—conclusion of law—supported by the evidence—The trial court did not err in a breach of contract case by failing to make sufficient findings of fact to support its challenged conclusion of law. The conclusion of law was sufficiently supported by the factual findings. **Wellikoff v. Progress Dev. Corp., 740.**

Breach of contract—finding of fact—unlicensed contractor—There was conflicting evidence in the record to support the trial court's finding of fact in a breach of contract case that the parties did not discuss whether defendant Scott was a licensed contractor. The case was remanded for more detailed factual findings. **Wellikoff v. Progress Dev. Corp., 740.**

COSTS

Child custody—litigation expenses—The portions of an award of costs other than attorney fees in a child custody case were remanded for a hearing on how those costs were incurred and whether they are authorized by statute. **Peters v. Pennington, 1.**

CRIMINAL LAW

Defenses—withdrawal—completion of assigned task—The trial court did not err by refusing defendant's requested instruction on the defense of withdrawal in a prosecution for first-degree burglary and assault with intent to kill inflicting serious injury where defendant completed his assigned task when he kicked the victim's door even though he expressed some hesitancy before doing so and even though he left the scene after kicking the door. **State v. Wright, 697.**

Failure to give final not guilty mandate—not plain error—The trial court's failure to give the final not guilty mandate in a burglary and assault prosecution did not rise to plain error. **State v. Wright, 697.**

Flight—evidence sufficient—The trial court did not err by instructing the jury on flight where the evidence, viewed in the light most favorable to the State, was sufficient to support the theory that defendant fled the scene to avoid apprehension. **State v. Lawrence, 73.**

Guilty plea—knowing and voluntary—Defendant's guilty plea was knowing and voluntary based on a review of the record, despite defendant's argument that he did not have the time he needed to reflect on his decision. **State v. Santos, 448.**

Guilty plea—motion to withdraw plea summarily denied—no error—The trial court did not err in a first degree rape and statutory rape case by summarily denying defendant's motion to withdraw his guilty plea after sentencing. Defendant presented no questions of fact that needed to be resolved by an evidentiary hearing, nothing in the record indicated that defendant's plea was not the product of a free and intelligent choice, and the trial court expressed willingness to allow defendant to confer with defense counsel about the propriety of his motion. Furthermore, defendant was not entitled to withdraw his guilty plea as he failed to show manifest injustice. **State v. Shropshire, 478.**

Guilty plea—withdrawing—procedure—Whether a guilty plea was made knowingly and voluntarily was considered because of the length of defendant's sentences, even though he did not move to withdraw his plea and did not seek a writ of certiorari. **State v. Santos, 448.**

DAMAGES AND REMEDIES

Punitive damages—motion to dismiss—compensatory damages—The trial court did not err by denying defendants' motion to dismiss plaintiff's appeal based on plaintiff's alleged abandonment of her punitive damages claims by electing to proceed to trial on the issue of compensatory damages after dismissal of the punitive damages claim. Instead of dismissing plaintiff's appeal in order to comply with N.C.G.S. § 1D-30, the case would be remanded for a new trial on all issues including liability for compensatory damages if plaintiff's appeal was successful. **George v. Greyhound Lines, Inc., 388.**

Punitive damages—partial summary judgment—willful and wanton conduct—The trial court did not err in an action arising out of an automobile accident by granting partial summary judgment for defendants on the issue of whether defendants' conduct was willful or wanton. While the evidence was sufficient to show that the bus driver fell asleep while driving the bus, inadvertent driver error caused by falling asleep behind the wheel by itself did not support an award of punitive damages. Thus, there was also an insufficient forecast of evi-

DAMAGES AND REMEDIES—Continued

dence that the bus company participated in or condoned the bus driver's alleged willful or wanton conduct. **George v. Greyhound Lines, Inc., 388.**

Restitution—amount ordered unsupported by evidence—plain error— The trial court committed plain error in an assault with a deadly weapon inflicting serious injury case by ordering defendant to pay restitution because the State failed to present evidence to support the amounts of restitution ordered. **State v. Smith, 439.**

Restitution—evidence not sufficient—A restitution order in a common law robbery case supported only by the unsworn statement of the prosecutor was vacated. **State v. Elkins, 110.**

DIVORCE

Alimony—ability to pay—The trial court clearly considered plaintiff's actual ability to pay when determining alimony; the court's inability to make more detailed findings was due to plaintiff's failure to attend the hearing or to submit more detailed information. **Robinson v. Robinson, 319.**

Alimony—consideration of child care expenses—The trial court erred when determining alimony by determining plaintiff's child support obligation under the Child Support Guidelines, then making its own calculations regarding actual expenses and using that total to determine defendant's shortfall to calculate alimony. Defendant may benefit from having her child care expenses considered in the calculation of alimony, but may not receive the benefit of a finding based in part upon her actual child support expenditures if plaintiff is credited only with his Guideline proportionate share of child support expenses. **Robinson v. Robinson, 319.**

Alimony—findings—earnings—The trial court did not err in the amount of alimony awarded where the court's finding as to the parties' earnings while married was supported by the record. **Robinson v. Robinson, 319.**

Alimony—obligation terminated—modification not allowed—The trial court erred in a domestic action by awarding defendant alimony after plaintiff's alimony obligation had been previously terminated. Under previous North Carolina alimony statutes, the right to modify a lump sum alimony award that was ordered to be paid over a fixed term was limited to the time period during which the alimony was actually ordered. **Cathey v. Cathey, 230.**

Alimony—pleading—The trial court erred by dismissing defendant's claim for alimony where his pleading, read in its entirety, provided a sufficient basis to give plaintiff fair notice of the ground for the alimony claim. **Quesinberry v. Quesinberry, 578.**

Equitable distribution—agreement—written stipulation required—The trial court erred in an equitable distribution action by concluding that the parties were in agreement concerning the division of certain personal property where there was no written stipulation in the record. **Robinson v. Robinson, 319.**

Equitable distribution—findings—valuation and classification of property—The trial court erred in an equitable distribution order by not making a finding as to the total net value of the marital estate, by not classifying or

DIVORCE—Continued

valuing the marital residence, and by not explicitly classifying another property as separate property. **Robinson v. Robinson, 319.**

Equitable distribution—marital property—date of valuation—There was no error in an equitable distribution action where the trial court did not expressly state in its judgment that marital property valuations were based on the date of separation, but the trial court's pretrial order reflected the parties' stipulation as to the separation and valuation date and the court referred to the pretrial order in its equitable distribution judgment. **Quesinberry v. Quesinberry, 578.**

Equitable distribution—marital property—depreciation—credibility of defendant—The trial court did not abuse its discretion in an equitable distribution action by valuing an account at the amount stipulated by both parties as the date of separation amount despite defendant's unsupported testimony that the value had decreased. The credibility of evidence in an equitable distribution trial was for the trial court to determine. **Quesinberry v. Quesinberry, 578.**

Equitable distribution—payments toward debt—allocation—debts not properly classified—The Court of Appeals could not determine in a domestic action whether plaintiff's payments on debts should have been included in equitable distribution or allocated toward plaintiff's alimony and child support obligations where the debts were not properly classified, valued, and distributed. **Robinson v. Robinson, 319.**

Equitable distribution—subject matter jurisdiction—The trial court had subject matter jurisdiction to distribute items of property which defendant contended belonged to a business that was not joined to the action where defendant had stipulated that those assets were marital property. **Quesinberry v. Quesinberry, 578.**

Equitable distribution—valuation of property—date of separation—finding binding—Although plaintiff contended that the trial court erred in an equitable distribution action in the date used to value certain accounts, plaintiff did not challenge that finding and it was therefore binding. **Robinson v. Robinson, 319.**

Equitable distribution—value of business—The trial court did not abuse its discretion in an equitable distribution action in its conclusion that defendant's unsupported assertions about the value of a business were not credible or relevant to the value of the business on the separation date. **Quesinberry v. Quesinberry, 578.**

DRUGS

Trafficking opium by possession and transportation—motion to dismiss—sufficiency of evidence—identity—weight—The trial court did not err by denying defendant's motion to dismiss the charge of trafficking opium by possession and transportation. Contrary to defendant's assertion, the State was not required to conduct a chemical analysis on the controlled substance in order to sustain a conviction under N.C.G.S. § 90-5(h)(4). A pharmacist's identification of the stolen drugs as more than 28 grams of opium derivative hydrocodone acetaminophen was sufficient evidence of identity and weight of the stolen drugs. **State v. Woodard, 725.**

EASEMENTS

Prescriptive—summary judgment—erroneously granted—The trial court erred by granting summary judgment for defendants on a prescriptive easement claim in an action involving a dirt road across a subdivision. Plaintiffs presented evidence sufficient to establish a genuine issue of material fact as to each element of the claim from 1950 to 1972, and plaintiffs were entitled to the benefits of any prescriptive easement as a successor in interest. The burden of proof on defendants' oblique claim of abandonment was on defendants, with the issue of abandonment being a question for the jury. **Deans v. Mansfield, 222.**

EMOTIONAL DISTRESS

Intentional infliction—failure to show extreme and outrageous behavior—The trial court did not err by dismissing plaintiff's claim for intentional infliction of emotional distress. Plaintiff's complaint and brief simply stated that defendants' behavior was extreme and outrageous without providing any support for this assertion. **Chidnese v. Chidnese, 299.**

EMPLOYER AND EMPLOYEE

Wrongful termination—no compulsory counterclaim—The trial court did not err in a wrongful termination case by denying defendants' motions to dismiss. Plaintiff's wrongful termination claim under N.C.G.S. § 143-422.2 was not a compulsory counterclaim to defendant Shook's pending lawsuit. **Townsend v. Shook, 462.**

Wrongful termination—prior action pending doctrine—not applicable—The trial court did not err in a wrongful termination case by denying defendants' motions to dismiss. The prior action pending doctrine was not applicable to this case because the parties, legal issues, and subject matter were not substantially similar to those raised in defendant's pending prior lawsuit. **Townsend v. Shook, 462.**

ESTOPPEL

Equitable estoppel—improper assertion of statute of limitations defense—The referee did not err in a construction claims case by concluding that plaintiff CCI timely filed suit within the three-year statute of limitations provided by N.C.G.S. § 1-52(1). Having obtained, through third-party settlements, funds derived from CCI's claims, EDCI was equitably estopped from asserting the statute of limitations as a defense to those claims. **Cleveland Constr., Inc. v. Ellis-Don Constr., Inc., 522.**

Quasi-estoppel—received periodic payments without conditions—construction claims—The trial court did not err in a construction claims case by granting partial summary judgment in favor of defendant EDCI on plaintiff CCI's extra/changed work, delay/disruption, and inefficiency claims. Based on the doctrine of quasi-estoppel, CCI was precluded from asserting the claims which it expressly acknowledged that it did not have as a condition of payment when it received periodic payments based on the applications submitted. **Cleveland Constr., Inc. v. Ellis-Don Constr., Inc., 522.**

EVIDENCE

Admission of witness testimony—within the trial court's discretion—supported by the record—The trial court did not commit plain error in a first-

EVIDENCE—Continued

degree statutory sexual offense, indecent liberties with a child, and crime against nature case by allowing the State to elicit allegedly misleading and irrelevant testimony from two witnesses. The trial court's decision was within its discretion and properly supported by the record. **State v. Oliver, 609.**

Bad character—no abuse of discretion—no plain error—The trial court did not err in an assault case by admitting evidence of defendant's bad character. Where the evidence was objected to at trial, there was no abuse of discretion in the trial court's admitting the testimony for corroborative purposes only. Furthermore, even assuming *arguendo* that the trial court erred in admitting the testimony that was not objected to at trial, defendant failed to show that a different result probably would have been reached absent the error. **State v. Wright, 52.**

Examining doctor's testimony—sexual abuse—no physical signs—impermissibly bolstered victim's credibility—The trial court committed plain error in a sexual offense with a child and statutory rape case by allowing a doctor who examined the juvenile victim to testify that the victim was sexually abused but showed no physical symptoms of abuse. The testimony impermissibly bolstered the victim's credibility in the eyes of the jury. **State v. Towe, 430.**

Extrinsic evidence—referee exceeded scope of trial court's summary judgment order—The referee erred in a construction claims case by considering extrinsic evidence regarding the scope of the trial court's summary judgment order for the claims of delay, disruption, and inefficiency damages occurring prior to 21 June 2001. The trial court's order unequivocally stated that all claims not specifically reserved by CCI arising prior to 21 June 2001 were barred. **Cleveland Constr., Inc. v. Ellis-Don Constr., Inc., 522.**

First-hand observation—convenience store cashier—belief that defendant had gun—A convenience store cashier's testimony that he believed that defendant was holding a gun under his jacket was rationally based on his first-hand observation of defendant and was more than mere speculation or conjecture. The trial court did not abuse its discretion by admitting the testimony in defendant's robbery prosecution. **State v. Elkins, 110.**

Hearsay—exception—no prejudicial error—The trial court did not commit prejudicial error by allowing detectives to testify concerning the contents of a witness's prior statement. Detective Downing's testimony was admissible to explain the subsequent conduct of the person to whom the statement was made. Furthermore, although Detective Weaver's testimony was inadmissable hearsay, defendant failed to show that there was a reasonable possibility that, had the error not been made, a different result would have been reached at trial. **State v. Banks, 30.**

Hearsay—no plain error—The trial court did not commit plain error in an assault case by admitting hearsay evidence which the prosecutor subsequently argued in closing argument. Defendant failed to show that a different result probably would have been reached had the evidence not been admitted. **State v. Wright, 52.**

Hearsay—offered to explain subsequent action—other evidence of guilt—There was no plain error in a common law robbery prosecution where the trial court admitted alleged hearsay testimony about a jacket that defendant

EVIDENCE—Continued

suddenly stopped wearing, about taking defendant to the hospital, and about a hospital employee's statements. The statements were offered to explain the detective's subsequent actions rather than as proof of the matter asserted and were not hearsay; even so, there was other evidence incriminating defendant, including his own written confession. **State v. Elkins, 110.**

Hearsay—offered to explain subsequent actions—no plain error—There was no plain error in a common law robbery prosecution where the trial court admitted a detective's testimony about a hospital employee's statements. The testimony was admitted to explain the detective's subsequent actions; however, assuming that it was hearsay, there was sufficient uncontested evidence to convict defendant. **State v. Elkins, 110.**

Leading question—not plain error—There was no plain error in a common law robbery prosecution where the prosecutor was allowed to ask the victim a leading question concerning the element of fear. There was sufficient evidence to support the element of fear or violence without the testimony elicited by the leading question. **State v. Elkins, 110.**

Objection after question answered—no motion to strike answer—other testimony—The defendant in an indecent liberties prosecution waived his objection to a question about where the victim had been touched by defendant when the victim had not yet identified defendant as the man by whom she was touched. Defendant objected only after the question was answered and made no motion to strike, nor did he object to similar questions. **State v. Carter, 156.**

Officer's opinion of guilt—no prejudice—There was no plain error in a common law robbery prosecution from the trial court's erroneous admission of a detective's testimony that he was "building a solid case." The statement was an opinion of the ultimate issue of defendant's guilt, but the other evidence incriminating defendant was such that there was no prejudice. **State v. Elkins, 110.**

Prior crimes or bad acts—broke into another pharmacy to obtain drugs—The trial court did not abuse its discretion in a drugs case by allowing the State to admit evidence allegedly in violation of N.C.G.S. § 8C-1, Rules 404(b) and 403 including that defendant and his coparticipants broke into another pharmacy but were unable to obtain narcotics. The evidence was sufficiently similar and the jury was specifically instructed to consider the testimony for the limited purpose of motive, plan, opportunity, intent, preparation, knowledge, and/or identity with regard to the current offenses. **State v. Woodard, 725.**

Prior crimes or bad acts—eighteen years earlier—probative value outweighed by prejudicial effect—reasonable probability of different result—The trial court committed prejudicial error in a first-degree sexual offense and taking indecent liberties with a child case by admitting evidence that defendant had sexually assaulted a four-year-old boy eighteen years before the alleged sexual assault in this case. Any probative value of the evidence was substantially outweighed by the danger of unfair prejudice and there was a reasonable possibility that, had the improper evidence not been admitted, a different result would have been reached at trial. **State v. Gray, 493.**

Prior crimes or bad acts—pattern jury instruction—substantial conformity with defendant's request—The trial court did not commit plain error in

EVIDENCE—Continued

a first-degree statutory sexual offense, indecent liberties with a child, and crime against nature case by failing to specifically instruct the jury that evidence admitted under Rule 404(b) could not be used to prove defendant's character or that he acted in conformity therewith. The trial court followed the pattern jury instruction format and the jury instruction was in substantial conformity with defendant's request. **State v. Oliver, 609.**

Prior crimes or bad acts—purpose for which evidence offered—at issue— The trial court failed to properly admit evidence of defendant's prior bad acts for the purpose of demonstrating a common plan or scheme where the trial court failed to determine whether the purposes for which the evidence was offered were at issue. **State v. Towe, 430.**

Prior crimes or bad acts—reported stolen gun possessed by defendant— The trial court did not err in a robbery with a dangerous weapon, possession of stolen property, and misdemeanor fleeing to elude arrest with a motor vehicle case by admitting under N.C.G.S. § 8C-1, Rule 803(6) testimony that the National Crime Information database indicated a gun with the same serial number as the one possessed by defendant had been reported stolen in Florida. Even assuming *arguendo* that the remaining evidence challenged on appeal should have been excluded, defendant failed to demonstrate plain error. **State v. Sneed, 622.**

Prior crimes or bad acts—substantially similar—no fundamental error— The trial court did not commit plain error in a first-degree statutory sexual offense, indecent liberties with a child, and crime against nature case by admitting evidence of defendant's prior bad acts. Some of the evidence was substantially similar to the acts of defendant toward the victim in the instant case and supported the purposes for which it was introduced. Admission of the remaining challenged evidence did not amount to fundamental error. **State v. Oliver, 609.**

Prior inconsistent statement—admitted for impeachment purposes—no abuse of discretion—The trial court did not abuse its discretion pursuant to N.C. Rules of Evidence 403 and 607 in allowing the State to impeach a witness with her pretrial statement. The witness admitted to having written the statement and testified that she could not remember making certain parts of the statement. Moreover, even if the trial court erred in allowing the State to impeach Harrin using her prior statement, defendant failed to demonstrate prejudice from the error. **State v. Banks, 30.**

Prior offense committed by witness—chain of events—no unfair prejudice—The trial court did not err in allowing a witness to testify about a prior robbery he had committed as the testimony was evidence pertaining to the chain of events in defendant's robbery and the probative value of the evidence was not outweighed by unfair prejudice. **State v. Hill, 170.**

Prior statement—cross-examination—evidence previously introduced—no prejudicial error—The trial court did not commit prejudicial error in allowing the prosecutor to cross-examine defendant's mother regarding the prior statement made by a witness. Because the evidence was already before the jury, even if the trial court had erred in overruling defendant's objection, no prejudice existed. **State v. Banks, 30.**

EVIDENCE—Continued

Racial slurs addressed to officers—not prejudicial—Any error in allowing the introduction of evidence that defendant addressed the arresting officers with racial slurs was not prejudicial given the overwhelming evidence of guilt. **State v. Eaton, 142.**

Statements made at mediation—oral settlement agreement—invited error—The trial court did not err by considering statements made at mediation to find that an oral settlement agreement was reached despite a stipulation that all evidence produced at the mediation would be inadmissible. Having presented the trial court with evidence about what was said and done at the settlement conference, defendant Liberty may not now complain that the trial court considered that very evidence. **SPX Corp. v. Liberty Mut. Ins. Co., 562.**

Testimony—results of blood tests—no misrepresentation of results—no error—The trial court did not commit error or plain error in a multiple assault case by admitting a State Bureau of Investigation (SBI) agent's testimony or a prosecutor's comments regarding the results of SBI Crime Laboratory blood tests. Neither the agent's testimony nor the prosecutor's comments misrepresented the results of the tests. **State v. Wright, 52.**

Unauthenticated surveillance photographs—other evidence of guilt—There was no plain error in admitting hospital surveillance photographs into evidence where the photographs were not properly authenticated but there was plenary uncontested evidence incriminating defendant. **State v. Elkins, 110.**

FIREARMS AND OTHER WEAPONS

Possession by felon—as applied constitutional challenge—no evidence or stipulations—The trial court erroneously dismissed an indictment for possession of a firearm by a felon where defendant filed an unverified motion to dismiss on constitutional grounds but no evidence was presented at the hearing and there were no clear stipulations. In order for defendant to prevail through an as-applied constitutional challenge to N.C.G.S. § 14-415.1, he must present evidence which would allow the trial court to make findings about the factors in *Britt v. State*, 363 N.C. 546. **State v. Buddington, 252.**

Possession by felon—guns obtained and possessed simultaneously—single possession conviction—The trial court erred by denying defendant's motion to dismiss two of three counts of possession of a firearm by a convicted felon where defendant obtained and possessed simultaneously two firearms used during the murder of one victim and assaults upon two other victims. N.C.G.S. § 14-415.1(a) does not authorize multiple convictions of and sentences for possession of a firearm by a convicted felon predicated on evidence that the defendant simultaneously obtained and possessed one or more firearms, which he used during the commission of multiple substantive criminal offenses. **State v. Wiggins, 128.**

GRAND JURIES

Information presented to grand jury—variance from instruction—There was not a fatal variance in an indecent liberties prosecution between the specific act identified in the jury instruction and the evidence defendant speculated was presented to the grand jury. **State v. Carter, 156.**

HOMICIDE

First-degree murder—sufficient evidence—The trial court did not err in failing to dismiss a first-degree murder charge against defendant as there was sufficient evidence of all the elements of the crime, including that defendant was the perpetrator. **State v. Banks, 30.**

Jury instructions—first-degree murder—lesser-included offense—second-degree murder—no plain error—The trial court did not commit plain error in a first-degree murder trial by failing to submit the issue of defendant's guilt of the lesser-included offense of second-degree murder to the jury. The evidence concerning defendant's behavior immediately prior to the shooting of the victim clearly supported a finding of premeditation and deliberation and did not support an inference that defendant formed the intent to kill the victim at the same time that he shot him. **State v. Wiggins, 128.**

IDENTIFICATION OF DEFENDANTS

Harris factors—findings support conclusion—The trial court did not err in denying defendant's motion to suppress a witness's identification of defendant. The trial court's findings on each of the factors set forth in *State v. Harris*, 308 N.C. 159, fully supported its conclusion that there was no likelihood of irreparable misidentification. **State v. Boozer, 371.**

INDECENT LIBERTIES

Purpose of sexual gratification—evidence sufficient—The trial court did not err by denying defendant's motion to dismiss a charge of taking indecent liberties where defendant argued that there was no evidence that he committed any act for the purpose of sexual gratification. The evidence presented by the State established a reasonable inference of defendant's guilt. **State v. Carter, 156.**

INDICTMENT AND INFORMATION

Indecent liberties—immoral, improper, indecent act not specifically identified—Although an indecent liberties defendant argued that his indictment did not specifically allege which of his acts was the immoral, improper and indecent liberty, the indictment used the language of the statute and the State was not required to allege an evidentiary basis for the charged offense. Nor did the instruction vary from the indictment. **State v. Carter, 156.**

INSURANCE

Auto—cancellation—effective date—receipt by insurance company—Defendants' insurance contract was in full force on 25 March 2008, the day of a car accident, where the request for cancellation by the company that financed the premiums stated an effective date of 24 March 2008 but the cancellation was not received by the insurance company until 28 March. Under N.C.G.S. § 58-35-85(3), an insurance policy is cancelled on the date the insurer receives the request for cancellation. **Universal Ins. Co. v. Patterson, 241.**

Choice of law—last act to make binding contract—The trial court did not err by holding that New York law, rather than Connecticut law, governed the application of defendant Traveler's policies. The last act to make a binding contract, receipt, and acceptance of the insurance policies, occurred in New York. **SPX Corp. v. Liberty Mut. Ins. Co., 562.**

INSURANCE—Continued

Coverage under policy—employees of named insured—insured—Defendant insurance companies MAG Mutual's and American's argument that the individual plaintiffs were not insureds under the policies was overruled. The individual plaintiffs were employees of the named insured and the actions that formed the bases of the complaint involved actions undertaken while the individual plaintiffs were performing duties related to the conduct of the named insured's business. **Kubit v. MAG Mut. Ins. Co., 273.**

Defective home construction and repair—date of injury—issue of fact—Whether the date of damages to a house from faulty construction and attempts to repair the defects occurred during an insurer's coverage period was a genuine issue of material fact and should not have been resolved by summary judgment. **Builders Mutual Ins. Co. v. Mitchell, 657.**

Duty to defend—defamation—negligent misrepresentation—quality assurance activities—Defendant insurance company MAG had a duty to defend plaintiffs in a negligent misrepresentation and defamation case because complainant's factual allegations were based in part on the individual plaintiffs' quality assurance activities. **Kubit v. MAG Mut. Ins. Co., 273.**

Duty to defend—defamation—personal injury—claim not covered—Defendant insurance companies had a duty to defend plaintiffs against complainant's defamation claim. The claim fell within the policies' coverage for personal injury and no exclusions were applicable. **Kubit v. MAG Mut. Ins. Co., 273.**

Duty to defend—defense costs—The trial court did not err in granting summary judgment in favor of defendant insurance company on plaintiffs' claim for reimbursement for expert witness fees where plaintiffs failed to offer any evidence that the expert fees were defense costs. **Bain v. Unitrin Auto and Home Ins. Co., 398.**

Duty to defend—defense costs—unjust enrichment—contract—Plaintiffs' claim that defendant was unjustly enriched by receiving the benefit of plaintiffs' expert witness's services without having to pay for them was overruled. The doctrine of unjust enrichment did not apply where, as here, a contract between the parties existed. **Bain v. Unitrin Auto and Home Ins. Co., 398.**

Duty to defend—equitable estoppel—no evidence of reliance—Defendant insurance company was not equitably estopped from claiming that the services of an expert witness who was hired by plaintiffs in conjunction with their negligence claim were not defense costs. Plaintiffs failed to demonstrate that they relied upon any statement or conduct of defendant or its attorney. **Bain v. Unitrin Auto and Home Ins. Co., 398.**

Duty to defend—multiple claims—An insurance company had a duty to defend claims for defective construction of a house and damaging repairs where the complaint alleged damages that may be covered by the policy. Where there were multiple claims, the duty to defend was triggered if some may be covered even if others were not. **Builders Mutual Ins. Co. v. Mitchell, 657.**

Duty to defend—negligent misrepresentation—bodily injury—claim not covered—Defendant insurance companies did not have a duty to defend plaintiffs against complainant's negligent misrepresentation claim because the claim

INSURANCE—Continued

did not fall within the policies' bodily injury coverage. **Kubit v. MAG Mut. Ins. Co., 273.**

Duty to defend—notice of action—actual notice—timely notice not received—no duty—Where plaintiffs failed to give proper notice of a complaint filed against them to an agent of defendant insurance companies American and Cincinnati, the insurers' duty to defend plaintiffs did not arise until the insurers themselves received notice. Moreover, where defendant Travelers insurance companies did not receive timely notice of the action, those carriers were relieved of their duty to defend. **Kubit v. MAG Mut. Ins. Co., 273.**

Home construction—issue of fact—defective workmanship or damaging repairs —The trial court should not have granted summary judgment for an insurance company on the issue of whether a policy covered construction defects where there was an issue of fact as to whether some of the damages were the result of faulty workmanship, which would not be covered, or the result of attempted repairs. **Builders Mutual Ins. Co. v. Mitchell, 657.**

Home repairs—exclusion—An insurance exclusion for "your work" would not apply to damages from repair attempts to previously undamaged portions of a house. Such damages would indicate an accident and thus an occurrence covered by the policy. **Builders Mutual Ins. Co. v. Mitchell, 657.**

New York law—duty to pay defense costs—The trial court did not abuse its discretion by ruling that under New York law, an insurer has the duty to pay 100% of defense costs associated with every underlying asbestos claim in which the complaint alleged bodily injury or disease that potentially occurred during the period when the insured provided coverage. **SPX Corp. v. Liberty Mut. Ins. Co., 562.**

New York law—payment of defense costs—The trial court did not abuse its discretion by applying New York law to require that defendant Travelers pay all of plaintiff SPX's defense costs. **SPX Corp. v. Liberty Mut. Ins. Co., 562.**

INTEREST

Prejudgment—breach of contract claims—waiver—The trial court did not err by awarding plaintiff CCI prejudgment interest on disputed breach of contract claims from the date of 3 November 2005. After the 1985 amendment to N.C.G.S. § 24-5(a), interest is awarded as a matter of law once the relevant facts have been established entitling the party to damages. By failing to contest the referee's finding regarding the date of breach, defendant EDCI waived review of that determination. **Cleveland Constr., Inc. v. Ellis-Don Constr., Inc., 522.**

JUDGES

Ex parte communication—calendaring motions to continue—There was no *ex parte* communication between the trial judge and defendant in the calendaring of defendant's motions to continue. Defendant's written notice to plaintiff and the trial court administrator's subsequent notice of hearing followed proper procedure. **Griffith v. N.C. Dep't of Corr., 544.**

Motion to recuse—personal knowledge—waiver—The trial court did not err by refusing to recuse itself from resolving disputed factual issues where the trial judge had personal knowledge. A party may not argue its substantive point in the

JUDGES—Continued

trial court with full knowledge of the alleged ground for disqualification, and then, upon losing on the merits, resort to a motion for recusal. **SPX Corp. v. Liberty Mut. Ins. Co., 562.**

JUDGMENTS

Clerical error—remanded for correction—A clerical error in a Tort Claims order was remanded for correction where the Industrial Commission concluded that plaintiff had complied with the special pleading requirements of Rule 9(j), even though it was clear from the context that the Commission had intended the opposite. **Stevenson v. N.C. Dep't of Corr., 473.**

Oral orders—not reduced to writing—motions not ruled upon—The trial court did not err by not reducing to writing its rulings on two motions where it was not clear that the court was ruling on those motions. **Griffith v. N.C. Dep't of Corr., 544.**

Oral orders—not reduced to writing—non-existent—Two assignments of error were not properly before the Court of Appeals where they were based on oral orders which were not reduced to writing. The orders therefore did not exist. **Griffith v. N.C. Dep't of Corr., 544.**

Order—delegation of drafting—guidance—Although plaintiff contended that the trial court erred by ordering defendant to draft a court order with insufficient guidance on conclusions or grounds, the court's acceptance of the proposed order as drafted manifested its agreement with the conclusions stated in the written order. Furthermore, the written order conformed with the oral judgment pronounced in open court. **Griffith v. N.C. Dep't of Corr., 544.**

JURY

Contact by member of public with juror—trial court's response—jurors capable of impartially rendering verdict—motion for mistrial properly denied—The trial court did not err in denying defendant's motion for a mistrial in a first-degree statutory sexual offense, indecent liberties with a child, and crime against nature case where there was contact by a member of the public with a juror. Given the trial court's response to the incident, as well as the lack of evidence tending to show the jurors were incapable of impartiality in rendering their verdict, the trial court's denial of defendant's motion was within the trial court's discretion. **State v. Oliver, 609.**

JUVENILES

Delinquency—permissible range of statutory dispositions—The trial court did not abuse its discretion in a juvenile delinquency case arising out of simple assault and sexual battery by entering a Level 2 intermediate disposition without considering a Level 1 community disposition because it was within the range of statutorily permissible dispositions. **In re K.L.D., 747.**

KIDNAPPING

Attempted—overt act—lying in wait—The trial court did not err by not dismissing two charges of attempted kidnapping where defendant was never in the presence of the intended victim. There was evidence of intent and preparation and, assuming that those acts were not more than preparations, defendant's hiding

KIDNAPPING—Continued

in the woods behind the victim's house and waiting for her to come home, and fleeing only upon the arrival of law enforcement and armed neighbors, was an act beyond mere preparation and thus overt. **State v. Lawrence, 73.**

Attempted—restraint—beyond that inherent in robbery—The evidence of attempted kidnapping was sufficient to survive defendant's motion to dismiss on the issue of whether the restraint he intended to use was inherent in the intended robbery. Defendant's plans were not only to intercept the victim outside her house and force her back into the house, but also to bind her hands and threaten to douse her with gasoline if she did not cooperate. These were additional acts that would have exposed the victim to greater danger than that inherent in the armed robbery and that were also the kind of danger and abuse the kidnapping statute was designed to prevent. **State v. Lawrence, 73.**

First-degree—jury instruction—erroneous—not prejudicial—The trial court did not commit plain error in its instruction to the jury on first-degree kidnapping. Although the instruction was erroneous, the error did not have a probable impact on the jury's finding of guilt. **State v. Boozer, 371.**

First-degree—lesser-included offense—jury instruction—no error—The trial court did not commit plain error in a first-degree murder case by failing to instruct the jury on the lesser-included offense of false imprisonment. The State presented sufficient evidence that defendants removed the victim for the purpose of doing him serious bodily harm or terrorizing him. **State v. Boozer, 371.**

First-degree—sufficient evidence—intent to cause bodily harm or terrorize—The trial court did not err in denying defendants' motions to dismiss first-degree kidnapping charges. The State presented sufficient evidence of each element of the crime, including defendants' intent to cause bodily harm or terrorize. **State v. Boozer, 371.**

LARCENY

Motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of larceny. The State provided sufficient evidence that defendant broke into a drugstore, took pills, and carried the pills away without consent with the intent to deprive the drugstore of the pills permanently. **State v. Woodard, 725.**

LIENS

Consent judgment—discharge of lien—harmless error—Any error by the trial court in discharging liens against a builder was harmless where plaintiff eventually entered into a consent judgment against the builder for the full amount it sought. **Pete Wall Plumbing v. Sandra Anderson Builders, Inc., 338.**

Extinguishment—foreclosure on property—Carolina Bank's foreclosure of two properties extinguished plaintiff's claims of liens against those properties where Carolina Bank recorded deeds of trust on the lots before plaintiff provided labor and materials. Carolina Bank's deeds of trust were senior to plaintiff's claims of lien. **Pete Wall Plumbing v. Sandra Anderson Builders, Inc., 338.**

Motion to strike allegations—considered under lien statute—filing sufficient—Plaintiff plumbing company's lien filings were sufficient to protect its

LIENS—Continued

interests, if they created a valid lien or a valid notice of lien, where they contained all of the information required by N.C.G.S. §§ 44A-12 and -19. Although defendant Anderson filed a motion to strike based only on N.C.G.S. § 1A-1, Rule 12(f), striking material allegations from the pleadings is not akin to reaching a final determination, and the discharge of statutory liens is governed by N.C.G.S. § 44A-16. **Pete Wall Plumbing v. Sandra Anderson Builders, Inc., 338.**

Notice of claim on funds—foreclosure—no evidence of payments for improvements—The trial court erroneously discharged plaintiff's notices of claim of lien on funds where the record did not contain evidence about whether payments were made for improvements between receipt of the notices and the foreclosure. The issue was remanded to determine the issue of payments. **Pete Wall Plumbing v. Sandra Anderson Builders, Inc., 338.**

Notice of claim on funds—received by bank after sale of property— Notices of a claim of lien on funds against a bank were correctly discharged where the properties for which services and supplies had been furnished were conveyed free of the bank's ownership interest before the notice of claim of lien on funds was received. Liability only attaches to funds after the notice of claim of lien on funds is received. **Pete Wall Plumbing v. Sandra Anderson Builders, Inc., 338.**

Plumbing supplies and services—contractor's property interest extinguished by sale—The trial court properly ordered that plaintiff plumbing company's claims of lien be discharged where the action involved the construction of single family houses on property owned by the Housing Authority of Greensboro, with the construction managed through leases and subleases and financed through multi-party agreements. Upon completion, the houses were conveyed to private owners. The lien statutes provided plaintiff only a claim of lien to the extent of an owner's interest in the property; here, the builder's sublease had been extinguished by the sale to private owners before plaintiff began enforcement proceedings. **Pete Wall Plumbing v. Sandra Anderson Builders, Inc., 338.**

MALICIOUS PROSECUTION

Liability of attorneys—motion to dismiss—vagueness—motion for more definite statement—The trial court erred by dismissing plaintiff wife's claim for malicious prosecution. Attorneys in North Carolina may be held liable for a malicious criminal prosecution only when the attorney advised the client, without any instigation from the client, to initiate criminal proceedings and the attorney acted without probable cause or for an improper purpose. Mere vagueness or lack of detail were not grounds for a motion to dismiss, but should have been attacked by a motion for a more definite statement. **Chidnese v. Chidnese, 299.**

MEDICAL MALPRACTICE

Rule 9(j) certification—res ipsa loquitur—not established—Although a claim which fails to comply with N.C.G.S. § 1A 1, Rule 9(j) may still be valid if it establishes negligence under *res ipsa loquitur*, plaintiff's allegation that a physician assistant's examination consisted of only a cursory glance was not the type of negligence a jury could infer through common knowledge and experience and plaintiff did not establish negligence through *res ipsa loquitur*. **Stevenson v. N.C. Dep't of Corr., 473.**

MEDICAL MALPRACTICE—Continued

Tort Claims Act—Rule 9(j)—applicable—An inmate's allegation in a complaint under the Tort Claims Act that a physician's assistant failed to provide the appropriate standard of medical care fell squarely within the definition of a medical malpractice claim. Compliance with N.C.G.S. § 1A 1, Rule 9(j) was required. **Stevenson v. N.C. Dep't of Corr., 473.**

MORTGAGES AND DEEDS OF TRUST

Default—foreclosure—hypothecation agreement—The trial court erred by finding that the debt owed by the construction company to the bank was evidenced by the 2008 note secured by the deed of trust under the terms of the hypothecation agreement and that the construction company had defaulted under the deed of trust. Thus, the trial court erred by concluding that the substitute trustee was entitled to foreclose on respondent appellant's property pursuant to the power of sale under the terms of the deed of trust. **In re Foreclosure of Hall, 409.**

NEGLIGENCE

Damages—denial of motion for new trial—no abuse of discretion—The trial court did not abuse its discretion in failing to grant plaintiff's motion for a new trial in a negligence case on the issue of damages based on plaintiff's claim that the jury entered into a compromise verdict. Plaintiff's evidence of damages was disputed and the jury may award damages based on the evidence they find credible and may disregard the evidence they do not find credible. **Dafford v. J.P. Steakhouse, LLC, 678.**

Legally responsible party—summary judgment—properly granted—The trial court did not err by entering summary judgment in favor of defendants in a negligence action. Defendants adequately supported their motion for summary judgment on the basis that none of the defendants were legally liable for the alleged negligence of employees at the Food Lion store in which plaintiff fell. Moreover, the internet printouts upon which plaintiff relied to support her assertion that the store in which she was injured was owned by defendant Delhaize America, Inc. were not admissible and could not have been properly considered by the trial court in ruling on defendants' summary judgment motion. **Rankin v. Food Lion, 213.**

Personal injury—sufficiency of service of process—statute of limitations—The trial court erred by dismissing plaintiff's complaint for personal injury arising out of an automobile accident based on alleged insufficient process, and the case was remanded for further proceedings. Defendant was properly served, both individually and as executrix of an estate, within the time prescribed by N.C.G.S. § 1A-1, Rule 4. Further, plaintiff brought her suit before the expiration of either the statute of limitations under N.C.G.S. § 1-52(16) for personal injury due to negligence or the time limit set by the non-claim statute under N.C.G.S. § 28A-19-3(f). **Boyd v. Sandling, 455.**

PARTIES

Aggrieved party—employee awarded all claimed workers' compensation benefits—Plaintiff employee was an aggrieved party in a workers' compensation case even though he was awarded all workers' compensation benefits that he claimed because the award affected his ability to collect his monetary benefits and all but negated his ability to receive further treatment. **Diaz v. Smith, 688.**

PARTIES—Continued

Necessary—tenants by the entirety—Judgment was improperly entered without a necessary party where a dispute arose over the dividing line between two properties, defendant's land was owned as tenants by the entirety with his wife, and she was not included as a party. **Boone v. Rogers, 269.**

PLEADINGS

Allegations stricken—lien filings—The trial court did not abuse its discretion by striking from a complaint by a plumbing company allegations regarding lien filings that the court correctly discharged. However, the court abused its discretion by striking allegations regarding a potentially viable lien on funds. **Pete Wall Plumbing v. Sandra Anderson Builders, Inc., 338.**

Judgment on—no factual issues—The trial court properly granted defendant's motion for judgment on the pleadings where the factual allegations were admitted in the pleadings and the trial court's conclusions of law were an accurate construction of the statutes at issue. **Griffith v. N.C. Dep't of Corr., 544.**

Sanctions—emergency custody motion—The trial court did not abuse its discretion by imposing Rule 11 sanctions on defendant for filing an emergency custody motion. The three determinations required under *Turner v. Duke University*, 325 N.C. 152, were answered affirmatively. **Lamm v. Lamm, 181.**

Sanctions—inadequate inquiry into allegations—The trial court correctly decided to sanction an attorney in a child custody case where the attorney either did not make an adequate inquiry into factual allegations or did not reasonably believe that the allegations were well-grounded in fact. **Peters v. Pennington, 1.**

PRETRIAL PROCEEDINGS

Denial of motion to continue—no error—The trial court did not improperly deny defendant's motions to continue his first-degree murder trial. Based on the facts, defendant was not entitled to a presumption of prejudice under *State v. Rogers*, 352 N.C. 119. Moreover, defendant failed to show that he suffered prejudice as a result of the denial. **State v. Banks, 30.**

PRISONS AND PRISONERS

Disciplinary fees—further legislative authority not needed—The trial court did not err by concluding that the Department of Correction did not have to first obtain legislative authority before instituting a disciplinary fee against inmates. **Griffith v. N.C. Dep't of Corr., 544.**

Inmates—not members of the public—The phrase "to the public" in N.C.G.S. § 12-3-1, which limits the authority of agencies to raise fees, did not apply to Department of Correction disciplinary fees against inmates because inmates are removed from the community and are not members of the public. **Griffith v. N.C. Dep't of Corr., 544.**

PROBATION AND PAROLE

Period based on improper factors—restitution—The trial court erred in an assault with a deadly weapon inflicting serious injury case by basing its decision to impose a longer period of probation than necessary upon consideration of the restitution to be paid and nature of the offense. **State v. Smith, 439.**

ROBBERY

Attempted—lying-in-wait—beyond mere preparation—The trial court did not err by denying defendant's motions to dismiss two counts of attempted armed robbery where defendant was never in the presence of the intended victim. The evidence established defendant's intent, preparations, and two instances of lying-in-wait, which goes beyond mere preparation and were thus overt acts. **State v. Lawrence, 73.**

Common law—element of fear—evidence sufficient—The trial court did not err by denying defendant's motion to dismiss a common law robbery charge for insufficient evidence of violence or fear where defendant went into a convenience store and told the cashier he needed $100; defendant hid his arm under his jacket in a manner suggesting that he had a gun; the clerk testified that he knew that defendant was serious because of defendant's eyes; and the clerk gave defendant the money because he was afraid. **State v. Elkins, 110.**

Instruction—use of weapon—plain error—There was plain error when instructing the jury on conspiracy to commit robbery with a dangerous weapon where the court did not instruct the jury that the charge included the use of a weapon to threaten or endanger the life of the victim, rather than merely a taking through the use of a firearm. **State v. Lawrence, 73.**

With a dangerous weapon—sufficient evidence—motion to dismiss properly denied—The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon where there was sufficient evidence of each element of the offense, including that defendant acted in concert with another individual to rob the victim. **State v. Hill, 170.**

SATELLITE-BASED MONITORING

Aggravated offense—first-degree sexual offense—The trial court erred by finding that a first-degree sexual offense was an aggravated offense for purposes of ordering lifetime satellite-based monitoring. First-degree sexual offense pursuant to N.C.G.S. § 14-27.4(a)(1) requires that the victim be under the age of 13, while an aggravated offense under N.C.G.S. § 14-208.6(1a) requires that the child be less than 12 years old. **State v. Santos, 448.**

First-degree sexual offense—indecent liberties with a minor—not aggravated offenses—The trial court erred in ordering defendant to register as a sex offender and enroll in a satellite-based monitoring program for the rest of his natural life. A conviction for first-degree sexual offense, in violation of N.C.G.S. § 14-27.4(a)(1), and a conviction for taking indecent liberties with a minor, in violation of N.C.G.S. § 14-202.1, are not aggravated offenses as defined by N.C.G.S. § 14-208.6(1a). The matter was remanded for a new satellite-based monitoring hearing. **State v. Oliver, 609.**

SEARCH AND SEIZURE

Baggie with pills abandoned alongside road—no expectation of privacy— The trial court did not err in a narcotics prosecution by denying defendant's motion to exclude a bag of pills which defendant discarded before complying with an officer's request to return to his patrol car. Defendant was not seized when he discarded the baggie containing the pills beside a public road, and he no longer had a reasonable expectation of privacy in the abandoned property. **State v. Eaton, 142.**

SEARCH AND SEIZURE—Continued

Consent—material conflict in evidence—written findings required—A conviction on cocaine charges was remanded where the trial court did not make written findings about whether a promise was made to defendant to obtain his consent for a search of his apartment. **State v. Neal, 645.**

SENTENCING

Class of offense—clerical error—An error in characterizing defendant's offense as a Class H felony rather than a Class I felony was clerical only and did not prejudice defendant where he was sentenced as a Class C felony pursuant to the Habitual Felon Act. **State v. Eaton, 142.**

Habitual felon—mandatory drug sentencing—The trial court did not err by sentencing defendant as an habitual felon after a trafficking in opium conviction where defendant argued that habitual felon status did not apply to increase the mandatory trafficking sentence under Structured Sentencing. A drug trafficker who is not an habitual felon would be subject to enhanced sentencing under N.C.G.S. § 90-95(h)(4), while a drug trafficker who has also attained habitual felon status would be subject to even more enhanced sentencing pursuant to N.C.G.S. § 14-7.6. **State v. Eaton, 142.**

Out-of-state convictions—no evidence of substantial similarity—erroneous assignment of points—The trial court erred in an assault case in its classification and assignment of points to two out-of-state convictions. The State did not produce any evidence that defendant's two prior out-of-state convictions were substantially similar to any North Carolina offenses, and the trial court did not make any substantial similarity conclusions. **State v. Wright, 52.**

STATUTES OF LIMITATION AND REPOSE

Emotional distress claim—nervous breakdown—tolling of limitations period—A dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) based on the statute of limitations was reversed where plaintiff alleged that she had been sexually assaulted at work in August of 2005, that she had a complete nervous breakdown a month later and was unable to manage her affairs from September of 2005 until February of 2007, and she filed her complaint in September of 2009. Plaintiff's argument on appeal focused only on the dismissal of her claims of intentional and negligent infliction of emotional distress, which are governed by a three-year statute of limitations with a provision that a person who is under a disability at the time the cause of action accrued may bring the action within the limitations period after the disability is removed. The cause of action accrued when plaintiff suffered emotional distress rather than when the harassment occurred, and plaintiff sufficiently alleged that she was mentally incompetent when she suffered the emotional distress. **Fox v. Sara Lee Corp., 706.**

Expiration on Sunday—filing on Monday—The trial court erred by granting summary judgment for defendant based on the statute of limitations where the limitations period expired on a Sunday and defendant filed his action on Monday. **Winston v. Livingstone Coll., Inc., 486.**

STIPULATIONS

Willful violation—settlement agreement—sanctions—The trial court did not err by imposing sanctions against defendant Liberty. Liberty willfully violated the stipulations it agreed to as part of a settlement agreement process, thereby

STIPULATIONS—Continued

frustrating the orderly and efficient resolution of the dispute. **SPX Corp. v. Liberty Mut. Ins., 562.**

TAXATION

General Assembly disbursement of funds—directly to private entity—not required to comply with statute—The General Assembly was not required to follow the statutory guidelines pertaining to the allocation of funds from the One North Carolina Fund as set out in N.C.G.S. § 143B-437.70, *et seq*. when it granted funds directly to Johnson and Wales University. **Saine v. State, 594.**

General Assembly disbursement of funds—private entity constitutional challenge—taxpayers lacked standing—The trial court properly dismissed count three of plaintiffs' complaint concerning the General Assembly's granting of funds to Johnson and Wales University. Plaintiffs failed to identify any class to which they belonged which could have been prejudiced by the session laws other than their status as taxpayers and, thus, plaintiffs did not have standing to bring their constitutional challenge. **Saine v. State, 594.**

General Assembly disbursement of funds—private entity—not exclusive emoluments—The trial court did not err by granting defendants' motion to dismiss plaintiffs' claim that funds provided to Johnson and Wales University via five session laws constituted exclusive emoluments and were unconstitutional. Because the session laws served a public purpose, they were not providing exclusive emoluments and were, therefore, not unconstitutional on that ground. **Saine v. State, 594.**

General Assembly disbursement of funds—private entity—public purpose—The trial court did not err by granting defendants' motion to dismiss plaintiffs' claim that the General Assembly's allocation of funds to Johnson and Wales University did not serve a public purpose and that the Session Laws which provided such funds were unconstitutional. Plaintiffs failed to plead facts demonstrating that the motivation, aim, or intent of the legislation was not a public one. **Saine v. State, 594.**

North Carolina Property Tax Commission—constitutional challenges—valuation of airplanes—no contention that decision not supported by substantial evidence—Taxpayer's argument in an appeal from the North Carolina Property Tax Commission concerning the valuation of three of taxpayer's airplanes that N.C.G.S. § 105-274(a) violates the uniformity requirements of the North Carolina Constitution and the equal protection clause of the United States Constitution was overruled. Taxpayer did not contend that any portion of the Commission's decision was not supported by substantial evidence or otherwise unlawful in any specific way. **In re Appeal of Marathon Holdings, LLC, 752.**

North Carolina Property Tax Commission—valuation of airplanes—denial of motion to permit testimony of Commission member—properly denied—The North Carolina Property Tax Commission did not err in an appeal from the valuation of three airplanes belonging to taxpayer by denying taxpayer's motion to permit the testimony of a Commission staff member. 17 N.C.A.C. 11.0219 does not require the Commission to make findings in denying a motion to permit testimony from a staff member and the testimony sought was not necessary to prevent manifest injustice to taxpayer. **In re Appeal of Marathon Holdings, LLC, 752.**

TAXATION—Continued

Sale of electricity—exemption from taxes—credit to customers not required—Where the trial court correctly concluded that plaintiff was exempt from paying certain taxes on its sale of electricity, plaintiff did not have to demonstrate that it had credited its customers prior to receiving the ordered refund. Based on the clear and specific language of former N.C.G.S. § 105 267, the judgment entered "shall be collected as in other cases" and N.C.G.S. § 105 164.11 did not control this case. **Cape Hatteras Elec. Membership Corp. v. Lay, 92.**

Sale of electricity—exemption from taxes—interest on entire judgment— In a case involving taxes levied on plaintiff's sale of electricity, plaintiff was entitled to interest on the entire judgment at the legal rate pursuant to N.C.G.S. § 105 267. **Cape Hatteras Elec. Membership Corp. v. Lay, 92.**

Sale of electricity—indirect taxation—unsupported conclusions irrelevant— In a case involving taxes levied on plaintiff's sale of electricity, the findings of fact did not support the conclusions of law that defendant was not able to tax plaintiff indirectly by taxing plaintiff's third party supplier. Nevertheless, the conclusions of law had no impact on the trial court's ultimate decree that plaintiff was not subject to sales or franchise taxes and that defendant must refund such taxes paid since 2000. **Cape Hatteras Elec. Membership Corp. v. Lay, 92.**

Sale of electricity—legislative act—exemption from taxes—The trial court did not err in a case concerning taxes levied on plaintiff's sale of electricity by concluding that the special legislative act at issue was ambiguous, and, therefore, that the legislative intent must be ascertained. Furthermore, the trial court did not err in its determination that the clear legislative intent of the act was for plaintiff to maintain its tax favored public agency status and to be exempt from paying franchise tax. **Cape Hatteras Elec. Membership Corp. v. Lay, 92.**

TERMINATION OF PARENTAL RIGHTS

Grounds—failure to offer alternative placement for minor child—The trial court did not err by concluding that grounds existed under N.C.G.S. § 7B-1111(a)(6) to terminate respondent father's parental rights. The trial court's finding that respondent had not offered an alternative placement for the minor child was sufficient, in conjunction with the undisputed determination that respondent father lacked the capacity to care for the minor child, to support the court's conclusion. **In re L.H., 355.**

Improper combining of dispositional hearing and Rule 60(b)(2) motion—best interests of child—The trial court's disposition and order related to the N.C.G.S. § 1A-1, Rule 60(b)(2) motion were reversed because the trial court combined the Rule 60(b)(2) hearing with what was essentially a new dispositional hearing without proper notice and concluded that it would still find that termination was in the best interests of the minor child even in the absence of the maternal grandmother. The case was remanded for a new dispositional hearing to determine whether termination of respondent father's parental rights was in the minor child's best interest. **In re L.H., 355.**

TRIALS

Judge acting as fact finder—presumed to rely solely upon competent evidence—The trial court did not err by allegedly using its own personal knowledge from *ex parte* communications to resolve a disputed factual issue. Where

TRIALS—Continued

competent and incompetent evidence is before a trial court, it is presumed that the court functioned as the finder of facts and relied solely upon the competent evidence. **SPX Corp. v. Liberty Mut. Ins. Co., 562.**

Motions to continue—no abuse of discretion—no prejudice—The trial court did not abuse its discretion by granting defendant's motions to continue where sufficient grounds existed for granting the motions. Local rules were violated in the timing of its ruling, but plaintiff appeared at the hearing prepared to argue and was not prejudiced. **Griffith v. N.C. Dep't of Corr., 544.**

WITNESSES

Four-year-old child—competent—The trial court did not abuse its discretion in an indecent liberties prosecution by finding that a four-year-old child was competent to testify where defendant argued that the witness had not responded or gave seemingly contradictory answers to some questions. While contradictions and nonresponsive answers may have been appropriate for cross-examination or jury argument, it does not alter the witness's competence. **State v. Carter, 156.**

WORKERS' COMPENSATION

Claim for modification of prior award—properly denied—The Industrial Commission properly denied plaintiff's claim for modification of her prior award. The Commission's conclusion that plaintiff did not satisfy her burden of proving a change of condition under N.C.G.S. § 97-47 was supported by the Commission's findings and the evidence upon which they were based. **Spears v. Betsy Johnson Mem. Hosp., 716.**

Commissioners—qualified to sit on Full Commission—neither adjudicated claim in the first instance—Two commissioners who participated in the Full Industrial Commission's decision to affirm the deputy commissioner's initial decision in plaintiff's workers' compensation case were qualified to sit on the Full Commission in the present case. Neither commissioner adjudicated plaintiff's claim "in the first instance" under N.C.G.S. § 97-84. **Spears v. Betsy Johnson Mem. Hosp., 716.**

Denial of motion to set aside prior decision—failed to raise issue—denial proper—The Industrial Commission did not abuse its discretion in denying plaintiff's motion to set aside its prior decision based on allegations that defendants committed fraud on the Commission. Plaintiff had the opportunity in the prior proceedings to raise her concerns, and failed to do so. **Spears v. Betsy Johnson Mem. Hosp., 716.**

Insurance policy—termination valid—nonpayment of premium—The Industrial Commission did not err in finding and concluding that defendant insurance carrier's preterm cancellation of defendant employer's workers' compensation coverage was valid and effective. A workers' compensation insurance policy may be cancelled by the insurer before the expiration of the term for nonpayment of the premium and defendant employer failed to pay its quarterly premium. **Bell v. Hype Mfg. LLC, 235.**

Requirements for cancellation of policy—power of attorney—The Industrial Commission erred in a workers' compensation case by concluding that defendant's policy was effectively and properly cancelled under a power of attorney

WORKERS' COMPENSATION—Continued

held by a third party and in accordance with N.C.G.S. § 58-35-85. The case was reversed and remanded to the Commission for further proceedings to determine whether defendant insurance carrier complied with N.C.G.S. § 58-36-105. **Diaz v. Smith, 688.**

ZONING

Denial of site plan renovation—impermissible expansion or enlargement of nonconforming use—The superior court did not err by concluding that a city zoning board of adjustment correctly interpreted section 13.3(C) of a land zoning ordinance in denying approval of petitioner's site plan for renovation of its asphalt plant. An increase in the scope, scale, or extent of a nonconforming use, namely the new equipment expanding plaintiff plant's maximum operating capacity, constituted an impermissible expansion or enlargement of the non-conforming use. **APAC-Atl., Inc. v. City of Salisbury, 668.**

Interpretation of zoning official—not timely appealed—binding—A statement by the Town's 2001 Planning Director in two letters that a proposed asphalt operation was a permitted use by right requiring only a general use permit was binding on the Town because the Town did not appeal the decision within the required thirty day period. **S.T. Wooten Corp. v. Bd. of Adjust. of the Town of Zebulon, 633.**