NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 212

17 MAY 2011

21 JUNE 2011

RALEIGH
2014

CITE THIS VOLUME
212 N.C. APP.

TABLE OF CONTENTS

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THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

JOHN C. MARTIN

Judges

LINDA M. McGEE
ROBERT C. HUNTER
WANDA G. BRYANT
ANN MARIE CALABRIA
RICHARD A. ELMORE
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS
DONNA S. STROUD
ROBERT N. HUNTER, JR.
SAMUEL J. ERVIN IV
J. DOUGLAS McCULLOUGH
CHRIS DILLON
MARK DAVIS

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

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.

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

CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. KENNETH MARK HARTLEY

No. COA10-964

(Filed 17 May 2011)

1. Confessions and Incriminating Statements— pre-Miranda statement—not custodial

Defendant was not in custody when he confessed to first-degree murder and other offenses where he was twice told that he was not under arrest, voluntarily accompanied officers was never handcuffed rode in the front of the officers' vehicle was offered food, water, and the use of the restroom was never misled or deceived was not questioned for a long period of time and the officers kept their distance during the interview and did not employ any form of physical intimidation. A pat-down did not automatically create a custodial situation, and a policeman's unarticulated plan had no bearing on whether a suspect was in custody.

2. Constitutional Law— two-stage interrogation—no violation of Fifth Amendment

Defendant's Fifth Amendment rights were not violated by a two-stage interrogation process in which defendant confessed, was given *Miranda* warnings, and confessed again. Defendant was not in custody when the first confession was given.

3. Constitutional Law— effective assistance of counsel—no objection at trial

Defendant did not receive ineffective assistant of counsel, and no further investigation was needed, where his trial attorney

did not object to his confession at trial but there was no error in the admission of the confession.

4. Constitutional Law— right to confront witnesses—pathologist who did not perform autopsy

Defendant's right to confront the witnesses against him was not violated where autopsy results were not presented by the pathologist who had performed the victims' autopsy. While the pathologist who testified made minimal reference to the reports of the pathologist who performed the autopsies, those reports were not admitted and the testimony primarily consisted of a description of the victims' injuries as depicted in photos, the result of the wounds, and ultimately the cause of death. Moreover, there was overwhelming evidence of the manner in which defendant killed the victims.

5. Evidence— DNA swabs—authentication—chain of custody

There was no plain error in the admission of swabs used for DNA matching in a rape prosecution where the evidence was sufficiently authenticated and any weakness in the chain of custody did not render the exhibit inadmissible.

6. Constitutional Law— Confrontation Clause—officer's description of autopsy exhibit

There was no Confrontation Clause violation in a rape and murder prosecution where an officer testified that an exhibit contained swabs taken from a victim at an autopsy.

7. Criminal Law— prosecutor's argument—specific intent—personal belief

The trial court did not err in a prosecution for first-degree murder and other offenses by failing to intervene *ex mero motu* in the prosecutor's argument on diminished capacity and specific intent. Moreover, remarks by the prosecutor which defendant contended expressed a personal belief did not warrant a new trial.

8. Criminal Law— instructions—insanity—pattern jury instructions

The trial court did not err by giving the pattern jury instruction on the consequences of a verdict of not guilty by reason of insanity rather than defendant's requested instruction.

9. Criminal Law— reinstruction—specific intent and diminished capacity—burden of proof not shifted

There was no plain error in a prosecution for first-degree murder where defendant contended that the trial court's reinstruction on specific intent to kill did not lower the State's burden of proof. The reinstruction was an attempt to remedy any confusion about the burden of proving specific intent; it was never unclear that specific intent, and not just the ability to form it, was required for a conviction of first-degree murder.

Appeal by defendant from judgments entered 2 December 2008 by Judge D. Jack Hooks, Jr. in Sampson County Superior Court. Heard in the Court of Appeals 22 February 2011.

Attorney General Roy Cooper, by Assistant Attorney General Joan M. Cunningham, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defenders Anne M. Gomez and Kathleen M. Joyce, for defendant-appellant.

HUNTER, Robert C., Judge.

Kenneth Mark Hartley ("defendant") appeals from judgments entered after a jury found him guilty of three counts of first degree murder, attempted first degree rape, and first degree sexual offense. After careful review, we find no error.

Background

On the morning of 18 June 2004, the bodies of Gail Tyndall ("Gail"), her daughter T.B. (age nine), and her son R.B. (age 14) were discovered in their trailer in Sampson County, North Carolina.[1] Officers then began looking for defendant who was Gail's 21-year-old son and the half-brother of T.B. and R.B. At approximately 9:51 p.m., SBI Special Agent James Tilley and Captain Ricky Mattocks of the Sampson County Sheriff's Department saw defendant walking along Highway 421. The officers pulled over, approached defendant, and asked him if he knew about anyone being hurt at his home. Defendant responded that he did not know about the situation at his home. The officers asked defendant if he would accompany them to the investigation headquarters at the Plainview Fire Department and he agreed.

1. The initials of the minor victims are used throughout this opinion.

In less than an hour after arriving at the Fire Department, defendant confessed to Special Agent Sheila Quick and Sergeant Julian Carr that he had killed Gail, R.B., and T.B. Defendant was then arrested and read his *Miranda* rights, which he waived. Defendant again confessed to the killings and signed a written confession.[2]

According to defendant's confession, his family members went to bed at around 12:00 a.m. on 18 June 2004. Defendant went to his bedroom and began watching television, but he "just started thinking about stabbing [his] mom." Defendant did not know "where the thoughts came from"; he had never thought about stabbing her before and he was not angry with her. Defendant admitted to thinking about stabbing his mother for around 15 or 20 minutes. At approximately 1:30 a.m., defendant retrieved a knife he had recently purchased and then walked to his mother's bedroom door. He "waited a minute to make sure she was asleep" and then entered the bedroom. Defendant stated that his mother was lying in the center of the bed with her back to him when he began stabbing her with the knife. She awoke immediately and began screaming and trying to fight defendant. Defendant continued to stab her until she stopped screaming. At about the same time Gail stopped screaming, R.B. came into the bedroom and turned on the light. Defendant then began stabbing R.B. until he fell face forward into the doorway of the bedroom.

Defendant confessed that he then put the knife on the kitchen table, found some duct tape, and proceeded to T.B.'s bedroom. When he entered the room, T.B. awoke and asked him what he was doing. Defendant told her to put a piece of clothing from the floor into her mouth, which she did. He then used the duct tape to bind her hands behind her back and tape her mouth shut. Defendant then instructed T.B. to walk to his bedroom where he undressed her and himself. Defendant attempted to have sex with T.B. vaginally "for a few minutes[,]" but was unable to achieve penetration. Defendant then had anal sex with T.B. Defendant admitted that he tried to strangle T.B. with a shoelace, but "it wasn't working[,]" so he strangled her with his arm for about five minutes until she stopped moving.

Defendant told police that he then washed his arms in the bathroom sink and changed clothes. Defendant took all of the telephones in the house and placed them in the bathroom so that the victims could not find them "if they didn't die." Defendant washed the knife

2. The circumstances surrounding defendant=s confession will be discussed in greater detail *infra*.

and gathered a flashlight, portable television, and cash to take with him. He then began walking in the direction of Dunn, North Carolina.

Defendant was charged with three counts of first degree murder, one count of attempted first degree rape, and one count of first degree sexual offense. At trial, it was undisputed that defendant killed the three victims and perpetrated sexual acts on T.B.; however, defendant claimed that he was not guilty of the crimes charged due to his being insane. In support of his defense, defendant offered the testimony of two mental health experts, Dr. Manish Fozdar and Dr. Ann Burgess, who claimed that defendant suffered from pervasive developmental disorder ("PDD"), a type of neurodevelopmental disorder, and that due to his mental illness defendant did not have the capacity to differentiate between right and wrong or appreciate the nature of his actions. Dr. Charles Vance, an expert witness for the State, testified that while defendant likely suffered from schizoid personality disorder ("SPD"), and possibly PDD, defendant knew the difference between right and wrong and had the ability to form the specific intent to kill.

On 22 November 2009, the jury convicted defendant of three counts of first degree murder on the basis of malice, premeditation, and deliberation. The jury also convicted defendant of the first degree murder of T.B. pursuant to the felony murder rule, attempted first degree rape, and first degree sexual offense. The jury recommended that defendant receive life imprisonment rather than the death penalty. The trial court sentenced defendant to three terms of life imprisonment without the possibility of parole, 240 to 297 months imprisonment for the first degree sexual offense conviction, and 157 to 198 months imprisonment for the attempted first degree rape conviction. Defendant timely appealed to this Court.

Discussion

I. Motion to Suppress Confession

[1] Defendant argues that the trial court erred in denying his motion to suppress his confession to the murders of Gail, T.B., and R.B. Specifically, defendant argues that his confession was given while in custody prior to being advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966).

Although defendant argues on appeal that the trial court erred in denying his pre-trial motion to suppress the confession, defendant did not object at trial to the admission of his confession into evidence. It is well established that

> a motion *in limine* is not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial. . . . [A] pretrial motion to suppress, a type of motion *in limine*, is not sufficient to preserve for appeal the issue of admissibility of evidence.

State v. Grooms, 353 N.C. 50, 65-66, 540 S.E.2d 713, 723 (2000) (internal citation omitted), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54, 70 (2001); accord *State v. Golphin*, 352 N.C. 364, 449, 533 S.E.2d 168, 224 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Nevertheless, defendant is entitled to relief if he can demonstrate plain error. *Golphin*, 352 N.C. at 449, 533 S.E.2d at 224.

> [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] . . . amounts to a denial of a fundamental right of the accused," or . . . where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings[.]"

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 (1982)). 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 threshold issue to be decided is whether defendant was in custody when he first confessed to the murders prior to receiving the *Miranda* warnings, which "w[ere] conceived to protect an individual's Fifth Amendment right against self incrimination in the inherently compelling context of custodial interrogations by police officers." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001). "Although the United States Supreme Court has acknowledged that the Fifth Amendment prohibits the use only of 'compelled' testimony, it has interpreted the *Miranda* decision as holding that failure to administer *Miranda* warnings in 'custodial situations' creates a presumption of compulsion which would exclude statements of a defendant." *Id.* at 336-37, 543 S.E.2d at 826 (citing *Oregon v. Elstad*, 470 U.S. 298, 306 07, 84 L. Ed. 2d 222, 230 31 (1985)).

> "[A] noncustodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.' Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect."

Id. at 337, 543 S.E.2d at 826-27 (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977)).

"[I]n determining whether a suspect was in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). "We must therefore determine whether . . . a reasonable person in defendant's position would have believed that he was under arrest or was restrained in his movement to that significant degree." *State v. Garcia*, 358 N.C. 382, 396 97, 597 S.E.2d 724, 736 37 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005); *accord State v. Waring*, —— N.C. ——, ——, 701 S.E.2d 615, 633 (2010). "This is an objective test, based upon a reasonable person standard, and is to be applied on a case by case basis considering all the facts and circumstances." *State v. Jones*, 153 N.C. App. 358, 365, 570 S.E.2d 128, 134 (2002) (internal citation and quotation marks omitted). "[Our Supreme] Court has considered such factors as whether a suspect is told he or she is free to leave, whether the suspect is handcuffed, whether the suspect is in the presence of uniformed officers, and the nature of any security around the suspect[.]" *Waring*, —— N.C. at ——, 701 S.E.2d at 633 (internal citations omitted).

In the instant case, on 18 June 2004 at approximately 9:51 p.m., Agent Tilley and Captain Mattocks approached defendant after he was located walking along Highway 421 in the direction of Dunn, North Carolina. Agent Quick and Sergeant Carr arrived soon there-

after. Agent Tilley asked defendant if his name was Kenneth Hartley and he responded affirmatively. Agent Tilley asked defendant if he was okay and he replied that he was okay. Agent Tilley then informed defendant that three people had been injured at his residence and asked him if he knew anything about the situation, to which defendant responded that he did not. Agent Tilley then asked defendant to place his hands on the vehicle so he could pat him down for weapons. Agent Tilley recovered two bundles of money from defendant's pants, but returned the money to defendant. It was apparent that defendant's clothes were damp and his hands were shaking. Agent Tilley told defendant that he would like to talk to him about what happened at the trailer and asked defendant if he would accompany him to the Plainview Fire Department, which was being used as a command post for the investigation. Defendant was not handcuffed and Agent Tilley told defendant that he was not under arrest. Defendant voluntarily went with the officers to the fire department, riding in the front passenger seat of the police car.

At the fire department, the officers entered a code to access the building and defendant followed them to a classroom where he was seated at one table while Agent Quick and Sergeant Carr sat across from him at a different table with an aisle separating the two tables. Defendant was asked if he wanted anything to eat or drink or if he needed to use the restroom. Defendant was again informed that he was not under arrest. Agent Quick asked defendant when he last saw his family and defendant responded that he had dinner with them at 8:30 p.m. and then left the house at about 1:00 a.m. while they were sleeping. He claimed that he was walking to Wal-mart and had not been home since 1:00 a.m.

Agent Quick noticed that defendant had cuts on his hands and when asked about them, defendant stated that he did not know how he had received the cuts. Agent Quick testified that at that time she decided that she would not allow defendant to leave, but she did not relay that decision to defendant; rather, she stated that there was forensic evidence at the scene that would likely lead to apprehension of the person suspected of killing defendant's family. She then asked defendant if there was anything else defendant would like to tell her, and defendant replied: "Yeah, I did it." Defendant then confessed to committing the murders in detail, stating that he stabbed his mother and then stabbed his brother who entered his mother's room. He then woke up his sister, gagged her, bound her hands with duct tape, attempted to have sex with her vaginally, had sex with her anally, and

then strangled her to death. Agent Quick testified that due to her concern for public safety, she asked defendant where the knife was located. Defendant told her that he hid it in the woods near a church.

At 10:41 a.m., Agent Quick left the room to inform Agent Tilley and District Attorney G. Dewey Hudson that defendant had confessed to killing his mother, R.B., and T.B. Sergeant Carr remained in the room with defendant. Soon thereafter, defendant was arrested and given the *Miranda* warnings. He was not handcuffed and he remained seated at the same table. Defendant then waived his rights under *Miranda* and restated his confession. Agent Quick wrote a statement on behalf of defendant as he gave his confession, read it back to defendant, and defendant signed the document.

In its order denying defendant's motion to suppress, the trial court concluded as a matter of law, *inter alia*, that under these facts and circumstances, defendant was not in custody when he gave his initial confession. We agree with the trial court and find no error, much less plain error, in the admission of defendant's confession at trial.

The following circumstances lead us to this conclusion: (1) defendant was told on two occasions that he was not under arrest; (2) defendant voluntarily accompanied the officers to the fire department; (3) defendant was never handcuffed; (4) defendant rode to the station in the front of the vehicle; (5) the officers asked defendant if he needed food, water, or use of the restroom; (6) defendant was never misled or deceived; (7) defendant was not questioned for a long period of time; and (8) the officers kept their distance during the interview and did not employ any form of physical intimidation. Our caselaw supports this holding under similar, albeit not identical, factual scenarios. *See e.g.*, *Waring*, ___ N.C. at __, 701 S.E.2d at 633-34 (holding that defendant was not in custody where officers told him he was not under arrest, he voluntarily went with officers to the police station, was never restrained, was given bathroom breaks, and he was not deceived, misled, or threatened); *Gaines*, 345 N.C. at 658-63, 483 S.E.2d at 402-06 (holding that juvenile defendants who voluntarily went with police officers to the police station for questioning, but were told they were not under arrest, were not in custody); *State v. Lane*, 334 N.C. 148, 154, 431 S.E.2d 7, 10 (1993) (holding that defendant was not in custody where he was told several times that he was not under arrest and never asked to leave the interview); *State v. Phipps*, 331 N.C. 427, 443-45, 418 S.E.2d 178, 185-87 (1992) (holding that defendant who voluntarily accompanied officers to the police

station in a police car, waited in a lobby with unlocked external doors, and was told more than once he was not under arrest, was not in custody).

Defendant points out that he was subjected to a pat-down; the fire department required an access code; he was not offered medical attention; he was never left alone in the room; he had no previous experience with the state's criminal justice system; he was a suspect; and Agent Quick continued to ask him questions after she had subjectively determined that she would not allow defendant to leave had he tried. None of these factors alone are determinative, and, viewing them in context with the other factors discussed above, we are not persuaded that defendant was in custody. We point out that a pat-down search does not automatically create a custodial situation. *State v. Benjamin*, 124 N.C. App. 734, 738, 478 S.E.2d 651, 653 (1996). Furthermore, with regard to Agent Quick's intentions, " '[a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.' " *Buchanan*, 353 N.C. at 341-42, 543 S.E.2d at 829 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 442, 82 L. Ed. 2d 317, 336 (1984)). In sum, viewing the totality of the circumstances we hold that "a reasonable person in defendant's position would [not] have believed that he was under arrest or was restrained in his movement to that significant degree." *Garcia*, 358 N.C. at 396-97, 597 S.E.2d at 737.

[2] Defendant further argues that he was interrogated in a two-stage process by which the officers deliberately drew out a confession prior to giving the *Miranda* warnings, then provided the *Miranda* warnings, obtained a waiver, and asked defendant to repeat his confession. Defendant relies heavily on *Missouri v. Seibert*, 542 U.S. 600, 159 L. Ed. 2d 643 (2004), where the United States Supreme Court held that a confession obtained by a two-stage interrogation violated defendant's Fifth Amendment rights. The Court stated that "[t]he object of question first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." *Id.* at 611, 159 L. Ed. 2d at 654. The Court further reasoned:

> The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as *Miranda* requires. . . . For unless the warnings could place a sus-

> pect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

Id. at 611-12, 159 L. Ed. 2d at 655.

While the officers in this case questioned defendant, obtained a confession, *Mirandized* defendant, and then obtained a second confession, the key distinction between *Seibert* and the present case is that the defendant in *Seibert* was arrested prior to questioning. *Id.* at 604, 159 L. Ed. 2d at 650. Therefore, both confessions in *Seibert* were obtained while the defendant was in custody. As we have concluded, defendant was not in custody when the first confession was given. Defendant was not under arrest, unlike the defendant in *Seibert*. "Because these statements were voluntary and would have been admissible if offered into evidence, no issue arises under *Missouri v. Seibert*[.]" *Waring*, ––– N.C. at –––, 701 S.E.2d at 634.

[3] Defendant also argues that he received ineffective assistance of counsel because his trial attorney failed to object to the confession at trial. "In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). However, ineffective assistance of counsel "claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required[.]" *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

> To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two prong test. First, he must show that counsel's performance fell below an objective standard of reasonableness. Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error.

State v. Blakeney, 352 N.C. 287, 307-08, 531 S.E.2d 799, 814-15 (2000) (internal citation omitted), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001).

As stated *supra*, there was no error, much less plain error, in the admission of defendant's confession at trial. Consequently, we hold that no further investigation is required as to defendant's ineffective assistance of counsel claim and that defendant is unable to show that had defense counsel objected to the confession, "a reasonable probability exists that the trial result would have been different . . . ." *Id.*

II. Confrontation Clause

[4] Next, defendant argues that his Sixth Amendment right to confront the witnesses against him was violated at trial when Dr. Deborah Radisch testified to the results of the victims' autopsies performed by Dr. Carl Barr who was not present to testify because he was recovering from surgery. Defendant objected to Dr. Radisch's testimony and the admission of Dr. Barr's file on Confrontation Clause grounds. Dr. Radisch testified that she reviewed Dr. Barr's autopsy results "in the course of [her] duties[,]" which requires her to review all of the medical examiners' cases. Dr. Radisch conducted a "more thorough review" of the reports shortly before trial. Defendant did not have the opportunity to cross-examine Dr. Barr before trial.

The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004). In *Melendez-Diaz v. Massachusetts*, —— U.S. ——, ——, 174 L. Ed. 2d 314, 327-28 (2009), the Supreme Court determined that forensic analyses, including autopsy examinations, qualify as "testimonial" statements, and forensic analysts are "witnesses" to which the Confrontation Clause applies. Therefore, when the State seeks to introduce forensic analyses, "[a]bsent a showing that the analysts [are] unavailable to testify at trial *and* that petitioner had a prior opportunity to cross examine them," such evidence is inadmissible under *Crawford*. *Id.* at ——, 174 L. Ed. 2d at 322.

Since *Melendez-Diaz*, our courts have held that the Confrontation Clause prohibits the introduction of testimony by an expert witness that is based solely upon the reports of a non-testifying analyst. *See, e.g.*, *State v. Locklear*, 363 N.C. 438, 451-52, 681 S.E.2d 293, 304-05 (2009); *State v. Hurt*, —— N.C. App. ——, ——, 702 S.E.2d 82, 99, *temporary stay allowed*, —— N.C. ——, 705 S.E.2d 349 (2010); *State v. Galindo*, —— N.C. App. ——, ——, 683 S.E.2d 785, 788 (2009). However, the expert testimony is permissible when the expert testifies "not just

to the results of other experts' tests, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts' tests, and her own expert opinion based on a comparison of the original data." *State v. Mobley*, —— N.C. App. ——, ——, 684 S.E.2d 508, 511 (2009), *disc. review denied*, 363 N.C. 809, 692 S.E.2d 393 (2010). Furthermore, any evidence offered "as the basis of an expert's opinion is not being offered for the truth of the matter asserted." *Id.* Thus, the critical distinction that we must make in order to address defendant's challenge to the admission of Dr. Radisch's testimony is determining whether she merely recited information previously reported by Dr. Barr or whether she testified to her own, independent expert opinion based on information of a type properly utilized in developing an expert opinion.

Upon review of the record, it is clear that Dr. Radisch provided her own expert opinion, not a regurgitation of Dr. Barr's reports. While Dr. Radisch made minimal references to Dr. Barr's autopsy reports, which were never introduced into evidence, her testimony primarily consisted of describing to the jury the injuries sustained by the victims as depicted in 28 autopsy photographs.[3] Dr. Radisch described the type of wounds, the pain the wounds would have inflicted, whether the wounds would have been fatal, and ultimately the cause of death of each victim. With regard to T.B., Dr. Radisch explained to the jury, through use of the photographs, that T.B. had been asphyxiated, how long it would have taken for her to lose consciousness, and that the blood seen in her vagina could have been menstrual blood or the result of attempted penetration.

Dr. Radisch's testimony is remarkably similar to that of the pathologist in *Hurt*, —— N.C. App. at ——, 702 S.E.2d at 86. There, Dr. Patrick Lantz testified as to the effect of the victim's stab wounds, the pain the wounds would have caused, and how long it would have taken for the victim to lose consciousness and die. *Id.* While this Court held that the testimony of other experts violated the defendant's rights under the Confrontation Clause, the Court noted the following with regard to Dr. Lantz's testimony:

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3. Defendant argues that he objected to Dr. Barr's entire file on Confrontation Clause grounds, which included the autopsy photographs. These photographs formed the basis, at least in part, of Dr. Radisch's admissible expert opinion. Consequently, the photographs were admissible to provide the basis for her expert opinion and their admission did not violate defendant's confrontation rights. *Id.* Defendant further argues that the photographs were never properly authenticated and that they were unduly prejudicial; however, defendant did not object on those grounds at trial. Moreover, defendant stipulated that the photographs were of the three victims.

> [W]e do not discuss Lantz's testimony to the non-testifying pathologist's autopsy findings at great length. For, even if Lantz's recitation of stab wounds visually observed by [the nontestifying expert] and listed in the latter's report are considered a type of testimonial forensic evidence contemplated by *Melendez-Diaz*, his description of [the victim's] stab wounds was not prejudicial. Several responding officers and EMS personnel also testified to the wounds they personally observed, and several photographs of the victim's body were published to the jury for inspection. *Moreover, Lantz's opinion testimony regarding the impact of the various wounds and the time it would have taken for [the victim] to lose consciousness was clearly based, not on the report at all, but on his own independent experience as a pathologist.*

Id. at —— n.5, 702 S.E.2d at 98 n.5 (emphasis added). As was the case with Dr. Lantz, Dr. Radisch's testimony as to the impact of the various trauma suffered by the three victims was based primarily on her inspection of the photographs that were admitted into evidence and her independent experience as a pathologist. The Court in *Hurt* declined to determine whether Dr. Lantz's initial recitation of the stab wounds observed and reported by the testifying expert violated the defendant's constitutional rights. *Id.* In the present case, Dr. Radisch made references to Dr. Barr's reports, but did not provide a recitation of the findings from the reports. However, as in *Hurt*, to the extent that Dr. Radisch recited any portion of Dr. Barr's reports, we hold that any such error was not prejudicial given the extensive testimony Dr. Radisch provided based strictly on her own personal knowledge as a pathologist, including the effect of the victims' various injuries and their cause of death.

Assuming, *arguendo*, that Dr. Radisch's testimony was erroneously admitted, the State has met its burden of proving that any error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2009) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless . . . it was harmless beyond a reasonable doubt."). " '[T]he presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt.' " *State v. Morgan*, 359 N.C. 131, 156, 604 S.E.2d 886, 901 (2004) (quoting *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988)), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005). Dr. Radisch testified regarding the type of wounds inflicted on the victims and the cause of death. We fail to see how this testimony

affected the outcome of this case where the overwhelming evidence established that defendant killed the victims, and, by his own confession, the manner in which he killed them. As defendant admits in his brief, "[his] only defense to the charges was mental illness." Assuming Dr. Radisch's testimony violated defendant's Confrontation Clause rights, it was harmless beyond a reasonable doubt.

III. State's Exhibit 39

[5] Defendant argues that State's Exhibit 39, a rectal swab taken from T.B. which contained sperm with DNA matching that of defendant, was not properly authenticated and was, therefore, erroneously admitted at trial. Defendant also argues that his right to confront the witnesses against him was violated because law enforcement testimony that the exhibit consisted of rectal swabs from T.B. was inadmissible testimonial hearsay of Dr. Barr who was not present to testify. Defendant has not preserved these arguments for appellate review as he did not object at trial on constitutional grounds or on authentication grounds. Nevertheless, we apply plain error review.

First, as to defendant's claim that the swabs were not properly authenticated, Rule 901 of the North Carolina Rules of Evidence requires "authentication or identification as a condition precedent to admissibility" of evidence. N.C. Gen. Stat. § 8C-1, Rule 901(a) (2009). The authentication or identification requirement is satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims." *Id*. The evidence at trial tended to establish that Officer Lawrence Dixon processed evidence at the crime scene, was present for the autopsy of T.B., and obtained evidence related to the crime from Dr. Barr, including the rectal swabs, on 24 June 2004. The swabs were then placed in the custody of the Sampson County Sheriff's Office. The swabs were submitted to the SBI for analysis and later returned to the Sampson County Sheriff's Office where they were kept unaltered until the time of trial. We hold that Exhibit 39 was properly authenticated.

Still, defendant questions the chain of custody and argues that the swabs were taken on 19 June 2004, but were not picked up by Officer Dixon until 24 June 2004. Our Supreme Court stated in *State v. Sloan*, 316 N.C. 714, 723, 343 S.E.2d 527, 533 (1986) (quoting *State v. Grier*, 307 N.C. 628, 633, 300 S.E.2d 351, 354 (1983)):

> In the first place, defendant has provided no reason for believing that this evidence was altered. Based on the detailed and docu-

> mented chain of custody presented by the State, the possibility that the real evidence involved was confused or tampered with "is simply too remote to require exclusion of this evidence." Furthermore, any weaknesses in the chain of custody relate only to the weight of the evidence, and not to its admissibility.

As in *Sloan*, there is no reason to believe that Exhibit 39 was in any way altered and the possibility that this evidence was tampered with is remote. Consequently, any weakness in the chain of custody does not render the exhibit inadmissible. *Id.*

[6] Second, defendant claims that Officer Dixon's testimony that Exhibit 39 contained rectal swabs taken from T.B. violated his Confrontation Clause rights. Since the record permits a determination that Officer Dixon had personal knowledge of the source from which the rectal swabs admitted into evidence as State's Exhibit 39 were obtained, any objection to the admission of these swabs predicated on the theory that the testimony utilized to authenticate them was inadmissible for confrontation-related reasons lacks merit. In other words, Officer Dixon's testimony was sufficient to establish that Exhibit 39 contained rectal swabs taken from T.B. at the autopsy performed by Dr. Barr. The results of the tests conducted on the swabs were relayed to the jury by the experts who conducted the tests. SBI serologist Russell Holley testified that Exhibit 39 consisted of two rectal swabs that he personally tested for semen. SBI DNA analyst Amanda Thompson testified that the swabs contained DNA that matched that of defendant. In sum, defendant's constitutional rights were not violated by Officer Dixon's testimony and we hold that there was no error in the admission of Exhibit 39 at trial.

IV. Prosecutor's Closing Argument

[7] Defendant argues that the prosecutor made improper statements during his closing argument at trial. Defendant did not object to these statements at trial. Consequently, our review is limited to "whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002). "Under this standard, only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Taylor*, 362 N.C. 514, 545, 669 S.E.2d 239, 265 (2008) (citations and internal quotation marks omitted). "To establish such

an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999).

The prosecutor argued: "[T]he judge is also going to instruct you about lack of mental capacity. It's also called diminished capacity. And the defense made reference to that, in other words, you cannot form specific intent." Defendant claims that the prosecutor's statement misled the jury into believing that defendant could only be found not guilty of murder if he did not have the ability to form the requisite intent. Defendant claims that even if he had the ability to form specific intent, it does not necessarily mean that he did so on 18 June 2004. We do not believe that the prosecutor's statement could have led to a jury conviction on an improper basis. The prosecutor's statement accurately pointed out that the defense of diminished capacity is utilized to negate the specific intent necessary for murder. The prosecutor went on to argue that defendant formed the specific intent to kill, which was the State's burden to prove if defendant did, in fact, have the capability to form such intent. Moreover, the jury was instructed that in order to convict defendant of murder, the jury must find that defendant formed the specific intent to kill, not simply that he had the ability to form the specific intent to kill.

Defendant also points to the prosecutor's statements: (1) "The defendant is trying to escape responsibility for the actions he did back on June 18, 2004. If that . . . isn't murder, I don't know what is[,]" and (2) "I know when to ask for the death penalty and when not to. This isn't the first case, it's the ten thousandth for me." Defendant claims that through these statements, the prosecutor impermissibly expressed his personal belief as to defendant's guilt. Defendant cites *State v. Smith*, 279 N.C. 163, 165-66, 181 S.E.2d 458, 459-60 (1971) where the prosecutor stated, among other things, that he knew when or when not to call for a conviction in a capital case; however, the statements by the prosecutor in *Smith* went far beyond those of the prosecutor in the present case. The prosecutor in *Smith* went on a "tirade," stating that he does not try innocent men, and that a man who did what defendant was alleged to have done was " 'lower than the bone belly of a cur dog." ' *Id.* The prosecutor further called defendant a liar and stated, " 'I don't believe a living word of what he says about this case, members of the jury.' " *Id.* at 166, 181 S.E.2d at 460. We do not believe the prosecutor's remarks in the case *sub judice* rise to the level such that a new trial is warranted. We hold that the trial court did no err in failing to intervene *ex mero motu*.

V. Requested Instruction on Commitment Proceedings

[8] Defendant contends that "[t]he trial court erred by failing to give [defendant]'s requested jury instruction on the commitment process." Where, as here, "a defendant interposes a defense of insanity and requests an instruction setting out the provisions for involuntary commitment, the trial court must instruct 'on the consequences of a verdict of not guilty by reason of insanity.' " *State v. Coppage*, 94 N.C. App. 630, 634, 381 S.E.2d 169, 171 (1989) (quoting *State v. Hammonds*, 290 N.C. 1, 15, 224 S.E.2d 595, 604 (1976)). In providing these instructions, the trial court must "set[] out *in substance* the commitment procedures outlined in [N.C. Gen. Stat. §§ 15A-1321 and -1322 (2009) and Article 5 of Chapter 122C of the General Statutes], applicable to acquittal by reason of mental illness." *Hammonds*, 290 N.C. at 15, 224 S.E.2d at 604 (emphasis added). The purpose of the instruction is to eliminate any "confusion" or "uncertainty" by the jury regarding "the fate of [the] accused if found insane at the time of the crime," *id.* at 15, 224 S.E.2d at 603-04, and to "remove any hesitancy of the jury in returning a verdict of not guilty by reason of insanity, engendered by a fear that by so doing they would be releasing the defendant at large in the community[,]" *State v. Harris*, 306 N.C. 724, 727, 295 S.E.2d 391, 393 (1982).

Our appellate courts have not set out "the precise instruction to be given" regarding the involuntary commitment procedures, but, rather, conduct a "case by case determination of whether there has been substantial compliance with the rule." *Id.* at 726, 295 S.E.2d at 393. The trial court's instruction on the consequences of a verdict of not guilty by reason of insanity are sufficient if the instruction explains the "substance," *Hammonds*, 290 N.C. at 15, 224 S.E.2d at 604, "gist," *State v. Bundridge*, 294 N.C. 45, 53, 239 S.E.2d 811, 817 (1978), or "central meaning," *Harris*, 306 N.C. at 727, 295 S.E.2d at 393, of the involuntary commitment procedures. At the charge conference, the trial court stated that it planned to give the jury the pattern jury instructions regarding the involuntary commitment process if a defendant is found not guilty by reason of insanity. N.C.P.I.—Crim. 304.10. Defendant made a written request to modify the pattern instructions to include the following italicized language:

> A defendant found not guilty by reason of insanity shall immediately be committed to a State mental facility. After the defendant has been automatically committed, the defendant shall be provided a hearing within 50 days. *This hearing will be held in the*

> *court in which the original trial was held. The hearing shall be open to the public. At this hearing and all subsequent hearings in which the defendant seeks his release from inpatient commitment, evidence that the defendant committed a homicide in the relevant past is prima facie evidence of dangerous[ness]*. At this hearing the defendant shall have the burden of proving by a preponderance of the evidence that the defendant no longer has a mental illness, or is no longer dangerous to others. If the court is so satisfied, it shall order the defendant discharged and released. If the court finds that the defendant has not met his burden of proof, then it shall order that inpatient commitment continue for a period not to exceed 90 days. This involuntary commitment will continue, subject *to review first within 180 days and thereafter every year, until the court finds that the defendant no longer has a mental illness or is no longer dangerous to others.*

The trial court, after considering arguments from both sides, denied defendant's request and subsequently instructed the jury according to N.C.P.I.—Crim. 304.10.

On appeal, defendant contends that the trial court should have given his requested instruction because, "[t]he pattern instruction, unlike [defendant]'s requested instruction did not inform jurors that community members and the victims' family would be able to attend public hearings on whether [defendant] should be released; that at these meetings, the plentiful evidence that [defendant] was guilty of homicide would be strong evidence of his dangerousness to others; and that the periods of review would lengthen to 180 days and then one year." Our Supreme Court, in *Harris*, 306 N.C. at 727, 295 S.E.2d at 393, rejected a similar "claim[] that the [trial] court did not give the instructions [regarding involuntary commitment procedures] in sufficient detail." There, the trial court instructed the jury that if it found the defendant, who had been charged with first degree murder, not guilty by reason of insanity,

> I then thereafter direct a verdict of not guilty because of that answer in each of these cases, I will order the defendant held in custody until such time as a hearing can be held to see whether or not he will be confined to a state hospital, at first for a period of not more than ninety days and then another hearing will be held in reference thereafter to see whether or not he will continue to be held in the State Hospital as involuntary committed mental patient from time to time.

Id. at 725-26, 295 S.E.2d at 392. The *Harris* Court held that the trial court's instructions, which provided the same substantive details as the instructions in this case, were "sufficient to remove any hesitancy of the jury in returning a verdict of not guilty by reason of insanity, engendered by a fear that by so doing they would be releasing the defendant at large in the community": "[the trial court] gave the jury the central meaning of the statute: that if defendant was acquitted by reason of insanity, he would not be released but would be held in custody until a hearing could be held to determine whether he should be confined to a state hospital." *Id.* at 727, 295 S.E.2d at 393.

In light of *Harris*, we conclude that the trial court did not err in refusing to give defendant's requested instruction regarding the consequences of a verdict of not guilty by reason of insanity and instructing the jury according to the pattern jury instruction on this issue. *See also State v. Allen*, 322 N.C. 176, 198-99, 367 S.E.2d 626, 638 (1988) ("The trial court gave the pattern jury instruction in N.C.P.I.—Crim. 304.10 which informed the jury of the commitment hearing procedures in N.C.G.S. §§ 15A-1321 and -1322, pursuant to article 5 of chapter 122C. This instruction adequately charged the jury regarding procedures upon acquittal on the ground of insanity. Defendant's assignment of error is overruled." (internal citation omitted)); *State v. Hall*, 187 N.C. App. 308, 318, 653 S.E.2d 200, 208 (2007) (holding that the trial court properly gave the pattern jury instruction for N.C.P.I.—Crim. 304.10, which is in accord with the applicable statutes).

VI. Burden of Proof

[9] Defendant argues that the trial court's instructions to the jury lowered the State's burden of proving that defendant formed the specific intent to kill. The trial court provided the pattern jury instruction pertaining to diminished capacity to the jury as follows:

> Now you may find that there's evidence which tends to show that the defendant lacked mental capacity at the time of the acts alleged in this case. The law regarding lack of mental capacity is also referred to as diminished capacity. These terms are used interchangeably and refer to the same law; however, if you find that the defendant lacked mental capacity, you should consider whether this condition affected his ability to formulate the specific intent which is required for a conviction of first-degree murder or any other crime requiring specific intent. In order for you to find the defendant guilty of first-degree murder, you must find beyond a reasonable doubt that he killed the deceased with

> malice and in the execution of an act with specific intent to kill, formed after premeditation and deliberation. If, as a result of lack of mental capacity, the defendant did not have the specific intent to kill the deceased formed after premeditation and deliberation, he is not guilty of first-degree murder.
>
> Therefore, I charge that if, upon considering the evidence with respect to the defendant's lack of mental capacity, you have a reasonable doubt as to whether the defendant formulated the specific intent required for conviction of first-degree murder, you will not return a verdict of guilty of first-degree murder. Th[ese] instructions will also apply to certain other charged offenses or lesser included offenses and I will specifically tell you when you're to recall and to consider this instruction on those offenses. And I will further tell you when it does not apply and you should not consider it.

As to each specific intent crime, the trial court instructed the jury:

> If you find from the evidence beyond a reasonable doubt that . . . the defendant [committed the offense charged], it would be your duty to return a verdict of guilty . . ., unless you are satisfied that the defendant was insane at that time and/or you are satisfied that the defendant lacked the mental capacity to formulate the specific intent required for conviction of this crime.

After completing the jury charge, *the* State suggested to the trial court that the latter instruction improperly shifted the burden of proof regarding specific intent to defendant. The trial court then altered the instruction and reinstructed the jury as follows:

> [I]f you find from the evidence beyond a reasonable doubt that the defendant [committed the offense charged], it would be your duty to return a verdict of guilty . . ., unless you are satisfied that the defendant was insane at that time and/or that the State has failed to prove beyond a reasonable doubt that the defendant had the required mental capacity to formulate the specific intent required for conviction of this crime.

Defendant specifically contends that the altered instruction lowered the State's burden to prove specific intent by requiring the State to prove only that defendant had the required mental capacity to form the specific intent required for conviction and did not require the State to prove that defendant actually formed the specific intent to kill.

There is a dispute as to whether defendant's argument is preserved for appeal. Defendant did not object to any of the instructions discussed above. In fact, defendant stated that he had no objection to the pattern jury instruction on diminished capacity and made no objection when the original mandate was given regarding specific intent. Later, when the State advised the trial court that the jury should be reinstructed on specific intent, defense counsel made no suggestions as to the rewording and made no objection to the final instruction. When the trial court asked defense counsel if he had anything to add to the reinstruction, he responded: "Well we don't have anything to add to the brilliance that's going on, Your Honor. It is above our pay grade." Defendant relies on *State v. Keel*, 333 N.C. 52, 56-57, 423 S.E.2d 458, 461 (1992), where the Court held that although no formal objection was entered, "[t]he State's request [for a pattern jury instruction], 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." There is an important distinction that defendant overlooks. In *Keel*, the requested instruction was unilaterally altered by the trial court to provide a misstatement of the law. *Id.* at 57, 423 S.E.2d at 461-62. Here, the trial court provided the reinstruction that was agreed upon verbatim. Defendant did not object to the instruction, and, arguably, acquiesced to the instruction he now claims is erroneous. Nevertheless, we will review the instruction for plain error.

"Long-standing precedent in this Court explains that the charge to the jury will be construed contextually, and segregated portions will not be viewed as error when the charge as a whole is free from objection." *State v. Haire*, —— N.C. App. ——, ——, 697 S.E.2d 396, 400 (2010). The segregated portion of the trial court's instructions to which defendant now objects states that the jury must find defendant guilty if it finds that defendant committed the killing unless "the State of North Carolina has failed to prove beyond a reasonable doubt that the defendant had the required mental capacity to formulate the specific intent required for conviction of this crime." We do not believe that the jury would infer, as defendant suggests, that "if [defendant] was capable of possessing specific intent, he necessarily did so." The trial court's instruction on diminished capacity specifically informed the jury: "In order for you to find the defendant guilty of first-degree murder, you must find beyond a reasonable doubt that he killed the deceased with malice and in the execution of an act with specific

intent to kill, formed after premeditation and deliberation." The trial court's reinstruction was an attempt to remedy any confusion as to which party bore the burden of proving specific intent. It was never unclear that specific intent, not just the ability to form it, is required for a conviction of first degree murder. We find no error, much less plain error, in the trial court's reinstruction.

VII. Preservation Issues

Defendant presents several issues for preservation purposes, acknowledging that identical arguments have already been rejected by our Supreme Court.

A. *Diminished Capacity Instruction*

Defendant first preserves his contention that he is entitled to an instruction on diminished capacity as a defense to first degree sexual offense. In *State v. Daughtry*, 340 N.C. 488, 459 S.E.2d 747 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996), our Supreme Court squarely rejected this argument, holding:

> Defendant further contends the trial court erred by failing to instruct on diminished capacity as that defense related to the charge of first-degree sexual offense. . . . First-degree sexual offense is not a specific intent crime; the intent to commit the crime is inferred from the commission of the act. Thus, diminished capacity is not a defense to first-degree sexual offense, and the trial court did not commit error . . . by failing to instruct on that defense.

Id. at 516, 459 S.E.2d at 761 (internal citation and quotation marks omitted). In light of *Daughtry*, defendant's argument in this case is overruled.

B. *Sufficiency of Short-form Indictment*

Similarly, defendant preserves for further review his argument that the trial court erred in denying his motion to dismiss the murder, attempted rape, and sexual offense charges on the basis that the short form indictments charging defendant with these offenses fail to comply with procedural due process as they do not allege all the elements of each offense. With respect to the short-form indictment charging defendant with first degree murder, the Supreme Court has "held that indictments for murder based on the short-form indictment statute are in compliance with both the North Carolina and United States Constitutions." *State v. Braxton*, 352 N.C. 158, 174, 531

S.E.2d 428, 437 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *see also State v. Smith*, 352 N.C. 531, 539, 532 S.E.2d 773, 779 (2000) ("We reiterate here that [short-form] indictments based on N.C.G.S. § 15-144, like those charging defendant in this case, comply with both the North Carolina and the United States Constitutions.").

With respect to the first degree attempted rape and first degree sexual offense indictments, this Court has observed that "[b]oth our legislature and our courts have endorsed the use of short-form indictments for rape and sex offenses, even though such indictments do not specifically allege each and every element." *State v. Harris*, 140 N.C. App. 208, 215, 535 S.E.2d 614, 619 (2000); *see also State v. O'Hanlan*, 153 N.C. App. 546, 551, 570 S.E.2d 751, 755 (2002) ("We find nothing in our previous cases or in defendant's argument that persuades us the short form indictments for rape or sexual offense are invalid or unconstitutional."). These arguments are overruled.

Conclusion

We hold that defendant was not in custody when he gave his first confession to police prior to receiving the *Miranda* warnings. His confession was, therefore, admissible at trial. We further hold that Dr. Radisch's testimony was properly admitted; however, assuming, *arguendo*, that Dr. Radisch's testimony violated defendant's right to confrontation, the error was harmless beyond a reasonable doubt. We hold that there was no error in the admission of Exhibit 39 and that the trial court was not required to intervene *ex mero motu* during the prosecutor's closing argument. We hold that the trial court's instructions to the jury were not erroneous and the trial court did not err in refusing to provide a special instruction on the commitment process should defendant be found not guilty by reason of insanity. Finally, the issues raised by defendant for preservation purposes are without merit.

No Error.

Judges STEPHENS and ERVIN concur.

HARRINGTON v. WALL

[212 N.C. App. 25 (2011)]

ELIZABETH C. HARRINGTON PLAINTIFF-APPELLEE v. ADRIAN SHELTON WALL, A.K.A. DARIUS MASON, DEFENDANT-APPELLANT

No. COA10-696

(Filed 17 May 2011)

Judges— motion to recuse—denied

The trial court did not err by denying defendant's motion to recuse in a domestic action in which defendant alleged bias from a prior judicial campaign. Defendant did not show substantial evidence of such a personal bias, prejudice, or interest that the trial judge would not be able to rule impartially or circumstances that would cause a reasonable person to question whether the judge could rule impartially.

Judge BEASLEY concurring in part and dissenting in part.

Appeal by Defendant from order entered 30 September 2009 by Judge Charles T. Anderson; and orders entered 13 October 2009, 15 December 2009, and 12 January 2010 by Judge Beverly A. Scarlett, in District Court, Orange County. Appeal by Defendant's attorney, Betsy J. Wolfenden, from order entered 12 January 2010 by Judge Beverly A. Scarlett in District Court, Orange County. Heard in the Court of Appeals 11 January 2011.

No brief for Plaintiff-Appellee.

Betsy J. Wolfenden for Defendant-Appellant; and Betsy J. Wolfenden, pro se.

McGEE, Judge.

Elizabeth Harrington (Plaintiff) commenced this action by filing a complaint on 6 January 2009, seeking child support and custody of a child born to Plaintiff and Adrian Wall (Defendant). Defendant was served on 7 January 2009, but he failed to timely file any responsive pleadings. Plaintiff moved for entry of default on 24 February 2009, and the Clerk of Superior Court entered default the same day. Defendant retained an attorney, Betsy Wolfenden (Attorney Wolfenden), who filed a notice of appearance on 13 April 2009.

Defendant filed a motion to set aside the entry of default and a motion to continue on 13 April 2009. The trial court entered an order on 4 May 2009 *nunc pro tunc* 24 April 2009, granting, *inter alia*, a

continuance "on the [c]ourt's own motion[.]" The trial court continued the matter to 17 and 18 June 2009. The trial court entered an order dated 22 June 2009 denying Defendant's motion to set aside the entry of default. The trial court also entered an order dated 22 June 2009 *nunc pro tunc* 17 June 2009, granting Plaintiff custody of the child and child support.

Defendant filed a motion to recuse dated 24 June 2009, requesting that Judge Beverly Scarlett recuse herself from hearing further matters in this case. Defendant also filed a document titled "Verified Rule 59 and 60 Motions" that was dated 6 July 2009. In that document, Defendant argued that Judge Scarlett "conducted her own investigation outside the courtroom[,]" and displayed "partiality and bias[.]" Defendant also filed a motion dated 24 August 2009 to compel Judge Scarlett to make oral deposition regarding Judge Scarlett's alleged bias. Judge Charles T. Anderson entered an order on 30 September 2009 denying Defendant's motion to compel deposition. Defendant appeals from that order.

The trial court entered an order titled "Response to Defendant's Request for Relief" on 13 October 2009. In that order, the trial court determined that "Defendant's request to set aside the order entered on June 17, 2009 and executed on June 22, 2009 is denied." Defendant also appeals from that order.

The trial court entered an order on Defendant's "Verified Rule 59 and 60 Motions" on 15 December 2009. The trial court denied Defendant's Rule 59 and Rule 60 motions as being "without legal justification" because Defendant "was not able to provide to the court any law requiring the [c]ourt to find an attorney at the call of the case when the case was properly noticed and set for hearing." Defendant also appeals from that order.

Plaintiff filed a motion for Rule 11 sanctions, arguing that there was no basis in fact or law for Defendant's Rule 59 and Rule 60 motions and requested that Defendant be ordered to pay Plaintiff's attorney's fees incurred in defending against the motions. The trial court granted Plaintiff's motion for sanctions in an order entered 12 January 2010. The trial court made the following finding:

> On their face, Defendant's verified Rule 59 and 60 Motions, appear to the [c]ourt to be without legal justification. The Defendant's counsel was unable to provide any legal justification for the same at this hearing. The Defendant failed to exercise his right to appear and be heard at the June 17, 2009 custody and

> child support hearing, following the advice of his counsel. The Defendant's counsel chose not to obtain leave of court to continue the hearing or hold it open while she filed papers with the Court of Appeals. The Defendant's counsel also chose not to remain in the Courtroom for this case to begin on June 17, 2009, even though she had ample notice to appear on June 17, 2009 and even though she had already completed her filings and returned from the Court of Appeals before the hearing in this case began on June 17, 2009.

The trial court concluded that Defendant's Rule 59 and 60 motions were "not well grounded in fact or law, and were filed for an improper purpose." The trial court ordered that Defendant and Attorney Wolfenden "pay Plaintiff's counsel fees and expenses incurred in having to defend against . . . Defendant's . . . Rule 59 and Rule 60 Motions in the amount of $8,175.33." Defendant and Attorney Wolfenden both appeal from that order.

The Issues Before Us

We first note that Defendant filed notice of appeal from Judge Anderson's 30 September 2009 order. However, Defendant's arguments are focused on Judge Scarlett's conduct and Defendant's "right to a fair trial in a fair tribunal." Therefore, Defendant has abandoned his appeal of Judge Anderson's order. N.C.R. App. P. 28(b)(6).

We also note that, in Defendant's notice of appeal from the 15 December 2009 order denying his motion to recuse and his Rule 59 and Rule 60 motions, he does not appeal the underlying child custody and support order, nor the order denying his motion to set aside entry of default. Because Defendant has not appealed from the order denying his motion to set aside entry of default nor from the order for child custody and support, we do not address the propriety of those orders. Rather, we have jurisdiction only to consider the orders from which Defendant has provided proper notice of appeal. *See Von Ramm v. Von Ramm*, 99 N.C. App. 153, 157, 392 S.E.2d 422, 425 (1990) ("We determine that this court has jurisdiction to review only appellant's appeal of the trial court's January 1989 order, which denies defendant's Rule 59 motion. On its face, defendant's notice of appeal fails to specify any other judgment or order. Furthermore, a reader cannot 'fairly infer' from the language of the notice of appeal that appellant intended also to appeal the June 1988 order which underlies defendant's Rule 59 motion."). Thus, the orders remaining for our review are: (1) the trial court's order entered 15 December

2009 "denying Defendant's motion to stay proceeding, motion to recuse and verified rule 59 and 60 motions asking that he be relieved from orders entered . . . 17 and 22 June 2009[;]" and (2) the trial court's order regarding sanctions entered 12 January 2010.

Standards of Review

Defendant argues that the trial court violated his constitutional due process rights in that Judge Scarlett's alleged personal bias against Attorney Wolfenden and Judge Scarlett's failure to reveal this bias to Defendant prevented Defendant from receiving a fair trial. Defendant contends *de novo* review is ordinarily appropriate in cases where constitutional rights are implicated. However, Defendant raised his arguments before the trial court in the form of a Rule 59 motion for a new trial, a Rule 60 motion to set aside judgment, and a motion to recuse.

"The burden is on the party moving for recusal to ' "demonstrate objectively that grounds for disqualification actually exist." ' " *State v. Kennedy*, 110 N.C. App. 302, 305, 429 S.E.2d 449, 451 (1993) (citation omitted).

> The moving party may carry this burden with a showing " 'of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially,' " or a showing that the circumstances are such that a reasonable person would question whether the judge could rule impartially.

Id. (internal citation omitted). We thus review the trial court's order to determine whether Defendant presented substantial evidence of such personal bias on the part of Judge Scarlett that Judge Scarlett would have been unable to rule impartially, or that circumstances were such that a reasonable person would question whether Judge Scarlett could rule impartially.

N.C. Gen. Stat. § 1A-1, Rule 59(a)(1) (2009) provides: "A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds: . . . [a]ny irregularity by which any party was prevented from having a fair trial[.]" N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2009) provides that: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . [a]ny . . . reason justifying relief from the operation of the judgment." In general, a trial court's ruling on a Rule 59 motion for a new trial is

reviewed for an abuse of discretion. *Batlle v. Sabates*, 198 N.C. App. 407, 423, 681 S.E.2d 788, 799 (2009). " 'However, where the [Rule 59] motion involves a question of law or legal inference, our standard of review is *de novo*.' " *Id.* (citation omitted). " 'As with Rule 59 motions, the standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion.' " *Id.* (citation omitted). " '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.' " *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (citation omitted). Because Defendant's Rule 59 and Rule 60 motions were not based upon an alleged error of law, we review the trial court's rulings on these motions for an abuse of discretion.

N.C. Gen. Stat. § 1A-1, Rule 11(a) (2009) provides:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . . 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[.]

Our Supreme Court has held that appellate review of a trial court's decision on mandatory sanctions pursuant to Rule 11 is *de novo* and consists of the following determinations:

> [T]he 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 University, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). "In reviewing the appropriateness of a particular sanction under either Rule 11 or the inherent powers of the court, we exercise

an abuse of discretion standard." *Dunn v. Canoy*, 180 N.C. App. 30, 48, 636 S.E.2d 243, 255 (2006).

However, Defendant makes no argument concerning the trial court's orders on his Rule 59 and Rule 60 motions, nor on Plaintiff's motion for Rule 11 sanctions, other than Defendant's attack on the orders' validity due to Judge Scarlett's alleged bias. Defendant does not argue that the trial court abused its discretion in entering either order. Nor does Defendant challenge any of the findings of fact or conclusions of law in the trial court's order concerning Rule 11 sanctions. Because Defendant's sole argument concerns Judge Scarlett's alleged bias, the only issue for our review is whether Judge Scarlett should have recused herself from this case and whether, after her failure to recuse herself, the orders entered by Judge Scarlett must be vacated.

The 15 December 2009 Order

Defendant's argument regarding the orders appealed is that Judge Scarlett "violated [Defendant's] constitutional right to a fair trial in a fair tribunal by not recusing herself at the outset of this case when she failed to reveal her personal bias against [Defendant's] attorney . . . and when Judge Scarlett violated the North Carolina Code of Judicial Conduct." We note at the outset that a significant portion of Defendant's appellate brief is directed towards a complaint submitted by Judge Scarlett anonymously to the North Carolina State Bar regarding Attorney Wolfenden's conduct during Attorney Wolfenden's judicial campaign. However, we note that the last of Attorney Wolfenden's notices of appeal was filed 20 January 2010 and, in her brief, Attorney Wolfenden states that she learned of Judge Scarlett's authorship of the complaint upon "receiv[ing] discovery from the [North Carolina] State Bar" on 22 January 2010. Thus, Attorney Wolfenden did not know of this fact until after this appeal was filed and, therefore, this particular information of alleged bias was not brought to the attention of the trial court in Defendant's motion to recuse or his Rule 59 and Rule 60 motions. " 'The role of an appellate court is to review the rulings of the lower court, not to consider new evidence or matters that were not before the trial court.' " *State v. Kirby*, 187 N.C. App. 367, 376, 653 S.E.2d 174, 180 (2007) (citation omitted).

In Defendant's Rule 59 and Rule 60 motions, Defendant alleged that:

> 1. This case was originally set to be heard on 24 April 2009 before the Honorable Alonzo B. Coleman, Jr., on the issues of child custody and child support.

> 2. On the morning of 24 April 2009, the Honorable Beverly Scarlett was brought in to hear this case though Judge Coleman was in the courthouse at the time.
>
> 3. In this case, and in at least one other Orange County civil case involving child custody . . . Judge Scarlett did not remain independent, impartial and faithful to the law as required by the North Carolina Code of Judicial Conduct.
>
> 4. Upon information and belief . . . Judge Scarlett conducted her own investigation outside the courtroom.
>
> 5. . . . Judge Scarlett failed to remain neutral and unbiased. Examples of Judge Scarlett's partiality and bias in the instant case are as follows[.]

Defendant then recited the following sequence of events which occurred on the day of the hearing:

> a. Judge Scarlett refused to enter a court order denying Defendant's Motion to Set Aside Entry of Default from which he could appeal prior to the hearing on permanent child custody and child support, leaving . . . Defendant with no other remedy than to petition the North Carolina Court of Appeals ("Court of Appeals") for relief the day the hearing on permanent child custody was set to commence.
>
> . . . .
>
> d. Undersigned counsel did not instruct her client to be present in court [at the hearing]. . . .
>
> e. After filing Defendant's petitions and motion for a temporary stay with the Court of Appeals, undersigned counsel arrived at the Orange County Courthouse . . . at approximately 10:30 a.m. to serve the petitions and motion for temporary stay on Judge Scarlett.
>
> f. When undersigned counsel entered the courtroom, Judge Scarlett was on the bench presiding over another case.
>
> . . . .
>
> h. When undersigned counsel began leaving the courtroom, the bailiff told her that Judge Scarlett said she could not leave the courtroom and that the hearing on permanent child custody and support in the instant case was going to begin next.

> i. Undersigned counsel sat down in the courtroom and waited for Judge Scarlett to commence the permanent child custody and child support hearing in the instan[t] action.
>
> j. Judge Scarlett recessed court and left the courtroom. Upon information and belief, Judge Scarlett took Defendant's petitions with her when she left the courtroom.
>
> k. After undersigned counsel waited for Judge Scarlett approximately 40 minutes, she gave her cellular telephone number to the bailiff and asked to be called when Judge Scarlett returned to the courtroom as she wanted to get something to eat prior to the hearing.
>
> l. Undersigned counsel got something to eat and then drove back to her office in Chapel Hill to retrieve Defendant's file and to see if the Court of Appeals had issued a ruling on Defendant's motion for temporary stay.

Defendant contended that the trial court did not call Defendant's attorney on her cell phone before starting the hearing and thus conducted the hearing without the presence of Defendant or his attorney. Defendant argued in his motion that the trial court violated his due process rights: "(1) [by] not remaining impartial in this matter; (2) by entering court orders after denying the Defendant notice, a right to be heard and a method of appeal; and (3) by entering court orders based solely upon Plaintiff's perjured testimony." Defendant then requested that the orders be set aside and that Defendant be granted a new trial.

In Defendant's motion to recuse, Defendant asserted the same essential facts and also included the following allegations:

> 2. In 2008 [Attorney Wolfenden] ran for district court judge in Judicial District 15B against the Honorable Alonzo B. Coleman, Jr.
>
> 3. During [her] campaign [she] spoke at various public events.
>
> . . . .
>
> 6. Since the campaign, Judge Scarlett appears to have developed a strong personal animosity towards [Attorney Wolfenden].

Defendant contended that the personal animosity that Judge Scarlett harbored against Attorney Wolfenden was indicative of bias which could be cured only by Judge Scarlett's recusal from Defendant's case.

The trial court's order denying Defendant's motion to recuse and Rule 59 and Rule 60 motions contained the following findings:

> 10. There was opportunity for both counsel for the Defendant and the Defendant to be present on June 17, 2009 at the child support and custody hearing prior to the close of the case.
>
> 11. Neither counsel for the Defendant nor the Defendant himself appeared on June 17, 2009 or provided either before or during this hearing legal justification for their failure to appear at the child support and custody hearing on June 17, 2009 before the close of the case. On June 17, 2009, a full hearing was had on the merits, without any allegations alleged in the Complaint or by the Plaintiff as being accepted as being true because of Defendant's failure to deny the same.
>
> 12. At this hearing, the Defendant presented no evidence of grounds for a new trial or to alter or amend the Order of this [c]ourt entered as a result of the June 17, 2009 child support and custody hearing.
>
> 13. At this hearing, the Defendant presented no evidence warranting relief from the Order of this [c]ourt entered as a result of the June 17, 2009 child support and custody hearing.
>
> 14. At this hearing, the Defendant presented no evidence of a meritorious defense warranting relief from the Order of this [c]ourt entered as a result of the June 17, 2009 child support and custody hearing.
>
> 15. It appears to this [c]ourt that the Defendant's Verified Rule 59 and Rule 60 Motions are without legal justification.

The trial court then concluded as follows:

> 2. The Defendant presented no legal or factual basis for his Motion to Recuse and the same should be denied.
>
> . . . .
>
> 5. The Defendant's Verified Rule 59 and Rule 60 Motions are without legal justification and should be denied.

As stated above, "[t]he burden is on the party moving for recusal to ' "demonstrate objectively that grounds for disqualification actually exist." ' " *Kennedy*, 110 N.C. App. at 305, 429 S.E.2d at 451 (citation omitted).

> The moving party may carry this burden with a showing ' "of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially," ' or a showing that the circumstances are such that a reasonable person would question whether the judge could rule impartially.

Id. (citation omitted).

Reviewing the allegations in Defendant's motion to recuse, we note that Defendant argued that Judge Scarlett "appear[ed] to have developed a strong personal animosity towards" Attorney Wolfenden because of Attorney Wolfenden's conduct during her campaign against Judge Coleman for District Court Judge. Defendant also alleged that Judge Scarlett entered "numerous tendentious and contradictory court orders, knowing that some of the orders have included false findings of fact and erroneous conclusions of law." Defendant also contended that Judge Scarlett allowed opposing attorneys courtesies that she did not extend to Attorney Wolfenden.

Defendant has not filed a transcript of the 17 June 2009 hearing, but reviewing the trial court's orders, Defendant's motions, and Defendant's characterization of the hearing in his brief, we are not persuaded that the trial court demonstrated any personal bias in conducting the hearing. Other than the allegations set forth in Defendant's verified motion to recuse, Defendant presented no actual evidence supporting his contention that Judge Scarlett harbored a personal animosity towards Attorney Wolfenden. At worst, the evidence before Judge Scarlett suggested that Judge Scarlett had disapproved of Attorney Wolfenden's conduct in campaigning against Judge Coleman, and that Judge Scarlett failed to call Attorney Wolfenden to a hearing that was properly scheduled and noticed for 17 June 2009. We also note that Judge Coleman, Attorney Wolfenden's former opponent, had originally been scheduled to hear Defendant's case, but on the day of the hearing was replaced by Judge Scarlett.

On these facts, we find that Defendant did not show " ' "substantial evidence that there exists such a personal bias, prejudice or interest on the part of [Judge Scarlett] that [s]he would be unable to rule impartially[.]" ' " *Kennedy*, 110 N.C. App. at 305, 429 S.E.2d at 451 (citation omitted). We also find that Defendant did not show "that the circumstances [were] such that a reasonable person would question whether [Judge Scarlett] could rule impartially." *Id.* Rather, Defendant has shown that Attorney Wolfenden and Judge Scarlett

had a professional relationship which was, at worst, strained by the actions and demands Attorney Wolfenden made during her previous campaign, as well as during the proceedings, and which did not warrant recusal. We hold that the trial court did not err in denying Defendant's motion to recuse. *Compare In re Murchison*, 349 U.S. 133, 137, 99 L. Ed. 942, 946 (1955) (holding that it was a violation of a defendant's due process rights under the constitution for a judge to "act as a grand jury and then try the very persons accused as a result of his investigations."); *Dunn v. Canoy*, 180 N.C. App. 30, 38 39, 636 S.E.2d 243, 249 (2006) (holding that a judge was not required to recuse himself from a case despite having become frustrated by the parties' failure to reach a settlement, noting that, "[b]eyond [the judge's] reaction regarding [the attorney's] actions in connection with the settlement agreement, the record reveals nothing that could be construed as demonstrating any personal bias, prejudice, or interest by [the judge]."). We affirm the remaining order entered by the trial court.

Affirmed.

Judge BRYANT concurs.

Judge BEASLEY concurs in part and dissents in part by separate opinion.

BEASLEY, Judge, concurring in part and dissenting in part.

While I agree with the majority's conclusion that the trial court did not err in denying the motion to recuse based on alleged personal bias against Defendant's attorney Betsy Wolfenden (Wolfenden), because Wolfenden's conduct alone—and not Defendant's—created the bases for which the trial court denied Defendant's Rule 59 and 60 motions and granted Plaintiff's Rule 11 motion, I would reverse the trial court's rulings as to Defendant's Rule 59 and 60 motions and that portion of the Rule 11 sanction which orders Plaintiff's counsel to be compensated by Defendant and Wolfenden and order that the Rule 11 sanction apply only to Wolfenden.

I believe that this case presents exceptional circumstances warranting our invocation of Rule 2 of the North Carolina Rules of Appellate Procedure to address Defendant's appeals from the trial court's rulings on his Rule 59 and 60 motions and on Plaintiff's motion for Rule 11 sanctions. Where the adverse rulings against Defendant were due primarily to directives his own attorney gave him and con-

duct in which she alone engaged, and where the preservation of his appeal was lost at the hands of Wolfenden's own self-serving brief that fails to develop several obvious arguments that would have inured to the benefit of her client, I would choose to exercise our Rule 2 authority to prevent a manifest injustice to Defendant.

Mindful that our suspension of the appellate rules must be done "cautiously" and only in "exceptional circumstances," *State v. Hart*, 361 N.C. 309, 315-16, 644 S.E.2d 201, 205 (2007), Rule 2 enables this Court to vary the non-jurisdictional requirements of our rules, *see Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) ("A jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal."), to consider significant issues of important "public interest" or "prevent manifest injustice to a party," N.C.R. App. P. 2. Here, the various notices of appeal filed on Defendant's behalf reference, *inter alia*, the 15 December 2009 order denying Defendant's "Verified Rule 59 and 60 Motions"—which requested relief from the trial court's orders denying his motion to set aside entry of default and awarding Plaintiff child custody and support—and the order granting Plaintiff's motion for Rule 11 sanctions dated 29 December 2009, *nunc pro tunc* 15 December 2009. Accordingly, the specific orders are properly before this Court, and where there is no jurisdictional default related thereto, we have the "authority to consider whether the circumstances of [the] purported appeal[s] justify application of Rule 2." *Dogwood*, 362 N.C. at 198, 657 S.E.2d at 365. The circumstances which justify the application of Rule 2 to address the merits of issues otherwise deemed abandoned relate to Wolfenden's actions throughout the course of her representation in this matter and her disbarment,[1] which was ordered before she submitted a "joint brief" on behalf of herself and Defendant in this appeal.

Wolfenden was disbarred by order of the DHC dated 29 July 2010. However, having filed several notices of appeal on Defendant's behalf and identifying herself as counsel of record, there is no indication in the record or the joint brief that Wolfenden ever informed her client of her disbarment so as to give him the choice to retain substitute counsel for purposes of this appeal. *See* 27 NCAC 01B .0124 ("A disbarred or suspended member of the North Carolina State Bar will promptly notify by certified mail, return receipt requested, all clients

1. I would take judicial notice of the 29 July 2010 order entered by the Disciplinary Hearing Commission (DHC) of the North Carolina State Bar (Bar) disbarring Wolfenden from the practice of law.

being represented in pending matters of the disbarment or suspension, the reasons for the disbarment or suspension, and consequent inability of the member to act as an attorney after the effective date of disbarment or suspension and will advise such clients to seek legal advice elsewhere."). While Wolfenden had thirty days from the date she was served with the disbarment order to complete pending matters, and the joint brief was filed within such time frame, it appears that her decision not to withdraw from representation in this appeal was made at Defendant's expense.

First, Wolfenden alleged in a joint motion to this Court that "she [was] unable to complete her and Defendant-Appellant's brief by [the original due date]" because she had "been occupied with preparing and filing her [100-page] motion for stay and petition for writ of supersedeas [regarding her disbarment] and handling her trial practice." Despite this Court extending the filing date to 20 August 2010, Wolfenden focused on her own disciplinary case and again failed to meet the deadline. Specifically, Wolfenden indicated in a motion to deem the joint brief timely filed that "[b]ecause of the time required to complete her petition"—where Wolfenden had "filed a 171-page (including exhibits) Petition for Writ of Supersedeas in her State Bar Disciplinary proceeding, NC Supreme Court Docket No. 352P10"—she "was unable to complete the joint brief in the instant case prior to . . . 26 August 2010."

Compounding Wolfenden's prioritization of her own appeal in the DHC action over Defendant's appeal here, the "joint" brief filed in this action does not appear to be joint at all. Rather, the entire argument is dedicated to the recusal issue and what appears to be Wolfenden's own agenda of attempting to reveal some sort of personal bias harbored against her by members of the judiciary in District 15-B. The perception that Wolfenden did not undertake the drafting of their joint brief primarily to safeguard Defendant's interests, if at all, is consistent with several "Findings of Fact Regarding Discipline" made by DHC in the disciplinary action connoting a pattern of similar self-serving behavior:

> 3. Wolfenden's trial practice has primarily involved domestic cases and juvenile abuse, neglect, and dependency cases.
>
> 4. Litigants in domestic cases are experiencing significant family turmoil. They often have concerns about their financial futures, living arrangements, and childcare. As a result, they are distressed, anxious, and not necessarily capable of making dispas-

sionate and well-informed decisions. This makes litigants in domestic cases a particularly vulnerable segment of the population.

5. Juvenile abuse, neglect, and dependency cases by definition involve families in crisis, and parents in these cases are vulnerable for the same reasons domestic litigants are vulnerable.

6. Wolfenden engaged in a pattern of manipulating her vulnerable clients by using their cases as a platform for her groundless personal attacks on the professional integrity of opposing counsel, the judiciary, and the court system as a whole. In so doing, she elevated her own interests above her clients' interests.

It is apparent that she engaged in the same conduct, elevating her own interests above Defendant's, in drafting the instant brief. Moreover, it cannot be gleamed from the record whether she afforded Defendant any opportunity to retain another attorney who was not consumed with representing his own professional interests (or if Defendant even knew that Wolfenden had been disbarred). What is clear, however, is that in drafting the instant brief purportedly on her client's behalf, Wolfenden preserved issues important to her and not Defendant. The understanding that Defendant did not know his attorney was not acting in good faith in taking up his appeal at a time when she was disbarred but allowed to wrap up pending matters is an exceptional circumstance meriting suspension of the non-jurisdictional appellate rules. Invocation of Rule 2 would save Defendant from being prejudiced by the same sort of selfish behavior that led, in part, to his attorney's disbarment, of which Defendant may not have been aware, and thereby prevent manifest injustice. Preserving Defendant's appeals from these orders would also further a significant public interest in a case involving child custody issues among litigants who are notably vulnerable. This is especially so where the permanent custody order entered in this case, which grants Plaintiff sole legal and physical custody of the parties' minor child and prevents Defendant from having any contact with his son, arose from a hearing that Wolfenden admittedly advised Defendant **not** to attend and then failed to appear herself, leaving Defendant's interests unrepresented and Plaintiff's evidence uncontested. Thus, I would reverse the trial court's rulings on Defendant's Rule 59 and 60 motions and on Plaintiff's motion for Rule 11 sanctions as applied to Defendant due to Wolfenden's woefully deficient advocacy.

Specifically, our Court should consider whether the trial court abused its discretion in denying Defendant's request for relief from

the trial court's denial of his motion to set aside the entry of default and the order for child support and custody pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure. Rule 60 authorized the trial court to relieve Defendant from its order denying his motion to set aside entry of default and its order granting Plaintiff permanent sole physical and legal custody for, *inter alia*, "[m]istake, inadvertence, surprise, or excusable neglect" and "[a]ny other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(1), (6) (2009). A new hearing on Plaintiff's claims for child custody and support may have also been granted pursuant to Rule 59 for, in pertinent part, "[a]ny irregularity by which any party was prevented from having a fair trial[.]" N.C. Gen. Stat. § 1A-1, Rule 59(a)(1) (2009).

Here, the custody action initiated by Plaintiff was set for mediation. As alleged, Defendant, who was not represented by counsel at the time, attended the mandatory mediation on 26 January 2009 but was later informed that Plaintiff would not sign the parenting agreement reached by the parties and prepared by the custody mediator. Plaintiff moved for entry of default based on Defendant's failure to thereafter file any responsive pleadings. After default was entered against Defendant on 24 February 2009, Wolfenden appeared on his behalf and moved to set aside the entry of default. Following a hearing, the trial court entered an order requiring counsel for both parties to submit a memorandum of law addressing whether the entry of default should be set aside. Wolfenden prepared a memorandum, citing relevant law in support of the argument that the entry of default should be set aside because Defendant "made an appearance in this case by mediating child custody in good faith" and "entries of default are disfavored in child custody cases," as hearings on the merits are far favored to treating the complaint's allegations as admitted. Plaintiff declined to file a memorandum, and, where Wolfenden emailed Judge Scarlett to request a ruling prior to the custody hearing set for 17 June 2009, Judge Scarlett responded by email on 15 June 2009 that the "[m]otion to set aside the entry of default is denied." Due to the lack of a formal written order by which she could appeal the denial, Wolfenden elected to travel to Raleigh on the morning of the custody and support hearing to file a motion for temporary stay, along with various petitions, with this Court. Wolfenden, however, admittedly instructed her client not to be present in court on 17 June 2009 out of fear that "Judge Scarlett [would] force[] [him] to proceed without counsel at a child custody hearing." In any event, Wolfenden arrived at the Orange County courthouse before Defendant's case was called,

but she left the courtroom thereafter and she and Defendant missed the custody hearing. Again, Wolfenden ignored the trial court's directive to appear and failed to inform her client that he too must appear in that his appearance in court had greater priority over Defendant's conference with Wolfenden.

On 22 June 2009, the trial court entered a written order denying Defendant's motion to set aside the entry of default, based on findings that Plaintiff had given Defendant sufficient opportunity to file responsive pleadings after informing him they did not have an agreement as to custody; the Defendant had not shown good cause for setting aside the entry of the default; and, notwithstanding the fact that the custody hearing had already been conducted without Defendant's interests being represented, "that even with the entry of default, appropriate evidence can be heard to ensure the best interests of the child are protected." However, the trial court also found and concluded that "[a]s a result of the default entered against the Defendant, the substantive allegations raised by the Plaintiff's Complaint are no longer in issue and are deemed admitted." The trial court entered an order for child custody and child support that same day, *nunc pro tunc* 17 June 2009, specifically finding, *inter alia* that Defendant and Wolfenden had "failed to appear at the hearing" without seeking leave of court; that Plaintiff was prepared to proceed with "a full hearing on the merits, as if an Entry of Default had never been granted" and "was not relying on the Entry of Default or any deemed admissions by the Defendant in the presentation of her case"; that "Defendant, if he had appeared would have had ample opportunity at the hearing to present all witnesses and evidence on the merits of all his claims and defenses regarding the issues of permanent custody and child support"; and that "Defendant's attorney was observed sitting outside of the courtroom at the time the hearing in this case began." The trial court concluded that Defendant was "not a fit and proper person to have any form of custody of the minor child or to have any visitation with the minor child," awarded "the sole physical and legal custody, care and control of the minor child born to the parties"; and precluded Defendant from having any "contact with the minor child at any place or in any form" until further court order.

On or about 6 July 2009, Defendant filed "Verified Rule 59 and 60 Motions," requesting relief from the 22 June 2009 orders denying his motion to set aside the entry of default and awarding Plaintiff child custody and support. Following a hearing on 4 September 2009, the trial court denied Defendant's Rule 59 and 60 motions. However, it is

clear from the face of Defendant's motion that he did not appear at the custody hearing based on his attorney's directives, and Wolfenden's imprudent behavior that caused her to miss the same hearing should not be imputed to Defendant in determining the fairness of leaving his parental interests unrepresented in providing the impetus for the trial court's conclusion that Defendant was "not a fit and proper person to have any form of custody of the minor child. . . ." (emphasis added). A concurring opinion stresses the important public policy principles involved where

> [t]he trial court's initial custody order, awarding custody to the father, was the result of a hearing at which neither the mother nor the child were present. The court did not appoint a guardian ad litem to represent the interests of the child. The only evidence received by the court was presented by the father. Although the custody order was not technically denominated a default judgment, it was, in effect, a result reached by default, since the court heard only one side of the dispute.
>
> Even in suits involving competent adults, our jurisprudence disfavors default judgments, believing that justice is more likely to result from a full, fair adversarial proceeding. *See, e.g.*, *Estate of Teel v. Darby*, 129 N.C. App. 604, 607, 500 S.E.2d 759, 762 (1998) ("[P]rovisions relating to the setting aside of default judgments should be liberally construed so as to give litigants an opportunity to have a case disposed of on the merits."). In some instances, where parties sit on their rights, we allow dollars or widgets to go by default. However, our courts should go the extra mile to insure that custody of our children does not go by default. *See Qurneh v. Colie*, 122 N.C. App. 553, 559, 471 S.E.2d 433, 436 (1996) ("As a policy matter, issues such as custody should only be decided after careful consideration of all pertinent evidence in order to ensure the best interests of the child are protected.")

West v. Marko, 141 N.C. App. 688, 695, 541 S.E.2d 226, 231 (2001) (Fuller, J., concurring). The concurring opinion emphasized that "to the extent possible, child custody determinations should be based upon consideration of the best available evidence, and should not be based merely upon deemed admissions or one parent's perspective." *Id.* at 695-96, 541 S.E.2d at 231.[2]

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2. There are certainly instances where it is appropriate for the court to award custody where a noncomplying or absent party fails to file an answer or otherwise comply with court orders and the court is aware that the noncomplying or absent party has received proper notice of the custody action.

While, in awarding custody to Plaintiff, the trial court found that Plaintiff was not relying on any allegations of the complaint having been deemed admitted via the entry of default, the trial court's order denying Defendant's motion to set aside the entry of default specifically finds and concludes that "[a]s a result of the default entered against the Defendant, the substantive allegations raised by the Plaintiff's Complaint are no longer in issue and are deemed admitted." Thus, it is not clear whether the trial court relied on any allegations of the complaint as having been deemed admitted by Defendant. Moreover, although Plaintiff's complaint requests that "Defendant be granted reasonable and consistent visitation with the minor child," the trial court denied Defendant any visitation rights after hearing only one side of the dispute. Finally, even if the trial court's denial of Defendant's motion to set aside the entry of default did not prejudice Defendant, I believe this Court should consider whether Defendant's failure to appear at the 17 June 2009 custody hearing and thereby protect his own interests was the result of his justified reliance on his attorney's instructions. The record suggests that Defendant was paying proper attention to his case, and there is nothing to indicate that Defendant's failure to appear at the custody hearing was anything more than a client heeding what he believed to be his attorney's good-faith strategic advice. Thus, I believe that this Court should consider whether Wolfenden's recklessness should have been imputed to Defendant or whether Defendant's reliance on his counsel and his subsequent failure to appear at a hearing of such importance was the result of excusable neglect, such that the custody and support order should have been set aside.

It is also important to address whether the trial court abused its discretion in awarding Rule 11 sanctions against Wolfenden and Defendant, jointly and severally, where the order and record evidence suggests that it was Defendant's attorney's conduct over which Defendant had no control that prompted the court to grant Plaintiff's motion. I acknowledge that

> a trial court may enter sanctions when the plaintiff or his attorney violates a rule of civil procedure or a court order, *Harris v. Maready*, 311 N.C. 536, 551, 319 S.E.2d 912, 922 (1984) (Rule 8(a)(2)); *Rivenbark v. Southmark Corp.*, 93 N.C. App. 414, 420, 378 S.E.2d 196, 200 (1989) (court order)[,] [and that] [t]he sanctions may be entered against either the represented party or the attorney, even when the attorney is solely responsible for the delay or violation. *See Smith [v. Quinn]*, 324 N.C. [316,] 318-19,

> 378 S.E.2d [28,] 30-31 [(1989)]; *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 674 75, 360 S.E.2d 772, 776 (1987) (trial court properly sanctioned plaintiff for plaintiff's attorney's violation of court order); *cf. Turner v. Duke Univ.*, 101 N.C. App. 276, 280-81, 399 S.E.2d 402, 405, *disc. rev. denied*, 329 N.C. 505, 407 S.E.2d 552 (1991) (attorney committed acts giving rise to sanction).

Foy v. Hunter, 106 N.C. App. 614, 618, 418 S.E.2d 299, 302 (1992). "The lack of misconduct by a represented party, however, can mitigate against the use of severe sanctions against that party." *Id.* In fact, in *Simmons v. Tuttle*, 70 N.C. App. 101, 318 S.E.2d 847 (1984), this Court held that dismissal was improper where the plaintiff's counsel was negligent in failing to stay abreast of the trial calendar:

> It is quite plain that the plaintiff, as distinguished from his new counsel, was without fault in not reporting to the court or attending the call of the clean-up calendar, and his case should not have been dismissed because of it. Though the court could have properly found that plaintiff's new counsel was negligent for failing to ascertain that the case was on the clean-up calendar and acted accordingly, this neglect was not imputable to plaintiff; because an attorney's neglect will not be imputed to a litigant that is himself free of fault. According to the record, the dismissal was entered because plaintiff's attorney failed to discharge an administrative duty; a duty, as is generally known to the profession, that is rarely, if ever, discharged by litigants whose cases are being handled by lawyers, and that, for aught that the record shows, plaintiff knew nothing about. Thus, though the court certainly had grounds for sanctioning plaintiff's new counsel, had it chosen to do so, it had no grounds for sanctioning plaintiff at all . . . .

Id. at 105-06, 318 S.E.2d at 849.

Specifically in the Rule 11 context, although Defendant did not, in fact, sign his "Verified Rule 59 and 60 Motions,"[3] it appears that represented parties may be subject to sanctions even when the paper violating Rule 11 is signed only by their counsel. *See Egelhof v. Szulik*, 193 N.C. App. 612, 618, 668 S.E.2d 367, 372 (2008); *see also* N.C. Gen. Stat. § 1A-1, Rule 11 (2009) ("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

3. Wolfenden's signature instead appears on the verification page.

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."). However, where litigants are sanctioned,

> "the relevant inquiry is . . . whether the client made a reasonable inquiry to determine the legal sufficiency of the document." The [Supreme] Court, in defining what would constitute a "reasonable inquiry," stated: [T]he good faith reliance of [plaintiffs], as represented parties, on their attorneys' advice that their claims were warranted under the law is sufficient to establish an objectively reasonable belief in the legal validity of their claims.

Taylor v. Collins, 128 N.C. App. 46, 52-53, 493 S.E.2d 475, 480 (1997) (quoting *Bryson v. Sullivan*, 330 N.C. 644, 656, 662, 412 S.E.2d 327, 333, 336-37 (1992)).

Here, the trial court concluded that Defendant's Rule 59 and 60 motions were not well grounded in fact or law and were filed for an improper purpose, but it made findings of fact only in support of the legal sufficiency prong and referenced only Wolfenden's conduct:

> 20. On their face, Defendant's verified Rule 59 and 60 Motions, appear to the Court to be without legal justification. The Defendant's counsel was unable to provide any legal justification for the same at this hearing. The Defendant failed to exercise his right to appear and be heard at the June 17, 2009 custody and child support hearing, following the advice of his counsel. The Defendant's counsel chose not to obtain leave of court to continue the hearing or hold it open while she filed papers with the Court of Appeals. The Defendant's counsel also chose not to remain in the Courtroom for this case to begin on June 17, 2009, even though she had ample notice to appear on June 17, 2009 and even though she had already completed her filings and returned from the Court of Appeals before the hearing in this case began on June 17, 2009.

Where the trial court made no findings in its Rule 11 sanctions order as to whether Defendant relied in good faith on Wolfenden's advice, the trial court's findings are insufficient to support its order of sanctions against Defendant.

LINDA G. DOBSON, PLAINTIFF v. SUBSTITUTE TRUSTEE SERVICES, INC., SUBSTITUTE TRUSTEE, AND WELLS FARGO BANK MINNESOTA, N.A., AS TRUSTEE FOR EQUIVANTAGE HOME EQUITY LOAN TRUST, 1996-4, NOTE HOLDER, EQUIVANTAGE INC., AND AMERICA'S SERVICING COMPANY, DEFENDANTS

No. COA10-632

(Filed 17 May 2011)

Mortgages and Deeds of Trust— foreclosure—evidence of owner of note and amount owed—photocopies

The trial court erred by granting summary judgment for plaintiff in a foreclosure action based on the court's erroneous conclusions that defendants failed as a matter of law to present sufficient evidence to show the amount owed and that Wells Fargo was the holder of the note. Such a conclusion on this evidence should not be made summarily, but only after meaningful consideration of the evidence.

Judge HUNTER, Jr., Robert N., dissenting.

Appeal by Defendants from order entered 28 December 2009 by Judge Russell J. Lanier, Jr., in Duplin County Superior Court. Heard in the Court of Appeals 17 November 2010.

Legal Aid of North Carolina, Inc., by Celia Pistolis, John Christopher Lloyd, and Anne J. Randall, for Plaintiff.

Hutchens, Senter & Britton, P.A., by John A. Mandulak, for Defendants.

STEPHENS, Judge.

Factual and Procedural Background

On 31 July 1996, Plaintiff Linda G. Dobson ("Dobson") and her husband borrowed, at a yearly rate of 12.41% interest, $50,400.00 from Equivantage, Inc. ("Equivantage"). Dobson executed a promissory note in favor of Equivantage in that same amount, the terms of which (1) required Dobson to make monthly payments of interest and principal amounting to $534.38, not including escrow; (2) charged a fee to Dobson for any late payments in the amount of "4.000% of [the] overdue payment of principal and interest;" and (3) stated that Dobson would be in default under the note if she did not pay the full amount

of each monthly payment on its due date. Along with the note, Dobson executed a deed of trust securing Dobson's promise to pay with property located in Magnolia, North Carolina, and owned by Dobson and her husband.

In September 2001, Equivantage assigned the note and deed of trust to Defendant Wells Fargo Bank Minnesota, N.A.[1] ("Wells Fargo"). In October 2001, "Dobson became delinquent under the repayment terms." At that time, the unpaid principal balance on the note was $49,288.96. To cure Dobson's delinquency under the note, the parties agreed to the following modifications of the note: (1) $3,987.30 was capitalized as principal, resulting in an unpaid principal balance of $53,276.26; (2) Dobson was required to make monthly payments of interest and principal in the amount of $578.19 and escrow payments estimated at $62.51; and (3) the new maturity date was to be 1 November 2026. The loan modification agreement was signed by Dobson in February 2002.

Dobson made regular payments under the note between March 2002 and November 2003. However, Dobson stopped making payments after November 2003, and in March 2004, Wells Fargo "caused to be filed a foreclosure action assigned special proceeding number 04 SP 94." On 2 April 2004, following commencement of foreclosure proceedings, Dobson filed a bankruptcy petition in the Eastern District of North Carolina to stay the foreclosure. The bankruptcy court created a bankruptcy plan and stayed foreclosure for several years until, on 18 July 2007, the bankruptcy court dismissed Dobson's case for failure to comply with the provisions of the bankruptcy plan.

In September 2007, Defendant Substitute Trustee Services, Inc. ("STS"), as substitute trustee for Wells Fargo, filed a foreclosure action with the Duplin County Clerk of Superior Court. In an order filed 25 October 2007, the Duplin County Clerk of Superior Court found that (1) Wells Fargo is the holder of the note; (2) "[t]he total due under the note and [d]eed of [t]rust was undetermined;" and (3) "[t]here was insufficient evidence that [Dobson] was in default under the terms of the [d]eed of [t]rust." The Clerk of Superior Court then ordered that "the foreclosure of the deed of trust . . . is dismissed with prejudice."

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1. The note and deed of trust were assigned to "Norwest Bank Minnesota, National Association, as trustee of Equivantage Home Equity Loan Trust 1996-4 under the pooling and servicing agreement dated as of November 1, 1996." According to affidavits, Norwest Bank Minnesota is "now known as Wells Fargo."

On 29 October 2007, Wells Fargo gave notice of appeal of the dismissal to the Duplin County Superior Court. On 1 November 2007, Dobson filed a complaint against Wells Fargo, STS, Equivantage, and Defendant America's Servicing Company ("ASC") (collectively, "Defendants") seeking (1) both a preliminary and permanent injunction against the foreclosure proceedings; (2) an equitable accounting and appointment of a referee; and (3) appointment of a mediator. On 13 November 2007, the trial court granted Dobson's request for a preliminary injunction.

Defendants answered Dobson's complaint on 14 January 2008, and on 10 September 2009, following a lengthy period of discovery, Dobson filed a motion for partial summary judgment. In an order entered 6 October 2009, Superior Court Judge Russell J. Lanier, Jr., denied Dobson's motion for partial summary judgment on the permanent injunction claim, but held open Dobson's motion on the requests for appointment of a referee and for an equitable accounting. On 30 November 2009, Defendants filed their own motion for summary judgment, requesting that Dobson's action be dismissed. At the 7 December 2009 hearing on Defendants' motion, Dobson "renewed and reopened" her previous summary judgment motion, which action was allowed by the trial court. On 28 December 2009, following the hearing on the motions for summary judgment, the trial court denied Defendants' motion and partially granted Dobson's motion for summary judgment by "permanently enjoin[ing] [Defendants] from foreclosing upon, or taking any steps of any nature to cause the foreclosure of the [d]eed of [t]rust . . . until such a time as Defendants can establish that they are the owner and holder of the [n]ote[] and the amount owed by [Dobson]." Wells Fargo and ASC gave notice of appeal of Judge Lanier's order on 27 January 2010.

Discussion

Summary judgment is proper when, viewed in the light most favorable to the nonmovant, "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." *See S.B. Simmons Landscaping & Excavating, Inc. v. Boggs*, 192 N.C. App. 155, 163-64, 665 S.E.2d 147, 152 (2008).

On appeal, Defendants argue that the trial court erred by granting partial summary judgment for Dobson because, based on the evidence before the court, Dobson was not entitled to judgment as a matter of law. For the following reasons, we agree.

"A party moving for summary judgment may prevail if it meets the burden . . . of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Bone Int'l, Inc. v. Brooks*, 304 N.C. 371, 375, 283 S.E.2d 518, 520 (1981). In this case, the trial court concluded that Defendants should be enjoined from pursuing foreclosure because, as a matter of law, the evidence presented by Defendants was insufficient "to prove the existence of the facts necessary to allow a foreclosure." Specifically, the court concluded that Defendants failed to present legally sufficient evidence to establish (1) that Wells Fargo is the holder of the note and (2) the amount owed by Dobson on the note. Both of these conclusions are erroneous.

On the issue of Wells Fargo's status as holder of the note, Defendants presented the following evidence to establish that Wells Fargo is the holder of the note: (1) an affidavit by the vice president of loan documentation of Wells Fargo, which states that "[t]he owner and holder of the [n]ote and indebtedness is[] Wells Fargo;" (2) an affidavit by a default litigation specialist with Wells Fargo, which states that "Wells Fargo is the present and current holder of the [n]ote;" (3) a photocopy of the original note; and (4) a photocopy of the document assigning the note to "Norwest Bank Minnesota," which is "now known as Wells Fargo."

Despite this evidence establishing Wells Fargo as the holder of the note, Dobson argues on appeal—and successfully argued before the trial court—that Wells Fargo has not proven that it is the holder of the note because it failed to produce the original note. This argument is unavailing.

Under similar circumstances, this Court has held that where there is no evidence that photocopies of a note or deed of trust are not exact reproductions of the original instruments, a party need not present the original note or deed of trust and may establish that it is the holder of the instruments by presenting photocopies of the note or deed of trust. In *In re Adams*, —— N.C. App. ——, 693 S.E.2d 705 (2010), respondents argued that a foreclosing party "did not present competent evidence that it had possession of the Note and Deed of Trust because it offered only photocopies of the Note and Deed of Trust, rather than the original instruments." *Id.* at ——, 693 S.E.2d at 709. Based on a previous decision in *In re Helms*, 55 N.C. App. 68, 284 S.E.2d 553 (1981), *disc. review denied*, 305 N.C. 300, 291 S.E.2d 149 (1982)—in which this Court "determined that the photocopies of the

promissory note and deed of trust were sufficient competent evidence to establish the required elements under [the foreclosure statute,]" *id.* at —, 693 S.E.2d at 709 (citing *Helms*, 55 N.C. App. at 70-71, 284 S.E.2d at 555)—the Court in *Adams* held that "[b]ecause respondents do not dispute that the photocopies are 'correct copies' of the original instruments, we conclude that [a foreclosing party] was not required to present the original Note and Deed of Trust at the foreclosure hearing to establish that it was in possession of these instruments." *Id.* at —, 693 S.E.2d at 709-10.

In this case, although Dobson does not admit that the photocopy of the note is a correct copy, Dobson has presented no evidence to dispute the fact that Wells Fargo is the holder of the note. Dobson contends in her brief that she "specifically disputes that the photocopy of the [n]ote is a true and correct copy of the original." However, Dobson's only "dispute" of the authenticity of the note comes from her 7 December 2009 affidavit, in which she states that "I cannot confirm the authenticity of the copy of the [n]ote produced by the Defendants." This bare statement by Dobson is insufficient to cast doubt on Defendants' evidence that Wells Fargo is the holder of the note and does not serve as evidence that the copies are not exact reproductions.

Dobson further contends that in its "response to [Dobson's] first request for admission," Wells Fargo itself denied possession of the original note and, therefore, Defendants are required to establish that Wells Fargo is the holder of the note by presentation of the original note. Again, we are unpersuaded by Dobson's argument. The response by Wells Fargo that Dobson characterizes as Defendants' denial of possession of the original note reads as follows:

> Wells Fargo did not prepare the loan origination documents, and is unsure as to whether the documents attached to [Dobson's] first request for admission constitute the complete set of loan origination documents used by Equivantage in the formation of [Dobson's] home loan. Because Wells Fargo did not originate this account, Wells Fargo denies that the documents attached to [Dobson's] first request for admission are true and correct copies of the loan origination documents signed by [Dobson] and used by Equivantage in the formation of [Dobson's] home loan.
>
> However, Wells Fargo admits that the documents attached to [Dobson's] first request for admissions are true and correct copies of all loan origination documents currently in the posses-

> sion of Wells Fargo that were acquired when Wells Fargo was assigned the payment rights to [Dobson's] account.

In our view, this statement by Wells Fargo clearly is not a denial of possession of the original note. The statement, read in its entirety, appears to (1) deny that the "attached documents" constitute *all of the loan origination documents used by Equivantage* in the formation of Dobson's home loan, and (2) admit that the "attached documents" are "true and correct copies" of *all loan origination documents currently in possession of Wells Fargo* and provided by Equivantage. Accordingly, rather than the above-quoted statement serving to deny Wells Fargo's possession of the original note, the statement admits that the photocopies of the original documents offered by Defendants are correct copies of the documents in Wells Fargo's possession, which include the original note. Because Defendants presented sufficient evidence to show that Wells Fargo is the holder of the note, we hold that the trial court erred by concluding that the evidence, taken in the light most favorable to Defendants, was insufficient to establish that Wells Fargo is the holder of the note.

As for whether Defendants presented sufficient evidence to establish the amount owed by Dobson on the note, the record contains evidence of the note itself, a 2002 modification of the note, the deed of trust, records of Dobson's payments and modifications of Dobson's payment schedule from bankruptcy proceedings, and computer printouts of Defendants' records of Dobson's payments and charges from January 2000 to February 2009. This evidence, taken in the light most favorable to Defendants, is sufficient to establish the amount owed by Dobson under the note.

The deed of trust and the note, both the original and as modified, set out the following information constituting the entirety of Dobson's obligations to Defendants: (1) the total amounts of principal owed and interest charged; (2) the amount of Dobson's initial monthly payment; (3) the due date of the monthly payments and the date on which payments are considered late; (4) the calculation and application of late charges; and (5) the types of expenses for which Dobson is responsible with respect to the property. This listing of Dobson's obligations, combined with the data from Defendants' records of Dobson's payments and charges, provide all of the information necessary to determine what amount is owed by Dobson. Although arriving at that determination may take some time and effort, and perhaps a calculator, the evidence contained in the record

in this case is not insufficient, as a matter of law, to allow the trial court to make that determination.

Accordingly, we hold that the trial court erred by granting summary judgment for Dobson based on the court's erroneous conclusions that, *as a matter of law*, Defendants failed to present sufficient evidence to show the amount owed by Dobson under the note and to show that Wells Fargo is the holder of the note. We note that this holding should be viewed in the context of summary judgment, and should not be interpreted as finding Defendants' evidence sufficient to warrant final judgment in Defendants' favor. Obviously, if the trial court, in a later proceeding beyond the summary judgment stage, finds Defendants' evidence incomplete, unreliable, or unconvincing, the court could ultimately conclude that Defendants failed to present sufficient evidence such that a permanent injunction is appropriate. However, based on the evidence presented in the case thus far, such a conclusion should not be made summarily by the court, but instead should be made only after meaningful consideration of the evidence, which apparently the trial court was loath to provide.[3]

Based on the foregoing, we remand "to let" the trial court "worry with it."

REVERSED AND REMANDED.

Judge STEELMAN concurs.

Judge HUNTER, ROBERT N., JR., dissents with a separate opinion.

HUNTER, JR., Robert N., Judge, dissenting.

As the majority notes, to prevail on her motion for summary judgment, Dobson has the burden of showing Defendants "cannot produce evidence to support an essential element of [their] claim." *Bone Int'l, Inc.*, 304 N.C. at 375, 283 S.E.2d at 520. I conclude Dobson has

3. From the transcript of the summary judgment hearing:

> THE COURT: I just don't like this mess. It's confusing. It's imprecise. I think probably the best thing to do is to let the Court of Appeals worry with it.
>
> . . . .
>
> THE COURT: Prepare an order and hopefully the folks up at Raleigh will be a lot smarter than I am and can figure this thing out. I am just not comfortable with the facts at all.

met her burden, demonstrating that Wells Fargo failed to present competent evidence sufficient to establish a genuine issue of material fact that it is the holder of Dobson's promissory note, an essential element of Defendants' claim. Therefore, I respectfully dissent.

In reaching the conclusion that Defendants have produced sufficient evidence to establish that Wells Fargo is the holder of Dobson's note, the majority cites *Adams* and concludes:

> Under similar circumstances, this Court has held that where there is no evidence that photocopies of a note or deed of trust are not exact reproductions of the original instruments, a party need not present the original note or deed of trust and may establish that it is the holder of the instruments *by presenting photocopies of the note or deed of trust.* (Emphasis added.)

I would like to conclude the majority does not intend this statement to stand for the proposition that a party may establish it is the holder of a promissory note merely "by presenting photocopies of the note." Because the record before this Court lacks any competent evidence that Wells Fargo is in possession of the Note, however, that is precisely what the majority permits.

Thus, my disagreement with the majority's decision is threefold. First, I conclude that our case law has established a narrow exception whereby an alleged holder may establish possession of a negotiable instrument without producing the original instrument, but that exception does not apply to the instant case. Second, I am concerned the majority's decision will be construed to permit an alleged holder of a negotiable instrument to establish it is in possession of an instrument merely by producing photocopies of the instrument. Third, I conclude Defendants have failed to produce competent evidence sufficient to establish that Wells Fargo is in possession of Dobson's promissory note. Without such evidence, Wells Fargo cannot establish it is the holder of the Note.

A. Interpretation of *In re Helms* and *In re Adams*

We have recently stated in *Adams*, the Uniform Commercial Code's ("UCC") definition of "holder" applies to foreclosure proceedings held pursuant to section 45-21.16(d) of our General Statutes. *In re Adams*, —— N.C. App. at ——, 693 S.E.2d at 709; *see* N.C. Gen. Stat. § 45-21.16(d) (2009) (in order for the foreclosure to proceed, the clerk of court must find, *inter alia*, the existence of a "valid debt of which the party seeking to foreclose is the *holder*" (emphasis added)). The

UCC, as codified in our General Statues, defines a "holder" as "[t]he person in *possession* of a negotiable instrument that is payable either to bearer or to an identified person that is the person in *possession*." N.C. Gen. Stat. § 25-1-201(b)(21) (2009) (emphasis added). Thus, establishing that a party is in possession of a note is essential in order to establish that party is the holder of the note. *See Connolly v. Potts*, 63 N.C. App. 547, 550, 306 S.E.2d 123, 125 (1983) ("It is the fact of possession which is significant in determining whether a person is a holder, and the absence of possession *defeats that status*." (*cited with approval in Adams*, —— N.C. App. at ——, 693 S.E.2d at 709-10)) (emphasis added).

Defendants are correct in stating that this Court has also held an alleged note holder need not produce the original promissory note at the foreclosure hearing, *but only if* the debtor concedes the photocopies of the note admitted into evidence are accurate copies of the original. *See Adams*, —— N.C. App. at ——, 693 S.E.2d at 710 ("Because respondents do not dispute that the photocopies are 'correct copies' of the original instruments," the alleged note holder was not required to produce the original promissory note and deed of trust to establish possession.); *In re Helms*, 55 N.C. App. at 70, 284 S.E.2d at 554 ("When the opposing party, however, admits that the documents shown him are correct copies of the original, the original need not be produced."). *Adams* thus applied the exception, created in *Helms*, to the requirement that the party seeking to foreclose must produce the original note to establish that it is in possession of the instrument—when the opposing party concedes the photocopies are correct copies of the instrument. Our holdings do not, however, relieve an alleged holder of the burden of establishing the party is in possession of the original instrument, nor—when the accuracy of the photocopy of the note is contested—do our holdings relieve the party of the burden of producing the original instrument.[4]

In *Helms*, possession of the note and deed of trust were not at issue. Rather, the appellant argued the "best evidence" rule required production of the original note and deed of trust by the party alleging to be the holder of the note. *Helms*, 55 N.C. App. at 70, 284 S.E.2d at

4. I recognize the UCC provides that a negotiable instrument may be enforced by "(i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to G.S. 25-3-309 or G.S. 25-3-418(d)." N.C. Gen. Stat. § 25-3-301 (2009). As Defendants have claimed to be the holder of the Note, however, my analysis is limited to Defendants' status as the holder of the instrument.

554. We concluded, however, that where the party seeking to foreclose produced photocopies of the note and deed of trust, and the debtors contested *only* the interest rate term within the note, it was unnecessary to produce the originals; the interest rate—and thus the *amount* of the debt due—is not relevant to a foreclosure proceeding. *Id.* Having established that the photocopies of the instruments were properly introduced, we then concluded there was sufficient evidence in the record to support the trial court's findings. *Id.* at 71, 284 S.E.2d at 555. That conclusion, however, does not imply that the photocopies were the *only* evidence of possession. Significantly, the opinion states there was evidence introduced in the trial court that the party seeking foreclosure was the holder of the note and deed of trust. *Id.* at 69, 284 S.E.2d at 554. On appeal, rather, the appellant argued the best evidence rule required production of the original note, and we concluded that, under the circumstances presented in *Helms*, it did not. *Id.* at 70, 284 S.E.2d at 554.

Similarly, in *Adams*, this Court concluded that, where the debtor *did not dispute* that the photocopies of the note and deed of trust were "correct copies" of the originals, the party claiming to be the holder of the instruments did not need to produce the originals to establish it was in possession of the instruments. *Adams*, ___ N.C. App at ___, 693 S.E.2d at 710. I do not interpret this holding in *Adams* to mean that a photocopy of the promissory note is, by itself, sufficient evidence to prove possession of the instrument. Rather, I conclude *Adams* merely applied *Helms* to reject the respondents' argument that even though *they did not dispute* the photocopies produced were not "exact reproductions" the original note must be produced. *Id.* As stated in *Helms*, "[w]hen the opposing party, however, admits that the documents shown him are correct copies of the original, the original need not be produced." 55 N.C. App. at 70, 284 S.E.2d at 554.

Here, Dobson contests the authenticity of the photocopy of the Note and, as discussed further below, the record contains evidence that the copy produced is not an exact reproduction of the original. Therefore, I conclude, the exception to the requirement to produce the original instrument, articulated in *Helms* and reiterated in *Adams*, does not apply to the present case.

Moreover, the lender bears the burden of proving the existence of their right to foreclose under section 45-21.16 of our General Statutes. *Adams*, ___ N.C. App. at ___, 693 S.E.2d at 709 (citing *In re*

Foreclosure of Brown, 156 N.C. App. 477, 489, 577 S.E.2d 398, 406 (2003)). The majority's holding, however, impermissibly shifts the burden of proving Defendants' photocopy of the Note is not an accurate copy of the original to Dobson, when it is the Defendants who, allegedly, have possession of the instrument.

Assuming *arguendo* that our holdings permit Defendants to establish possession of the promissory note by means other than production of the original instrument, I conclude the evidence offered by Defendants is not competent evidence of Defendants' possession of the Note.

B. Defendants' Affidavits

In support of their argument that Wells Fargo is the holder of Dobson's promissory note, Defendants submitted affidavits from two Wells Fargo employees. Neither affidavit, however, alleges any facts that would allow this Court to conclude that Defendants are in possession of Dobson's note.

The affidavit by Yolanda Williams, Vice President of Loan Documentation at Wells Fargo, makes the conclusory statement that "[t]he owner and holder of the Note and indebtedness is: Wells Fargo Bank Minnesota, NA, as Trustee for Equivantage Home Equity Loan Trust, 1997-1." This statement of the identity of the alleged holder is not a statement of fact, but is a legal conclusion that is to be determined on the basis of factual allegations. As such, the statement is irrelevant as to the determination of the holder of the instrument as defined under the UCC. *See Lemon v. Combs*, 164 N.C. App. 615, 622, 596 S.E.2d 344, 349 (2004) (" 'Statements in affidavits as to opinion, belief, or conclusions of law are of no effect.' " (quoting 3 Am. Jur. 2d, *Affidavits* § 13)); *see also Speedway Motorsports Int'l Ltd. v. Bronwen Energy Trading, Ltd.*, ___ N.C. App. ___, ___ n.2, ___ S.E.2d ___, ___ n.2, slip. op. at 12 n.2, No. 09-1451, 2011 WL 646664 (Feb. 15, 2011) (rejecting a party's contention that the Court must accept as true all statements found in the affidavits in the record, stating, "our standard of review does not require that we accept a witness' characterization of what 'the facts' mean").

Furthermore, Williams avers in her affidavit that Dobson's note was assigned to "Equivantage Home Equity Loan Trust, 1997-1." This is not the same trust indicated by the indorsement on the photocopy of the Note, nor is it the same trust to which Defendants claim the Note is presently assigned: "Equivantage Home Equity Loan Trust

1996-4." Thus, as Williams' affidavit alleges no facts to establish who is in physical possession of the Note, makes an irrelevant conclusion of law as to the identity of the holder, and alleges the Note has been assigned to a different trust, I conclude the Affidavit is not competent evidence that Defendant Wells Fargo Bank Minnesota, N.A. as Trustee for Equivantage Home Equity Loan Trust 1996-4 is the holder of Dobson's note.

This discrepancy between Williams' affidavit and the indorsement on the Note also demonstrates the danger of permitting photocopies of the promissory note to suffice as the sole evidence of possession: there is at least one assignment of Dobson's note that is not evidenced by the photocopy of the instrument. Granted, if the Note were endorsed as Williams describes, rather than as shown on the photocopy of the Note, the instrument would still be payable to Wells Fargo, as a trustee. *See* N.C. Gen. Stat. § 25-3-110(c)(2) (2009) ("If an instrument is payable to (i) a trust, an estate, or a person described as trustee or representative of a trust or estate, the instrument is *payable to the trustee*, the representative, or a successor of either, whether or not the beneficiary or estate is also named . . . .") (emphasis added). Williams' averment that the Note was assigned to a different trust, however, demonstrates the potential for multiple suits on the same promissory note if proof of possession could be established merely by producing a photocopy of the instrument, as contemplated in *Liles v. Myers:* an alleged holder "could negotiate the instrument to a third party who would become a holder in due course, bring a suit upon the note in her own name and obtain a judgment in her favor." 38 N.C. App. 525, 527, 248 S.E.2d 385, 387 (1978). Permitting such evidence to establish that a party seeking foreclosure is in possession of the promissory note would provide little protection from such an "inequitable occurrence" contemplated by the *Liles* Court. *Id.* at 528, 248 S.E.2d at 388 ("As evidence that a [party] is holder of a note is an essential element of a cause of action upon such note, the [debtor] was entitled to demand strict proof of this element." (emphasis added)).

The second affidavit produced by Defendants, that of Jennifer L. Robinson, Default Litigation Specialist for Wells Fargo, suffers similar inadequacies. Robinson avers that Dobson's note was assigned to "Norwest Bank Minnesota, National Association as Trustee of Equivantage Home Equity Loan Trust 1996-4 under the pooling and servicing agreement dated as of November 01 1996, now known as Wells Fargo." She then makes the conclusory statement, "Wells Fargo is the present and current holder of the Note." Again, a determination

of the entity that is the holder of a negotiable instrument under the UCC is a legal conclusion to be determined on the basis of factual allegations; Robinson's opinion as to Wells Fargo's status as the holder of the Note is irrelevant. Without any allegation of facts that would allow this Court to determine Wells Fargo is in possession of Dobson's note, Robinson's affidavit is not competent evidence of Well Fargo's status as the holder of the Note.

C. Wells Fargo's Answer

The majority also points to Wells Fargo's Answer to one of Dobson's Requests for Admission as support for concluding Wells Fargo is in possession of Dobson's note:

> Wells Fargo did not prepare the loan origination documents, and is unsure as to whether the documents attached to [Dobson's] first request for admission constitute the complete set of loan origination documents used by Equivantage in the formation of [Dobson's] home loan. Because Wells Fargo did not originate this account, Wells Fargo denies that the documents attached to [Dobson's] first request for admission are true and correct copies of the loan origination documents signed by [Dobson] and used by Equivantage in the formation of [Dobson's] home loan.
>
> However, Wells Fargo admits that the documents attached to [Dobson's] first request for admission are true and correct copies of all loan origination documents currently in the possession of Wells Fargo that were acquired when Wells Fargo was assigned the payment rights to [Dobson's] account.

I agree with the majority, this statement is not a denial of possession of the original note as Dobson contends. I cannot, however, agree that this statement is an admission that Wells Fargo is in possession of the original note. The statement is merely an admission that the documents that were attached to Dobson's Request for Admission were true and correct copies of all loan origination documents *that Wells Fargo possessed* at the time the statement was made; it does not state that Wells Fargo was in possession of all of the loan origination documents.

In my view, the majority's interpretation contradicts itself. To conclude this answer states that Wells Fargo possesses the original note, the majority necessarily interprets its Answer to state that Wells Fargo possesses all of the loan origination documents. This is con-

tradicted by the first paragraph of the Answer in which Wells Fargo states it is "unsure" whether the documents provided by Dobson "constitute the complete set" of the loan origination documents. Wells Fargo's counsel reiterated this uncertainty in the hearing on Defendants' Motion for Summary Judgment: "We don't know if these are all of the origination documents. They were the copies that were provided to us when Wells Fargo purchased the loan, and that's basically the answer we said."

If, as the majority suggests, Wells Fargo's Answer establishes that it possesses all of the loan origination documents, including the original note, how could Wells Fargo not know whether the documents provided by Dobson were a complete set of all of the original documents? This discrepancy makes the majority's interpretation of Wells Fargo's Answer untenable, and I cannot adopt their conclusion.

Our decision in *Connolly*, 63 N.C. App. 547, 306 S.E.2d 123, provides further support for concluding that Defendants' evidence is not sufficient to establish that Wells Fargo is the holder of the Note. In *Connolly*, the petitioners sought to foreclose on a promissory note and deed of trust and were denied at the special proceeding before the clerk of court. 63 N.C. App. at 548, 306 S.E.2d at 124. Several years prior to instituting foreclosure proceedings on the note, the petitioners assigned and delivered that note to a bank as collateral for a loan for which they were the debtors. *Id.* at 549, 306 S.E.2d at 124. At the time the petitioners instituted foreclosure proceedings with the clerk of court, their loan from the bank had not been repaid and the bank retained possession of the note they pledged as collateral and which they sought to foreclose. *Id.*

The petitioners appealed the decision by the clerk of court for a *de novo* hearing. During the hearing, the petitioners "introduced the originals of the note and deed of trust," but also testified "they had left the [] note at the bank, for security purposes." *Id.* at 551, 306 S.E.2d at 125. The trial court found the bank was in "physical possession" of the note and concluded, as a matter of law, the petitioners were not the holders of the note at the institution of the foreclosure proceedings. *Id.* at 549-50, 306 S.E.2d at 124-25.

On appeal to this Court, we concluded that, despite the fact that the party seeking foreclosure introduced the original note at the time of the *de novo* hearing, the trial court's findings of fact did not address whether petitioners were in possession of the note at the time of the trial. *Connolly*, 63 N.C. App. at 549-50, 306 S.E.2d at

124-25. Such requirement for "strict proof" that the party seeking to foreclose is in possession of the promissory note cannot be reconciled with the majority's reliance on Defendants' evidence.

In sum, I conclude *Helms* established, and *Adams* applied, a narrow exception to the requirement that the party seeking to foreclose must produce the original note to establish possession of that note; the exception is permitted only in those cases where the parties do not dispute that photocopies of the note are "correct copies" of the original instrument. Assuming *arguendo* that our holdings permit a party seeking to foreclose under a power of sale to establish possession of the promissory note by means other than production of the original instrument, I find no competent evidence in the record from which this Court could determine that Wells Fargo is the holder of Dobson's note. Neither of the affidavits provided by Defendants, nor the answer provided by Wells Fargo allege possession of the instrument. Thus, Defendants have failed to present competent evidence sufficient to establish a genuine issue of material fact to survive Plaintiff's Motion for Summary Judgment. Accordingly, I would affirm the trial court's Order.

STATE OF NORTH CAROLINA v. MICHAEL DUSTIN SLAUGHTER

No. COA10-844

(Filed 17 May 2011)

1. Drugs— constructive possession of marijuana—proximity

The trial court did not err by denying defendant's motion to dismiss the charge of possession with intent to distribute marijuana where there was substantial evidence of constructive possession based on proximity alone. This was not a case in which any of the individuals detained might have had control over a single baggie of marijuana or in which defendant may have had no knowledge of the contraband. Defendant was found in a 150-square-foot room with bags of marijuana and paraphernalia in plain view.

2. Drugs— possession of paraphernalia—proximity

The trial court did not err by denying defendant's motion to dismiss the charge of possession of drug paraphernalia based on proximity.

Judge HUNTER, Robert C., dissents by separate opinion.

Appeal by defendant from judgments entered 17 March 2010 by Judge W. Erwin Spainhour in Lincoln County Superior Court. Heard in the Court of Appeals 15 December 2010.

Attorney General Roy Cooper, by Assistant Attorney General Mary S. Mercer, for the State.

David M. Black for defendant.

ELMORE, Judge.

A jury found Michael Dustin Slaughter (defendant) guilty of possession with intent to distribute marijuana and possession of drug paraphernalia. Defendant now appeals. After careful consideration, we find no error.

I. Background

On 29 January 2009, the Lincoln County Sheriff's Department (Sheriff's Department) executed a search warrant for the residence of Corey Howard. Several officers and detectives, as well as a SWAT team, entered Howard's mobile home between 6 and 7 p.m. Officers detained four people inside the mobile home—Howard's mother and three white males, including defendant. Officers believed that Howard was inside the mobile home when they executed the search warrant; they had seen him go into the mobile home around 6 p.m. and had not seen him leave. However, they did not find him inside the home. The mobile home had a back door, though none of the officers saw Howard leave through the back door; no officers were specifically watching the back door before the SWAT team knocked and announced.

Five members of the Sheriff's Department testified at trial: Detective Lonnie Leonard, Detective Jesse Helms, Detective Billy Benton, Officer Lester White, and Lieutenant Toby Szykula. Lieutenant Szykula was overseeing the SWAT team that evening, and he "pounded on the side of the house and announced" that the Sheriff's Department was executing a search warrant. Lieutenant Szykula heard no response from inside the mobile home. Eight to ten seconds later, other SWAT team members breached the front door and deployed a "flashbang" distraction device. To ensure everyone's safety, SWAT team members immediately entered the home and

"secur[ed] every room in the house, putting people in custody, securing people, placing them on the floor until [the tactical team] kn[ew] that the whole residence [was] secured." Lieutenant Szykula entered the home about five seconds after the first officer and saw a deputy detaining Howard's mother in the front room and other officers detaining three men in one of the bedrooms. Detective Benton estimated the size of the bedroom as ten by fifteen feet.

Detective Leonard was also a member of the SWAT team that evening, and he also entered the home immediately after the flash-bang device went off. When he entered the home, he also saw a deputy detaining Howard's mother in the front room. He entered the left bedroom and saw three white males on the floor of the bedroom. He was the second or third officer to enter the bedroom, and the first officer had "already placed everybody on the floor[.]" Detective Leonard "noticed a strong smell of marijuana in the house" and "a few bags of marijuana . . . scattered around the room." In the bathroom, which was accessible only from the bedroom, he saw stacks of twenty and hundred dollar bills, plastic sandwich baggies, and stems and other small pieces of marijuana in the sink.

Detective Benton entered the home "just behind the tactical team" after the home was secured. He went into the left bedroom and saw defendant and two other men lying on the bedroom floor, being secured by tactical officers. He saw marijuana residue on a table next to the bed, three individual baggies of marijuana in a dresser, a gallon bag containing "a bunch of smaller bags packaged for sale on the bed[,]" and a 9 millimeter pistol lying on the couch. He also smelled a strong odor of marijuana.

Officer White entered the home "three or four minutes" after the tactical team opened the front door, and when he went into the left bedroom, he saw the 9 millimeter pistol, several baggies of marijuana, and a gallon bag of marijuana, all "out in the open."

Detective Helms also entered the home after the tactical team had secured it. When he went into the left bedroom, he also saw marijuana, the 9 millimeter gun, and cash in plain view. There was also an open safe in the bathroom. The safe contained another handgun.

Eventually, officers recovered the following from the bedroom and attached bathroom: three handguns, digital scales, a lockbox, a box of plastic Ziploc-style bags, a large Ziploc-style bag containing marijuana packed in smaller bags, blunt wraps, a grinder, a cigar tube, "some tore up parts of a cigar that has been used to roll a mar-

ijuana cigarette," a knife, a ledger, $7,000.00 in cash in the bathroom sink, $7,182.00 in cash from elsewhere in the bathroom, and $24,500.00 in a white bag in the bedroom. Officers also recovered $8,000.00 in cash from a car parked in the driveway of the mobile home. The State did not offer testimony as to the total weight of the marijuana found in the bedroom, but Detective Leonard did testify that he estimated that each small bag of marijuana found in plain view to be "roughly a quarter of an ounce size bag," or the size of a "golf ball[.]"

At the close of the State's evidence, defendant moved to dismiss the three charges of conspiracy, possession with intent to distribute marijuana, and possession of drug paraphernalia. The trial court dismissed the conspiracy charge, but denied defendant's motion as to the two possession charges. Defendant offered no evidence at trial. He renewed his motion after the close of all of the evidence. The trial court denied defendant's motion and submitted the two possession charges to the jury.

The jury found defendant guilty of both felony possession with intent to distribute marijuana and misdemeanor possession of drug paraphernalia. Defendant was sentenced as a level three offender. For the felony conviction, the trial court imposed an intermediate punishment of six to eight months' imprisonment, suspended, subject to thirty-six months' supervised probation. Defendant was also ordered to serve an active term of thirty days in the custody of the Lincoln County Sheriff and to pay jail fees. For the misdemeanor conviction, defendant was sentenced to 120 days' imprisonment, suspended, subject to thirty-six months' supervised probation.

On 18 March 2010, defendant moved the trial court for appropriate relief, contending that the evidence was insufficient to justify submission of the case to the jury. The trial court denied defendant's motion by written order on 6 April 2010. Defendant now appeals.[1]

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1. We remind counsel that appeals taken after 1 October 2009 should not include Assignments of Error; instead, appellants should include Proposed Issues on Appeal. *See* N.C.R. App. P. 10(b) (2009) ("Proposed 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.").

II. Arguments

A. Possession with intent to distribute marijuana

[1] Defendant first argues that the trial court erred by denying his motion to dismiss the possession with intent to distribute marijuana because the State did not present sufficient evidence that defendant was in possession of the marijuana.

> When ruling on a motion to dismiss for insufficient evidence, the trial court *must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor.* Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. The trial court must decide only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. When the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted. However, so long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence.

State v. Miller, 363 N.C. 96, 98-99, 678 S.E.2d 592, 594 (2009) (quotations and citations omitted; emphasis added). "The denial of a motion to dismiss for insufficient evidence is a question of law, which this Court reviews *de novo*." *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (internal quotation marks and citations omitted).

Per N.C. Gen. Stat. § 90-95(a), it is "unlawful for any person . . . [t]o . . . possess with intent to . . . sell or deliver[] a controlled substance[.]" N.C. Gen. Stat. § 90-95(a)(1) (2009). "The offense of possession with intent to sell or deliver has three elements: (1) possession of a substance; (2) the substance must be a controlled substance; and (3) there must be intent to sell or distribute the controlled substance." *State v. Nettles*, 170 N.C. App. 100, 105, 612 S.E.2d 172, 175 (2005) (quotations and citations omitted). The only element at issue here is possession. At trial, the State proceeded on a theory of constructive possession.

> A defendant constructively possesses contraband when he or she has the intent and capability to maintain control and dominion over it. The defendant may have the power to control either alone

> or jointly with others. Unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession. *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001).

Miller, 363 N.C. at 99, 678 S.E.2d at 594 (quotations and additional citations omitted). "Our determination of whether the State presented sufficient evidence of incriminating circumstances depends on the totality of the circumstances in each case. No single factor controls, but ordinarily *the questions will be for the jury*." *State v. Alston*, 193 N.C. App. 712, 716, 668 S.E.2d 383, 386-87 (2008) (quotations and citation omitted), *aff'd per curiam*, 363 N.C. 367, 677 S.E.2d 455 (2009). This Court has previously listed the following actions by a defendant as incriminating circumstances relevant to constructive possession:

> (1) owned other items found in proximity to the contraband; (2) was the only person who could have placed the contraband in the position where it was found; (3) acted nervously in the presence of law enforcement; (4) resided in, had some control of, or regularly visited the premises where the contraband was found; (5) was near contraband in plain view; or (6) possessed a large amount of cash.

Id., 363 N.C. at 367, 668 S.E.2d at 386 (quotations and citation omitted).

However, the Supreme Court's most recent opinion addressing constructive possession focused on a "defendant's proximity to the contraband and indicia of [a] defendant's control over the place where the contraband is found." *Miller*, 363 N.C. at 100, 678 S.E.2d at 595. In *Miller*, the defendant did not have exclusive control over the premises where the contraband was found, but he was "sitting on the same end of" a bed from which a small rock of cocaine was recovered, he was "within reach" of a package of cocaine resting behind a door, his "birth certificate and state-issued identification card were found on top of a television stand in th[e] bedroom[,]" and the bedroom was in a home in which two of his children lived with their mother. *Id.* at 100, 678 S.E.2d at 595.

Here, without question, defendant did not have exclusive control over the place where the contraband was found. In addition, there was no evidence that he owned any other items found in proximity to the contraband, that he was the only person who could have placed

the contraband in the positions where it was found, that he acted nervously in front of law enforcement personnel, that he resided in or regularly visited the premises where the contraband was found, or that he possessed a large amount of cash on his person. Accordingly, the primary evidence supporting defendant's constructive possession of the marijuana was his proximity to the contraband.

In this case, defendant was in a 150-square-foot room surrounded by bags of marijuana, marijuana residue, stacks of cash, bags of cash, handguns, blunts, rolling papers, a grinder, and packaging paraphernalia such as plastic baggies and scales. Many of these items were in plain view of law enforcement personnel when they entered the room, including several baggies of marijuana, marijuana residue, several stacks of cash, at least one handgun, and plastic baggies. In addition, almost all of the officers testified that a strong smell of marijuana pervaded the mobile home. This was not a case in which any of the three individuals detained in that bedroom might have had control over a single baggie of marijuana. *See State v. Richardson*, ___ N.C. App. ___, ___, 689 S.E.2d 188, 190 (2010) (concluding that there was insufficient evidence of constructive possession when the defendant and several other men ran out the back door and, when they were apprehended in the back yard, officers found a plastic baggie containing a 9.4-gram crack rock two feet from the defendant, who was about two feet from the other men), *disc. rev. denied*, 364 N.C. 246, 699 S.E.2d 643 (2010). Nor was this a case in which defendant may not have had knowledge of the contraband in his proximity. *See State v. Balsom*, 17 N.C. App. 655, 655, 658, 195 S.E.2d 125, 125, 128 (1973) (reversing possession of narcotics judgments when the State presented no evidence that the defendants knew of the narcotics, which were found in a closed dresser drawer and a closet). As the trial judge explained to defendant during sentencing, "This is not a little mistake, being in a place where there is $38,000 of illegal drug funds sitting around a house and pounds of marijuana. I mean, the evidence, if you look at the pictures you can tell, you were in a place that anyone should never be."

We are also cognizant that three justices dissented from the Supreme Court's decision in *Miller*, and one of those justices lamented that *Miller* "effectively nullifie[d] the substantial evidence requirement in constructive possession cases, thereby giving the State free reign to prosecute anyone who happens to be at the wrong place at the wrong time[,]" thereby "swing[ing] open the door for prosecutors to charge, try, and convict individuals across North

Carolina of possession of controlled substances or other contraband on the basis of mere proximity." *Miller*, 363 N.C. at 110-11, 678 S.E.2d at 601 (Brady, J., dissenting). Nevertheless, we conclude that the State presented far more evidence of defendant's proximity to and knowledge of the contraband here than it did in *Miller*. Viewing the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor, and resolving all contradictions in the evidence in favor of the State, we conclude that there is substantial evidence that defendant constructively possessed the marijuana in the bedroom and the matter was properly submitted to the jury. Accordingly, we hold that the trial court did not err by denying defendant's motion to dismiss the charge of possession with intent to distribute marijuana.

B. Possession of drug paraphernalia

[2] Defendant next argues that the trial court erred by denying his motion to dismiss the charge of possession of drug paraphernalia. Again, defendant challenges the element of possession. Again, we hold that the trial court properly denied defendant's motion to dismiss.

Our General Statutes define the misdemeanor crime of possession of drug paraphernalia as follows:

> It is unlawful for any person to knowingly . . . possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, package, repackage, store, contain, or conceal a controlled substance which it would be unlawful to possess, or to inject, ingest, inhale, or otherwise introduce into the body a controlled substance which it would be unlawful to possess.

N.C. Gen. Stat. § 90-113.22(a) (2009). The preceding statute section defines drug paraphernalia as "all equipment, products and materials of any kind that are used to facilitate, or intended or designed to facilitate, violations of the Controlled Substances Act[.]" N.C. Gen. Stat. § 90-113.21(a) (2009). The statute lists examples of drug paraphernalia, which includes the following relevant items: "[s]cales and balances for weighing or measuring controlled substances"; "[c]apsules, balloons, envelopes and other containers for packaging small quantities of controlled substances"; "[c]ontainers and other objects for storing or concealing controlled substance"; "[o]bjects for ingesting, inhaling, or otherwise introducing marijuana . . . into the body[.]" N.C. Gen. Stat. § 90-113.21(a)(5), (9), (10), (12) (2009).

(b) The following, along with all other relevant evidence, may be considered in determining whether an object is drug paraphernalia:

* * *

(3) The proximity of the object to a violation of the Controlled Substances Act;

(4) The proximity of the object to a controlled substance;

* * *

(6) The proximity of the object to other drug paraphernalia;

N.C. Gen. Stat. § 90-113.21(b)(3)-(6) (2009).

Here, officers recovered scales, Ziploc-style baggies, cigars, cigar wrappers, and a grinder in close proximity to a substantial amount of marijuana and to each other. For the same reasons set out above, there is sufficient evidence that defendant constructively possessed these items to submit a charge of possession of drug paraphernalia to a jury. Accordingly, we hold that the trial court did not err by denying defendant's motion to dismiss the charge of possession of drug paraphernalia.

III. Conclusion

We hold that defendant received a trial free from error.

No error.

Judge CALABRIA concurs.

Judge HUNTER, Robert C., dissents by separate opinion.

HUNTER, Robert C., Judge, dissenting.

I disagree with the majority's conclusion that the evidence in this case is sufficient to support a reasonable inference that defendant constructively possessed the marijuana and drug paraphernalia found in the bedroom in which he and two other individuals were detained. As the trial court should have granted defendant's motion to dismiss the related charges for insufficient evidence, I dissent.

"When considering a motion to dismiss, the trial court's inquiry is limited to a determination of '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. Butler*, 356 N.C. 141,

145, 567 S.E.2d 137, 139 (2002) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Scott*, 356 N.C. 591, 597, 573 S.E.2d 866, 869 (2002). While the trial court, in determining the sufficiency of the evidence, is required to consider the evidence in the light most beneficial to the State, making all reasonable inferences from the evidence in favor of the State, as well as resolving all contradictions and discrepancies in its favor, *In re Vinson*, 298 N.C. 640, 656, 260 S.E.2d 591, 602 (1979), " '[e]vidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it is so, is an insufficient foundation for a verdict and should not be left to the jury[,]' " *State v. Madden*, 212 N.C. 56, 60, 192 S.E. 859, 861 (1937) (quoting *State v. Vinson*, 63 N.C. 335, 338 (1869)). 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," even if "the suspicion aroused by the evidence is strong." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983); accord *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) ("[A] motion to dismiss should be allowed where the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant's guilt.").

It is well established that the State may obtain a conviction for a possessory offense by establishing that the defendant either had actual or constructive possession of the contraband. *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). "A person has actual possession of [a thing] if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use." *State v. Reid*, 151 N.C. App. 420, 428-29, 566 S.E.2d 186, 192 (2002). In contrast, "[a] person is in constructive possession of a thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing." *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986). When, however, the defendant does not have exclusive possession of the place where the contraband is found, constructive possession "exists only upon a showing of some independent and incriminating circumstance, beyond mere association or presence," linking the defendant to the contraband. *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998). "As the terms 'intent' and 'capability' suggest, constructive possession depends on

the totality of circumstances in each case," and thus "ordinarily the question will be for the jury." *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986).

The majority relies almost exclusively on our Supreme Court's decision in *State v. Miller*, 363 N.C. 96, 678 S.E.2d 592 (2009), for its "conclu[sion] that there is substantial evidence that defendant constructively possessed the marijuana [and drug paraphernalia] in the bedroom and the matter was properly submitted to the jury." In *Miller*, after observing that "the defendant's proximity to the contraband and indicia of the defendant's control over the place where the contraband is found" are "two factors frequently considered" in determining whether the evidence is sufficient to support a reasonable inference of constructive possession, the Court concluded that the evidence was sufficient to withstand the defendant's motion to dismiss:

> Here, police found defendant in a bedroom of the home where two of his children lived with their mother. When first seen, defendant was sitting on the same end of the bed where cocaine was recovered. Once defendant slid to the floor, he was within reach of the package of cocaine recovered from the floor behind the bedroom door. Defendant's birth certificate and state-issued identification card were found on top of a television stand in that bedroom. The only other individual in the room was not near any of the cocaine. Even though defendant did not have exclusive possession of the premises, these incriminating circumstances permit a reasonable inference that defendant had the intent and capability to exercise control and dominion over cocaine in that room.

Id. at 100, 678 S.E.2d at 595.

In comparing the evidence in this case to the evidence presented in *Miller*, the majority concedes—and I agree—that "the primary evidence supporting defendant's constructive possession of the marijuana [and drug paraphernalia] was his proximity to the contraband":

> without question, defendant did not have exclusive control over the place where the contraband was found. In addition, there was no evidence that he owned any other items found in proximity to the contraband, that he was the only person who could have placed the contraband in the positions where it was found, that he acted nervously in front of law enforcement personnel, that he resided in or regularly visited the premises where the contra-

band was found, or that he possessed a large amount of cash on his person.

The majority nonetheless concludes that "the State presented far more evidence of defendant's proximity to and knowledge of the contraband here than it did in *Miller*." With this conclusion, I strongly disagree.

With respect to proximity, this Court has cautioned:

> Necessarily, power and intent to control the contraband material can exist only when one is aware of its presence. Therefore, evidence which places an accused within close juxtaposition to [contraband] *under circumstances giving rise to a reasonable inference that he knew of its presence* may be sufficient to justify the jury in concluding that it was in his possession. "However, mere proximity to persons or locations with [contraband] about them is usually insufficient, *in the absence of other incriminating circumstances*, to convict for possession."

State v. Weems, 31 N.C. App. 569, 571, 230 S.E.2d 193, 194 (1976) (quoting B. Finberg, Annotation, *What constitutes "possession" of a narcotic drug proscribed by § 2 of the Uniform Narcotic Drug Act*, 91 A.L.R.2d 810, 811 (1963)) (emphasis added); *accord State v. Barron*, —— N.C. App. ——, ——, 690 S.E.2d 22, 27 ("It is well-settled that the mere 'fact that a person is present in a room where drugs are located, nothing else appearing, does not mean that person ha[d] constructive possession of the drugs.' " (quoting *James*, 81 N.C. App. at 93, 344 S.E.2d at 79)), *disc. review denied*, —— N.C. ——, 700 S.E.2d 926 (2010).

Here, the evidence presented at trial, even when considered in the light most favorable to the State, as is required in reviewing the denial of a motion to dismiss for insufficient evidence, tends to show only that defendant and two other individuals were detained by the tactical team and placed on the floor of a 10-by-15 foot bedroom in the back of the mobile home, which had a pervasive odor of marijuana. Inside the bedroom, police found, in plain view, numerous bags—some small, some large—containing marijuana, approximately $38,000 in cash, several firearms, a grinder, and a digital scale. Stacks of $20 and $100 bills, plastic sandwich baggies, and marijuana residue were found in the bathroom adjoining the bedroom.

As defendant points out in his brief, the State presented absolutely no evidence of defendant's proximity to the contraband prior to being "plac[ed] . . . on the floor" face down in the bedroom

where the contraband was found, *see Miller*, 363 N.C. at 100, 678 S.E.2d at 595 (noting, in holding evidence was sufficient to support finding of constructive possession, that, "*[w]hen first seen*, defendant was sitting on the same end of the bed where cocaine was recovered" (emphasis added)), defendant's proximity to the contraband after being placed on the floor, *see id.* (observing that defendant, when ordered by police officers to get on the floor, "slid to the floor" where he was then "within reach" of package containing cocaine), or defendant's proximity to the contraband relative to the other two individuals detained in the room, *see id.* (noting that while defendant near cocaine, "[t]he only other individual in the room was not near any of the cocaine"); *State v. Richardson*, —— N.C. App. ——, ——, 689 S.E.2d 188, 191-92 (vacating cocaine possession conviction for insufficient evidence of constructive possession where defendant and two other men detained in backyard, defendant was "about two feet" from package of crack cocaine, but other two men were roughly equidistant from contraband), *disc. review denied*, 364 N.C. 246, 699 S.E.2d 643 (2010). In short, "[t]he most the State has shown is that defendant [was] in an area where he could have committed the crimes charged." *State v. Minor*, 290 N.C. 68, 75, 224 S.E.2d 180, 185 (1976).

Without evidence of proximity, we are left only with presence. Despite the fact-intensive nature of the inquiry into whether there is substantial evidence of constructive possession, our caselaw is quite clear that "mere presence in a room where [contraband] [is] located does not itself support an inference of constructive possession." *James*, 81 N.C. App. at 96, 344 S.E.2d at 81; *accord State v. Acolatse*, 158 N.C. App. 485, 490, 581 S.E.2d 807, 811 (2003) ("[T]there must be more than mere association or presence linking the person to the item in order to establish constructive possession[.]"). Without "a showing of some independent and incriminating circumstance, beyond mere association or presence," *Alston*, 131 N.C. App. at 519, 508 S.E.2d at 318, there is insufficient evidence to support a reasonable inference of constructive possession. *See, e.g.*, *Barron*, —— N.C. App. at ——, 690 S.E.2d at 27 ("The State contends that the following evidence is sufficient to support the charges of possession of controlled substances: When [Officer] Herbert entered the residence, he noticed some plastic baggies on the couch, about three feet away from where Defendant had been standing at the front door. The baggies were later determined to contain marijuana and cocaine. Additionally, in executing a search warrant, police found a crack pipe approximately two-and-a-half feet away from where Defendant had

been standing, and a push rod and a piece of Chore Boy approximately 10 or 12 feet away from where Defendant had been standing. . . . We are not persuaded by the State's argument.").

Nor does the evidence that the contraband was in plain view in the bedroom take this case out of the realm of conjecture. The contraband being in plain view suggests that defendant knew of its presence, but there is no evidence—and the majority points to none—indicating that defendant had "the *intent and capability* to maintain control and dominion over it." *James*, 81 N.C. App. at 93, 344 S.E.2d at 79 (emphasis in original). I have found no North Carolina appellate decision—and the majority cites to none—where a defendant's mere presence in a location where contraband is visible is sufficient to support a conviction for a possessory offense based on constructive possession. Our State's jurisprudence has always required more. *See*, *e.g.*, *State v. Kraus*, 147 N.C. App. 766, 770, 557 S.E.2d 144, 148 (2001) (finding "sufficient incriminating circumstances exist[ed] to infer that defendant had the intent and capability to maintain control and dominion" over marijuana and drug paraphernalia found in motel room where, in addition to evidence showing that defendant and another person were "in *a small* motel room filled with marijuana smoke" with "a quantity of marijuana and drug paraphernalia . . . in *plain view*," evidence also showed that "[d]efendant was 'stoned,' " had "spent the previous night in the motel room," and had "equal access to the room key" (emphasis added)).

In this case, I believe, contrary to the majority's holding, that the State presented less evidence—not more—of incriminating circumstances than it did in *Miller*. To uphold the trial court's denial of defendant's motion to dismiss, as the majority does in this case, means that "mere association or presence," *Alston*, 131 N.C. App. at 519, 508 S.E.2d at 318, without more, is now sufficient to establish constructive possession. I decline to set sail on such a dangerous "sea of conjecture and surmise." *Minor*, 290 N.C. at 75, 224 S.E.2d at 185. I must, therefore, respectfully dissent.

KAY R. HAMILTON, ON BEHALF OF HERSELF AND ALL OTHER SIMILARLY SITUATED, PLAINTIFF v. MORTGAGE INFORMATION SERVICES, INC., AND FIRST AMERICAN TITLE INSURANCE COMPANY, DEFENDANTS

No. COA10-45

(Filed 17 May 2011)

Appeal and Error— interlocutory orders and appeals—partial denial of class certification—no jurisdiction

The Court of Appeals lacked jurisdiction over plaintiff's appeal from an interlocutory order under N.C.G.S. §§ 1-277(a) and 7A-27(d)(1) that partially denied class certification. Plaintiff failed to show a substantial right or the risk of inconsistent verdicts. Further, the Court of Appeals declined plaintiff's request to treat its appeal as a petition for *certiorari*.

Appeal by Plaintiff from order entered 10 November 2009 by Judge Ripley E. Rand in Wake County Superior Court. Heard in the Court of Appeals 29 September 2010.

Hartzell & Whiteman, L.L.P., by J. Jerome Hartzell; Financial Protection Law Center, by Mallam J. Maynard, Maria D. McIntyre, and Andrea B. Young; North Carolina Justice Center, by Carlene McNulty; Puryear & Lingle, PLLC, by David B. Puryear, Jr., for Plaintiff-Appellant.

Bailey & Dixon, L.L.P., by Dayatra T. Matthews, G. Lawrence Reeves, Jr., and Jeffrey D. McKinney, for Defendant-Appellee Mortgage Information Services, Inc.

Ellis & Winters, LLP, by Matthew W. Sawchak, and Stephen D. Feldman; Sonnenschein Nath & Rosenthal, LLP, by Charles A. Newman and Jason Maschmann, for Defendant-Appellee First American Title Insurance Co.

ERVIN, Judge.

Plaintiff Kay R. Hamilton appeals from an order entered on 10 November 2009 to the extent that the order partially granted dismissal motions filed by Defendants First American Title Insurance Company (First American) and Mortgage Information Services, Inc. (MIS), and partially denied Plaintiff's request for class certification. After careful consideration of the record in light of the applicable law, we conclude that Plaintiff's appeal has been taken from an unappealable interlocutory order and must, for that reason, be dismissed.

I. Factual Background

On 22 April 2005, Plaintiff procured a home loan from Ameriquest Mortgage Company. As part of this transaction, Ameriquest engaged MIS, acting as a settlement agent, to provide services in connection with Plaintiff's loan. In exchange for these services, Plaintiff was charged various fees, which were paid from the proceeds of Plaintiff's loan.

On 25 August 2008, Plaintiff filed a complaint in Wake County Superior Court against First American and MIS.[1] In her complaint, Plaintiff alleged that the charging of certain fees associated with her loan constituted an unfair and deceptive trade practice, actionable pursuant to N.C. Gen. Stat. § 75-1.1, and that Defendants "charged numerous other North Carolina borrowers similarly inappropriate fees in connection with their mortgages, thereby giving rise to a class action." More specifically, Plaintiff challenged the following seven fees:

Closing fee to MIS	$325.00
Title search [fee] to MIS	$225.00
Title clearing [fee] to MIS	$75.00
Title insurance binder [fee] to MIS	$50.00
Signing fee to Mobile Closings	$250.00
Title insurance	$371.60
Courier Fee to MIS	$60.00

The claims asserted in Plaintiff's complaint fall into several categories: (1) claims that certain fees represented payments to a non-lawyer for the provision of legal services; (2) claims that certain payments involved the unlawful division of fees for legal services between lawyers and non-lawyers; (3) claims that certain fees violated the prohibition contained in N.C. Gen. Stat. § 28-8(d) against the charging of unreasonable third party fees associated with loan-related goods, products, or services; (4) claims that certain fees violated N.C. Gen. Stat. § 58-33-85(b) because Plaintiff did not consent in advance and in writing to the imposition of those fees; (5) claims that work for which certain fees were charged was not performed properly; (6) claims that certain fees were not permitted by the rate filing that First American had made with the North Carolina Department of Insurance; (7) claims that certain fees exceeded the level authorized by the North Carolina Notary Public Act; (8) claims that the services

1. Plaintiff contends that MIS and First American had a principal-agent relationship, making them jointly liable to Plaintiff.

associated with certain fees were not performed at all; and (9) claims that closing insurance was issued in violation of N.C. Gen. Stat. § 58-26-1.

On 25 November 2008, this case was classified as an Exceptional Case pursuant to Rule 2.1 of the General Rules of Practice and assigned to the trial court. On 27 October 2008, Defendants filed separate dismissal motions.[2] On 27 February 2009, Plaintiff filed a Motion for Class Certification. The trial court heard Defendants' dismissal motions on 8 May 2009 and Plaintiff's class certification motion on 4 June 2009.

On 10 November 2009, the trial court entered an order granting Defendants' dismissal motions in part and denying them in part and granting Plaintiff's class certification motion in part and denying it in part. The trial court dismissed all of the claims asserted in Plaintiff's complaint except the claim pertaining to the following:

> 1. The "closing fee" as it relates to the unreasonableness of the fee under N.C. Gen. Stat. § 24-8(d). This allegation survives as to Defendant MIS only.
>
> 2. The "title search" fee as it relates to the unreasonableness of the fee under N.C. Gen. Stat. § 24-8(d). This allegation survives as to Defendant MIS only.
>
> 3. The "title clearing" fee as it relates to the unreasonableness of the fee under N.C. Gen. Stat. § 24-8(d). This allegation survives as to Defendant MIS only.
>
> 4. The "title binder" fee as it relates to the unreasonableness of the fee under N.C. Gen. Stat. § 24-8(d). This allegation survives as to both Defendant MIS and First American.
>
> 5. The "signing fee" as it relates to the unreasonableness of the fee under N.C. Gen. Stat. § 24-8(d), the amount that it was in excess of that set forth in the Notary Public Act, and the failure of Defendant MIS to provide the services associated with it under N.C. Gen. Stat. § 24-8(d). These allegations survive as to Defendant MIS only.
>
> 6. The "title insurance" fee as it relates to the conduct of Defendant MIS and Defendant First American in failing to offer the "reissue" rate set forth in First American's rate filing at the

2. MIS amended its dismissal motion on 27 February 2009.

North Carolina Department of Insurance. These allegations survive as to both Defendant MIS and Defendant First American.

7. The "courier fee" as to the unreasonableness of the fee under N.C. Gen. Stat. § 24-8(d) and the failure of Defendant MIS to provide the services associated with it under N.C. Gen. Stat. § 24-8(d). These allegations survive as to Defendant MIS only.

In addition, the trial court granted class certification[3] with respect to the following issues:

> . . . (a) whether the "signing fee" imposed by Defendant MIS was in excess of that prescribed by the Notary Public Act; (b) whether Defendants MIS and First American failed to provide the services associated with the "signing fee" imposed by Defendant MIS; (c) whether the failure of Defendants MIS and First American to offer the "reissue rate" for a title insurance policy in the imposition of the "title insurance fee" violate[d] the filed rate doctrine; and (d) whether Defendant MIS failed to provide the services associated with the Acourier fee" imposed by Defendant MIS.

Plaintiff noted an appeal to this Court on 25 November 2009. Subsequently, Defendants moved for dismissal of Plaintiff's appeal.

II. Legal Analysis

A. Interlocutory Appeal

An order is either "interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, Rule 54(a). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 354, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). The order from which Plaintiff has attempted to appeal in this case is clearly interlocutory given that it does not dispose of all claims as to either Defendant. *See Pratt v. Staton*, 147 N.C. App. 771, 773, 556 S.E.2d 621, 623 (2001) (stating that "[a]n order . . . granting a motion to dismiss certain claims in an action, while leaving other claims in the action to go forward, is

3. The class defined in the trial court's order consisted of "[a]ll persons who were borrowers on loans made by [Ameriquest] or affiliates, and in connection with which [MIS] purportedly acted as settlement agent, and which loans: (a) were secured by real property in North Carolina; (b) were disbursed within four years prior to the institution of this civil action; and (c) were, prior to the date on which the court certifies this case as a class action, paid off, or foreclosed upon."

plainly an interlocutory order"). As a general proposition, only final judgments, as opposed to interlocutory orders, may be appealed to the appellate courts. *Steele v. Hauling Co.*, 260 N.C. 486, 491, 133 S.E.2d 197, 201 (1963) (citing *Perkins v. Sykes*, 231 N.C. 488, 490, 57 S.E.2d 645, 646 (1950)); *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990) (stating that "there is no right of immediate appeal from interlocutory orders and judgments"). Appeals from interlocutory orders are only available in "exceptional cases." *Ford v. Mann*, ___ N.C. App. ___, ___ 690 S.E.2d 281, 283 (2010). Interlocutory orders are, however, subject to appellate review:

> "if (1) the order is final as to some claims or parties, and the trial court certifies pursuant to [N.C. Gen. Stat.] § 1A-1, Rule 54(b) that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed."

Currin & Currin Constr., Inc. v. Lingerfelt, 158 N.C. App. 711, 713, 582 S.E.2d 321, 323 (2003) (quoting *Myers v. Mutton*, 155 N.C. App. 213, 215, 574 S.E.2d 73, 75 (2002), *disc. review denied*, 357 N.C. 63, 579 S.E.2d 390 (2003)). The appealing party bears the burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). If a party attempts to appeal from an interlocutory order without showing that the order in question is immediately appealable, we are required to dismiss that party's appeal on jurisdictional grounds. *Pasour v. Pierce*, 46 N.C. App. 636, 639, 265 S.E.2d 652, 653 (1980) (citing *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 210, 240 S.E.2d 338, 344 (1978)). As a result, given the interlocutory nature of the order from which Plaintiff appeals, we are required to determine, before considering the merits of Plaintiff's challenges to the trial court's order, whether Plaintiff's appeal is properly before this Court at this time.

B. Substantial Right

Since the order which Plaintiff appeals was not certified for immediate review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b),[4]

4. An interlocutory order is immediately appealable if the order represents "a final judgment as to one or more but fewer than all of the claims or parties . . . [,] there is no just reason for delay[,] and it is so determined in the judgment." N.C. Gen. Stat. § 1A-1, Rule 54(b); *see also Embler v. Embler*, 143 N.C. App. 162, 164-65, 545 S.E.2d 259, 261 (2001) (citation omitted). The trial court did not certify its order for interlocutory review, thus its order is not immediately appealable on this basis.

Plaintiff is only entitled to interlocutory review of the trial court's order in the event that it " 'deprives the appellant of a substantial right.' " *Currin*, 158 N.C. App. at 713, 582 S.E.2d at 323 (quoting *Myers*, 155 N.C. App. at 215, 574 S.E.2d at 75); *see also* N.C. Gen. Stat. § 1-277(a); N.C. Gen. Stat. § 7A-27(d)(1). In order to determine whether a particular interlocutory order is appealable pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1), we utilize a two-part test, with the first inquiry being whether a substantial right is affected by the challenged order and the second being whether this substantial right might be lost, prejudiced, or inadequately preserved in the absence of an immediate appeal. *Estate of Redden v. Redden*, 179 N.C. App. 113, 116, 632 S.E.2d 794, 797 (2006) (quoting *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736); *see also Blackwelder v. Dep't of Human Res.*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780-81 (1983). As a result, the extent to which Plaintiff is entitled to appeal the trial court's order hinges upon whether she has established that "delay of the appeal will jeopardize a substantial right" and "caus[e] an injury that might be averted if the appeal were allowed." *Embler*, 143 N.C. App. at 165, 545 S.E.2d at 262.

The extent to which an interlocutory order affects a substantial right must be determined on a case-by-case basis. *McCallum v. N.B. Coop. Extension Serv.*, 142 N.C. App. 48, 50, 542 S.E.2d 227, 231 (citing *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982)), *disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001); *Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 292, 420 S.E.2d 426, 428 (1992) (stating that, "[i]n determining which interlocutory orders are appealable and which are not, [this Court] must consider the particular facts of each case and the procedural history of the order from which an appeal is sought") (citations omitted). In making this determination, we take a "restrict[ive] view of the 'substantial right' exception to the general rule prohibiting immediate appeals from interlocutory orders.[5] *Blackwelder*, 60 N.C. App. at 334,

5. North Carolina's restrictive view of the substantial right exception rests upon sound policy considerations. The purpose of the general rule against allowing interlocutory appeals is the prevention of "fragmentary and premature appeals that unnecessarily delay the administration of justice[.]" *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980) (citations omitted); *see also Hunter v. Hunter*, 126 N.C. App. 705, 708, 486 S.E.2d 244, 245-46 (1997)(stating that " '[a]ppellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment' ") (quoting *Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951)). As a general practice, parties should "allow the[ir] case to proceed, and then bring the[ir] issue[s] before the Court as part of an appeal from the final judgment." *Embler*, 143

299 S.E.2d at 780 (citations omitted). As we previously mentioned, the appellant must demonstrate the applicability of the substantial right exception to the particular case before the appellate court. *See generally Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254 (stating that "[i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits") (citing *GLYK and Assocs. v. Winston-Salem Southbound Ry. Co.*, 55 N.C. App. 165, 170-71, 285 S.E.2d 277, 280 (1981)); N.C.R. App. P. 28(b)(4) (providing that an appellant must include in his or her brief "[a] statement of the grounds for appellate review[,]" including "citation of the statute or statutes permitting appellate review" and, in the case of an appeal from an interlocutory order, "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right").

C. Claims

According to clearly-established North Carolina law, a party's preference for having all related claims determined during the course of a single proceeding does not rise to the level of a substantial right. *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 7, 362 S.E.2d 812, 816 (1987). In *J & B Slurry Seal*, we discussed the Supreme Court's decision in *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982), stating that:

> after *Green*, simply having all claims determined in one proceeding is not a substantial right. A party has instead the substantial right to avoid two separate trials of the same "issues": conversely, avoiding separate trials of different issues is not a substantial right. *See Porter v. Matthews Enterprises, Inc.*, 63 N.C. App. 140, 143, 303 S.E.2d 828, 830, *disc. review denied*, 309 N.C. 462, 307 S.E.2d 365 (1983) (stating *Green* held avoiding separate trials on separate issues is not [a] substantial right)[.]

Id. Issues are the "same" if the facts relevant to their resolution overlap in such a way as to create a risk that separate litigation of those issues might result in inconsistent verdicts. *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989). As we explained in *Davidson*:

N.C. App. at 165, 545 S.E.2d at 262 (citing *Yang v. Three Springs, Inc.*, 142 N.C. App. 328, 542 S.E.2d 666 (2001)).

> when common fact issues overlap the claim appealed and any remaining claims, delaying the appeal until all claims have been adjudicated creates the possibility the appellant will undergo a second trial of the same fact issues if the appeal is eventually successful. This possibility in turn "creat[es] the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue."

Id. (quoting *Green*, 305 N.C. at 608, 290 S.E.2d at 596); *see also J & B Slurry Seal*, 88 N.C. App. at 9, 362 S.E.2d at 817 (explaining that "the presence of identical factual issues in both proceedings may produce inconsistent verdicts and thus an immediate appeal is [] allowed").

The mere fact that claims arise from a single event, transaction, or occurrence does not, without more, necessitate a conclusion that inconsistent verdicts may occur unless all of the affected claims are considered in a single proceeding. *Moose v. Nissan of Statesville, Inc.*, 115 N.C. App. 423, 428, 444 S.E.2d 694, 698 (1994). In *Moose*, a plaintiff sought compensatory and punitive damages based on a single automobile accident. *Id.* We held that, "despite being based on the same facts," "there [was] no possibility of inconsistent verdicts" if plaintiff's claims were determined in separate proceedings because "the issues before the jury [would be] separate." *Id.* at 428, 444 S.E.2d at 697-98. In support of this conclusion, we explained that:

> Because the issues are separate, there is no possibility of inconsistent verdicts should plaintiff prevail on a later appeal. If the jury at the initial trial determines that defendant was negligent and plaintiff is therefore entitled to compensation, a retrial on the issue of punitive damages wherein defendant's negligence has already been established, may be won or lost without inconsistency in the verdicts. Should plaintiff lose at trial on the issues of negligence and proximate cause, he would not be eligible for recovery based on punitive damages, and a significant amount of time and effort expended at the appellate level will have been avoided. Again, there is no possibility of inconsistent verdicts.

Id. at 428, 444 S.E.2d at 698; *see also Nguyen v. Taylor*, ___ N.C. App. ___, ___, 684 S.E.2d 470, 474-75 (2009) (stating that, "[w]hile plaintiffs are correct that all of these claims ultimately arise out of [the same incident], they are not correct in asserting that this creates a substantial right based upon the possibility of inconsistent verdicts and supports this Court's hearing of an interlocutory appeal[;]" that, "[a]lthough the facts involved in the claims remaining before the trial

court may overlap with the facts involved in the claims that have been dismissed, plaintiffs have failed to show that they will be prejudiced by the possibility of inconsistent verdicts in two separate proceedings[;]" and that, "[a]ccordingly, plaintiffs have failed to establish that a substantial right will be lost unless the trial court's order is immediately reviewed").

In light of the principle enunciated in *Moose* and *Nguyen*, we must look beyond the fact that Plaintiff's claims arose out of a single transaction in order to determine whether the trial court's order is immediately appealable. Instead, we must evaluate the specific proof required to litigate each claim in order to determine whether inconsistent verdicts might result in the event that we refrained from considering Plaintiff's appeal on the merits at this time.[6] After conducting the required analysis, we conclude that Plaintiff is not entitled to appeal the trial court's order on an interlocutory basis pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1).

On appeal, Plaintiff contends that her substantial right to have all of her claims against First American, each of which alleges the charging of unreasonable fees, determined in a single proceeding would be adversely affected were we to refuse to hear her appeal at this time. More specifically, Plaintiff argues that separately litigating her claims alleging that First American charged an unreasonable title binder fee, which survived Defendants' dismissal motions, and her claims challenging the reasonableness of the closing fee, the title search fee, the title clearing fee, the signing fee, and the courier fee, which were not equally successful in surviving Defendant's dismissal motions, might

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6. The dismissed claims include: (1) claims that various fees represented payments to a non-lawyer for legal services rendered; (2) claims that various fees amounted to an unlawful division of fees relating to the provision of legal services between lawyers and non-lawyers; (3) claims that various fees violated N.C. Gen. Stat. § 58-33-85(b) given that Plaintiff did not consent to pay them in advance by means of a written document; (4) claims that the work leading to the assessment of certain fees was not properly performed; (5) claims that closing services insurance was issued in violation of N.C. Gen. Stat. § 58-26-1; and (6) claims that certain fees violated the prohibition set out in N.C. Gen. Stat. § 28-8(d) against the charging of unreasonable third party fees in connection with the provision of loan-related goods, products, or services. On the other hand, the claims still pending before the trial court include: (1) claims alleging that various fees violated the prohibition set out in N.C. Gen. Stat. § 28-8(d) against the charging of unreasonable third party fees charged in connection with the provision of loan-related goods, products, or services; (2) claims that various fees were not permitted by the rate schedule that First American had on file with the Department of Insurance; (3) claims that various fees exceeded the level permitted by the North Carolina Notary Public Act; and (4) claims that the services associated with various fees were not actually performed.

result in inconsistent verdicts. In each of these claims, Plaintiff has sought to have First American found liable based on a derivative liability theory. For that reason, the success of each claim depends upon a finding that First American "was either the principal of, a co-conspirator of, or a cooperating participant in MIS's unfair trade practices." As Plaintiff correctly points out, "there will be issues of fact for trial as to whether or not (and to what extent) MIS was [First American]'s agent in collecting the 'title binder,' whether or not MIS and [First American] agreed to collect the 'title binder' fee, and whether or not [First American] provided assistance to MIS in wrongfully collecting the 'title binder' fee" that will inevitably be considered during the litigation of Plaintiff's claim against First American stemming from the allegedly unreasonable title binder fee. In addition, as Plaintiff also correctly notes, her claims challenging the reasonableness of the closing fee, the title search fee, the title clearing fee, the signing fee, and the courier fee "all depend for their viability, as against [First American], on a finding . . . that MIS was [First American]'s agent in imposing those fees, that [First American] was a co-conspirator with MIS in imposing those fees, or that [First American] actively assisted and authorized MIS's charging of those fees." As a result, Plaintiff reasons that, in the event that one jury "render[ed] a verdict on the agency relationship, co-conspirator relationship, or aider/abettor relationship between MIS and [First American], as to the 'title binder' fee," and that a separate jury makes a different decision concerning "the issue of [First American]'s liability based on agency, conspiracy, or active aid and assistance" relating to the closing fee, title search fee, title clearing fee, signing fee, and courier fee, there is a sufficient risk of inconsistent verdicts to support allowance of an immediate appeal from the trial court's order. Plaintiff's logic is, however, fatally flawed.

As we understand Plaintiff's claims, First American's liability to Plaintiff must be assessed on a fee-specific basis. Even under Plaintiff's theory of the case, First American may have acted as MIS's principal, conspired with MIS, or otherwise assisted MIS with respect to one fee without having acted in the same manner with respect to another. For that reason, a finding that First American is liable to Plaintiff with respect to the title binder fee would not necessarily be inconsistent with a finding that First American is not liable as to one or more of the other fees. As a result, we do not find Plaintiff's "inconsistent verdict" argument relating to First American's liability for the charging of different allegedly unreasonable fees to be persuasive.

In addition, Plaintiff argues that its challenges to the reasonableness of the fees described in its complaint should not be considered separately because "the fees charged by MIS are alleged to be unreasonable in consideration of the totality of fees charged." We do not find this aspect of Plaintiff's argument persuasive either, since all of the "unreasonable fee" claims that Plaintiff has lodged against MIS survived Defendants' dismissal motions. As a result, the "aggregate reasonableness" of those fees will be determined by a single jury, with any subsequent claims against First American relating to these fees still requiring a fee-by-fee determination of the nature that we have outlined above. Simply put, Plaintiff has not demonstrated the existence of a substantial right to have the fee-based claims that she has asserted against First American litigated in the same proceeding in which MIS's liability for the charging of those fees is addressed. *Long v. Giles*, 123 N.C. App. 150, 152-53, 472 S.E.2d 374, 375-76 (1996) (holding that no substantial right is affected when a plaintiff's claims based on derivative liability are litigated separately from the claims that the plaintiff has asserted based on a direct liability theory because no possibility of inconsistent verdicts exists). Thus, Plaintiff has not established that there is a risk of inconsistent verdicts based upon her "cumulative unreasonableness" theory.

Next, Plaintiff appears to contend that separately litigating her claims alleging the charging of unreasonable fees and her claims alleging that the work performed in exchange for the payment of those fees was unlawfully performed by non-lawyers creates a risk of inconsistent verdicts. In support of this argument, Plaintiff points out that, in order to resolve both categories of claims, the jury must consider facts relating to the "scope of the work performed" in return for the payment of the challenged fees. There is, however, a clear difference in the manner in which these facts will be viewed during the jury's consideration of each class of claims. In evaluating the reasonableness of the challenged fees, "the scope of the work performed" is relevant for the purpose of examining the appropriateness of the amount charged in light of the nature and extent of the work performed and in comparing the fees charged by MIS with those typically charged for comparable services by other industry participants. On the other hand, in evaluating Plaintiff's claims that work was unlawfully performed by non-lawyers, the "scope of the work performed" is relevant for the purpose of ascertaining whether the work in question could only have been performed by licensed attorneys in light of the unauthorized practice statutes, the extent of the work actually per-

formed by licensed attorneys, and the amount that was paid for the performance of legal work by non-lawyers. The mere fact that the "scope of the work performed" is relevant to both classes of claims does not, standing alone, establish that separate consideration of these claims creates a risk of inconsistent verdicts given the differences in the nature of the inquiry that must be conducted as part of the evaluation of those claims.

As a result, we do not find the arguments advanced in Plaintiff's brief and response to Defendants' dismissal motions with respect to the appealability issue persuasive.[7] In addition, our independent examination of the facts relating to each of the relevant claims has not satisfied us that there is any danger of inconsistent verdicts stemming from the separate litigation of the dismissed[8] and remaining[9]

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7. We are unable to agree with Plaintiff's argument that Defendants' "affirmative defenses may present fact issues that overlap claims dismissed by [the] interlocutory order and the claims that remain for trial, raising the possibility [of inconsistent verdicts]," since Plaintiff has failed to describe how separate consideration of Plaintiff's claims may result in such inconsistent verdicts in light of the affirmative defenses that Defendants have asserted. In addition, we are not persuaded by Plaintiff's contention that all claims arising under N.C. Gen. Stat. § 75-1.1 should be addressed in a single proceeding given that the extent to which a particular act does or does not constitute an unfair or deceptive practice is a question of law rather than fact. *See Lee v. Keck*, 68 N.C. App. 320, 330, 315 S.E.2d 323, 330 (stating that, "[i]n unfair trade practices cases, the jury need only find whether the defendant committed the acts alleged; it is then for the court to determine as a matter of law whether these acts constitute unfair or deceptive practices in or affecting commerce") (citing *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975)), *disc. review denied*, 311 N.C. 401, 319 S.E.2d 271 (1984); *Budd Tire Corp. v. Pierce Tire Co.*, 90 N.C. App. 684, 691, 370 S.E.2d 267, 271 (1988) (stating that whether an act or practice violates N.C. Gen. Stat. § 75-1.1 is a question of law) (citing *Hoke v. Young*, 189 N.C. App. 569, 366 S.E.2d 548 (1988)); *Durling v. King*, 146 N.C. App. 483, 487-88, 554 S.E.2d 1, 4 (2001) (stating that "[t]he jury decides whether the defendant has committed the acts complained of" and that, "[i]f it finds the alleged acts have been proved, the trial court then determines as a matter of law whether those acts constitute unfair or deceptive practices in or affecting commerce") (citations omitted). In addition, we do not believe that a jury determination that a particular act was or was not in commerce with respect to one fee is necessarily conclusive on the "in commerce" issue with respect to a different fee or a different defendant. As a result, we do not believe that the fact that Plaintiff has asserted multiple claims under N.C. Gen. Stat. § 75-1.1 provides any justification for allowing her interlocutory appeal to proceed.

8. The facts relevant to the litigation of the dismissed claims include facts relating to what, if any, portion of the work associated with the challenged fees was performed by non-lawyers; what, if any, portion of the challenged fee was paid to non-lawyers; the extent to which Plaintiff did not consent to the assessment of the challenged fees in advance and in writing; and the quality of the services provided in exchange for the challenged fees.

9. The facts relevant to the litigation of the remaining claims include facts relating to the quantity of work performed; the amount charged; the relationship between

claims. As a result, Plaintiff's appeal from the trial court's decision to dismiss certain of her claims has been taken from an unappealable interlocutory order.

D. Class Certification

Generally speaking, an interlocutory order denying a request for class certification is immediately appealable on the theory that it affects a substantial right. *Stetser v. TAP Pharm. Prods. Inc.*, 165 N.C. App. 1, 10-11, 598 S.E.2d 570, 577-78 (2004) (citations omitted); *Perry v. Cullipher*, 69 N.C. App. 761, 762, 318 S.E.2d 354, 356 (1984). However, as we explained in *Stetser*, the "general rule[] [is] not dispositive," so that "each interlocutory order must be analyzed to determine whether a substantial right is jeopardized by delaying the appeal." *Stetser*, 165 N.C. App. at 10-11, 598 S.E.2d at 577-78. Plaintiff has not cited any case holding that an order partially, as opposed to completely, denying class certification affected a substantial right and was, for that reason, appealable on an interlocutory basis. Defendants, on the other hand, note that "[a]n examination of the cases allowing interlocutory review reveals that in each such case the trial court denied class certification completely."

Although Plaintiff argues that, "[i]f a denial of certification is immediately appealable because it eliminates all class members' claims, then a partial denial of class certification that eliminates some members' claims must likewise be appealable," we do not find this argument persuasive. In cases, such as this one, in which a request for class certification is partially granted, a class is defined and certain issues are designated for consideration on a class-wide basis. In light of the fact that an order, such as that at issue here, does involve a refusal to certify certain issues for consideration in the context of a class action, the class representative may, after final judgment, seek appellate review of that portion of the trial court's order refusing class certification on behalf of the proposed class. Based upon these considerations, we believe that an order partially denying class certification does not affect a substantial right to the same extent and in the same manner that an order refusing to certify any issue for consideration on a class-wide basis does. As a result, the trial court's decision to partially deny Plaintiff's motion for class cer-

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the level of the challenged fees and similar fees charged by other industry participants; Plaintiff's eligibility for the reissue rate; the nature and extent of Plaintiff's communications with Defendants concerning her eligibility for that rate; the identity of the entity that assessed the signing fee; and the portion of the challenged fees attributable to the performance of notarial acts.

tification, like the trial court's order partially granting Defendants' motions to dismiss, is not appealable at this time.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Plaintiff has, in this case, attempted to appeal from an unappealable interlocutory order. In light of that fact, we lack jurisdiction over Plaintiff's appeal and must dismiss it. Furthermore, we decline Plaintiff's invitation to treat its appeal as a petition for *certiorari* based on our determination that the general policy principles counseling against entertaining interlocutory appeals outweigh the "public interest" considerations upon which Plaintiff relies in urging us to grant *certiorari* in this case. As a result, Plaintiff's appeal should be, and hereby is, dismissed.

APPEAL DISMISSED.

Judges BRYANT and STEELMAN concur.

LYLE G. CUNNINGHAM, WALTER JAMES PENROD, THOMAS R. MELLINGER AND RONALD S. POWELL, PLAINTIFFS V. CITY OF GREENSBORO, DEFENDANT

No. COA10-584

(Filed 17 May 2011)

1. Cities and Towns— utilities agreement with developers—not between municipalities—not an annexation agreement

Agreements between a municipality and developers that provided for extension of water and sewer services in exchange for a petition for annexation and the payment of fees were not annexations governed by N.C.G.S. § 160A-58.21 *et seq*. because the agreements were not between participating municipalities and were not annexation agreements as defined by statute.

2. Cities and Towns— utilities agreement with developers—subsequent owners—withdrawal of consent to annexation

Summary judgment was properly granted for plaintiffs where the original developers entered into annexation agreements with defendant in exchange for water and sewer services, but the deeds to lots subsequently sold made no reference to those agree-

ments. Allowing plaintiffs to withdraw their consent to the annexation of the properties was not contrary to the literal language or the intent underlying N.C.G.S. § 160A-31, the statute governing voluntary annexation proceedings.

3. Cities and Towns— utilities agreement with developers—support for annexation—not agreed to by subsequent owners

Defendant was not authorized by N.C.G.S. § 160A-314(a) to require annexation as a condition for the extension of utility services where defendant and the original developers had agreed to such terms but the deeds to individual lots made no reference to those agreements. Even if a municipality had the authority to condition the provision of water and sewer services on a customer's agreement to support annexation, the record contained no indication that defendant did so when it connected any individual customer.

4. Cities and Towns— utilities and annexation agreement with developers—not covenant running with the land

Summary judgment was properly granted for plaintiffs in an action arising from agreements between defendant and developers to extend utilities in exchange for annexation where defendant argued that the agreements were enforceable covenants that ran with the land.

5. Real Property— implied equitable servitude—not adopted in North Carolina

The doctrine of implied equitable servitude has not been adopted in North Carolina and did not apply in an action involving an attempt to enforce against individual subsequent landowners an agreement between defendant and developers to extend utilities service in exchange for annexation.

Appeal by defendant from judgment entered 5 February 2010 by Judge Edwin G. Wilson in Guilford County Superior Court. Heard in the Court of Appeals 15 November 2010.

Eldridge Law Firm, P.C., by James E. Eldridge, for Plaintiff-Appellees.

Office of the City Attorney, by James A. Clark, for Defendant-Appellant.

ERVIN, Judge.

Defendant City of Greensboro appeals from an order granting summary judgment in favor of Plaintiffs Lyle Cunningham, Walter Penrod, Thomas Mellinger, and Ronald Powell by declaring that the contractual provisions under which Defendant attempted to annex Plaintiffs' properties were unenforceable. On appeal, Defendant argues that the trial court's decision contravened various statutory provisions governing the activities of municipal governments and that the contractual provisions upon which Defendant relies were either valid covenants that ran with the land or enforceable equitable servitudes. After careful consideration of Defendant's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court correctly granted summary judgment in favor of Plaintiffs and that its order should be affirmed.

I. Factual Background

A. Substantive Facts

The present litigation stems from the parties' disagreement about the effect of certain documents executed by Defendant and three real estate developers, including:

> A. [An] October 15, 1997 Agreement between [Defendant] and Millstream LLC for the Whitehurst development;
>
> B. [A] May 12, 1999 Agreement between [Defendant] and D.R. Horton, Inc., for the Hartwood development; and
>
> C. [A] July 10, 2000 Agreement between [Defendant] and Laurel Park, LLC for the Laurel Park development.

These agreements, each of which were entitled "Utility Agreement and Annexation Petition," provided that, in exchange for Defendant's willingness to extend water and sewer service to the affected developments, the developers who owned the applicable real property at that time petitioned for annexation of their development and agreed to pay fees imposed by Defendant for water and sewer service. In addition, each utility agreement specified that no vested zoning rights had been established and that Defendant was authorized to "terminate the water and sewer services" in the event that the annexation petitions were withdrawn. Finally, each utility agreement stated that "[t]he conditions contained herein attach to, and shall run with, the described real property" and provided that the agreement was "binding upon the heirs, assigns, transferees, and successors in interest of the Owners and shall, upon execution, be recorded in the Office of

the Register of Deeds of Guilford County, North Carolina." Although the utility agreements were signed by Defendant and by the developers who owned the property where each subdivision would be located, and were recorded in the Guilford County Register of Deeds office, the deeds to individual lots in each affected subdivision, including the lots subsequently sold to Plaintiffs, made no reference to the existence of these agreements.

The annexation proceedings at issue here began in 2008, which was about eight years after the date upon which the last agreement had been signed. On 18 March 2008, Defendant's assistant city attorney executed a certificate addressing the sufficiency of the petitions by which Defendant sought to annex Plaintiffs' properties in which she stated that:

> Utility Agreement and Annexation Petitions having been received for the annexation of the properties belonging to D. R. Horton, Inc.—Greensboro, Millstream, LLC and Laurel Park, LLC, I submit the following report thereon:
>
> The total number of property owners is three; the number signing the petitions is three. I, therefore, certify that the petitions are properly signed and are legally sufficient.

Although the assistant city attorney's certificate asserted that there were only three property owners in the area to be annexed, the record shows that, by 2008, lots had been sold to numerous individual purchasers in each subdivision. As a result, it appears that the certificate signed by the assistant city attorney was making reference to the three original developers who signed the utility agreements, rather than to the current owners of property in the affected areas.

On 1 April 2008, Defendant scheduled a public hearing to discuss annexation of the areas identified in the annexation petitions contained in the utility agreements. The public meeting was continued until 7 April 2009, at which time thirty-nine individuals who owned property within the affected area, including Plaintiffs, submitted signed Owner's Withdrawals Of Petition For Annexation in which they withdrew their consent to the annexation of their properties. Even so, the City voted, by a 5-4 vote, to adopt an ordinance annexing the affected area on 21 April 2009.

B. Procedural History

On 18 June 2009, Plaintiffs filed a complaint for declaratory judgment in which they challenged the validity of the annexation ordi-

nance and sought temporary and preliminary injunctive relief directed against its implementation, a declaration that the annexation ordinance was null and void, and a declaration of the rights of the parties under the utility agreements. On 19 June 2009, Judge Ripley E. Rand temporarily enjoined enforcement of the annexation ordinance pending a hearing on Plaintiffs' preliminary injunction motion, which he set for 29 June 2009. After providing the parties with an opportunity to be heard on 29 June 2009, Judge Catherine C. Eagles denied Plaintiffs' request for the issuance of a preliminary injunction.

On 24 August 2009, Defendant filed an answer asserting that the utility agreements were binding upon all property owners in the affected subdivisions, including Plaintiffs, and asking that Plaintiffs' complaint be dismissed. On 21 January 2010, Plaintiffs moved for summary judgment. After a hearing held on 2 February 2010, the trial court entered summary judgment in favor of Plaintiffs on 5 February 2010, concluding that:

> [S]ummary judgment is granted in favor of Plaintiffs against the Defendant such that the ordinance adopted by Defendant's governing body on April 21, 2009 . . . is hereby declared null and void and . . . the costs of this action be awarded in favor of Plaintiffs and against Defendant.

Defendant noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Standard of Review

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). In the present case, Defendant does not claim that disputed issues of fact exist, and we have not discovered any such disputed factual issue during the course of our own review of the record. As a result, the only remaining question before us is the extent, if any, to which Plaintiffs were entitled to judgment as a matter of law, an issue which we address utilizing a *de novo* standard of review. *Ron Medlin Const. v. Harris*, —— N.C. ——, ——, 704 S.E.2d 486, 488 (2010) ("This Court reviews a trial court's entry of summary judgment *de novo*.") (citation omitted).

B. Withdrawal of Consent to Annexation

The present annexation was undertaken pursuant to N.C. Gen. Stat. § 160A-31(a), which provides that:

> The governing board of any municipality may annex by ordinance any area contiguous to its boundaries upon presentation to the governing board of a petition signed by the owners of all the real property located within such area. The petition shall be signed by each owner of real property in the area and shall contain the address of each such owner.

The annexation petitions at issue here were signed by the original developers, as part of agreements for the provision of water and sewer utility service, years before the initiation of the present annexation proceedings. In *Conover v. Newton*, 297 N.C. 506, 518, 256 S.E.2d 216, 224 (1979), the Supreme Court held that "petitioners may withdraw at any time up until the governing municipal body has taken action upon the petition by enacting an ordinance annexing the area described in the petition." Although Defendant contends that Plaintiffs were bound by the language in the utility agreements precluding the owner or a future property owner from withdrawing his or her consent to the annexation, Plaintiffs argue that, as property owners at the time of the actual annexation proceeding, they had the legal authority to withdraw their consent and that their decision to do so precluded adoption of the annexation ordinance. As a result, the ultimate issue before us is the extent, if any, to which Plaintiffs were legally precluded from withdrawing their consent to the annexation of their properties.

C. Relevant Statutory Provisions

In seeking to persuade us that Plaintiffs lacked the authority to withdraw their consent to the annexation of their properties, Defendant initially contends that the trial court's decision contravenes a number of statutory provisions. Although Defendant's argument in reliance on these statutory provisions is not entirely clear, we understand Defendant's position to hinge on N.C. Gen. Stat. § 160A-58.21 *et seq.*, N.C. Gen. Stat. § 160A-31(a), and N.C. Gen. Stat. § 160A-314(a). After a careful review of Defendant's arguments, we conclude that the trial court's decision is not inconsistent with any of the statutory provisions upon which Defendant relies.

1. N.C. Gen. Stat. § 160A-58.21 *et seq.*

[1] First, Defendant contends that the trial court's decision is inconsistent with N.C. Gen. Stat. § 160A-58.21, *et seq.*, which "authorize cities to enter into binding agreements concerning future annexation in order to enhance orderly planning by such cities as well as residents and property owners in areas adjacent to such cities." Pursuant

to N.C. Gen. Stat. § 160A-58.23, "[t]wo or more cities may enter into agreements in order to designate one or more areas which are not subject to annexation by one or more of the participating cities." According to Defendants, allowing Plaintiffs to withdraw their consent to the annexation of their properties would be "contrary to the provisions" of N.C. Gen. Stat. § 160A-58.24, which precludes modification of such annexation agreements in the absence of a written agreement signed by the affected municipalities. The fundamental problem with Defendant's reliance on N.C. Gen. Stat. § 160A-58.21 and related statutory provisions is that the annexation agreements authorized by those statutory provisions must be between participating municipalities. Obviously, that is not the case in this instance. Moreover, the utility agreements at issue here are not annexation agreements as defined in N.C. Gen. Stat. § 160A-58.24(a), since they do not "[s]pecify one or more participating cities which may not annex the area or areas described in the agreement." Instead, the utility agreements at issue state that Defendant will provide water and sewer service to the affected developments and will require owners of property in the affected subdivisions to pay the appropriate fees for water and sewer service, to petition for the annexation of their subdivisions, and to refrain from withdrawing their consent to any subsequent annexation.[1] The legal relevance of the statutory provisions governing annexation agreements between municipalities to agreements of the type at issue here is not obvious to us, and Defendant has not demonstrated that these provisions have anything to do with the present controversy. As a result, we conclude that the agreements in question are not annexation agreements governed by the statutory provisions upon which Defendant relies.[2]

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1. In its brief, Defendant asserts that, "[w]hen the Plaintiffs purchased their properties, their lots were subject to all restrictions of record." According to well-established North Carolina law, "a restrictive covenant is not enforceable, either at law or in equity, against a subsequent purchaser of property burdened by the covenant unless notice of the covenant is contained in an instrument in his chain of title." *Runyon v. Paley*, 331 N.C. 293, 313, 416 S.E.2d 177, 191 (1992). "A purchaser has such notice whenever the restrictions appear in a deed or in any other instrument in his record chain of title." *Hawthorne v. Realty Syndicate, Inc.*, 300 N.C. 660, 665, 268 S.E.2d 494, 497 (1980). Although Plaintiffs executed affidavits stating that there was no reference to the pertinent agreement in the deeds to their properties, Defendant has not identified any document in Plaintiffs' chains of title that refers to a utility agreement or asserted that documents evidencing such a reference exist. As a result, Defendant has failed to establish that Plaintiffs had proper notice of the agreements.

2. In advancing this argument, Defendant contends that the "sole consideration" it received from the utility agreements was the developers' agreement to petitions

2. N.C. Gen. Stat. § 160A-31

[2] Secondly, Defendant argues that the result reached in the trial court would thwart the purpose of the voluntary annexation statutes and "run[] contrary to the express purpose of the laws allowing annexation agreements." We conclude, however, that allowing Plaintiffs to withdraw their consent to the annexation of the properties is not contrary to the literal language of or the intent underlying N.C. Gen. Stat. § 160A-31, the statute governing voluntary annexation proceedings.

The agreements at issue here purport to waive, on behalf of future property owners, any right to withdraw consent to annexation by Defendant, regardless of the point in time at which Defendant might seek to annex the subject properties and regardless of the conditions that might exist at that time. In *Conover*, the Supreme Court found that various public policy considerations favored allowing individual property owners to withdraw their consent to a voluntary annexation petition:

> "It is supposed that second thoughts are apt to be sounder, and this conviction has led courts to consider the right of withdrawal favorably, both as a matter of justice to the individual, who is entitled to apply his best judgment to the matter in hand, and as sound policy in community and public affairs, where the establishment of governmental institutions should rest upon mature consideration rather than be mere unnecessary excrescences upon the body politic, raised by the whim and fancy of a few men." . . .
>
> We think both considerations relied upon in Idol, justice to the individual and policies favoring the establishment of governmental institutions only upon mature reflection, are equally applicable to a voluntary annexation petition. The first consideration is applicable by the very nature of the annexation proceeding

for annexation and that permitting Plaintiffs to exercise their right to withdraw consent from an annexation petition would "deprive [Defendant] of its consideration." Wholly aside from the other difficulties that Defendant faces in establishing that various statutory provisions preclude Plaintiffs from withdrawing their consent to the annexation of their properties, the record reflects that Plaintiffs and other property owners living in the affected subdivisions have been receiving water and sewer service from Defendant and have either paid the rates that Defendant has charged for that service or been subject to disconnection. As a result, to the extent that the consideration issue is relevant to the proper disposition of this case, we do not believe that Plaintiffs' withdrawal of consent to annexation deprives Defendant of all benefit from the provision of utility service to Plaintiffs and other persons receiving utility service in the affected areas.

> authorized by statute, *i.e.*, *voluntary* annexation by the consent of all property owners in the area proposed to be annexed. Because the annexation of an area by a municipality involves substantially more extensive consequences and obligations, application of the second consideration is even more appropriate than it was in *Idol* in which only the establishment of a single-purpose district was involved.

Conover, 297 N.C. at 516, 256 S.E.2d at 223 (quoting *Idol v. Hanes*, 219 N.C. 723, 725, 14 S.E.2d 801, 802 (1941)) (emphasis in the original). Nothing in the literal language of N.C. Gen. Stat. § 160A-31(a) sets any time limitation within which a petitioning landowner is entitled to withdraw his or her consent to a proposed voluntary annexation, and the imposition of such a limitation would be inconsistent with the policy justifications for allowing such withdrawals enunciated in *Conover*. Although *Conover* was decided in 1979, the General Assembly has not amended the relevant statutory provisions in the ensuing three decades in order to eliminate or set limitations upon the right of property owners to withdraw their consent to a voluntary annexation petition. "The failure of a legislature to amend a statute which has been interpreted by a court is some evidence that the legislature approves of the court's interpretation." *Young v. Woodall*, 343 N.C. 459, 462-63, 471 S.E.2d 357, 359 (1996). Thus, we conclude that allowing Plaintiffs to exercise the right to withdraw their consent to the annexation petitions at the time at which they attempted to do so in this case does not violate either the language or the intent of N.C. Gen. Stat. § 160A-31 or the other statutory provisions governing voluntary annexations.

Although Defendant acknowledges the Supreme Court's *Conover* decision, it asserts that *Conover* "speaks only to the premise that the original petitioners of an annexation petition may withdraw their consent to annexation prior to action by the responsible government" and contends that *Conover* does not constitute any "authority for allowing subsequent purchasers within the area proposed for annexation to withdraw their consent." In essence, Defendant appears to argue that, if property changes hands after the owner has signed an annexation petition, the new owner may not withdraw his or her consent to the annexation petition. A careful review of *Conover* provides no support for this position, since the Supreme Court's decision never makes or relies upon a distinction of the type contended for by Defendant. Thus, Defendant's argument that *Conover* does not afford current property owners the right to withdraw their consent to a voluntary annexation petition signed by a prior owner lacks merit.

Defendant attempts to bolster its argument that late-stage withdrawals from voluntary annexation petitions are inconsistent with the controlling statutory provisions by citing *Kansas City So. Ry. Co. v. City of Shreveport*, 354 So.2d 1362, *cert. denied*, 439 U.S. 829, 58 L. Ed. 2d 122, 99 S. Ct. 103 (1978). In *Kansas City*, the Supreme Court of Kansas held that various individuals who sought to withdraw their consent to a proposed voluntary annexation after the municipality had taken steps to provide municipal services in the affected area were not entitled to do so, stating that:

> "The purpose of such a [voluntary annexation] statute could readily be thwarted by a few people opposed to the proposition presented, by inducing a sufficient number of signers to withdraw their names from the petition and thus take the matter out of the hands of the governing body where they had been satisfied to place it before and had permitted favorable action to be taken."

Kansas City, 354 So.2d at 1367 (quoting *Barbe v. City of Lake Charles*, 216 La. 871, 901, 45 So.2d 62, 72 (1949)). However, *Conover* clearly establishes that the Supreme Court was aware of and not concerned by the problem upon which the Supreme Court of Kansas relied:

> [T]he statute providing for voluntary annexation requires the signatures of one hundred per cent of the owners of real property in the area proposed to be annexed. One or more unwilling property owners are in a position, thereby, to thwart the aspirations of the majority in a given area who seek voluntary annexation. . . . [T]he legislature intended voluntary annexation to be accomplished only upon unanimous consent. Absent statutory prohibition on the right to withdraw from a voluntary annexation petition after it has been submitted but final action has not yet been taken on it, we think the considerations articulated in *Idol* support the right of individual petitioners to reconsider their initial decision and withdraw from the petition at any time before final action thereupon.

Conover at 516-17, 256 S.E.2d at 223. At bottom, Defendant's argument in reliance on N.C. Gen. Stat. § 160A-31 amounts to a contention that the voluntary annexation process will become unworkable unless limitations upon the ability of individual property owners to withdraw their consents to annexation are created. However, no such limitations appear in the existing statutory provisions relating to voluntary annexations, and the creation of such limitations is a matter for the General Assembly rather than the judicial branch. As a result,

we are unable to find support for Defendant's position in N.C. Gen. Stat. § 160A-31.

3. N.C. Gen. Stat. § 160A-314(a)

[3] Thirdly, in reliance on N.C. Gen. Stat. § 160A-314(a), Defendant contends that it "is statutorily authorized to require annexation as a term of its extension of utility services" and asserts that "[a] city may fix the terms upon which the service may be rendered and its facilities used." Although N.C. Gen. Stat. § 160A-314 authorizes municipalities "to establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise," it does not address the imposition of conditions such as those posited by Defendant. The numerous cases cited in Defendant's brief, such as *Fulghum v. Selma and Griffis v. Selma*, 238 N.C. 100, 104-05, 76 S.E.2d 368, 371 (1953), *Construction Co. v. Raleigh*, 230 N.C. 365, 368-69, 53 S.E.2d 165, 168 (1949), and *Town of Spring Hope v. Bissette*, 53 N.C. App. 210, 212-13, 280 S.E.2d 490, 492 (1981), *aff'd*, 305 N.C. 248, 287 S.E.2d 851 (1982), address a municipality's right to establish rates for extraterritorial service and make no reference to any right that a municipality may possess to condition the provision of water and sewer service on a customer's consent to be voluntarily annexed. Even if a municipality has the authority to condition the provision of water and sewer service upon the customer's agreement to support annexation of the area served, the record contains no indication that Defendant did so at the time that it connected any individual customer residing in the affected developments to its water and sewer facilities. As a result, none of Defendant's arguments in reliance upon various statutory provisions have merit.

D. Utility Agreements as Real Covenants

[4] Secondly, Defendant argues that the trial court erred by granting summary judgment in favor of Plaintiffs on the grounds that the utility agreements constitute "enforceable covenants that run with the land." According to Defendant, the utility agreements satisfy the conditions required for real, rather than personal, covenants and are, for that reason, enforceable against subsequent purchasers. We do not believe that this argument has merit.

"A restrictive covenant is defined as a 'private agreement, usually in a deed or lease, that restricts the use or occupancy of real property, especially by specifying lot sizes, building lines, architectural styles, and the uses to which the property may be put.' " *Wal-Mart Stores, Inc. v. Ingles Mkts., Inc.*, 158 N.C. App. 414, 420, 581 S.E.2d 111, 116

(2003) (quoting *Hutchens v. Bella Vista Village Prop. Owners Assn., Inc.*, 82 Ark. App. 28, 35, 110 S.W.3d 325, 329 (2003)). Covenants may be categorized as either real or personal:

> Covenants that run with the land are real as distinguished from personal covenants that do not run with the land. . . . Three essential requirements must concur to create a real covenant: (1) the intent of the parties as can be determined from the instruments of record; (2) the covenant must be so closely connected with the real property that it touches and concerns the land; and, (3) there must be privity of estate between the parties to the covenant.

Raintree Corp. v. Rowe, 38 N.C. App. 664, 669, 248 S.E. 2d 904, 907-08 (1978). "We adhere to the rule that a party seeking to enforce a covenant as one running with the land at law must show the presence of both horizontal and vertical privity. In order to show horizontal privity, it is only necessary that a party seeking to enforce the covenant show that there was some 'connection of interest' between the original covenanting parties, such as, here, the conveyance of an estate in land." *Runyon*, 331 N.C. at 303, 416 S.E.2d at 184-85 (citing Restatement of Property § 534 (1944)). The Restatement of Property, which the Supreme Court quoted in *Runyon*, specifically states with respect to the "connection of interest" issue that:

> The successors in title to land respecting the use of which the owner has made a promise are not bound as promisors upon the promise unless
>
> (a) the transaction of which the promise is a part includes a (a) transfer of an interest either in the land benefited by or in the land burdened by the performance of the promise; or
>
> (b) the promise is made in the adjustment of the mutual relation ships arising out of the existence of an easement held by one of the parties to the promise in the land of the other.

The agreements between the City and the original developers were clearly not executed in connection with the transfer of real property. Defendant contends, however, that, "[i]n the present case, horizontal privity arose when the Agreements between [Defendant] and the Developers were made in connection with zoning vested rights, as well as rights-of-way and easements required for Greensboro to maintain the utilities installed in the Developments." Defendant does not, however, cite any record support for this assertion, and we have found none. The utility agreements explicitly state

that vested zoning rights have not been established with respect to the affected properties. Although Defendant contends that, "[a]s exemplified in a plat included as part of the Plaintiffs' own exhibits to their complaint, the [utility agreements] also included property interests to [Defendant], namely rights of way and easements for water, sewer, roads and drainage," the page to which Defendant makes reference is a copy of a preliminary plat for one of the three subdivisions covered by these agreements. Defendant has not explained how this preliminary plat could effectively create or transfer property rights in the development covered by that plat, much less in two developments not depicted on that document. On the contrary, counsel for Defendant candidly conceded during oral argument that the record did not reveal the existence of any easements in the affected developments and stated instead that it was "common knowledge" that such easements were necessary in order for Defendant to provide water and sewer utility service. As a result of the fact that appellate review is conducted on the basis of the information contained in the record developed before the trial court and not on the basis of "common knowledge," *Vassey v. Burch*, 301 N.C. 68, 74, 269 S.E.2d 137, 141 (1980) ("It is axiomatic that . . . appellate courts in this State are bound by the record as certified and can judicially know only what appears of record."), we conclude that Defendant has failed to identify any record evidence tending to show that rights of way, easements, or other property rights were created or transferred in connection with the utility agreements. Thus, we further conclude that Defendant has failed to show the existence of horizontal privity, a necessary prerequisite for the creation of a valid and enforceable real covenant, so that Defendant's argument that the utility agreements constituted enforceable real covenants that run with the land and bind current property owners is without merit.

E. Equitable Servitude

[5] Finally, Defendant argues that the non-withdrawal provisions of the utility agreements "are alternatively enforceable as equitable servitudes" in reliance on the Supreme Court's decision in *Runyon*, 331 N.C. at 309, 416 S.E.2d at 188. However, this Court has explicitly stated that:

> Plaintiffs also contend that the doctrine of implied equitable servitudes applies in this case. Under that doctrine, the owners of lots in a subdivision in which most of the lots were conveyed subject to common restrictions, may impose those restrictions

> against persons whose deeds did not include such restrictions, but who were on notice that such restrictions applied to the lots in the subdivision. We have not adopted the doctrine of implied equitable servitudes in North Carolina, although our Supreme Court has recognized that when an owner of a tract of land subdivides it and conveys distinct parcels to separate grantees, imposing common restrictions upon the use of each parcel pursuant to a general plan of development, the restrictions may be enforced by any grantee against . . . any purchaser who takes land in the tract with notice of the restrictions.

Harry v. Crescent Resources, Inc., 136 N.C. App. 71, 80-81, 523 S.E.2d 118, 124 (1999) (emphasis added) (citation omitted). Defendant has made no attempt to distinguish *Harry* from the factual situation at issue here, and we see no valid basis for making such a distinction. According to well-established North Carolina law, "[w]here one panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." I*n re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). As a result, Defendant's final challenge to the trial court's order is also without merit.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Plaintiffs were not barred from withdrawing their consent to the annexation petitions at issue here. "Having concluded that the withdrawals were valid, we now must consider what legal effect those withdrawals have on the . . . annexation ordinance adopted [21 April 2009.] The superior court ruled that the entire ordinance was void, and with this ruling we agree." *Conover* at 518, 256 S.E.2d at 224. As a result, we conclude the trial court properly granted summary judgment in favor of Plaintiffs and that its order should be affirmed.

AFFIRMED.

Chief Judge MARTIN and Judge McGEE concur.

STATE OF NORTH CAROLINA v. DAVID ONEAL TWITTY

No. COA10-1320

(Filed 17 May 2011)

1. Evidence— subsequent crimes or bad acts—failure to show prejudice

The trial court did not err in an obtaining property by false pretenses case by admitting evidence of defendant obtaining money from other churches. Defendant failed to show how he was prejudiced by his trial counsel's failure to object to these subsequent bad acts that were admissible under N.C.G.S. § 8C-1, Rule 404(b).

2. Criminal Law— prosecutor's argument—defendant a con man, liar, and parasite—no contradictory evidence

The trial court did not abuse its discretion in an obtaining property by false pretenses case by failing to intervene *ex mero motu* during the State's closing argument referring to defendant as a con man and a liar because these terms accurately described the offense. Although calling defendant a parasite was unnecessary and unprofessional, it did not rise to the level of gross impropriety. Further, the prosecutor's comment that there was no evidence to contradict the State's evidence was not a reference to defendant's right to remain silent.

3. False Pretense—obtaining property by false pretenses—motion to dismiss—sufficiency of evidence

The trial court did not err in an obtaining property by false pretenses case by denying defendant's motions to dismiss. The evidence taken in the light most favorable to the State supported a conclusion that defendant was telling a false story about his wife dying in order to elicit sympathy and obtain property.

4. Constitutional Law— right to speedy trial—waiver of review—pro se motion while represented by counsel

The trial court did not deprive defendant of his right to a speedy trial. Defendant waived appellate review of this issue by filing *pro se* motions for a speedy trial while represented by counsel. Further, defendant failed to show actual substantial prejudice in the delay between his arrest and trial.

5. Sentencing— aggravated range—findings not required when also within presumptive range

The trial court did not err in an obtaining property by false pretenses case by sentencing defendant in the aggravated range without finding any aggravating factors. Defendant's sentence straddling both the presumptive and aggravated ranges did not create any ambiguity.

Judge STEELMAN concurring in separate opinion.

Appeal by Defendant from judgment entered 15 April 2010 by Judge Paul Gessner in Alamance County Superior Court. Heard in the Court of Appeals 13 April 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas R. Miller, for the State.

John T. Hall for Defendant.

STEPHENS, Judge.

Procedural and Factual History

On 29 June 2009, Defendant David O'Neal Twitty[1] was indicted for obtaining property by false pretense and having attained the status of habitual felon. On 20 July 2009, Defendant, acting pro se, moved for a "speedy trial." A superseding indictment was returned on 4 January 2010 for the same charge.

The evidence at trial tended to show the following: On 22 February 2009, Defendant presented himself and a man he claimed was his son to the congregation of Mt. Olive Baptist Church in Alamance County. He claimed that his wife had died in a car accident in Greensboro and that he and his son had traveled to Greensboro from their home in Charleston, South Carolina, to retrieve her possessions. Defendant stated that he had no food, was almost out of gas, and had only 75 cents left. Defendant then broke down in tears and asked church members for money to help him get back to South Carolina. Moved by Defendant's story, several members of the congregation gave Defendant money or gas for his car.

Defendant's story was not true. He lived in Charlotte, not Charleston, and his only known (ex-)wife was still living and testified

1. Defendant's middle name is spelled "O'Neal" in his brief and most other documents in the record on appeal, but spelled without the apostrophe on the judgment form.

at trial. Evidence was also presented that Defendant told the same story later that day to the congregation of nearby Mitchell Chapel A.M.E. Zion Baptist Church in Pittsboro and on later dates at three other churches in North Carolina and Virginia. In each case, Defendant asked for help and received money from sympathetic church members.

The jury found Defendant guilty of obtaining property by false pretense and found that he had attained the status of habitual felon. Defendant was sentenced to 151 to 191 months in prison. Defendant appeals.

Defendant makes five arguments on appeal: that the trial court erred in (I) admitting evidence of his obtaining money from other churches; (II) allowing prosecutorial misconduct during the State's closing argument; (III) denying his motions to dismiss; (IV) depriving him of a speedy trial; and (V) sentencing him in the aggravated range. As discussed herein, we conclude that Defendant received a fair trial free of error.

Admission of Rule 404(b) Evidence

[1] Defendant first argues that the trial court erred in admitting evidence of his obtaining money from other churches. We disagree.

Defendant's arguments on this issue are disjointed, but he appears to contend that the trial court should not have admitted evidence that Defendant told the same false story to obtain money at several churches *after* the incident at Mt. Olive Baptist Church for which he was charged. Defendant states that, because the evidence concerned his *subsequent* bad acts, it was not properly admitted under Rule 404(b). Defendant also states that the evidence had no purpose other than "character assassination."

Under Rule of Evidence 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). Rule 404(b) is a rule of inclusion, allowing the admission of such evidence unless 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) (emphasis in original). Evidence of both prior and subsequent bad acts by a defendant is admissible under Rule 404(b). *State v. Hutchinson*, 139 N.C. App. 132, 136, 532 S.E.2d 569, 572 (2000). In making a determination under Rule 404(b), the trial court must consider the similarity and temporal proximity of the defendant's other acts. *State v. Barnett*, 141 N.C. App. 378, 389-90, 540 S.E.2d 423, 431 (2000), *appeal dismissed*, *disc. review denied*, 353 N.C. 526, 549 S.E.2d 552, *affirmed*, 354 N.C. 350, 554 S.E.2d 644 (2001). However, evidence admissible under Rule 404(b) can be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2009). This decision is left to the trial court's sound discretion. *State v. Stager*, 329 N.C. 278, 315, 406 S.E.2d 876, 897 (1991).

Here, the trial court admitted evidence, over Defendant's objection, that Defendant told a similar false story and asked for money at numerous churches for the purpose of showing a common plan or scheme, a purpose permitted under Rule 404(b). As noted above, evidence of subsequent bad acts is treated no differently than evidence of prior bad acts under Rule 404(b). The subsequent acts here were highly similar and occurred within a month of the offense for which Defendant was charged, indicating that the evidence was highly probative. We thus conclude that the evidence was properly admitted, and we see no abuse of discretion in the trial court's determination that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice to Defendant.

Defendant also states that, to the extent his trial counsel failed to object to some of the evidence of his subsequent bad acts, he received ineffective assistance of counsel. However, Defendant does not make any argument that he was prejudiced by the performance of his trial counsel, instead simply citing the cases that establish the test for ineffective assistance. Thus, he cannot show ineffective assistance of counsel. *See State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (holding that a defendant claiming ineffective assistance of counsel must show that (1) his attorney's performance was constitutionally deficient and (2) the deficiency deprived the defendant of a fair trial). Defendant's arguments are overruled.

Alleged Prosecutorial Misconduct

[2] Defendant also argues that the trial court erred in allowing prosecutorial misconduct during the State's closing argument. We disagree.

Here, during closing argument, the prosecutor referred to Defendant as a con man, a liar, and a parasite. Defendant characterizes these references as prosecutorial misconduct. Defendant did not object to any of these remarks at trial, but now contends that the trial court should have intervened *ex mero motu*.

Appellate courts "will not find error in a trial court's failure to intervene in closing arguments *ex mero motu* unless the remarks were so grossly improper they rendered the trial and conviction fundamentally unfair." *State v. Raines*, 362 N.C. 1, 14, 653 S.E.2d 126, 134 (2007) (quotation marks and citations omitted), *cert. denied*, —— U.S. ——, 174 L. Ed. 2d 601 (2007). "[O]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Mann*, 355 N.C. 294, 307, 560 S.E.2d 776, 785 (2002) (citations and quotation marks omitted), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). Further, it is not improper for the State to refer to a defendant in terms that reflect the offense which has been charged or the evidence presented at trial. For example, in "a trial for first-degree murder involving a calculated armed robbery and an unprovoked killing, it [is] not improper for the State to refer to [the] defendant as 'cold-blooded murderer.' " *State v. Harris*, 338 N.C. 211, 229-30, 449 S.E.2d 462, 472 (1994) (also finding no impropriety in the State's reference to the defendant as a "doper" where evidence showed that the defendant had a history of drug abuse).

Here, Defendant was charged with obtaining property by false pretense, an offense which by definition is committed by deceiving or lying in order to win the confidence of victims. The evidence presented tended to show that Defendant lied to a church congregation in order to convince them to give him money. As in *Harris*, we see no impropriety in the State's reference to Defendant as a liar and con man, as those terms accurately characterize the offense with which he was charged and the evidence presented at trial. As for the term "parasite," this name-calling by the State was unnecessary and unprofessional, but does not rise to the level of gross impropriety. *Compare State v. Matthews*, 358 N.C. 102, 111, 591 S.E.2d 535, 542 (2004) (awarding a new trial for other reasons, but noting in *dicta* the impropriety of references to the defendant as a "monster," "demon," "devil," "a man without morals" and as having a "monster mind"); *State v. Walters*, 357 N.C. 68, 105, 588 S.E.2d 344, 366 (holding the State

improperly compared the defendant to Hitler), *cert. denied*, 540 U.S. 971, 157 L. Ed. 2d 320 (2003); *State v. Jones*, 355 N.C. 117, 132-33, 558 S.E.2d 97, 103-105 (2002) (vacating the defendant's death sentence where the State improperly compared the victim to those killed at Columbine High School and in the Oklahoma City Federal Building bombing); *State v. Smith*, 279 N.C. 163, 165-67, 181 S.E.2d 458, 459-60 (1971) (reversing the defendant's rape conviction where the State improperly described the defendant as "lower than the bone belly of a cur dog").

Defendant also notes that the prosecutor remarked several times that there was "no evidence to contradict" evidence presented by the State. Defendant contends that these comments constituted a reference to his decision not to testify in violation of his rights under the United States and North Carolina Constitutions. We do not believe that these comments constituted a reference to Defendant's right to remain silent. In addition, it is well established that, on appeal, we will not consider constitutional arguments not raised and passed on in the trial court. *In re Adoption of Searle*, 82 N.C. App. 273, 277, 346 S.E.2d 511, 515 (1986). Because Defendant did not make his constitutional argument regarding his right not to testify below, we will not consider it here.

Defendant again raises ineffective assistance of counsel based on his trial counsel's failure to object to comments of the prosecutor as an alternative basis to support his position. However, again, Defendant makes no argument that he was prejudiced by the performance of his trial counsel, and, thus, he cannot show ineffective assistance of counsel. *See Braswell*, 312 N.C. at 562, 324 S.E.2d at 248. Defendant's arguments are overruled.

Motions to Dismiss

[3] Defendant next argues that the trial court erred in denying his motions to dismiss. Specifically, Defendant contends that the trial court erred in (1) failing to dismiss the original indictment after a superseding indictment was returned, (2) denying his motion to dismiss the subsequent indictment because it alleged that Defendant obtained property by false pretense "from THE CONGREGATION OF MT. OLIVE BAPTIST CHURCH" which is too vague to sustain a conviction, and (3) denying his motion to dismiss where there was insufficient evidence that he asked for money or made false representations. We disagree with each of these assertions.

Defendant was indicted on 29 June 2009 for obtaining property by false pretense, and a superseding indictment was returned on 4 January 2010 for the same charge. Defendant filed several *pro se* motions to dismiss, but none of those requested dismissal of the original indictment or argued that the indictment was flawed. At a 13 April 2010 hearing just before trial began, defense counsel stated that he was "adopting" some of Defendant's *pro* se motions, but did not request dismissal of the original indictment.

Our General Statutes provide, in pertinent part:

> If at any time before entry of a plea of guilty to an indictment or information, or commencement of a trial thereof, another indictment or information is filed in the same court charging the defendant with an offense charged or attempted to be charged in the first instrument, the first one is, with respect to the offense, superseded by the second and, upon the defendant's arraignment upon the second indictment or information, the count of the first instrument charging the offense must be dismissed by the superior court judge.

N.C. Gen. Stat. § 15A-646 (2009). However,

[a]lthough the better practice and, indeed, the required practice under the statute is for the trial court to dismiss *any* prior indictments charging an offense upon the arraignment of the defendant on a superseding indictment charging the same offense, the failure of the trial court to do so does not render the superseding indictment void or defective.

State v. Carson, 320 N.C. 328, 333, 357 S.E.2d 662, 666 (1987). Accordingly, Defendant's argument on this issue is overruled.

Prior to trial, Defendant's counsel moved to dismiss the obtaining property by false pretense charge, stating:

> Specifically, Your Honor, I'm asserting that the congregation of Mt. Olive Baptist Church is not any proper persons [sic] or group or entity in which the statute defines as individuals who pursuant to statute could be victims of obtaining property by false pretense.

Defense counsel and the trial court then engaged in discussion, all of which focused on whether the relevant statutory language permitted the offense to be committed against a "congregation." Section 14-100 of our General Statutes provides, in pertinent part:

> If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony[.]

N.C. Gen. Stat. § 14-100(a) (2009). Subsection (c) goes on to offer the following definition: "For purposes of this section, 'person' means person, association, consortium, corporation, body politic, partnership, or other group, entity, or organization." N.C. Gen. Stat. § 14-100(c). The trial court quoted this language from subsection (c) in overruling Defendant's motion to dismiss. In his brief, Defendants' argument is based on the possibility of double jeopardy and his assertion that the indictment was "unconstitutionally vague." However, before the trial court, Defendant did not make any constitutional argument or assert either unconstitutional vagueness or risk of double jeopardy. Because Defendant failed to raise these constitutional arguments at trial, we will not consider them on appeal. *See In re Adoption of Searle*, 82 N.C. App. at 277, 346 S.E.2d at 515.

At the close of the State's evidence, Defendant moved to dismiss, contending that there was insufficient evidence that Defendant asked for anything besides "help" or that his representations about his wife having just died in a car accident were false. Defendant renewed this motion at the close of all evidence.

We review the denial of a motion to dismiss in a criminal trial to see "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citation 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). "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted). The elements of obtaining property by false pretense are: "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended

to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980).

Here, the testimony tended to show that Defendant visited several churches within a period of less than two months, telling a story that his wife had just died and he lacked the money, food, and gas to get home. Pastor Shelby Stevens of Mt. Olive Baptist testified that Defendant told his congregation that his wife had just died, he had collected her belongings in Greensboro, had little gas and only 75 cents in his pocket, and had to get home to Charleston. Joan Snyder and Keith Andrews, members of the congregation, testified that Defendant said his wife had died in a car accident. Andrews also testified:

> Well, I accept the fact that he quoted some scripture. Said he needed money and his wife had been killed and him [sic] and Travis was [sic] on the way back to get her belongings and headed back. And he just give [sic] a heart wrenching story to the fact that he was crying and needed money.

As a result of hearing Defendant's story, Andrews gave him some gasoline.

A number of witnesses offered evidence under Rule 404(b). Pastor Kenneth Brooks, pastor of the Mitchell Chapel A.M.E. Zion Baptist Church in Pittsboro, testified that on the afternoon of 22 February 2009, Defendant appeared at his church service and told a similar story, asking for help, and that the pastor and others had given him money. Vance Blanton, a member of the Church of Christ of Sanford, testified that Defendant appeared at that church on 1 March 2009, told members that his wife had died in an accident in Pittsboro, and he needed gas money; the members gave him at least $80. Pastor Scott Wilson of Tramway Baptist Church in Sanford testified that on the first or second Sunday in March 2009, Defendant appeared at his church: "He said that his wife had died and that he and his son, Travis, were driving through Pittsboro to try to get some belongings that she had and that they needed some help." Wilson gave Defendant money and gas, and a member of the congregation gave him $100. Lydia Craven, a member of Culdee Presbyterian Church in West End, testified that Defendant came to her church in March 2009 and told the congregation that his wife had been killed in Lee County. Craven and others gave him money. Cassius Eugene Horton, Jr., pastor of the Galax First Assembly of God Church in Galax, Virginia, testified that, on 22 March 2009, Defendant appeared at his church and told the con-

gregation his wife had been killed in Roanoke, Virginia, and that he needed gas to get back to his home in North Carolina.

In sum, Keith Andrews specifically testified that Defendant asked for gas money. Further, Defendant told various congregations, over a period of two months, that his wife had died in various locations in North Carolina and in Virginia. This evidence, taken in the light most favorable to the State and giving the State the benefit of all reasonable inferences, is substantial evidence which could support a conclusion by a reasonable juror that Defendant was telling a false story about his wife dying in order to elicit sympathy and obtain property. Defendant's arguments on this issue are overruled.

Motion for a Speedy Trial

[4] Defendant also argues that the trial court deprived him of a speedy trial. We disagree.

Defendant was arrested on 24 March 2009 and tried 13 months later in April 2010. Defendant, *pro se*, requested a speedy trial by letter filed 20 July 2009 asserting his Sixth Amendment rights under the United States Constitution, and renewed his request by letter filed 9 December 2009. On 18 February 2010, Defendant moved to dismiss for failure to grant him a speedy trial, citing both the Sixth Amendment and N.C. Gen. Stat. § 15A-711(c). On 4 May 2009, the trial court appointed counsel for Defendant. Defendant's original counsel later moved to withdraw, and the trial court appointed replacement counsel for Defendant on 1 October 2009. Thus, Defendant was represented by counsel when each of his speedy trial filings was made. At a 13 April 2010 pretrial hearing, defense counsel stated that he was "adopting" some of Defendant's *pro se* motions, but did not mention the issue of Defendant's right to a speedy trial.

"[A] defendant does not have the right to be represented by counsel and to also appear *pro se*." *State v. Spivey*, 357 N.C. 114, 121, 579 S.E.2d 251, 256 (2003) (citation omitted). "Having elected for representation by appointed defense counsel, [a] defendant cannot also file motions on his own behalf or attempt to represent himself. [A d]efendant has no right to appear both by himself and by counsel." *State v. Grooms*, 353 N.C. 50, 61, 540 S.E.2d 713, 721 (2000) (citing N.C. Gen. Stat. § 1-11), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001). A defendant who files *pro se* motions for a speedy trial while represented has "waived appellate review of this issue by failing to properly raise the constitutional issue in the trial court." *Id.* at 62, 540 S.E.2d at 721.

Even had Defendant not waived his right of appellate review on this issue, he would not prevail. Under section 15A-711(c), the statute cited in one of Defendant's filings,

> [a] defendant who is confined in an institution in this State pursuant to a criminal proceeding and who has other criminal charges pending against him may, by written request filed with the clerk of the court where the other charges are pending, require the prosecutor prosecuting such charges to proceed pursuant to this section.

N.C. Gen. Stat. § 15A-711(c) (2009). This section does not apply to Defendant, who had no other criminal charges pending against him at the time he was confined and awaiting trial.

In reviewing a constitutional claim for denial of the right to a speedy trial, we consider four factors: the length and reason for the delay, the defendant's assertion of his right, and any prejudice resulting from the delay. *Spivey*, 357 N.C. at 118, 579 S.E.2d at 254. None of these factors is dispositive, and there is no mandated method of weighing them. *Id.* at 118, 579 S.E.2d at 255. Rather, an appellate court must engage in a balancing test based on the facts of each case. *Id.*

As to the first factor, the length of delay, no delay is *per se* determinative of a constitutional violation, but delays approaching one year have been considered significant enough to trigger an inquiry into the remaining factors. *Id.* at 119, 579 S.E.2d at 255. However, regarding the second factor, the cause of delay, a "defendant has the burden of showing that the delay was caused by the neglect or *willfulness* of the prosecution." *Id.* (emphasis in original). Here, Defendant made no allegation regarding any cause of the delay in his pretrial filings. In his brief, Defendant states that his first court-appointed lawyer was not authorized to represent defendants charged with class C felonies, such as himself, and that he was not appointed replacement counsel until October 2009, six months after his arrest. However, the prosecution does not control appointment of defense counsel and, thus, Defendant makes no argument that "the delay was caused by the *neglect* or *willfulness* of the prosecution." *Id.*

As discussed above, Defendant did not properly assert his right to a speedy trial, the third factor under *Spivey*. Regarding the fourth factor, prejudice, Defendant's only assertion of prejudice in his brief is that he was experiencing "anxiety and concern over his charges." While minimizing the anxiety and concern of defendants is one of the

motivations behind the constitutional right to a speedy trial, a "defendant must show actual, substantial prejudice." *Id.* at 122, 579 S.E.2d at 257. Our Supreme Court has held that "claims of faded memory and evidentiary difficulties[, being] inherent in *any* delay[,]" do not establish actual, substantial prejudice. *State v. Goldman*, 311 N.C. 338, 345, 317 S.E.2d 361, 365 (1984). Similarly, we conclude that, because most criminal defendants likely experience "anxiety and concern" over their charges, Defendant here has failed to show actual, substantial prejudice in the delay between his arrest and trial. This argument is overruled.

Sentencing

[5] Finally, Defendant argues that the trial court erred in sentencing him in the aggravated range without finding any aggravating factors. We disagree.

Defendant was convicted of obtaining property by false pretense, a class C felony, and the trial court sentenced Defendant to 151 to 191 months in prison. A term of 151 months is the top of the presumptive range for a defendant with a prior record level of V convicted of a class C felony, and is also listed as the lowest sentence in the aggravated range. Defendant contends that this creates ambiguity and asserts that he received an aggravated sentence.

We rejected this argument in *State v. Ramirez*, 156 N.C. App. 249, 576 S.E.2d 714, *disc. review denied*, 357 N.C. 255, 583 S.E.2d 286, *cert. denied*, 540 U.S. 991, 157 L. Ed. 2d 388 (2003), and subsequent cases, none of which are cited in Defendant's brief. *See State v. Allah*, 168 N.C. App. 190, 607 S.E.2d 311, *disc. review denied*, 359 N.C. 636, 618 S.E.2d 232 (2005); *State v. Fowler*, 157 N.C. App. 564, 579 S.E.2d 499 (2003). In *Ramirez*, the defendant asserted that

> the trial court erred by imposing sentences which fall into the aggravated range without finding aggravate[ing] factors. [The] [d]efendant admits the trial court sentenced [the] defendant within the presumptive range, but asserts that because the presumptive range and the aggravated range overlap, an offender may not be sentenced within this overlapping range without a finding that aggravating factors outweigh mitigating factors. [The] [d]efendant asserts this overlap is a quirk in our sentencing laws and creates an ambiguity. This argument was also presented by the defendant in *State v. Streeter*, 146 N.C. App. 594, 553 S.E.2d 240 (2001), *cert. denied*, 356 N.C. 312, 571 S.E.2d 211 (2002). In accord with Streeter, we disagree with [the] defendant's argument. In both *Streeter* and the case at bar, the defendant was

> properly sentenced within the presumptive range. The fact that the trial court could have found aggravating factors and sentenced [the] defendant to the same term does not create an error in [the] defendant's sentence. We hold the statute is not ambiguous, and accordingly find no error.

Id. at 259, 576 S.E.2d at 721. Likewise, here, the fact that Defendant's sentence straddles the presumptive and aggravated ranges does not create any ambiguity, and the trial court did not err in imposing sentence. This argument borders on the frivolous and is overruled.

NO ERROR.

Judge HUNTER, JR., ROBERT N., concurs.

Judge STEELMAN concurs with a separate opinion.

STEELMAN, Judge concurring.

I fully concur with the majority opinion in this case. I write separately concerning the appellant's final argument. It is crystal clear from the judgment entered by the trial court that the sentence imposed was from the *presumptive range*.[2] As noted by the majority opinion, the argument made by counsel has been rejected by this Court on numerous prior occasions. This argument does not border on the frivolous; it is totally and completely frivolous. Defendant's counsel should be personally sanctioned pursuant to Rule 34(a)(3) of the North Carolina Rules of Appellate Procedure.

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2. Judge Gessner's judgment stated that he made no written findings because the prison term was "within the presumptive range of sentences authorized under G.S. 15A-1340.17(c)." Defendant was found to be a prior record level V for felony sentencing. Based upon the version of N.C. Gen. Stat. § 15A-1340.17 that was in effect on the date defendant committed the offenses for which he was found guilty, a sentence of a minimum of 151 months and a maximum of 191 months imprisonment was a permitted sentence from the presumptive range.

HIBSHMAN v. HIBSHMAN

[212 N.C. App. 113 (2011)]

MARK STEVEN HIBSHMAN, PLAINTIFF v. LUDMILLA HIBSHMAN, DEFENDANT

No. COA10-435

(Filed 17 May 2011)

Child Custody and Support— change in custody—failure to find substantial change of circumstances

The trial court erred by changing custody of the minor children without first determining there had been a substantial change of circumstances. The case was remanded.

Appeal by defendant from order entered 21 October 2009 by Judge Charlie Brown in Rowan County District Court. Heard in the Court of Appeals 26 October 2010.

Sherrill & Cameron, PLLC, by Carlyle Sherrill, for Plaintiff-Appellee.

Horack, Talley, Pharr & Lowndes, P.A., by Elizabeth J. James and Kary C. Watson, for Defendant-Appellant.

ERVIN, Judge.

Defendant Ludmilla Hibshman appeals from orders changing the custody of her minor children from Defendant to Plaintiff Mark Steven Hibshman entered by the trial court on 21 October 2009. On appeal, Defendant contends, among other things, that she did not have the ability under North Carolina law to waive the necessity for a showing of a change in circumstances as a precondition for modification of a prior custody order and that the trial court erred by failing to address the "changed circumstances" issue in reliance on her agreement not to insist that such a showing be made. After careful consideration of Defendant's challenges to the trial court's orders in light of the record and the applicable law, we conclude that the trial court's orders should be reversed and that this case should be remanded to the Rowan County District Court for further proceedings not inconsistent with this opinion.

I. Factual Background

Plaintiff and Defendant were married in Pennsylvania on 5 September 1998. The couple had two children, a daughter, who was born in 2000, and a son, who was born in 2003.

On 10 January 2008, Plaintiff filed a complaint seeking custody of the children, a divorce from bed and board, child support, post-separation support, and alimony. On 6 March 2008, Plaintiff, without providing any notice to Defendant, took the children and moved back to Pennsylvania. On 11 March 2008, Defendant filed a motion, which Judge William C. Kluttz granted on the following day, seeking immediate temporary custody. On 25 April 2008, the trial court entered a temporary custody order granting the parties joint custody of the children.

In July 2008, the trial court conducted a hearing for the purpose of addressing child custody issues.[1] On 14 July 2008, counsel for the parties orally argued their respective positions to the trial court. At that time, the trial court and the parties discussed the possibility that Plaintiff and Defendant would enter into a stipulation addressing future modification of any custody order that the trial court might ultimately enter:

> THE COURT: But [Defendant has] been willing to say that in the event I award her custody during the school year that . . . would be by her agreement and contingent upon her maintaining the residence, therefore, maintaining [the daughter's] enrollment and sometime soon [the son's] enrollment in the Granite Quarry School District. Do I hear you correctly on that?
>
> [DEFENSE COUNSEL]: Yes, that would be—we would be willing—and again, I don't know if the Court of Appeals says all kinds of funny things about what a judge can do with custody orders.
>
> THE COURT: I don't believe I can mandate that.
>
> [DEFENSE COUNSEL]: And to the . . . extent that you cannot, we would stipulate, correct?
>
> [DEFENDANT]: Yes.
>
> . . .
>
> THE COURT: Now, coming back to how that all links up to her concession that she'd be willing to . . . have imposed upon her the requirement she maintain the home, otherwise this thing

1. The transcript of the July 2008 evidentiary hearing has not been provided to the Court in connection with Defendant's appeal. However, there is a transcript of the arguments of counsel relating to the issues before the court as a result of that hearing, which occurred on 14 July 2008, in the materials that have been presented for purposes of our review.

unravels, it's subject to review without further evidence, etcetera, is an interesting argument.

At the conclusion of the oral argument, the trial court announced certain findings of fact and then stated that:

> [THE COURT:] All right. Based on those Findings of Fact, the Court concludes that both parents are fit and proper parents to have custody of their children. Their homes are appropriate and meet the needs of their children. The Court does find that it would be in the best interest for [the children] to be in the primary custody of their mother. And that is going to be by her agreement with this unusual contingency that is offered, and so I'd like it to be spelled out in the Findings of Fact. It's not a stipulation. I resist that word because it's not something that—I mean, this is—this announcement of judgment is as a result of a contested hearing and so nothing about this is what you're agreeing to, but it creates a burden for her, and so it's by her agreement—it's not court mandate—but it's going to be adopted by the Court that she will be a primary custodian during the school year—during the Rowan County school year for [the children] so long as she maintains residence so that [the daughter] may continue to be enrolled in Granite Quarry Elementary School. In the event that cannot be maintained, the matter may be rescheduled by calendar request and notice of hearing. Without the burden of proving substantial change of circumstances, the Court may receive additional evidence to evaluate whether custody during the school year should continue with defendant or not. Do I understand that to be your agreement, [Defense Counsel]?
>
> [DEFENSE COUNSEL]: Yes, Your Honor[.]

On 5 September 2008, the trial court entered an order granting custody of the children to Defendant and including the following findings:

> 9. On March 6, 2008, while the Defendant was at work, the Plaintiff moved from the marital home, took the children, and moved to Pennsylvania, all without notice to the Defendant.
>
> 10. On March 12, 2008, the Defendant sought and obtained an immediate custody order . . . placing [the children] in the immediate custody of the Defendant.
>
> 11. A temporary custody hearing was held on March 19, 2008, and an order entered granting the parties shared custody . . . but requiring the children to remain in school in Rowan County.

. . .

31. Defendant's home is a fit and proper place for the children to reside[.]

32. Plaintiff's home is a fit and proper place for the children to reside[.]

. . .

48. Both parties are fit and proper persons to have custody of the minor children.

Based upon these and other findings of fact, the trial court concluded that "[a]n award of custody as set forth below is in the best interests of the minor children" and ordered, in pertinent part, that:

1. Defendant is granted primary custody of the minor children during the school year.

2. Plaintiff is granted primary custody during the summer[.]

. . .

7. Defendant's primary custody of the children during the school year is conditioned on Defendant maintaining a home in the Granite Quarry Elementary School district, while the children are still in elementary school. If she does not, this court may receive additional evidence and this order may be modified without a showing of a substantial change in circumstances.

Above Decretal Paragraph No. 7, the trial court initialed a handwritten notation that this provision was included "w/consent of [Defendant.]"

On 17 July 2009, Plaintiff filed a motion seeking a change of custody. In his motion, Plaintiff alleged that, after Defendant lost her job in Rowan County, she relocated to Greenville, South Carolina, where she found other employment. In addition, Plaintiff asserted that, although the children had relatives near his home in Pennsylvania, they had no similar family connections in South Carolina. In reliance on Decretal Paragraph No. 7 of the 5 September 2008 custody order, Plaintiff requested the trial court to modify its earlier order and award primary custody of the children to him.

On 9 September 2009, Plaintiff's motion came on for hearing before the trial court. Prior to receiving evidence, the trial court engaged in the following colloquy with counsel for the parties:

THE COURT: All right. Can I inquire of counsel, is there a stipulation? We had this pre-trial discussion yesterday. Is there a stipulation that the evidence presentation will sort of leap-frog the substantial change test and be considered by the Court on evaluation of best interest for custody?

[PLAINTIFF'S COUNSEL]: Yes, Your Honor, according to the prior court order substantial change in circumstances would not have to be shown, and this would merely be best interest of the child—children.

THE COURT: Is that a stipulation, Mr. Inge?

[DEFENSE COUNSEL]: Yes, I can live with that stipulation.

At the hearing, Plaintiff testified that he was born and raised in Pennsylvania and had moved to North Carolina solely because Defendant had employment there. After Defendant received primary custody of the children, Plaintiff returned to his home community in Pennsylvania, which was fairly close to the places where other members of his family lived and was where he planned to remain permanently. On cross-examination, Plaintiff agreed that the children had done well in school while in Defendant's custody.

Defendant testified that, for the past fifteen years, she had been employed selling specialized vans that had been converted for use by handicapped individuals. After being laid off from the job she held at the time of the earlier custody hearing, Defendant found a job in the same field that paid a higher salary, offered more prospects for advancement, and had more flexible hours in Greenville, South Carolina. As a result, Defendant moved to Simpsonville, South Carolina, where the children were enrolled in Bethel Elementary School, an institution that has been designated a National School of Excellence and that is located two miles from Defendant's home. After her separation from Plaintiff, Defendant became involved with an individual named Will Martinez. As of the date of the 9 September 2009 hearing, Defendant and Mr. Martinez had been dating for about a year and planned to marry within the ensuing twelve months. Defendant acknowledged on cross-examination that she had agreed to remain in Rowan County at the earlier hearing.

After the presentation of evidence, the trial court stated that:

THE COURT: All right. Matter comes on for a modification of the Order that was entered on September 5th following the trial

that occurred on July 15th. By stipulation of the parties and consistent with the Order language, the Court convened this hearing for a best interest determination despite the existence of a custody order being entered.

Further, by stipulation of the parties, the Findings of Fact contained and enumerated 1 through 48 in the [5 September 2008] custody order are incorporated by reference and are received by this Court in addition to the additional testimony and exhibits presented this date in the Court's determination of best interest of the parties' minor children[.]

The Court further notes that [the children] are now enrolled in school having begun the 09-2010 academic year in South Carolina. [The son] is now a first grader; that [the daughter] is a fourth grader[, and] . . . both performed exceptionally in school the last academic year while in primary custody of Ms. Hibshman.

That the exhibits presented by both movant and respondent are received and incorporated into the Court's Findings of Fact and the Court does specifically note that the home continued to be occupied and maintained by the plaintiff remains a fit and proper home for Mr. Hibshman and his children.

That the . . . townhome occupied by Ms. Hibshman, located in Simpsonville, is a three-bedroom, two and-a-half bath rental unit that she plans to move from and intends to remain within the children's school district upon the sale of the parties' marital home here in Rowan County.

That both parents have made formal . . . concrete steps toward investigating the appropriateness of the schools, and the Court finds that the school, the campus itself and the school system that the children would enroll in in Pennsylvania versus South Carolina are appropriate and would meet their best interest.

The Court does not find that this evidence supports any finding that Ms. Hibshman has moved to the State of South Carolina for the specific purpose of frustrating Mr. Hibshman's court-ordered custody and/or visitation. She has not moved for that purpose. In fact, I'll make a specific finding that securing a better job and the history that she has agreed on more visitation time is contrary to any position that she has relocated to frustrate Mr. Hibshman's court-ordered visitation and custody.

> Mr. Hibshman's employment remains unchanged [and the] findings that were previously made remain the findings at this trial installment.
>
> Ms. Hibshman's job has changed. The job with Carolina Mobility [is a] similar job but a position of management that includes a base salary, bonus, benefits, profit sharing, more flexible hours. She's been employed in this specific area of auto sales for 15 years. There are a limited number of dealerships that specialize in the sale of handicap-accessible vehicles.
>
> Ms. Hibshman is in a relationship with Will Martinez, has been in that relationship for more than one year, live[d] with this man for the past seven months. Mr. Martinez is unemployed at this time and is seeking certification to pursue employment in insurance[.]
>
> . . .
>
> All right, so I'll say further, when we tried this case and I heard extensive evidence from each of you in July, . . . it was a close case in my estimation[, and] . . . [i]t's still a close case.
>
> And so this is the Order of the Court. The motion to modify the custody order entered on September 5, 2008 is granted. I find that the best interest will be served by placing primary custody during the school year with the plaintiff, Mr. Hibshman and primary custody during the summer months with the defendant, Ms. Hibshman.

On 21 October 2009, the trial court entered an order, consistent with the statements that it made in open court, changing primary custody of the children from Defendant to Plaintiff. In the preamble to its order, the trial court stated that:

> The subject of this hearing is a Motion for Change of Custody filed by the Plaintiff on July 17, 2009 invoking paragraph seven of the decree of the July 15, 2008 order that stated "Defendant's primary custody of the children during the school year is conditioned on Defendant maintaining a home in the Granite Quarry Elementary school district while the children are still in elementary school. If she does not, this court may receive additional evidence and this order [may be] modified without a showing of a substantial change in circumstances." This matter comes on for a modification of the order that was entered on September 5, 2008

> following a trial that occurred on July 15, 2008 by stipulation of the parties and consistent with the order language mentioned above the court hereby convened this hearing for a best interest determination despite the existence of a custody order previously entered.

After making findings of fact that were essentially identical to those announced in open court, the trial court concluded as a matter of law that:

1. That the Court has jurisdiction over the subject matter and the parties of this action.
2. That both Plaintiff and Defendant are fit and proper persons to exercise care, custody and control of the minor children.
3. That it is in the best interest of the minor children that custody be modified to provide that the Plaintiff, Mr. Hibshman, have primary custody during the school year and the Defendant, Ms. Hibshman having primary custody during the summer.
4. That it is in the best interest of the minor children that the remaining specific periods with the non-custodial parent remain as they were under the prior order.

Based on these findings and conclusions, the trial court granted Plaintiff primary custody of the children during the school year. Defendant noted an appeal to this Court from the trial court's orders.

II. Legal Analysis

A. Standard of Review

According to N.C. Gen. Stat. § 50-13.7(a), "an order of a court of this State for custody of a minor child 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."

> The trial court has the authority to modify a prior custody order when a substantial change in circumstances has occurred, which affects the child's welfare. The party moving for modification bears the burden of demonstrating that such a change has occurred. The trial court's order modifying a previous custody order must contain findings of fact, which are supported by substantial, competent evidence. "The trial court is vested with broad discretion in cases involving child custody," and its decision will not be reversed on appeal absent a clear showing of

> abuse of discretion. In determining whether a substantial change in circumstances has occurred[, "c]ourts must consider and weigh all evidence of changed circumstances which effect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child. In appropriate cases, either may support a modification of custody on the ground of a change in circumstances."

Karger v. Wood, 174 N.C. App. 703, 705-06, 622 S.E.2d 197, 200 (2005) (citing *Shipman v. Shipman*, 357 N.C. 471, 473-74, 586 S.E.2d 250, 253 (2003), and quoting *Pulliam v. Smith*, 348 N.C. 616, 619, 624-25, 501 S.E.2d 898, 899, 902 (1998)), appeal dismissed, 360 N.C. 481, 630 S.E.2d 665 (2006). As a result, "once the custody of a minor child is judicially determined, that order of the court cannot be modified until it is determined that (1) there has been a substantial change in circumstances . . . affecting the welfare of the child; and (2) a change in custody is in the best interest of the child." *Dobos v. Dobos*, 111 N.C. App. 222, 226, 431 S.E.2d 861, 863 (1993) (quoting *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 77, 418 S.E.2d 675, 678 (1992), *disapproved on other grounds by Pulliam*. 348 N.C. at 620, 501 S.E.2d at 900), *disapproved on other grounds by Pulliam*, *id.*

This Court has held that "the trial court commit[s] reversible error by modifying child custody . . . absent any finding of substantial change of circumstances affecting the welfare of the child." *Jackson v. Jackson*, 192 N.C. App. 455, 459, 665 S.E.2d 545, 548 (2008). *See also*, *e.g.*, *Lewis v. Lewis*, 181 N.C. App. 114, 118, 638 S.E.2d 628, 631 (2007) (holding that "it was error for the court to modify the existing consent order as to custody when it concluded, at the same time, that there had not been any substantial change in circumstances."). "A determination of whether there has been a substantial change of circumstances is a legal conclusion, which must be supported by adequate findings of fact." *Armstrong v. Droessler*, 177 N.C. App. 673, 678, 630 S.E.2d 19, 22-23 (2006) (citing *Garrett v. Garrett*, 121 N.C. App. 192, 197, 464 S.E.2d 716, 720 (1995), *disapproved of on other grounds by Pulliam*, *id.*).

> [B]efore a child custody order may be modified, the evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child, and flowing from that prerequisite is the requirement that the trial court make findings of fact regarding that connection. . . . [Where] the effects of

> the change on the welfare of the child are not self-evident and therefore necessitate a showing of evidence directly linking the change to the welfare of the child[,] . . . our appellate courts have required a showing of specific evidence linking the change in circumstances to the welfare of the child.

Shipman, 357 N.C. at 478, 586 S.E.2d at 255-56 (citing *Carlton v. Carlton*, 145 N.C. App. 252, 262, 549 S.E.2d 916, 923 (Tyson, J., dissenting), *rev'd per curiam per dissent*, 354 N.C. 561, 557 S.E.2d 529 (2001), *cert. denied*, 536 U.S. 944, 153 L. Ed. 2d 811, 122 S. Ct. 2630 (2002)) (other citation omitted).

B. Substantial Change of Circumstance

On appeal, Defendant argues that the trial court erred by failing to determine whether a substantial change of circumstances justified changing the custody of the minor children. Defendant claims that the trial court was required to demonstrate the existence of a substantial change in circumstances before changing primary custody of the children from Defendant to Plaintiff and that the "changed circumstances" requirement could not be lawfully waived by either party or omitted by the trial court. We believe that Defendant's argument has merit.

The record clearly demonstrates that the trial court's initial custody order rested on a conclusion that it was in the children's best interest for Defendant to have primary custody, with this determination "conditioned on [her] maintaining a home in the Granite Quarry Elementary School district, while the children are still in elementary school." The trial court's initial custody order further provided that, if Defendant failed to remain a resident of the Granite Quarry school zone, the trial court "may receive additional evidence and this order may be modified without a showing of a substantial change in circumstances," with a handwritten notation near this provision indicating that Defendant consented to its inclusion. At the second custody hearing, the trial court explicitly stated that it was not considering whether a substantial change of circumstances warranting a change in custody had occurred, with this determination resting on the waiver provision contained in the original custody order.

The extent to which the trial court was authorized to order a change in the custody of the minor children without a showing of changed circumstances in reliance on Defendant's stipulation hinges upon an analysis of the language and purpose of N.C. Gen. Stat.

§ 50-13.7, including the nature of the interest or interests protected by that statutory provision. The Supreme Court has observed that, "[u]nfortunately, child custody disputes are often hotly-contested, bitter affairs in which the innocent children in issue suffer as confused and unwilling pawns." *In re Custody of Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982). N.C. Gen. Stat. § 50-13.7 checks this tendency toward contentious litigation by limiting the circumstances under which the custody of a child, once established, is subject to being changed. This Court has emphasized that:

> "The welfare of the child in controversies involving custody is the polar star by which the courts must be guided in awarding custody." "In a custody modification action, even one involving a parent, the existing child custody order cannot be modified [unless] . . . the party seeking a modification [first shows] that there has been a substantial change in circumstances affecting the welfare of the child[.]"[2]

Warner v. Brickhouse, 189 N.C. App. 445, 451, 658 S.E.2d 313, 317 (2008) (quoting *Thomas v. Thomas*, 259 N.C. 461, 467, 130 S.E.2d 871, 876 (1963), and *Johnson v. Adolf*, 149 N.C. App. 876, 878, 561 S.E.2d 588, 589 (2002)). In addition, the *Warner* Court noted that:

> Our Supreme Court articulated the following purpose for this rule: "A decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. To hold otherwise would invite constant litigation by a dissatisfied party so as to keep the involved child constantly torn between parents and in a resulting state of turmoil and insecurity. This in itself would destroy the paramount aim of the court, that is, that the welfare of the child be promoted and subserved."

Warner, 189 N.C. App. at 451-52, 658 S.E.2d at 317-18 (quoting *Shepherd v. Shepherd*, 273 N.C. 71, 75, 159 S.E.2d 357, 361 (1968)).

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2. "The statutory language does not use the word 'substantial' in describing change of circumstances nor does the statute use the phrase 'affecting the child's welfare.' Both 'substantial' and 'affecting the child's welfare' have been added by judicial decisions and represent a commonsense interpretation of the legislative intent." *Pulliam*, 348 N.C. at 629, 501 S.E.2d at 905 (Justice Orr, concurring). Thus, "under N.C. Gen. Stat. § 50-13.7(a), 'changed circumstances' means a 'substantial change of circumstances affecting the welfare of the child[.]' " *Correll v. Allen*, 94 N.C. App. 464, 468, 380 S.E.2d 580, 583 (1989) (citation omitted).

Finally, this Court has held that:

> Since, there is a statutory procedure for modifying a custody determination, a party seeking modification of a custody decree must comply with its provisions. There are no exceptions in North Carolina law to the requirement that a change in circumstances be shown before a custody decree may be modified.

(emphasis added). *Bivens v. Cottle*, 120 N.C. App. 467, 469, 462 S.E.2d 829, 831 (1995), *disc. review improvidently granted, appeal dismissed*, 346 N.C. 270, 485 S.E.2d 296 (1997). As a result, according to well-established North Carolina law, the "requirement of substantial change is an effort to lend 'such stability as would end the vicious litigation so often accompanying such contests[.]' " *Ellenberger v. Ellenberger*, 63 N.C. App. 721, 724, 306 S.E.2d 190, 191 (1983) (quoting *Shepherd* 273 N.C. at 75, 159 S.E.2d at 361), *rev'd in part on other grounds*, 309 N.C. 631, 308 S.E.2d 714 (1983). For that reason, a "court's discretion in child custody and visitation cases is limited by the well[-]established legal standard for modification of custody and visitation orders." *Benedict v. Coe*, 117 N.C. App. 369, 378, 451 S.E.2d 320, 325 (1994), *disapproved of on other grounds by Pulliam*, *id.*

"Waiver is 'an intentional relinquishment or abandonment of a known right or privilege.' Almost any right may be waived, so long as the waiver is not illegal or contrary to public policy." *Medearis v. Trustees of Meyers Park Baptist Church*, 148 N.C. App. 1, 10, 558 S.E.2d 199, 206 (2001) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 1466, 58 S. Ct. 1019, 1023 (1938), overruled in part on other grounds by *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981), and citing *Clement v. Clement*, 230 N.C. 636, 639, 55 S.E.2d 459, 461 (1949)), *disc. review denied*, 355 N.C. 493, 563 S.E.2d 190 (2002). A careful analysis of the language of N.C. Gen. Stat. § 50-13.7, coupled with statements made in numerous cases interpreting its provisions, inevitably leads us to the conclusion that (1) the requirement set out in N.C. Gen. Stat. § 50-13.7 to the effect that a child custody order may only be modified upon a proper showing, is not a personal right possessed by a litigant, but is instead a legislatively mandated limitation on the authority of the courts to modify prior custody orders and that, (2) if the necessity to show a substantial change of circumstances were to be treated as an individual right possessed by a parent rather than as a rule intended to protect the affected child, such an interpretation would be completely inconsistent with the clear emphasis of the Supreme Court and this Court

upon the purposes served by the "changed circumstances" requirement. As a result, we conclude that Defendant did not have the ability to "waive" the requirement that the trial court find a substantial change in circumstance before modifying a prior custody order, so that the trial court erred by failing to address the "changed circumstances" issue at the time that it awarded Plaintiff custody of the parties' children.[3]

III. Conclusion

Thus, for the reasons discussed above, we conclude that the trial court erred by changing the custody of the minor children, without first determining that there had been a substantial change of circumstances. Having reached this result, we need not address Defendant's remaining challenges to the trial court's order. As a result, the trial court's order is reversed and this matter is remanded to the Rowan County District Court for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

Judges BRYANT and STEELMAN concur.

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3. The same logic renders Plaintiff's reliance on the doctrine of equitable estoppel unavailing. Although the doctrine of equitable estoppel exists to prevent "a party from asserting a legal claim or defense which is contrary to or inconsistent with his prior actions or conduct," *Godley v. County of Pitt*, 306 N.C. 357, 360, 293 S.E.2d 167, 169 (1982), for the purpose of " 'protect[ing] the integrity of the courts and the judicial process,' " *Gore v. Myrtle/Mueller*, 362 N.C. 27, 33, 653 S.E.2d 400, 405 (2007), quoting *State v. Taylor*, 128 N.C. App. 394, 400, 496 S.E.2d 811, 815, *aff'd per curiam*, 349 N.C. 219, 504 S.E.2d 785 (1998), and "promot[ing] fairness between the parties," *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 17, 591 S.E.2d 870, 881 (2004), we do not believe that the conduct of one person can equitably estop the effectuation of legal principles intended to protect someone else. Since, as we have noted in the text, the purpose of the "changed circumstances" requirement is to protect the child rather than the parents, we do not believe that the doctrine of equitable estoppel can be invoked to justify upholding the trial court's decision to refrain from making the required "changed circumstances" determination.

WHITE v. FARABEE

[212 N.C. App. 126 (2011)]

PHILIPPE WHITE, AND WIFE, ELIZABETH S. WHITE, PETITIONERS v. ROBERT LEROY FARABEE, UNMARRIED; RICHARD EUGENE RASBERRY, AND SPOUSE, IF ANY; HOSEA R. RASBERRY, UNMARRIED; CHARLES ALBERT ISLEY, JR., AND SPOUSE, IF ANY; ERNEST LEMELL ISLEY, AND SPOUSE, IF ANY; WILLIAM CECIL DOUGLAS ISLEY, AND WIFE, CECELIA ISLEY; RALPH MALCOLM POLLARD, UNMARRIED; EDWINA M. DELONEY, UNMARRIED; FREDERICK A. SMITH, AND WIFE, BERTHA M. SMITH; PATRICIA S. DAY, AND HUSBAND, JOHN W. DAY; JOYCE L. BRASWELL LIVINGSTON, UNMARRIED; KENNETH E. WHITESIDE, AND WIFE, JOAN D. WHITESIDE; STEPHANIE MARIE SIMMONS, UNMARRIED; RICARDO BENNERMAN, UNMARRIED; BRENT F. KING, TRUSTEE; UNITED GENERAL MORTGAGE CORPORATION, NOTEHOLDER; PROPERTY MANAGEMENT SERVICES, INC., JUDGMENT CREDITOR; UNITED STATES OF AMERICA, LIENHOLDER; AND ANY PERSONS AND THEIR SPOUSES, FIRMS OR CORPORATIONS WHO MAY HAVE ACQUIRED ANY INTEREST BY ASSIGNMENT, TRANSFER, SALE, WILL, DEVISE, BEQUEST OR LAWS OF DESCENT AND DISTRIBUTION OR IN ANY MANNER WHATSOEVER, BY, THROUGH, OR UNDER CEOLA ELIZABETH SMITH (SPECIFICALLY INCLUDING BUT NOT LIMITED TO THOSE ACQUIRING SUCH AN INTEREST BY, THROUGH, OR UNDER OZELLA J. SMITH RASBERRY, CHARLOTTE BEATRICE SMITH POLLARD, LEWIS E. SMITH, CARL SHEPARD, WADE SHEPARD AND/OR BOY SMITH, BORN AUGUST 4, 1917), RESPONDENTS

No. COA10-1213

(Filed 17 May 2011)

1. Appeal and Error— interlocutory orders and appeals—adverse possession—all interests not resolved

An order addressing the property interests of some of the parties to an adverse possession claim was interlocutory, but the appeal was nevertheless heard, where there were overlapping factual issues between the claims being appealed and those left to be determined in a partition action.

2. Adverse Possession— color of title—execution and delivery of deeds

The trial court erred by finding that some of the respondents had acquired title by adverse possession under color of title where four groups of relatives who had been paying property taxes on family property assumed they were the proper owners and exchanged reciprocal deeds dividing the property. Although the date inscribed at the top of the deeds was more than seven years prior to the action, some of the deeds were not signed, and therefore not delivered, until less than seven years before the action.

Appeal by petitioners from order entered 21 April 2010 by Judge Ronald E. Spivey in Guilford County Superior Court. Heard in the Court of Appeals 7 March 2011.

Robertson, Medlin & Bloss, PLLC, by John F. Bloss, for petitioner-appellants.

Land Loss Prevention Project, by Mary E. Henderson and Jeffrey M. Jandura, for Patricia Day and Kenneth and Joan Whiteside respondent-appellees.

Tuggle Duggins & Meschan, PA, by John R. Barlow, II, and Michael S. Fox, for Natasha Braswell respondent-appellee.

McCULLOUGH, Judge.

Petitioners appeal from an order entered by the trial court in favor of respondents, finding that each of the four respondents had acquired title to portions of a certain piece of real property by adverse possession under color of title. After careful review, we reverse.

I. Background

On 22 June 1961, Ceola Elizabeth Smith ("Ceola") died intestate seized of a 70-acre parcel of real property located in Guilford County, North Carolina ("the Ceola Smith Property"). The Ceola Smith Property is undeveloped, having only a single driveway and no habitable buildings. In the years following Ceola's death, certain of her grandchildren continued to pay the taxes on the Ceola Smith Property. These grandchildren, comprising four groups of relatives, were: (1) respondents Patricia Day ("Day") and her husband, John Day (collectively "the Days"[1]); (2) respondents Frederick Smith, Jr. ("Smith") and his wife, Bertha Smith (collectively, "the Smiths"); (3) Joyce Livingston ("Livingston"); and (4) respondents Edwina Deloney ("Deloney") and Ralph Malcolm Pollard ("Pollard").

Eventually, these four groups of family members decided to voluntarily divide the Ceola Smith Property into four tracts, each owned by one of the four groups of relatives that had been paying one-fourth of the property taxes on the Ceola Smith Property since Ceola's death. Despite their awareness of multiple other heirs of Ceola, these four groups of relatives assumed they were the only proper owners of the Ceola Smith Property by virtue of having paid all of the property taxes in the years following Ceola's death. Accordingly, in June 1998, these four groups of relatives collectively hired a surveyor to divide the Ceola Smith Property into four approximately equal parcels, and employed a lawyer to prepare four reciprocal deeds for those parcels.

1. At the time of trial John Day was deceased.

One such reciprocal deed granted the Days an 18.69-acre parcel of the Ceola Smith Property (the "Day tract"). On 4 October 2004, the Days conveyed a 2.00-acre portion of this parcel (the "Whiteside tract") to Day's daughter and son-in-law, respondents Joan and Kenneth Whiteside ("the Whitesides"). Another such reciprocal deed granted Livingston a 20.00-acre parcel of the Ceola Smith Property (the "Livingston tract"). Livingston died intestate on 12 January 2002, and one of her four children, respondent Natasha Braswell ("Braswell"), now claims ownership of the Livingston tract on behalf of her mother's estate.

The four reciprocal deeds all state on their face that they were "made" on 15 December 1998. Day testified during trial that she and her brother, Smith, picked up the unsigned deeds from the preparing lawyer's office some time in December 1998. At one point, Day testified she signed the deeds on that day, after picking them up from the lawyer's office. Day then mailed the deeds for signature to Livingston, Deloney, and Pollard, each of whom lived at different locations in New Jersey.

The signed deeds, bearing the signatures of Livingston, Deloney, and Pollard, were then returned to Day by mail. Upon receipt, Day and the remaining parties to the deeds—her husband John Day and the Smiths—took the deeds to a notary in Guilford County. Day then testified that she and her husband and the Smiths all signed the four deeds before the notary on 1 March 1999 and vouched for the authenticity of the absent parties' signatures. The deeds were then signed and acknowledged by the notary on 1 March 1999, and thereafter recorded at the courthouse.

Prior to the actions by these four groups of family members, in August 1992, petitioner Philippe White ("White") and his wife, Elizabeth White (collectively, "petitioners"), purchased the interest of Nancy Louise Glanz ("Glanz") in several tracts of land, including an undivided tenant-in-common interest in the Ceola Smith Property. When petitioners purchased Glanz's interest in the Ceola Smith Property, they knew that they were purchasing a percentage interest in the entire 70-acre tract, but they did not know at the time the precise percentage of ownership that they were buying. The special warranty deed evidencing the conveyance to petitioners of Glanz's interest in the Ceola Smith Property and the contiguous tracts was recorded on 7 October 1992. White initiated a title search to determine his percentage interest in the Ceola Smith Property, but due to the complexity of ownership by multiple heirs and the costs involved, White suspended the search before getting an answer.

In June 2003, White hired an attorney to try to ascertain the ownership interests in the Ceola Smith Property. Upon studying the tax maps and records, White had discovered the attempted division of the Ceola Smith Property by the four groups of family members. Upon White's request, Day attended a meeting with White and his attorney regarding the ownership interests of the Ceola Smith Property. Day testified she refused to argue about the property interests at the meeting because she had a deed to her parcel and therefore "knew [she] owned it." During the meeting, White made notes listing the names of Ceola's heirs that may have an interest in the Ceola Smith Property for follow-up.

Petitioners initiated the present action by filing a verified petition for partition in Guilford County Superior Court on 30 January 2006. The petition asks that the trial court determine the proportionate interests of the petitioners and the many various respondents and to then partition the property accordingly. On 2 March 2006, respondents Day and her husband and the Whitesides filed a response to the petition for partition. In their response, Day and the Whitesides asserted a counterclaim, alleging that they had acquired all right, title, and interest in 18.69 acres of the Ceola Smith Property by adverse possession under color of title. On 8 February 2008, respondent Braswell filed a response to the petition for partition denying the title of petitioners.

The parties stipulated prior to trial that the family members who executed the reciprocal deeds in 1998 were not the complete and proper heirs to the Ceola Smith Property—only Deloney, Pollard, and Livingston actually owned any interest in the Ceola Smith Property at that time. Prior to executing the reciprocal deeds, the Days and the Smiths had no actual interest in the Ceola Smith Property. Unknown to them at the time the reciprocal deeds were executed, the father of Day and Smith had deeded his interest in the Ceola Smith Property to some of the other family members, thereby eliminating their interest in the Ceola Smith Property.

The matter came on for trial on 4 March 2010 on the sole issue of the claims of respondents Day, the Whitesides, and Braswell that they are the sole owners, by reason of adverse possession under color of title, of three tracts consisting of approximately 38.69 acres of the Ceola Smith Property. Based on the evidence adduced at trial, the trial court entered an order on 21 April 2010 finding that respondents Day, the Whitesides, and Braswell each owned title to their respective parcels by adverse possession under color of title. Petitioners appeal.

II. Interlocutory nature of appeal

[1] The order being appealed in the present case is interlocutory, as it only addresses the counterclaims asserted by respondents Day and the Whitesides, as well as their and respondent Braswell's interests in the subject Ceola Smith Property, leaving for determination the interests of petitioners and the remaining respondents in the subject Ceola Smith Property for partition. An order is interlocutory if "it 'does not dispose of the case, but leaves it for further action for the trial court in order to settle and determine the entire controversy.' " *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 24, 376 S.E.2d 488, 490 (1989) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950)). " 'Generally, there is no right of immediate appeal from interlocutory orders and judgments.' " *Plomaritis v. Plomaritis*, ___ N.C. App. ___, ___, 684 S.E.2d 702, 704 (2009) (quoting *State v. Sanchez*, 175 N.C. App. 214, 215-16, 623 S.E.2d 780, 781 (2005)).

However, there are two circumstances in which a party may appeal an interlocutory order. *Atkins v. Peek*, 193 N.C. App. 606, 609, 668 S.E.2d 63, 65 (2008). "The first exception applies where the order represents a '"final judgment as to one or more but fewer than all of the claims or parties" and the trial court certifies in the judgment that there is no just reason to delay the appeal.' " *Id.* (quoting *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994)). Second, "a party may appeal an interlocutory order where delaying the appeal will irreparably impair a substantial right of the party." *Id.*

Our Supreme Court has stated, "It is usually necessary to resolve the question [of whether a substantial right is affected] in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982) (internal quotation marks and citation omitted). However, this Court has related the general proposition that, "so long as a claim has been finally determined, delaying the appeal of that final determination will ordinarily affect a substantial right if there are overlapping factual issues between the claim determined and any claims which have not yet been determined." *Davidson*, 93 N.C. App. at 26, 376 S.E.2d at 492.

In the present case, the first exception allowing appeal of an interlocutory order does not apply, as the trial court did not certify the order for appeal pursuant to Rule 54(b). However, under the circumstances of this case, we find that delaying the appeal would affect a substantial right of the petitioners. The trial court's order deter-

mines only the rights of certain respondents in the subject property. Going forward, the trial court must now decide the rights of all remaining respondents and of petitioners in the subject property, and then make a partition based on that determination. The rights of the various respondents in the Ceola Smith Property will ultimately affect petitioners' proportionate interest in the property and the resulting partition. As such, the partition hearing will rely on facts found in the order being appealed in the present case. Therefore, there exist overlapping factual issues between the claims being appealed and those left to be determined in petitioners' partition action. Accordingly, we address the merits of the arguments raised by petitioners in this appeal.

III. Standard of review

Where, as here, trial is by judge rather than by jury, "[t]he trial judge acts as both judge and jury and considers and weighs all the *competent* evidence before him. If different inferences may be drawn from the evidence, the trial judge determines which inferences shall be drawn and which shall be rejected." *In re Estate of Trogdon*, 330 N.C. 143, 147-48, 409 S.E.2d 897, 900 (1991) (citation omitted).

> "In a bench trial in which the superior court sits without a jury, the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*."

Hanson v. Legasus of North Carolina, LLC, ___ N.C. App. ___, ___, 695 S.E.2d 499, 501 (2010) (quoting *Hinnant v. Philips*, 184 N.C. App. 241, 245, 645 S.E.2d 867, 870 (2007)).

IV. Effective date of deed for color of title

[2] Petitioners first argue the trial court erred in concluding that respondents obtained color of title to the property at least seven years before the filing of the present action. Petitioners contend the undisputed evidence adduced at trial establishes that the deeds to Day and Livingston, under which Day, the Whitesides, and Braswell claim color of title, were not fully executed nor delivered prior to 1 March 1999, when the Days and the Smiths appeared before the notary. Petitioners maintain that because the deeds to Day and Livingston were not fully executed and delivered prior to 30 January

1999—seven years before the date petitioners commenced the present action—the claims of respondents must fail as a matter of law. We agree.

"In North Carolina, '[t]o acquire title to land by adverse possession, the claimant must show actual, open, hostile, exclusive, and continuous possession of the land claimed for the prescriptive period[.]' " *Jones v. Miles*, 189 N.C. App. 289, 292, 658 S.E.2d 23, 26 (2008) (quoting *Merrick v. Peterson*, 143 N.C. App. 656, 663, 548 S.E.2d 171, 176 (2001)); *see also Federal Paper Board Co. v. Hartsfield*, 87 N.C. App. 667, 671, 362 S.E.2d 169, 171 (1987) (holding that "[t]itle to land may be acquired by adverse possession when there is actual, open, notorious, exclusive, continuous and hostile occupation and possession of the land of another under claim of right or color of title for the entire period required by the statute.") (internal quotation marks and citation omitted)). Ordinarily, adverse possession of privately owned property must be maintained for twenty years in order for the claimant to acquire title to the land. N.C. Gen. Stat. § 1-40 (2009). However, by statute, when the claimant's possession is maintained under an instrument that constitutes "color of title," the prescriptive period is reduced to seven years. N.C. Gen. Stat. § 1-38(a) (2009).

Color of title is bestowed by an instrument that purports to convey title to land but fails to do so:

> "Color of title may be defined to be a writing, upon its face professing to pass title, but which does not do it, either from a want of title in the person making it or the defective mode of conveyance which is used; and it would seem that it must not be so obviously defective that no man of ordinary capacity could be misled by it."

Bond v. Beverly, 152 N.C. 56, 61, 67 S.E. 55, 57 (1910) (quoting *Tate v. Southard*, 10 N.C. 119, 121 (1824)); *see also First-Citizens Bank & Trust Co. v. Parker*, 235 N.C. 326, 332, 69 S.E.2d 841, 845 (1952); *New Covenant Worship Ctr. v. Wright*, 166 N.C. App. 96, 105, 601 S.E.2d 245, 252 (2004). It is well established that "a deed may constitute color of title" to the land described therein. *McManus v. Kluttz*, 165 N.C. App. 564, 568, 599 S.E.2d 438, 443 (2004); *see also Nichols v. York*, 219 N.C. 262, 271, 13 S.E.2d 565, 570 (1941) ("[T]he rule is broadly stated in a very large number of decisions that a deed purporting to convey the land in controversy will give color of title to a possession taken under it, even though it be void."); *Marlowe v.*

Clark, 112 N.C. App. 181, 186, 435 S.E.2d 354, 357 (1993). "When the deed is regular upon its face and purports to convey title to the land in controversy, it constitutes color of title . . . . It is immaterial whether the conveyance actually passes the title. It is sufficient if it appears to do so." *Lofton v. Barber*, 226 N.C. 481, 484, 39 S.E.2d 263, 264 (1946) (emphasis added). " 'Colorable title, then, in appearance is title, but in fact is not[.]' " *Nichols*, 219 N.C. at 271, 13 S.E.2d at 570 (quoting *Neal v. Nelson*, 17 N.C. 393, 23 S.E. 438 (1895) (emphasis added).

Under North Carolina law, when a deed is relied upon as color of title, the seven-year prescriptive period ordinarily does not begin to run until the date the deed is recorded. *Foreman v. Sholl*, 113 N.C. App. 282, 289, 439 S.E.2d 169, 174 (1994). However, "[w]here . . . the adverse claimant and the opposing party derive their title from independent sources, as is the case here, recordation is irrelevant, and the seven-year period begins to run when the adverse claimant obtains color of title and that does not occur until the conveyance, if a deed, is delivered." *Id.* at 290, 439 S.E.2d at 174 (citation omitted). "The date recited in a deed . . . is at least *prima facie* evidence that the instrument was executed and delivered on such date." *Sandlin v. Weaver*, 240 N.C. 703, 706, 83 S.E.2d 806, 808 (1954) (internal quotation marks and citations omitted); *see also Williams v. Board of Education*, 284 N.C. 588, 598, 201 S.E.2d 889, 895 (1974). As such, " '[a] deed is presumed to have been delivered at the time it bears date[.]' " *Williams*, 284 N.C. at 599, 201 S.E.2d at 896 (quoting *Kendrick v. Dellinger*, 117 N.C. 491, 493, 23 S.E. 438, 438 (1895)). "Evidence to the contrary, however, may negate or neutralize this presumption." *Id.* at 598, 201 S.E.2d at 895.

Our Supreme Court has explained that:

> The execution of a deed means the making thereof, and includes all acts which are necessary to give effect thereto.
>
> . . . *The delivery of a deed is the final act of its execution.* It is that which gives it force and effect, and without which, it is a nullity. When a deed is said to be executed, the meaning is, that, *with all the other requisites*, it has been delivered by the one party to, or for, the other.

Turlington v. Neighbors, 222 N.C. 694, 697, 24 S.E.2d 648, 650 (1943) (emphasis added) (internal quotation marks and citations omitted). Our Supreme Court has also held that "there is a delivery of a deed when, signed and sealed, it is put out of the possession of the

maker."[2] *Lynch v. Johnson*, 171 N.C. 611, 613, 89 S.E. 61, 61 (1916) (internal quotation marks and citation omitted). Accordingly, and crucial to this case, delivery of a deed, for purposes of beginning the prescriptive period for adverse possession under color of title, cannot occur until the deed is signed by all of its grantors. Otherwise, the deed is neither fully executed nor "regular upon its face," *Lofton*, 226 N.C. at 484, 39 S.E.2d at 264, and such a deed cannot constitute color of title, as without all the requisite signatures by its grantors, it is "plainly and obviously defective." *Tate*, 10 N.C. at 121.

In the present case, the trial court concluded the deeds to Day and Livingston constitute color of title based on the fact that "the relatives who executed the four reciprocal deeds were not the complete and proper heirs" to the Ceola Smith Property. The evidence shows that certain of the grantors/grantees—the Days and the Smiths—were strangers to the title in that they had no actual interest in the Ceola Smith Property at the time the deeds were executed. In addition, the other grantors/grantees—Livingston, Pollard, and Deloney—only held interests in the Ceola Smith Property as tenants in common with other heirs to the property who did not join in the execution of the reciprocal deeds. Therefore, because the deeds were executed by a group of persons failing to have full and complete title to the property, the deeds fail to actually convey the land as described in the deeds. "A color-of-title situation can arise when the person executing the writing does not actually have title." *Taylor v. Brittain*, 76 N.C. App. 574, 580-81, 334 S.E.2d 242, 246 (1985), *modified and aff'd*, 317 N.C. 146, 343 S.E.2d 536 (1986). However, unless the deeds to Day and Livingston were executed and delivered to them prior to 30 January 1999—seven years before the date the present action was filed—the claims of respondents fail as a matter of law.

Petitioners challenge the trial court's conclusion that the deeds at issue were delivered, and therefore became operative as color of title, on 15 December 1998—the date recited in the deeds. Petitioners contend that the evidence shows the deeds were not signed by all of the grantors until the Smiths and the Days appeared before the notary on 1 March 1999. Therefore, petitioners argue, because delivery of a deed cannot occur before it is signed by its grantors, the deeds could not have been delivered prior to that date and the trial court erred in concluding otherwise.

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2. We note the requirement of a seal by the signatory has since been abrogated by statute. N.C. Gen. Stat. § 39-6.5 (2009).

Here, the trial court's order makes no finding of fact as to the date of delivery of the four reciprocal deeds. Rather, the trial court's order relies on the presumption that a deed is delivered on the date inscribed at the top of the document. In its conclusions of law, the trial court states:

> Sufficient evidence has been presented to establish that [respondents] ha[ve] possessed the property under color of title pursuant to the deed since 15 day of December, 1998, as the face of the deed states. "The date recited in the beginning of a deed is prima facie evidence that [it] was delivered on that date." *Williams v. North Carolina State Board of Education*, 284 N.C. 588, 598; 201 S.E.2d 889 (1974). "A deed is presumed to have been delivered at the time it bears date unless the contrary is satisfactorily shown." *Kendrick v. Dellinger*, 117 N.C. 491, 23 S.E. 438 (1895).

Petitioners note that "[e]vidence to the contrary, however, may negate or neutralize this presumption." Williams, 284 N.C. at 598, 201 S.E.2d at 895. Petitioners contend that because Day admitted that the deeds were not fully executed until 1 March 1999, the presumption on which the trial court relied was "neutralized."

The only evidence, other than the four deeds themselves, before the trial court regarding the execution of the deeds was Day's testimony. Day's testimony was inconsistent regarding the details of the execution of the deeds. On the one hand, Day testified that she signed the deeds on the day she picked them up from the lawyer's office, and then she placed the deeds in the mail for signature by the other relatives. At other times she testified that she, along with her husband John Day and the Smiths, signed the deeds in the presence of the notary, after the deeds were returned to her by mail, having already been signed by the other relatives.

However, Day's testimony unequivocally establishes that her husband John Day and the Smiths—three of the grantors listed on Livingston's deed, and two of the grantors listed on Day's deed—did not sign the deeds until 1 March 1999 when they appeared before the notary. As delivery is "the final act" of execution of a deed, *Neighbors*, 222 N.C. at 697, 24 S.E.2d at 650, the deeds could not have been fully executed and delivered prior to 1 March 1999 because the requisite signatures were not complete until that date. *See Lynch*, 171 N.C. at 611, 89 S.E.2d at 61. Although the Days and the Smiths had no actual interest in the Ceola Smith Property at the time the deeds were executed, the deeds reflected on their face that the signatures of all the

grantors, including the Days and the Smiths, were required for the conveyance. As such, we find that "a person of ordinary capacity, but not skilled in the law," would find the deed defective on its face without those signatures. *Burns v. Stewart*, 162 N.C. 360, 365, 78 S.E. 321, 323 (1913).

Because the uncontroverted evidence shows the date on which the deeds were finally executed by all the grantors was 1 March 1999, the deeds could not operate as color of title until that date. Accordingly, the tolling of the seven-year prescriptive period for adverse possession under color of title did not begin to run until 1 March 1999—less than seven years prior to the bringing of this action by petitioners. As such, respondents' claims of adverse possession under color of title must fail as a matter of law, and the trial court erred in concluding otherwise. The order of the trial court finding that each of the four respondents had acquired title to their respective tracts by adverse possession under color of title must therefore be reversed.

Because we reverse the trial court's order on this issue, we need not address petitioners' remaining arguments.

V. Conclusion

We hold that the evidence presented at trial was sufficient to overcome the presumption that the deeds at issue in the present case were delivered on the date appearing in the deed. The uncontroverted evidence shows that at least three of the seven grantors signed the deeds in the presence of the notary on 1 March 1999. Because a deed cannot be delivered before it is signed by its grantors, the deeds at issue could not have been delivered until 1 March 1999. Accordingly, because respondents have not maintained color of title for at least seven years prior to petitioners instituting the present action, their claims of adverse possession under color of title fail as a matter of law. Accordingly, the trial court's order must be reversed.

Reversed.

Chief Judge MARTIN and Judge McGEE concur.

BEATRIZ BAUMANN-CHACON, PLAINTIFF v. KARSTEN BAUMANN, DEFENDANT

No. COA10-359

(Filed 17 May 2011)

1. Child Custody and Support— parents not yet separated— subject matter jurisdiction

The trial court erred by dismissing claims for child custody and support for lack of subject matter jurisdiction where the parties had not yet separated.

2. Divorce— post-separation support— pre-separation claim— no subject matter jurisdiction The trial court correctly dismissed a claim for post separation spousal support for lack of subject matter jurisdiction where the parties had not yet separated. The relevant statutory language clearly presupposed that the parties had already separated.

Appeal by plaintiff from judgment entered 19 January 2010 by Judge Lori Christian in Wake County District Court. Heard in the Court of Appeals 1 November 2010.

Ellis Family Law, PLLC, by Alyscia G. Ellis, for Plaintiff.

ERVIN, Judge.

Plaintiff Beatriz Baumann-Chacon appeals from a judgment dismissing her claims for child custody, child support, and spousal support on the grounds that the trial court lacked jurisdiction over the subject matter of those claims. After careful consideration of Plaintiff's challenges to the trial court's judgment in light of the record and the applicable law, we find no error in the trial court's decision to dismiss Plaintiff's spousal support claim. On the other hand, we conclude that the trial court's decision to dismiss Plaintiff's claims for child custody and child support on subject matter jurisdiction grounds should be reversed and that this case should be remanded to the trial court for further proceedings not inconsistent with this opinion.

I. Factual Background

Plaintiff and Defendant Karsten Baumann were married on 5 November 1994. Two children were subsequently born of the parties' marriage.

On 29 April 2009, Plaintiff filed a complaint against Defendant in the Wake County District Court seeking temporary and permanent custody of the parties' children, temporary and permanent child support, postseparation support and alimony, and attorney's fees.[1] As of the filing of Plaintiff's complaint, the parties had not separated. In her complaint, Plaintiff alleged that she "desire[d] to separate from [Defendant], but believes it is in the parties' and minor children's best interest that the issues set forth herein be resolved before said separation occurs[.]" On 7 July 2009, Defendant filed an answer in which he responded to the material allegations of Plaintiff's complaint; asserted a number of affirmative defenses; and counterclaimed for custody and child support.[2]

The issues raised by the parties' pleadings came on for hearing before the trial court at the 9 September 2009 session of Wake County District Court. After hearing the parties' testimony and the arguments of counsel, the trial court entered an order on 19 January 2010 in which it made the following findings of facts:

1. Both parties are residents of Wake County, North Carolina, and have so resided for at least six (6) months prior to the commencement of this action.

2. The parties were married on November 5, 1994 and were currently married and still residing together with their minor children in the marital home on the date of the hearing (September 9, 2009).

3. Two children were born of the marriage[.]

4. Neither party filed a claim for divorce from bed and board in the instant action.

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1. Plaintiff's claim for attorney's fees rests on N.C. Gen. Stat. §§ 50-13.6 and 50-16.4, which authorize such relief in the event that a litigant successfully prosecutes child support, child custody, or spousal support claims and meets any other applicable conditions for such an award. As a result, we need not give separate consideration to the viability of Plaintiff's claim for attorney's fees, which rises or falls with her claims for child custody, child support, and spousal support.

2. Defendant did not raise a subject matter jurisdictional challenge to any of Plaintiff's claims in his answer. However, since the absence of subject matter jurisdiction is not a waivable defense, *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (stating that "[s]ubject matter jurisdiction 'cannot be conferred upon a court by consent, waiver or estoppel,' " so that a " 'failure to . . . object to the [lack of] jurisdiction is immaterial' ") (quoting *In re Sauls*, 270 N.C. 180, 187, 154 S.E.2d 327, 333 (1967), we are required to address Plaintiff's claims on the merits despite the fact that Defendant did not raise a subject matter jurisdiction defense in the court below.

5. Plaintiff made no written allegations of marital misconduct on the part of Defendant in her complaint. Her financial affidavit listed her current expenses and her "anticipated" expenses, which she testified were estimates of the expenses she would incur after moving out of the marital residence.

6. Plaintiff desires to separate from Defendant and requested that the Court enter temporary orders on child custody, child support and post separation support prior to her leaving the residence and obtaining alternate housing.

7. Plaintiff has not asked the Court to remove the Defendant from the marital home.

8. Plaintiff testified that [she] did not wish to vacate the marital home herself without having a ruling on temporary child custody before she moved out.

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

1. This Court has personal jurisdiction over the parties to this action; however, this Court does not have subject matter jurisdiction in the instant action under the circumstances existing at the time this matter was called for trial on September 9, 2009 because there was no evidence of a physical separation and there was no pending claim by Plaintiff for divorce from bed and board or possession of the marital residence.

2. The Plaintiff's complaint should be dismissed for lack of subject matter jurisdiction.

Plaintiff noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

On appeal, Plaintiff argues that the trial court erred by dismissing her claims for child custody, child support, and postseparation support on subject matter jurisdiction grounds. We review the trial court's decision utilizing a *de novo* standard of review. *Cooke v. Faulkner*, 137 N.C. App. 755, 757, 529 S.E.2d 512, 513-14 (2000) (stating that an "appellate court reviews *de novo* an order of the trial court allowing a motion to dismiss for lack of subject matter jurisdiction, but the trial court's findings of fact are binding on appeal if supported by competent evidence") (citation omitted). After reviewing the trial court's order in a manner consistent with the applicable standard of

review, we conclude that Plaintiff's challenge to the dismissal of her child custody and child support claims has merit and that the trial court correctly dismissed her spousal support claim. As a result, we affirm the trial court's judgment in part, reverse the trial court's judgment in part, and remand this case to the Wake County District Court for further proceedings not inconsistent with this opinion.

A. Subject Matter Jurisdiction

A court must, in order to properly decide a case, have jurisdiction over the type of case under consideration. *Boyles v. Boyles*, 308 N.C. 488, 491, 302 S.E.2d 790, 793 (1983) (explaining that subject matter jurisdiction is "the power to pass on the merits of the case") (citations omitted). *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956) (stating that " 'subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act' ") (quoting *Stafford v. Gallops*, 123 N.C. 19, 21-22, 31 S.E. 265, 266 (1898)). The General Assembly is, "within constitutional limitations, [empowered to] fix and circumscribe the jurisdiction of the courts of this State." *In re T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790 (quoting *Bullington v. Angel*, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941)). As a result, our decision in this case hinges upon a proper construction of the statutory provisions governing claims for child custody, child support, and spousal support.

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), *cert. denied*, 526 U.S. 1098, 143 L. Ed. 2d 671, 119 S. Ct. 1576 (1999)). "The best indicia of that intent are the language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted). "Individual expressions must be construed as part of the composite whole and be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." *State v. Tew*, 326 N.C. 732, 739, 392 S.E.2d 603, 607 (1990) (citing *In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978)). "The Court may also consider the policy objectives prompting passage of the statute and should avoid a construction which defeats or impairs the purpose of the statute." *O & M Indus. v. Smith Eng'r. Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006) (citing *Elec. Supply Co. of Durham v. Swain Electrical Co.*,

328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991)). Thus, we will attempt to construe the relevant statutory provisions utilizing these well-established rules of construction.

B. Child Custody and Child Support

[1] According to N.C. Gen. Stat. § 50-13.1(a), "[a]ny parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child[.]" Similarly, N.C. Gen. Stat. § 50-13.4(a) provides that "[a]ny parent, or any person, agency, organization or institution having custody of a minor child, or bringing an action or proceeding for the custody of such child, or a minor child by his guardian may institute an action for the support of such child[.]" N.C. Gen. Stat. § 50-13.5(a) delineates the proper "procedure [for use] in actions for custody and support of minor children[,]" so we will consider Plaintiff's challenge to the trial court's ruling concerning her child custody and child support claims in combination.

An action for custody or support of children may be brought as "a civil action[,]" separate and apart from an action for "annulment . . .[,] divorce, either absolute or from bed and board, or . . . alimony without divorce." N.C. Gen. Stat. § 50-13.5(b). In addition, N.C. Gen. Stat. § 50-13.5(c) specifically provides that "[t]he jurisdiction of the courts of this State to enter orders providing for the support of a minor child shall be as in actions or proceedings for the payment of money or the transfer of property," N.C. Gen. Stat. § 50-13.5(c)(1), and that "[t]he courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child under [N.C. Gen. Stat. §§ 50A-201, 50A-202, and 50A-204]", none of which have any bearing on the exact issue before us in this case. N.C. Gen. Stat. § 50-13.5(c)(2). Finally, the General Assembly has clearly stated that "[o]rders for custody and support of minor children may be entered when the matter is before the court as provided by this section, irrespective of the rights of the wife and the husband as between themselves in an action for annulment or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce." N.C. Gen. Stat. § 50-13.5(g).

Based upon our examination of the relevant provisions of N.C. Gen. Stat. §§ 50-13.1 and 50-13.5, we are unable to agree with the trial court's conclusion that, absent "physical separation . . . [or a claim for] divorce from bed and board or possession of the marital residence[,]" courts lack subject matter jurisdiction over claims for custody or child support. Aside from our inability to identify any support

for such an interpretation in the relevant statutory language, our conclusion[3] that the trial court's decision was in error is reinforced by the history of the applicable statutory provisions and the reasons underlying their enactment.

Prior to its repeal and replacement with new statutory language in 1967, N.C. Gen. Stat. § 50-13 specifically provided that custody-related issues could be litigated in instances involving either a divorce or separation. 1967 N.C. Sess. Law ch. 1153, § 1. The General Assembly's decisions to repeal this statutory limitation on the availability of child custody and child support actions and to refrain from including similar language in the replacement legislation strongly suggests that the General Assembly did not intend to preclude the litigation of child custody and child support issues outside the context of physical separation or the institution of an action for divorce from bed and board, particularly given the language contained in N.C. Gen. Stat. § 50-13.5(b) stating that custody and support claims may be maintained in "a civil action" without the necessity for joinder with other claims typically asserted at the time that a party seeks the dissolution of the marital relationship and the language contained in N.C. Gen. Stat. § 50-13.5(g) indicating the irrelevance "of the rights of the wife and the husband as between themselves" to a trial court's ability to enter orders addressing child custody and child support claims. Thus, aside from the absence of any language in the relevant statutory provisions that supports the trial court's decision, nothing in what we have been able to discern concerning the General Assembly's intent suggests the existence of a jurisdictional limitation on the availability of child custody and child support actions like that upon which the trial court relied.

The fact that Plaintiff and Defendant continued to live within the same residence at the time of the hearing before the trial court does not require us to reach a different result. According to N.C. Gen. Stat. § 50-13.4(e), a trial court is authorized to address possession of the marital home in awarding child support without any indication that a divorce, either absolute or from bed and board, or separation is a necessary precondition for such an award. N.C. Gen. Stat. § 50-13.4(e) (stating that "[p]ayment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or

3. Our reading of the relevant statutory provisions is consistent with our decision in *Freeman v. Freeman*, 103 N.C. App. 801, 803, 407 S.E.2d 262, 263 (1991), in which we stated that "N.C. Gen. Stat. § 50-13.4(a) does not specifically require a judicial determination of custody before a person or agency can bring an action for support." *Id.* (citing *Craig v. Kelley*, 89 N.C. App. 458, 366 S.E.2d 249 (1988)).

possession of personal property of any interest therein, or a security interest in or possession of real property, as the court may order"); *see also Martin v. Martin*, 35 N.C. App. 610, 615, 242 S.E.2d 393, 396-97 (stating that "[w]e have previously rejected the contention that our courts may not award possession of real estate as a part of child support" on the theory that " 'shelter is a necessary component of a child's needs and in many instances it is more feasible for a parent to provide actual shelter as part of his child support obligations than it is for the parent to provide monetary payments to obtain shelter' ") (citing *Arnold v. Arnold*, 30 N.C. App. 683, 685, 228 S.E.2d 48, 50 (1976), and quoting *Boulware v. Boulware*, 23 N.C. App. 102, 103, 208 S.E.2d 239, 240-41 (1974)), *cert. denied*, 295 N.C. 261, 245 S.E.2d 778 (1978); Suzanne Reynolds, 1 *Lee's North Carolina Family Law* § 6.23(A) (5th ed. 1993) (stating that "a court may order possession of real property as a payment of child support or as a way to effectuate an order for custody"). In light of the absence of any indication in the relevant statutory language that the parents must have physically separated or initiated an action for divorce from bed and board as a precondition for the entry of an order awarding the marital residence as a component of child support, we find further evidence that the General Assembly did not intend to require physical separation or the initiation of an action for divorce from bed and board as a precondition for the maintenance of claims for child custody and child support.

Finally, the policy justifications for child custody and child support awards militate in favor of a determination that relief is available pursuant to N.C. Gen. Stat. §§ 50-13.1 and 50-13.4 even if the parties are not living separate and apart and have not initiated an action for

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4. In *Harper v. Harper*, 50 N.C. App. 394, 398, 273 S.E.2d 731, 734 (1981), this Court addressed a trial court's ability, "in the absence of allegations . . . that would also support an award of alimony or divorce[,]" to permit one spouse to "maintain an action to evict the other, get sole custody of the children and obtain an order for child support," essentially declining to allow "what appear[ed] to be for most practical purposes, a 'no fault' divorce from bed and board.' " In reaching this conclusion, we stated that, while "[t]he law cannot require [the wife] to live with her husband, . . . it will not allow her to evict him." *Harper*, 50 N.C. App. at 400, 273 S.E.2d at 735. We do not believe that our decision in *Harper* stands as an insurmountable obstacle to the relief requested by Plaintiff in this case given that Plaintiff has not sought to "evict" Defendant and is, as a result of our decision here, limited to claims for child custody and child support, which may or may not be successful depending on the facts that are ultimately established when Plaintiff's claim is heard and decided on the merits. In addition, given that the General Assembly amended N.C. Gen. Stat. § 50-13.4(e) to explicitly allow a trial court to award possession of the marital residence as an element of child support after our decision in *Harper*, it is clear that the General Assembly reiterated the paramount importance of ensuring adequate support for minor children shortly after *Harper* was decided.

divorce from bed and board. In essence, the purpose of actions for child custody and child support is, consistently with the law's overriding interest in protecting minor children, to assure that the needs of such children are adequately met. *See Price v. Howard*, 346 N.C. 68, 72, 484 S.E.2d 528, 530 (1997) (discussing the "state's well-established interest in protecting the welfare of children"). Although there is no question but that, in most instances, the entry of a formal order addressing child custody and child support issues would be unnecessary in the event that the children's parents are living together and providing adequate support for their children, we are able to foresee situations, such as the one at issue here, where that might not necessarily be the case. In particular, there might be merit in having child custody and child support issues adjudicated prior to separation in order to ensure that the children of the separating parents are properly addressed. As a result, particularly given the general principle that "[a] court having jurisdiction of children located within the state surely has the inherent authority to protect those children and make such temporary orders as their best interests may require[,]" *MacKenzie v. MacKenzie*, 21 N.C. App. 403, 407, 204 S.E.2d 561, 563 (1974), we find that child custody and child support claims are not precluded by the fact that Plaintiff and Defendant have neither physically separated nor asserted divorce from bed and board claims against each other and that the trial court erred by dismissing Plaintiff's child custody and child support claims on subject matter jurisdiction grounds.

C. Spousal Support

[2] Spousal support claims, whether in the form of claims for postseparation support, alimony, or both, are readily distinguishable from child custody and child support claims in that they relate to the economic needs of dependent spouses rather than the custody and care of minor children. For that reason, we reach a different result with respect to the issue of the necessity for a physical separation or the initiation of an action for divorce from bed and board as a prerequisite for the maintenance of a spousal support claim and, for that and other reasons, affirm the trial court's decision to dismiss Plaintiff's spousal support claim on jurisdictional grounds.

The General Assembly has defined postseparation support as "spousal support to be paid until the earlier of any of the following:

a. The date specified in the order for postseparation support.

b. The entry of an order awarding or denying alimony.

c. The dismissal of the alimony claim.

d. The entry of a judgment of absolute divorce if no claim of alimony is pending at the time of entry of the judgment of absolute divorce.

e. Termination of postseparation support as provided in [N.C. Gen. Stat. §] 50-16.9(b). Postseparation support may be ordered in an action for divorce, whether absolute or from bed and board, for annulment, or for alimony without divorce. However, if postseparation support is ordered at the time of the entry of a judgment of absolute divorce, a claim for alimony must be pending at the time of the entry of the judgment of divorce.

N.C. Gen. Stat. § 50-16.1A(4). Alimony is defined as "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(1). As a result of the fact that Plaintiff's appellate challenge to the trial court's order focuses exclusively on the dismissal of her claim for postseparation support, we limit our discussion to a determination of whether "[a] trial court [has] subject matter jurisdiction to award post separation support pre-date of separation of the parties."

N.C. Gen. Stat. § 50-16.2A provides that:

> (a) In an action brought pursuant to Chapter 50 of the General Statutes, either party may move for postseparation support. The verified pleading, verified motion, or affidavit of the moving party shall set forth the factual basis for the relief requested.
>
> (b) In ordering postseparation support, the court shall 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.
>
> (c) Except when subsection (d) of this section applies, a dependent spouse is entitled to an award of postseparation

> support if, based on consideration of the factors specified in subsection (b) of this section, the court finds that the resources of the dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay.
>
> (d) At a hearing on postseparation support, the judge shall consider marital misconduct by the dependent spouse occurring prior to or on the date of separation in deciding whether to award postseparation support and in deciding the amount of postseparation support. When the judge considers these acts by the dependent spouse, the judge shall also consider any marital misconduct by the supporting spouse in deciding whether to award postseparation support and in deciding the amount of postseparation support.
>
> (e) Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation.

A careful reading of this statutory language reveals the presence of no less than three references to the "date of separation." Based upon that fact, it appears to us that the General Assembly has not contemplated the availability of postseparation support in the event that the parties have not physically separated. As a result, despite Plaintiff's observation that the statute "makes no reference to any required timing for the filing of the [postseparation support] claim," we believe that the occurrence of a separation is presumed in the context of postseparation support claims.

The purpose of postseparation support is to ensure "subsistence for the [dependent spouse] during the period of separation." *Hester v. Hester*, 239 N.C. 97, 100, 79 S.E.2d 248, 251 (1953) (citing *Anderson v. Anderson*, 183 N.C. 139, 110 S.E. 863 (1922)). As a result, whenever there is a "reconciliation and resumption of marital relations in the home, the necessity for [such support] ceases[,]" so that "an allowance for temporary alimony falls[5]" upon the "reconciliation between husband and wife who have been living apart." *Id.* at 100, 79 S.E.2d at 250-51 (citations omitted). Although we understand the concerns that motivate Plaintiff to seek an award of spousal support

5. The purpose served at the time of our decision in *Hester* is now served by post-separation support.

before separating from Defendant, we cannot overlook the fact that the relevant statutory language clearly presupposes that the parties have already separated. Had the General Assembly intended that claims lodged pursuant to N.C. Gen. Stat. § 50-16.2A could be litigated and decided prior to separation, it would not have made so many references to the parties' separation in the relevant statutory language. As a result, we are unable to determine that the General Assembly authorized the maintenance of a claim for postseparation support under such circumstances. Thus, we conclude that the trial court correctly dismissed Plaintiff's claim for postseparation support on subject matter jurisdiction grounds.

III. Conclusion

Therefore, for the reasons set forth above, we conclude that the trial court correctly dismissed Plaintiff's claim for postseparation support. However, we also conclude that the trial court erred by dismissing Plaintiff's claims for child custody and child support. As a result, we affirm the portion of the trial court's order that dismissed Plaintiff's claim for spousal support, reverse the trial court's order to the extent that it dismissed Plaintiff's claim for child custody and child support, and remand this case to the trial court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Chief Judge MARTIN and Judge McGEE concur.

HIGH POINT BANK AND TRUST COMPANY, AS EXECUTOR OF THE ESTATE OF ELIZABETH M. SIMMONS, PLAINTIFF v. SAPONA MANUFACTURING COMPANY, INC., ACME-MCCRARY CORPORATION, RANDOLPH OIL COMPANY, C.W. MCCRARY, JR., C. WALKER MCCRARY, III, W.H. REDDING, JR. A/K/A WILLIAM H. REDDING, JR., S. STEELE REDDING, JOHN O.H. TOLEDANO, JOHN O.H. TOLEDANO, JR., ROBERT C. SHAFFNER, BRUCE T. PATRAM, JOHNNY R. KNOWLES A/K/A JOHNNY R. KNOWLES, SR., DEAN F. LAIL, VIRGINIA R. WEILER, JAMES W. BROWN JR., DONNIE R. WHITE A/K/A DONALD R. WHITE, DIANE L. DONAHUE, LARRY K. SMALL, LARRY D. ELMORE AND M. GIL FRYE A/K/A MICHAEL G. FRYE, DEFENDANTS

No. COA10-1369

(Filed 17 May 2011)

Corporations— dissolution—request for purchase of shares at fair market value—reasonable expectation analysis

The trial court did not err by granting summary judgment in favor of defendant corporations on plaintiff's claims requesting dissolution of the corporations, or alternatively, that the corporations purchase decedent's shares at fair market value. Decedent did not possess an enforceable right or interest based upon a reasonable expectation shared by all shareholders that her ownership in the corporations would be redeemed at fair market value upon her death.

Appeal by plaintiff from order and opinion entered 22 June 2010 by Judge Ben F. Tennille in Randolph County Superior Court. Heard in the Court of Appeals 22 March 2011.

Roberson Haworth & Reese, P.L.L.C., by Robert A. Brinson, Thomas F. Foster, and Christopher C. Finan, for plaintiff-appellant.

Ellis & Winters, LLP, by J. Donald Cowan, Jr., and Schell Bray Aycock Abel & Livingston, P.L.L.C., by Doris R. Bray, for defendants-appellees.

HUNTER, Robert C., Judge.

High Point Bank and Trust Company ("plaintiff"), as executor of the estate of Elizabeth M. Simmons ("Mrs. Simmons"), appeals from the trial court's order and opinion granting Sapona Manufacturing Company ("Sapona"), Acme-McCrary Corporation ("Acme"), and Randolph Oil Company's ("Randolph") (collectively "the defendant

corporations" or "defendants") motion for summary judgment.[1] The trial court determined that no material issue of fact exists and that plaintiff's claim that defendants were required to purchase Mrs. Simmons' shares in the defendant corporations after her death was unreasonable as a matter of law. After careful review, we affirm.

Background

Sapona, Acme, and Randolph are closely held corporations that are managed and controlled by the same, or substantially the same, individuals. Each corporation has its principal place of business in Randolph County, North Carolina. Sapona, which was founded in the 1800's, was purchased in 1916 by D.B. McCrary, T.H. Redding, and W.J. Armfield, Jr. Sapona produces and supplies natural and synthetic yarn, including textured nylon and covered spandex. The corporation has approximately 200 employees and 51 shareholders. Acme, which has approximately 892 employees and 81 shareholders, was formed by D.B. McCrary and T.H. Redding in 1909. The corporation manufacturers hosiery and seamless apparel and is supplied with yarn-based products from Sapona. Acme and Sapona also share health insurance, accounting, and personnel services. Randolph was founded in 1934 by C.W. McCrary, Sr., the son of D.B. McCrary. Randolph has approximately 49 employees and 25 shareholders and is in the business of selling fuel oil, gasoline, and LP gas at wholesale prices to various retailers and convenience stores.

Mrs. Simmons is the daughter of C.W. McCrary, Sr. and the granddaughter of D.B. McCrary. She inherited her shares in the defendant corporations from her parents. At the time of her death in 2004, Mrs. Simmons owned approximately 15% of Sapona (20,590 shares), 11% of Acme (14,449 shares), and 9% of Randolph (815 shares). At the time this action was initiated, plaintiff held these shares in trust for the benefit of Mrs. Simmons' estate. It does not appear that there is a market for these shares or any of the shares held by a minority shareholder.

After Mrs. Simmons' death, plaintiff sent letters to defendants requesting that they redeem the shares that were held in trust at fair market value. Sapona and Acme responded, stating: "At this time our company is not redeeming shares or buying back stock. It has been many years since we have redeemed shares; and at this time, we have no plans to change our position." Randolph offered to redeem its

1. The members of the Board of Directors of each corporation are also named defendants in this action.

shares for $60.00 per share.[2] The record indicates that other individual shareholders from all three corporations made offers to purchase the shares; however, plaintiff did not accept those offers because it deemed them to be below fair market value.[3]

On 8 April 2008, plaintiff filed a complaint requesting dissolution of the defendant corporations or, alternatively, that defendants purchase Mrs. Simmons' shares at fair market value. Plaintiff alleged that defendants' refusal to purchase the shares contravened Mrs. Simmons' reasonable expectation that her shares would be purchased after her death. Plaintiff contemporaneously filed a Notice of Designation of Action as Mandatory Complex Business Case. On 28 April 2008, this matter was designated a mandatory complex business case by order of the Chief Justice of the North Carolina Supreme Court and later assigned to Chief Special Superior Court Judge Ben F. Tenille.

After extensive discovery, all parties moved for summary judgment. On 22 June 2010, the trial court issued an order and opinion, granting defendants' motion for summary judgment and denying plaintiff's motion for summary judgment. The trial court reasoned that "the pertinent and material facts are undisputed" and that "Mrs. Simmons did not possess an enforceable right or interest based upon a *reasonable* expectation (shared by *all* shareholders) that her ownership in the Defendant Corporations would be redeemed at fair [market] value upon her death." Plaintiff timely appealed to this Court.

Standard of Review

"The standard of review on appeal [from] summary judgment is whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. The question is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is a genuine issue as to any material fact." *Sellers v. Morton*, 191 N.C. App. 75, 81, 661 S.E.2d 915, 920-21 (2008) (internal citations and quo-

2. As revealed in discovery, Randolph was serving as a conduit for another shareholder to purchase those shares. Randolph has never offered to purchase shares for its own account.

3. Plaintiff hired George B. Hawkins ("Mr. Hawkins") of Barrister Financial, Inc. to conduct an independent appraisal of the fair market value of the shares held by plaintiff in trust. Mr. Hawkins determined that the Acme shares had a fair market value of $23.97 per share (a total of $346,343.00 for 14,449 shares); the Sapona shares had a fair market value of $149.37 per share (a total of $3,129,302.00 for 20,590 shares); and the Randolph shares had a fair market value of $137.90 per share (a total of $112,389.00 for 815 shares).

tation marks omitted). "The burden is upon the moving party to show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *McGuire v. Draughon*, 170 N.C. App. 422, 424, 612 S.E.2d 428, 430 (2005) (internal citation omitted). 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." *Collingwood v. General Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). "All facts asserted by the [nonmoving] party are taken as true and their inferences must be viewed in the light most favorable to that party." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal citations omitted). On appeal, this Court reviews an order granting summary judgment *de novo*. *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006).

Discussion

Plaintiff argues that there are genuine issues of material fact and defendants are, therefore, not entitled to judgment as a matter of law. Alternatively, plaintiff argues that summary judgment should have been entered in its favor because the facts establish that Mrs. Simmons had a reasonable expectation that defendants would purchase her shares after her death.

Plaintiff devotes a significant portion of its brief to arguing that the trial court improperly weighed the evidence in its extensive findings of fact, which signifies that material issues of fact exist, and, therefore, this case should not have been decided at summary judgment. Upon review of the entire order, it is clear that the trial court considered the undisputed facts and determined as a matter of law that Mrs. Simmons did not have a reasonable expectation that her shares would be purchased after her death. Although the trial court made some inferences based on these facts, the trial court clearly set out that "[t]he pertinent and material facts are undisputed." *See Capps v. City of Raleigh*, 35 N.C. App. 290, 292, 241 S.E.2d 527, 529 (1978) ("Granted, in rare situations it can be helpful for the trial court to set out the *undisputed* facts which form the basis for [its] judgment. When that appears helpful or necessary, the court should let the judgment show that the facts set out therein are the undisputed facts."). The inferences drawn by the trial court demonstrate the trial court's application of the undisputed facts to the essential legal analysis. Moreover, this Court reviews summary judgment *de novo*, *McCutchen*, 360 N.C. at 285, 624 S.E.2d at 625; therefore, regardless of the trial court's findings of fact, it is the task of this Court to determine anew whether there are material issues of fact that would pre-

clude entry of summary judgment for defendants. We hold that there is not a genuine issue of material fact in this case. We now address whether the undisputed facts support the trial court's entry of summary judgment in favor of defendants.

Plaintiff in this case seeks a dissolution of the defendant corporations pursuant to N.C. Gen. Stat. § 55-14-30(2)(ii) (2009) (emphasis added), which states that "[t]he superior court may dissolve a corporation . . . [i]n a proceeding by a shareholder if it is established that . . . liquidation is reasonably necessary *for the protection of the rights or interests of the complaining shareholder*[.]" However, N.C. Gen. Stat. § 55-14-31(d) (2009) mandates that if the trial court determines that dissolution is appropriate, "the court shall not order dissolution if . . . the corporation elects to purchase the shares of the complaining shareholder at their fair value, as determined in accordance with such procedures as the court may provide." Accordingly, the trial court must first establish if dissolution is reasonably necessary. I*d.* If dissolution is deemed to be necessary, then the corporations may avoid dissolution by purchasing the shares at issue. *Id.*

"[B]efore it can be determined whether, in any given case, it has been established that liquidation is reasonably necessary to protect the complaining shareholder's rights or interest[s], the particular rights or interests of the complaining shareholder must be articulated." *Meiselman v. Meiselman*, 309 N.C. 279, 298, 307 S.E.2d 551, 562 (1983) (internal quotation marks omitted). The complaining shareholder has the burden of establishing that his or her rights or interests are being contravened. *Id.* at 297, 307 S.E.2d at 562. The *Meiselman* Court set forth the following "expectations analysis" to ascertain whether liquidation of the corporation is reasonably necessary to protect the rights of the complaining shareholder:

> For plaintiff to obtain relief under the expectations[] analysis, he must prove that (1) he had one or more substantial reasonable expectations known or assumed by the other participants; (2) the expectation has been frustrated; (3) the frustration was without fault of plaintiff and was in large part beyond his control; and (4) under all of the circumstances of the case plaintiff is entitled to some form of equitable relief.

Id. at 301, 307 S.E.2d at 564. In determining the first prong of the *Meiselman* test, the Supreme Court provided some guidance:

> [A] complaining shareholder's rights or interests in a close corporation include the reasonable expectations the complaining

> shareholder has in the corporation. These reasonable expectations are to be ascertained by examining the entire history of the participants' relationship. That history will include the reasonable expectations created at the inception of the participants' relationship; those reasonable expectations as altered over time; and the reasonable expectations which develop as the participants engage in a course of dealing in conducting the affairs of the corporation. The interests and views of the other participants must be considered in determining reasonable expectations. *The key is reasonable. In order for plaintiff's expectations to be reasonable, they must be known to or assumed by the other shareholders and concurred in by them. Privately held expectations which are not made known to the other participants are not reasonable.* Only expectations embodied in understandings, express or implied, among the participants should be recognized by the court.

Id. at 298, 307 S.E.2d at 563 (emphasis added) (internal quotation marks omitted).

Consequently, plaintiff in the case at bar must show that Mrs. Simmons had more than a privately held expectation that her shares would be purchased after her death at fair market value by defendants. Mrs. Simmons' expectation "must be known to or assumed by the other shareholders and concurred in by them." *Id.* The trial court aptly stated:

> Plaintiff asserts a right to tender the shares of Mrs. Simmons owned in each of the Defendant Corporations. If such a right exists, it needs protection because the Defendant Corporations have refused to purchase the shares that Mrs. Simmons owned. Thus, the central question is whether a buyout at fair [market] value is an enforceable right or interest under *Meiselman*.

The trial court decided this matter exclusively on the first prong of the *Meiselman* test and determined that the undisputed facts establish that Mrs. Simmons' expectation was not reasonable as a matter of law, and, therefore, plaintiff does not currently have an enforceable right of redemption on behalf of Mrs. Simmons' estate.[4] We agree.

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4. Defendants in this case argued before the trial court that *Meiselman* should only apply to corporations with 10 shareholders or less. The trial court engaged in a thorough analysis concerning the applicability of the *Meiselman* test to the facts of this case. The trial court acknowledged that "[n]one of the underlying factors which drove

The undisputed facts that plaintiff relies on to establish that Mrs. Simmons' expectation was reasonable are: (1) Acme and Sapona previously purchased the shares of a deceased shareholder, Thomas Redding ("Mr. Redding"); (2) in 1997, Acme and Sapona made a tender offer to all shareholders giving them the opportunity to sell some of their shares back to the defendant corporations; (3) Sapona made the same tender offer again in 2000; and (4) Mrs. Simmons wanted the proceeds of the purchased shares to benefit her adult son, Bo, and she expressed her belief to the trust officer in charge of her estate planning, Ms. Elizabeth Allen ("Ms. Allen"), that selling her shares after her death for that purpose "wouldn't be a problem."

In 1997 Mr. Redding, who was an employee, officer, and director of Acme, died at the age of 40. After examining their respective financial conditions, Acme and Sapona offered to purchase Mr. Redding's shares that were held in trust.[5] There is no evidence that the Redding family expected the shares to be redeemed; rather, it appears from the record that the offer was made due to Mr. Redding's age, longstanding employment, and the fact that he left behind a family with young children. This purchase was the only time that a deceased shareholder's shares were purchased by Acme and Sapona after the shareholder's death. This isolated event does not create a precedent that would give rise to a reasonable expectation amongst the shareholders, including Mrs. Simmons, that upon a shareholder's death, Acme and Sapona will purchase the deceased shareholder's shares.

In 1997, soon after the death of Mr. Redding, Acme and Sapona gave its shareholders an opportunity to sell their shares to the corpo-

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the decision in *Meiselman* are clearly found in this case." Most notably, *Meiselman* and its progeny involved a small number of shareholders where antagonistic relationships and dominance by a controlling majority shareholder are more likely to occur than in a corporation where there are many shareholders and the corporation is run in a manner similar to that of a publicly held corporation. *See*, *e.g.*, *Meiselman*, 309 N.C. at 282, 307 S.E.2d at 554 (involving two shareholders); *Lowder v. All Star Mills*, *Inc.*, 75 N.C. App. 233, 235-36, 330 S.E.2d 649, 651-52 (1985) (involving four shareholders in one corporation and five shareholders in another corporation); *Foster v. Foster Farms*, *Inc.*, 112 N.C. App. 700, 702, 436 S.E.2d 843, 845 (1993) (involving two shareholders). Additionally, as the trial court pointed out, the "number, composition, and rights and interests of the non-complaining shareholders" are important considerations when contemplating dissolution. For example, the effect of dissolution on the remaining shareholders will undoubtedly be different in a corporation with many shareholders versus a corporation with only a few shareholders. The trial court determined that "it is conceivable that *Meiselman* could apply to a business with more than a handful of shareholders." Consequently, while *Meiselman* is distinguishable, the trial court applied the test to the present case.

5. Randolph did not purchase any shares from Mr. Redding's estate.

rations. The letters from both corporations stated that "[b]ecause there is no market for the Company's stock, the Company's Board of Directors believes it appropriate that shareholders be given the opportunity to liquidate their investment from time to time."[6] In 2000, using the same rationale as stated in the 1997 letters, Sapona once again gave its shareholders the opportunity to redeem their shares in the corporation. Plaintiff claims that since all shareholders received the 1997 and 2000 letters, they were all under the same assumption that Acme and Sapona were willing to redeem their shares since there is no market for them. Plaintiff's argument is without merit. The letters do not support plaintiff's claim that a shareholder can expect that her shares will be purchased after her death at fair market value. To the contrary, the letters establish a precedent that the corporation will "from time to time" offer to purchase shares up to a certain amount and at a specified price. Moreover, the letters make no reference to estates or deceased shareholders and make no promises to purchase shares at any other time except when this type of limited offer is made.

As to Mrs. Simmons' statement to Ms. Allen that redeeming her shares after her death "wouldn't be a problem," we fail to see how this statement demonstrates anything other than her privately held expectation that defendants would redeem her shares. Mrs. Simmons did not provide any additional information to Ms. Allen that would indicate that any other shareholder was aware of her expectation. Ms. Allen testified that plaintiff has no information that any officer, director, or shareholder of any of the defendant corporations knew that Mrs. Simmons expected the corporations to purchase her shares after her death. In other words, there is no evidence that Mrs. Simmons ever relayed her subjective expectation to any member of the defendant corporations. Moreover, Mrs. Simmons never inquired as to the circumstances under which her shares would be purchased as she engaged in her estate planning.

Plaintiff cites *Royals v. Piedmont Electric Repair Co.*, 137 N.C. App. 700, 529 S.E.2d 515 (2000), and argues that, like the plaintiff in *Royals*, Mrs. Simmons had a reasonable expectation of receiving fair market value for her shares. This case does not support plaintiff's argument. In *Royals*, the deceased plaintiff had been actively involved in the corporation and had a reasonable expectation that he would receive "some sort of fair value for his shares." *Id.* at 706, 529 S.E.2d at 519. This expectation was known and concurred in by the

6. Randolph did not send a letter to its shareholders offering to purchase their shares.

other shareholders. *Id.* The plaintiff originally expected the redemption to occur at a bargain price supplemented by a subsidized compensation at retirement; however, when the arrangement was modified to eliminate the compensation component, the parties' expectations changed and the plaintiff had a reasonable expectation that his shares would be redeemed at fair market value. *Id.* at 706-07, 529 S.E.2d at 519. In the present case, there is no evidence that Mrs. Simmons' expectation was known, shared, or concurred in by any other shareholder. No other shareholder testified in this matter that he or she had the same expectation as Mrs. Simmons that his or her shares would be purchased after death. Moreover, the undisputed evidence shows that Mrs. Simmons, unlike the plaintiff in *Royals*, was never involved in the day-to-day operations of any of the defendant corporations and it does not appear that she attended the regular shareholder meetings or attempted to take an active role in the management of the defendant corporations.

In sum, while the undisputed facts may demonstrate a subjective expectation in the mind of Mrs. Simmons that her shares would be purchased from her estate after her death, they do not establish that the expectation was known or assumed by the other shareholders and concurred in by them. *Meiselman*, 309 N.C. at 298, 307 S.E.2d at 563. Consequently, the expectation is not reasonable and does not satisfy the first prong of the *Meiselman* test.[7]

Conclusion

In sum, there is no genuine issue of material fact in this case. The trial court properly concluded that "Mrs. Simmons did not possess an enforceable right or interest based upon a *reasonable* expectation (shared by *all* shareholders) that her ownership in the Defendant Corporations would be redeemed at fair [market] value upon her death." Consequently, we affirm the trial court's order granting defendants' motion for summary judgment and denying plaintiff's cross-motion for summary judgment.

Affirmed.

Judges STEELMAN and STEPHENS concur.

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7. We have discussed the expectation of Mrs. Simmons with regard to defendants collectively; however, we note that plaintiff's argument pertaining to Randolph is even weaker than its arguments pertaining to Acme and Sapona. Randolph did not purchase shares from Mr. Redding's estate or send letters offering to redeem shares.

STATE OF NORTH CAROLINA v. EVERETT GREGORY McCAIN

No. COA10-534

(Filed 17 May 2011)

1. Drugs— possession with intent to manufacture—possession—trafficking

A jury necessarily found defendant guilty of possession of cocaine when it found him guilty of possession with the intent to manufacture. The case was remanded for judgment and sentencing for possession since the trial court erred by instructing the jury on possession with intent to manufacture cocaine as a lesser-included offense of trafficking.

2. Search and Seizure— probable cause for warrant—drugs in defendant's home

There was a substantial basis in a search warrant application to believe that drugs would be found in defendant's home and the trial court correctly denied defendant's motion to suppress for lack of probable cause.

Appeal by defendant from judgment entered on or about 4 December 2009 by Judge Bradley B. Letts in Superior Court, Person County. Heard in the Court of Appeals 2 November 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General William P. Hart, Jr., for the State.

Anne Bleyman, for defendant-appellant

STROUD, Judge.

Everett Gregory McCain ("defendant") appeals from a conviction for possession with intent to manufacture cocaine, and possession of oxycodone. Defendant also contends that the trial court erred in denying his motion to suppress. For the following reasons, we vacate defendant's conviction and sentence as to possession with intent to manufacture cocaine; and affirm the denial of defendant's motion to suppress.

I. Background

On 8 December 2008, defendant, in two separate indictments, was indicted on two counts (08CRS002724 and 08CRS002725) of traf-

ficking in cocaine in violation of N.C. Gen. Stat. § 90-95(h)(3). By superseding indictment for 08CRS002725, defendant was indicted on one count of trafficking in oxycodone in violation of N.C. Gen. Stat. § 90-95(h)(3) on 12 January 2009. On 17 July 2009, defendant filed a motion to suppress certain statements made to police and evidence obtained as a result of the execution of search warrants on 7 March and 17 July 2008. The trial court heard defendant's motion to suppress at the 17 July and 6 August 2009 Criminal Sessions of Superior Court, Person County. The trial court denied defendant's motion to suppress. Defendant was tried on these charges during the 30 November 2009 Criminal Session of Superior Court, Person County. On 4 December 2009, the jury found defendant guilty of possession with intent to manufacture cocaine and possession of oxycodone. The trial court consolidated defendant's convictions and sentenced him to a term of six months to eight months imprisonment. The trial court suspended this sentence and placed defendant on supervised probation for 36 months. Defendant gave notice of appeal from his convictions in open court.

II. Jury instructions

[1] Defendant contends and the State concedes that the trial court erred in submitting to the jury the charge of possession with intent to manufacture cocaine, pursuant to N.C. Gen. Stat. § 90-95(a)(1), as this charge was not a lesser included offense of trafficking by possession of cocaine, pursuant to N.C. Gen. Stat. § 90-95(h)(3). Defendant contends that because of this error his conviction and consolidated sentence for possession with intent to manufacture cocaine should be vacated. However, the State, citing *State v. Wilson*, 128 N.C. App. 688, 497 S.E.2d 416, *disc. review improvidently allowed*, 349 N.C. 289, 507 S.E.2d 38 (1998), contends that even if the charge of possession with intent to manufacture cocaine is vacated, the case should be remanded with instruction to enter judgment as to the lesser included offense of possession of cocaine.[1]

1. The State also contends that defendant is not entitled to relief on this issue because defendant invited this error. However, the State concedes that *State v. Kelso*, 187 N.C. App. 718, 723-24, 654 S.E.2d 28, 32-33 (2007) (following the *Wilson* court in holding that the defendant was entitled to relief even though the defendant "encouraged the trial court to submit the offense of sexual battery to the jury" which is not a lesser included offense of first degree rape, despite the invited error doctrine), *disc. review denied*, 362 N.C. 367, 663 S.E.2d 432 (2008) and *State v. Wilson*, 128 N.C. App. at 690-91, 497 S.E.2d at 418-19 (even though the defendant requested the instruction of felonious restraint, which was found not to be a lesser included offense of the indicted offense of kidnapping, the Court held that defendant was entitled to relief, notwithstanding the invited error doctrine), are controlling on this issue and only seek "to pre-

In *Wilson*, the defendant was indicted and tried for first degree kidnapping and assault. 128 N.C. App. at 690, 497 S.E.2d at 418. The defendant was acquitted of the assault charge but convicted of felonious restraint, which was submitted to the jury as a lesser included offense under the kidnapping indictment. *Id.* On appeal, the defendant argued that "the indictment charging him with first degree kidnaping was insufficient to support defendant's conviction of felonious restraint." *Id.* at 692, 497 S.E.2d at 419. This Court noted the general rule that "when a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense [only] when the greater offense which is charged in the bill of indictment contains all of the essential elements of the lesser." *Id.* at 692, 497 S.E.2d at 419-20 (quotation marks omitted). This Court further noted that

> the offense of felonious restraint contains an element not contained in the crime of kidnaping-transportation by motor vehicle or other conveyance. In fact, it is this element which distinguishes felonious restraint from another lesser included offense of kidnaping, false imprisonment. False imprisonment, like felonious restraint, contains all of the elements of kidnaping, except for the requirement that there be an intent to confine, restrain, or remove another person. Unlike felonious restraint, however, the offense of false imprisonment does not include the element of transportation by motor vehicle or other conveyance.

Id. at 693-94, 497 S.E.2d at 420-21. This Court concluded that "transportation by motor vehicle or other conveyance is an essential element of the crime of felonious restraint that must be alleged by the State in a bill of indictment in order to properly indict a defendant for that crime." *Id.* at 694, 497 S.E.2d at 421. In applying this principle, this Court further concluded that "the defendant in this case could not have lawfully been convicted of the crime of felonious restraint upon his trial on the kidnaping indictment since the indictment . . . did not allege that the defendant transported the victim by motor vehicle or other conveyance." *Id.* The Court went on to hold that "since the jury's verdict of felonious restraint means that they found

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serve this issue for further appellate review." Here, during the charge conference, defense counsel stated several times that possession with intent to manufacture cocaine was a lesser included offense of trafficking in cocaine and did not object to the trial court's decision to include a jury instruction on possession with intent to manufacture cocaine as a lesser offense. Even if this could be construed as invited error by defendant, we hold that *Kelso* and *Wilson* are controlling and defendant is entitled to relief.

each of the elements of false imprisonment, we remand this case to the trial court for imposition of judgment and appropriate sentencing for the offense of false imprisonment." Id. at 696, 497 S.E.2d at 422.

Here, defendant's indictment for trafficking in cocaine states the following:

> The jurors for the State upon their oath present that on or about the 7th day of March, 2008, in the county named above the defendant named above unlawfully, willfully and feloniously did possess 28 grams or more but less than 200 grams of cocaine in violation of G.S. 90-95(h)(3).

The trial court gave jury instructions as to trafficking in cocaine, possession with the intent to manufacture cocaine, and possession of cocaine. As stated above, the jury found defendant guilty of possession with intent to manufacture cocaine. N.C. Gen. Stat. § 90-95(h)(3) (2007) sets out the elements for trafficking in cocaine: "Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine . . . shall be guilty of a felony . . . known as 'trafficking in cocaine[.]' " N.C. Gen. Stat. § 90-95(a) (2007) makes it "unlawful for any person: (1) [t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance[.]" Therefore, to convict someone of possession with the intent to manufacture cocaine the State must prove that (1) the defendant possessed cocaine and (2) defendant's intention was to manufacture the drug. *See id.* Possession with the intent to manufacture cocaine contains one element that is not contained in trafficking in cocaine—the intent to manufacture. Therefore, possession with the intent to manufacture cocaine is not a lesser included offense of trafficking in cocaine, as the "greater offense" does not "contain[] all of the essential elements of the lesser." *See Wilson*, 128 N.C. App. at 692, 497 S.E.2d at 419-20. Additionally, we cannot say that defendant was properly indicted on the charge of possession with the intent to manufacture cocaine, as the indictment does not mention anything showing defendant's intention to manufacture cocaine, an essential element of the crime. *See id.* at 694, 497 S.E.2d at 421. Therefore, as the crime of possession with the intent to manufacture cocaine is not a lesser included offense of trafficking in cocaine, the charged offense, and defendant was not properly indicted on the charge of possession with the intent to manufacture cocaine, we hold that the trial court erred in giving the instruction as to possession with the intent to manufacture cocaine. Accordingly, we vacate defendant's conviction and sentence as to possession with the intent to manufacture cocaine.

However, as noted above, the trial court also instructed the jury regarding possession of cocaine. Possession of cocaine is one of the essential elements of trafficking in cocaine, *see* N.C. Gen. Stat. § 90-95(h)(3). Therefore, it is a lesser included offense of trafficking in cocaine. As the jury found defendant guilty of possession with the intent to manufacture cocaine, it necessarily found defendant guilty of possession of cocaine. Defendant was properly indicted on this crime as the indictment states that defendant "did possess 28 grams or more but less than 200 grams of cocaine[.]" Accordingly, we remand this case to the trial court for entry of judgment and appropriate sentencing for the offense of possession of cocaine. *See id.* at 696, 497 S.E.2d at 422.

III. Motion to suppress

[2] Defendant next contends that the trial court erred in denying his motion to suppress as "the information in support of the application for the search warrant did not provide probable cause in violation of [defendant's] state and federal rights."

A. Preliminary matters

Defendant challenged the 17 July 2008 search warrant by filing a pretrial motion to suppress, which was denied in open court at the 17 July 2009 Criminal Session of Superior Court, Person County. Defendant renewed his motion to suppress during trial at the end of the presentation of the State's evidence and, again, at the end of the presentation of all evidence. The trial court denied defendant's renewals of his motion to suppress. N.C. Gen. Stat. § 15A-979(b) (2007), in pertinent part, states that "[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction[.]" As stated above, defendant appealed from his convictions at the end of his trial. Therefore, we may hear his appeal from the denial of his motion to suppress pursuant to N.C. Gen. Stat. § 15A-979.

B. The 17 July 2008 Search Warrant[2]

We have stated that

> "[t]he standard of review to determine whether a trial court properly denied a motion to suppress is whether the trial

2. At the 17 July and 6 August 2009 hearings on defendant's motion to suppress, the trial court also made a ruling on a 7 March 2008 search warrant of defendant's residence. However, defendant raises no argument on appeal regarding the 7 March 2008 search warrant.

> court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law." *State v. Tadeja*, 191 N.C. App. 439, 443, 664 S.E.2d 402, 406-07 (2008). "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).

State v. Williams, ___ N.C. App. ___, ___, 703 S.E.2d 905, 907 (2011). Specifically, defendant contends that "the motion to suppress should have been granted" as "[t]he information in support of the application for the [17 July 2008] search warrant was insufficient to establish probable cause to believe that criminal activity was afoot" particularly since the trial court excluded the information in paragraph five of the warrant application.

In determining whether there was sufficient probable cause to justify the magistrate's issuance of a search warrant, this Court has noted that

> [t]he general rule, pursuant to the Fourth Amendment of the United States Constitution and Article I, Section 20 of the North Carolina Constitution, is that issuance of a warrant based upon probable cause is required for a valid search warrant. *See State v. Jones*, 96 N.C. App. 389, 397, 386 S.E.2d 217, 222 (1989), *appeal dismissed and review denied*, 326 N.C. 366, 389 S.E.2d 809 (1990). An application for a search warrant must contain a statement supported by allegations of fact that there is probable cause to believe items subject to seizure may be found on the premises sought to be searched. *See* N.C. Gen. Stat. § 15A-244 (2007). Under the "totality of the circumstances" standard adopted by our Supreme Court for determining the existence of probable cause:
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> > [t]he task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing] that probable cause existed."

State v. Arrington, 311 N.C. 633, 638, 319 S.E.2d 254, 257-58 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 76 L. Ed. 2d 527, 548 (1983)).

When the application is based upon information provided by an informant, the affidavit should state circumstances supporting the informant's reliability and basis for the belief that a search will find the items sought. *State v. Crawford*, 104 N.C. App. 591, 596, 410 S.E.2d 499, 501 (1991). A showing is not required "that such a belief be correct or more likely true than false. A practical, nontechnical probability is all that is required." *State v. Zuniga*, 312 N.C. 251, 262, 322 S.E.2d 140, 146 (1984). Further, a magistrate's determination of probable cause should be given great deference, and an "after-the-fact scrutiny should not take the form of a de novo review." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258.

State v. Washburn, ___ N.C. App. ___, ___, 685 S.E.2d 555, 560-61 (2009). In the application for the 17 July 2008 search warrant, Investigator M.C. Massey, of the Person County Sheriff's Office, made the following averments as to probable cause:

1. THIS APPLICANT, INVESTIGATOR M.C. MASSEY HAS RECEIVED INFORMATION FOR THE PAST THIRTY (30) DAYS FROM CONFIDENTIAL RELIABLE INFORMANTS/SOURCES, HEREAFTER REFERENCED TO AS "CRI'S", THAT THE ABOVE SUSPECT WAS SELLING AND CONTINUES TO SELL NARCOTICS FROM THE RESIDENCE OF 970 ALLIE CLAY RD. IN WHICH THE SUSPECT LISTED ABOVE OCCUPIED AT THE TIME OF THOSE SALES. THE "CRI'S" USED IN THIS INVESTIGATION HAVE PROVIDED THE PERSON COUNTY SHERIFF'S OFFICE WITH INFORMATION THAT HAS LED TO ARRESTS AND CONVICTIONS IN THE PAST. THIS INFORMATION WAS PROVIDED AGAINST THE "CRI'S" OWN PENAL INTERESTS.

2. DURING THE MONTHS OF JUNE AND JULY 2008, THE PERSON COUNTY SHERIFF'S OFFICE STARTED GATHERING INFORMATION ABOUT DRUGS BEING SOLD AT 970 ALLIE CLAY RD. BOTH ANONYMOUS CALLERS AND CONFIDENTIAL AND RELIABLE INFORMANTS HAVE GIVEN THIS INFORMATION.

3. THE SUBJECT RESIDING AT 970 ALLIE CLAY RD. (McCAIN, Everett Gregory) HAS BEEN SYNONYMOUS WITH THE CONSTANT SALE AND DELIVERY OF ILLEGALLY CONTROLLED SUBSTANCES, IN THE PAST. THE SUBJECT HAS BEEN CHARGED, AND ARRESTED [FOR] PAST CRIMES OF POS-

SESSING WITH INTENT TO SELL AND DELIVER ILLEGALLY CONTROLLED SUBSTANCES.

4. DURING THE MONTH OF JULY 2008 I (INV. MASSEY) MET WITH A CONCERNED CITIZEN ABOUT HIS SISTER BEING ADDICTED TO "CRACK" COCAINE AND THE CONCERNED CITIZEN RELAYED TO MYSELF THAT HE HAD KNOWLEDGE OF McCAIN, Everett Gregory BEING THE SUPPLIER OF ILLEGAL CONTROLLED SUBSTANCES TO HIS SISTER.

5. ON JULY 17TH 2008, I (INV. M.C MASSEY[)] WENT INSIDE THE RESIDENCE OF 970 ALLIE CLAY RD, TO CHECK ON THE WELFARE OF AGENTS FROM THE NC DEPT OF REVENUE. UPON ENTRY INTO THE RESIDENTCE I (INV. M.C. MASSEY) SAW IN PLAIN VIEW A SHOTGUN AND A GLASS ASHTRAY CONTAINING APPROXIMATELY 5-10 PARTIALLY SMOKED MARIJUANA CIGARETTES. THAT BEING A VIOLATION OF NORTH CAROLINA CONTROLLED SUBSTANCE LAWS. AT THAT TIME I DETAINED THE SUBJECT (McCAIN, Everett Gregory) AND ASKED THE NC TAX AGENTS TO DEPART FROM THE RESIDENCE. THE RESIDENCE WAS THEN SECURED BY OTHER OFFICERS AND THIS SEARCH WARRANT WAS TO BE OBTAINED.

6. FURTHER, THIS APPLICANT STATES THAT THE CONFIDENTIAL AND RELIABLE INFORMANTS USED, HAVE BEEN CERTIFIED THROUGH CONVICTIONS, AS RESULT OF INFORMATION PROVIDED, THROUGH THE PERSON COUNTY JUDICIAL SYSTEM. THIS APPLICANT STATES THAT THE CRI'S ARE FAMILIAR WITH THE APPEARANCE, PACKAGING AND AFFECTS [sic] OF THE CONTROLLED SUBSTANCE COCAINE AND HAS PROVIDED STATEMENTS TO THIS APPLICANT AGAINST THEIR OWN PENAL INTEREST.

7. CRIMINAL HISTORY CHECKS WERE CONDUCTED ON THE SUBJECT LISTED ON THIS APPLICATION BY UTILIZING SHERIFF'S OFFICE AND LAW ENFORCEMENT MEANS, REVEALING THAT PRIOR HISTORY OF THE ILLEGAL POSSESSION OF NARCOTICS EXIST FOR THE SUBJECT LISTED IN THIS AFFIDAVIT.

8. IT IS MY OPINION, BASED ON MY EXPERIENCES, TRAINING AND OBSERVATIONS THAT ILLEGAL NARCOTICS ARE BEING KEPT AND INGESTED AT THE ABOVE LOCATION. THEREFORE THIS APPLICANT RESPECTFULLY REQUESTS THAT THE COURT ISSUE A WARRANT TO SEARCH THE PER-

> SONS(S), RESIDENCE, PROPERTY, ANY STORAGE OUT BUILDINGS AND THE VEHICLE(S) LISTED ON THIS APPLICATION.

In the transcript of the 17 July 2009 hearing on defendant's motion to suppress, the trial court made the following ruling as to the 17 July 2008 search warrant:

> It appears to the Court that the search warrant issued . . . July 17, 2008, one year ago today, is valid on its face. The information provided by the applicant in his affidavit sufficiently supports a finding of probable cause by the magistrate, and the Court makes this ruling even without consideration of paragraph number five.[3]

After a thorough review of the 17 July 2008 warrant, we hold that, even excluding paragraph five of Investigator Massey's affidavit, there was sufficient evidence in support of the search warrant of defendant's residence to provide probable cause to believe that contraband would be found in that location.[4]

Investigator Massey, in his affidavit, states that he had received information within the past 30 days from confidential reliable informants ("CRIs") that defendant was selling narcotics from his residence; during June and July of 2008, the sheriff's department had received information from anonymous callers and CRIs that drugs were being sold at defendant's residence; in July 2008, Investigator Massey met with a "concerned citizen" that stated defendant was supplying drugs to his sister who was addicted to "crack" cocaine; defendant's residence had been "synonymous with the constant sale and delivery of illegally controlled substances" as defendant had been the subject of past charges and arrests for possession with intent to sell and deliver illegal controlled substances; and a criminal background check of defendant also revealed that he had a "prior history" of possession of narcotics. Given the specific information from multiple

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3. We note that there is no written order in the record on appeal denying defendant's motion to suppress. N.C. Gen. Stat. § 15A-977(f) (2009) states that in ruling upon a defendant's motion to suppress, "[t]he judge must set forth in the record his findings of facts and conclusions of law." However, defendant makes no argument regarding the lack of a written order. *See* N.C.R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

4. According to the "memorandum of rulings" in the record on appeal, the trial court ultimately ruled that "Paragraph No. 5 may not be used as [a] basis for determination of probable cause for issuance of search warrant." As the trial court determined that Investigator Massey's affidavit even excluding paragraph No. 5 offered sufficient probable cause to support the 17 July 2008 search warrant and we affirmed that conclusion, we need not address defendant's arguments as to paragraph No. 5.

sources, including informants, citizens, and anonymous callers, that there was ongoing drug activity at defendant's residence combined with defendant's past criminal involvement with illegal drugs, we conclude that sufficient probable cause was presented the Investigator Massey's affidavit. Next, we turn to the issue of "the informant's reliability and basis for [their] belief[s]." *See Washburn*, ___ N.C. App. at ___, 685 S.E.2d at 560-61.

First, Investigator Massey's affidavit states that the CRIs used had been "certified" because information provided by them had resulted in arrests and convictions in the past. *See State v. Arrington*, 311 N.C. 633, 642, 319 S.E.2d 254, 260 (1984) ("The fact that statements from the informants in the past had led to arrests is sufficient to show the reliability of the informants."). Also, the CRIs were familiar with "the appearance, packaging, and affects [sic]" of cocaine and had provided statements to him "against their own penal interest." *See State v. Beam*, 325 N.C. 217, 221, 381 S.E.2d 327, 330 (1989) ("Statements against penal interest carry their own indicia of credibility sufficient to support a finding of probable cause to search." (citation omitted)). Also, Investigator Massey had met personally with the concerned citizen. Further, the CRIs, callers, and the concerned citizen had all given consistent information that during the months of June and July 2008, illegal drugs were being sold at defendant's residence. Applying the totality of the circumstances test prescribed in *Washburn* and giving proper deference to the decision of the magistrate to issue the search warrant, we hold that there was a substantial basis in the application for the search warrant, even without consideration of paragraph five, for the magistrate to conclude there was probable cause to believe drugs would be found in defendant's home. The 17 July 2008 search warrant of defendant's home is therefore valid and defendant's argument is overruled. Accordingly, we affirm the trial court's denial of defendant's motion to suppress.

IV. Conclusion

For the reasons stated above, we vacate defendant's conviction and sentence for possession with intent to manufacture cocaine; remand for imposition of judgment and appropriate sentencing for the offense of possession of cocaine; and affirm the denial of his motion to suppress.

VACATED, REMANDED, AND AFFIRMED.

Judges BRYANT and BEASLEY concur.

STATE OF NORTH CAROLINA v. DENNIS KEITH JACKSON, JR.

No. COA10-1182

(Filed 17 May 2011)

1. Appeal and Error— preservation of issues—failure to object—failure to argue plain error

Although defendant contended that the trial court erred in a felonious operation of a motor vehicle to elude arrest case by denying defendant's motion to suppress, defendant failed to preserve this issue by failing to object at trial and by failing to argue plain error.

2. Motor Vehicles— felonious operation of motor vehicle to elude arrest—motion to dismiss—aggravating factors

The trial court did not err by denying defendant's motion to dismiss the charge of felonious operation of a motor vehicle to elude arrest because sufficient evidence was presented of the aggravating factors necessary to support the conviction.

3. Constitutional Law— effective assistance of counsel—failure to object

A defendant was not denied effective assistance of counsel in a felonious operation of a motor vehicle to elude arrest case based on his trial counsel's failure to object to evidence obtained from an alleged illegal search. Defendant failed to show he was prejudiced when defendant voluntarily answered the front door of his house to answer the officers' questions and did not challenge the voluntariness of his later statements to the officers in which he admitted to being the driver of the motorcycle.

Appeal by defendant from judgment entered 6 April 2010 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 7 March 2011.

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

James W. Carter, *for defendant-appellant.*

Defendant Dennis Keith Jackson, Jr. appeals from a judgment entered upon a jury verdict finding him guilty of felonious operation of a motor vehicle to elude arrest. We find no error.

The evidence presented at trial tended to show that, on 23 August 2009 at around 5:00 p.m., while traveling northbound on U.S. Highway 29 in Guilford County, North Carolina, State Highway Patrol Trooper Robert M. Robertson, Jr. observed a blue motorcycle traveling in the southbound lane on the highway "coming at [him] at a high rate of speed." Because the area was a 55 mile-per-hour zone, Trooper Robertson activated his radar and clocked the vehicle as traveling 82 miles per hour. The trooper then proceeded to cross the grassy median dividing the two northbound and two southbound lanes of U.S. Highway 29, activated his marked patrol car's siren and rooftop and front grill lights, and began pursuit of the blue motorcycle in the southbound lanes of U.S. Highway 29. Trooper Robertson testified that

> [he] could see that the motorcycle [was] going from the left lane to the right lane going around traffic back and forth just going up through there. Normal traffic in there is from 55 to 60. So, you know, a vehicle doing 80 plus would have to go from left to right to—to get around them.

Then, after Trooper Robertson was within seven or eight car lengths of the motorcycle, the motorcycle maneuvered out of the left lane by "cut[ting] through" the slower, heavier traffic on the highway and exited at Hicone Road. The trooper exited the highway to continue his pursuit of the motorcycle and, although he got close enough to read the license tag on the motorcycle, he was unable to do so because the tag was affixed at a 45 degree or 60 degree angle, which made it unreadable while the trooper was in pursuit. Due to the heavy traffic on Hicone Road, Trooper Robertson lost sight of the motorcycle for a brief period of time, but then got within 100 feet or less shortly before the vehicle reached Hines Chapel Road. The trooper then saw the motorcycle turn right onto Hines Chapel Road without stopping at the red traffic light and, when the driver made the right turn, the trooper "could see the driver very well, [he] could see the bike very well. And the actual driver himself turned back and looked at [Trooper Robertson] when he was turning, making that right turn onto Hines Chapel." Then, as the motorcycle continued on Hines Chapel Road, the trooper paced the vehicle as traveling at speeds in excess of 108 miles per hour, at which time the trooper again lost sight of the motorcycle.

Over defendant's objection, Trooper Robertson testified that a motorist and his passenger flagged the trooper down and asked him if he was "looking to find a blue bike," and told the trooper where

they had seen it last. Based on this information, the trooper turned his vehicle around and proceeded in the direction from which he came. By this time, additional units from the Guilford County Sheriff's Department had also arrived in the area to look for the motorcycle.

After State Trooper Royce Barham first heard the call that Trooper Robertson was "attempting to overtake a fleeing blue motorcycle on U.S. 29," he immediately headed towards the area of Hicone and Hines Chapel Roads, the last location in which the motorcycle was seen. Less than a minute later, and about six or seven minutes after the chase initially began, Trooper Barham started into a sharp sweeping curve on Creekview Road near Hines Chapel Road and "met" the blue motorcycle as both vehicles approached the curve from opposite directions. Because the sharp curve required both drivers to slow their vehicles to 15 or 20 miles per hour, the trooper testified, "And as we met[,] I looked over at the driver of the motorcycle and made eye contact with him." Because the shield of the helmet covering the driver's eyes and nose was clear, Trooper Barham "could tell it was a white male and [he] could make out his eyebrows, nose and eyes." Trooper Barham then reported where he had encountered the blue motorcycle to the other units and, upon hearing Trooper Barham's report, Trooper Robertson proceeded back towards Hines Chapel Road.

As Trooper Robertson drove slowly down Hines Chapel Road, looking up driveways and at houses for any sign of the blue motorcycle, he was flagged down again, this time by an older man and his grandchildren in the front of the man's house: "[H]e told me that if I was looking for a blue motorcycle, that a blue motorcycle just come [sic] speeding by and pulled into the driveway at his neighbor's house right [next door]."

Trooper Robertson pulled into the driveway at 3703 Hines Chapel Road and followed the curved driveway to the rear of the house. The trooper then testified:

> As soon as I pulled into the driveway I kind of scanned everywhere to see if I could see where the—where the blue bike was. I didn't know if he proceeded through the yard into the next yard or what. I was—I was looking around making sure that there was no one out there or anything like that.
>
> . . . .
>
> At that time—point in time I stepped out of the patrol vehicle and took about four or five steps up to the van and I was mainly look-

> ing into the big building that was back there. I thought that maybe he had pulled through there. And as I looked at the building[, which looked like "some type of aircraft hangar-type building, one of those big industrial-type metal buildings" that appeared to serve as a carport,] I looked back and the blue bike was on the carport beside [a] silver van. And I think there was another small passenger car there also. It was in between the two.

After seeing the blue motorcycle, the trooper determined that this was the same vehicle he had been pursuing, based on the overall look of the vehicle, the angled license tag, and the heat he could feel emanating from the vehicle from several feet away. Trooper Robertson returned to his patrol vehicle and communicated with the other units in the area that he "believe[d] [he] had found the blue bike." He then backed his patrol vehicle out of the driveway to signal his location to the other officers in the area.

About one minute later, Trooper Barham arrived on the scene and both troopers drove into the driveway, took another look at the motorcycle parked in the carport structure, and proceeded to the front door of the residence. The troopers told the woman who answered the door that they "needed to see the driver of the blue bike." Defendant then came to the door, wearing jeans like those worn by the driver of the motorcycle, and sweating profusely. When defendant appeared at the door, Trooper Barham "immediately recognized him as the person on or the driver of the bike that [he] saw over on [Creekview] Road," because "[i]t was the same set of eyes, eyebrows, and nose that [he] just saw."

Defendant initially denied being the driver of the motorcycle, claiming that the motorcycle had been parked for several hours. The troopers then placed defendant under arrest, advised him of his *Miranda* rights, and verified that defendant was the owner of the vehicle by running the Vehicle Identification Number and tag through their communications center. Defendant then asked to speak with Trooper Robertson and admitted to the trooper that he was the driver of the motorcycle. Defendant was "very apologetic," and said that he "just didn't want a speeding ticket and that he had a Class A CDL and he didn't want to lose his job; and if he got a ticket or if he, you know, got in trouble, he could possibly lose his job." One of the people in the house then brought out a helmet and jacket, both of which appeared to be the same as the items that Troopers Barham and Robertson observed the driver of the motorcycle wearing during the pursuit.

Defendant was indicted with one count of felonious fleeing to elude arrest with a motor vehicle in violation of N.C.G.S. § 20-141.5(b). Defendant moved to suppress the evidence gathered at 3703 Hines Chapel Road, as well as the contents of his statements made after his arrest. The trial court denied defendant's motion by order, in which it made detailed findings of fact and conclusions of law. The case was tried before a jury in Guilford County Superior Court. Defendant moved to dismiss the charge at the close of the State's evidence, which was denied. Defendant informed the court that he would not present any evidence, and so did not renew his motion to dismiss the charge at the close of all of the evidence. The jury found defendant guilty and, on 6 April 2010, the court entered its judgment upon the jury's verdict and sentenced defendant to a term of six to eight months imprisonment suspended on the condition of sixty months of supervised probation. Defendant appeals.

I.

[1] Defendant first contends the trial court erred by denying his motion to suppress. However, defendant concedes in his brief that he did not object when the evidence that was the subject of his motion was introduced at trial. Therefore, defendant has failed to preserve this issue for review. *See State v. Golphin*, 352 N.C. 364, 463, 533 S.E.2d 168, 232 (2000) ("To preserve an issue for appeal, the defendant must make an objection at the point during the trial when the State attempts to introduce the evidence. A defendant cannot rely on his pretrial motion to suppress to preserve an issue for appeal. His objection must be renewed at trial. [Defendant's] failure to object at trial waived his right to have this issue reviewed on appeal. This assignment of error is overruled." (citations omitted)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

Although defendant suggests that this Court may review this issue for plain error, defendant asserts only that "it was prejudicial error for the trial court to deny the motion to suppress" because, "[i]f not for the illegal search, there would have been no evidence of [defendant] as the driver of the motorcycle." However, "[i]n meeting the heavy burden of plain error analysis," a defendant "must convince this Court, with support from the record, that the claimed error is so fundamental, so basic, so prejudicial, or so lacking in its elements that absent the error the jury probably would have reached a different verdict." *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). Thus,

"[d]efendant *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." *Id.* (omission in original) (internal quotation marks omitted). In the present case, defendant "provides no explanation, analysis or specific contention in his brief supporting the bare assertion that the claimed error is so fundamental that justice could not have been done." *See id.* "Defendant's empty assertion of plain error, without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule." *See id.* at 637, 536 S.E.2d at 61. "By simply relying on the use of the words 'plain error' as the extent of his argument in support of plain error, defendant has effectively failed to argue plain error and has thereby waived appellate review." *See id.* Accordingly, we decline to review this issue for plain error.

II.

[2] Defendant next contends the trial court erred by denying his motion to dismiss because defendant argues the State presented insufficient evidence to establish that defendant drove recklessly. We disagree.

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Etheridge*, 319 N.C. 34, 47, 352 S.E.2d 673, 681 (1987). "The test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both." *Powell*, 299 N.C. at 99, 261 S.E.2d at 117. "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.*

N.C.G.S. § 20-141.5(a) provides in relevant part: "It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties." N.C. Gen. Stat. § 20-141.5(a) (2009). Violation of this section shall be a Class H felony when both of "the following aggravating fac-

tors are present at the time the violation occurs": "[s]peeding in excess of 15 miles per hour over the legal speed limit"; and "[r]eckless driving as proscribed by G.S. 20-140." N.C. Gen. Stat. § 20-141.5(b)(1), (b)(3). Reckless driving is defined in N.C.G.S. § 20-140 as follows:

> (a) Any person who drives any vehicle upon a highway or any public vehicular area carelessly and heedlessly in willful or wanton disregard of the rights or safety of others shall be guilty of reckless driving.
>
> (b) Any person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving.

N.C. Gen. Stat. § 20-140(a)–(b) (2009).

In the present case, defendant contends the State failed to present evidence of the aggravating factors necessary to support a conviction for felonious fleeing to elude arrest because defendant asserts the State failed to present evidence in conformity with the trial court's instructions to the jury that defendant drove recklessly by improperly weaving through traffic and improperly crossing a solid yellow double line. However, Trooper Robertson testified that he clocked defendant traveling at a speed of 82 miles per hour in a 55 mile-per-hour zone and observed defendant maneuvering "from the left lane to the right lane going around traffic back and forth just going up through there." When asked whether the motorcycle was "weaving in and out of vehicles," Trooper Robertson answered:

> Yeah, both—it's a two-lane highway going northbound and southbound. There was [sic] vehicles not bumper to bumper, but they were sporadically through both lanes, both of the southbound lanes so that you couldn't just go straight up one lane. You had to merge into traffic left and right to get around it. Like I said, most of the traffic at this point in time was probably about 55 to 65, somewhere around that area; so that if a vehicle was traveling at 85 or—or 80 miles an hour, they would have to go in and out of lanes to go around the vehicles.

Additionally, with respect to whether defendant improperly crossed a solid double yellow line, Trooper Robertson testified that most of the portion of Hicone Road traveled by defendant was a two-lane road

divided by a solid double yellow line. The trooper further testified that, based on the amount of traffic present on Hicone Road at the time he pursued defendant, defendant would have had "to go around that traffic to get down through there . . . to go around those vehicles to get down to where he was at." Thus, although the trooper had lost sight of defendant's motorcycle while on Hicone Road after exiting U.S. Highway 29, the trooper's testimony allowed the jury to reasonably infer that defendant would have had to travel across the solid double yellow line to maneuver through the traffic while being pursued by Trooper Robertson. See State v. Rowland, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965) ("When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty."). Therefore, we conclude the State presented sufficient evidence of the aggravating factors necessary to support a conviction for felonious fleeing to elude arrest. Accordingly, we overrule this issue on appeal.

III.

[3] Finally, defendant contends he was denied effective assistance of counsel because his trial counsel failed to object when the evidence that was the subject of his motion to suppress was introduced at trial. Again, we disagree.

"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. 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 the "only evidence" that defendant was the driver of the motorcycle resulted from Trooper Robertson's discovery of defendant's blue motorcycle in the carport located in the back of the residence at 3703 Hines Chapel Road, and appears to suggest that, but for the trooper's purported "illegal" search that led to discovery of the motorcycle, the jury "would have had to acquit [defendant] of the charge." Nevertheless, Trooper Robertson testified that he was directed to the residence at Hines Chapel Road by a neighbor, who told the trooper that, "if [he] was looking for a blue motorcycle, that a blue motorcycle just come [sic] speeding by and pulled into the driveway at [the] neighbor's house right [next door]." Trooper Barham further testified that, because he had an opportunity to see defendant's face during the pursuit, he immediately recognized defendant as the driver of the motorcycle when defendant voluntarily came to the front door of the residence when Troopers Barham and Robertson asked to speak to the driver of the motorcycle. Because defendant concedes that "[l]aw enforcement officers have the right to approach a person's residence to inquire whether the person is willing to answer questions," *State v. Wallace*, 111 N.C. App. 581, 585, 433 S.E.2d 238, 241, *disc. review denied*, 335 N.C. 242, 439 S.E.2d 161 (1993), and because defendant does not challenge the voluntariness of his later statements to the troopers in which he admitted to being the driver of the motorcycle, we are not persuaded that defense counsel's representation at trial was "so lacking" as to turn defendant's trial into "a farce and a mockery of justice" when he failed to object to the testimony regarding the discovery of the blue motorcycle in the carport. *See Sneed*, 284 N.C. at 612, 201 S.E.2d at 871. Accordingly, we overrule this issue on appeal.

No error.

Judges McGEE and McCULLOUGH concur.

WILLIAM H. "BILL" WILSON PETITIONER v. CITY OF MEBANE BOARD OF ADJUSTMENT, THE CROWN COMPANIES, LLC, INTERVENOR, RESPONDENTS

No. COA10-971

(Filed 17 May 2011)

1. Zoning— prior ordinance—common law vested right

Expenditures on a real estate development project prior to the enactment of a Unified Development Ordinance were not made in reasonable reliance on and after the issuance of a building permit. Respondent Crown did not acquire a common law vested right to have its development plan evaluated under the prior ordinances.

2. Appeal and Error— mootness—zoning

An appeal from a zoning decision was not moot even though amendments to a zoning ordinance before the appeal was filed would have entitled respondent Crown to a building permit for its development. A permit issued under the prior ordinance was void *ab initio* and the amendments would not have eradicated the effects of the violation.

Appeal by Petitioner from Judgment entered 18 May 2010 by Judge Ronald Stephens in Alamance County Superior Court. Heard in the Court of Appeals 26 January 2011.

Andrew J. Petesch, Attorney for Petitioner-Appellant.

Bateman Law Firm, by Charles Bateman, Attorney for Respondent-Appellee City of Mebane Board of Adjustment.

Wishart Norris Henninger & Pittman, P.A., by June K. Allison, Attorney for Intervenor-Respondent-Appellee The Crown Companies, LLC.

HUNTER, JR., Robert N., Judge.

Petitioner appeals the trial court's Judgment affirming the decision of the City of Mebane Board of Adjustment ("the Board"), which approved the issuance of a building permit by the City of Mebane to The Crown Companies, LLC ("Crown"). Petitioner alleges the trial court erred as a matter of law in affirming the Board's decision, which found that Crown had acquired a common law vested right to proceed

with the development under zoning ordinances that are no longer in effect. Petitioner further alleges the trial court's decision was arbitrary and capricious, as it was not supported by substantial evidence. We do not reach all issues raised by Petitioner, because we agree with his contention that Crown did not acquire a common law vested right and therefore reverse the trial court's Judgment.

I. Factual & Procedural History

This dispute arises out of the approval of a commercial development for a Walgreens retail store adjacent to a residential neighborhood in the city of Mebane, North Carolina (the "Walgreens Project"). Petitioner Bill Wilson ("Wilson") is the owner of a residential property located at 815 S. Fifth Street in Mebane. At this address, Wilson owns a lot that is zoned for residential use, upon which sits a 1950's four-bedroom house. Wilson purchased the property in 2005 and, that same year, sought to have it rezoned for commercial use. The City of Mebane denied his request.

In late 2006, Crown, a commercial real estate development company, became interested in developing the area of land adjacent to Wilson's property. Crown sought to build a Walgreens retail store on the site.

The Crown property is approximately 1.62 acres and is comprised of three parcels. At the time Crown purchased the property, two of the three parcels were zoned for business use, while the eastern–most parcel—the parcel adjacent to Wilson's property—was zoned for residential use.

Since 2002, the City of Mebane ("the City") had two separate zoning and landscaping ordinances in effect that applied to both the Crown and Wilson properties: the Landscape Standards Ordinance ("LSO") and the Mebane Zoning Ordinance ("MZO"). The LSO required a vegetation buffer to be placed between incompatible land uses. Specifically, section 3(f) of the LSO called for a 50-foot buffer between commercial and residential uses. The City adopted an amendment to the LSO in 2003 that exempted developments of less than five (5) acres of land from the 50-foot buffer requirement (the "five-acre exemption").

As Crown began its planning for the Walgreens Project, Daniel Barnes ("Barnes"), an engineer for and principle of Crown, had a series of conversations with the City of Mebane Planning Administration. In December of 2006, Barnes met with Montrina Hadley ("Hadley"), the Mebane Planning Director, and presented

Crown's initial plan for the Walgreens Project. From this first meeting with Hadley, it was apparent to Barnes that Crown's plan for the Walgreens site was in conflict with the zoning ordinances in effect at that time, the LSO and the MZO. Specifically, Barnes knew it would be difficult to accommodate the 50-foot buffer on the perimeter of the Walgreens site for the benefit of adjacent residential lots. Additionally, the site plan required that thirty percent (30%) of the building that would house the Walgreens store would sit on the eastern-most parcel, which was zoned for residential use and borders Wilson's property. Barnes was reassured, however, that because Crown's property was approximately 1.62 acres, certain zoning requirements, including the 50-foot buffer, could be waived pursuant to the five-acre exemption provided in the LSO.

After this initial meeting, Crown continued to pursue the development of the Walgreens Project and considered purchasing Wilson's property in order to accommodate a 50-foot buffer. In April 2007, Wilson and Crown entered into a purchase agreement whereby Crown acquired the right to purchase Wilson's property.

In May 2007, however, Barnes concluded that purchasing Wilson's property was prohibitively expensive. Barnes submitted a revised site plan to Hadley reflecting Crown's decision not to acquire Wilson's land and requested Hadley's opinion as to the possibility of acquiring a waiver for the 50-foot buffer. Barnes also inquired as to whether Crown should seek rezoning of the residential-zoned parcel adjacent to Wilson's property, and upon which thirty percent of the Walgreens building would sit. Hadley replied that she discussed the issue with her staff; she recommended that Crown apply to have the residential parcel rezoned and indicated that a waiver for the 50-foot buffer would be granted.

In December 2007, Crown informed Wilson that it would not exercise its option to purchase his property. Crown, however, continued with its development efforts. During the next year, Barnes submitted four versions of the site plan to Hadley's office for approval on 23 January 2008, 19 May 2008, 23 June 2008, and 17 November 2008.

At the same time Crown was moving forward with its development plan, the City of Mebane adopted a new set of zoning ordinances, the Unified Development Ordinance ("UDO"). The UDO was adopted on 4 February 2008 and is a consolidation of the then-existing ordinances, the LSO and the MZO. While the majority of the LSO survived the consolidation into the UDO, the LSO's five-acre exemp-

tion for the 50-foot buffer between incompatible land uses was not incorporated into the UDO. Additionally, UDO section 1-2(A) states that any portion of a City ordinance that relates to land use and is inconsistent with the UDO is repealed.

When the UDO was adopted, Crown had not yet received approval on its site plan nor received a building permit. Three days after the adoption of the UDO, on 7 February 2008, the City's Planning Department Technical Review Committee ("TRC") met to review Crown's January 2008 site plan. The notes from this meeting indicate the plan had not been approved. The TRC met again on 4 June 2008 to review Crown's second revised plan. The notes from this meeting also indicate Crown's plans had not been approved. On 30 January 2009, Hadley stated in an email to Wilson's attorney that the site plan and building plans were still in review status and that no approvals or permits had been issued. Additional TRC meetings were held, and the record shows that Crown did not receive approval of its plans and a building permit until 24 February 2009.

On 3 March 2009, Wilson appealed the issuance of the Crown building permit to the Board. Wilson alleged the ordinance that controls the Crown development project is the UDO, adopted more than one year before the building permit was issued. Wilson alleged the buffer specified on the Crown site plan and approved by the Planning Administration was in violation of the UDO buffer requirements. Alternatively, he argued, if Crown's site plan was controlled by the LSO, the plan is in violation of the LSO, as the approved buffer does not "preserve the spirit of the Ordinance," as required by section 2(d) of the LSO.

The Board conducted a hearing on the matter on 4 May 2009 and issued its decision the same day. The Board denied Wilson's appeal, concluding that Crown had acquired a common law vested right to proceed with the development project pursuant to the requirements of the LSO and the MZO, which were in effect before the adoption of the UDO. On 4 June 2009, Wilson petitioned the Alamance County Superior Court for a writ of certiorari to review the Board's decision pursuant to N.C. Gen. Stat. § 160A-388 and UDO §§ 8-13 and 11-7; the writ of certiorari was issued on 22 July 2009. Crown filed a motion to intervene, which was granted on 4 August 2009.

After a hearing on the merits, the Superior Court upheld the Board's decision in its Judgment issued 18 May 2010. The trial court's findings of fact included, *inter alia*:

7. The review process for the Proposed Walgreens began in the first week of December 2006. . . . The first submittal [of the site plan] was made January 23, 2008, the second submittal was made May 19, 2008 and the fourth submitted on November 17, 2008. The final site plan was approved, the building permit application approved and fees paid on February 23, 2009. . . .

8. At all times during the review of the Proposed Walgreens, the City of Mebane applied the LSO to the project having taken the position that Crown had a vested right to proceed under the LSO rather than the UDO which was enacted on February 4, 2008.

9. Crown Development made substantial expenditures in good faith and in reliance upon valid governmental approvals and action.

Based upon its findings, the trial court concluded, as a matter of law, the Board's decision was supported by substantial evidence and it committed no error of law in determining Crown acquired a common law vested right to proceed under the LSO and was entitled to a building permit. From this Judgment, Wilson appeals.

II. Jurisdiction and Standard of Review

Jurisdiction in this Court is proper pursuant to N.C. Gen. Stat. § 7A-27(b) (2009) (stating a right of appeal lies with this Court from the final judgment of a superior court "entered upon review of a decision of an administrative agency"). We review the trial court's decision for errors of law *de novo*. *Hilliard v. N.C. Dep't of Corrections*, 173 N.C. App. 594, 596, 620 S.E.2d 14, 17 (2005).

III. Analysis

A. Common Law Vested Right

[1] In his first argument on appeal, Wilson alleges the trial court erred, as a matter of law, in finding that Crown acquired a common law vested right to proceed with the Walgreens Project under the LSO and the MZO. We agree.

As we stated in *Browning-Ferris Indus. of S. Atl., Inc. v. Guilford County Bd. of Adjustment*, generally " '[t]he adoption of a zoning ordinance does not confer upon citizens . . . any vested rights to have the ordinance remain forever in force, inviolate and unchanged.' " 126 N.C. App. 168, 171, 484 S.E.2d 411, 414 (1997) (quoting *McKinney v. City of High Point*, 239 N.C. 232, 237, 79 S.E.2d 730, 734 (1954)). North Carolina law recognizes two methods by which a landowner may, however, obtain the legal right to continue a land

development project contrary to an ordinance that is currently in effect; such rights may vest in a landowner by common law or by statute. *Id.*

In the present case, Respondents do not argue that Crown acquired the right to proceed with the Walgreens Project under the LSO and the MZO by virtue of a statute. Our analysis will therefore focus on whether Crown obtained a common law vested right to proceed with the Walgreens Project under the pre-UDO Ordinances.

A common law right to proceed with a development plan under a prior ordinance may vest in a party when:

> (1) the party has made, prior to the amendment of a zoning ordinance, expenditures or incurred contractual obligations "substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building" . . .
>
> (2) the obligations and/or expenditures are incurred in good faith,
>
> (3) the obligations and/or expenditures were made in reasonable reliance *on and after the issuance of a valid building permit*, if such permit is required, authorizing the use requested by the party . . .
>
> and (4) the amended ordinance is a detriment to the party.

Browning-Ferris, 126 N.C. App. at 171-72, 484 S.E.2d at 414 (internal citations omitted) (emphasis added). The landowner has the burden of establishing it has satisfied the elements for common law vested rights. *Id.* at 172, 484 S.E.2d at 414.

In the present case, Wilson challenges three out of the four elements arguing the expenditures Crown made for the Walgreens Project were not made in reliance on a valid building permit, were not made in good faith, and that Crown would not suffer any detriment by complying with the amended ordinance.

The timeline of pertinent events in the record establishes that Crown's expenditures, made prior to the enactment of the UDO, were not made in reasonable reliance on and after the issuance of a valid building permit. The events are summarized in the trial court's Judgment as follows:

> The review process for the Proposed Walgreens began in the first week of December 2006. . . . The site plan for the Walgreens

> Project was drawn on November 30, 2007 and the plan sealed on December 17, 2007. The first submittal was made January 23, 2008, the second submittal was made May 19, 2008 and the fourth submitted on November 17, 2008. *The final site plan was approved, the building permit application approved and fees paid on February 23, 2009.* (Emphasis added.)

Additionally, during the Board's hearing, the City stipulated that the 23 February 2009 issuance of the building permit was the "final act establishing approval" of Crown's site plan.

Assuming *arguendo* that Crown made "substantial expenditures" prior to the adoption of the UDO, the City did not issue a permit for the Walgreens Project until more than one year after the enactment of the UDO on 4 February 2008. As our Supreme Court concluded in *Warner v. W & O, Inc.*, expenditures made by the landowner prior to issuance of a permit were "manifestly not made in reliance on the permit thereafter issued." 263 N.C. 37, 41, 138 S.E.2d 782, 786 (1964); *see also* David W. Owens, Land Use Law in North Carolina 150 (2006) ("expenditures made to secure government approval are not considered" as expenditures made in reliance upon government approval). Therefore, Crown failed to establish one of the elements necessary to acquire a common law vested right.

The City issued a permit for Crown's Walgreens Project based on the premise that the controlling ordinances were the LSO and the MZO. Because we have determined Crown did not acquire a common law vested right to proceed with its development plan under the LSO and the MZO, the permit was void *ab initio*. Additionally, any expenditures made by Crown after the issuance of the permit could not serve as a basis for a vested right. *See Mecklenburg County v. Westbery*, 32 N.C. App. 630, 635, 233 S.E.2d 658, 661 (1977) ("[T]he permit must have been lawfully issued in order for the holder of the permit to acquire a vested right in the use.").

Respondents' argument that Crown relied upon the City's assurances that the 50-foot buffer requirement would be waived is unavailing. While we do not conclude the City's assurances to Crown amounted to conditional approvals of the site plan, this Court rejected reliance on such actions in *Browning-Ferris*. 126 N.C. App. at 172, 484 S.E.2d at 415 (rejecting the plaintiffs' argument that substantial expenditures in reliance on the pre-amended ordinance, a letter from the town's planning director giving assurances of approval, or the planning department's conditional approval of the site develop-

ment plan gave rise to a common law vested right to proceed with construction in contravention of the then-enacted ordinance); *MLC Auto., LLC v. Town of S. Pines*, —— N.C. App. ——, ——, 702 S.E.2d 68, 76 (2010) ("We need not specifically address what types of government approval, short of a permit, are sufficient for the common law vested right analysis because *Browning-Ferris* establishes that expenditures in reliance on letters such as these are not sufficient to give rise to a vested right.")

Respondents claim in their brief that our courts have permitted other towns to "take the approach taken by the City of Mebane," but fail to cite to a single case in which our courts have done so. Rather, our case law makes clear, where a permit is required, expenditures made prior to the issuance of a permit are not considered in the common law vested rights analysis. Respondents' argument is dismissed.

Because we conclude Crown's expenditures for the Walgreens Project were not made in reasonable reliance on and after the issuance of a valid building permit, we need not reach Wilson's challenge to the other elements necessary to acquire a common law vested right. Similarly, because we conclude Crown does not have a common law vested right to proceed with its development project under the LSO and the MZO, we need not address Wilson's alternative argument that the buffer approved in Crown's development plan violates the LSO in that it fails to preserve the "spirit of the Ordinance" as required by section 2(d) of the LSO.

B. Mootness

[2] Respondents contend that this appeal is moot because, before the filing of this appeal, the City of Mebane adopted amendments to the UDO that would entitle Crown to the building permit that was issued. We cannot agree.

A matter is rendered moot when "(1) the alleged violation has ceased, and there is no reasonable expectation that it will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Kinesis Adver., Inc. v. Hill*, 187 N.C. App. 1, 20, 652 S.E.2d 284, 298 (2007) (citation and quotation marks omitted), *appeal dismissed, disc. review denied*, 362 N.C. 177, 658 S.E.2d 485 (2008).

As discussed above, the permit issued under the requirements of LSO and the MZO for Crown's development plan was void *ab initio*. There is no evidence in the record that Crown's development plan

was approved under the UDO. Thus, the City's amendments to the UDO could not have eradicated the effects of the violation and Respondents' argument is dismissed.

III. Conclusion

We conclude the expenditures on the Walgreens Project made by Crown, prior to the enactment of the UDO, were not made in reasonable reliance on and after the issuance of a valid building permit. Accordingly, Crown did not acquire a common law vested right to have its development plan evaluated under the LSO and the MZO. The building permit issued by the City of Mebane was void *ab initio*. The trial court's Judgment is

Reversed.

Judges CALABRIA and STROUD concur.

HOUSING AUTHORITY OF THE CITY [OF] WILMINGTON, NORTH CAROLINA, PLAINTIFF v. SPARKS ENGINEERING, PLLC, DEFENDANT

No. COA10-950

(Filed 17 May 2011)

1. Appeal and Error— Rule 41(a) voluntary dismissal—original action no longer existed—mootness

The Court of Appeals lacked jurisdiction over defendant's challenge to the propriety of the trial court's decision to deny its dismissal motion in a breach of contract, negligence, and negligent misrepresentation case because plaintiff's original action no longer existed once it voluntarily dismissed it under N.C.G.S. § 1A-1, Rule 41(a). Thus, defendant's appeal was dismissed.

2. Appeal and Error— denial of writ of certiorari—adequate remedies remaining

The Court of Appeals declined defendant's request for a writ of *certiorari* to permit review of the challenged order on the merits given defendant's right to seek redress for any inappropriate conduct by plaintiff and its agents in New Hanover County File No. 10 CVS 1767.

Appeal by defendant from order entered 18 February 2010 by Judge Gary E. Trawick in New Hanover County Superior Court. Heard in the Court of Appeals 13 December 2010.

Shipman & Wright, LLP, by Gary K. Shipman, and William G. Wright, for Plaintiff-appellee.

Allen, Moore & Rogers, L.L.P., by Joseph C. Moore, III, and John C. Rogers, III, for Defendant-appellant.

ERVIN, Judge.

Defendant Sparks Engineering, PLLC, appeals from an order denying its motion seeking the dismissal of a claim that Plaintiff Housing Authority of the City of Wilmington had asserted against it or, in the alternative, the designation of Plaintiff's action as a Complex Business Case. In addition, Defendant has filed a petition asking this Court, in the event that we determine that it is not entitled to appeal the trial court's order as a matter of right, to issue a writ of *certiorari* permitting us to review Defendant's challenge to the trial court's order on the merits. After careful consideration of the issues raised by Defendant's appeal and *certiorari* petition in light of the record and the applicable law, we conclude that Defendant has no right to appeal the trial court's order; that we should not, in the exercise of our discretion, issue a writ of *certiorari* in accordance with Defendant's request; and that Defendant's appeal should therefore be dismissed.

I. Factual Background

On 15 February 2008, Plaintiff filed suit against Defendant, a structural engineering firm, in New Hanover County File No. 08 CVS 710. In its complaint, Plaintiff sought damages from Defendant stemming from services provided to Plaintiff in connection with Plaintiff's acquisition of an apartment complex. Plaintiff asserted that Defendant had entered into a contract with Plaintiff requiring the performance of a structural analysis and an inspection of the apartment complex; that Plaintiff's decision to purchase the apartment complex was predicated, at least in part, upon the information contained in Defendant's report concerning the condition of the property; that Defendant "failed to properly conduct its inspection and analysis" of the apartment complex; that the apartments in the complex suffered from numerous serious defects; that Plaintiff was eventually forced to abandon the apartment complex because tenants could not safely

live there; and that Plaintiff was entitled to recover compensatory damages from Defendant for breach of contract, negligence, and negligent misrepresentation.

On 16 April 2008, Defendant filed an answer in which it denied the material allegations of Plaintiff's complaint and asserted a number of affirmative defenses. On 20 February 2009, with leave of court and Plaintiff's consent, Defendant amended its answer to assert an additional affirmative defense. On 26 January 2010, Defendant filed a Motion to Dismiss or, in the Alternative, for Recommendation for Designation as a Complex Business Case, in which Defendant alleged that Plaintiff had improperly provided information concerning the case to local media, resulting in publicity that "render[ed] it impossible for Defendant Sparks to receive a fair trial," and requested the court to "exercise its inherent authority to prevent abuses, ensure the orderly operation of justice, and manage the judicial process by dismissing this action with prejudice." In the alternative, Defendant requested that this case be designated as a Complex Business Case and assigned to a judge "who will be well positioned to deal with the many complex issues" that would inevitably arise during the litigation of this case, making it "possible for motions and pre-trial proceedings to be heard in a venue other than New Hanover County—and hence at least physically removed from the glare of local publicity unleashed by [Plaintiff]—to wit, Raleigh, while preserving the right of Defendant Sparks to conduct the trial in New Hanover County."

A hearing was conducted before the trial court concerning Defendant's motion on 4 February 2010. At that time, the trial court offered to enter an order changing the venue for the trial, but Defendant rejected this remedy. On 18 February 2010, the trial court entered an order denying Defendant's motion. On 13 April 2010, Plaintiff voluntarily dismissed its complaint in New Hanover County File No. 08 CVS 710 pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a). On the same date, Plaintiff filed a complaint against Defendant, identical except for the addition of Ronald W. Sparks as a party defendant, in New Hanover County File No. 10 CVS 1767. On 13 May 2010, Defendant noted an appeal to this Court from the trial court's denial of its dismissal motion in New Hanover County File No. 08 CVS 710. On 6 August 2010, Defendant filed a *certiorari* petition seeking review of the trial court's order in New Hanover County File No. 08 CVS 710 on the merits as an alternative to its notice of appeal.

II. Legal Analysis

A. Appellate Jurisdiction

[1] As an initial matter, we must address the extent, if any, to which Defendant's appeal is properly before us. "[A]n appellate court has the power to inquire into jurisdiction in a case before it at any time, even *sua sponte*." *Xiong v. Marks*, 193 N.C. App. 644, 652, 668 S.E.2d 594, 599 (2008) (citations omitted). "A jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) (citing *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000)). A careful review of the record and the applicable law demonstrates that we lack jurisdiction over Defendant's appeal and that it should, as a result, be dismissed.

As discussed above, Defendant noted an appeal, in the aftermath of Plaintiff's decision to take a voluntary dismissal without prejudice in New Hanover County File No. 08 CVS 710, from the denial of a dismissal motion that it filed and unsuccessfully litigated in that case. According to N.C. Gen. Stat. § 1A-1, Rule 41(a), "an action or any claim therein may be dismissed by the plaintiff without order of court . . . by filing a notice of dismissal at any time before the plaintiff rests his case[.]" By voluntarily dismissing its complaint against Defendant pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a), Plaintiff effectively mooted Defendant's dismissal motion.

"It is well settled that '[a] Rule 41(a) dismissal strips the trial court of authority to enter further orders in the case[.]' . . . '[T]he effect of a judgment of voluntary [dismissal] is to leave the plaintiff exactly where he [or she] was before the action was commenced.' After a plaintiff takes a Rule 41(a) dismissal, 'there is nothing the defendant can do to fan the ashes of that action into life[,] and the court has no role to play.' " *Bryson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 593, 528 S.E.2d 568, 570 (2000) (quoting *Walker Frames v. Shively*, 123 N.C. App. 643, 646, 473 S.E.2d 776, 778 (1996); *Gibbs v. Light Co.*, 265 N.C. 459, 464, 144 S.E.2d 393, 398 (1965); and *Universidad Cent. Etc., Inc. v. Liaison C. on Med. Ed.*, 760 F.2d 14, 18 n.4 (1st Cir. 1985)). As a result of the fact that, "[o]nce a party voluntarily dismisses its action pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (1990), 'it [is] as if the suit had never been filed[,]' " *Pine Knoll Assn v. Cardon*, 126 N.C. App. 155, 161, 484 S.E.2d 446, 449 (quoting *Tompkins v. Log Systems, Inc.*, 96 N.C. App. 333, 335, 385

S.E.2d 545, 547 (1989), *disc. review denied*, 326 N.C. 366, 389 S.E.2d 819 (1990)), *disc. rev. denied*, 347 N.C. 138, 492 S.E.2d 26 (1997), Plaintiff's decision to voluntarily dismiss its action against Defendant effectively terminated that proceeding, barring review of any interlocutory orders that the trial court might have entered to that point, such as the denial of Defendant's dismissal motion. Given that Plaintiff's original action no longer exists, we lack jurisdiction over Defendant's challenge to the propriety of the trial court's decision to deny its dismissal motion, so that Defendant's appeal should be, and hereby is, dismissed.[1]

B. Defendant's Petition for Writ of *Certiorari*

[2] In seeking the issuance of a writ of *certiorari* to permit review of its claim on the merits, Plaintiff asserts that there are "certain inconsistencies in the decisional law regarding a party's right to appeal following a voluntary dismissal without prejudice" and that, in light of "these inconsistencies" and "the importance of the issues implicated by the Order denying the subject sanctions motion to both the parties and the justice system," "the Court [should] issue its writ of *certiorari* and review the trial court's Order denying the sanctions motion." After carefully considering both components of Defendant's argument, we conclude that neither provides adequate justification for the issuance of the requested writ of *certiorari*.

In seeking *certiorari*, Plaintiff acknowledges the decisions holding that a party's voluntary dismissal of an action precludes further review of orders entered prior to the dates upon which the action was dismissed. On the other hand, Defendant claims that there are "inconsistencies" in our decisions relating to this appealability issue and urges us to adhere to one of the "lines" of cases that Defendant contends would support allowing an appeal as of right from the trial court's order. After reviewing the cases upon which Defendant relies, we conclude that there is no "inconsistency" in our decisions with respect to the appealability of orders entered after the taking of a voluntary dismissal and that the cases upon which Defendant relies have no application to the facts of this case.

According to Defendant, the "line of decisions represented by *Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 555 S.E.2d 634

1. As a result of the fact that Defendant simply alluded to and summarized the arguments advanced in its *certiorari* petition in that portion of its brief seeking to establish that it had a right to appeal the trial court's order, we will address those arguments in that portion of our opinion addressing Defendant's *certiorari* petition.

(2001)[,] stand[s] for the proposition that a voluntary dismissal has the effect of rendering earlier orders in the cause final and hence immediately appealable." *Kennedy* is, however, readily distinguishable from this case and provides no support for Defendant's position. In *Kennedy*, after the trial court entered an order granting partial summary judgment in favor of the defendant, the plaintiff voluntarily dismissed his remaining claim and noted an appeal from the trial court's order granting partial summary judgment. On appeal, we held that "Plaintiff's voluntary dismissal of this remaining claim . . . ha[d] the effect of making the trial court's grant of partial summary judgment a final order." Our decision in *Kennedy* allowed the plaintiff to appeal an order granting partial summary judgment in favor of the defendant after the plaintiff voluntarily dismissed his remaining claims, the existence of which had rendered an appeal from the trial court's partial summary judgment order interlocutory in nature. On the other hand, this Court has refused to allow an appeal from the denial of a summary judgment motion taken after the filing of a subsequent voluntary dismissal. In *Teague v. Randolph Surgical Assocs.*, 129 N.C. App. 766, 773, 501 S.E.2d 382, 387 (1998), we stated that the taking of a voluntary dismissal without prejudice left "nothing in dispute, and render[ed] the trial court's denial of [plaintiff's] motion for summary judgment moot." As a result, we conclude that, rather than demonstrating the existence of an "inconsistency" in our appellate jurisprudence, these decisions simply illustrate the difference between the appealability of an order granting partial summary judgment after the taking of a voluntary dismissal of the appealing party's remaining claims and the appealability of an order denying a request for summary judgment after the party had voluntarily dismissed his or her action. Defendant has completely failed to articulate how *Kennedy* provides any justification for a decision to recognize an appeal as of right from the denial of Defendant's dismissal motion in this case, and we are unable to see any such justification based upon our own research into the issues raised by Defendant's attempt to appeal.

In addition, we further conclude that the other "line" of cases to which Defendant directs our attention is equally irrelevant to the present case. As Defendant correctly notes, the taking of a voluntary dismissal does not deprive the trial courts of the ability to address motions for monetary sanctions under N.C. Gen. Stat. § 1A-1, Rule 11. As the Supreme Court stated in *Bryson v. Sullivan*, 330 N.C. 644, 653, 412 S.E.2d 327, 331 (1992), "[d]ismissal does not deprive the court of

jurisdiction to consider collateral issues such as sanctions that require consideration after the action has been terminated." Defendant has not, however, identified any "collateral" issue that remains to be decided in this case. In its dismissal motion, Plaintiff did not argue that any of the prerequisites for the imposition of sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11 were present in this case. On the contrary, the legal basis upon which Defendant sought the dismissal of Plaintiff's claim with prejudice stemmed from the courts' inherent authority to discipline members of the bar, *Cunningham v. Selman*, —— N.C. App. ——, ——, 689 S.E.2d 517, 526-27 (2009), and from the policy objectives sought to be achieved by N.C. Gen. Stat. § 1A-1, Rule 8(a)(2) (stating that, "[i]n all negligence actions, and in all claims for punitive damages in any civil action, wherein the matter in controversy exceeds the sum or value of ten thousand dollars ($10,000), the pleading shall not state the demand for monetary relief, but shall state that the relief demanded is for damages incurred or to be incurred in an amount in excess of ten thousand dollars ($10,000)"). Aside from the fact that the "sanction" which Defendant sought to have imposed would adversely affect Plaintiff rather than any lawyer and the fact that Plaintiff has not cited any authority authorizing any court to impose a sanction stemming from a violation of N.C. Gen. Stat. § 1A-1, Rule 8(a)(2) after the taking of a voluntary dismissal, the only "sanction" that Defendant sought in the motion at issue here was dismissal. Even if we agreed that the trial court should have dismissed Plaintiff's case (a subject about which we express no opinion), we are unable to accommodate that request now, since Plaintiff has already done so, albeit without rather than with prejudice.[2]

In addition, Defendant's *certiorari* petition also details the alleged acts of misbehavior by Plaintiff's agents upon which Defendant's request for dismissal was predicated. These allegations, however, go to the merits of Defendant's appeal rather than to the

2. In his brief before this Court, Defendant has requested that we remand this case to the trial court for a determination of the appropriate sanction to impose. Defendant did not, as we understand the record, seek any sanction other than dismissal or complex case treatment in the trial court. As a result of the fact that a litigant must litigate his case on appeal using the same theory upon which he relied in the court below, *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) (stating that "the law does not permit parties to swap horses between courts in order to get a better mount" on appeal), we are not persuaded by Plaintiff's argument that, by virtue of seeking a remand for the purpose of determining what sanction should be imposed, it has provided a justification for granting review of his claim on the merits. Defendant sought a dismissal in the court below, and it ultimately got exactly that.

issue of whether an appeal should be allowed at all. Although Defendant asserts that "the unfair prejudice which [Plaintiff] and its counsel visited upon [Defendant] cannot be undone and [will] unfairly prejudice[Defendant] in [Plaintiff's] re-filed suit," we note that, if Defendant feels that such prejudice continues to exist in connection with the litigation of the claim that Plaintiff has asserted against Defendant in New Hanover County File No. 10 CVS 1767, Defendant can seek redress by filing a similar motion in the refiled action. Indeed, Plaintiff asserts, and Defendant has not denied, that Defendant has filed an essentially identical motion seeking dismissal of Plaintiff's claim in New Hanover County File No. 10 CVS 1767. Although we have not taken formal judicial notice of this motion, we note that such a motion is available to Defendant and provides a more appropriate avenue for attaining any needed redress from any deleterious effects arising from the conduct of Plaintiff and its agents than would be achieved by a decision on our part to allow an appeal from or *certiorari* review of the trial court's refusal to dismiss Plaintiff's earlier action with prejudice.

III. Conclusion

Thus, for the reasons set forth above, we conclude that, in light of Plaintiff's decision to voluntarily dismiss its claim against Defendant in New Hanover County File No. 08 CVS 710 without prejudice, Defendant does not have the right to seek appellate review of the trial court's refusal to grant its request to dismiss Plaintiff's claim with prejudice. We further conclude that, given Defendant's right to seek redress for any inappropriate conduct by Plaintiff and its agents in New Hanover County File No. 10 CVS 1767, the issuance of a writ of *certiorari* in order to permit review of the challenged order on the merits would not be appropriate either. As a result, we conclude that Defendant's appeal should be dismissed and that Defendant's petition for the issuance of a writ of *certiorari* should be denied.

APPEAL DISMISSED; PETITION FOR *CERTIORARI* DENIED.

Chief Judge MARTIN and Judge McGEE concur.

IN THE MATTER OF: APPEAL OF PARKDALE AMERICA, FROM THE DECISION OF THE DAVIDSON COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION OF CERTAIN REAL PROPERTY FOR THE TAX YEAR 2007

No. COA10-453

(Filed 17 May 2011)

Taxation— Property Tax Commission—findings and conclusions—not sufficient

A decision of the Property Tax Commission affirming appraised values was remanded for specific findings and conclusions where the Commission's order did not explain why the County's methods ascertained true value despite being arbitrary or illegal.

Appeal by taxpayer from final decision entered 3 November 2009 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 26 October 2010.

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker, for respondent.

Bell, Davis & Pitt, P.A., by John A. Cocklereece, Jr., D. Anderson Carmen, and Justin M. Hardy, for taxpayer.

HUNTER, JR., Robert, N., Judge.

Parkdale America, LLC ("Parkdale") appeals from a final decision of the Property Tax Commission upholding Davidson County's (the "County") 2007 ad valorem property tax valuation of two textile mills located in Lexington and Thomasville, North Carolina. Parkdale contends the County's valuation exceeds the properties' true value in violation of N.C. Gen. Stat. § 105-283. Parkdale attributes this violation to the County's reliance on the cost approach method, failure to properly deduct the value lost due to obsolescence, and failure to undertake a "post-market reasonableness check." Parkdale also argues the Commission's decision is arbitrary and capricious because it does not contain a "reasoned analysis." We agree with this latter contention and therefore do not address Parkdale's other arguments.

I. Factual and Procedural Background

Parkdale owns two textile manufacturing plants in Davidson County. The County assessed the total value of the Lexington plant as of 1 January 2007 at $6,776,160 and the total value of the Thomasville

plant as of 1 January 2007 as $3,620,080. Parkdale appealed both valuations to the Davidson County Board of Equalization and Review (the "Review Board"), which reduced the appraised value to $5,040,429 for the Lexington plant and $3,287,150 for the Thomasville plant. Parkdale contended before the Review Board that the true value for the Lexington plant was $906,000 and the true value of the Thomasville plant was $625,000.

After a hearing, the Commission determined "that the County had met its burden with regard to the assessments of the Lexington and Thomasville manufacturing facilities" and affirmed the appraised values established by the Review Board. Parkdale timely appealed this ruling.

II. Jurisdiction

We have jurisdiction over Parkdale's appeal of right. *See* N.C. Gen. Stat. § 7A-29 (2009) (stating a party has an appeal of right from any final order of the Property Tax Commission); N.C. Gen. Stat. § 105-345(d) (2009) (stating such an appeal shall be to this Court).

III. Standard of Review

When reviewing decisions of the Commission, this 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(b) (2009). Like other questions of law, whether a decision is arbitrary and capricious is reviewed *de novo*. *See*, *e.g.*, *Transcon. Gas Pipe Line Corp. v. Calco Enters.*, 132 N.C. App. 237, 244, 511 S.E.2d 671, 677 (1999).

We review Commission decisions under the whole record test to determine whether a decision has a rational basis in the evidence. *In re McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 127 (1981) (quoting *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979)).

> The "whole record" test does not allow the reviewing court to 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*. 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 . . . evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the . . . result, without taking into account the contradictory evidence or evidence from which conflicting inferences could be drawn.

Id. at 87-88, 283 S.E.2d at 127 (citations omitted). However, this Court cannot reweigh the evidence presented and substitute its evaluation for the Commission's. *In re AMP*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975). If the Commission's decision, considered in 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. 529, 533, 503 S.E.2d 679, 682 (1998).

IV. Analysis

The Commission is required to apply the following burden shifting framework. A county's ad valorem tax assessment is presumptively correct. *In re IBM Credit Corp. (IBM Credit II)*, —— N.C. App. ——, ——, 689 S.E.2d 487, 489 (2009). The taxpayer rebuts this presumption by presenting " 'competent, material[,] and substantial' evidence that tends to show that (1) [e]ither the county tax supervisor used an arbitrary method of valuation; or (2) the county tax supervisor used an illegal method of valuation; and (3) the assessment substantially exceeded the true value in money of the property." *Id.* (quoting *In re AMP*, 287 N.C. at 563, 215 S.E.2d at 762) (second alteration in original). Once the taxpayer rebuts the initial presumption, the taxing authority must demonstrate its methods produce true values. *Id.*

The critical inquiry in the final step of the analysis is "whether the tax appraisal methodology adopted by the tax appraiser is the proper means or methodology given the characteristics of the property under appraisal to produce a true value or fair market value." *Id.* at

—, 689 S.E.2d at 489 (internal quotation marks omitted). Whether this is the case is not determined by a mechanical bright line rule. Rather, it is a factual inquiry requiring the Commission to determine the appropriate appraisal methodology under the circumstances. *See id.*

In its appeal, Parkdale contends that the County's appraisal methodology was arbitrary and capricious because it relied solely on the cost approach to valuation and failed to apply this approach in the manner specified by its schedule of values in that the County failed to properly compute the value lost due to obsolescence and failed to undertake a "post-market reasonableness check" of the values the methodology produced. Parkdale further contends that, because this methodology was arbitrary and capricious, the resulting values were as well. Therefore, Parkdale argues, the Commission's decision in support of these values is both arbitrary and capricious, in part because it does not contain a reasoned analysis and in part because it is unsupported by competent evidence.

North Carolina law directs tax assessors to prepare "[u]niform schedules of values, standards, and rules to be used in appraising real property at its true value and at its present-use value[, which] are prepared and are sufficiently detailed to enable those making appraisals to adhere to them in appraising real property." N.C. Gen. Stat. § 105-317(b)(1) (2009). Generally, real property subject to taxation is appraised according to its true value. N.C. Gen. Stat. § 105-283 (2009); *In re Whiteside Estates, Inc.*, 136 N.C. App. 360, 365, 525 S.E.2d 196, 198 (2000). True value is "market value," that is, "the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used." *In re AMP*, 287 N.C. App. at 568, 215 S.E.2d at 765.

The County adopted a schedule of values for the 2007 Tax Year that successfully follows the uniform system of appraisal required by the statute. To arrive at its appraised value for industrial property, the County used standardized mass appraisal techniques by compiling a database from cost manuals and residential, commercial, and industrial sales comparisons throughout Davidson County and by establishing a base rate or per-square-foot price for each type of property. The appraised value of an individual property is obtained by multiplying that base rate by the square footage of the type of structure

thus determining a preliminary value and then deducting from that value depreciation or other relevant factors.

For example, the Lexington plant was originally assigned a value of $6,776,160. This figure was obtained by multiplying the base rate for industrial buildings contained in the Davidson County schedule of values by the square footage in the Lexington plant. The County then applied a 70% depreciation to this amount based upon the age of the buildings. After a challenge before the Davidson County Board of Equalization and Review, this initial assessment was reduced to $5,040,429 by applying an additional 10% functional depreciation rate.

The Commission's 3 November 2009 order makes the following findings of fact and conclusions of law:

> 11. When arriving at the assessments for the Lexington and Thomasville manufacturing facilities, Davidson County applied its duly 2007 adopted schedule of values, standards, and rules to determine the values that were assigned to the manufacturing plants.
>
> 12. Applying the schedule of values, standards, and rules the total assessment for the Lexington Plant was $5,040,429, as of January 1, 2007. Applying the schedule of values, standards, and rules the total assessment for the Thomasville Plant was $3,287,150, as of January 1, 2007.
>
> 13. Davidson County's assessments of the Lexington and Thomasville Plants were consistent with the county's assessment of similarly situated manufacturing facilities in Davidson County as of January 1, 2007.
>
> 14. The Commission determines that the total value of the Thomasville Plant was $3,287,150, as of January 1, 2007. The Commission determines that the total value of the Lexington Plant was $5,040,429, as of January 1, 2007.
>
> BASED UPON THE FOREGOING FINDINGS OF FACT, THE NORTH CAROLINA PROPERTY TAX COMMISSION CONCLUDES AS A MATTER OF LAW:
>
> 1. When an appellant challenges the county's assessment of its property, it is required to produce evidence that tends to show that the County relied on an illegal or arbitrary valuation method and that the assessment substantially exceeds true value of the property.
>
> 2. After the appellant produces such evidence as outlined above, the burden of going forward with the evidence and of per-

suasion that its methods would in fact produce true value then rests with the County; and it is the Commission's duty to hear the evidence of both sides, to determine its weight and sufficiency and the credibility of witnesses, to draw inferences, and to appraise conflicting and circumstantial evidence, all in order to determine whether the County met its burden.

3. After considering all of the testimony, and reviewing the exhibits offered at the hearing, the Commission concludes that the County met its burden with regard to the assessments of the Lexington and Thomasville manufacturing facilities.

BASED UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, THE COMMISSION THEREFORE ORDERS that the decisions of the 2007 Davidson County Board of Equalization and Review assigning a total value of $5,040,420 [sic] to the Lexington facility and a total value of $3,287,150 to the Thomasville facility, effective January 1, 2007 is hereby affirmed.

Although the Commission's order does not explicitly contain the language that the County obtained the presumption of correctness by its initial tender of evidence of its values, we deduce from the language in paragraph 2 above that the Commission properly applied this presumption. We also deduce that Parkdale presented sufficient evidence to rebut this presumption by showing that the County relied on an illegal or arbitrary valuation method and that the assessment substantially exceeds the true value of the property. This second deduction is not based upon any direct statement to that effect contained in the order. Unfortunately, there is no such language. Rather, we reach this conclusion based upon paragraph 3 of the Commission's conclusions of law, which states that the "County met its burden." If the Commission is properly applying the burden shifting framework set forth in conclusion of law paragraph 1, then, in order for the Commission to reach the ultimate conclusion stated in paragraph 3 (that the County had met its burden), it logically follows the Commission must have concluded Parkdale produced competent evidence tending to show the County relied on an illegal or arbitrary valuation method and that the assessment substantially exceeds the true value of the property.

The order has no finding or conclusion of law explaining why the County's methods were arbitrary or illegal and how either of those results impacted the valuation finding. More importantly, the order does not explain why the Commission concluded the County's ulti-

mate assessment was correct. Because the Commission failed to explain why the County's appraisal methods ascertained true value despite being arbitrary or illegal, we cannot adequately apply the standard of review.

The lack of findings undermines our confidence in the Commission's conclusion that the County has met its ultimate burden of establishing a true value. *Cf.*, *e.g.*, *In re IBM Credit Corp. (IBM Credit I)*, 186 N.C. App. 223, 227, 650 S.E.2d 828, 831 (2007) (stating that the Commission's analysis did not reflect the proper burden-shifting framework) *aff'd per curiam*, 362 N.C. 228, 657 S.E.2d 355 (2008). Therefore, we vacate and remand this case to the Commission, which may conduct additional hearings on this matter if it deems them necessary. On remand, the Commission *shall* make specific findings of fact and conclusions of law explaining how it weighed the evidence to reach its conclusions using the burden-shifting framework articulated above and in this Court's previous decisions.

Vacated and remanded.

Judges McGEE and BEASLEY concur.

ELIZABETH RUNNELS v. EDWARD GEORGE ROBINSON AND RITA SWANSON ROBINSON

No. COA10-923

(Filed 17 May 2011)

1. Release— incidental or intended third-party beneficiary— summary judgment

The trial court did not err by granting summary judgment for defendants in an action arising from a real estate sale where plaintiff contended that defendants were only incidental beneficiaries of a release, so that a rescission and revised release were valid. It was clear from the language of the original release that defendants were intended third-party beneficiaries.

2. Attorney Fees— release—justiciable issue present

The trial court did not abuse its discretion by denying defendants attorney fees after it granted summary judgment for defend-

ants in an action involving a release. It could not be said that there was a complete absence of a justiciable issue.

Appeal by plaintiff and cross-appeal by defendants from judgment entered 10 March 2010 by Judge Dennis J. Winner in Polk County Superior Court. Heard in the Court of Appeals 8 February 2011.

Long, Parker, Warren, Anderson & Payne, P.A., by Ronald K. Payne and Philip S. Anderson, for plaintiff-appellant.

F.B. Jackson & Associates Law Firm, PLLC, by Angela S. Beeker, for defendants-appellees.

BRYANT, Judge.

Where plaintiff signed a general release, releasing defendants from liability, the trial court did not err in granting summary judgment in favor of defendants. Where the trial court denied defendants' motion for attorney's fees under N.C. Gen. Stat. § 6-21.5, there was no abuse of discretion.

Facts and Procedural History

In March 2007, Elizabeth Runnels (plaintiff) filed an action against Edward George Robinson and Rita Swanson Robinson (defendants) for a breach of contract regarding the 2005 purchase of a residence from defendants. Among other things, the complaint alleged that defendants had failed to obtain a permit for a residential septic system and failed to construct the building as a residence in conformity with the North Carolina Residential Building Code. Plaintiff alleged that defendants, "with intent to deceive," had induced her into the 2005 contract and that she had suffered damages in excess of $10,000.00. In their answer, defendants made a counterclaim for $10,000.00 in damages for having to defend this "frivolous, unfounded" action. Plaintiff filed a motion to dismiss defendants' counterclaim for failure to state a cause of action under Rule 12(b)(6) of the Rules of Civil Procedure.

In June 2008, plaintiff's attorneys sent a demand letter to Flat Rock Realty, LLC, a realty company that had listed the property. The demand letter claimed that because plaintiff had purchased her home in reliance on Flat Rock's representation that there was a permitted septic system on the property, Flat Rock shared in the responsibility for the misrepresentation. On 28 August 2008, plaintiff signed a "Release of All Claims" (Original Release) form with Flat Rock that stated the following, in pertinent part:

> the Undersigned . . . for and in consideration of SIX THOUSAND AND 00/100 THS DOLLARS ($6,000.00) . . . do/does hereby and for my/our/its heirs, executors, administrators, successors and assigns release, acquit and forever discharge STEVEN P. COLLINS, TRANG COLLINS, JOE HOPE, DEBORAH L. HOPE, FLAT ROCK REALTY, LLC, REAL ESTATE SERVICES OF HENDERSONVILLE AND FLAT ROCK, NC, LLC and his, her, their, or its agents, servants, employees . . . *and all other persons*, *corporations*, *firms*, *associations or partnerships of and from any and all claims*, actions, causes of action, demands, rights, damages, costs, expenses and compensation whatsoever, which the undersigned now has/have or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen damages and the consequences thereof arising out of or in connection with that Offer To Purchase And Contract between Elizabeth A. Runnels as Buyer and Edward George Robinson and wife, Rita Swanson Robinson, as Seller in connection with the purchase of property located at Off Spicer Cove Road, in Polk County, North Carolina and the purchase of such property, including, without limitation, all things and matters alleged or which could have been alleged in that action entitled "Elizabeth Runnels v. Edward George Robinson, et. al. . . ."

(emphasis added).

Following the signing of the release, in June 2009, plaintiff and defendants made amendments to their complaint and answer, respectively. In their amended answer, defendants raised the affirmative defenses of release, waiver, estoppel, contributory negligence, merger, and failure to state a claim. On 29 June 2009, the trial court denied defendants' motion for judgment on the pleadings and their 12(b)(6) motion to dismiss. In September 2009, defendants filed a motion for summary judgment stating that plaintiff had "executed a full and general release of all claims she may have or could have asserted in this case, Runnels v. Robinson" in support of their motion. Defendants also filed a motion for attorney's fees pursuant to N.C. Gen. Stat. § 6-21.5.

In January 2010, plaintiff and Flat Rock Realty, LLC, executed a "Release of Claims Against Certain Joint Tortfeasors" (Revised Release) attempting to cancel the Original Release. The Revised Release stated that it was "not intended to release any claim which [plaintiff] may have against [defendants] in connection with the aforementioned transaction." In March 2010, the trial court, finding

that there were no genuine issues of material fact and defendants were entitled to judgment as a matter of law, granted defendants' motion for summary judgment and denied their motion for attorney's fees. From this order, granting summary judgment, plaintiff appeals. Defendants cross-appeal from the denial of attorney's fees.

There are two issues on appeal: (I) whether the trial court erred in granting summary judgment in favor of defendants by dismissing plaintiff's claims and failing to grant partial summary judgment to plaintiff on defendants' affirmative defense of release; and (II) whether the trial court properly denied defendants' motion for attorney's fees pursuant to N.C. Gen. Stat. § 6-21.5.

I.

[1] Plaintiff argues that the trial court erred in granting defendants' motion for summary judgment. Plaintiff argues that because neither plaintiff nor Flat Rock intended defendants to be beneficiaries of the release, they are not direct beneficiaries but rather incidental beneficiaries. Therefore, plaintiff contends that the rescission of the Original Release and execution of a revised release was valid, even without the consent of defendants and other incidental beneficiaries. We disagree.

The applicable standard of review for a summary judgment motion is de novo and we view the evidence in the light most favorable to the non-moving party. *Scott & Jones, Inc. v. Carlton Ins. Agency, Inc.*, 196 N.C. App. 290, 293, 677 S.E.2d 848, 850 (2009). "The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citation omitted).

> Summary judgment is appropriate if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'

Forbis v. Neal, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (citing N.C. R. Civ. P. 56(c)). "Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a

prima facie case at trial." *Edwards v. GE Lighting Sys., Inc.*, —— N.C. App. ——, ——, 685 S.E.2d 146, 148 (2009) (quotation omitted).

Plaintiff argues that the "circumstances surrounding the execution of the Original Release, as well as the boilerplate-nature of its language" indicate that defendants were neither intended nor direct third-party beneficiaries, but rather incidental beneficiaries. We disagree.

In *Sykes v. Keiltex*, the plaintiff was injured at work when "a machine he was operating spewed out and burned over ninety percent (90%) of his body." *Sykes v. Keiltex Industries, Inc.*, 123 N.C. App. 482, 483, 473 S.E.2d 341, 342 (1996). The plaintiff instituted an action against his employer, supervisor, and the manufacturer of the machine. The plaintiff had signed a general release with his defendant employer and defendant supervisor and, sometime thereafter, the defendant manufacturer moved for summary judgment based on the release. The trial court granted the defendant manufacturer's motion for summary judgment, and the plaintiff appealed, arguing that he did not release his claims against the defendant manufacturer. The language of the release in *Sykes*, similar to our present case, stated that

> [plaintiff] . . . does hereby . . . release, acquit and forever discharge [employer,] [supervisor,], . . . *and all other persons, firms, corporations, associations or partnerships* of and from any and all claims, actions . . . which the undersigned now has or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen, personal injury and the consequences thereof resulting or to result from the incident [at issue in this action].

Id. at 485, 473 S.E.2d at 343. Our Court, stating that the defendant manufacturer was a third-party beneficiary of the release, held that the release was a "valid general release which by its terms unambiguously release[d] defendant from the liability charged in plaintiff's complaint, constituting a bar to plaintiff's claim against defendant in the instant action." *Id.* at 485, 473 S.E.2d at 344. "Other authorities are in accord with the proposition that a general release to all whomsoever bars further suits against other entities involved in the occurrence which produced the settlement with one participant that led to the release." *Battle v. Clanton*, 27 N.C. App. 616, 619, 220 S.E.2d 97, 99 (1975) (discussing *Peters v. Butler*, 253 Md. 7, 251 A.2d 600 (1969), *Panichella v. Pennsylvania Railroad Co.*, 268 F.2d 72 (3rd Cir. 1959), *cert. denied*, 361 U.S. 932 (1960), and *Hasselrode v. Gnagey*, 404 Pa. 549, 172 A.2d 764 (1961)).

In our present case, similar to the language found in *Sykes* and other authorities, the Original Release released "all other persons, corporations, firms, associations, or partnerships of and from *any and all claims*, actions, causes of action, demands, rights, damages, costs . . . arising out of or in connection with that Offer to Purchase And Contract between [plaintiff] as Buyer and [defendants] as Seller." *See Best v. Ford Motor Co.*, 148 N.C. App. 42, 557 S.E.2d 163 (2001); *Van Keuren v. Little*, 165 N.C. App. 244, 598 S.E.2d 168 (2004). From the language of the Original Release, it is clear that defendants were intended third-party beneficiaries. "It is well settled that, after acceptance or action on a contract by a third person for whose benefit it was made, the original parties may not, without the consent of such third person, rescind the contract by mutual agreement, so as to deprive him of its benefits." *American Trust Co. v. Catawba Sales & Processing Co.*, 242 N.C. 370, 380, 88 S.E.2d 233, 240 (1955) (citing Anno. 53 A.L.R. 181). "[W]here, from the terms of the release, it must be apparent to the claimant that its execution forecloses further compensation from any source, the result is one voluntarily accepted by the claimant himself." *Battle*, 27 N.C. App. at 619, 220 S.E.2d at 99. Because the Original Release released defendants from liability, the subsequent Revised Release had no effect on defendants. Therefore, we hold that the trial court did not err in granting defendants' motion for summary judgment.

II.

[2] Defendants cross-appeal and argue that the trial court erred in denying their motion for attorney's fees pursuant to N.C. Gen. Stat. § 6-21.5. Particularly, defendants argue that the Original Release rendered all issues in the complaint non-justiciable and that plaintiff persisted in litigating her action after she knew or should have known that her complaint was no longer justiciable.

The applicable standard of review on

> whether to award attorney's fees is within the sound discretion of the trial court and will not be overturned absent an abuse of discretion. An abuse of discretion occurs when a decision is 'either manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.'

Egelhof v. Szulik, 193 N.C. App. 612, 620-21, 688 S.E.2d 367, 373 (2008) (internal citation and quotation omitted).

Under N.C.G.S. § 6-21.5, the trial court, "upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing

party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." N.C.G.S. § 6-21.5 (2009).

> When reviewing an award of attorneys' fees under section 6-21.5, this Court must review all relevant pleadings and documents of a case in order to determine if either: (1) the pleadings contain 'a complete absence of a justiciable issue of either law or fact,' . . . or (2) 'whether the losing party persisted in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue.'

Credigy Receivables, Inc., v. Whittington, ___ N.C. App. ___, ___, 689 S.E.2d 889, 893 (2010) (quoting *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 258, 400 S.E.2d 435, 438 (1991)). "In order to find complete absence of a justiciable issue it must conclusively appear that such issues are absent even giving the pleadings the indulgent treatment they receive on motions for summary judgment or to dismiss." *Id* at ___, 689 S.E.2d at 895 (quotation omitted). The plaintiff must have reasonably been aware, at the time the complaint was filed, that the pleading contained no justiciable issue, or must have persisted in litigating the case after she reasonably should have been aware that the complaint no longer contained a justiciable issue. *Id*.

> [T]he mere filing of an affirmative defense without more is not sufficient to establish the absence of a justiciable issue, . . . nor the entry of summary judgment. These events may only be *evidence* of the absence of a justiciable issue. However, action by the losing party which perpetuated litigation in the face of events substantially establishing that the pleadings no longer presented a justiciable controversy may also serve as evidence for purposes of N.C.G.S. § 6-21.5. Whether such evidence would be sufficient without more is determinable on a case-by-case basis.

Sunamerica Financial Corp., 328 N.C. at 259-60, 400 S.E.2d at 439 (internal citations omitted).

In the case before us, plaintiff filed her complaint in March 2007 and, thereafter, executed the Original Release on August 2008. On 26 June 2009, plaintiff filed an amendment to her complaint and defendants filed an amendment to their answer, raising several affirmative defenses, including release. On 29 June 2009, the trial court denied defendants' motions for judgment on the pleadings. (R 53) In September 2009, defendants filed a motion for summary judgment. (R 54) Plaintiff, attempting to rescind the Original release, executed the

Revised Release in January 2010. In March 2010, seven months after its filing, the trial court granted defendants' motion for summary judgment. After careful review, although the trial court granted defendants' motion for summary judgment, we are unable to say that there was a "complete absence of a justiciable issue of either law or fact." *Id.* at 256, 400 S.E.2d at 437. A function of a motion for judgment on the pleadings "is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit." *Garrett v. Winfree*, 120 N.C. App. 689, 691, 413 (1995) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974)). Because the trial court denied defendants' motion for judgment on the pleadings in June 2009 after receiving an amended complaint and answer that included the defense of release, it necessarily did not find plaintiff's claims to lack merit. We are unable to say that plaintiff "persisted in litigating the case after a point where [she] should reasonably have become aware that the pleading [she] filed no longer contained a justiciable issue.' " *Credigy Receivables, Inc.*, ––– N.C. App. at –––, 689 S.E.2d at 893. For the foregoing reasons, we hold that the trial court did not abuse its discretion in denying defendants' motion for attorney's fees pursuant to N.C. Gen. Stat. § 6-21.5. Defendants' assignment of error is overruled.

Affirmed.

Judges McGEE and BEASLEY concur.

IN THE MATTER OF: J.R.V.

No. COA10-1116

(Filed 17 May 2011)

Juveniles— privilege against self-incrimination—court's failure to advise

There was no prejudicial error in a juvenile delinquency adjudication where the trial court failed to comply with N.C.G.S. § 7B-2405 by allowing the juvenile to testify without determining if the juvenile understood his privilege against self-incrimination. The error was harmless because the juvenile's testimony was consistent with the State's prior evidence or otherwise favorable to the juvenile.

IN RE J.R.V.

[212 N.C. App. 205 (2011)]

Appeal by juvenile from order entered 31 March 2010 by Judge James A. Grogan in Rockingham County District Court and order entered 29 June 2010 by Judge William F. Southern in Stokes County District Court. Heard in the Court of Appeals 9 February 2011.

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

Richard Croutharmel, for juvenile-appellant.

CALABRIA, Judge.

J.R.V. ("the juvenile") appeals (1) an order adjudicating him delinquent for misdemeanor larceny and (2) the resultant disposition order. We find no prejudicial error in the proceedings below, and thus, we affirm the orders of the trial court.

I. Background

On 1 January 2010, Garland Sparks ("Sparks") went to property he owned in Ayersville, North Carolina. When he arrived at the property, Sparks discovered that a locked gate had been uprooted and moved. Several items of farm equipment had been stolen from the property.

Corporal Jason Doom ("Corporal Doom") of the Rockingham County Sheriff's Department investigated the theft of the farm equipment. Corporal Doom interviewed the juvenile, who was Sparks' nephew by marriage and who lived next door to Sparks' property. After initially denying involvement with the theft, the juvenile admitted that he had witnessed two men removing the equipment. The juvenile was familiar with the two men, who were friends with his father, and he had assisted them in removing air conditioning parts from Sparks' property a few days earlier.

On 27 January 2010, a juvenile petition was filed against the juvenile in Rockingham County District Court. The petition alleged that the juvenile was delinquent in that he committed, *inter alia*, the offense of misdemeanor larceny. On 22 March 2010, the trial court conducted an adjudication hearing.

At the hearing, Sparks testified about the stolen farm equipment. In addition, Corporal Doom testified about the statements made to him by the juvenile. At the close of the State's evidence, the juvenile made a motion to dismiss, which was denied by the trial court.

The juvenile's counsel then called the juvenile to testify. The trial court allowed the juvenile's testimony to proceed without comment.

The juvenile testified that he had no involvement with the theft of Sparks' equipment and that he had not seen anyone else steal the equipment. The juvenile also testified that he had moved scrap metal off his mother's property with the two men he had identified to Corporal Doom and that he had "hung out" with the men and his father at his grandmother's house. After the juvenile completed his testimony, he renewed his motion to dismiss, which was again denied by the trial court.

The trial court adjudicated the juvenile as delinquent and transferred the case to Stokes County District Court for disposition. The juvenile was placed on probation under the supervision of a court counselor for a period not to exceed twelve months. The juvenile appeals.

II. N.C. Gen. Stat. § 7B-2405

Defendant's sole argument on appeal is that the trial court violated N.C. Gen. Stat. § 7B-2405 when it permitted the juvenile to testify without advising him of his privilege against self-incrimination.[1] We agree, but find that this error did not prejudice the juvenile.

"Our courts have consistently recognized that the State has a greater duty to protect the rights of a respondent in a juvenile proceeding than in a criminal prosecution." *In re T.E.F.*, 359 N.C. 570, 575, 614 S.E.2d 296, 299 (2005) (internal quotations, citations, and brackets omitted). The General Assembly has also taken affirmative steps to ensure that a juvenile's rights are protected during a delinquency adjudication. N.C. Gen. Stat. § 7B-2405 states, in relevant part:

> *In the adjudicatory hearing, the court shall protect the following rights of the juvenile* . . . to assure due process of law:
>
> (1) The right to written notice of the facts alleged in the petition;
>
> (2) The right to counsel;
>
> (3) The right to confront and cross-examine witnesses;
>
> (4) *The privilege against self-incrimination;*
>
> (5) The right of discovery; and
>
> (6) All rights afforded adult offenders except the right to bail, the right of self-representation, and the right of trial by jury.

1. The State's brief contends that this Court has already decided this issue in *In re R.M.*, 181 N.C. App. 759, 640 S.E.2d 870, 2007 N.C. App. LEXIS 386, 2007 WL 509415 (2007) (unpublished). However, under our appellate rules, "[a]n unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority." N.C.R. App. P. 30(e)(3) (2010).

N.C. Gen. Stat. § 7B-2405 (2009) (emphasis added). Thus, pursuant to this statute, the trial court *shall* protect the juvenile's delineated rights, including the right against self-incrimination. "The use of the word 'shall' by our Legislature has been held by this Court to be a mandate, and the failure to comply with this mandate constitutes reversible error." *In re Z.T.B.*, 170 N.C. App. 564, 569, 613 S.E.2d 298, 300 (2005).

In *T.E.F.*, our Supreme Court determined that it was reversible error for a trial court to accept a juvenile's admission without following all of the six steps required by N.C. Gen. Stat. § 7B-2407. 359 N.C. at 574-75, 614 S.E.2d at 299. The Court stated:

> By listing the rights that the trial court must protect during juvenile adjudicatory hearings to assure that due process is satisfied [in N.C.G.S. § 7B-2405], and by subsequently listing the six steps specified in N.C.G.S. § 7B-2407(a) that must be taken before accepting a juvenile's admission of guilt and waiver of these rights, it is clear that our legislature intended a procedure more protective and careful than that afforded adults to ensure a fully informed choice and voluntary decision by all juveniles.

Id. at 574, 614 S.E.2d at 299. The *T.E.F.* Court further stated that since the General Assembly explicitly set out the inquiries that were required to be made when a juvenile admits his guilt, the requirements had to be followed, because the "higher burden placed upon the State to protect juvenile rights would certainly be undermined by ignoring the mandatory language of N.C.G.S. § 7B-2407." *Id.* at 575, 614 S.E.2d at 299. As a result, the Court determined that a trial court's failure to follow all of the steps required by N.C. Gen. Stat. § 7B-2407 when accepting a juvenile's admission constituted reversible error. *Id.*

Similarly, N.C. Gen. Stat. § 7B-2405 "list[s] the rights that the trial court *must* protect during juvenile adjudicatory hearings to assure that due process is satisfied[.]" *Id.* at 574, 614 S.E.2d at 299 (emphasis added). The statute, by stating that the trial court "shall" protect a juvenile's delineated rights, places an affirmative duty on the trial court to protect, *inter alia*, a juvenile's right against self-incrimination. The trial court cannot satisfy this affirmative duty by doing absolutely nothing, as the "higher burden placed upon the State to protect juvenile rights would certainly be undermined by ignoring the mandatory language" of the statute. *Id.* at 575, 614 S.E.2d at 299. While N.C. Gen. Stat. § 7B-2405, unlike the statute governing admissions at issue in *T.E.F.*, does not provide the explicit steps a trial

court must follow when advising a juvenile of his rights, the statute requires, at the very least, *some* colloquy between the trial court and the juvenile to ensure that the juvenile understands his right against self-incrimination before choosing to testify at his adjudication hearing.

In the instant case, there was absolutely no colloquy between the juvenile and the trial court. After the trial court denied the juvenile's motion to dismiss, the juvenile's counsel called the juvenile to testify. The trial court simply responded, "All right." By saying nothing to the juvenile to protect the juvenile's privilege against self-incrimination, the trial court failed to follow its statutory mandate from N.C. Gen. Stat. § 7B-2405(4) to protect the juvenile's constitutional privilege against self-incrimination. This failure was error.

Nevertheless, it is still necessary to determine whether the juvenile was prejudiced by the trial court's error. Since the trial court's failure to follow its statutory mandate implicates the juvenile's constitutional right against self-incrimination, the error is prejudicial unless it was harmless beyond a reasonable doubt. *See State v. Quick*, 337 N.C. 359, 363, 446 S.E.2d 535, 537-38 (1994)(holding that the trial court's violation of a statute which derived from Eighth Amendment protections was "a violation of both our statute and the Eighth Amendment," and was prejudicial unless it was harmless beyond a reasonable doubt).

In the instant case, there was no evidence that the juvenile personally participated in the theft of Sparks' farm equipment. Instead, the State presented evidence that the juvenile was present when the equipment was stolen and relied upon the "friend exception" to the mere presence rule, which states that "[w]hen the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement [of a crime]." *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999) (citations omitted). The juvenile contends that his testimony was incriminating because it bolstered the State's evidence that he was friends with the two men he had identified to Corporal Doom as the perpetrators.

However, prior to the juvenile's testimony, the State had already thoroughly established, through Corporal Doom's testimony, that the juvenile had a prior relationship with the men. According to Corporal Doom, the juvenile admitted he knew the men, that they were friends with the juvenile's father, and that the juvenile had recently helped the men remove other items from Sparks' property a few days earlier.

While the juvenile's testimony provided additional facts about his relationship with the men, these facts did not alter the character of the relationship that was established by the State's evidence.

Moreover, the juvenile's defense was not that he was not friends with the men. Rather, the juvenile testified that he was not involved in any way with the theft, that he was not present at the time the equipment was stolen, that he did not know who stole the equipment, and that the equipment he had helped the men remove a few days earlier was located on the juvenile's mother's property, not Sparks' property. Since the juvenile's testimony was either consistent with the prior evidence presented by the State or was otherwise favorable to the juvenile, it cannot be considered prejudicial. Consequently, the trial court's failure to advise the juvenile of his privilege against self-incrimination was harmless beyond a reasonable doubt.

The juvenile also briefly argues that the trial court's failure to explicitly enunciate, on the record, the standard of review for a motion to dismiss when it denied the juvenile's motion at the close of the State's evidence also made its failure to comply with N.C. Gen. Stat. § 7B-2405 prejudicial. However, the juvenile cites no authority for the proposition that the trial court, in a bench trial, must state aloud the standard of review for a ruling on a motion to dismiss, and we have found none. As a result, we deem this argument abandoned pursuant to N.C.R. App. P. 28(b)(6) (2010).

III. Conclusion

The plain language of N.C. Gen. Stat. § 7B-2405 places an affirmative duty on the trial court to protect the rights delineated therein during a juvenile delinquency adjudication. In the instant case, the trial court failed to comply with N.C. Gen. Stat. § 7B-2405 by allowing the juvenile to testify without determining if the juvenile understood his privilege against self-incrimination. However, since the juvenile's eventual testimony was not incriminating because it was either consistent with the evidence presented by the State or favorable to the juvenile, this error was harmless beyond a reasonable doubt. The trial court's orders of adjudication and disposition are affirmed.

Affirmed.

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

IN THE MATTER OF THE ESTATE OF: WHITNEY MONIQUE MANGUM, DECEASED

No. COA10-1454

(Filed 17 May 2011)

1. Parent and Child— voluntary parenting agreement—statutory requirements

The assistant clerk of court and the superior court judge did not err by concluding that the parties' voluntary parenting agreement satisfied the requirements of N.C.G.S. § 29-19(b)(2).

2. Estates— legal heir—father

The superior court did not err by finding that petitioner was a legal heir of his child's estate. The birth and death certificates, the parenting agreement, and the fact that petitioner held himself out as the child's father was enough to support the corresponding findings of fact.

Appeal by respondent from order entered 17 August 2010 by Judge Shannon R. Joseph in Wake County Superior Court. Heard in the Court of Appeals 13 April 2011.

Lorie Cramer for petitioner-appellee.

George Ligon, Jr., for respondent-appellant.

McCULLOUGH, Judge.

Shannon Street ("respondent) appeals from an order finding Samuel Earl Mangum ("petitioner") to be a legal heir of the Estate of Whitney Monique Mangum. For reasons discussed herein, we affirm.

I. Background

Petitioner filed a Petition for Acknowledgment as Heir of the estate of his daughter, Whitney. On 12 March 1988, respondent gave birth to Whitney out of wedlock. Petitioner was designated as Whitney's biological father on the birth certificate.

Whitney was fatally injured in a hit-and-run automobile accident and died 27 September 2009. Soon thereafter, the liability carrier tendered policy limits to the heirs of the estate. Respondent qualified as administratrix of Whitney's estate and refused to recognize petitioner as an heir of the estate.

Accompanying the Petition, petitioner included a copy of Whitney's birth and death certificates, acknowledging him as her biological father. Petitioner also referenced a 1996 civil action filed in Wake County District Court by respondent, seeking mutual custody, visitation and support. The civil action was resolved by a "Parenting Agreement" attached to the trial court's order. The parties and the district court judge signed the Parenting Agreement on different dates. The Assistant Clerk of Superior Court for Wake County deemed petitioner to be a legal heir of Whitney's estate, which respondent appealed to the Wake County Superior Court. After reviewing the decision of the Assistant Clerk of Court, the trial judge affirmed the decision of the Clerk. Respondent-appellant appeals.

II. Analysis

A. Compliance with N.C. Gen. Stat. § 29-19(b)(2)

[1] The main issue respondent raises to this Court on appeal is whether or not the trial court erred in concluding that the voluntary Parenting Agreement satisfied the requirement of N.C. Gen. Stat. § 29-19(b)(2) (2009) to recognize petitioner as decedent's father. Respondent argues, pursuant to N.C. Gen. Stat. § 29-19(b)(2), that petitioner and respondent did not follow the specified requirements by signing the Parenting Agreement in the presence of a certifying officer. Based upon prior case law and our interpretation of the statute, we disagree.

In reviewing an appeal to the superior court from an order of the clerk of court in a probate matter, the trial court sits as an appellate court. *In re Estate of Swinson*, 62 N.C. App. 412, 415-16, 303 S.E.2d 361, 363-64 (1983). When the order appealed from contains specific findings of fact or conclusions to which the appellant takes exception, the trial court on appeal is to apply the whole record test. *Id.* at 415, 303 S.E.2d at 363. In applying the whole record test, the trial court "reviews the Clerk's findings and may either affirm, reverse, or modify them." *In re Estate of Pate*, 119 N.C. App. 400, 403, 459 S.E.2d 1, 2 (1995). The judge must affirm if there is sufficient evidence to support the clerk's findings. *Swinson*, 62 N.C. App. at 415, 303 S.E.2d at 363. "Moreover, even though the Clerk may have made an erroneous finding which is not supported by the evidence, the Clerk's order will not be disturbed if the legal conclusions upon which it is based are supported by other proper findings." *Pate*, 119 N.C. App. at 403, 459 S.E.2d at 2. "The standard of review in this Court is the same as in the Superior Court." *Id.* at 403, 459 S.E.2d at 2-3. In the case

before us, respondent took exception to a few of the Clerk's findings of fact and conclusions of law.

N.C. Gen. Stat. § 29-19(b)(2) and (c) state:

> (b) For purposes of intestate succession, an illegitimate child shall be entitled to take by, through and from:
>
> . . . .
>
> (2) Any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides.
>
> . . . .
>
> (c) Any person described under subdivision (b)(1) or (2) above and his lineal and collateral kin shall be entitled to inherit by, through and from the illegitimate child.

N.C. Gen. Stat. § 29-19 "provides the only means by which a putative father may inherit from his illegitimate child." *In re Estate of Morris*, 123 N.C. App. 264, 266, 472 S.E.2d 786, 787 (1996). This Court has held that,

> "[w]hen construing statutes, this Court first determines whether the statutory language is clear and unambiguous. If the statute is clear and unambiguous, we will apply the plain meaning of the words, with no need to resort to judicial construction. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment."

Wiggs v. Edgecombe County, 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007) (internal citations and quotations omitted).

The language of N.C. Gen. Stat. § 29-19(b) is clear and unambiguous and, on its face, the statute does not place any limitations on the type of written instrument which must be filed with the Clerk of Superior Court. To meet the requirements imposed by this statute, the father of the child must:

> (1) acknowledge himself to be the father of the child in a written instrument;
>
> (2) execute the instrument or acknowledge parentage before a certifying officer named in N.C. Gen. Stat. § 52-10(b); and
>
> (3) file the instrument during the lifetime of both the father and child in the superior court of the county in which either reside.

N.C. Gen. Stat. § 29-19(b)(2) (2005); *see also In re Estate of Morris*, 123 N.C. App. 264, 472 S.E.2d 786 (1996).

In re Estate of Potts, 186 N.C. App. 460, 462-63, 651 S.E.2d 297, 299 (2007).

In the case at bar, petitioner meets the requirements as laid out in N.C. Gen. Stat. § 29-19(b)(2) and further examined in *Potts*. First, petitioner clearly acknowledged himself to be Whitney's father in the Parenting Agreement, as he is referred to as her father throughout the document. The Parenting Agreement and Order Approving Parenting Agreement meet the requirements of a written instrument in similar fashion to the voluntary support agreement in *Potts*. *See generally Potts*, 186 N.C. App. 460, 651 S.E.2d 297 (voluntary support agreement found to meet the requirements of N.C. Gen. Stat. § 29-19(b)(2)).

The dispositive issue arises in petitioner's meeting of the second requirement that he execute the instrument or acknowledge parentage before a certifying officer named in N.C. Gen. Stat. § 52-10(b) (2009). Respondent contends that because petitioner and respondent did not appear "in the presence" of the district court judge, then the Parenting Agreement does not meet the second requirement. This is not the case as the Parenting Agreement was acknowledged by all parties and approved by the district court judge.

As the assistant clerk of court determined and the superior court affirmed, the meaning of "before" in N.C. Gen. Stat. § 29-19(b)(2), considering case law and the purpose and intent of the statute is "in the jurisdiction of" the certifying officer (or, as in here, the district court judge). Petitioner properly accepted parentage of Whitney in the Parenting Agreement and acknowledged it before the district court by presenting it for consideration.

As for the final requirement, petitioner clearly met the condition by filing the Parenting Agreement in the Wake County Superior Court. Both respondent and Whitney were residents of Wake County at the time of Whitney's death. Therefore, the assistant clerk of court and

the superior court judge did not err in concluding that the Parenting Agreement satisfied the requirements of N.C. Gen. Stat. § 29-19(b)(2).

B. Findings of Fact

[2] Respondent also contends that the superior court erred by finding that petitioner was a legal heir of Whitney's estate based on findings of fact unsupported by the evidence. This argument is without merit.

Respondent assigned error to four findings of fact and also argued that the assistant clerk of court erred by not conducting an evidentiary hearing. As stated above, "[i]f there is evidence to support the findings of the Clerk, the judge must affirm." *Swinson*, 62 N.C. App. at 415, 303 S.E.2d at 363. "Moreover, even though the Clerk may have made an erroneous finding which is not supported by the evidence, the Clerk's order will not be disturbed if the legal conclusions upon which it is based are supported by other proper findings." *Pate*, 119 N.C. App. at 403, 459 S.E.2d at 2.

The assistant clerk clearly based his decisions on the pleadings and documentation filed with the trial court. The evidence reviewed by the assistant clerk in the form of birth and death certificates, the Parenting Agreement, and the fact that petitioner has held himself out as Whitney's father, is enough to support the corresponding findings of fact. For those reasons, the assistant clerk had sufficient findings of fact to determine that petitioner was a legal heir of Whitney's estate. We find no error on the part of the superior court.

III. Conclusion

For the foregoing reasons, we affirm the decision of the trial court in finding that petitioner is a legal heir of the Estate of Whitney Monique Mangum.

Affirmed.

Judges HUNTER (Robert C.) and Judge BRYANT concur.

STATE FARM FIRE AND CASUALTY CO., AS SUBROGEE OF JASON TORRANCE, PLAINTIFF V. DURAPRO; WATTS WATER TECHNOLOGIES, INC.; WAXMAN INDUSTRIES, INC.; BARNETT BRASS AND COPPER, INC.; NIBCO, INC.; LINX LTD.;INTERLINE BRANDS, INC., DEFENDANTS

No. COA10-611

(Filed 17 May 2011)

1. Appeal and Error— interlocutory orders and appeals—motion to dismiss—jurisdiction over person

Although an order denying defendant Linx's motion to dismiss for lack of jurisdiction was interlocutory, appeal of the decision was proper under N.C.G.S. § 1-277(b).

2. Jurisdiction— personal—motion to transfer—jurisdictional defense waived

The trial court properly denied defendant Linx's motion to dismiss for lack of personal jurisdiction where Linx had filed a motion to transfer the action from district to superior court two months earlier. Although an earlier extension of time to answer or otherwise respond did not in itself waive the defense, it did not mean that any N.C.G.S. § 1A-1, Rule 12(b) defense was preserved through the date of the extension regardless of other motions that might be filed.

Appeal by defendant from order entered 24 February 2010 by Judge Abraham Penn Jones in Orange County Superior Court. Heard in the Court of Appeals 4 November 2010.

Law Office of Stephen R. Paul, by Stephen R. Paul and L. Skye MacLeod, for plaintiff-appellee.

Forman Rossabi Black, P.A., by Emily J. Meister and Amiel J. Rossabi, for defendant-appellant Linx, Ltd.

GEER, Judge.

Defendant Linx, Ltd. appeals from an order of the trial court denying its motion to dismiss plaintiff State Farm Fire and Casualty Co.'s complaint for lack of personal jurisdiction. Under N.C. Gen. Stat. § 7A-258(f) (2009) and Rule 12 of the Rules of Civil Procedure, Linx waived its personal jurisdiction defense when it filed its motion to dismiss two months after having filed a motion to transfer the action from district court to superior court. We, therefore, hold that the trial court properly denied Linx's motion to dismiss.

Facts

On 23 September 2009, State Farm commenced this action by filing a complaint against Linx (a Rhode Island corporation) and six other defendants asserting claims for negligence and breach of express and implied warranties. State Farm alleged that, in 2003, one or more of the defendants manufactured, designed, and sold a toilet supply line that was subsequently installed in a home that was insured by State Farm. In September 2006, a coupling nut on the toilet fractured, causing extensive damage to the house and the homeowner's personal property.

On 22 October 2009, Linx filed a motion, pursuant to N.C. Gen. Stat. §§ 7A-258 and 7A-243, to transfer the action from Orange County District Court to Orange County Superior Court on the grounds that the amount in controversy exceeded $10,000.00. On the same day, Linx also filed a motion for extension of time to answer or otherwise move in response to State Farm's complaint. The trial court granted Linx's motion for extension of time, allowing Linx through 14 December 2009 to respond to State Farm's complaint. Shortly thereafter, defendant Interline Brands, Inc. also filed a motion to transfer or alternatively a motion to dismiss the action for having been filed in an improper division of the General Court of Justice.

Subsequently, on 14 December 2009, Linx filed a motion to dismiss, pursuant to Rule 12(b)(2) of the Rules of Civil Procedure, for lack of personal jurisdiction. Linx attached the affidavit of its Vice President, stating that Linx had not conducted business within North Carolina; was not registered to conduct business in North Carolina; has not maintained a place of business within North Carolina; has not owned or leased any real property within North Carolina; does not and never has had a post office box, mailing address, phone number, or bank account within North Carolina; and has not advertised within North Carolina or directed advertisements to the state. In addition, the affidavit stated that Linx did not sell, provide, or ship the toilet supply line at issue to the homeowner or his builder and did not receive any payment from the homeowner or his builder.

On 8 February 2010, the trial court granted Interline Brands' motion to transfer the action to superior court, but denied its motion to dismiss. On 24 February 2010, the trial court entered an order denying Linx's motion to dismiss for lack of personal jurisdiction. Linx has appealed to this Court from the order denying its motion to dismiss.

Discussion

[1] Although the order denying Linx's motion to dismiss is an interlocutory order, Linx's appeal of the trial court's Rule 12(b)(2) decision is proper under N.C. Gen. Stat. § 1-277(b) (2009). *See Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982) ("[T]he right of immediate appeal of an adverse ruling as to jurisdiction over the person, under [N.C. Gen. Stat. § 1-277(b)], is limited to rulings on 'minimum contacts' questions, the subject matter of Rule 12(b)(2).").

[2] On appeal, Linx contends that the court erred in denying its motion to dismiss because State Farm has failed to establish jurisdiction under North Carolina's long-arm statute and that Linx has the necessary minimum contacts with this state. State Farm, however, has argued that Linx waived its personal jurisdiction defense by first filing a motion to transfer under N.C. Gen. Stat. § 7A-258(a). We agree.

On 22 October 2009, Linx filed a motion to transfer pursuant to N.C. Gen. Stat. § 7A-258(a), which authorizes any party to move to transfer a civil action to the proper division when the action has been filed in an improper division. N.C. Gen Stat. § 7A-258(f), however, specifically provides: "Objection to the jurisdiction of the court over person or property is waived when a motion to transfer is filed unless such objection is raised at the time of filing or before." Since Linx did not raise its objection to personal jurisdiction on or before 22 October 2009, the date the motion to transfer was filed, Linx waived any objection based on personal jurisdiction.

In response, Linx argues that the Rules of Civil Procedure "supersede" N.C. Gen. Stat. § 7A-258(f). Rule 1 of the Rules of Civil Procedure, however, expressly precludes that argument: "These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature *except when a differing procedure is prescribed by statute.*" (Emphasis added.) Linx's argument is also inconsistent with N.C. Gen. Stat. § 7A-258(f)'s express reference to Rule 12: "In no other case does the filing of a motion to transfer waive any rights under other motions or pleadings, nor does it prevent the filing of other motions or pleadings, except as provided in Rule 12 of the Rules of Civil Procedure."

Regardless, Rule 12 and N.C. Gen. Stat. § 7A-258(f) are consistent. According to Rule 12(b), a motion asserting a defense of personal jurisdiction "shall be made before pleading if a further pleading is permitted." Rule 12(b) further states that "[t]he consequences of fail-

ure to make such a motion" shall be as provided in Rule 12(g) and 12(h). Rule 12(g) and 12(h) provide:

(g) *Consolidation of defenses in motion.*—A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in section (h)(2) hereof on any of the grounds there stated.

(h) *Waiver or preservation of certain defenses.*—

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (i) if omitted from a motion in the circumstances described in section (g), or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a necessary party, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Under these provisions of Rule 12(b), (g), and (h), Linx was required to file its motion pursuant to Rule 12(b)(2) at the same time or before it filed its motion to transfer. Because Linx sought adjudicative relief from the trial court through the motion to transfer and did not consolidate its Rule 12(b)(2) motion with the transfer motion, Rule 12(h)(1) provides that Linx waived its objection to personal jurisdiction. *See*, *e.g.*, *Evangelistic Outreach Ctr. v. Gen. Steel Corp.*, 181 N.C. App. 723, 725, 640 S.E.2d 840, 842 (2007) ("Rule 12(g) and (h) establish that, by failing to include a motion for dismissal under Rule 12(b)(2) with its motion under Rule 12(b)(1), defendant waived any challenge to personal jurisdiction."); *Humphrey v. Sinnott*, 84 N.C. App. 263, 265-66, 352 S.E.2d 443, 445 (1987) (holding that when defendant moved to change venue prior to asserting his Rule 12(b)(2)

defense, he "necessarily invoked the adjudicatory and discretionary power of the court as to the relief which he requested" and, therefore, "waived any objection to personal jurisdiction," and his motion to dismiss should have been denied).

In arguing otherwise, Linx points to the language in Rule 12(b), which provides that "[o]btaining an extension of time within which to answer or otherwise plead shall not constitute a waiver of any defense herein set forth." Linx repeatedly asserts, citing only this language, that once its motion for extension of time was filed, "the defense of lack of personal jurisdiction was preserved." Linx has, however, misread this exception. Rule 12(b) provides only that filing a motion for extension of time does not *in itself waive* the defense. The granting of an extension of time to move or respond to a complaint does not mean that any Rule 12(b) defense is preserved through the date of the extension irrespective of whatever other motions may be filed before the expiration of the extension. To the contrary, Linx's filing of a motion for extension of time before or simultaneously with its motion to transfer did not provide a blanket preservation of its personal jurisdiction objection.

In sum, Rule 12 and N.C. Gen. Stat. § 7A-258(f) establish that Linx, by filing its motion to transfer two months prior to its Rule 12(b)(2) motion, waived any defense under Rule 12(b)(2). The trial court, therefore, properly denied Linx's motion to dismiss for lack of personal jurisdiction.

Affirmed.

Judges CALABRIA and THIGPEN concur.

STATE OF NORTH CAROLINA v. WILLIAM BURGE, JR.

No. COA10-493

(Filed 17 May 2011)

Animals— attack by dangerous dog—elements—cost of treatment

A sentence for a class 1 misdemeanor, attack by a dangerous dog in violation of N.C.G.S. § 67-4.3, was remanded where the warrant omitted the element that the injuries required medical

treatment costing more than $100.00. Resentencing should be for a violation of N.C.G.S. § 67-4.2(a), failure to confine a dangerous dog.

Appeal by defendant from judgment entered 5 November 2009 by Judge Kenneth F. Crow in Lenoir County Superior Court. Heard in the Court of Appeals 27 October 2010.

Attorney General Roy Cooper, by Assistant Attorney General Joan M. Cunningham, for the State.

Ryan McKaig for defendant-appellant.

GEER, Judge.

Defendant William Burge, Jr. appeals from a judgment sentencing him for commission of a Class 1 misdemeanor based on the jury's finding him guilty of failing to confine a dangerous dog. Because defendant was charged only with violation of N.C. Gen. Stat. § 67-4.2 (2009), a Class 3 misdemeanor, we must vacate and remand for resentencing.

Facts

The State's evidence tended to show the following facts. In 2007, defendant's two dogs were formally designated as dangerous dogs under N.C. Gen. Stat. § 67-4.1 (2007) by the appropriate county board. As a result of this designation, defendant was required to keep the dogs, if unattended, confined indoors, in a securely enclosed and locked pen, or in another structure designed to restrain the dogs. N.C. Gen. Stat. § 67-4.2(a)(1). Defendant was also notified that it was unlawful for him to allow the dogs to go beyond his real property unless the dogs were leashed and muzzled or otherwise securely restrained and muzzled.

On the morning of 8 July 2008, John Flowers was walking home from a nearby store on a path that ran alongside defendant's property. As he walked down the path, one of defendant's two dogs attacked him, biting both of his arms and one of his legs. Flowers became dizzy, he was in a great deal of pain, and his arms were bloody and swollen. After defendant helped Flowers walk home, Flowers was taken by ambulance to Lenoir Memorial Hospital, where he received treatment for several days. He incurred hospital charges of several thousand dollars.

Officer Pat Smith talked to Flowers at the hospital on 11 July 2008. After speaking with Flowers, Officer Smith spoke with defendant who admitted that his dog had bitten Flowers, but he claimed that

Flowers provoked the dog by "kicking at" it. Officer Smith obtained a warrant for defendant's arrest for violation of N.C. Gen. Stat. § 67-4.2(a). The warrant alleged that defendant "did PERMIT A DANGEROUS DOG TO BE AT LARGE, UNATTENDED ON HIS OWN PROPERTY AND DURING THIS TIME THE DANGEROUS DOG ATTACKED JOHN FLOWERS CAUSING SERIOUS MEDICAL INJURY WHICH REQUIRED TREATMENT AT LENOIR MEMORIAL HOSPITAL."

Defendant pled not guilty in district court. On 29 September 2008, the trial court found him guilty and sentenced him to 10 days in jail. This sentence was suspended and he was placed on unsupervised probation for a period of 12 months. Defendant appealed to superior court. At the end of the two-day trial, the jury found defendant guilty of failing to confine a dangerous dog. The trial court found defendant to be a prior conviction level III offender for misdemeanor sentencing purposes and sentenced defendant to 120 days in jail. That sentence was suspended, and defendant was placed on supervised probation for 48 months. The trial court's judgment specified that defendant had been found guilty of N.C. Gen. Stat. § 67-4.2(a) and that the offense was classified as a Class 1 misdemeanor. Defendant gave timely notice of appeal to this Court.

Discussion

Defendant contends that he was charged and found guilty of a Class 3 misdemeanor, failure to confine a dangerous dog in violation of N.C. Gen. Stat. § 67-4.2(a), but was erroneously sentenced for a Class 1 misdemeanor, attack by a dangerous dog in violation of N.C. Gen. Stat. § 67-4.3 (2009).

N.C. Gen. Stat. § 67-4.2(a)(1) provides in pertinent part that it is a crime for a dog owner to:

> Leave a dangerous dog unattended on the owner's real property unless the dog is confined indoors, in a securely enclosed and locked pen, or in another structure designed to restrain the dog.

N.C. Gen. Stat. § 67-4.2(c) states that a violation of that offense is a Class 3 misdemeanor. On the other hand, N.C. Gen. Stat. § 67-4.3 provides:

> The owner of a dangerous dog that attacks a person and causes physical injuries requiring medical treatment in excess of one hundred dollars ($100.00) shall be guilty of a Class 1 misdemeanor.

Here, the warrant for defendant's arrest charged defendant with having violated N.C. Gen. Stat. § 67-4.2(a). The trial court's instruc-

tions to the jury, however, required the jury, in order to find defendant guilty, to decide whether the State had proven that (1) defendant was the owner of a dog named TJ, (2) TJ was a dangerous dog, (3) defendant left TJ unattended on his property without confining TJ to a secured enclosure or pen or without properly securing TJ, (4) TJ attacked Flowers, and (5) TJ caused injuries to Flowers that required medical treatment in excess of $100.00. This instruction merges the elements of N.C. Gen. Stat. § 67-4.2(a)(1) and N.C. Gen. Stat. § 67-4.3. The judgment then identified the offense as being a violation of N.C. Gen. Stat. § 67-4.2(a), but classified that offense as a Class 1 misdemeanor.

In arguing that he could not be sentenced for a Class 1 misdemeanor, defendant points to the fact that the arrest warrant charged him with violating N.C. Gen. Stat. § 67-4.2, a Class 3 misdemeanor. While the arrest warrant references § 67-4.2, the description of the offense more closely tracks § 67-4.3. The statutory cite in the charging document is not controlling if the wording of the charge sets out the elements of another statutory offense and adequately informs the defendant of the charge against him. *See State v. Allen*, 112 N.C. App. 419, 428, 435 S.E.2d 802, 807-08 (1993) (holding that text of warrant and indictment properly charged defendant with violating N.C. Gen. Stat. § 14-34.2(1) even though charging documents specified that offense was violation of N.C. Gen. Stat. § 14-33(b)(4)).

"As a general rule a warrant following substantially the words of the statute is sufficient when it charges the essentials of the offense in a plain, intelligible, and explicit manner." *State v. Barneycastle*, 61 N.C. App. 694, 697, 301 S.E.2d 711, 713 (1983). The arrest warrant, in this case, alleged each of the elements of N.C. Gen. Stat. § 67-4.3 *except* for the element that the injuries required medical treatment costing more than $100.00.

While our courts have not previously addressed whether an indictment or warrant alleging a violation of N.C. Gen. Stat. § 67-4.3 must include the monetary allegation, our Supreme Court has considered that issue with respect to felony larceny, which requires that the value of the stolen goods be more than a specified amount, and held that an indictment is insufficient in the absence of an allegation that the monetary requirement was met. *See State v. Jones*, 275 N.C. 432, 436, 168 S.E.2d 380, 383 (1969) ("Where neither larceny from the person nor by breaking and entering is involved, an indictment for the *felony* of larceny must charge, *as an essential element of the crime*, that the value of the stolen goods was more than two hundred dollars.").

We see no reason to reach a different conclusion with respect to N.C. Gen. Stat. § 67-4.3. Therefore, because the warrant in this case does not allege each of the elements required by N.C. Gen. Stat. § 67-4.3, defendant could not be convicted of violating that statute. As this Court observed in *State v. Daniels*, 43 N.C. App. 556, 558, 259 S.E.2d 396, 397 (1979), a defendant cannot be found guilty of an offense not charged in the criminal pleading:

> The resolution of the issue raised by this appeal is governed by a fundamental rule of law which was laid down by our Supreme Court as early as 1792 and which had developed under English law as early as 1470. The defendant herein cannot be found "guilty of larceny" because the offense of larceny is not charged in the indictment. *State v. Higgins*, 1 N.C. 36 (1792). "[I]t is still necessary that the technical words, requisite in the description of the offense . . ., be inserted in the indictment." *Id.* at 47.

See also State v. Scott, 150 N.C. App. 442, 453-54, 564 S.E.2d 285, 294 (holding that even though it is permissible to convict defendant of lesser included offenses of crime charged in indictment, "the trial court lacks subject matter jurisdiction to try, or enter judgment on, an offense based on an indictment that only charges a lesser-included offense"), *appeal dismissed and disc. review denied*, 356 N.C. 443, 573 S.E.2d 508 (2002).

Defendant does not dispute that the warrant was sufficient to charge him with a violation of N.C. Gen. Stat. § 67-4.2. We, therefore, vacate the judgment in this case and remand for resentencing for defendant's violation of § 67-4.2(a).

Vacated and remanded.

Judges ROBERT C. HUNTER and CALABRIA concur.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, PLAINTIFF v. NORBERTO BUSTOS-RAMIREZ, AUGUSTINE M. PEREZ, AND THE ESTATE OF SERGIO UMBERTO MORALES ARRIAGA, DEFENDANTS

No. COA10-1087

(Filed 17 May 2011)

Insurance— automobile—exclusion—no permission to use vehicle

The trial court correctly granted summary judgment for plaintiff in a declaratory judgment action to determine insurance coverage after an automobile accident. The policy excluded coverage for an insured using a vehicle without a reasonable belief that he was entitled to do so, the owner had told the driver (Perez) not to use his vehicles when Perez had been drinking, Perez had been drinking on the night of the accident, and Perez knew that he did not have permission to operate the vehicle on that night.

Appeal by defendant, the Estate of Arriaga, from judgment entered 29 March 2010 by Judge Patrice A. Hinnant in Forsyth County Superior Court. Heard in the Court of Appeals 9 February 2011.

Davis & Hamrick, L.L.P., by James G. Welsh, Jr., for the plaintiff-appellee.

James B. Wilson, Jr., for the defendant-appellant, Estate of Sergio Umberto Morales Arriaga.

STEELMAN, Judge.

There was no genuine issue of material fact as to whether Perez had a reasonable belief that he was entitled to use the Honda automobile owned by Ramirez. The trial court correctly granted summary judgment in favor of plaintiff.

I. Factual and Procedural History

Augustine Perez ("Perez") had resided with the family of Norberto Bustos-Ramirez ("Ramirez") in Winston-Salem, Forsyth County for several years. Ramirez was the owner of a 1999 Honda Civic automobile which was insured by plaintiff, State Farm Mutual Automobile Insurance Company ("State Farm"). On the night of 10 January 2009, Ramirez was either asleep or away from his home. Perez did not have a driver's license. At approximately 10:00 p.m.

Perez took the keys to the Honda automobile without asking permission from Ramirez. Together with Sergio Umberto Morales Arriaga ("Arriaga"), Perez drove to a disco in Greensboro where he consumed alcohol. At approximately 3:11 a.m. on 11 January 2009, the two men were returning to Winston-Salem, with Perez operating the automobile. Perez lost control of the vehicle, resulting in it turning over several times before coming to rest. Arriaga was thrown from the vehicle and subsequently died from injuries received in the incident.

On 3 June 2009, State Farm filed this action seeking a declaratory judgment that its policy covering the 1999 Honda automobile did not provide any coverage for any claims by Arriaga's Estate for wrongful death, that it had no duty to defend Perez in any such litigation, and that Ramirez would not be a proper party to such litigation. Arriaga's Estate filed answer denying the coverage allegations of the complaint. This answer asserted cross-claims for wrongful death against Perez and Ramirez seeking damages of "one million dollars ($1,000,000.00)" for the wrongful death of Arriaga and a counterclaim against State Farm seeking a declaration that State Farm's policy provided coverage for the death of Arriaga.

On 19 February 2010, State Farm filed a motion for summary judgment. On 29 March 2010, the trial court granted the motion, declared that State Farm was "neither obligated nor has a duty to defend or indemnify the Defendant, Augustine M. Perez, as a matter of law," and dismissed the counterclaim of Arriaga's Estate with prejudice.

The Arriaga Estate appeals.

II. Granting of State Farm's Motion for Summary Judgment

In its only argument, the Estate of Arriaga contends that the trial court erred in granting summary judgment in favor of State Farm. We disagree.

A. Standard of Review

Our standard of review 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. [T]he evidence presented by the parties must be viewed in the light most favorable to the non-movant. Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

Carlson v. Old Republic Ins. Co., 160 N.C. App. 399, 402, 585 S.E.2d 497, 499 (2003) (internal quotations and citations omitted).

Our review of orders granting summary judgment is *de novo*. *Miller v. First Bank*, ––– N.C. App. –––, –––, 696 S.E.2d 824, 827 (2010).

B. Analysis

State Farm's motion for summary judgment was based upon an exclusion contained in Part A of the policy, "Liability Coverage" which excludes coverage for an insured "[u]sing a vehicle without a reasonable belief that that insured is entitled to do so." Part A of the policy defines an "insured" as "[y]ou or any family member for the ownership, maintenance or use of any auto or trailer" and "[a]ny person using your covered auto."[1]

State Farm contended, and the trial court agreed that Perez was not using Ramirez' vehicle with a reasonable belief that he was entitled to do so. The Estate of Arriaga contends that the evidence before the trial court presented genuine issues of material fact on this issue, and that the trial court erred in granting summary judgment.

The evidence presented to the trial court included the depositions of Floraina Villarreal (the girlfriend of Arriaga), Maria F. Arriaga (mother of Arriaga), Perez, Ramirez, State Farm's insurance policy on the 1999 Honda automobile, and the responses of Perez and Ramirez to written discovery. This evidence revealed that Perez did not have a driver's license; that Ramirez was either asleep or away from his home when Perez took the vehicle on 10 January 2009; that Perez did not ask permission before he took the vehicle; that Ramirez had specifically instructed Perez not to drive his vehicles if he had been drinking; that Perez had been drinking when the accident occurred on 11 January 2009; and that Perez admitted he had no legal right to operate the Honda vehicle. There was conflicting evidence about Ramirez allowing Perez to use his vehicles. At one point, Perez testified that Ramirez instructed him "Don't—don't get my cars anymore. Don't take my cars anymore." At other times Perez testified that Ramirez let him use his cars. Ramirez testified that Perez did not have permission to drive the Honda, because Perez did not have a driver's license.

While it is disputed whether Ramirez had allowed Perez to operate his vehicles at other times, it is undisputed that Ramirez had told

1. The remaining definitions of "insured" contained in the policy are not relevant to our analysis in this case.

Perez that he was not to operate any of his vehicles when he had been drinking. It is also uncontroverted that Perez was drinking on the night that Arriaga was killed, and that he knew he did not have permission to operate the Honda on that occasion.

In *Newell v. Nationwide Mut. Ins. Co.*, 334 N.C. 391, 432 S.E.2d 284 (1993) our Supreme Court addressed the precise exclusion at issue in this case. The Supreme Court held that where the son of the owner of the vehicle did not have a driver's license, and was forbidden to use any of the father's vehicles, that he "could not have had a reasonable belief that he was entitled to use his father's vehicle." *Id.* at 397, 432 S.E.2d at 288; *see also Haney v. Miller*, 128 N.C. App. 326, 494 S.E.2d 619 (1998); *Nationwide Mutual Ins. Co. v. Baer*, 113 N.C. App. 517, 439 S.E.2d 202 (1994).

We hold that based upon the uncontested facts in this case, and the cases cited above, Perez did not have a reasonable belief that he was entitled to drive Ramirez' Honda automobile on the night that Arriaga was killed. The trial court correctly determined that State Farm's policy did not afford coverage to Perez. We affirm the declaratory ruling of the trial court, and its dismissal of the counterclaim filed by the Estate of Arriaga.

AFFIRMED.

Judges ELMORE and ERVIN concur.

STATE OF NORTH CAROLINA v. EVERETT GREGORY McCAIN DEFENDANT

No. COA10-647

(Filed 17 May 2011)

Evidence— untimely motion to strike—witness testimony

The trial court did not abuse its discretion in a possession of cocaine case by denying defendant's untimely motion to strike an SBI forensic chemist's testimony when an objection was not made during direct examination, but made after the completion of this witness and another witness's testimony plus a motion to suppress.

Appeal by defendant from judgment entered on or about 18 February 2010 by Judge W. Osmond Smith, III, in Superior Court, Person County. Heard in the Court of Appeals 2 November 2010.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Kathleen Mary Barry, for the State.

Anne Bleyman, for defendant-appellant.

STROUD, Judge.

Everett Gregory McCain ("defendant") appeals from a conviction for possession of cocaine. For the following reasons, we find no error in defendant's trial.

On 11 May 2009, defendant was indicted for one count of possession with intent to manufacture, sell, and deliver, oxycontin and possession with intent to sell and deliver cocaine. Defendant was tried on these charges during the 17 February 2010 Criminal Session of Superior Court, Person County. The State's evidence tended to show that on 6 November 2008, the Roxboro Police Department executed a search warrant of defendant's residence at 970 Allie Clay Road in Person County. As a result of the execution of that search warrant, police seized, among other items, eight plastic bags containing a white powdery substance. This evidence was submitted to the North Carolina State Bureau of Investigation ("SBI") for examination. Irvin Lee Alcox, a forensic chemist with the SBI, analyzed the white powder and testified that the eight plastic bags contained 14.0 grams of the controlled substance cocaine hydrochloride. During trial, the State voluntarily dismissed the charge of possession with intent to manufacture, sell, and deliver oxycontin. On 18 February 2010, the jury found defendant guilty of possession of cocaine. The trial court sentenced defendant to a term of six months to eight months imprisonment. The trial court suspended this sentence and placed defendant on supervised probation for 36 months. Defendant gave notice of appeal in open court.

In his only argument on appeal, defendant contends that the trial court abused its discretion in permitting SBI forensic chemist Irvin Alcox to testify as an expert witness, as the State had committed a discovery violation by not providing defendant with a copy of Mr. Alcox's laboratory notes stating that he had combined all of the eight bags of white powdery substance for analysis based on a visual examination and this violation amounted to a surprise to the defense. We

note that defendant raised these arguments at trial in a motion to strike Mr. Alcox's testimony, which was denied by the trial court.

Our Supreme Court has stated that

> a motion to strike out the testimony, to which no objection was aptly made, is addressed to the discretion of the trial judge, and his ruling in the exercise of such discretion, unless abuse of that discretion appears, is not subject to review on appeal.

State v. Hunt, 223 N.C. 173, 176, 25 S.E.2d 598, 600 (1943) (citation omitted). N.C. Gen. Stat. § 8C-1, Rule 103(a)(1) (2009) states that "[e]rror may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected, and . . . a *timely* objection or motion to strike appears of record. . . ." (emphasis added). Our Supreme Court has further noted that "[i]t is axiomatic that an objection to or motion to strike an offer of evidence must be made as soon as the party objecting has an opportunity to discover the objectionable nature thereof. Unless prompt objection is made, the opponent will be held to have waived it." *State v. Cox*, 303 N.C. 75, 81, 277 S.E.2d 376, 380 (1981) (citations omitted). Therefore, "[a] motion to strike will . . . be deemed untimely if the witness answers the question and the opposing party does not move to strike the response until after further questions are asked of the witness." *State v. McCray*, 342 N.C. 123, 127, 463 S.E.2d 176, 179 (1995) (the defendant's motion to strike the witness' in-court identification was not timely as the defense counsel allowed the witness to answer three subsequent questions following the witness identification before making the motion to strike.).

Here, the trial transcript shows that defendant's motion to strike was untimely. During direct examination of Sergeant Shawn Williams of the Roxboro Police Department, the State, with permission from defendant, suspended Sergeant Williams' testimony and brought Mr. Alcox to the stand for direct examination. During the State's direct examination, Mr. Alcox testified as to his analysis of the white powder and his conclusion that it was cocaine hydrochloride, but the only objection raised by defendant was as to the State's introduction of Mr. Alcox's laboratory report into evidence. Defendant made no objection as to Mr. Alcox's testimony during direct examination. Defense counsel cross-examined Mr. Alcox, including questions regarding his laboratory notes. After Mr. Alcox's testimony, Sergeant Williams was then brought back to the stand and defense counsel was permitted to cross-examine Sergeant Williams; the State asked questions on redi-

rect; and defendant asked questions to Sergeant Williams in recross examination. Defense counsel then moved to suppress the physical evidence, which was denied by the trial court. It was at this point in the trial that defense counsel moved "to strike the chemical, the forensic scientist's opinion of cocaine based on [a] discovery violation[,]" as the State had not provided defendant Mr. Alcox's laboratory notes which provided for the underlying basis of the expert's opinion, and this omission amounted to a surprise to the defense. The trial court denied defendant's motion.

It appears from the transcript that defense counsel had already discovered "the objectionable nature[,]" *see Cox*, 303 N.C. at 81, 277 S.E.2d at 380, of Mr. Alcox's testimony prior to trial, as defense counsel during his argument for a motion to strike stated:

> I will say for the record, right before the trial began [the prosecutor] spoke to the chemist and the chemist told him he only pretested five bags and the combined, but that was the notice we had with regards to how this testing was done.

Therefore, defendant should have made his objection or motion to strike during or prior to Mr. Alcox's testimony. We also note that defense counsel gave no reason for his delay in raising his motion to strike. As defense counsel did not make an objection to Mr. Alcox's testimony during direct examination but waited until after the completion of Mr. Alcox's and Sergeant Williams' testimony, and his motion to suppress before raising the above motion to strike, we hold that defendant's motion to strike was untimely. Therefore, the trial court did not abuse its discretion in denying defendant's motion to strike. Accordingly, we overrule defendant's argument and hold that defendant received a trial free from error.

NO ERROR.

Judges BRYANT and BEASLEY concur.

TAMMY ALLISON, EMPLOYEE, PLAINTIFF v. WAL-MART STORES, SELF-INSURED EMPLOYER, (CLAIMS MANAGEMENT, INC., THIRD PARTY ADMINISTRATOR), DEFENDANTS

No. COA10-1023

(Filed 17 May 2011)

Appeal and Error— interlocutory orders and appeals—workers' compensation opinion and award—continuing disability to be determined

An appeal from a workers' compensation opinion and award was dismissed as interlocutory where the order expressly reserved the extent of plaintiff's continuing disability for future determination.

Appeal by defendant Wal-Mart Stores from Opinion and Award entered 18 May 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 February 2011.

Cobourn & Saleeby, L.L.P., by Sean C. Cobourn, for plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones and Brandon M. Williams, for defendant-appellant Wal-Mart Stores.

MARTIN, Chief Judge.

Defendant-employer Wal-Mart Stores appeals from an Opinion and Award by the North Carolina Industrial Commission ("the Commission") awarding temporary total disability compensation to plaintiff-employee Tammy Allison. The parties stipulate that plaintiff-employee sustained an injury by accident arising out of and in the course of her employment on 19 June 2007. On 5 July 2007, defendant-employer filed a Form 60 with the Commission, admitting that plaintiff-employee suffered an injury by accident, sustained a "[c]ontusion of the left knee & sprain of lumbar," and was entitled to temporary total compensation for such injury. One year later, plaintiff-employee filed a Form 33 with the Commission, requesting payment for permanent partial disability, medical expenses, and additional medical treatment. In March 2009, defendant-employer filed a Form 61 with the Commission, denying plaintiff-employee's claim for the following reasons:

> [Plaintiff-employee] was released at MMI with a zero percent (0%) impairment rating to the left knee on September 5, 2007. Dr. Goebel opined that [plaintiff-employee] sustained a "flare-up" of her underlying arthritis. Defendants contend that [any] treatment received by [plaintiff-employee] for her left lower extremity or back after September 5, 2007 is not causally related to the incident of June 19, 2007.

After a hearing before the deputy commissioner, on 16 November 2009, the deputy commissioner entered an Opinion and Award denying plaintiff-employee's claim for further benefits. Plaintiff-employee appealed to the Full Commission, which entered an Opinion and Award on 18 May 2010 reversing the deputy commissioner's Opinion and Award. The Commission concluded that plaintiff-employee's "left medial meniscus tear was causally related to the June 19, 2007 injury by accident, resulting in [plaintiff-employee] being temporarily totally disabled from any employment and subsequent knee surgery." The Commission also concluded that plaintiff-employee's injury by accident "additionally caused [plaintiff-employee's] back injury, which resulted in ongoing treatment and [plaintiff-employee] being temporarily totally disabled from any employment as a result of back surgery on February 10, 2009 until July 27, 2009." Accordingly, the Commission awarded plaintiff-employee temporary total disability compensation for the periods from 19 June 2007 to 5 September 2007, from 2 July 2008 to 15 October 2008, and from 10 February 2009 to 27 July 2009. The Commission further ordered that defendant-employer pay all related medical expenses that have been or will be incurred as a result of plaintiff-employee's compensable injury by accident on 19 June 2007, "for so long as such examinations, evaluations and treatments may reasonably be required to effect a cure, give relief or tend to lessen [plaintiff-employee's] period of disability." The Commission also concluded that "[t]he record contains insufficient evidence regarding the extent of [plaintiff-employee's] continuing disability," and decreed, "In that the record contains insufficient evidence concerning the extent of [plaintiff-employee's] continuing disability, if any, after July 27, 2009, this issue is RESERVED for future determination or agreement of the parties." Defendant-employer appeals.

"Neither party addresses the issue of whether the [O]pinion and [A]ward is appealable at this time." *See Riggins v. Elkay S. Corp.*, 132 N.C. App. 232, 233, 510 S.E.2d 674, 675 (1999). " '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.' " *Perry v. N.C. Dep't of Corr.*, 176 N.C. App. 123, 129, 625 S.E.2d 790, 794 (2006) (quoting *Ratchford v. C.C. Mangum, Inc.*, 150 N.C. App. 197, 199, 564 S.E.2d 245, 247 (2002)). " 'Thus, an appeal of right arises only from a final order or decision of the Industrial Commission.' " *Id.* (quoting *Ratchford*, 150 N.C. App. at 199, 564 S.E.2d at 247). "A decision of the Industrial Commission 'is interlocutory if it determines one but not all of the issues in a workers' compensation case.' " *Id.* (quoting *Ratchford*, 150 N.C. App. at 199, 564 S.E.2d at 247). "A decision that 'on its face contemplates further proceedings or which does not fully dispose of the pending stage of the litigation is interlocutory.' " *Id.* (quoting *Watts v. Hemlock Homes of the Highlands, Inc.*, 160 N.C. App. 81, 84, 584 S.E.2d 97, 99 (2003)).

In the present case, after concluding that "[t]he record contain[ed] insufficient evidence regarding the extent of [plaintiff-employee's] continuing disability," the Commission expressly reserved "for future determination" the "extent of [plaintiff-employee's] continuing disability, if any, after July 27, 2009." There is nothing in the record to indicate that this issue has since been addressed by the Commission or resolved by agreement of the parties. "It is our duty to dismiss an appeal *sua sponte* when no right of appeal exists." *Riggins*, 132 N.C. App. at 233, 510 S.E.2d at 675 (citing *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980)); *see, e.g., Nash v. Conrad Indus., Inc.*, 62 N.C. App. 612, 618, 303 S.E.2d 373, 377 ("The 23 July 1981 Opinion and Award expressly reserved final disposition of the matter pending the receipt of more complete evidence regarding any additional permanent partial disability plaintiff sustained as a result of the condition of her back. That Opinion and Award did not dispose finally of the matter. Rather, it contemplated further proceedings and was therefore interlocutory. Appeal from an order of the Industrial Commission lies only from a final order. Appeal from an interlocutory order is improper." (citation omitted)), *aff'd per curiam*, 309 N.C. 629, 308 S.E.2d 334 (1983). Accordingly, we dismiss this appeal as interlocutory.

Dismissed.

Judges McGEE and McCULLOUGH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 MAY 2011)

BASS v. ALVARADO No. 10-421	Union (06CVS2109)	Reversed and Remanded
BREWER v. OAKS OF CAROLINA No. 10-626	Indus. Comm. (855204)	Affirmed in part; remanded in part
HUSTON v. HUSTON No. 10-941	Cumberland (09CVD9966)	Affirmed
IN RE C.L.C. No. 10-1396	Mecklenburg (07JT503)	Affirmed
IN RE C.N. No. 10-1450	Mecklenburg (07JT227)	Affirmed
IN RE J.A.S. No. 10-1511	Buncombe (09JT336)	Affirmed
IN RE J.L.H. No. 10-1557	Chatham (10JT12)	Affirmed
IN RE N.N. No. 10-1340	Union (09JA106-108)	Affirmed in part, reversed in part, vacated in part and remanded
IN RE R.S. No. 10-1381	Union (10JA49)	Affirmed in part, reversed in part
IN RE RAMIREZ No. 10-1162	Mecklenburg (10SPC2522)	Reversed
LEADMAN v. LEADMAN No. 10-821	New Hanover (08CVD63)	Affirmed
LOCKARD v. CHAPEL HILL REHAB. CTR. No. 10-811	Indus. Comm. (785930)	Affirmed
PUCKETT v. N.C. DEP'T OF CORR. No. 10-1341	Wake (04CVS14711)	Affirmed
SMITH v. TD AMERITRADE, INC. No. 10-1221	Caswell (08CVS386)	Dismissed
STATE v. ADAMS No. 10-1363	Pitt (05CRS53713) (05CRS5889)	No Error
STATE v. ARDREY No. 10-312	Buncombe (09CRS177) (08CRS61839)	Reversed

STATE v. BRODIE No. 10-737	Wayne (07CRS55283)	No Error
STATE v. BYNEM No. 10-999	Johnston (09CRS51433)	No Error
STATE v. DAVIS No. 10-824	Randolph (08CRS53398-99) (08CRS53532) (08CRS53535) (08CRS53537)	No Error
STATE v. DEATON No. 10-1079	Cleveland (09CRS50314-15) (09CRS50322) (09CRS727)	No Error
STATE v. GILLIKIN No. 10-1226	Carteret (07CRS55096-97) (07CRS55099) (07CRS6050)	No Error
STATE v. GOBLE No. 10-665	Iredell (02CRS58743-44) (02CRS58749) (02CRS58760-61) (02CRS58770-71) (09CRS2065)	Vacated and Remanded
STATE v. GORHAM No. 10-673	Wake (08CRS77725) (08CRS77727-28)	No error in part, no plain error in part, and remanded in part to correct a clerical error
STATE v. GRIER No. 10-1472	Mecklenburg (09CRS228413-15) (09CRS60586)	No error in part; vacated in part; and remanded for resentencing
STATE v. HERRON No. 10-1360	Mecklenburg (09CRS248015-16)	No error in part, remanded in part for resentencing
STATE v. HODGE No. 10-1036	Wake (08CRS80028)	No error in part and dismissed in part.
STATE v. JEFFRIES No. 10-595	Rockingham (09CRS50819)	Dismissed
STATE v. JOHNSON No. 10-642	Rockingham (09CRS52040) (09CRS52039)	No Error
STATE v. MAYNOR No. 10-945	Buncombe (08CRS53977)	No Error

STATE v. MCCRIMMON No. 10-494	Chatham (08CRS51606)	Vacated and Remanded
STATE v. NGENE No. 10-546	Wake (08CRS64397-64400) (08CRS64385-95)	No Error
STATE v. PARKER No. 10-1015	Brunswick (08CRS57059) (09CRS3235)	No Error
STATE v. RIDDICK No. 10-1448	Washington (09CRS202-203)	No Error
STATE v. SCOTT No. 10-780	Robeson (07CRS53581)	No Error
WADDELL v. GOODYEAR TIRE & RUBBER CO. No. 10-1102	Indus. Comm. (328445) (351178)	Dismissed
WAKE RADIOLOGY SERVS. v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 10-933	Dept. of Health & Human Services (09DHR2976)	Affirmed
WILLIAMS v. BIESECKER No. 10-1206	Transylvania (07CVS481)	Affirmed

STATE OF NORTH CAROLINA v. BARRY EUGENE TAYLOR

No. COA10-551

(Filed 7 June 2011)

1. Obstruction of Justice— misdemeanor conviction—felonious indictments—motion for appropriate relief

The trial court did not err by denying defendant chief deputy's motion for appropriate relief based on alleged lack of jurisdiction to accept a verdict and enter a judgment convicting him of misdemeanor obstruction of justice even though the original and superseding indictments charged defendant with felonious obstruction of justice.

2. Statutes of Limitation and Repose— misdemeanor—motion for appropriate relief—lesser-included offense

The trial court did not err by denying defendant chief deputy's motion for appropriate relief on the grounds that the trial court permitted him to be convicted for committing a time-barred lesser-included offense. The statute of limitations set out in N.C.G.S. § 14-1 did not control the submission of the issue of defendant's guilt of a misdemeanor lesser-included offense to the jury since the greater offense was properly charged in a timely manner.

3. Obstruction of Justice— failure to instruct—lack of legal authority

The trial court did not err in an obstruction of justice case by denying defendant chief deputy's motion for appropriate relief on the grounds that the trial court failed to instruct the jury on the legal authority to require the processing with which defendant allegedly interfered. Defendant failed to establish that he had any right or obligation to determine that a subordinate had arrested a suspect without possessing the required probable cause and to take corrective action.

4. Appeal and Error— preservation of issues—plain error

The trial court did not commit plain error or error by submitting the issue of defendant chief deputy's guilt of misdemeanor obstruction of justice to the jury or by its failure to instruct the jury concerning the sufficiency of a sergeant's justification for arresting a doctor for driving while impaired.

STATE v. TAYLOR

[212 N.C. App. 238 (2011)]

Appeal by defendant from judgment entered 30 September 2009 by Judge A. Robinson Hassell and order entered 15 January 2010 by Judge Richard L. Doughton in Cleveland County Superior Court. Heard in the Court of Appeals 16 November 2010.

Attorney General Roy Cooper, by Catherine F. Jordan, Assistant Attorney General, for the State.

Knox, Brotherton, Knox & Godfrey, by Allen C. Brotherton, for Defendant-Appellant.

ERVIN, Judge.

Defendant Barry Eugene Taylor appeals from a judgment entered by the trial court ordering that Defendant be imprisoned for 45 days in the custody of the Sheriff of Lincoln County and suspending his sentence for 18 months on the condition that Defendant successfully complete probation, perform 20 hours of community service during the first 60 days of the probationary period, pay a $500.00 fine and the costs, and comply with the usual terms and conditions of probation based upon his conviction for misdemeanor obstruction of justice, and from an order entered by Judge Doughton denying his motion for appropriate relief. After carefully considering Defendant's challenges to the trial court's judgment and Judge Doughton's order in light of the record and the applicable law, we conclude that Defendant had a fair trial that was free from prejudicial error, that Judge Doughton did not err by denying Defendant's motion for appropriate relief, and that Defendant is not entitled to any relief on appeal.

I. Factual Background

A. Substantive Facts

In February 2007, Timothy Daugherty was the elected Sheriff of Lincoln County, North Carolina. Defendant was Sheriff Daughtery's chief deputy or "second in charge." As Chief Deputy, Defendant held a position superior to other departmental employees, including Sergeant Steve Dombrowski. As of the date in question, Sergeant Dombrowski had stopped more than three hundred individuals suspected of driving while impaired during a fourteen year law enforcement career. In addition, Sergeant Dombrowski had been trained in the administration of standard field sobriety tests and was certified to operate an Intoxilyzer, a device used to measure a person's blood alcohol concentration.

On 25 February 2007, Sergeant Dombrowski and two other officers set up a license checkpoint on Highway 16 in Lincoln County. The officers participating in the operation of the checkpoint stopped each approaching car, checked the operator's driver's license and the vehicle's registration, and attempted to determine whether the driver was intoxicated or whether there were open containers of alcoholic beverages in the car. Sergeant Dombrowski established the checkpoint on a straight section of Highway 16 so that drivers could see the checkpoint from a distance as they approached. Aside from the fact that the area in which the checkpoint had been established was lit by "several large street lamps," the participating officers also carried flashlights, left the lights of their patrol vehicle on, and wore reflective vests.

At approximately 12:45 a.m., Sergeant Dombrowski observed a car drive slowly past the checkpoint without stopping. As a result, he stopped the car, checked its license plate number, and determined that the vehicle was registered to Dr. Daniel Senft, who was driving the car on that occasion. Sergeant Dombrowski noticed an odor of alcohol about Dr. Senft, who acknowledged that he had consumed several alcoholic drinks before being stopped. After asking Dr. Senft to exit the vehicle in order to perform various field sobriety tests, Sergeant Dombrowski noticed that Dr. Senft steadied himself using the car door as he complied with the request.[1] Sergeant Dombrowski asked Dr. Senft to blow into his handheld Alco-Sensor, a portable device that measures an individual's blood alcohol concentration, but Dr. Senft declined to do so. After interacting with Dr. Senft for about thirty minutes, Sergeant Dombrowski formed the opinion that Dr. Senft was an impaired driver, took Dr. Senft into custody for driving while impaired, placed Dr. Senft in the rear of his patrol vehicle, and drove to the Lincoln County Sheriff's office, where he planned to ask Dr. Senft to take an Intoxilyzer test.

At the time that Sergeant Dombrowski placed Dr. Senft in his patrol car, he did not handcuff Dr. Senft or confiscate Dr. Senft's cell phone. During the trip to the Lincoln County Sheriff's Department, Dr. Senft called his wife. In the course of this call, Dr. Senft handed the phone to Sergeant Dombrowski. Mrs. Senft told Sergeant Dombrowski that her husband "worked with somebody who is dating

1. Although Sergeant Dombrowski did not recall how Dr. Senft performed on the field sobriety tests, Dr. Senft testified that he passed the walk-and-turn test and the one-leg stand test and Defendant told an investigator that Sergeant Dombrowski told him that Dr. Senft passed the field sobriety tests.

the person who's second in charge" at the Lincoln County Sheriff's Department. In response, Sergeant Dombrowski suggested that she call the Sheriff's Department's communications center and ask how to contact Defendant. As a result, Mrs. Senft spoke with Catherine Lafferty, an employee assigned to the communications center. Mrs. Senft told Ms. Lafferty that she was a personal friend of Defendant's and asked to have him paged. Instead of paging him, Ms. Lafferty called Defendant and gave him Mrs. Senft's phone number.

When Ms. Lafferty called Defendant, he was at home with his girlfriend, Tabatha Willis, who was employed by Dr. Senft's medical practice. Defendant told Ms. Lafferty to have Sergeant Dombrowski call him, so Ms. Lafferty relayed that message to Sergeant Dombrowski. In addition, Ms. Willis called Mrs. Senft, who told her that Dr. Senft was in custody and needed help. At that point, Defendant provided Mrs. Senft with directions to the Lincoln County Sheriff's Department and told Mrs. Senft that he would meet her there.

Sergeant Dombrowski arrived at the Sheriff's Department at around 2:00 a.m., called Defendant, and told him about the checkpoint and the reason for Dr. Senft's arrest. Upon his own arrival at the Sheriff's Department, Defendant took Dr. Senft into his office. About twenty minutes later, Defendant emerged from his office and asked Sergeant Dombrowski to retrieve the Alco-Sensor device from his patrol vehicle. After Sergeant Dombrowski complied with this request, Defendant took the Alco-Sensor into his office, where he remained with Dr. Senft for approximately twenty additional minutes. At that point, Defendant came out of his office, informed Sergeant Dombrowski that Dr. Senft had blown a .07 on the Alco-Sensor, and said that Dr. Senft had been released. Dr. Senft testified that Sergeant Dombrowski told him that he "did fine" on the field sobriety test the officer administered, and also testified that Defendant administered field sobriety tests. Dr. Senft was not charged with any offenses and left the law enforcement center with his wife shortly thereafter.

In deciding to release Dr. Senft, Defendant did not administer an Intoxilyzer test, bring Dr. Senft before a magistrate, or discuss the situation with Sergeant Dombrowski. Defendant was not a certified Intoxilyer operator and had never been trained to use an Alco-Sensor. Defendant did not show Sergeant Dombrowski the results of the Alco-Sensor screen which he claimed to have administered to Dr. Senft. According to a statement that Defendant made to an investigator with the State Bureau of Investigation, the release of Dr. Senft was the only time he had intervened in connection with an arrest made by

another officer. Even so, Defendant told an investigator that he had released Dr. Senft because he had concerns about whether there was probable cause to believe that Dr. Senft was guilty of driving while impaired.

B. Procedural History

On 13 July 2009, the Lincoln County grand jury returned a bill of indictment charging Defendant with felonious obstruction of justice[2] by interfering with the processing of "a subject" who had been arrested for impaired driving. The grand jury returned a superseding indictment against Defendant on 10 August 2009, which differed from the original indictment by substituting Dr. Senft's name for the references to "a subject" in the original indictment. On 18 August 2009, Judge Forrest D. Bridges entered an order changing the venue for the trial from Lincoln County to Cleveland County as a result of the "degree of publicity" about the case.

The charge against Defendant came on for trial before the trial court and a jury at the 28 September 2009 criminal session of Cleveland County Superior Court. At the conclusion of the evidence, the trial court instructed the jury to determine whether Defendant was guilty of felonious obstruction of justice, guilty of misdemeanor obstruction of justice, or not guilty. On 30 September 2009, the jury returned a verdict finding Defendant guilty of misdemeanor obstruction of justice. Based upon this verdict, the trial court sentenced Defendant to forty-five days imprisonment in the Lincoln County jail, suspended Defendant's sentence, and placed Defendant on supervised probation for eighteen months on the condition that he complete 20 hours of community service within the first 60 days of the probationary period, pay a $500 fine and the costs, and comply with the usual terms and conditions of probation.

On 12 October 2009, Defendant filed a motion for appropriate relief in which he requested that the court strike the verdict, arrest judgment, and dismiss the charge against him. In support of his motion for appropriate relief, Defendant alleged, in pertinent part, that:

1. The statute of limitations had run as to the misdemeanor charge upon which the judgment was entered[.]

2. The Indictment and Superseding Indictment did not charge a legally cognizable felony offense and the Superior Court did

2. In the absence of an explicit statement to the contrary, references to "obstruction of justice" throughout the remainder of this opinion are to common law obstruction of justice rather than to any statutorily-defined offense.

not have jurisdiction in this matter. Obstruction of justice by obstructing an officer in the discharge of a lawful duty as alleged herein cannot be a felony. . . . [T]he legislature has supplanted the common law as to the alleged acts of defendant by enacting N.C. [Gen. Stat. §] 14-223[.]

3. The evidence, at the close of all the evidence, was insufficient to justify submission of the case to the jury[.]

After providing the parties with an opportunity to be heard, Judge Doughton entered an order denying Defendant's motion on 15 January 2010. Defendant noted an appeal to this Court from the trial court's judgment and the denial of his motion for appropriate relief.

II. Legal Analysis

A. Standard of Review

On appeal, Defendant argues that Judge Doughton erred by denying his motion for appropriate relief on the grounds that (1) the trial court lacked subject matter jurisdiction over the charged offense; (2) the misdemeanor obstruction of justice charge of which Defendant was convicted was barred by the statute of limitations; and (3) the trial court "failed to instruct the jury on the lack of legal authority to require the processing with which Defendant allegedly interfered." In addition, Defendant argues that the trial court committed plain error by submitting the issue of Defendant's guilt of misdemeanor obstruction of justice to the jury and by failing to instruct on the defense of "lack of legal authority to require the processing with which Defendant allegedly interfered."

1. Denial of Motion for Appropriate Relief

We review a trial court's ruling on a motion for appropriate relief "to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982). " 'When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal.' " *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (quoting *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998) (internal citations omitted)). As a result of

the fact that the issues raised by Defendant's challenge to Judge Doughton's decision to deny his motion for appropriate relief are primarily legal rather than factual in nature, we will essentially use a *de novo* standard of review in evaluating Defendant's challenges to Judge Doughton's order.

2. Instructional Issues

"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). "In criminal cases, [however,] an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action 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." 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 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[.]"

State v. Odum, 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)). As a result, plain error review involves the use of "a higher standard, *i.e.*, that a different result 'probably would have been reached but for the error.' " S*tate v. Williams*, —— N.C. App. ——, ——, 689 S.E.2d 412, 420 (2009) (quoting *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000) (internal quotation marks omitted), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641, 121 S. Ct. 1660 (2001)).

3. Default

In his brief, Defendant argues that, since the rules of appellate procedure do not apply to motions for appropriate relief and since the default provisions set out in N.C. Gen. Stat. § 15A-1419(a) assume the existence of a previous motion for appropriate relief or prior appeal, a trial judge has the authority to address legal error committed at trial despite the absence of an objection at trial unless the defend-

ant invited the trial court's error. Although Defendant's argument is not entirely clear, he appears to suggest that the absence of statutory language requiring a contemporaneous objection as a precondition for obtaining relief by means of a motion for appropriate relief coupled with the reference to invited error in N.C. Gen. Stat. § 15A-1443(c) means that the mere absence of a contemporaneous objection does not bar consideration of such a claim in connection with the resolution of the issues raised by a motion for appropriate relief filed within ten days after the entry of judgment and that we are barred from insisting upon the existence of such an objection as a prerequisite for considering a defendant's claims on the merits at the appellate level. We are not inclined to accept this construction of the relevant statutory provisions, since, in the event that we were to do so, a defendant could circumvent the contemporaneous objection requirement set out in the rules of appellate procedure by withholding an objection during the trial for tactical reasons and then seeking relief on the basis of that alleged error in a motion for appropriate relief in the event that the hoped-for tactical advantage does not materialize. However, we need not decide this issue at this time, since we conclude that, even when considered on the merits, the claims asserted in Defendant's motion for appropriate relief lack merit.

B. Substantive Legal Issues

1. Subject Matter Jurisdiction

[1] First, Defendant argues that Judge Doughton erred in denying his motion for appropriate relief on the grounds that, "because the common law had been supplanted by statute for the conduct alleged in the superseding indictment and found by the jury under the instructions," the trial court lacked jurisdiction to accept a verdict and enter a judgment convicting him of misdemeanor obstruction of justice. This argument lacks merit.

The initial and superseding indictments returned against Defendant charged him with felonious obstruction of justice. In *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983), the Supreme Court held that:

> Obstruction of justice is a common law offense in North Carolina. Article 30 of Chapter 14 of the General Statutes does not abrogate this offense. N.C. Gen. Stat. § 4-1 (1981). Article 30 sets forth specific crimes under the heading of Obstructing Justice[.] . . . There is no indication that the legislature intended Article 30 to encompass all aspects of obstruction of justice. . . .

> "At common law it is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice. The common law offense of obstructing public justice may take a variety of forms[.]"

(quoting 67 C.J.S., *Obstructing Justice* §§ 1, 2 (1978)). As a result, in order to convict Defendant of the common law offense of obstruction of justice, the State was required to demonstrate that Defendant had committed an act that prevented, obstructed, impeded or hindered public or legal justice. *Id.* Although obstruction of justice is ordinarily a common law misdemeanor, N.C. Gen. Stat. § 14-3(b) provides that, "[i]f a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall . . . be guilty of a Class H felony." For that reason, "[u]nder N.C. Gen. Stat. § 14-3(b) (1979), for a misdemeanor at common law to be raised to a Class H felony, it must be infamous, or done in secret and with malice, or committed with deceit and intent to defraud. If the offense falls within any of these categories, it becomes a Class H felony and is punishable as such." *State v. Clemmons*, 100 N.C. App. 286, 292, 396 S.E.2d 616, 619 (1990) (citing *State v. Mann*, 317 N.C. 164, 169-70, 345 S.E.2d 365, 368-69 (1986)).

The superseding indictment returned against Defendant alleged that "on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did

> obstruct justice by interfering with an arrest of Daniel Scott Senft for the charge of driving while impaired by Deputy Steven J. Dombrowski of the Lincoln County Sheriff's Office.
>
> Deputy Dombrowski had taken Daniel Senft from the place where Deputy Dombrowski had stopped Daniel Senft to the Lincoln County Sheriff's Office following the arrest of Daniel Senft for the purpose of performing a chemical analysis on the person of Daniel Senft. Before Deputy Dombrowski could perform the chemical analysis or complete any other investigation into the matter, the Defendant took custody of Daniel Senft from Deputy Dombrowski[,] thereby preventing Deputy Dombrowski from offering the chemical analysis to Daniel Senft or performing any other acts necessary to complete his duties with respect to the arrest of Daniel Senft.

> The actions of the Defendant described above were infamous, done in secrecy and malice, or with deceit and intent to defraud.

Defendant does not dispute that this superseding indictment adequately alleges facts that, if proven, would allow a jury to find the existence of all of the elements of obstruction of justice or argue that it lacks the averments necessary to elevate common law obstruction of justice from a misdemeanor to a felony. Instead, Defendant argues that the indictment alleges acts that must be prosecuted, if at all, as a misdemeanor under N.C. Gen. Stat. § 14-223:

> [I]t is defendant's position that: 1) by enacting N.C. [Gen. Stat.] § 14-223, the legislature has unequivocally stated its intention that the conduct alleged in the Superseding Indictment, obstructing justice by preventing an officer from performing his duty, is to be punished as a Class 2 misdemeanor, and 2) therefore the state cannot charge that conduct as a class H felony under the generic charge of common law obstruction of justice and N.C. [Gen. Stat.] § 14-3. The specific controls the general, and what has been supplanted by N.C. [Gen. Stat.] § 14-223 is the ability of the State to charge interference with an officer in the performance of his duties as a felony. . . . The indictment does not allege any additional elements that would place defendant's conduct outside the coverage of N.C. [Gen. Stat.] § 14-223.

Put another way, the essence of Defendant's argument is that: (1) the superseding indictment alleged facts that, if proven, would have established a violation of N.C. Gen. Stat. § 14-223, which penalizes resisting, delaying or obstructing an officer; (2) because there is a specific statute that addresses Defendant's alleged behavior, the State lacked the authority to prosecute him for felonious common law obstruction of justice; and, for that reason, (3) the trial court lacked subject matter jurisdiction over the felonious common law obstruction of justice charge. We disagree.

The fundamental defect in Defendant's argument is its premise that the existence of a statutorily-defined criminal offense necessarily deprives the State of the ability to prosecute a defendant for a common law offense applicable to the same or similar conduct. This Court has expressly rejected the logic upon which Defendant's argument rests. In *State v. Wright*, —— N.C. App. ——, 696 S.E.2d 832 (2010), we upheld a defendant's conviction for felonious obstruction of justice despite the fact that the defendant's alleged conduct also

fell within the confines of a statutorily-defined misdemeanor. More particularly, the defendant in *Wright* was convicted of felonious obstruction of justice based upon his failure to file complete and accurate campaign finance reports with the State Board of Elections. On appeal, the defendant argued that the State could have charged him with misdemeanor failure to file accurate campaign reports in violation of N.C. Gen. Stat. § 163-278.27 and that "allowing the common law charge in effect permitted the State to sidestep the statute of limitations that barred it from proceeding under N.C. Gen. Stat. § 163-278.27 for the reports filed between 2000 and 2005." *Wright*, ––– N.C. App. at –––, 696 S.E.2d at 837. In rejecting Defendant's argument, we held that:

> Defendant . . . cites no authority that precludes the district attorney from proceeding on a common law charge when a potentially applicable statutory charge is barred by the statute of limitations or could result in a lesser sentence. . . . [P]ursuant to Article IV, Section 18 of our Constitution, " 'the responsibility and authority to prosecute all criminal actions in the superior courts is vested solely in the several District Attorneys of the State.' " That authority includes "[t]he ability to be selective in determining what cases to prosecute and what charges to bring against a particular defendant[.]" The district attorney, in this case, was entitled to elect to proceed under the common law rather than under the campaign finance statutes.

Id. (quoting *State v. Ward*, 354 N.C. 231, 243, 555 S.E.2d 251, 260 (2001) (quoting *State v. Camacho*, 329 N.C. 589, 593, 406 S.E.2d 868, 871 (1991))). As a result, we conclude that, even if Defendant could have been charged with resisting, delaying or obstructing an officer in violation of N.C. Gen. Stat. § 14-223, this possibility does not bar the State from proceeding against Defendant on a charge of felonious common law obstruction of justice instead. Thus, Defendant's challenge to the trial court's subject matter jurisdiction lacks merit.

2. Statute of Limitations

[2] Secondly, Defendant argues that the trial court erred by denying his motion for appropriate relief on the grounds that the trial court's decision to allow the jury to consider the issue of his guilt of misdemeanor obstruction of justice erroneously permitted him to be convicted for committing "a time-barred lesser-included" offense submitted "at the State's request" despite the fact that "the State intentionally failed to advise the court that the statute of limitations

had run." In response, the State argues that, even though the statute of limitations had expired on the misdemeanor charge, Defendant waived this claim by failing to object to the submission of misdemeanor obstruction of justice to the jury at trial. Although the trial court rejected this aspect of Defendant's motion for appropriate relief on waiver grounds, we need not address the waiver issue given our conclusion that the statute of limitations applicable to misdemeanor offenses does not apply when the issue of a defendant's guilt of a misdemeanor offense is submitted to the jury as a lesser included offense of a properly charged felony.

"[S]tatutes of limitations, which provide predictable, legislatively enacted limits on prosecutorial delay, provide 'the primary guarantee against bringing overly stale criminal charges.' " *State v. Goldman*, 311 N.C. 338, 343, 317 S.E.2d 361, 364 (1984) (quoting *United States v. Lovasco*, 431 U.S. 783, 788-89, 52 L. Ed. 2d 752, 758, 97 S. Ct. 2044, 2048 (1977)). "In this State no statute of limitations bars the prosecution of a felony." *State v. Johnson*, 275 N.C. 264, 271, 167 S.E.2d 274, 279 (1969) (citing *State v. Burnett*, 184 N.C. 783, 115 S.E. 57 (1922)). However, "North Carolina has adopted a two year statute of limitations for misdemeanors.

> Our legislature has specifically provided that: "All misdemeanors except malicious misdemeanors, shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards[.] . . . . N.C. [Gen. Stat.] § 15-1 (1983) . . . . Our courts have consistently construed this language, which has not been altered since its adoption in 1826, to mean that either an indictment or a presentment issued by a grand jury within two years of the crime alleged 'arrests the statute of limitations.' "

State v Whittle, 118 N.C. App. 130, 133-34, 454 S.E.2d 688, 690 (1995).

"In criminal cases where an indictment or presentment is required, the date on which the indictment or presentment has been brought or found by the grand jury marks the beginning of the criminal proceeding and arrests the statute of limitations." *State v. Underwood*, 244 N.C. 68, 70, 92 S.E.2d 461, 463 (1956) (citing N.C. Gen. Stat. § 15-1 and *State v. Williams*, 151 N.C. 660, 65 S.E. 908 (1909)). As a result, the running of any applicable statute of limitations is tolled by the issuance of a valid criminal process. Although "[N.C. Gen. Stat. §] 15-1 contains no reference to warrants[, in] *State v. Underwood*, *supra*, it was held 'that in all misdemeanor cases, where there has been a conviction in an inferior court that had final

jurisdiction of the offense charged, upon appeal to the Superior Court the accused may be tried upon the original warrant and that the statute of limitations is tolled from the date of the issuance of the warrant.' " *State v. Hundley*, 272 N.C. 491, 493, 158 S.E.2d 582, 583 (1968) (quoting *Underwood*, 244 N.C. at 69, 92 S.E.2d at 462). Thus, the critical date for purposes of determining whether the statute of limitations has run is the date upon which a defendant is properly charged with committing a criminal offense.

The obstruction of justice charge lodged against Defendant rested upon conduct in which he allegedly engaged on or about 25 February 2007. Had Defendant initially been charged with misdemeanor obstruction of justice, the necessary warrant or other charging instrument would have had to have been issued on or before 25 February 2009 in order to avoid the bar created by N.C. Gen. Stat. § 15-1. However, Defendant was initially indicted for felonious obstruction of justice, an offense for which there is no statute of limitations. As a result, the statute of limitations set out in N.C. Gen. Stat. § 15-1 has no application to the charge that was actually brought against Defendant.

Although Defendant does not contend that N.C. Gen. Stat. § 15-1 has any relevance to the felony with which he was initially charged, he does argue that, because he was indicted for felonious obstruction of justice more than two years after the date of the alleged offense, the trial court had no authority to submit the issue of his guilt of misdemeanor obstruction of justice to the jury despite the fact that it is a lesser included offense of felonious obstruction of justice. We do not find Defendant's logic persuasive.

" 'It is well settled that "a defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternative verdicts." ' " *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (quoting *State v. Palmer*, 293 N.C. 633, 643-44, 239 S.E.2d 406, 413 (1977)). At bottom, Defendant is arguing that this rule is subject to an implicit exception, which is that a defendant is not entitled to submission of a lesser included offense which happens to be a misdemeanor unless he or she was indicted within two years of the alleged offense date. Defendant has not cited any authority in support of this position, and we know of none. Such a result would deprive certain defendants charged with committing felony offenses of the right to have the issue of lesser included misdemeanor offenses submitted for the jury's consideration despite the

fact that "the failure to so instruct constitutes reversible error that cannot be cured by a verdict finding the defendant guilty of the greater offense," *State v. Lawrence*, 352 N.C. 1, 19, 530 S.E.2d 807, 819 (2000) (citations omitted), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684, 121 S. Ct. 789 (2001), a result we do not believe to be consistent with the General Assembly's intent. Thus, we conclude that the statute of limitations set out in N.C. Gen. Stat. § 15-1 does not control the submission of the issue of a defendant's guilt of a misdemeanor lesser included offense to the jury, provided that the greater offense was properly charged in a timely manner, so that Defendant's challenge to the trial court's decision to submit the issue of Defendant's guilt of misdemeanor obstruction of justice to the jury as a lesser included offense does not justify an award of appellate relief.[3]

3. Jury Instruction on "Lack of Legal Authority"

[3] Thirdly, Defendant argues that Judge Doughton erred by denying his motion for appropriate relief on the grounds that "the trial court failed to instruct the jury on the lack of legal authority to require the processing with which Defendant allegedly interfered." In support of this contention, Defendant asserts that

> [T]he lack of probable cause for Deputy Dombrowski to charge Dr. Senft and require him to submit to further processing was a substantial feature of the case and . . . the trial court had a duty to instruct on that substantial feature, even in the absence of a request from the defendant. . . . [I]t was error not to instruct the jury that it should find the defendant not guilty unless it was convinced beyond a reasonable doubt that Deputy Dombrowski had sufficient legal justification to process Dr. Senft for impaired driving. There is nothing illegal about obstructing the processing of an illegal arrest.

Once again, we conclude that this argument lacks merit.

First, we note that the evidentiary record would not support a finding that Sergeant Dombrowski lacked probable cause to arrest Dr. Senft for impaired driving and request him to submit to a chemical analysis of his breath. The uncontradicted record evidence tends to show that Sergeant Dombrowski and several other officers set up a traffic checkpoint in a well-lit area that was visible for some

3. In light of our resolution of this issue, we need not address Defendant's challenge to the State's acknowledgement that it was aware of the fact that the Lincoln County grand jury indicted Defendant for felonious obstruction of justice more than two years after 25 February 2009.

distance. The officers, who wore reflective vests, held flashlights and left their patrol car lights on, stopped each car as it arrived at the traffic checkpoint. Dr. Senft, however, drove through the checkpoint without stopping, which, despite Defendant's contention to the contrary, was a significant indicator of impairment. Sergeant Dombrowski spent a half hour in Dr. Senft's presence and noted that Dr. Senft admitted consuming several alcoholic beverages, had an odor of alcohol about his person, declined to take an Alco-Sensor test, and supported himself while getting out of his car. Although Dr. Senft testified that he had passed the sobriety tests that Sergeant Dombrowski administered and that Defendant also administered field sobriety tests, and although Defendant told Sergeant Dombrowski that Dr. Senft had an Alco-Sensor reading of .07, these facts would not support a finding that Sergeant Dombrowski lacked probable cause to arrest Dr. Senft at the time of the alleged impaired driving given the undisputed nature of Sergeant Dombrowski's testimony and the lapse of time between the observations made by Sergeant Dombrowski and those made by Defendant. As a result, assuming for purposes of discussion, without in any way deciding, that Defendant had the legal right to intervene in order to prevent further processing of Dr. Senft based on a conclusion that Sergeant Dombrowski lacked the probable cause needed to place Dr. Senft under arrest for impaired driving and request him to submit to a chemical analysis of his breath, the record does not contain sufficient evidence to permit a jury determination that Sergeant Dombrowski lacked the necessary probable cause,[4] obviating any need for an instruction of the sort contended for by Defendant. "A trial judge should not give instructions that are not supported by a reasonable view of the evidence." *State v. McQueen*, 324 N.C. 118, 142, 377 S.E.2d 38, 52 (1989) (citing *State v. Lampkins*, 283 N.C. 520, 196 S.E.2d 697 (1973)).

4. Admittedly, at least some of the evidence upon which Defendant relies in support of this argument would have been admissible at a trial of Dr. Senft had he ever been charged with impaired driving. However, that evidence addresses the issue of whether Dr. Senft was actually impaired rather than the issue of whether Sergeant Dombrowski had probable cause to arrest Dr. Senft, which is an entirely separate question. " 'Beyond a reasonable doubt' and 'probable cause' are two different standards applied at different stages of a criminal prosecution. To arrest petitioner, [the officer] needed probable cause to believe that he committed an implied offense. To convict petitioner of the charge of driving while impaired, the State was required to prove its case beyond a reasonable doubt[.]" *Gibson v. Faulkne*r, 132 N.C. App. 728, 736, 515 S.E.2d 452, 456 (1999).

Furthermore, again assuming for purposes of discussion that the instruction which Defendant contends should have been given represents an accurate statement of North Carolina law, the record contains no indication that Defendant had any authority to or responsibility for evaluating and correcting the arrest decisions made by other deputies. The essential basis upon which the State proceeded against Defendant for obstruction of justice was that Defendant used his official position to interfere with the arrest and processing of a third person by another officer. In attempting to persuade us that the requested instruction should have been given, Defendant asserts that:

> In the exercise of its powers, the sheriff's department is of course bound by constitutional limitations on the exercise of authority over persons suspected of criminal activity. North Carolina recognizes the liability of a sheriff for false imprisonment and false arrest where a seizure is made without adequate justification, such as an arrest without probable cause. . . . In the absence of probable cause to charge Dr. Senft it would have been lawful for defendant to have acted as alleged.

As we understand this argument, Defendant appears to be suggesting that, if he believed that Sergeant Dombrowski lacked probable cause to arrest Dr. Senft for impaired driving, it would have been lawful for him to prevent Sergeant Dombrowski from completing the processing of Dr. Senft. The record developed at trial is, however, completely devoid of any evidence tending to show that Defendant had the responsibility for "un-arresting" Dr. Senft if, in Defendant's opinion, Sgt. Dombrowski had placed Dr. Senft under arrest without adequate justification. Thus, Defendant has failed to establish that he had any right or obligation to determine that a subordinate had arrested a suspect without possessing the requisite probable cause and to take corrective action, a fact that undercuts the validity of Defendant's argument. As a result, Defendant has failed to demonstrate that the record evidence would have supported the delivery of this instruction.

4. Plain Error

[4] Finally, Defendant argues that "[t]he submission of the time-barred misdemeanor and the failure to instruct on the lack of legal authority to require the processing with which Defendant allegedly interfered constituted plain error." In advancing this argument, Defendant essentially restates contentions that we addressed and rejected earlier in this opinion. However, instead of characterizing these arguments as a justification for overturning Judge Doughton's

decision to deny his motion for appropriate relief, he treats these issues as plain error occurring during the trial. As we have already concluded that neither the trial court's decision to submit the issue of Defendant's guilt of misdemeanor obstruction of justice to the jury nor its failure to instruct the jury concerning the sufficiency of Sergeant Dombrowski's justification for arresting Dr. Senft constituted error, we necessarily reject Defendant's argument that the trial court committed plain error as regards these issues.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendant had a fair trial, free from prejudicial error, and that Judge Doughton did not err by denying Defendant's motion for appropriate relief. As a result, Defendant is not entitled to any relief on appeal from the trial court's judgment or Judge Doughton's order.

NO ERROR AT TRIAL; DENIAL OF MOTION FOR APPROPRIATE RELIEF AFFIRMED.

Judges BRYANT and BEASLEY concur.

KAREN B. ORR AND MICHAEL TREXLER, PLAINTIFFS-APPELLANTS V. RONALD D. CALVERT, DEFENDANT-APPELLEE

No. COA10-480

(Filed 7 June 2011)

Statutes of Limitation and Repose— fraud—misrepresentation —Securities Act violations—breach of fiduciary duty

The trial court did not err by granting a directed verdict in favor of defendant based on expiration of the statutes of limitation. Plaintiffs' fraud, misrepresentation, North Carolina Securities Act violations, and breach of fiduciary duty claims were required to be filed within three years of their discovery of the facts giving rise to their claim. Under N.C.G.S. § 1-15(c), plaintiff Trexler's negligence claim must have been filed within one year of his discovery of his loss and plaintiff Orr's negligence claim was barred by the four-year statute of repose regardless of when she may have discovered her loss.

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

Appeal by Plaintiffs from judgment entered 17 December 2009 by Judge Laura J. Bridges in Superior Court, Henderson County. Heard in the Court of Appeals 26 October 2010.

Falls & Veach, by John B. Veach III, for Plaintiffs-Appellants.

Karolyi-Reynolds, PLLC, by Ronald W. Karolyi, for Defendant-Appellee.

McGEE, Judge.

Karen B. Orr (Ms. Orr) and Michael Trexler (Mr. Trexler) (collectively Plaintiffs) filed a complaint against Ronald D. Calvert (Defendant) on 17 December 2007, alleging claims for fraud, misrepresentation, negligence, breach of fiduciary duty, and violations of the North Carolina Securities Act. Defendant answered and asserted that Plaintiffs' claims were barred by the statute of limitations. At the close of Plaintiffs' evidence, Defendant moved for a directed verdict on the following two grounds: (1) that Plaintiffs' claims were barred by the applicable statutes of limitation as to their claims for fraud, misrepresentation, negligence, and North Carolina Securities Act violations; and (2) that Plaintiffs presented insufficient evidence of a fiduciary duty owed by Defendant. The trial judge, in open court, granted Defendant's motion for directed verdict "on all counts . . . . [f]or either the Statute of Limitations or the Securities Violations Statute of Limitations."

I. Facts

Plaintiffs' complaint contained the following allegations concerning Ms. Orr. Ms. Orr received $150,000 in "early 2003" from a life insurance policy in the name of her former husband. Defendant learned of Ms. Orr's insurance proceeds from his wife, who worked with Ms. Orr. Defendant then approached Ms. Orr regarding an investment opportunity. Ms. Orr took Defendant's recommendation and invested the entire $150,000 in a company called Resort Holdings International. Ms. Orr alleged that, "for about six months[,]" she received interest payments on her investment, but that the payments then stopped. Ms. Orr eventually confronted Defendant regarding her investment and Defendant told her three times that he would be "settling up[.]" Plaintiffs' complaint asserted that "Ms. Orr now realizes that all of the money that she entrusted to [Defendant] is gone." Ms. Orr further

alleged that Resort Holdings International was "part of a large scam" and that Defendant was aware of that fact, or should have been aware, when he encouraged Ms. Orr to invest.

Plaintiffs' complaint contained the following allegations concerning Mr. Trexler. Mr. Trexler had begun doing business with Defendant "in or around 2000." Defendant approached Mr. Trexler regarding an investment in a company known as Nexstar Communications. Defendant told Mr. Trexler that Nexstar Communications involved " 'point of sale' credit card terminals." Mr. Trexler, based on Defendant's "representations and assurances," invested $35,000 in Nexstar Communications "sometime around late January 2004." Mr. Trexler alleged he "totally relied" on Defendant. Mr. Trexler "received a few payments on his Nexstar investment and then the payments stopped." Plaintiffs' complaint further alleged that they "lost their enti[r]e investments as a result of [Defendant's] actions."

After Defendant answered and raised the defense of the statute of limitations, the matter was tried on 15 December 2009. At the close of Plaintiffs' evidence, Defendant moved for a directed verdict on the grounds stated above. The trial court heard arguments from the parties and granted Defendant's motion for a directed verdict on 17 December 2009. Plaintiffs appeal. Further facts will be discussed below as necessary.

II. Accrual of Causes of Action

Plaintiffs argue that the trial court erred in granting Defendant's motion for a directed verdict on all claims based on the statute of limitations. Plaintiffs contend that they presented sufficient evidence to submit to the jury the question of whether their claims were barred by the statute of limitations. We disagree.

We review a trial court's ruling on a motion for directed verdict to determine " 'whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury.' " *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 720, 693 S.E.2d 640, 643 (2009) (citation omitted). A directed verdict in favor of a defendant is proper when, as a matter of law, the plaintiff cannot recover upon any view of the facts reasonably supported by the evidence. *Id.* However, "when the evidence is so considered, it must do more than raise a suspicion, conjecture, guess, surmise, or speculation as to the pertinent facts in order to justify its submission to the jury." *Transport Co. v. Insurance Co.*, 236 N.C. 534, 539, 73

S.E.2d 481, 485 (1952). " 'Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period [rests] on the plaintiff. A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired.' " *Shepard v. Ocwen Fed. Bank*, 361 N.C. 137, 139, 638 S.E.2d 197, 199 (2006) (citation omitted). "The issue of whether a cause of action is barred by the statute of limitations should be submitted to a jury '[w]hen the evidence is sufficient to support an inference that the limitations period has not expired[.]' " *Piles v. Allstate Ins. Co.*, 187 N.C. App. 399, 400, 653 S.E.2d 181, 183 (2007) (citation omitted).

We must therefore determine whether there was sufficient evidence presented at trial " 'to support an inference [by the jury] that the limitations period ha[d] not expired[.]' " *Id.* (citation omitted). In the present case, Plaintiffs asserted four causes of action in their complaint: (1) common law fraud and misrepresentation; (2) negligence; (3) breach of fiduciary duty; and (4) violation of the North Carolina Securities Act. Our determination of whether the statutes of limitations had expired for these claims will depend upon a determination as to when they accrued.

A. Fraud

The applicable statute of limitations for fraud or misrepresentation is three years from discovery of the facts constituting fraud or misrepresentation. N.C. Gen. Stat. § 1-52(9) (2009) (three years for "relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake"). "[W]ith respect to a claim for fraud, we have defined "discovery' . . . as 'actual discovery or the time when the fraud should have been discovered in the exercise of due diligence.' " *Piles*, 187 N.C. App. at 403, 653 S.E.2d at 185 (citation omitted).

> "When . . . the fraud is allegedly committed by the superior party to a confidential or fiduciary relationship, the aggrieved party's lack of reasonable diligence may be excused. This principle of leniency does not apply, however, when an event occurs to 'excite [the aggrieved party's] suspicion or put her on such inquiry as should have led, in the exercise of due diligence, to a discovery of the fraud.' "

Id. at 404, 653 S.E.2d at 185 (citation omitted).

B. Negligence

Plaintiffs' claims for negligence are based upon Defendant's alleged "breach[] [of] his professional duties." "The applicable statute of limitations for professional malpractice, negligence, and breach of contract is three years." *Harrold v. Dowd*, 149 N.C. App. 777, 781, 561 S.E.2d 914, 917 (2002). "The statute of limitations for a malpractice claim begins to run from [the] defendant's last act giving rise to the claim or from substantial completion of some service rendered by [the] defendant." *Id.* Ordinarily, "[a] cause of action based on negligence accrues when the wrong giving rise to the right to bring suit is committed, even though the damages at that time be nominal and the injuries cannot be discovered until a later date." *Id.*, 561 S.E.2d at 918.

N.C. Gen. Stat. § 1-15(c)(2009) provides the following:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action[.]

Therefore, Plaintiffs' claims for negligence are subject to a three-year statute of limitations, which began running at the last act of negligent malpractice by Defendant. Plaintiffs argue they were unaware of their injury by reason of Defendant's deception and, therefore, contend that the three-year statute of limitations did not begin running until they discovered the fraud. Plaintiffs misunderstand the effect of the discovery provision of N.C.G.S. § 1-15(c). Rather, N.C.G.S. § 1-15(c) provides that, if

> the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made[.]

Thus, if Plaintiffs did not discover their loss until two years after the last negligent act of Defendant, then Plaintiffs had one year from the date of discovery to file their action, and not three years, as they argue. N.C.G.S. § 1-15(c). Further, regardless of the date of discovery, Plaintiffs were barred by the outer limitation of four years from the last negligent act. *Id.*

In Plaintiffs' complaint, allegations of Defendant's negligence focused on Defendant's "recommending unsuitable investments." The particular facts are different for Ms. Orr and Mr. Trexler, and we address each in turn. Plaintiffs' complaint alleged that "[i]n late August, 2003, Ms. Orr agreed to meet with [Defendant] at his house to discuss the investment." The evidence introduced at trial shows that Ms. Orr actually gave money, for the purpose of investing, to Defendant in August and September 2003. Thus, the last act of Defendant "recommending unsuitable investments" occurred no later than September 2003. Therefore, Ms. Orr's complaint was required to have been filed no "more than four years from the last act of [Defendant] giving rise to the cause of action[,]" or by September 2007. In the present case, Plaintiffs' complaint was filed in December 2007 and, therefore, was not timely filed as to Ms. Orr. N.C.G.S. § 1-15(c).

Plaintiffs' complaint alleged that, "[b]ased on [Defendant's] representations and assurances, Mr. Trexler invested" money with Defendant "sometime around late January 2004." The evidence at trial showed that Mr. Trexler actually made his investment in February 2004. Thus, Plaintiffs' complaint filed in December 2007 was within the four-year maximum limit provided by N.C.G.S. § 1-15(c). However, Plaintiffs' complaint must have been filed within three years of the last act of Defendant giving rise to the cause of action, unless not discoverable by Mr. Trexler for more than two years, in which case Mr. Trexler had one year from the time of discovery. *See* N.C.G.S. § 1-15(c). Because three years after the last alleged negligent act of Defendant would have been February 2007, Plaintiffs' complaint was not timely filed unless Mr. Trexler was subject to the discovery provision of N.C.G.S. § 1-15(c). Because the discovery provision allows an action to be commenced within one year of discovery, Mr.

Trexler must show that he did not discover his loss until December 2006 in order for Plaintiffs' complaint to have been timely filed as to Mr. Trexler's negligence claim.

C. Breach of Fiduciary Duty

Plaintiffs contend that it is "undisputed that [the statute of limitations for their] claim[s] for breach of fiduciary duty is ten years." In support of this contention, Plaintiffs point to Defendant's statement, made while arguing his motion for summary judgment before the trial court, that "we do not believe that there is a statute of limitations motion for the breach of fiduciary duty. Our determination is that there's a 10-year statute of limitations on the breach of fiduciary duty." Though the trial court's written judgment granting directed verdict does not state the reasons for its decision, in its ruling at trial, the trial court stated: "Directed verdict for [Defendant] on all counts as stated by [Defendant's] attorney. For either the Statute of Limitations or the Securities Violations Statute of Limitations." While the parties appear to agree that the applicable statute of limitations is ten years, we do not.

" 'When determining the applicable statute of limitations, we are guided by the principle that the statute of limitations is not determined by the remedy sought, but by the substantive right asserted by plaintiffs.' " *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005) (citation omitted). A ten-year statute of limitations applies to breach of fiduciary duty claims only when they rise to the level of constructive fraud. *See id.* ("Allegations of breach of fiduciary duty that do not rise to the level of constructive fraud are governed by the three-year statute of limitations applicable to contract actions contained in N.C. Gen. Stat. § 1-52(1)[.]"). "[A] cause of action for constructive fraud must allege (1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured." *White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004). "The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself." *Id.*; *accord Toomer*, 171 N.C. App. at 67, 614 S.E.2d at 335 (" 'Implicit in the requirement that a defendant "[take] advantage of his position of trust to the hurt of plaintiff" is the notion that the defendant must seek his own advantage in the transaction; that is, the defendant must seek to benefit himself.' ") (citation omitted).

In the present case, Plaintiffs' complaint contains the following allegations under the caption, "Count Three—Breach of Fiduciary Duty[:]"

> 34. Defendant owed fiduciary duties to [P]laintiffs because he undertook to act as their financial advisor and made investment recommendations and decisions on their behalf.
>
> 35. Defendant breached his fiduciary duties to [P]laintiffs.
>
> 36. Plaintiff was damaged as a result of [D]efendant's breach of fiduciary duty.
>
> 37. Plaintiffs are therefore entitled to recover from [D]efendant compensation for all their damages, plus prejudgment interest.
>
> 38. In addition, [P]laintiffs are entitled to recover punitive damages to punish [D]efendant's willful fraud and conscious indifference to the rights of [P]laintiffs.

We note in the present case, as in *Toomer*, that "[n]oticeably absent is the required assertion that [Defendant] sought to benefit [him]self." *Toomer*, 171 N.C. App. at 68, 614 S.E.2d at 336. Further, Plaintiffs' pleadings assert that Defendant "breached his fiduciary duties to plaintiff" rather than asserting that Defendant "took advantage of [a] position of trust[.]" *White*, 166 N.C. App. at 294, 603 S.E.2d at 156. Thus, Plaintiff's complaint asserts a clam for breach of fiduciary duty and not for constructive fraud.

We note that Plaintiffs' complaint did allege that "[o]n information and belief, [Defendant] received a large commission for selling Ms. Orr this fraudulent investment." However, "[a] plaintiff must allege that the benefit sought was more than a continued relationship with the plaintiff or payment of a fee to a defendant for work it actually performed." *Id.* at 295, 603 S.E.2d at 156. "This Court [has] held . . ., however, that an allegation of the payment of commissions for transactions actually performed is not sufficient to survive a motion to dismiss a claim for constructive fraud." *Id.* We therefore hold that Plaintiffs' breach of fiduciary duty claims do not rise to the level of constructive fraud and are subject to a three-year statute of limitations. *Toomer*, 171 N.C. App. at 66, 614 S.E.2d at 335. In cases regarding breach of fiduciary duty, " '[t]he statute of limitations begins to run when the claimant "knew or, [by] due diligence, should have known" of the facts constituting the basis for the claim.' " *Id.* at 68-69, 614 S.E.2d at 336 (citation omitted).

D. North Carolina Securities Act

In their brief, Plaintiffs "acknowledge[] that the portion of their Securities Act claim[s] relating to the sale of unregistered securities by an unregistered agent was barred by a two year statute of limitation . . . and [we] should uphold [the trial court's] order on that limited claim." Because Plaintiffs make no argument challenging this portion of the trial court's judgment, they have abandoned this issue on appeal. N.C.R. App. P. 28(b)(6). However, Plaintiffs do argue that they alleged sufficient facts to support claims under N.C. Gen. Stat. § 78A-56. A claim brought pursuant to N.C.G.S. § 78A-56 must be filed within "three years after the [aggrieved] person discovers the facts constituting the violation[.]" N.C. Gen. Stat. § 78A-56(f) (2009). Thus, for the purposes of Plaintiffs' N.C.G.S. § 78A-56 claims, the relevant statute of limitations was three years, and began running at the time of discovery.

E. Summary of Statutes of Limitation

The pertinent statutes of limitation for Plaintiffs' claims may be summarized as follows. For Plaintiffs' fraud, misrepresentation, North Carolina Securities Act violations, and breach of fiduciary duty claims, their complaint must have been filed within three years of their discovery of the facts giving rise to their claims. For Mr. Trexler's negligence claim, Plaintiffs' complaint must have been filed within one year of his discovery of his loss. N.C.G.S. § 1-15(c). Ms. Orr's negligence claim is barred by the four-year statute of repose, regardless of when she may have discovered her loss. *Id.* Thus, the issue now before us is when Plaintiffs discovered the facts giving rise to their claims.

III. Directed Verdict

Plaintiffs' complaint was filed 17 December 2007. In order for it to have been timely filed as to Mr. Trexler's negligence claim, Mr. Trexler must have discovered his loss no earlier than 17 December 2006. For the remainder of Plaintiffs' claims, Plaintiffs must have discovered the facts giving rise to their other claims no earlier than 17 December 2004. Thus, we must review the evidence presented at trial to determine whether sufficient evidence was presented to allow the jury to determine whether either Ms. Orr or Mr. Trexler discovered, or should have discovered, the wrongs giving rise to their causes of action after the relevant dates.

A. *Everts* and *Piles*

Though arising from different procedural postures than the case before us, we find instructive our Court's decisions in *Piles*, as well as *Everts v. Parkinson*, 147 N.C. App. 315, 555 S.E.2d 667 (2001). In *Everts*, the trial court had granted summary judgment in favor of the defendants on the grounds of the statute of limitations. Our Court reviewed the plaintiff's deposition testimony and found that "[t]he evidence produced during discovery indicates at least three possible points in time at which it might be determined that the alleged damage or defects became apparent or reasonably should have become apparent to [the] plaintiffs." *Everts*, 147 N.C. App. at 320, 555 S.E.2d at 671. In reciting that evidence, we noted three specific, articulated dates over the course of three years when the plaintiffs could have been found to have become aware of their injury.

> The [defendants] point to these [first] two points in time and contend that by at least March of 1994 the alleged damage was apparent or reasonably should have been apparent to [the] plaintiffs, and that their claim filed on 9 June 1997 is therefore barred by the three year statute of limitations.

Id. However, the "[p]laintiffs, on the other hand, point to a third point in time, February of 1996, and contend that they did not discover that their home suffered significant water intrusion damage and construction defects until this time." *Id.* This Court noted that, if discovery of the damages occurred in February 1996, then the plaintiffs' complaint was timely filed.

> We believe that the evidence produced during discovery allows at least an inference that the alleged damage was not apparent, and should not reasonably have been apparent, to plaintiffs prior to June of 1994. Thus, the issue of whether plaintiffs' claims against the [defendants] are barred by the statute of limitations is an issue for the jury, and the [defendants] are not entitled to summary judgment on this basis.

Id. at 320-21, 555 S.E.2d at 671. Thus, in *Everts*, this Court found the evidence sufficient to support an inference regarding discovery when there was evidence of three specific dates, and the jury was simply required to choose among them. *Id.* at 321, 555 S.E.2d at 671.

In *Piles*, our Court reviewed a trial court's granting of a Rule 12(b)(6) motion to dismiss based on the statute of limitations. *Piles*, 187 N.C. App. at 402, 653 S.E.2d at 184. The issue therein involved a

complaint alleging fraud and the dates the plaintiff discovered, or reasonably should have discovered, the fraud. *Id.* at 402-03, 653 S.E.2d at 184-85. "The date of [the plaintiff's] discovery of the alleged fraud or negligence—or whether she should have discovered it earlier through reasonable diligence—is a question of fact for a jury, not an appellate court." *Id.* at 405, 653 S.E.2d at 186.

This Court conducted the following analysis:

> As such, the critical dates at issue in [the plaintiff's] complaint are when she discovered or reasonably should have discovered the alleged fraud or negligence committed by [the defendants], and when she was denied UIM coverage by [her insurer]. [The plaintiff] signed her insurance policy in 1998, was injured in the car accident in October 2000, settled with the other driver's insurance company, exhausting those policy limits, in November 2004, and subsequently filed this suit in November 2005. [The plaintiff] claim[ed] that she had no knowledge that her policy did not include UIM coverage until she was first informed of that fact by [her insurer] in February 2003. Additionally, she would not have acquired any contractual right to such coverage—if indeed it should have existed—until November 2004, when she exhausted the other driver's policy.
>
> Likewise, according to the facts alleged in her complaint, [the plaintiff's] claims for breach of covenant of good faith and fair dealing with punitive damages and unfair and deceptive trade practices are premised at least in part on [her insurer's] actions in response to the claim she filed for UIM coverage. As such, they would have accrued in November 2004, when she was denied UIM coverage. Moreover, the basis of the constructive fraud claims clearly falls within ten years of the complaint, regardless of what dates are used. The breach of fiduciary duty claims also accrued when [the plaintiff] allegedly discovered that her policy did not include UIM coverage.
>
> Thus, [the plaintiff] ha[d] asserted facts in her complaint "sufficient to support an inference that the limitations period has not expired," therefore, we find that the trial court erred by finding as a matter of law that her claims are time barred by the relevant statutes of limitations. We therefore reverse the trial court's dismissal on statute of limitations grounds of [the plaintiff's] claims for negligence, fraud, constructive fraud, breach of contract, breach of covenant of good faith and fair dealing with punitive

damages, unfair and deceptive trade practices, and breach of fiduciary duty.

Id. at 404-05, 653 S.E.2d at 185-86 (citations omitted).

While the analysis in *Piles* states that the date a plaintiff did in fact discover, or should have discovered, an alleged fraud "is a question of fact for a jury, not an appellate court[,]" we note that the complaint in *Piles* also contained numerous allegations of relevant dates. *Id.* Thus, the trial court in *Piles*, in ruling on a Rule 12(b)(6) motion, was able to forecast evidence of a timeline from which a jury would be able to answer the question of fact regarding the plaintiff's discovery. Therefore, in both *Everts* and *Piles*, the relevant facts before the trial court included dates and an established timeline. We next address the sufficiency of the evidence presented at trial in the present case.

B. Ms. Orr

Our review of the transcript and exhibits in the present case shows that Ms. Orr testified that, after giving her money to Defendant to invest in August and September 2003, she received "some money from the investment for a while[,]" but that there came a time when the payments stopped. Ms. Orr did not testify as to what date the payments stopped. She called Defendant to ask him why her payments had stopped, and Defendant assured her that he would "take care of it." However, Ms. Orr further testified that "the months kept going by and every time I called [Defendant] he said, '[t]hey're working on it[.]' "

Ms. Orr also testified concerning a "delivery receipt" for a "universal lease" document. Ms. Orr testified that the receipt stated that " '[t]his lease documents [sic] were delivered to me [Ms. Orr] on the 20th day of September 2003.' " However, Ms. Orr testified that the receipt bore her signature and the date "3/26/04[.]" Ms. Orr indicated that the documents were not given to her on 20 September 2003, but instead had been kept by Defendant. Ms. Orr testified that Defendant did not give her the documents until she "asked for them a year later" when she "stopped getting the money." Finally, Ms. Orr testified that she commenced this action at some point subsequent to receiving the lease document. However, Ms. Orr did not specify a date when she received the lease documents other than clarifying that the receipt bore her signature, dated 26 March 2004. Ms. Orr did not state the date when she decided to take action against Defendant.

As stated above, in order for Plaintiffs' complaint to have been timely filed with respect to Ms. Orr's claims, Ms. Orr must have discovered the facts giving rise to her cause of action no earlier than 17 December 2004. Plaintiffs argue in their brief that "[t]he jury could have easily inferred that Ms. Orr continued to rely on [Defendant] and reasonably did not discover that she had been damaged until well after December 18, 2004, i.e. within the applicable statute of limitations." We disagree. Unlike the factual situations in *Everts* and *Piles*, there is no specific timeline established by the evidence here. The only specific dates in evidence are September and August 2003, when Ms. Orr gave her money to Defendant to invest. There are only vague references to time passing after Ms. Orr invested her money. The only other date involved the date on which Ms. Orr signed the receipt of her lease documents. The testimony is unclear on the relevance of the lease documents to the accrual of Ms. Orr's causes of action, but the fact that she signed them in March 2004, and thereafter commenced this action, does not strengthen Plaintiffs' argument that the jury could infer that Ms. Orr continued to rely on Defendant's assurances until December 2004.

For the jury to do as Plaintiffs argue, and infer that Ms. Orr relied on Defendant's assurances until after 17 December 2004, the jury would be basing such inferences on no more than " 'suspicion, conjecture, guess, surmise or speculation.' " *Hudgins v. Wagoner*, ___ N.C. App. ___, ___, 694 S.E.2d 436, 442 (2010) (citation omitted). Thus, Plaintiffs failed to present sufficient evidence at trial to allow the jury to find that their complaint was timely filed with respect to Ms. Orr. *Compare Hudgins*, ___ N.C. App. at ___, 694 S.E.2d at 442 ("After the trial, the jury entered a verdict in which they found, *inter alia*, that plaintiff neither knew nor should have known prior to 12 December 2003 of activities taken by Wagoner or WKS with respect to the Property 'after late June 2000.' At trial, defendants claimed that plaintiff should have had knowledge of the events in question in July 2000. However, plaintiff testified that he did not know about the development until 2006. [The] [p]laintiff corroborated his testimony with the timing of his filing, which occurred immediately after the time he testified he discovered defendants' actions. [The] [p]laintiff's testimony, consistent with his explanation of his actions, is more than a '[m]ere scintilla of evidence,' enabling a jury to make a decision based upon more than just 'suspicion, conjecture, guess, surmise or speculation.' ") (citation omitted).

C. Mr. Trexler

Our review of the transcript reveals the following evidence with respect to Mr. Trexler. Mr. Trexler was approached by Defendant "some time in 2003 or 2004" and informed about an investment on which Defendant would guarantee twelve percent interest. Mr. Trexler actually invested in Nexstar Communications on 12 February 2004 and he received "approximately" $5,500 "in interest" payments, but then the payments stopped. Mr. Trexler received assurances from Defendant that "everything is going to be back to normal[.]" Mr. Trexler testified that he learned that something was wrong with the Nexstar Communications investment when he "got a letter from a lawyer in Florida that [was] handling the case." Mr. Trexler did not testify as to when he received this letter, and the letter was not included in the record of this case.

In their brief, Plaintiffs contend that the jury could have made the following chain of inferences:

> Mr. Trexler testified that he received about $5,500 in interest payments and then the payments stopped. . . . Mr. Trexler testified that [Defendant] told him he would receive twelve percent interest on his $35,000 investment in Nexstar. . . . The jury could therefore reasonably infer that Mr. Trexler received interest payments of $350 a month. Since Mr. Trexler received $5,500, the jury could reasonably conclude that he received the interest payments for at least 15 months, or at least until May 2005.

We first note that, even if Plaintiffs are correct in their argument, the May 2005 date they argue in their brief would be much earlier than the December 2006 cutoff date for Mr. Trexler's negligence claim. However, as with the evidence presented by Ms. Orr, we find Mr. Trexler's testimony insufficient to submit the issue to the jury for his remaining claims as well. The series of inferences which Plaintiffs contend the jury could make is simply inference upon inference without any support in the record. For the jury to make a determination that Mr. Trexler discovered his injury on or after 17 December 2004, the jury would have to assume each of the facts suggested above in Plaintiffs' chain of inferences. As with Ms. Orr's evidence, Mr. Trexler's chain of inferences would invite the jury to engage in no more than " 'suspicion, conjecture, guess, surmise or speculation' " and is, therefore, insufficient to support submitting the question to the jury. *Id.* (citation omitted). As Plaintiffs failed to present evidence sufficient to submit their claims to the jury, the trial court properly

granted Defendant's motion for directed verdict. We, therefore, affirm the trial court's order granting a directed verdict in favor of Defendant.

Affirmed.

Judge BEASLEY concurs.

Judge HUNTER, JR. concurs in part and dissents in part by separate opinion.

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

While I agree with the majority opinion that the trial court properly dismissed Plaintiffs' claims for common law fraud, misrepresentation, negligence and violation of the North Carolina Securities Act, I disagree with the majority's conclusion that Plaintiffs' breach of fiduciary duty or constructive fraud claim is beyond the applicable ten-year statute of limitation.

The majority rests its conclusion exclusively on *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 614 S.E.2d 328 (2005). Until our Supreme Court's opinion in *Barger v. McCoy Hillard and Parks*, 346 N.C. 650, 488 S.E.2d 215 (1997) there was no distinction between the elements of constructive fraud and breach of fiduciary duty; the elements were essentially the same. In *Barger*, our Supreme Court took the position that "[i]mplicit in the requirement that a defendant '[take] advantage of his position of trust to the hurt of plaintiff' is the notion that the defendant must seek his own advantage in the transaction; that is, the defendant must seek to benefit himself." *Id.* at 666, 488 S.E.2d at 224 (second alteration in original). There is considerable difficulty in applying this notion of a defendant seeking his own advantage in actions for constructive fraud and breach of fiduciary duty because of the burden-shifting involved in analyzing both torts.

In establishing the elements of either tort, the initial burden of proof is on the plaintiff to "allege the facts and circumstances (1) which created the relation of trust and confidence, and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950).

> Our pattern jury instructions summarize the law as follows:
>
> "Did the plaintiff take advantage of a position of trust and confidence to bring about (identify transaction)?"
>
> On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things:
>
> First that a relationship of trust and confidence existed between the plaintiff and the defendant. Such a relationship exists where one person places special confidence in someone else who, in equity and good conscience, must act in good faith and with due regard for such person's interests. . . .
>
> And Second, that the defendant used *his* position of trust and confidence to bring about (*identify transaction*) to the detriment of the plaintiff and for the benefit of the defendant.

N.C.P.I.–Civ. 800.05 (2010).

The second phrase, "for the benefit of the defendant," has been, in my view, improperly inserted in the plaintiff's case-in-chief and rather should be inserted in the defendant's affirmative defense of openness. Where a confidential relationship is alleged to have been abused, the specific benefit question should clearly be a defensive matter. It should be shown by the defendant that he dealt with the plaintiff fairly, and the plaintiff should not be required to prove advantage was taken as an initial element of his case-in-chief. Our case law appears to require this element in the plaintiff's case-in-chief, which is problematic given the presumption of fraud to which a plaintiff is entitled from the initial showing of a confidential relationship.

In this case, Plaintiffs' proof meets both requirements. The uncontested facts show Defendant was not properly licensed under state or federal law. Without a license, he was legally prohibited from marketing the securities, advising anyone on the suitability of financial transactions, or charging or collecting any sales commissions from the marketing or sale of securities. The transactions herein clearly involve the sale of securities. It is undisputed Defendant obtained some commissions in this case to which he would not have been legally entitled. When a defendant is not licensed at all, the receipt of an illegal commission would clearly meet the factual predicate that the transaction was "to the detriment of the plaintiff and for the benefit of the defendant."

The majority opinion would dismiss Plaintiffs' Complaint on the grounds that " '[a] plaintiff must allege that the benefit sought was more than a continued relationship with the plaintiff or payment of a fee to a defendant for work it actually performed.' *White*, 155 N.C. App. at 295, 603 S.E.2d at 156." In *White*, the defendant was an employee of a *licensed* broker. Thus, he was legally entitled to receive a commission or to have a "continuing relationship" with regard to the plaintiff and to charge a commission.

In this case, the alleged tortfeasor is an individual, not an employee of a legally licensed entity, who began a series of acts which were the equivalent of rendering securities advice or marketing securities in violation of N.C. Gen. Stat. § 78A-36. Unlike the parties in *White*, Defendant is not entitled to any legal commission for his advice. The "benefit received" is completely illegal.

The second ground for the majority's dismissal is that Plaintiffs only alleged a "breach of fiduciary" claim rather than a claim for constructive fraud because the Complaint lacks an allegation of entrustment or placing of trust. In my view, this is a distinction without a difference. In a constructive fraud claim, the allegation of a trust relationship arises from the facts alleged. Clearly, in this case the confidence of Plaintiff was entrusted to Defendant through the transactions alleged in paragraphs 4 through 14 of the Complaint.

Furthermore, the only material difference between breach of fiduciary duty and constructive fraud, in this context, is that the law presumes a confidential relationship of trust exists if certain fiduciary relationships are present. Indeed an instruction on confidence is mandatory in these situations.[1] The agent-principal relationship alleged here is clearly sufficient to meet this requirement.

Under these facts, I would hold Plaintiffs have established facts sufficient to survive a summary judgment motion based upon a ten-year statute of limitation.

I would reverse the trial court and remand for a trial on breach of fiduciary duty.

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1. The pattern jury instruction for constructive fraud provides for a peremptory instruction where the evidence shows a fiduciary relationship: "In this case, members of the jury, the plaintiff and the defendant had a relationship of *(name presumptive fiduciary relationship, e.g., . . . agent and principal, etc.)* You are instructed that, under such circumstances, a relationship of trust and confidence existed." N.C.P.I.-Civ. 800.05 (2010).

JOAN NEWNAM, EMPLOYEE, PLAINTIFF v. NEW HANOVER REGIONAL MEDICAL CENTER, EMPLOYER, SELF-INSURED (ALLIED CLAIMS ADMINISTRATION, SERVICING AGENT), DEFENDANT

No. COA10-905

(Filed 7 June 2011)

1. Workers' Compensation— occupational disease—carpal tunnel syndrome

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's carpal tunnel syndrome was a compensable occupational disease. The testimony by plaintiff's expert witnesses was supported by competent evidence.

2. Workers' Compensation— temporary total disability—ability to earn wages

The Industrial Commission erred in a workers' compensation case by awarding plaintiff temporary total disability benefits. Plaintiff failed to meet the requirements of the first method of proof under *Russell*, 108 N.C. App. 762, since she presented no medical evidence that she was incapable of work in any employment following her surgery. Further, the case could not be remanded for additional findings because there was no medical evidence found in the transcripts to support this finding.

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

Appeal by defendant from Opinion and Award entered 3 May 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 January 2011.

Kathleen Shannon Glancy, P.A., by Terrie Haydu, for plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Kari A. Lee and Justin D. Robertson, for defendant-appellant.

CALABRIA, Judge.

New Hanover Regional Medical Center ("defendant" or "NHRMC") and Allied Claims Administration appeal an Opinion and Award of the North Carolina Industrial Commission concluding that Joan Newnam ("plaintiff") suffered a compensable occupational disease and awarding her temporary total disability payments. We affirm in part and reverse in part.

I. BACKGROUND

In 1999, plaintiff began working for defendant as a magnetic resonance imaging ("MRI") technologist. Plaintiff rotated to three different locations: NHRMC, Cape Fear Hospital ("Cape Fear"), and the "Medical Mall." The standard procedure for each location required two MRI technologists to be on duty at the same time. In addition, plaintiff was on-call four to six times per month at Cape Fear, and volunteered to work extra hours or shifts when any of the locations were understaffed.

Plaintiff's basic duties included performing MRI scans. For each patient receiving a scan, plaintiff was also required to scan paper documents and input data into defendant's computer system, move and instruct the patient for the scan, adjust the coil for the body part to be scanned, and conduct the MRI scan using a computer keyboard and mouse. Plaintiff performed between four and nine MRI scans per eight-hour shift, depending on whether she worked alone or if other MRI technologists were on duty. Each MRI scan lasted approximately 35 to 45 minutes. When plaintiff was the only MRI technologist on duty, she was responsible for all of these duties, but when other MRI technologists were on duty, the responsibilities were shared.

Each of plaintiff's three work locations had two separate work stations. One work station was used for ordering MRI studies, scanning paper documents, and inputting data into defendant's computer system. The second work station was for conducting the MRI scan. This second station had a large computer monitor, mouse, and keyboard. When plaintiff was engaged in her duties at the second work station, she constantly used the computer mouse and keyboard in order to adjust certain parameters associated with the MRI scan. The duration of plaintiff's duties at this second work station was between 16 seconds to several minutes.

In 2001, plaintiff reported to defendant that she experienced problems with tightness in her right shoulder and arm. On 22 March 2001, David Clawson ("Clawson"), an occupational therapist employed by defendant, performed an ergonomic assessment of plaintiff's work stations at NHRMC and the Medical Mall. According to Clawson, plaintiff's duties consisted of operating a computer 90 to 100 percent of the time, and the remaining 10 percent of her work duties involved transferring patients. Clawson recommended neck and shoulder stretches to help alleviate plaintiff's complaints of tightness in her right shoulder and arm. Clawson also recommended that

plaintiff obtain a foam or gel padded wrist rest on which to rest her forearms when using the computer and mouse. Plaintiff subsequently obtained a wrist rest and keyboard tray to provide support for her arms.

On 19 March 2004, plaintiff fell from an MRI mobile truck while working for defendant. She sustained injuries to, *inter alia*, her right thumb, left shoulder, and left wrist. Defendant accepted the compensability of plaintiff's injuries. Plaintiff sought treatment from Dr. Richard Moore ("Dr. Moore"), an orthopaedist with a subspecialty in hand surgery, and was unable to work for two to three weeks. Plaintiff subsequently returned to light duty work with defendant, which involved screening patients via telephone.

In October 2004, plaintiff reported to defendant that she experienced pain in her right shoulder, neck, and arm. On 13 October 2004, Clawson performed a second ergonomic assessment of plaintiff's work station at NHRMC. Clawson discovered that the height of plaintiff's desktop, combined with the face board under the desktop at her work station, prevented her from sitting close enough to the desk unless she lowered her chair. However, Clawson determined that if plaintiff lowered her chair, her elbows were too far below the desktop. Defendant allowed plaintiff to obtain a new chair which would suit plaintiff's needs at her work station.

On 20 August 2007, plaintiff obtained a "permanent" work assignment at the Medical Mall. Plaintiff's new duties required her to spend approximately 75 percent of her working hours at the Medical Mall, and the remaining 25 percent rotating between NHRMC and Cape Fear. Shortly after plaintiff began her new work assignment, she reported to defendant that she experienced pain in her right shoulder, trapezius, and arm as well as bilateral hand numbness, cramping, and tingling. Plaintiff reported to defendant that her pain began in the morning, increased throughout the day, and awakened her at night.

On 10 September 2007, Karla Santacapita ("Santacapita"), an occupational therapist employed by defendant, evaluated plaintiff's work station at the Medical Mall. Santacapita recommended the following: lowering the height of plaintiff's "desk area one" approximately one-and-one-half inches in order to allow for the proper angle of plaintiff's upper extremities to the keyboard and mouse; gel wrist rests for the keyboard and mouse; removing the drawers mounted under the desktop of "desk area two"; and either lowering the height of desk area two approximately three to four inches or, alternatively, providing plaintiff a foot stool and adjustable-height chair with

removable arm rests. Defendant accommodated some, but not all, of Santacapita's recommendations.

On 18 October 2007, plaintiff sought treatment from Dr. Moore for bilateral hand pain and bilateral hand numbness and tingling. Dr. Moore recommended a consultation with Dr. Patrick T. Boylan ("Dr. Boylan"), a pain management specialist, and also recommended that plaintiff obtain an ergonomic evaluation of her work stations. Plaintiff sought treatment on 30 November 2007 from Dr. Boylan for hand and wrist pain and numbness. Dr. Boylan's examination revealed that plaintiff suffered from moderate bilateral medial neuropathy at the wrist, consistent with moderate bilateral carpal tunnel syndrome. As a result of the examination, Dr. Boylan ordered conservative treatment including wrist splints for plaintiff to wear at night and use of pain medication.

On 7 February 2008, Dr. Moore agreed with Dr. Boylan's diagnosis of bilateral carpal tunnel syndrome, and discussed surgical options with plaintiff. Since Dr. Moore previously completed a Form 18M regarding plaintiff's 19 March 2004 work injury, he amended the Form 18M and indicated that plaintiff developed bilateral post-traumatic carpal tunnel syndrome as a result of her 19 March 2004 work injury and that plaintiff required surgery. Dr. Moore performed carpal tunnel injection therapy on plaintiff on 29 April 2008.

On 14 May 2008, plaintiff filed a Form 18 "Notice of Accident" with the North Carolina Industrial Commission ("the Commission" or "the Full Commission"), which defendant subsequently denied. On 27 May 2008, plaintiff reported relief of her carpal tunnel symptoms in her left hand, and elected to undergo carpal tunnel injection therapy in her right hand since it had become more symptomatic. Plaintiff reported improvement in her right hand following the second injection. On 21 August 2008, plaintiff filed a Form 33R and requested that her claim be assigned for a hearing.

On 24 November 2008, plaintiff returned to Dr. Moore, complaining of carpal tunnel symptoms in both hands. Plaintiff received bilateral carpal tunnel injections, with temporary relief. On 22 January 2009, plaintiff reported to Dr. Moore an exacerbation of her carpal tunnel symptoms due to increased activity. Dr. Moore recommended that plaintiff undergo limited open carpal tunnel release surgery, which plaintiff underwent on 11 March 2009. The surgery was successful. However, Dr. Moore did not release plaintiff to return to work.

On 30 September 2009, following a hearing, Deputy Commissioner Robert Harris entered an Opinion and Award concluding that plaintiff had not established that her employment caused or significantly contributed to her bilateral carpal tunnel syndrome, or placed her at an increased risk of developing carpal tunnel syndrome. Plaintiff appealed, and on 3 May 2010, the Full Commission entered an Opinion and Award concluding that plaintiff suffered a compensable occupational disease, and awarded her temporary total disability payments. Defendant appeals.

II. STANDARD OF REVIEW

A party may appeal an Opinion and Award of the Full Commission "to the Court of Appeals for errors of law under 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).

> Under the Workers' Compensation Act, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965). Therefore, on appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. *Adams v. AVX Corp.*, 349 N.C. 676, 681-82, 509 S.E.2d 411, 414 (1998). This "court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274.

Richardson v. Maxim Healthcare/Allegis Group, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008). "The facts found by the Commission are conclusive upon appeal to this Court when they are supported by competent evidence, even when there is evidence to support contrary findings." *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709 (1999). As an initial matter, defendant objected to Findings of Fact numbers 18, 24-27, 31, and 32 in the Full Commission's Opinion and Award. Findings of fact to which defendant does not object are binding. *Davis v. Harrah's Cherokee Casino*, 362 N.C. 133, 139, 655 S.E.2d 392, 395 (2008).

III. COMPENSABLE OCCUPATIONAL DISEASE

[1] Defendant argues that the Full Commission erred by concluding plaintiff sustained a compensable occupational disease. More specifically, defendant contends that testimony by plaintiff's expert witnesses was unsupported by the evidence and "entirely based on conjecture, and therefore, not competent." Defendant then argues that since the testimonies were incompetent, that the Commission's findings based on their testimonies were not supported by competent evidence. We disagree.

> In the instant case, plaintiff's claim for carpal tunnel syndrome
>
> was filed under the catch-all disease provision of North Carolina's Workers' Compensation Act, which encompasses, "[a]ny disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment."

Hassell v. Onslow Cty. Bd. of Educ., 362 N.C. 299, 305-06, 661 S.E.2d 709, 714 (2008) (quoting N.C. Gen. Stat. § 97-53(13) (2007)).

> [A] plaintiff worker satisfies the elements of this statute if she shows that her employment "exposed [her] to a greater risk of contracting [the] disease than members of the public generally, and [that] the . . . exposure . . . significantly contributed to, or was a significant causal factor in, the disease's development. This is so even if other non-work-related factors also make significant contributions, or were significant causal factors."

Id. at 306, 661 S.E.2d at 714 (quoting *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 101, 301 S.E.2d 359, 369-70 (1983)).

> For a disease to be occupational under G.S. 97-53(13) it must be (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be "a causal connection between the disease and the [claimant's] employment."

Rutledge, 308 N.C. at 93, 301 S.E.2d at 365 (quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 105-06 (1981)). "Plaintiff has the burden of proving that her claim is compensable under the Workers' Compensation Act and specifically here, that her

claim qualifies as an occupational disease." *Hassell*, 362 N.C. at 306, 661 S.E.2d at 714. "Evidence is insufficient on causation if it 'raises a mere conjecture, surmise, and speculation.' " *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 542, 463 S.E.2d 259, 262 (1995) (quoting *Hinson v. National Starch & Chem. Corp.*, 99 N.C. App. 198, 202, 392 S.E.2d 657, 659 (1990)).

> In cases involving "complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). "However, when such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). "The evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation." *Gilmore v. Hoke Cty. Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942) (discussing the standard for compensability when a work-related accident results in death).

Holley v. ACTS, Inc., 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003).

A. Testimony of LeNeve Duncan

Defendant contends that the Full Commission's Findings of Fact 24, 25, 26, and 27, regarding deposition testimony offered by plaintiff's witness, LeNeve Duncan ("Duncan"), are unsupported by competent evidence. More specifically, defendant argues that Duncan's testimony was incompetent because: (1) she "admitted that her impression regarding [p]laintiff's contact stress was derived from photographs she took, not her actual observations"; (2) she "was the only person to testify that [p]laintiff's wrist postures were 'extreme' "; (3) that her measurements of plaintiff's wrist extension and impressions of contact stress were derived from the photographs; (4) that video footage of plaintiff performing her job duties rendered Duncan's photographs "not credible"; and (5) the video footage also contradicted Duncan's conclusion that plaintiff maintained poor posture at her work stations in order to always be in a "ready position" to use the computer.

Duncan, a licensed physical therapist with twenty-two years' experience in ergonomics, testified that she authored a report which

detailed her ergonomic analysis of plaintiff's work duties at all three worksites. She further testified that when she performed her analysis, she relied on her observation of plaintiff, conversations with plaintiff, videotapes and photographs that she personally took, measurements she made, and documents she reviewed. She also testified that she derived her opinion regarding plaintiff's contact stress based on personal observation.

While Duncan was the only witness who testified that plaintiff's wrist postures were "extreme," the Full Commission did not rely on this statement in making its findings and conclusions. Duncan testified that she used a rapid upper limb assessment ("RULA") to measure plaintiff's posture, force, and muscle work for her upper extremities and cervical spine. She also testified that contact pressure and posture, including wrist extension postures, are factors to be considered when performing an ergonomic analysis. She further testified that each of plaintiff's worksites caused plaintiff thirty to fifty degrees of wrist extension, which is a deviation from a neutral position, and that when the wrist extension varies from neutral, the person experiences increased pressure in the carpal tunnel, which causes carpal tunnel inflammation and carpal tunnel syndrome. Duncan stated that plaintiff had poor posture. Although the computer monitors at all three worksites were not at the correct height, each computer's mouse was not the correct type. In addition, the desk edges were too sharp, and the chairs did not provide elbow support. Duncan also stated that plaintiff experienced contact pressure and wrist extension at all three worksites. Duncan's testimony was clearly based on her own observations of plaintiff's worksites, as well as her observations of her own photographs and videotapes.

Defendant argues that Duncan's photographs were not credible because defendant's ergonomic expert, Alex Arab ("Arab"), testified that he "saw a couple" of photographs which "were not consistent" with what he observed. However, the trial court's uncontested finding states that Arab "did not personally observe [p]laintiff at her other work locations at which she spent 25 percent of her time[.]" Furthermore, Duncan testified that she videotaped her evaluation of plaintiff's worksites at the same time as defendant's videographer, and that she took photographs during taping. In addition, both Dr. Moore and defendant's medical expert, Dr. George Edwards ("Dr. Edwards"), testified that the postures and positions plaintiff demonstrated in the photographs were consistent with and were accurate representations of her daily work duties.

Defendant contends that the video footage shows plaintiff "continuously moved throughout her tasks, and was not always in the 'ready position.' " However, Duncan testified that plaintiff maintained poor posture because her hands were "always . . . in ready [position.]" Plaintiff testified that work station two required constant use of the mouse and keyboard in order to adjust certain parameters associated with the MRI scan. Debra Carter ("Carter"), plaintiff's supervisor, and Susan Britt ("Britt"), a coworker of plaintiff, corroborated plaintiff's testimony. Carter also testified, "When you are scanning, you are constantly putting in perimeters [sic], using the mouse and typing on the keyboard."

B. Testimony of Dr. Moore

In addition to disputing Duncan's testimony, defendant also contends that the Full Commission's Findings of Fact 31 and 32, regarding Dr. Moore's deposition testimony, are unsupported by competent evidence. Specifically, defendant argues that Dr. Moore's testimony was incompetent because it was based on Duncan's photographs and was unsupported by the video footage, and defendant supports its argument by citing testimony from Arab and Edwards, and findings made by the Deputy Commissioner.

As an initial matter, the Full Commission reviews appeals from the Deputy Commissioner *de novo*. Therefore, the Deputy Commissioner's findings are irrelevant and have no bearing on the instant case. *See Watkins v. City of Wilmington*, 290 N.C. 276, 280, 225 S.E.2d 577, 580 (1976) ("[I]n reviewing the findings found by a deputy commissioner . . ., the Commission may review, modify, adopt, or reject the findings of fact found by the hearing commissioner."). Furthermore, the Full Commission's unchallenged findings show greater weight was given to the testimony of Duncan and Moore over that of Arab and Edwards. Therefore, defendant's arguments for this Court to "re-weigh" the evidence are overruled. *See Hassell*, 362 N.C. at 307, 661 S.E.2d at 715 (On appeal from a decision by the Full Commission, "this Court may not re-weigh the evidence, given that the Commission has already weighed the evidence, as is its role under statute.").

Dr. Moore had been plaintiff's treating physician since 2004, when she suffered compensable work-related injuries after she fell from a MRI mobile truck. On 18 October 2007, plaintiff sought treatment from Dr. Moore for carpal tunnel symptoms, including bilateral hand numbness and tingling. Dr. Moore recommended an ergonomic

evaluation of plaintiff's workstations and a consultation with Dr. Boylan.

On 30 November 2007, Dr. Boylan performed nerve conduction studies of plaintiff's hands. Dr. Boylan's studies revealed moderate bilateral median neuropathy at plaintiff's wrists, and he prescribed wrist splints for her to wear at night. On 7 January 2008, plaintiff reported to Dr. Boylan that she had been wearing her splints at night without relief. Dr. Boylan recommended an MRI of plaintiff's cervical spine. Following the MRI of her spine, plaintiff reported to Dr. Moore on 7 February 2008. After examining the MRI, Dr. Boylan's studies, and his own medical notes, Dr. Moore's diagnosis of plaintiff's condition was carpal tunnel syndrome. Dr. Moore then amended the Form 18M, which previously indicated that plaintiff was at risk for post-traumatic arthritis, by adding that plaintiff developed post-traumatic carpal tunnel syndrome which required surgery.

Plaintiff followed Dr. Boylan's recommendations and underwent physical therapy from 18 April through 23 July 2008. On 29 April 2008, Dr. Moore performed a carpal tunnel injection to plaintiff's left wrist, which brought plaintiff temporary relief. Plaintiff underwent the same procedure on her right wrist on 27 May 2008. However, plaintiff returned to Dr. Moore on 24 November 2008 with recurring carpal tunnel symptoms. Dr. Moore performed two additional carpal tunnel injections, but on 22 January 2009, Dr. Moore stated that plaintiff required surgery.

Dr. Moore performed bilateral open carpal tunnel releases on 11 March 2009, removed plaintiff's sutures on 23 March 2009, and gave instructions regarding scar massage, along with range-of-motion and strengthening exercises. Following the surgery, Dr. Moore did not release plaintiff at maximum medical improvement or assign her a disability rating.

Dr. Moore was deposed twice in the instant case regarding his treatment of plaintiff. In his first deposition on 29 July 2008, he testified that he made a mistake on the second Form 18M that was filed with the Commission. Dr. Moore explained that after revising his medical notes, he determined that plaintiff's bilateral carpal tunnel syndrome was not related to her 2004 injury, but was caused by her employment duties. He also testified that plaintiff's job duties were similar to those of a transcriptionist. Dr. Moore further stated that, to a reasonable degree of medical certainty, plaintiff's employment history with defendant placed her at a greater risk of contracting bilateral

carpal tunnel syndrome than the general population not equally exposed.

Approximately one month after plaintiff's 11 March 2009 surgery, Dr. Moore was deposed a second time. Prior to his second deposition, unlike his first deposition, Dr. Moore reviewed DVDs of plaintiff's work stations; ergonomic evaluations by Duncan and Arab; Dr. Edwards' deposition; and the testimony from the hearing before the Deputy Commissioner. Dr. Moore testified that carpal tunnel syndrome was a compressive neuropathy of the median nerve at the wrist leading to dysfunction, pain, numbness, tingling and weakness. He testified that contact pressure increased the pressure localized on the carpal tunnel nerve, thereby increasing the pressure on the median nerve and contributing to the development of carpal tunnel syndrome.

Dr. Moore testified that wrist postures increased the pressure in the carpal tunnel and that, based on his review of the videos and photographs of plaintiff performing duties in the scope of her employment, plaintiff's duties put her at risk for developing carpal tunnel syndrome. Based on Dr. Moore's review of these materials, his evaluation, training, education, and experience, Dr. Moore stated to a reasonable degree of medical certainty that plaintiff's employment history with defendant caused her carpal tunnel syndrome. Furthermore, Dr. Moore determined that, based on a number of occupational factors, including sharp desk edges, improper desk heights, immovable arm rests on plaintiff's chairs, and difficulty positioning the chairs, plaintiff's employment duties subjected her to a greater risk of developing carpal tunnel syndrome "than the general public not equally exposed" to these factors. Dr. Moore also testified that he based his opinions on several factors, including plaintiff's complaints of bilateral hand numbness and tingling, her medical history, and the ergonomic evaluations by Santacapita, Duncan, and Arab.

Since Dr. Moore was plaintiff's treating physician since 2004, he was in the best position to understand plaintiff's job duties. His opinions were predicated on accurate impressions of plaintiff's job duties and activities. In addition, his deposition testimony is supported by competent evidence. Findings 31 and 32 by the Full Commission that were based on Dr. Moore's testimony are therefore supported by competent evidence.

IV. TEMPORARY TOTAL DISABILITY BENEFITS

[2] Defendant argues that the Full Commission erred by awarding plaintiff temporary total disability benefits. We agree.

> In order to obtain compensation under the Workers' Compensation Act, the claimant has the burden of proving the existence of his disability and its extent. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982); *Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E.2d 857 (1965). In cases involving occupational disease, N.C.G.S. § 97-54 provides that "disablement" is equivalent to "disability" as defined by N.C.G.S. § 97-2(9). *Booker v. Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979). N.C.G.S. § 97-2(9) defines "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." To support a conclusion of disability, the Commission must find: (1) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in the same employment, (2) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in any other employment and (3) that the plaintiff's incapacity to earn was caused by his injury. *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683.

Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 185-86, 345 S.E.2d 374, 378-79 (1986).

> The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment, [] (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment, [] (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, *i.e.*, age, inexperience, lack of education, to seek other employment, [] or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Product Distrib., 108 N.C. App. 762, 765-66, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

> In *Terasaka v. AT&T*, the Full Commission concluded, *inter alia*:
>
> (1) "plaintiff developed bilateral carpal tunnel syndrome, an occupational disease, due to causes and conditions characteristic of and peculiar to her employment that was not an ordinary disease of life to which the general public is equally exposed"; (2) plaintiff proved "that she was temporarily totally disabled from 13 March 2002, less four days, and continuing thereafter"; (3) "plaintiff is entitled to receive total disability benefits in the weekly amount of 502.36 from 13 March 2002, less four days, and continuing until further order of the [Commission]"[.]

174 N.C. App. 735, 737-38, 622 S.E.2d 145, 148 (2005), *aff'd per curiam*, 360 N.C. 584, 634 S.E.2d 888 (2006). The Commission also concluded that "[a]s of 13 March 2002, plaintiff was *unable to work in any capacity* due to her carpal tunnel syndrome and, except for four days when she later attempted to return to work, plaintiff remained disabled." *Id.* at 739, 622 S.E.2d at 148-49 (emphasis original). On appeal, our Court held that the Commission's findings were supported by competent evidence. *Id.* at 739-40, 622 S.E.2d at 148-49. Furthermore, we concluded:

> Since the Commission conclusively found "plaintiff was unable to work in any capacity due to her carpal tunnel syndrome," the only *Russell* prong applicable on these facts is the first prong. . . . While we agree that a plaintiff can ordinarily prove disability under any of the four *Russell* prongs, [], on these particular facts, the Commission's finding [] is conclusively established and precludes us from considering any of the other *Russell* prongs.
>
> Thus, under the only *Russell* prong applicable on these facts, in order for plaintiff to meet her burden of proving disability, she had to produce *medical evidence* that she is physically or mentally, as a consequence of the work related injury, incapable of work in *any* employment.

Id. at 740, 622 S.E.2d at 149 (emphases original and internal citations omitted). We then held that the Commission's finding "that the medical evidence merely showed 'plaintiff could not return to any job which required repetitive motion of the hands and wrists' . . . does not amount to a finding that plaintiff could not work in *any* employment." *Id.* (emphasis original).

In the instant case, the Full Commission found:

> 18. On March 11, 2009, Plaintiff underwent bilateral carpal tunnel release surgery performed by Dr. Moore, which was successful. As of the date of the close of the record before the Deputy Commissioner, Dr. Moore had yet to release Plaintiff to return to work, and she was not at maximum medical improvement.

The Full Commission then concluded, in pertinent part:

> 4. As a result of Plaintiff's occupational disease of bilateral carpal tunnel syndrome, Dr. Moore removed her from work on March 11, 2009 due to her surgery and has not released her to return to work. Therefore, Plaintiff has established that she has been medically disabled and unable to earn wages in any employment from March 11, 2009, and continuing. Plaintiff is entitled to temporary total disability compensation at the rate of $754.00 per week from March 11, 2009 through the present and continuing until further order of the North Carolina Industrial Commission.

Therefore, the Full Commission focused on the fact that Dr. Moore never released plaintiff to return to work as support for its conclusion that plaintiff established disability under the first prong of *Russell*. However, a finding that a doctor never released a plaintiff to return to work is insufficient to establish disability under the first prong of *Russell*. *See Parker v. Wal-Mart Stores, Inc.*, 156 N.C. App. 209, 212, 576 S.E.2d 112, 114 (2003) (holding Commission's findings were insufficient to support determination of disability where "the Full Commission merely found that [plaintiff's doctor] had not released plaintiff to return to work after her surgery even though she retained the ability to perform a range of activities that may or may not have allowed her to earn her pre-injury wages . . . .").

Finding of Fact 18 "conclusively established" that Dr. Moore had not released plaintiff to return to work. Therefore, while plaintiff could ordinarily prove disability under any of the four *Russell* prongs, the Full Commission's finding precludes us from considering any of the other prongs, and plaintiff was required to present medical evidence that she was physically or mentally unable to work in any employment as a result of her work-related injury. The Full Commission's Finding of Fact 18 simply established that Dr. Moore had not yet released plaintiff to return to work at her present employment. However, this finding "does not amount to a finding that plain-

tiff could not work in any employment." *Terasaka*, 174 N.C. App. at 740, 622 S.E.2d at 149. As such, it is insufficient to establish that plaintiff could not obtain any employment due to her work-related injury. *See*, *e.g.*, *Ramsey v. S. Indus. Constructors Inc.*, 178 N.C. App. 25, 42, 630 S.E.2d 681, 692 (2006) (concluding medical evidence was insufficient to establish disability under *Russell's* first prong when doctor's testimony showed only that, due to injury, plaintiff could not lift objects over his head, suffered partial permanent loss of the use of his right arm, and was "more disabled than he would otherwise be as a result of the injury" due to congenital problems with his left arm).

Therefore, this finding of fact—and indeed the evidence in the record—is insufficient to support a conclusion that plaintiff met her burden as to the first prong of *Russell*. Plaintiff has not met the requirements of the first method of proof under *Russell* since she presented no medical evidence that she was incapable of work in any employment following her surgery on 11 March 2009. *See Britt v. Gator Wood, Inc.*, 185 N.C. App. 677, 684, 648 S.E.2d 917, 922 (2007) ("Plaintiff has not met the requirements of the first method of proof under *Russell* since he presented no medical evidence that he was incapable of work in *any employment* during the period of 13 January 2003 to 7 February 2003.") (emphasis original).

"Moreover, we cannot remand for additional findings because the transcripts reveal no medical evidence that could support a finding that plaintiff was incapable of work in any employment." *Terasaka*, 174 N.C. App. at 741, 622 S.E.2d at 149. At his second deposition on 14 April 2009, Dr. Moore testified as follows:

> Q: At this point [plaintiff's] restrictions and limitations, is she still currently out of work related to the surgery?
>
> A: I don't—I don't believe she's out of work with regards to the surgery anymore, but I can't tell you that definitively unless I have that specific note in front of me.
>
> . . .
>
> Q: Okay. And so at this point you can't recall without seeing the notes exactly what's happened in terms of [plaintiff]?
>
> A: With regards to the specific work release, that's correct.
>
> Q: But [plaintiff] would have been out of work post surgery for some period of time?

A: Yes.

Q: And that should be noted in your notes that you think we should be able to get?

A: Yes.

However, the only evidence in the record regarding Dr. Moore's post-surgical care of plaintiff is a report dated 23 March 2009, twelve days after plaintiff's surgery, in which Dr. Moore reported that plaintiff was doing "very well" and wanted to perform range-of-motion, strengthening, and scar massage exercises on her own. The report does not reference plaintiff's employment status, nor does it state that Dr. Moore excused plaintiff from performing her work duties, or that she was incapable of work in any employment.

Accordingly, because plaintiff failed to meet her burden of establishing disability under *Russell*, we hold the Full Commission erred in concluding that plaintiff "established that she has been medically disabled and unable to earn wages in any employment from March 11, 2009, and continuing." *See id.* Furthermore, the Commission's award of temporary total disability payments based on this conclusion "was likewise in error," and we reverse that portion of the opinion and award of the Commission. *Id.*

V. CONCLUSION

The portion of the Full Commission's Opinion and Award awarding plaintiff temporary total disability benefits is reversed. We affirm the Opinion and Award in all other respects.

Affirmed in part and reversed in part.

Judge STROUD concurs.

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

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

I concur with the majority opinion based upon this Court's opinion in *Parker v. Wal-Mart Stores, Inc.*, 156 N.C. App. 209, 212, 576 S.E.2d 112, 114 (2003). I would reverse and remand this matter to the Industrial Commission, however, for further findings of fact on the remaining three *Russell* factors for establishing temporary total disability. 108 N.C. App. at 765-66, 425 S.E.2d at 457.

ANDREA GREGORY, EMPLOYEE/PLAINTIFF v. W.A. BROWN & SONS, PMA INSURANCE GROUP, CARRIER/DEFENDANTS

No. COA10-1521

(Filed 7 June 2011)

1. Appeal and Error— interlocutory orders and appeals— multiple appeals

Although there is typically no right of immediate appeal from an interlocutory order, the Court of Appeals reached the merits of this workers' compensation case because the case had already been heard on appeal once before, was being heard on appeal a second time, and an issue had been reserved for future determination by the Industrial Commission which otherwise would result in an appeal for a third time.

2. Workers' Compensation— failure to give timely written notice of incident—failure to show prejudice

The Industrial Commission did not err in a workers' compensation case by concluding that defendants were not prejudiced by plaintiff's failure to give written notice of her work injury within thirty days after the incident as required by N.C.G.S. § 97-22. The evidence supported the Commission's findings that defendant had actual notice under the circumstances of this case that satisfied the twin aims of providing notice including opportunity both to promptly investigate the facts surrounding plaintiff's injury and visible pain, and to direct plaintiff's medical treatment.

Appeal by defendants from opinion and award entered 8 September 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 April 2011.

DeVore Acton & Stafford, P.A., by William D. Acton, Jr., for plaintiff appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones and Neil P. Andrews, for defendant appellants.

McCULLOUGH, Judge.

Defendants appeal from an opinion and award of the North Carolina Industrial Commission finding that defendants were not prejudiced by plaintiff's failure to give written notice of her work injury within 30 days. We affirm.

I. Background

Andrea Gregory ("plaintiff") began working for W.A. Brown & Sons ("defendant-employer") in June 1999 as a metal shop worker building industrial walk-in coolers. As of October 2001, plaintiff had been experiencing intermittent lower back pain for approximately six months and was taking an over-the-counter medication for the pain. During the week of 11 October 2001, plaintiff alleged that she was lifting a container of metal pods, weighing approximately 60 pounds, when she heard her back "pop" and experienced a high level of pain in her lower back. Plaintiff immediately dropped the container as a result of the incident, and plaintiff's work partner, Tony Harding ("Harding") came over to plaintiff to see what was wrong.

Plaintiff alleged that immediately after the incident occurred, she reported her injury to her team leader, Rick Dunaway ("Dunaway"). Dunaway then reported the incident to plaintiff's supervisor, Barry Christy ("Christy"). Christy gave plaintiff a back support brace so that plaintiff could return to work, and Dunaway assisted plaintiff with putting the back support brace on. Plaintiff stated that with the help of the back support brace, she worked the remainder of the day on 11 October 2001, and the next day, Friday, 12 October 2001.

Plaintiff's back pain continued to increase over the weekend, so on Sunday, 14 October 2001, plaintiff saw a doctor about her back pain. Plaintiff informed the doctor that she had been experiencing lower back pain for approximately six months and described the lifting incident that had just occurred at work. Plaintiff was unable to return to work on Monday due to her pain.

Plaintiff reported for work on Tuesday, 16 October 2001, but she was so visibly impaired by pain that Christy told her to go home and referred her to Pam Cordts ("Cordts") in Human Resources. Plaintiff discussed her back pain with Cordts, and Cordts told plaintiff that for her own safety, she would not be allowed to return to work without a note from the doctor. Cordts told plaintiff she should return to the doctor she had seen on Sunday, "or another physician of her choice," and helped plaintiff get an appointment by making phone calls on her behalf.

On 5 February 2002, 87 days after the incident, plaintiff filed a Form 18 claiming benefits for her back injury allegedly caused by the specific traumatic incident that occurred on 11 October 2001 while plaintiff was working for defendant-employer. Defendant-employer and its insurance carrier, PMA Insurance Group (collectively, "defendants"), denied plaintiff's claim on the basis that medical evidence did

not support an injury by accident within plaintiff's scope of employment and because of plaintiff's "non-cooperation with the workers compensation investigation." Plaintiff then requested that her claim be assigned for hearing.

A hearing was held on 16 September 2003 before Deputy Commissioner Morgan S. Chapman ("Deputy Commissioner Chapman"), and on 28 April 2004, Deputy Commissioner Chapman entered an opinion and award denying plaintiff's claim for benefits. Deputy Commissioner Chapman concluded that "[o]n an unknown date during the week of October 11, 2001 plaintiff sustained an injury by accident arising out of and in the course of her employment with [defendant-employer]." Deputy Commissioner Chapman also concluded, "[h]owever, plaintiff's claim is barred due to her failure to give [defendant-employer] written notice of the injury within thirty days," as required by N.C. Gen. Stat. § 97-22 (2009). Both plaintiff and defendants appealed to the Full North Carolina Industrial Commission ("the Commission").

The Commission reviewed plaintiff's case and filed an opinion and award on 18 January 2005, reversing Deputy Commissioner Chapman's opinion and award. The Commission first concluded that plaintiff "sustained a back injury as the result of a specific traumatic incident of the work assigned" on "an unknown date during the week of October 11, 2001." In addition, the Commission concluded, "The aggravation or exacerbation of plaintiff's pre-existing back condition as a result of a specific traumatic incident, which has resulted in loss of wage[-]earning capacity, is compensable under the Workers' Compensation Act." The Commission then concluded that defendants "had actual notice of plaintiff's work-related injury," and "[b]ecause defendants had actual knowledge of plaintiff's work-related injury, plaintiff's failure to give written notice of her claim did not bar her claim for compensation." The Commission further concluded that plaintiff had a reasonable excuse for failing to give defendant-employer timely written notice of her accident in accordance with N.C. Gen. Stat. § 97-22. However, the Commission did not make any specific conclusion of law that defendants were or were not prejudiced by plaintiff's failure to give timely written notice.

Subsequently, the case was remanded by the Commission for assignment to a deputy commissioner "for the taking of additional evidence or further hearing, if necessary" and the entry of an opinion and award with additional findings of fact as to the extent of plain-

tiff's disability, the amount of indemnity owed, and the extent of medical benefits owed to plaintiff. These three issues were heard by Deputy Commissioner John DeLuca ("Deputy Commissioner DeLuca"), whose findings were substantially adopted by the Commission in an opinion and award of benefits to plaintiff filed on 11 May 2007. The Commission also "incorporated by reference" its previous opinion and award filed 18 January 2005. Furthermore, the Commission's 11 May 2007 opinion and award expressly "reserved for future determination" the issue of "the extent of plaintiff's disability, if any, after May 31, 2005," stating, "The parties may hereafter enter into an Agreement, stipulate to the extent of continuing disability, or either party may present additional evidence to this panel of the Full Commission on this issue." Defendants appealed the Commission's 11 May 2007 opinion and award to this Court.

On 19 August 2008, this Court addressed the merits of defendants' appeal, and a divided panel of this Court affirmed, holding, *inter alia*, that the Commission's conclusion that defendant-employer had actual knowledge of plaintiff's injury was supported by findings of fact, which in turn were supported by competent evidence in the record. *Gregory v. W.A. Brown & Sons*, 192 N.C. App. 94, 106, 664 S.E.2d 589, 596 (2008), *rev'd in part, remanded in part*, 363 N.C. 750, 688 S.E.2d 431 (2010). The majority held that as a result of defendant-employer's actual knowledge of plaintiff's injury on the date of occurrence, defendant-employer was not prejudiced by plaintiff's failure to provide written notice of her injury within 30 days. *Id.* However, the dissenting judge disagreed with the majority's decision to "infer a lack of prejudice when the Commission has not addressed that issue specifically." *Id.* at 111, 664 S.E.2d at 599 (Jackson, J., dissenting in part). Rather, the dissenting judge would have "remand[ed] to the Commission for findings of fact and conclusions of law addressing the issue of prejudice as required by section 97-22." *Id.* at 114, 664 S.E.2d at 601.

Defendants appealed to our Supreme Court based on the split decision, and our Supreme Court then considered the issue of whether the employer's actual knowledge of the work-related accident and injury relieved the Commission from the obligation to make findings of fact and conclusions of law on whether the employer was prejudiced by the employee's failure to provide written notice of the accident within 30 days. *Gregory v. W.A. Brown & Sons*, 363 N.C. 750, 688 S.E.2d 431 (2010). On 29 January 2010, our Supreme Court reversed the decision of this Court, holding that, when an employee

fails to give written notice of the accident to the employer within 30 days as required by N.C. Gen. Stat. § 97-22, regardless of whether the employer had actual notice of the accident, the Commission cannot award compensation to the employee unless the Commission concludes as a matter of law, and supports the conclusions with appropriate findings of fact, that: (1) the lack of timely written notice is reasonably excused, and (2) the employer has not been prejudiced thereby. *Gregory*, 363 N.C. at 764, 688 S.E.2d at 440. The Court emphasized that these two factors must be found by the Commission regardless of whether the Commission finds the employer had actual notice of the accident. *Id.* The Court also reiterated this Court's prior holding that there are two purposes for the statutory notice requirement: (1) it allows the employer to provide immediate medical diagnosis and treatment in order to minimize the seriousness of the injury, and (2) it facilitates the earliest possible investigation of the facts surrounding the injury. *Id.* at 762, 688 S.E.2d at 439. The Court remanded the case to this Court for remand to the Commission in order for the Commission to make findings and conclusions addressing whether defendants were prejudiced by plaintiff's failure to give timely written notice as required by the statute. *Id.* at 764, 688 S.E.2d at 441.

On remand, the Commission entered an opinion and award on 8 September 2010, specifically finding that defendants were not prejudiced by plaintiff's failure to give timely written notice. In its opinion and award, the Commission expressly incorporated its 18 January 2005 opinion and award and added Finding of Fact No. 31, which stated:

> The Full Commission is satisfied, based upon the greater weight of the evidence, that defendants were not prejudiced by plaintiff's failure to give written notice of her work-related injury within 30 days for the following reasons: 1) defendant-employer had actual notice of plaintiff's work-related injury on the date of occurrence shortly after it occurred; 2) defendant-employer had an opportunity to promptly investigate the circumstances surrounding plaintiff's injury immediately after receipt of actual notice of her injury, but did not; 3) defendant-employer was aware of the observable pain behaviors and physical impairments plaintiff exhibited at work a few days after having been given actual notice of her injury; 4) defendant-employer had an opportunity to provide plaintiff with assistance in obtaining prompt medical treatment and did in fact provide some assistance to plaintiff in obtaining prompt medical treatment; 5) there is no evidence that plaintiff's injury was wors-

> ened by any delay in medical treatment; and, 6) defendants did not assert as a defense on their Form 61 denial of compensability that they were prejudiced by plaintiff's delay in providing written notice of her claim.

In addition, the Commission found that plaintiff had given "a detailed written notice of her work-related injury in less than four months by the filing of a Form 18 notice of accident with defendants for workers' compensation benefits." For those reasons, the Commission concluded that defendants had failed to meet their burden of showing prejudice from plaintiff's failure to provide written notice of her injury and accident within 30 days of the occurrence.

In addition, the final award again reserves for future determination the issue of "the extent of plaintiff's disability, if any, after May 31, 2005," stating:

> In that the record contains insufficient evidence concerning the extent of plaintiff's disability, if any, after May 31, 2005, this issue is RESERVED for future determination. The parties may hereafter enter into an Agreement, stipulate to the extent of continuing disability, or either party may present additional evidence to this panel of the Full Commission on this issue.

Defendants appeal solely on the basis that the Commission erred in its conclusion of law, and also its findings of fact, that defendants failed to show prejudice from plaintiff's lack of timely written notice as required by the statute.

II. Interlocutory nature of appeal

[1] As an initial matter, we must first address the interlocutory nature of defendant-employer's appeal. An order or judgment is interlocutory " 'if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy.' " *Norris v. Sattler*, 139 N.C. App. 409, 411, 533 S.E.2d 483, 484 (2000) (quoting *Howerton v. Grace Hospital, Inc.*, 124 N.C. App. 199, 201, 476 S.E.2d 440, 442 (1996)). "Generally, there is no right of immediate appeal from an interlocutory order." *Abe v. Westview Capital*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998). There are two circumstances, however, in which a party may 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).

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). "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.' " *Cash v. Lincare Holdings*, 181 N.C. App. 259, 263, 639 S.E.2d 9, 13 (2007) (alterations in original) (quoting *Perry v. N.C. Dep't of Corr.*, 176 N.C. App. 123, 129, 625 S.E.2d 790, 794 (2006)). Consequently, "[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." *Riggins v. Elkay Southern Corp.*, 132 N.C. App. 232, 233, 510 S.E.2d 674, 675 (1999).

In the present case, the Commission's opinion and award on its face reserves the issue of the extent of plaintiff's disability, if any, after 31 May 2005 for future determination:

> In that the record contains insufficient evidence concerning the extent of plaintiff's disability, if any, after May 31, 2005, this issue is RESERVED for future determination. The parties may hereafter enter into an Agreement, stipulate to the extent of continuing disability, or either party may present additional evidence to this panel of the Full Commission on this issue.

This Court has held that such language in a Commission's opinion and award renders the opinion and award interlocutory. *See, e.g.*, *Thomas v. Contract Core Drilling & Sawing*, —— N.C. App. ——, ——, 703 S.E.2d 862, 864 (2011) (dismissing appeal as interlocutory where Commission's opinion and award "reserved the issue of whether [plaintiff] was disabled after 13 November 2008 for a future hearing"). Specifically, in *Allison v. Wal-Mart Stores*, No. COA10-1023 (N.C. Ct. App. 17 May 2011), this Court dismissed the defendants' appeal as interlocutory based on language in the Commission's opinion and

award that is precisely the same as the language at issue in the present case. In *Allison*, the Commission's opinion and award stated on its face: "In that the record contains insufficient evidence concerning the extent of [plaintiff's] continuing disability, if any, after July 27, 2009, this issue is RESERVED for future determination or agreement of the parties." *Id.*, slip op. at 3-4. In addition, as this Court found in *Allison*, there is nothing in the record in the present case "to indicate that this issue has since been addressed by the Commission or resolved by agreement of the parties." *Id.*, slip op. at 5. Accordingly, the Commission's opinion and award in the present case is interlocutory, and likewise should be dismissed. "It is our duty to dismiss an appeal *sua sponte* when no right of appeal exists." *Riggins*, 132 N.C. App. at 233, 510 S.E.2d at 675 (citing *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980)).

However, in the present case, such language was ignored when the Commission's 11 May 2007 opinion and award was first appealed to this Court and subsequently heard by our Supreme Court. For this reason alone, we reach the merits of this appeal. However, we note ' "[t]he reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts.' " *White v. Carver*, 175 N.C. App. 136, 139, 622 S.E.2d 718, 720 (2005) (quoting *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218 (1985)). The circumstances of this case exemplify why the rule on interlocutory appeals should be strictly followed, as this case has already been heard on appeal once before, is now being heard on appeal a second time, and because an issue has been reserved for future determination by the Commission, may be heard on appeal for a third time.

III. Standard of Review

This Court reviews an opinion and award by the Commission to determine: (1) whether there is any competent evidence in the record to support the Commission's findings of fact, and (2) whether the Commission's 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). "Where there is competent evidence to support the Commission's findings, they are binding on appeal even in light of evidence to support contrary findings." *Starr v. Gaston Cty. Bd. of Educ.*, 191 N.C. App. 301, 304–05, 663 S.E.2d 322, 325 (2008). "Our review goes no further than to determine whether the record contains any evidence tending to support the finding." *Chavis v. TLC Home Health Care*, 172 N.C.

App. 366, 369, 616 S.E.2d 403, 408 (2005) (internal quotation marks and citation omitted). "It is not the job of this Court to re-weigh the evidence." *Id.* at 370, 616 S.E.2d at 408. In determining whether competent evidence supports the Commission's findings of fact, the evidence must be viewed in the light most favorable to the plaintiff, giving the plaintiff "the benefit of every reasonable inference to be drawn from the evidence." *Nale v. Ethan Allen*, 199 N.C. App. 511, 514, 682 S.E.2d 231, 234, *disc. review denied*, 363 N.C. 745, 688 S.E.2d 454 (2009). We review the Commission's conclusions of law *de novo*. *Griggs v. Eastern Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

IV. Prejudice for failure to provide timely written notice

[2] Defendants' single contention is that the Commission erred in concluding that defendants were not prejudiced by plaintiff's failure to give written notice of her work injury within 30 days after the incident as required by N.C. Gen. Stat. § 97-22. Defendants argue the Commission's conclusion is not supported by findings of fact that are supported by competent evidence.

Section 97-22 of the Workers' Compensation Act provides:

> Every injured employee . . . shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident . . . ; but no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident . . . , unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

N.C. Gen. Stat. § 97-22. A defendant-employer bears the burden of showing that it was prejudiced. *Lakey v. U.S. Airways, Inc.*, 155 N.C. App. 169, 172-73, 573 S.E.2d 703, 706 (2002); *see also Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 604, 532 S.E.2d 207, 214 (2000); *Chavis*, 172 N.C. App. at 378, 616 S.E.2d at 413. If the defendant-employer is able to show prejudice by the delayed written notice, the employee's claim is barred, even though the employee had a reasonable excuse for not providing written notice within 30 days, as required by statute. *Jones v. Lowe's Companies*, 103 N.C. App. 73, 76, 404 S.E.2d 165, 167 (1991). Our Courts have noted the purpose of providing the employer with written notice within 30 days of the injury in accordance with the statute is twofold: "First, to enable the employer to

provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury; and second, to facilitate the earliest possible investigation of the facts surrounding the injury." *Id.* at 76-77, 404 S.E.2d at 167 (internal quotation marks and citation omitted); *see also Lakey*, 155 N.C. App. at 173, 573 S.E.2d at 706 ("Possible prejudice occurs where the employer is not able to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury and where the employer is unable to sufficiently investigate the incident causing the injury."). Thus, in determining whether prejudice occurred, the Commission must consider the evidence in light of this dual purpose. *Westbrooks v. Bowes*, 130 N.C. App. 517, 528, 503 S.E.2d 409, 417 (1998). In addition, our Courts have found that where the employer is on actual notice of the employee's injury soon after it occurs, and soon enough for a thorough investigation, defendant-employer is not prejudiced by plaintiff's failure to provide timely written notice. *See Sanderson v. Northeast Construction Co.*, 77 N.C. App. 117, 123, 334 S.E.2d 392, 395 (1985).

Defendants in the present case challenge the following conclusion of law made by the Commission in its 8 September 2010 opinion and award:

> For the reasons set forth in Finding of Fact number 31 above, the Full Commission concludes that plaintiff's failure to give written notice to defendant-employer of her October 2001 injury as a result of an accident at work within 30 days did not prejudice defendants, as defendants failed to meet their burden of proof on this issue.

In Finding of Fact No. 31, the Commission concluded as follows:

> The Full Commission is satisfied, based upon the greater weight of the evidence, that defendants were not prejudiced by plaintiff's failure to give written notice of her work-related injury within 30 days for the following reasons: 1) defendant-employer had actual notice of plaintiff's work-related injury on the date of occurrence shortly after it occurred; 2) defendant-employer had an opportunity to promptly investigate the circumstances surrounding plaintiff's injury immediately after receipt of actual notice of her injury, but did not; 3) defendant-employer was aware of the observable pain behaviors and physical impairments plaintiff exhibited at work a few days after having been given actual notice of her injury; 4) defendant-employer had an opportunity to

provide plaintiff with assistance in obtaining prompt medical treatment and did in fact provide some assistance to plaintiff in obtaining prompt medical treatment; 5) there is no evidence that plaintiff's injury was worsened by any delay in medical treatment; and, 6) defendants did not assert as a defense on their Form 61 denial of compensability that they were prejudiced by plaintiff's delay in providing written notice of her claim.

This conclusion is supported by multiple findings of fact in the Commission's 18 January 2005 opinion and award. In Finding of Fact No. 4, the Commission found that plaintiff did suffer an injury at work during the week of 11 October 2001 when she lifted a container of pods. Upon lifting the container, plaintiff "experienced a sharp pain in her low[er] back, and immediately dropped the tote." In Finding of Fact No. 5, the Commission found that "[p]laintiff's work partner, Tony Harding, observed the event and said he could tell from plaintiff's expression that she was in pain. Plaintiff told him that her back was hurting." The Commission found that after the incident at work, "[p]laintiff immediately left her workstation to inform Rick Dunaway, the team leader, about her injury. Plaintiff's statement that she reported the injury to Dunaway, as corroborated by Harding, is credible."

Each of these findings of fact is supported by competent evidence in the record. At the hearing before Deputy Commissioner Chapman on 16 September 2003, plaintiff testified that as she started to lift the container of pods, she heard a "pop" in her back and "dropped the bucket." Plaintiff testified that Harding then came over to her and asked her "what was wrong." Plaintiff then testified that Harding called over Dunaway and that plaintiff told Dunaway her "back had [gone] out" and that she couldn't "straighten up." Harding corroborated plaintiff's testimony by stating that he was working with plaintiff on 11 October 2001 and "noticed that her facial expression dramatically changed as if she had just felt pain" as "[she] picked up a crate of metal pods." Harding also testified that after the incident, "[plaintiff] then went and advised our team leader, Rick Dunaway."

In Finding of Fact No. 6, the Commission found that plaintiff's team leader, Dunaway, "reported the incident to plaintiff's supervisor, Barry Christy, who subsequently gave plaintiff a back support belt." This finding of fact is supported by plaintiff's testimony that after she informed Dunaway of the incident, Dunaway went to find plaintiff's supervisor, Christy, who took her to his office and gave her a back brace. Plaintiff testified that Dunaway assisted her with putting on the back brace so that she could return to her work.

In addition, in Finding of Fact No. 8, the Commission found that plaintiff "reported for work on Tuesday but was so visibly impaired by pain that Christy referred her to Pam Cordts in human resources, which is corroborated by Christy's testimony." The Commission also found, in Finding of Fact No. 11, that "Ms. Cordts advised plaintiff to see a doctor, and told her that for her own safety she would not be allowed to return to work without a note from the doctor."

These findings of fact are likewise supported by competent evidence in the record. At the 16 September 2003 hearing, plaintiff testified that she reported for work on Tuesday, 16 October 2001, following the incident and that Christy took her into his office around noon and told her she should leave for the day because of "the way [plaintiff] was walking." Plaintiff further testified that she was then "carried . . . to Pam Cordts[']s office" in Human Resources, who also told plaintiff that she needed to leave work "because of the way [she] was walking." Cordts likewise testified that Christy came over to her office that Tuesday expressing concern for plaintiff's safety because "[plaintiff] was having difficulty standing," and "she was leaning against or laying [sic] over the table on which she was working." Further, Cordts testified that she told plaintiff that plaintiff should return to the physician plaintiff had just seen, "or another physician of her choice," to try to obtain relief for her back pain. Cordts testified that she helped plaintiff to get physician appointments for plaintiff's back pain by making several phone calls for plaintiff.

The Commission both incorporated and relied on these findings of facts in its 8 September 2010 opinion and award, stating:

> The findings of fact and conclusions of law from the January 18, 2005 and May 11, 2007 Opinions and Awards of the Full Commission remain unchanged, except that finding of fact number 31 and conclusions of law numbers nine and 10 are added to the May 11, 2007 Full Commission Opinion and Award.

In its 11 May 2007 opinion and award, the Commission likewise expressly incorporated its 18 January 2005 opinion and award, including all findings of fact and conclusions of law.

We hold that these findings of fact, which are supported by competent evidence in the record, support the Commission's conclusion of law that defendant-employer has failed to demonstrate any prejudice from the lack of timely written notice for the reasons stated by the Commission in its Finding of Fact No. 31. The findings of fact indicate that plaintiff's team leader and supervisor had actual knowl-

edge of her injury immediately after it happened; in fact, plaintiff's supervisor provided her with a back support belt in attempt to mitigate the pain plaintiff was experiencing. The following week, plaintiff's supervisor again noticed plaintiff's back pain on the job and informed the human resources officer that he was concerned for plaintiff's safety. In addition, the human resources officer not only instructed plaintiff to leave work and see her physician for her pain, but also helped plaintiff obtain a doctor's appointment. As the Commission concluded in its Finding of Fact No. 31, these findings indicate that defendant-employer had actual notice of plaintiff's injury on the date of occurrence, and therefore had opportunity both to promptly investigate the facts surrounding plaintiff's injury and visible pain, and to direct plaintiff's medical treatment.

Furthermore, defendants have provided no evidence that plaintiff's injuries were made worse by any delay in treatment; in fact, as the Commission reiterates in its Finding of Fact No. 31, the findings of fact reveal that plaintiff sought a wide array of treatment and sought prompt medical attention for her back soon after the injury occurred, as directed by defendant-employer's human resources officer. Furthermore, the record reflects that defendant-employer did not raise the issue of prejudice by lack of timely notice in its Form 61 response to plaintiff's workers' compensation claim, as the Commission also found in Finding of Fact No. 31. Accordingly, we hold the evidence supports the Commission's findings that defendant-employer had actual notice of plaintiff's injury soon after it occurred and that such actual notice under the circumstances of the present case satisfied the twin aims of providing the employer with a 30-day written notice. *See Chavis*, 172 N.C. App. at 378, 616 S.E.2d at 413; *Lakey*, 155 N.C. App. at 173, 573 S.E.2d at 706; *Sanderson*, 77 N.C. App. at 123, 334 S.E.2d at 395. We therefore affirm the opinion and award of the Commission.

V. Conclusion

We hold there is competent evidence in the record to support the Commission's findings of fact, which in turn support the Commission's conclusion of law that defendant-employer was not prejudiced by plaintiff's failure to give timely notice pursuant to N.C. Gen. Stat. § 97-22. The Commission's 8 September 2010 opinion and award is therefore affirmed.

Affirmed.

Judges HUNTER (Robert C.) and BRYANT concur.

LAKE COLONY CONSTRUCTION, INC., PLAINTIFF v. WILLIAM RICHARD BOYD, JR., SUBSTITUTE TRUSTEE, DEED OF TRUST RECORDED IN BOOK 1671, AT PAGE 675 IN THE OFFICE OF THE REGISTER OF DEEDS OF JACKSON COUNTY, NC; MARCIA J. RINGLE, TRUSTEE, DEED OF TRUST RECORDED IN BOOK 1562, AT PAGE 766, IN THE REGISTER OF DEEDS OF JACKSON COUNTY, NC; MACON BANK, INC.; LAKE COLONY PARTNERS, LLC; PETER A. PAUL, TRUSTEE, DEED OF TRUST RECORDED IN BOOK 1671, PAGE 683 IN THE OFFICE OF THE REGISTER OF DEEDS IN JACKSON COUNTY, NC; AND BIG RIDGE PARTNERS, LLC, DEFENDANTS

No. COA10-959

(Filed 7 June 2011)

Joint Venture— judgment creditor—subordinate rights—permanent injunction

The trial court did not err in a declaratory judgment action by ordering a permanent injunction based on its conclusion that plaintiff entered into a joint venture with defendant and was solely a judgment creditor whose rights to the proceeds from certain real property were subordinate to three deeds of trust. The parties' contract expressly stated that the parties intended to form a joint venture, provided for the sharing of profits, and that each had the right to direct the other's conduct in some measure.

Appeal by plaintiff from judgment entered 25 February 2010 by Judge C. Phillip Ginn in Jackson County Superior Court. Heard in the Court of Appeals 27 January 2011.

Hunter, Large & Sherrill, PLLC, by Diane E. Sherrill, for plaintiff-appellant.

Roberts & Stevens, P.A., by Mark C. Kurdys, for defendants-appellees William Richard Boyd, Jr., Marcia J. Ringle, and Macon Bank, Inc.

GEER, Judge.

Plaintiff Lake Colony Construction, Inc. appeals from a judgment determining that it entered into a joint venture with defendant Lake Colony Partners, LLC and, therefore, was solely a judgment creditor whose rights to the proceeds from certain real property were subordinate to three deeds of trust. Because the parties' contract expressly stated the parties' intent to form a "joint venture" and further provided for the sharing of profits and that each had the right to direct

the other's conduct in some measure, we hold that the trial court properly construed the contract as establishing a joint venture. We, therefore, affirm.

Facts

On 19 March 2007, Lake Colony Construction entered into a written contract with Lake Colony Partners specifying that the terms of the contract were "a joint venture between the above parties for the construction and sale of one house in the Sims Valley Development" in Jackson County. Under the contract, Lake Colony Partners was required to purchase the lot, arrange for all financing for construction of the house (described as "a spec house"), and to provide all cash and required personal and corporate guarantees to secure the financing. The contract called for Lake Colony Construction to act as a general contractor for the project, to obtain the required building permits, and to provide adequate staff for the construction of the spec house. The contract further provided that Lake Colony Construction would bill Lake Colony Partners weekly for actual costs, including specified percentage increases over Lake Colony Construction's employees' hourly rates to cover workers' compensation and federal and state taxes. Lake Colony Partners was required to reimburse Lake Colony Construction for its costs bi-weekly.

The contract specified that Lake Colony Partners and Lake Colony Construction would "jointly determine the asking price for the house . . . ." If, however, the house remained unsold for four months after completion, Lake Colony Partners had authority to accept a lesser price so long as Lake Colony Construction was paid a specified guaranteed return. According to the contract, upon the sale of the house, the sales proceeds would be distributed in the following order: (1) to pay off the lot price, construction loan, real estate fees, and closing costs; (2) to reimburse Lake Colony Partners for any cash advanced in connection with the project; (3) to pay Lake Colony Construction $25,000.00 regardless of the adequacy of the closing proceeds; (4) to pay Lake Colony Partners up to $25,000.00 subject to there being sufficient closing proceeds; and (5) the remainder being divided equally between Lake Colony Partners and Lake Colony Construction.

On 2 May 2007, Lake Colony Partners purchased Lot 30 in the Sims Valley Development from defendant Big Ridge Partners. Big Ridge Partners had previously entered into a 2006 deed of trust with defendant Macon Bank as the beneficiary that included Lot 30 as part

of the property securing Big Ridge Partners' debt. On the same day as the purchase of the property, Lake Colony Partners, Macon Bank, and the trustee for the 2006 deed of trust, defendant Marcia J. Ringle, entered into a subordination agreement with respect to the 2006 deed of trust. Lake Colony Partners also executed on 2 May 2007 two additional deeds of trust as to Lot 30: one with Ms. Ringle as trustee with Macon Bank as the beneficiary (a construction deed of trust) and the second with defendant Peter A. Paul as trustee and Big Ridge Partners as the beneficiary.

From 26 March 2007—before Lake Colony Partners purchased Lot 30—through 22 April 2008, Lake Colony Construction furnished labor, materials, and services pursuant to its contract with Lake Colony Partners. The last payment received by Lake Colony Construction was on 11 December 2007 in the amount of $7,856.09.

On 24 March 2008, Lake Colony Construction filed a claim of lien pursuant to N.C. Gen. Stat. § 44A-8 (2007), claiming that Lake Colony Partners owed it $121,445.74. Subsequently, Lake Colony Construction submitted a final invoice dated 14 May 2008 to Lake Colony Partners for $5,947.44, making the total amount due $127,393.18. On 25 August 2008, Lake Colony Construction filed an action to enforce its lien against Lot 30 pursuant to N.C. Gen. Stat. § 44A-13 and § 44A-14 (2007).

While the lien action was pending, defendant William Richard Boyd, Jr., a substitute trustee, instituted a foreclosure proceeding as to the construction deed of trust secured by Lot 30. On or about 1 June 2009, an order authorizing the sale of Lot 30 was entered by the Clerk of Court of Jackson County, and the sale of the real property was initially set for 9 July 2009, but later was postponed until 6 August 2009.

On 10 July 2009, Lake Colony Construction filed a declaratory judgment action against defendants Lake Colony Partners, Big Ridge Partners, Macon Bank, and the three trustees for the three deeds of trust. Lake Colony Construction alleged that through perfection of its lien, which related back to the first furnishing of labor and materials on 26 March 2007, it had priority over the construction deed of trust, the subordinated deed of trust, and the third deed of trust. Lake Colony Construction requested a determination of its interest and priority, as well as the interests and priorities of all the parties to the action with respect to Lot 30. Lake Colony Construction also sought

a permanent injunction against all defendants preventing further proceedings against Lot 30 to the extent that such proceedings would defeat or diminish the priority of Lake Colony Construction's lien and any judgment entered on the lien.

At trial, the parties stipulated to the joint admission of 21 exhibits, including a copy of the contract between Lake Colony Construction and Lake Colony Partners. The parties also entered into eight stipulations, including the following:

5. As a matter of law, if the Court concludes in this action that Plaintiff has a valid statutory laborers and materialmens lien pursuant to N.C. Gen. Stat. § 44A-8, such lien, if any has been filed, recorded and perfected in a timely manner, that such lien, if any, is enforceable pursuant to the terms of that judgment entered July 29, 2009, in Jackson County, North Carolina Civil Action No. 08 CVS 624 against that real property known as Lot #30 Sims Valley Development and that Plaintiff's rights under and claims to enforce that judgment by executions and to the proceeds of a judicial sale of Lot #30 Sims Valley would have first priority to the proceeds of public or judicial sale of Lot #30 over and above any other liens or claims against Lot #30, including the liens and claims of the Defendants.

6. As a matter of law, if the Court concludes in this action that Plaintiff has no valid statutory laborers and materialmens lien pursuant to N.C. Gen. Stat. § 44A-8, then Plaintiffs [sic] rights under and claims against Lake Colony Partners, LLC and its assets, would be as an unsecured judgment creditor and would not constitute a lien against that real property known as Lot #30 Sims Valley Development and the improvements thereon, and Plaintiff's claims, if any, to the proceeds of a public or judicial sale of Lot #30 Sims Valley and the improvements thereon would have fourth priority, after satisfactions of those liens of the Defendants against Lot #30, including the liens and claims of defendants Boyd, Substitute Trustee, Ringle, Trustee, Macon Bank, Inc., Peter A. Paul, Trustee and Big Ridge Partners, LLC, as described in the pleadings and in Exhibits 16, 18 and 21.

7. As a matter of law, if the Court finds that the Plaintiff had supplied labor and materials for the improvement of Lot #30 Sims Valley Development pursuant to a joint venture with Lake Colony Partners, LLC, then Plaintiff has no valid lien against

Lot #30 or the improvements thereon, in particular no statutory lien pursuant to N.C. General Statute §44A-8.

8. As a matter of law, the relative priority of lien rights and claims as between those Deeds of Trust described as Commercial Construction Loan Deed of Trust, Exhibit 16 (Substitution of Trustee, Exhibit 17), the Development Loan Deed of Trust, Exhibit 18 (Substitution of Trustee, Exhibit 19) and the Third Deed of Trust, Exhibit 21, to the proceeds of a public or judicial sale of Lot #30 Sims Valley and the improvements thereon is:

   - *first*, the Commercial Construction Loan Deed of Trust, Exhibit 16 (Substitution of Trustee, Exhibit 17),
   - *second*, the Development Loan Deed of Trust, Exhibit 18 (Substitution of Trustee, Exhibit 19)
   - *third*, the Third Deed of Trust, Exhibit 21[.]

Following arguments by counsel from both sides, the trial court announced its finding in open court that "this is a joint venture based on the totality of the agreement that is set out in Defendants' Exhibit 1. The Court, in its discretion, is further not considering parole [sic] evidence in regard to its determination." In the written judgment for permanent injunction subsequently entered on 25 February 2010, the trial court found that Lake Colony Construction "entered into a joint venture with Lake Colony Partners, LLC, to select and acquire a lot in the Sims Valley Development, select a building plan, obtain necessary cash or financing for construction, construct a residence on that lot, sell the lot and improvements and split the proceeds of the sale." The court also found that "[a]ny and all labor and materials supplied by Plaintiff Lake Colony Construction, Inc. for the improvement of Lot #30 were supplied in pursuit of that joint venture."

The court then concluded that Lake Colony Construction's equitable and contractual claims against Lake Colony Partners had been determined by a judgment entered 29 July 2009 in Jackson County, North Carolina, Civil Action No. 08 CVS 624, and any claim or rights Lake Colony Construction may have against any interest Lake Colony Partners may have in Lot 30 "are those of a judgment creditor, subordinate to the lien claims and rights" described in the parties' stipulations. Lake Colony Construction timely appealed to this Court.

Discussion

On appeal, Lake Colony Construction contends that the trial court erred in finding that Lake Colony Construction and Lake Colony Partners entered into a joint venture. " 'The standard of review in declaratory judgment actions where the trial court decides questions of fact is whether the trial court's findings are supported by any competent evidence. Where the findings are supported by competent evidence, the trial court's findings of fact are conclusive on appeal.' " *Lynn v. Lynn*, 202 N.C. App. 423, 430, 689 S.E.2d 198, 204 (quoting *Cross v. Capital Transaction Grp., Inc.*, 191 N.C. App. 115, 117, 661 S.E.2d 778, 780 (2008), *disc. review denied*, 363 N.C. 124, 672 S.E.2d 687 (2009)), *disc. review denied*, 364 N.C. 613, 705 S.E.2d 736 (2010).

The trial court's conclusions of law are reviewable *de novo*. *Id*. In addition, "[q]uestions of contract interpretation are also reviewed *de novo*." *Id*. *See also Davison v. Duke Univ.*, 282 N.C. 676, 712, 194 S.E.2d 761, 783 (1973) (observing that interpretation of contract is within province of court and "has uniformly been treated as a question of law subject to review by the appellate courts").

A joint venture "is a business association like a partnership but narrower in scope and purpose." *Jones v. Shoji*, 110 N.C. App. 48, 51, 428 S.E.2d 865, 867 (1993), *aff'd in part and disc. review improvidently allowed in part*, 336 N.C. 581, 444 S.E.2d 203 (1994). Our Supreme Court has characterized a joint venture as

> "an association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill, and knowledge, but without creating a partnership in the legal or technical sense of the term.
>
> . . .
>
> Facts showing the joining of funds, property, or labor, in a common purpose to attain a result for the benefit of the parties in which each has a right in some measure to direct the conduct of the other through a necessary fiduciary relation, will justify a finding that a joint adventure exists.
>
> . . .
>
> To constitute a joint adventure, the parties must combine their property, money, efforts, skill, or knowledge in some com-

> mon undertaking. The contributions of the respective parties need not be equal or of the same character, but there must be some contribution by each coadventurer of something promotive of the enterprise."

Pike v. Wachovia Bank & Trust Co., 274 N.C. 1, 8-9, 161 S.E.2d 453, 460 (1968) (quoting *In re Simpson*, 222 F. Supp. 904, 909 (M.D.N.C. 1963)).

As this Court has summarized:

> Thus, the essential elements of a joint venture are (1) an agreement to engage in a single business venture with the joint sharing of profits, *Edwards v. Bank*, 39 N.C. App. 261, 275, 250 S.E.2d 651, 661 (1979), (2) with each party to the joint venture having a right in some measure to direct the conduct of the other "through a necessary fiduciary relationship." *Cheape v. Town of Chapel Hill*, 320 N.C. 549, 562, 359 S.E.2d 792, 799 (1987) (emphasis in original). The second element requires that the parties to the agreement stand in the relation of principal, as well as agent, as to one another.

Southeastern Shelter Corp. v. BTU, Inc., 154 N.C. App. 321, 327, 572 S.E.2d 200, 204-05 (2002).

As for the first element, the contract between Lake Colony Construction and Lake Colony Partners expressly provided for the sharing of profits:

> 5. Upon a sale of the house, sales proceeds will be distributed as follows:
>
> A. First, to pay off the lot price and construction loan, real estate fees and closing costs. . . .
>
> B. Second, to reimburse [Lake Colony Partners] for any cash advanced for acquisition of the lot, costs advanced by [Lake Colony Partners] for completion of the house and interest paid during construction. . . .
>
> C. Third, to [Lake Colony Construction] in the amount of $25,000, regardless of the adequacy of closing proceeds.
>
> D. Fourth, to [Lake Colony Partners] up to $25,000, subject to there being sufficient closing proceeds.
>
> E. Thereafter, 50% of the remainder to each [Lake Colony Construction] and [Lake Colony Partners].

In sum, proceeds would first go to covering certain costs incurred in funding the project, then to Lake Colony Construction up to $25,000.00, then to Lake Colony Partners up to $25,000.00, and then split 50/50 between the parties. *See Slaughter v. Slaughter*, 93 N.C. App. 717, 720-21, 379 S.E.2d 98, 100-01 (1989) (holding evidence supported first element of joint venture, requiring joint sharing of profits, when parties engaged in "mutually beneficial" task of dredging pond located between their houses), *disc. review improvidently allowed*, 326 N.C. 479, 389 S.E.2d 803 (1990). Consequently, the contract establishes the existence of the first element of a joint venture.

Lake Colony Construction argues, however, that the contract did not contain any term supplying the second element of a joint venture: that each party had a right to control or direct each other's conduct. Even if the contract contains no express provision that the parties will have a principal/agent relationship with respect to each other, it is well established 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).

Our Supreme Court explained the law further:

> "Intention or meaning in a contract may be manifested or conveyed either expressly or impliedly, and it is fundamental that that which is plainly or necessarily implied in the language of a contract is as much a part of it as that which is expressed. 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." 17 Am. Jur. 2d Contracts § 255 at 649 (1964). However, "[n]o meaning, terms, or conditions can be implied which are inconsistent with the expressed provisions." 17 Am. Jur. 2d *Contracts*, *supra* at 652.

Id. at 410-11, 200 S.E.2d at 625.

Here, the contract between Lake Colony Partners and Lake Colony Construction provided: "The following is a *joint venture* between the above parties [Lake Colony Construction and Lake Colony Partners] for the construction and sale of one house in the Sims Valley Development." (Emphasis added.) Another fundamental principle of contract construction is that "parties are generally presumed to take into account all existing laws when entering into a contract." *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 406, 584 S.E.2d 731, 739 (2003), *superseded by statute as stated in Bodine v. Harris Vill. Prop. Owners Ass'n*, 207 N.C. App. 52, 699 S.E.2d 129 (2010). We thus presume that when they entered into their contract and identified their relationship as a "joint venture," Lake Colony Partners and Lake Colony Construction took into account the law that, in a joint venture, the parties "stand in the relation of principal, as well as agent, as to one another." *Southeastern Shelter Corp.*, 154 N.C. App. at 327, 572 S.E.2d at 205. Consequently, their use of the phrase "joint venture" necessarily implies their intent to adopt a principal/agent relationship.

In addition, the second element of a joint venture does not require that the parties have the right to control the conduct of each other in all aspects of the project, but only that they have the right to direct each other's conduct "in some measure." *Cheape*, 320 N.C. at 562, 359 S.E.2d at 799. The contract between Lake Colony Construction and Lake Colony Partners provided that the parties were required to mutually agree upon a house plan and lot. In addition, "[a]ny major changes in the building plans will be subject to the mutual approval of" Lake Colony Construction and Lake Colony Partners. Finally, the contract required that Lake Colony Partners and Lake Colony Construction "jointly determine the asking price for the house," although after four months Lake Colony Partners had authority to accept a lesser offer upon paying Lake Colony Construction the return guaranteed by the contract.

These provisions—subjecting each party to the control of the other regarding selection of and changes to the house plans, selection of the lot, and determination of the sales price for the house—are sufficient to establish that the parties had the right, in some measure, to direct each other's conduct. The trial court did not, therefore, given the terms of the contract, err in determining that the parties had entered into a joint venture.

In arguing the non-existence of a joint venture, Lake Colony Construction points to exhibits other than the contract and argues

that they show "the course of performance or conduct of the parties" to the contract. At trial, however, the trial court stated that "in its discretion," it was "not considering parole [sic] evidence in regard to its determination." Although Lake Colony Construction included, in the record on appeal, a proposed issue challenging this exclusion of parol evidence, it did not address this issue in its brief. "Issues not presented and discussed in a party's brief are deemed abandoned." N.C.R. App. P. 28(a). Since the trial court did not consider Lake Colony Construction's evidence of course of performance or conduct in reaching the court's decision and since Lake Colony Construction has not argued on appeal that the trial court erred in excluding that evidence, we cannot, on appeal, rely upon the excluded evidence as a basis for reversing the trial court's decision.

In its second argument, Lake Colony Construction challenges the trial court's finding of fact number 4 that "[a]ny and all labor and materials supplied by Plaintiff Lake Colony Construction, Inc. for the improvement of Lot #30 were supplied in pursuit of that joint venture." Lake Colony Construction does not, however, dispute that the labor and materials it supplied to Lot 30 were supplied pursuant to the contract that the trial court determined established a joint venture, a determination that we have upheld. Consequently, the trial court did not err in making finding of fact number 4.

Finally, Lake Colony Construction challenges the trial court's fourth conclusion of law:

> The Plaintiff's equitable and contractual claims against Lake Colony Partners, LLC, have been determined by that judgment entered July 29, 2009, in Jackson County, North Carolina Civil Action No. 08 CVS 624 and any claim or rights Plaintiff Lake Colony Construction, Inc. may have against any interest Lake Colony Partners, LLC, may have in Lot #30, as an asset of Lake Colony Partners, LLC, are those of a judgment creditor, subordinate to the lien claims and rights described in Paragraphs 4 and 8 of the parties' stipulations set forth above.

Lake Colony Construction also challenges the following related paragraph in the decretal portion of the trial court's order:

> Plaintiff Lake Colony Construction, Inc. shall refrain from initiation or further proceedings or efforts toward execut[ing] upon its judgment against Lake Colony Partners, LLC in Jackson County Civil Action No. 08 CVS 624 against Lot #30 Sims Valley as an asset of Lake Colony Partners, LLC, other than as a general cred-

> itor as set forth in paragraph numbered 1 above and as subordinated to the priorities set forth in the immediately preceding paragraph numbered 1, above.

Paragraph 1 of the decree specified that William Boyd, as substitute trustee on the construction loan deed of trust for the benefit of Macon Bank, had first priority to the proceeds realized upon a sale of Lot 30; Mr. Boyd as substitute trustee on the subordinated deed of trust for the benefit of Macon Bank had second priority; and Peter Paul as trustee on the third deed of trust for the benefit of Big Ridge Partners had third priority. Lastly came "the claims of creditors of Lake Colony Partners, LLC, including but not limited to any claim Plaintiff Lake Colony Constructions [sic], Inc. may have against any interest Lake Colony Partners, LLC may have in Lot #30, as an asset of Lake Colony Partners, LLC, as a judgment creditor."

On appeal, Lake Colony Construction notes that its claim of lien pursuant to N.C. Gen. Stat. § 44A-8 had been reduced to judgment prior to the trial in this action, but that the above paragraphs "prevent[] Lake Colony Construction, Inc. from enforcing its judgment." In arguing that this result is in error, Lake Colony Construction asserts:

> Reviewing the evidence considered by the trial court *de novo* and as in part set forth in sections II and III of this argument to determine if this conclusion is sustained by the findings of fact and following the argument in this brief of Lake Colony Construction, Inc. as to those findings, the only determination possible is that this conclusion is not supported by the findings of fact because all of the compelling evidence supports finding that Lake Colony Construction, Inc. was a contractor and Lake Colony Partners, LLC was the owner of the lot to which Lake Colony Partners, LLC furnished labor and materials for improvements.

The appellees, defendants William Boyd, Marcia Ringle, and Macon Bank, have read this argument as contending "that the elements of a joint venture do not automatically preclude [Lake Colony Construction] from having a statutory lien pursuant to N.C.G.S. §44A-8 . . . ." It is not entirely clear to this Court whether Lake Colony Construction was, in fact, making the argument suggested by the appellees. Lake Colony Construction's brief could be read as arguing that (1) the trial court erred in finding a joint venture because the evidence established only a general contractor/property owner relationship; (2) because there was no evidence of a joint venture, the trial court erred in finding that labor and materials were

supplied pursuant to a joint venture; and (3) because there was no evidence of a joint venture, the trial court's conclusion of law and decree regarding the priorities was not supported by proper findings of fact. Nothing in Lake Colony Construction's brief specifically argues that, even if this Court upheld the finding of a joint venture, the trial court still erred in establishing the priorities and precluding enforcement of Lake Colony Construction's lien.

Assuming that appellees have correctly read Lake Colony Construction's brief, we agree that the issue whether one member of a joint venture may still enforce a laborers and materialmen's lien against the real property that is the subject of the joint venture is not properly before this Court. We do not, however, agree with appellees' reasoning.

Appellees point to the following stipulations entered into by the parties prior to the hearing and argue that they are binding on Lake Colony Construction:

> 6. As a matter of law, if the Court concludes in this action that Plaintiff has no valid statutory laborers and materialmens lien pursuant to N.C. Gen. Stat. § 44A-8, then Plaintiffs [sic] rights under and claims against Lake Colony Partners, LLC and its assets, would be as an unsecured judgment creditor and would not constitute a lien against that real property known as Lot #30 Sims Valley Development and the improvements thereon, and Plaintiff's claims, if any, to the proceeds of a public or judicial sale of Lot #30 Sims Valley and the improvements thereon would have fourth priority, after satisfactions of those liens of the Defendants against Lot #30, including the liens and claims of defendants Boyd, Substitute Trustee, Ringle, Trustee, Macon Bank, Inc., Peter A. Paul, Trustee and Big Ridge Partners, LLC, as described in the pleadings and in Exhibits 16, 18 and 21.
>
> 7. *As a matter of law, if the Court finds that the Plaintiff had supplied labor and materials for the improvement of Lot #30 Sims Valley Development pursuant to a joint venture with Lake Colony Partners, LLC, then Plaintiff has no valid lien against Lot #30 or the improvements thereon, in particular no statutory lien pursuant to N.C. General Statute §44A-8.*

(Emphasis added.) It is, however, well established that "[a] stipulation as to the law is not binding on the parties or the court." *Bryant v. Thalhimer Bros., Inc.*, 113 N.C. App. 1, 14, 437 S.E.2d 519, 527 (1993), *appeal dismissed and disc. review denied*, 336 N.C. 71, 445 S.E.2d 29 (1994).

Nevertheless, this action sought declaratory relief pursuant to N.C. Gen. Stat. § 1-254 (2009), which provides:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof.

The contract that was the subject of the declaratory judgment action was, of course, the contract between Lake Colony Construction and Lake Colony Partners.

At the hearing, the trial judge stated that he understood the parties were seeking a determination "whether or not there was a joint venture agreement between the parties in the construction of the house or whether it was a construction contract . . . . That's what we're for here today, as I understand it." Both counsel for defendants (other than Lake Colony Partners) and counsel for Lake Colony Construction agreed. When counsel for Lake Colony Construction pointed out that the trial court would also need to determine the priorities, the trial judge asked, "But these kind of fall in line depending . . . on how the Court would rule on that particular issue[,]" referring to the joint venture question. Lake Colony Construction's counsel responded: "That's correct." Subsequently, counsel for Lake Colony Construction made no argument that her client was entitled to enforce a laborers and materialmen's lien even if a joint venture existed.

Rule 10(a)(1) of the Rules of Appellate Procedure provides that "[i]n 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." Since Lake Colony Construction did not raise in the trial court the issue whether it was entitled to priority over the deeds of trust even if a party to a joint venture, that issue has not been preserved for appellate review. *See also Fowler v. Johnson*, 18 N.C. App. 707, 711, 198 S.E.2d 4, 7 (1973) (holding that parties were bound by their pretrial stipulation agreeing to limit issues at trial to single issue and could not "after final judgment has been entered, seek to avoid their stipulations which were knowingly made and relied on by both parties").

In sum, because we have upheld the trial court's finding of a joint venture, we likewise uphold the conclusion of law and the decretal portion of the order. We, therefore, affirm the trial court's judgment and order for permanent injunction.

Affirmed.

Judges STEPHENS and McCULLOUGH concur.

THE GRAHAM COUNTY BOARD OF ELECTIONS, PLAINTIFF v. GRAHAM COUNTY BOARD OF COMMISSIONERS; STEVE ODOM, BILLY CABLE, BRUCE SNYDER, SANDRA SMITH, GENE TRULL, IN THEIR OFFICIAL CAPACITIES AS GRAHAM COUNTY COMMISSIONERS; ANGELA ORR, DEFENDANTS

No. COA10-653

(Filed 7 June 2011)

1. Appeal and Error— mootness—satisfaction of judgment

Defendant Board of Commissioners' appeal was not moot even though it had already paid employment compensation and attorney fees in compliance with a writ of *mandamus*. Payment was not made by way of compromise, nor did the payment suggest that defendants did not intend to appeal.

2. Jurisdiction— subject matter jurisdiction—county boards of elections—issuance of writ of mandamus

The trial court had subject matter jurisdiction in a case seeking a writ of *mandamus* that would require the Board of Commissioners to pay an employee of the Graham County Board of Elections. County boards of elections have the power to sue and be sued, and they are distinct legal entities from the counties in which they are located.

3. Mandamus— payment of employee—Board of Elections—waiver of sovereign immunity

The trial court did not err by issuing a writ of *mandamus* that required the Board of Commissioners to pay an employee of the Graham County Board of Elections. This duty was purely ministerial and there was no discretion involved. Further, the Board of Commissioners waived any potential sovereign immunity protection by failing to assert it at trial.

4. Attorney Fees— payment from county's general fund—no statutory authorization

The trial court erred by ordering defendant Board of Commissioners to pay the Graham County Board of Elections' legal expenses from the general fund of Graham County and not the amount already budgeted for the Graham County Board of Elections. There was no statutory authorization for attorney fees, and thus, this portion of the order was reversed.

Appeal by Graham County Board of Commissioners and Steve Odom, Billy Cable, Bruce Snyder, Sandra Smith, and Gene Trull, in their official capacities as Graham County Commissioners, from order entered 14 December 2009 by Judge James L. Baker in Graham County Superior Court. Heard in the Court of Appeals 1 December 2010.

David A. Sawyer for Defendants-appellants.

McKinney and Tallant, P.A., by Zeyland G. McKinney, Jr., and Stiles, Krake & Smith, P.C., by Stephen S. Krake and Eric W. Stiles, for Plaintiff-appellee.

Stark Law Group, PLLC, by S.C. Kitchen, and James B. Blackburn, III, for North Carolina Association of County Commissioners, amicus curiae.

HUNTER, JR., Robert N., Judge.

The Graham County Board of Commissioners and its members (collectively, the "Board of Commissioners") appeal the issuance of a writ of mandamus requiring the Board of Commissioners to pay an employee of the Graham County Board of Elections (the "GCBOE"). The Board of Commissioners also appeals an award of attorney's fees to the GCBOE. For the following reasons, we affirm the issuance of the writ of mandamus and reverse the award of attorney's fees.

I. Factual and Procedural Background

A county board of commissioners is responsible for funding the local county board of elections. In Graham County, the Board of Commissioners issues paychecks directly to GCBOE employees. At a September 2009 meeting, the Board of Commissioners voted to eliminate one of the GCBOE's two full-time employee positions from the budget. It determined the GCBOE should operate with one full-time employee (the director of elections) and one part-time employee. Despite the amended budget, the GCBOE eventually hired two part-time employees, one of whom was Angela Orr. The Graham County

finance officer informed the director of elections that the GCBOE could hire only one part-time employee. Subsequently, the Board of Commissioners refused to pay Ms. Orr for her work with the GCBOE. Budget projections indicate there were sufficient funds in the GCBOE's budget to pay both part-time employees for the remainder of the budget year.

The GCBOE filed a petition for a writ of mandamus seeking to compel the Board of Commissioners to pay Ms. Orr her salary and for any benefits owed to her as a result of her employment. The Graham County Superior Court issued the writ and ordered the Board of Commissioners to pay $5035.50 in attorney's fees.

The Board of Commissioners promptly remitted payment to Ms. Orr and counsel for the GCBOE. After issuing payment, the Board of Commissioners gave timely notice of appeal. The GCBOE filed a motion to dismiss the appeal as moot, which the trial court denied.

II. Analysis

A. Mootness

[1] At the outset, this appeal presents a question of mootness because the Board of Commissioners immediately paid Ms. Orr in compliance with the writ of mandamus. In North Carolina,

> the exclusion of moot questions from determination is not based on a lack of jurisdiction but rather represents a form of judicial restraint.
>
> Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.
>
> Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the commencement of the action. If the issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action.

In re Peoples, 296 N.C. 109, 147–48, 250 S.E.2d 890, 912 (1978) (citations omitted).

When a party satisfies a judgment and then appeals the ruling giving rise to that judgment, it appears the question of mootness is

largely an issue of waiver. *See People Unlimited Consulting, Inc. v. B & A Indus., LLC.*, No. COA02-815, 2003 WL 21498768, at *7 (N.C. Ct. App. July 1, 2003) (unpublished) (holding that the involuntary satisfaction of a judgment did not render moot a party's cross-appeal). "North Carolina follows the rule that the waiver of the right to appeal, like most waivers, must be voluntary and intentional." *Redevelopment Comm'n of Winston-Salem v. Weatherman*, 23 N.C. App. 136, 140, 208 S.E.2d 412, 415 (1974) (citing *Luther v. Luther*, 234 N.C. 429, 67 S.E.2d 345 (1951); *Bank v. Miller*, 184 N.C. 593, 115 S.E. 161 (1922)).

> Voluntary payment or performance of a judgment is generally held to be no bar to an appeal, or writ of error for its reversal, unless such payment was made by way of compromise and agreement to settle the controversy, or unless the payment or performance of the judgment was under peculiar circumstances which amounted to a confession of its correctness.

Id. (quoting *Miller*, 184 N.C. at 597, 115 S.E.2d at 163) (internal quotation marks omitted).

In *Weatherman*, the appellant argued it was error for the trial court to tax expert-witness costs. *Id.* at 139, 208 S.E.2d at 414. The appellant paid the judgment to the clerk of court and appealed. *See id.* at 140, 208 S.E.2d at 415. The appellant failed to obtain an extension of time to docket his case on appeal and was forced to obtain appellate review through a writ of certiorari. *Id.* at 140, 208 S.E.2d at 415–16. The appellee argued the payment of fees in combination with the deficiencies in the appellant's appeal amounted to a waiver and abandonment of the appellant's right to appeal this issue. *Id.* at 140, 208 S.E.2d at 415. In holding the appellant did not waive its right to appeal, the Court explained that the appellant

> never, by his actions, confessed the correctness of the order allowing the witness fees. Instead, he was appealing directly to this Court, and the respondents were aware of this. The petition for writ of certiorari was not so unreasonably delayed as to indicate an intentional abandonment of his appeal. In fact, it was filed soon after the original ninety day period for docketing in this Court had expired.

Id.

The appellee has the burden of demonstrating abandonment or waiver, *id.* at 141, 208 S.E.2d at 415, and the GCBOE has failed to carry

this burden in this appeal. Our review of the record does not indicate payment was made by way of compromise or that the payment would suggest to the GCBOE (or other parties) that the Board of Commissioners did not intend to appeal. This case involves a matter of significant public concern—namely, the division of power between boards of county commissioners and county boards of elections—which further counsels us not to abstain from review. *Cf. Beronio v. Pension Comm'n of City of Hoboken*, 33 A.2d 855, 858 (N.J. 1943) (indicating the importance of a legal question counseled in favor of not concluding the case was moot); *In re Peoples*, 296 N.C. at 147, 250 S.E.2d at 912 (explaining that, in North Carolina, the mootness doctrine is "a form of judicial restraint," not a matter of jurisdiction). We hold the Board of Commissioners' appeal is not moot.

B. The Allocation of Power to and Between Counties, Local Boards of Elections, and the State Board of Elections

[2] The Board of Commissioners argues our courts lack jurisdiction to hear this case. Several of the Board of Commissioners' jurisdictional arguments hinge on whether the GCBOE is a separate legal entity from Graham County and whether the GCBOE is vested with the power to "sue and be sued." These jurisdictional issues, as well the substantive issues related to the writ of mandamus, are best understood after reviewing the constitutional and statutory relationship between the state, county boards of commissioners, county boards of elections, and State Board of Elections.

All North Carolina government entities are subunits of the state government. "[C]ounties are both state agencies and local governments . . . ." A. Fleming Bell, II, *An Overview of Local Government*, at 3, *in County and Municipal Government in North Carolina* (David M. Lawrence ed., 2007), *available at* http://www.sogpubs.unc.edu/cmg/cmg01.pdf. "In North Carolina, local governments are creatures of legislative benevolence—not constitutional mandate." C. Tyler Mulligan, *Toward a Comprehensive Program for Regulating Vacant or Abandoned Dwellings in North Carolina: The General Police Power, Minimum Housing Standards, and Vacant Property Registration*, 32 Campbell L. Rev. 1, 12 (2009). The North Carolina Constitution provides that the "General Assembly . . . may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable." N.C. Const. art. VII, § 1. Thus, counties and "other governmental subdivisions," such as the GCBOE, depend on the General Assembly for their legal existence and powers. The General Assembly has the constitutional authority to structure the legal relationships between those entities.

Chapter 153A provides for the counties' powers and governance structure. *See, e.g.*, N.C. Gen. Stat. § 153A-10 (2009) (providing that "North Carolina has 100 counties" and naming them). "The inhabitants of each county are a body politic and corporate" with the power to, among other things, "sue and be sued." N.C. Gen. Stat. § 153A-11 (2009). Counties also "have and may exercise in conformity with the laws of this State county powers, rights, duties, functions, privileges, and immunities of every name and nature." *Id.* The county board of commissioners exercises these powers. N.C. Gen. Stat. § 153A-12 (2009).

Chapter 163, Article 4 establishes the state and county boards of elections. Section 163-30 states that, "[i]n every county of the State[,] there shall be a county board of elections, to consist of three persons." N.C. Gen. Stat. § 163-30 (2009). The State Board of Elections appoints and may remove the members of the county boards of elections. *See id.* (addressing appointment); N.C. Gen. Stat. § 163-22(c) (2009) (addressing appointment and removal). County boards of elections have the power to "exercise all powers granted to such boards in . . . Chapter [163]." N.C. Gen. Stat. § 163-33 (2009). Section 163-33 provides numerous specific duties and powers related to administering elections, hiring employees, and investigating election law violations. *See id.* In addition to the duties set forth in section 163-33, county boards of elections must "perform such other duties as may be prescribed by . . . Chapter [163], by directives promulgated pursuant to [section] 163-132.4, or by the rules, orders, and directives of the State Board of Elections." *Id.* The executive director of the State Board of Elections is authorized to promulgate directives concerning the duties of the county boards of elections. N.C. Gen. Stat. § 163-132.4 (2009).

Section 163-33 does not explicitly state county boards of elections have the power to "sue and be sued" or that they are bodies politic and corporate. However, section 163-25 explicitly authorizes the State Board of Elections to "assist any county or municipal board of elections in any matter in which litigation is contemplated or *has been initiated.*" N.C. Gen. Stat. § 163-25 (2009) (emphasis added). Section 163-25 also states that "[t]he Attorney General shall provide the State Board of Elections with legal assistance in execution of its authority under this section or, in his discretion, recommend that private counsel be employed." *Id.*

County boards of elections have the power "[t]o appoint and remove the board's clerk, assistant clerks, and other employees." N.C. Gen. Stat. § 163-33(10). Each county board of elections selects a

director of elections who is then appointed by the State Board of Elections. *See* N.C. Gen. Stat. § 163-35(b) (2009) (stating that the executive director of the State Board of Elections must appoint as director of elections the individual nominated by majority vote of a county board). The State Board of Elections has the authority to terminate a local director of elections. *See id.* While a county director of elections is appointed and terminated by the State Board of Elections, he is a "county employee." *See* N.C. Gen. Stat. § 163-32(c) (2009) (describing the director of elections as a "county employee").

Although the county boards of elections are largely under the control of the State Board of Elections, they are funded by the counties: "The respective boards of county commissioners shall appropriate reasonable and adequate funds necessary for the legal functions of the county board of elections, including reasonable and just compensation of the director of elections." N.C. Gen. Stat. § 163-37 (2009). Section 163-32 provides that, "[i]n all counties[,] the board of elections shall pay its clerk, assistant clerks, and other employees such compensation as it shall fix within budget appropriations." N.C. Gen. Stat. § 163-32 (2009). However, section 153A-92 states, "[T]he board of commissioners shall fix or approve the schedule of pay, expense allowances, and other compensation of all county officers and employees, whether elected or appointed, and may adopt position classification plans." N.C. Gen. Stat. § 153A-92 (2009). Counties are required to pay members of the local board of elections $25 per meeting and reimburse certain expenses. N.C. Gen. Stat. § 163-32 (2009). The local board of county commissioners "may pay the chairman and members of the county board of elections compensation in addition to the per meeting and expense allowance." *Id.*

In sum, the county boards of elections and county commissioners enjoy—or in this case, do not enjoy—a reciprocal, interwoven relationship.

C. The GCBOE's Standing, Legal Existence, and Power to Sue

The Board of Commissioners offers several reasons why our courts lack subject matter jurisdiction over this case. While these arguments were not presented in the trial court below, a defect in subject matter jurisdiction may be asserted for the first time on appeal. *In re Green*, 67 N.C. App. 501, 504, 313 S.E.2d 193, 195 (1984).

The Board of Commissioners presents three closely-related arguments: (1) our courts lack subject matter jurisdiction because the GCBOE is not a "legal entity"; (2) because the GCBOE is not a legal

entity, it lacks standing; and (3) the GCBOE cannot bring suit because the General Assembly has not explicitly vested it with the power to sue and be sued.

"Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Beachcomber Props., L.L.C. v. Station One, Inc.*, 169 N.C. App. 820, 823, 611 S.E.2d 191, 193 (2005) (quoting *Street v. Smart Corp.*, 157 N.C. App. 303, 305, 578 S.E.2d 695, 698 (2003)). If a party cannot maintain an action in its own capacity, it lacks standing. *See Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000) (stating that a plaintiff lacked standing because it could not "maintain an action in its own capacity"). Thus, if an entity does not have the power to bring suit, it also lacks standing to bring suit. Consequently, the dispositive issue with respect to standing, as far as the County Board of Commissioners is concerned, is whether the GCBOE is an independent legal entity with the ability to sue or whether it is merely an integrated subcomponent of Graham County. *Cf. Coleman v. Cooper*, 89 N.C. App. 188, 192, 366 S.E.2d 2, 5 (1988) (holding the Raleigh Police Department cannot be sued because it is a subcomponent of the City of Raleigh and there is not a statute authorizing suit against the police department), *overruled in part on other grounds by Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997).

"In this state, a legal proceeding must be prosecuted by a legal person, whether it be a natural person, *sui juris*, or a group of individuals or other entity having the capacity to sue and be sued, such as a corporation, partnership, unincorporated association, or governmental body or agency." *In re Coleman*, 11 N.C. App. 124, 127, 180 S.E.2d 439, 442 (1971). The above discussion in Section II.A reveals that county boards of elections, as creatures of statute, possess only the powers bestowed upon them by the General Assembly. It follows that they can sue only if the legislature authorizes them to do so.

The appellate division and the General Statutes frequently employ the language "sue and be sued" to refer to an entity's ability to bring an action in court or have an action brought against it. *E.g.*, N.C. Gen. Stat. § 153A-11; *Tucker v. Eatough*, 186 N.C. 505, 507, 120 S.E. 57, 59 (1923). The General Statutes do not state explicitly that a county board of elections has the power to "sue and be sued." But section 163-25 explicitly authorizes the State Board of Elections to "assist any county or municipal board of elections in any matter in which litigation is contemplated or *has been initiated*." N.C. Gen.

Stat. § 163-25 (emphasis added). If the State Board of Elections can assist a county board in ongoing litigation, county boards of elections must have the ability to sue and be sued. Otherwise, they would not require the assistance of the State Board of Elections with respect to litigation that "*has been initiated*."

In order to establish the GCBOE does not have the power to sue and be sued, the Board of Commissioners calls our attention to the word "expressly" in the following passage by our Supreme Court:

> Even a state department, like the insane asylum; or the board of education; or the state prison—is so essentially a part of the state, notwithstanding these departments are created by statute, that they have no power to sue and have immunity from liability to suit, except when the statute creating them expressly grants permission that they may "sue and be sued."

Nelson v. Atl. Coast Line R. Co. Relief Dept., 147 N.C. 103, 104, 60 S.E. 724, 724 (1908) (citations omitted). This language is clearly dicta. *Nelson* dealt with whether an unincorporated division of a railroad company could be sued. *Id.* The purpose of this expansive language was to point out that, if a state department could only be sued with the state's statutory consent, a non-governmental entity also required statutory "permission" to be sued. We do not believe the words "sue and be sued" have any talismanic qualities. Rather, we must ascertain based on the statutory language and framework whether the General Assembly intended to allow a government entity to bring suit or be sued in court.

The relationship established between the State Board of Elections, county boards of elections, and counties suggests county boards of elections are not integrated subcomponents of the counties. The members of the county boards of election are appointed and can be removed by the State Board of Elections. N.C. Gen. Stat. § 163-30 (addressing appointment); N.C. Gen. Stat. § 163-22(c) (addressing removal); *see also supra* Section II.A. And the county boards of elections are required to comply with directives from the State Board of Elections. N.C. Gen. Stat. § 163-33. It is true, as the Board of Commissioners points out, that the county boards of elections are dependent on the counties for their funding. *Supra* Section II.A (discussing various statutes related to funding and compensation). However, we believe the State Board of Elections' dominion over the local boards' conduct weighs more heavily than their reliance on the counties for funding. Finally, we note that our

Supreme Court and this Court have heard numerous cases in which a county board of elections has been a party to the litigation. *E.g.*, *Democratic Party of Guilford Cnty. v. Guilford Cnty. Bd. of Elections*, 342 N.C. 856, 467 S.E.2d 681 (1996); *Revels v. Robeson Cnty. Bd. of Elections*, 167 N.C. App. 358, 605 S.E.2d 219 (2004).

We hold that county boards of elections have the power to sue and be sued and that they are distinct legal entities from the counties in which they are located. We also hold the GCBOE has standing.[1]

D. The Issuance of the Writ

[3] We now turn to whether the trial court correctly issued the writ of mandamus. A writ of mandamus is an extraordinary court order to "a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law." *Sutton v. Figgatt*, 280 N.C. 89, 93, 185 S.E.2d 97, 99 (1971). We review legal questions *de novo*. *E.g.*, *Staton v. Brame*, 136 N.C. App. 170, 174, 523 S.E.2d 424, 427 (1999). The trial court's unchallenged findings of fact are binding on appeal. *Peters v. Pennington*, No. COA10-91, slip op. at 14–15, —— N.C. App. ——, ——, —— S.E.2d ——, —— (March 1, 2011).

> Mandamus lies when the following elements are present: First, the party seeking relief must demonstrate a clear legal right to the act requested. Second, the defendant must have a legal duty to perform the act requested. Moreover, the duty must be clear and not reasonably debatable. Third, performance of the duty-bound act must be ministerial in nature and not involve the exercise of discretion. Nevertheless, a court may issue a writ of mandamus to a public official compelling the official to make a discretionary decision, as long as the court does not require a particular result. Fourth, the defendant must have "neglected or refused to perform" the act requested, and the time for performance of the act must have expired. Mandamus may not be used to reprimand an official, to redress a past wrong, or to prevent a future legal injury. Finally, the court may only issue a writ of mandamus in the absence of an alternative, legally adequate remedy. When appeal is the proper remedy, mandamus does not lie.

In re T.H.T., 362 N.C. 446, 453–54, 665 S.E.2d 54, 59 (2008) (citations omitted).

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1. The Board of Commissioners does not challenge the GCBOE's standing on any other grounds. Our review indicates there is no defect in standing that has not been asserted by the Board of Commissioners on appeal.

The Board of Commissioners argues (1) that it—and not the GCBOE—is responsible for determining the number of GCBOE employees and (2) that the Board of Commissioners' duty to do so is discretionary—not ministerial—in nature. The Board of Commissioners also contends that, assuming *arguendo* it is duty-bound to pay GCBOE employees if payment can be made without exceeding the GCBOE's budget, mandamus cannot lie because this duty is not sufficiently "clear" based on the applicable statutory framework.

At first glance, section 153A-92, which states that boards of county commissioners shall "fix or approve the schedule of pay" for all county employees, indicates the Board of Commissioners has the discretion to determine the number and pay of all GCBOE employees. N.C. Gen. Stat. § 153A-92. Although no statute states that county boards of elections employees other than the director of elections are "county employees," if the director of elections is a county employee, it follows that all other county board of elections employees are county employees as well. *See* N.C. Gen. Stat. § 163-35(c) (describing the director of elections as a "county employee"). However, section 163-32 states that the county boards of elections shall pay their employees "such compensation as it shall fix within budget appropriations." N.C. Gen. Stat. § 163-32. And subsection 163-33(10) gives county boards of elections the power to "appoint and remove the board's clerk, assistant clerks, and other employees." N.C. Gen. Stat. § 163-33(10). These statutes all address the same subject matter, but sections 163-32 and -33 do so more specifically; therefore, they control. *See Fowler v. Valencourt*, 334 N.C. 345, 349, 435 S.E.2d 530, 532 (1993) ("[W]here two statutes deal with the same subject matter, the more specific statute will prevail over the more general one.").

We conclude that, so long as a county board of elections remains within the budget allocated by the local board of county commissioners, the county board of elections has the sole authority to hire and fire elections employees.[2] This authority provides the clear legal right required for mandamus. Here, it is uncontested that there were sufficient funds in the budget to pay Ms. Orr. Consequently, the Board of Commissioners was duty-bound to disburse funds to pay Ms. Orr. This duty is purely ministerial—there is no discretion involved.

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2. County boards of commissioners are, of course, free to fix the overall budget for the county board of elections as long as that budget provides "reasonable and adequate funds necessary for the legal functions of the county board of elections." N.C. Gen. Stat. § 163-37.

The Board of Commissioners also contends separation of powers principles deprive our courts of subject matter jurisdiction. However, as the above discussion illustrates, compelling the Board of Commissioners to disburse payment to GCBOE employees does not impinge upon a political decision-making process committed to county boards of commissioners by the North Carolina Constitution. Rather, the General Assembly has created a statutory framework under which county boards of commissioners have no authority to determine the number of county board of elections employees if those employees can be compensated within the budget established by the county commissioners.

The Board of Commissioners next argues it is entitled to sovereign immunity, and therefore, mandamus cannot lie. "[A] motion to dismiss based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction . . . ." *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 246 (2001). Sovereign immunity is an affirmative defense. *Herring v. Winston-Salem/Forsyth Cnty. Bd. of Educ.*, 188 N.C. App. 441, 446, 656 S.E.2d 307, 311 (2008). If a party fails to assert personal jurisdiction as a defense, the defense is waived. *In re J.T.*, 363 N.C. 1, 4, 672 S.E.2d 17, 18 (2009). Our review indicates sovereign immunity was never asserted in the trial court below; therefore, the Board of Commissioners waived any potential sovereign immunity protection and cannot assert the doctrine on appeal. *Cf.* Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 Duke L.J. 1167, 1227 (2003) (discussing the potential for states to litigate cases on the merits in federal court and then assert sovereign immunity on appeal and demonstrating that "[s]uch tactics are unfair and unworthy of sovereign dignity").

The Board of Commissioners argues the proceedings below violated the Law of the Land Clause of the North Carolina Constitution, which states that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. We decline to address this argument because it was not presented to the trial court below. *See State v. Creason*, 313 N.C. 122, 127, 326 S.E.2d 24, 27 (1985) (stating this Court is not "required to pass upon a constitutional issue unless it affirmatively appears that the issue was raised and determined in the trial court").

We also reject the Board of Commissioners' argument that mandamus is precluded because there is an alternative remedy in the form of an action for wages by Ms. Orr. The GCBOE has an interest in ensuring prompt compliance with the General Statutes independent of Ms. Orr's interest. The interference with the GCBOE's internal management hinders its ability to administer elections, and the GCBOE must be able to remedy this promptly without relying on another litigant.

We hold that our courts have subject matter jurisdiction over this lawsuit and that the trial court correctly issued the writ of mandamus.

E. Attorney's Fees

[4] The trial court ordered the Board of Commissioners to pay the GCBOE's legal expenses in connection with this matter from the general fund of Graham County and not the amount already budgeted for the GCBOE. "[T]he general rule in North Carolina is that a party may not recover its attorney's fees unless authorized by statute." *Martin Architectural Prods., Inc. v. Meridian Const. Co.*, 155 N.C. App. 176, 181, 574 S.E.2d 189, 192 (2002). Our research has discovered no statutory authorization for attorney's fees in this case. Therefore, the portion of the trial court's order awarding attorney's fees is reversed.

III. Conclusion

Affirmed in part and reversed in part.

Judges STEELMAN and STEPHENS concur.

IN RE P.D.R.

[212 N.C. App. 326 (2011)]

IN THE MATTER OF: P.D.R., L.S.R., J.K.R., MINOR CHILDREN

No. COA10-1519

(Filed 7 June 2011)

Constitutional Law— right to counsel—failure to make sufficient inquiry for waiver

The trial court erred by allowing respondent mother to waive counsel and represent herself during a termination of parental rights hearing. The trial court failed to make sufficient inquiry under N.C.G.S. § 15A-1242 regarding whether respondent understood and appreciated the consequences of her decision to waive counsel, and whether she comprehended the nature of the hearing.

Appeal by respondent from order entered 28 September 2010 by Judge Elizabeth T. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 9 May 2011.

Kathleen Arundell Widelski for petitioner-appellee.

Richard Croutharmel for respondent-appellant.

N.C. Administrative Office of the Courts, by Appellate Counsel Pamela Newell, for guardian ad litem.

GEER, Judge.

Respondent mother appeals from an order terminating her parental rights as to P.D.R. ("Paula"), L.S.R. ("Lindsay"), and J.K.R. ("Jimmy").[1] Respondent mother contends that the trial court erred in allowing her to waive counsel and represent herself during the termination of parental rights ("TPR") hearing. Because the record shows that the trial court failed to make sufficient inquiry regarding whether respondent mother understood and appreciated the consequences of her decision to waive counsel and whether she comprehended the nature of the TPR hearing and its possible outcome, we must vacate and remand.

Facts

The Mecklenburg County Department of Social Services, Youth and Family Services ("YFS") became involved with respondent mother's family in 2003. Since that time, it has received 14 referrals regarding one or more of respondent mother's children. On 6 October

1. The pseudonyms of "Paula," "Lindsay," and "Jimmy" are used throughout this opinion to protect the minors' privacy and for ease of reading.

2008, YFS filed a juvenile petition asserting that the children were neglected and dependent juveniles. The petition alleged that on 9 September 2008, YFS received a report that respondent mother and the children were living in respondent mother's vehicle. YFS received another report on 4 October 2008 claiming that respondent mother and the children had been kicked out of a shelter and spent the night in the Carolinas Medical Center waiting area. On the same day that the petition was filed, the trial court entered a non-secure custody order placing the children in the custody of YFS.

YFS filed an amended juvenile petition on 31 October 2008 that added allegations of domestic violence between respondent mother and Paula and Lindsay's father and respondent mother's failure to provide proper care and supervision of the children. The amended petition also alleged that respondent mother had ongoing mental health issues and "seemingly did not understand questions asked of her and did not appear able to respond appropriately."

On 11 February 2009, the trial court ordered respondent mother to undergo a forensic evaluation to evaluate her mental health and competency to proceed in a civil matter. On 17 March 2009, Jennifer Krance of the Behavioral Health Center at Carolinas Medical Center-Randolph ("CMC-Randolph") reported to the court that as of the date of the letter she had not been contacted by respondent mother, and the evaluation had, therefore, been cancelled. On 24 June 2009, the trial court ordered that respondent mother's medical or mental health records from CMC-Randolph be released to the court. On 30 July 2009, the court appointed a guardian ad litem for respondent mother pursuant to Rule 17 of the Rules of Civil Procedure.

On 20 August 2009, the trial court entered an order adjudicating the children neglected and dependent. The court ordered that the plan of care for the children be reunification with respondent mother with a concurrent goal of adoption. The court further ordered that respondent mother comply with her family services case plan and ordered that visitation with respondent mother be suspended until she submitted to a mental health evaluation coordinated by YFS.

A permanency planning hearing was held on 9 September 2009. The trial court found that respondent mother had made no progress toward reunification—she had not participated in her case plan "or anything else to place [her] in position to parent children." The trial court further noted that respondent mother's mental health needs had not been addressed. The court ceased reunification efforts and changed the permanent plan to adoption only.

On 19 November 2009, YFS filed petitions to terminate respondent mother's parental rights. A guardian ad litem was appointed for respondent mother for the TPR hearing. Before the TPR hearing, another permanency planning hearing was held in March 2010, after which the trial court entered an order again finding that no progress had been made by respondent mother.

The TPR hearing was held on 13 May and 18 June 2010. Respondent mother's appointed counsel, Christian Hoel, was allowed to withdraw and respondent mother proceeded *pro se* at the TPR hearing. On 28 September 2010, the trial court entered an order terminating respondent mother's parental rights. The court's findings of fact detailed the extensive history of domestic violence between respondent mother and Paula and Lindsay's father. According to the trial court, respondent mother had not taken any steps to protect herself from domestic violence, and she minimized or overlooked the fact that domestic violence was "at the heart of this case and the primary reason" that the children were in danger and in need of placement outside of respondent mother's care.

The trial court found that, on various occasions, the children witnessed the domestic violence and that the volatile and violent relationship between respondent mother and Paula and Lindsay's father was what frequently caused respondent mother and the children to be homeless. The trial court also found that respondent mother had been offered but refused services to assist with homelessness, domestic violence, and substance abuse.

The trial court determined that grounds existed to terminate respondent mother's parental rights to Paula, Lindsay, and Jimmy pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (2009) (neglect), § 7B-1111(a)(2) (willfully leaving the children in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the children), § 7B-1111(a)(3) (willful failure to pay a reasonable portion of the cost of care for the children for a continuous period of six months next preceding the filing of the TPR petition), and § 7B-1111(a)(7) (willful abandonment). The trial court then concluded that termination of respondent mother's parental rights was in the best interests of the children. Respondent mother timely appealed from the TPR order to this Court.

Discussion

Respondent mother's sole contention on appeal is that the trial court erred in allowing her to waive counsel and represent herself at the TPR hearing. Respondent mother asserts that the record contains evidence that she had unresolved mental health issues and was incompetent to make these decisions. She argues that the trial court did not conduct a sufficient inquiry to determine whether she was competent to waive counsel and proceed *pro se*. This Court has previously looked to criminal cases when addressing a parent's right to counsel in an abuse, neglect, or dependency proceeding, *see In re S.L.L.*, 167 N.C. App. 362, 364, 605 S.E.2d 498, 499 (2004), and we do so here with respect to competency to waive counsel.

The foundational case concerning the right to self-representation is *Faretta v. California*, 422 U.S. 806, 807, 45 L. Ed. 2d 562, 566, 95 S. Ct. 2525, 2527 (1975), in which the United States Supreme Court held that the Sixth and Fourteenth Amendments guarantee that a criminal defendant "has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so." In *Faretta*, however, the competence of the defendant was not in question because "[t]he record affirmatively show[ed] that [the defendant] was literate, competent, and understanding" in choosing to waive his Sixth Amendment right to counsel. *Id.* at 835, 45 L. Ed. 2d at 582, 95 S. Ct. at 2541. Nevertheless, the Supreme Court also established that, as with any constitutional right, a defendant must knowingly and voluntarily waive its benefits. *Id.*, 45 L. Ed. 2d at 581-82, 95 S. Ct. at 2541.

In *Godinez v. Moran*, 509 U.S. 389, 125 L. Ed. 2d 321, 113 S. Ct. 2680 (1993), the Supreme Court refined its holding in *Faretta* by addressing the right to self-representation for those criminal defendants whose competence is at issue. The defendant in *Godinez* had been found to be competent to stand trial under the standard set out in *Dusky v. United States*, 362 U.S. 402, 402, 4 L. Ed. 2d 824, 825, 80 S. Ct. 788, 789 (1960), which asks whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational as well as factual understanding of the proceedings against him. *Godinez*, 509 U.S. at 392, 125 L. Ed. 2d at 328, 113 S. Ct. at 2683. The trial court in *Godinez*, after finding that the defendant was knowingly and intelligently waiving his right to counsel, allowed the defendant's motion to discharge his attorneys and plead guilty to the capital murder charges against him. *Id.* at 392–93, 125 L. Ed. 2d at 328, 113 S. Ct. at 2683. The

defendant later appealed, arguing that the trial court should not have allowed him to represent himself, as he was not competent to do so.

The Supreme Court "reject[ed] the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard." *Id.* at 398, 125 L. Ed. 2d at 331, 113 S. Ct. at 2686. Nevertheless, because the trial court must conduct the additional, second step of inquiring whether such waiver is made knowingly and voluntarily, "[i]n this sense there is a 'heightened' standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of competence." *Id.* at 400–01, 125 L. Ed. 2d at 333, 113 S. Ct. at 2687.

The Supreme Court observed that the purpose of this second inquiry is "to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced." *Id.* at 401 n.12, 125 L. Ed. 2d at 333 n.12, 113 S. Ct. at 2687 n.12; *see also Faretta*, 422 U.S. at 835, 45 L. Ed. 2d at 581–82, 95 S. Ct. at 2541 ("Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." (internal quotation marks omitted)). Accordingly, "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself," meaning that "a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation." *Godinez*, 509 U.S. at 399, 400, 125 L. Ed. 2d at 332, 333, 113 S. Ct. at 2687.

The Supreme Court considered a related, but distinct, issue in *Indiana v. Edwards*, 554 U.S. 164, 171 L. Ed. 2d 345, 128 S. Ct. 2379 (2008). In *Edwards*, the Court pointed out that "*Godinez* involved a State that sought to permit a gray-area defendant to represent himself. *Godinez's* constitutional holding is that a State may do so." *Id.* at 173, 171 L. Ed. 2d at 355, 128 S. Ct. at 2385.[2] The *Edwards* Court, however, addressed "whether the Constitution permits a State to limit that defendant's self-representation right by insisting upon representation by counsel at trial—on the ground that the defendant lacks the

2. The Court defined the "gray area" as involving a mental condition that falls between "*Dusky's* minimal constitutional requirement that measures a defendant's ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose." *Edwards*, 554 U.S. at 172, 171 L. Ed. 2d at 354, 128 S. Ct. at 2385.

mental capacity to conduct his trial defense unless represented." *Id.* at 174, 171 L. Ed. 2d at 355, 128 S. Ct. at 2385-86.

The Court concluded that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Id.* at 178, 171 L. Ed. 2d at 357, 128 S. Ct. at 2388. In such circumstances, "judges [may] take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." *Id.* at 177-78, 171 L. Ed. 2d at 357, 128 S. Ct. at 2387-88. Indeed, the trial judge "will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant." *Id.* at 177, 171 L. Ed. 2d at 357, 128 S. Ct. at 2387.

The North Carolina Supreme Court has explained, in *State v. Lane*, 365 N.C. 7, 21-22, 707 S.E.2d 210, 219 (2011), that this line of cases by the United States Supreme Court supports the principle that all criminal defendants, if competent to stand trial, enjoy the constitutional right to self-representation, although that right is not absolute:

> For a defendant whose competence is at issue, he must be found to meet the *Dusky* standard before standing trial. If that defendant, after being found competent, seeks to represent himself, the trial court has two choices: (1) it may grant the motion to proceed *pro se*, allowing the defendant to exercise his constitutional right to self-representation, if and only if the trial court is satisfied that he has knowingly and voluntarily waived his corresponding right to assistance of counsel, pursuant to [*Godinez*]; or (2) it may deny the motion, thereby denying the defendant's constitutional right to self-representation because the defendant falls into the "gray area" and is therefore subject to the "competency limitation" described in *Edwards*, 554 U.S. at 175–76, 128 S.Ct. at 2386, 171 L.Ed.2d at 355–56. The trial court must make findings of fact to support its determination that the defendant is "unable to carry out the basic tasks needed to present his own defense without the help of counsel." *Id.* at 175–76, 128 S.Ct. at 2386, 171 L.Ed.2d at 356 (citations omitted).

Id. at 22, 707 S.E.2d at 219.

Applying these cases, we first consider whether the trial court erred in allowing respondent mother's motion to waive counsel. In

North Carolina, "the waiver of counsel, like the waiver of all constitutional rights, must be knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will." *State v. Thacker*, 301 N.C. 348, 354, 271 S.E.2d 252, 256 (1980). Accord *State v. Hardy*, 78 N.C. App. 175, 179, 336 S.E.2d 661, 663 (1985) ("[W]aiver of counsel must be voluntarily and knowingly made, and the record must show that the defendant was literate and competent, and that he voluntarily and of his own free will waived this right.").

With respect to the requirement that waiver of counsel be voluntarily and knowingly made, N.C. Gen. Stat. § 15A-1242 (2009) (emphasis added) provides that a defendant "may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant: (1) [h]as been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled; (2) [u]nderstands and appreciates the consequences of this decision; and (3) [c]omprehends the nature of the charges and proceedings and the range of permissible punishments." The requirements of N.C. Gen. Stat. § 15A-1242 "are clear and unambiguous. The inquiry is mandatory and must be made in every case in which a defendant elects to proceed without counsel." *State v. Callahan*, 83 N.C. App. 323, 324, 350 S.E.2d 128, 129 (1986), *disc. review denied*, 319 N.C. 225, 353 S.E.2d 409 (1987).

In this case, the trial court was in the midst of discussing Mr. Hoel's motion to withdraw as respondent mother's appointed counsel at the time respondent mother informed the trial court that she "want[ed] to represent [herself]." The Court had already asked whether respondent mother understood that Mr. Hoel had been appointed to represent her; whether she understood that a petition had been filed to terminate her parental rights to Paula, Lindsay, and Jimmy; whether she understood that if she could not afford to hire a lawyer she was entitled to a court-appointed lawyer; and whether she understood that the court had previously found she was entitled to a court-appointed lawyer and that Mr. Hoel had been appointed to represent her. Respondent mother answered "[y]es" to each of these questions.

The trial court's next question was whether respondent mother wanted an attorney to represent her, and respondent mother answered "[n]o," asserting she wanted to represent herself. The trial court then granted Mr. Hoel's motion to withdraw and asked respond-

ent mother to sign a waiver of counsel form: "I'm passing to you a written waiver of counsel. We have already gone over all these issues with you and you have stated that you understand your right to counsel and that it was your desire to represent yourself, so you need to read over that and sign it." When respondent mother refused to sign the form, but still insisted that she wanted to proceed *pro se*, the trial court responded, "Okay."

Although, before granting respondent mother's motion to waive counsel, the trial court inquired as to whether she understood that a petition had been filed to terminate her parental rights to her children, the court did not determine whether respondent mother comprehended the nature of the TPR petition, the proceedings, and what termination of her rights would actually mean. The trial court also did not inquire into whether respondent mother understood and appreciated the consequences of her decision to waive counsel.

This Court has held in criminal cases that "[i]n omitting the second and third inquiries required by N.C. Gen. Stat. § 15A-1242, the trial court failed to determine whether defendant's waiver of his right to counsel was knowing, intelligent and voluntary." *State v. Evans*, 153 N.C. App. 313, 316, 569 S.E.2d 673, 675 (2002) (holding court's inquiry into probationer's expressed desire to proceed *pro se* did not satisfy N.C. Gen. Stat. § 15A-1242 when court merely ascertained that probationer did not have counsel, did not desire counsel and understood that he could have had counsel appointed; court failed to inquire as to whether probationer understood and appreciated consequences of his decision; and court failed to ascertain whether probationer comprehended nature of charges and proceedings and range of permissible punishments that he faced). We hold that the same analysis applies in TPR proceedings.

We further hold that the trial court's later inquiries—made after returning from a lunch recess—were not sufficient to establish that respondent mother had the necessary understanding at the time she waived counsel earlier that morning. After the hearing resumed following the lunch recess, respondent mother's guardian ad litem expressed to the court her concern about moving forward since the trial court had not explained to respondent mother the consequences of proceeding *pro se* and since she did not think respondent mother understood "the process that we're going through today."

The trial court then conducted a lengthier discussion with respondent mother about her decision to proceed *pro se*. At that

point, the court asked respondent mother whether she understood that if YFS was successful in its petition, respondent mother would not be allowed to have a relationship with her children. Instead of directly answering, respondent mother repeatedly insisted that YFS could not prove its allegations. The trial court eventually said, "Oh, my God—[respondent mother], I desperately need you to answer my question," after which respondent mother finally indicated she understood. By this point in the hearing, however, a YFS social worker had already testified for YFS.

Because the trial court did not make the necessary inquiries to determine whether respondent mother made a knowing and voluntary waiver of her right to counsel *before* permitting her to do so and to proceed *pro se*, the trial court erred. *See State v. Carter*, 338 N.C. 569, 581, 451 S.E.2d 157, 163 (1994) ("Before a defendant is allowed to waive in-court representation by counsel, the trial court must insure that constitutional and statutory standards are satisfied." (emphasis added)), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263, 115 S. Ct. 2256 (1995); *State v. McLeod*, 197 N.C. App. 707, 715, 682 S.E.2d 396, 400 (2009) ("N.C. Gen. Stat. § 15A-1242 makes it clear that the defendant must be advised of the aforementioned inquiries *before* being allowed to proceed *pro se*." (emphasis added)). *See also State v. Moore*, 362 N.C. 319, 326, 661 S.E.2d 722, 726-27 (2008) (holding that later colloquy that took place between defendant and trial court concerning defendant's decision to waive counsel did not cure earlier failure by court to fulfill requirements of N.C. Gen. Stat. § 15A-1242, because it did not take place until first day of defendant's sentencing proceeding, more than five months after defendant was permitted to proceed without assistance of counsel and approximately two months after defendant, proceeding *pro se*, pleaded guilty to murder).

Consequently, the TPR order must be vacated. *See id.*, 661 S.E.2d at 727 (holding new trial was warranted where trial court did not make adequate determination pursuant to N.C. Gen. Stat. § 15A-1242 whether defendant's decision to proceed *pro se* was knowingly, intelligently, and voluntarily made); *In re Watson*, 206 N.C. App. 507, 519, 706 S.E.2d 296, 304 (2011) ("Because the trial court failed to comply with the statutory mandates of N.C. Gen. Stat. § 15A-1242 . . . respondent's waiver of counsel was ineffective and the resulting . . . order must be vacated."). *See also State v. Lamb*, 103 N.C. App. 646, 648, 406 S.E.2d 654, 655 (1991) ("The record must affirmatively show that the inquiry mandated by N.C.G.S. § 15A-1242 was made and that the defendant, *by his answers*, *was literate*, *competent*, understood the

consequences of his waiver, and voluntarily exercised his own free will." (emphasis added)).

We further note that the trial court did not ascertain whether respondent mother met the "higher standard" of competence to represent herself at the TPR hearing. *Edwards*, 554 U.S. at 172, 171 L. Ed. 2d at 354, 128 S. Ct. at 2385. *See McKaskle v. Wiggins*, 465 U.S. 168, 174, 79 L. Ed. 2d 122, 133, 104 S. Ct. 944, 951 (cited in *Edwards* for its description of trial tasks as including organization of defense, making motions, arguing points of law, participating in *voir dire*, questioning witnesses, and addressing court and jury). Respondent mother's competence to represent herself was clearly "at issue" in this case. *Lane*, 365 N.C. at 22, 707 S.E.2d at 219.

Significantly, the trial court had appointed a guardian ad litem for respondent mother, which, at a minimum, raised an issue whether she could meet the "somewhat higher [than *Dusky*] standard" for competence to represent herself. *Edwards*, 554 U.S. at 172, 171 L. Ed. 2d at 354, 128 S. Ct. at 2385. In addition, the attorney for YFS objected to the motion of Mr. Hoel, respondent mother's attorney, to withdraw, noting that she believed that "at the last hearing this Court found that [respondent mother] was not competent to waive counsel." At one point, respondent mother even told the court, "I know I may seem crazy, but I don't know what's going on, what they're doing. That's why I'm acting this way, 'cause I don't understand this."

Given these circumstances, the trial court had a duty to inquire into respondent mother's competence not only to waive counsel, but also to represent herself in the TPR proceedings. We believe that the trial court's brief explanation to respondent mother about the proceedings—even if respondent mother claimed to understand—was not sufficient to establish that respondent mother was actually competent to represent herself from the time she waived counsel. *See State v. Wray*, 206 N.C. App. 354, 362, 368, 698 S.E.2d 137, 143, 146 (2010) (reversing and remanding because, *inter alia*, trial court ordered defendant to proceed *pro se* even though record included "significant evidence" from prior hearings that defendant may be in gray area, namely that defendant appeared not to grasp his legal situation and was unable to focus on pertinent legal issues).

The trial court in this case explained after lunch:

> I realize that at a prior hearing several months [sic], I did not find that [respondent mother] was responding to the Court's questions about her ability to understand her right to counsel

> and the nature of those proceedings. Her responses indicated to me at that time that she didn't understand the nature of those proceedings. However, there has been nothing about her responses to the Court today or any of the comments that she has made during these proceedings that give me any hesitation in concluding that she understands why we are here, that she understands that this is a termination of parental rights proceeding, that if the department were to prevail that she would lose any parental rights to her three children. She has demonstrated that she understands that she has a right to a lawyer and she has stated over and over again that she does not want a lawyer, any lawyer, to hire a lawyer, a different appointed lawyer, any lawyer, but that she wants to represent herself. And while there was some confusion at the last hearing, there is no—I have not seen any confusion or apparent misunderstanding by [respondent mother] about what we are doing today and the seriousness of this case and her decision to waive her right to counsel.

Even if respondent mother did have the understanding necessary to waive her right to counsel, the trial court never addressed whether respondent mother was actually competent to represent herself without the assistance of counsel. *See Wray*, 206 N.C. App. at 369, 698 S.E.2d at 147 (expressing concern about summary nature of court's ruling that defendant would proceed *pro se* because, *inter alia*, doubts had arisen regarding defendant's competence at previous hearings and defendant had not participated in hearing before ruling was made).

On remand, if respondent mother again indicates that she wishes to waive counsel and proceed *pro se*, the trial court must conduct the N.C. Gen. Stat. § 15A-1242 inquiry, and the record must show that respondent mother is competent to waive counsel, before the court allows respondent mother to waive counsel. "[I]f and only if" the trial court is satisfied that respondent mother has knowingly and voluntarily waived her right to assistance of counsel the court may either (1) allow her to proceed *pro se* because she has the mental fitness to represent herself or (2) deny her right to represent herself if she falls into the gray area and is therefore subject to the *Edwards* competency limitation. *Lane*, 365 N.C. at 22, 707 S.E.2d at 219. If the trial court denies respondent mother's request to represent herself, the court must then "make findings of fact to support its determination that [respondent mother] is 'unable to carry out the basic tasks

needed to present [her] own defense without the help of counsel.' " *Id.* (quoting *Edwards*, 554 U.S. at 175–76, 171 L. Ed. 2d at 356, 128 S. Ct. at 2386).

Vacated and remanded.

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

LLOYD G. BROWN, NANCY L. BLACKWOOD, CHAD BRANDON, RICHARD C. COCKERHAM, CAROLYN M. DAWSON, TRENT WILLIAM DUNCAN, ROGER J. HART, LISA HARTRICK, KEVIN HARVELL, ALAN W. HILL, ADAM HUFFMAN, CHRIS LIV, JOHN MCRAE MCBRYDE, ROGER V. MILLER, RONALD J. MYERS, JR., WILLIAM PICKENS, WILLIAM S. POWELL, LAURA PREVATTE, DENNIS K. REGISTER, JOSEPH SWARTZ, SARA ELLIS THOMPSON, ERIC P. WELKER, STEPHEN L. WILLIAMS, DAVID AMARAL, JODY BRADY, RICHARD CHELLBERG, GARY M. CURCIO, SHANE HARDEE, JAMES M. HENDRICKS, WILLIAM R. HILDRETH, JOHN P. HOWARD, ANTHONY RUSSELL MEADOWS, JAMES SCHLENKER, PETER C. STEPONKUS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS V. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, AN AGENCY OF THE STATE OF NORTH CAROLINA; DEE FREEMAN, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, IN HIS OFFICIAL CAPACITY; AND THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA10-315

(Filed 7 June 2011)

1. Immunity— sovereign immunity—waiver—overtime compensation rights

The trial court erred by dismissing plaintiffs' claim for overtime compensation under N.C.G.S. § 1A-1, Rule 12(b)(1) for lack of jurisdiction based on sovereign immunity. The State waived its sovereign immunity by conferring rights to overtime compensation on state foresters under N.C.G.S. § 113-56.1.

2. Employer and Employee— Fair Labor and Standards Act—foresters—learned professional exemption inapplicable

The trial court erred by dismissing plaintiffs' claims for relief under the Fair Labor and Standards Act based on N.C.G.S. § 1A-1, Rule 12(b)(6). The learned professional exemption was

not applicable because the primary duty of plaintiff state foresters was not management of the enterprise in which they were employed.

3. Administrative Law— Fair Labor and Standards Act— exhaustion of administrative remedies not required

The trial court erred by dismissing plaintiffs' claims for relief under the Fair Labor and Standards Act (FLSA) based on lack of jurisdiction because plaintiffs were not required to exhaust administrative remedies under N.C.G.S. § 143-300.35(a). Plaintiffs were entitled to choose to pursue an FLSA claim in either a judicial or an administrative forum, but not both.

Appeal by plaintiffs from order entered 30 November 2009 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 29 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Scott A. Conklin and Assistant Attorney General Ward Zimmerman, for the State.

Elliot Pishko Morgan, P.A., by Robert M. Elliot, for plaintiff-appellants.

BRYANT, Judge.

Where the State has conferred a right to overtime compensation to state foresters under North Carolina General Statutes, section 113-56.1, the State has waived its sovereign immunity, and we reverse the trial court's dismissal of plaintiffs' claim for overtime compensation pursuant to Rule 12(b)(1). Further, where N.C. Gen. Stat. § 143-300.35(a) authorizes the maintenance of a separate action in the trial division of the General Courts of Justice for claims brought by state employees against state agencies under the Fair Labor Standards Act, we reverse the trial court's dismissal of plaintiffs' claims.

Pursuant to the allegations of the complaint, each named plaintiff is a resident of North Carolina, employed as a forester in the Division of Forest Resources, a division of the North Carolina Department of Environment and Natural Resources (NCDENR). On 1 December 2008, plaintiffs instituted a class action complaint on behalf of themselves and a proposed class of "professional" employees of the NCDENR, alleging violations of state and federal wage and hour laws, naming as defendants NCDENR, NCDENR Secretary Dee Freeman,

and the State. Plaintiffs sought overtime compensation (1) for all hours worked in fighting forest fires pursuant to N.C. Gen. Stat. § 113-56.1; (2) for firefighting and other disaster relief work under the Fair Labor and Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*; and (3) for their regular duties under the FLSA. In lieu of an answer, defendants filed a motion to dismiss pursuant to Rule 12(b)(1), 12(b)(2), and 12(b)(6) alleging sovereign immunity, failure to state a claim upon which relief can be granted, and failure to exhaust administrative remedies. Memoranda were submitted in support of their respective positions. On 20 November 2009, following a 6 November 2009 hearing, the trial court entered an order which granted defendants' motion to dismiss plaintiffs' complaint: plaintiffs' first claim for compensation, under N.C.G.S. § 113-56.1, was dismissed pursuant to Rule 12(b)(1), on grounds of sovereign immunity; plaintiffs' second and third claims were dismissed pursuant to Rules 12(b)(1) and 12(b)(6), for, respectively, failure to exhaust administrative remedies and failure to state a claim under the FLSA for which relief could be granted. Plaintiffs appeal.

On appeal, plaintiffs argue the trial court erred in dismissing their action for overtime compensation where (I) the State waived its sovereign immunity; (II) plaintiffs are not exempt from the FLSA; and (III) plaintiffs are not required to exhaust administrative remedies.

I

[1] Plaintiffs argue that the trial court erred in dismissing their claim for overtime compensation pursuant to Rule 12(b)(1), by ruling that the court lacked jurisdiction based on the doctrine of sovereign immunity. Plaintiffs contend the State waived its sovereign immunity by conferring rights to overtime compensation on state foresters under N.C.G.S. § 113-56.1. We agree.

We review a trial court's dismissal of a claim pursuant to Civil Procedure Rule 12(b)(1) de novo. *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007) (citations omitted). And, in so doing, we may consider matters outside the pleadings. *Id.*

"It is an established principle of jurisprudence, resting on grounds of sound public policy, that a state may not be sued in its own courts or elsewhere unless by statute it has consented to be sued or has otherwise waived its immunity from suit." *Smith v. Hefner*, 235 N.C. 1, 6, 68 S.E.2d 783, 787 (1952) (citations omitted). " 'By application of this principle, a subordinate division of the state, or agency

exercising statutory governmental functions . . . may be sued only when and as authorized by statute.' " *N.C. Ins. Guar. Ass'n. v. Bd. of Trs. of Guilford Technical Cmty. Coll.*, 364 N.C. 102, 107, 691 S.E.2d 694, 697 (2009) (quoting *Smith v. Hefner*, 235 N.C. 1, 6, 68 S.E.2d 783, 787 (1952)). Such a waiver may not be lightly inferred, "and statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Battle Ridge Cos. v. N.C. Dep't of Transp.*, 161 N.C. App. 156, 157, 587 S.E.2d 426, 427 (2003) (quoting *Guthrie v. State Ports Auth.*, 307 N.C. 522, 537 8, 299 S.E.2d 618, 627 (1983)); *see, e.g.*, *N.C. Ins. Guar. Ass'n v. Bd. of Trs. of Guilford Technical Cmty. Coll.*, 364 N.C. 102, 104, 691 S.E.2d 694, 695 (2010) ("we conclude that N.C.G.S. § 97-7 of the Workers' Compensation Act is a plain and unmistakable waiver of sovereign immunity . . . ."). "With respect to a motion to dismiss based on sovereign immunity, the question is whether the complaint 'specifically allege[s] a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action.' " *Sanders v. State Pers. Comm'n.*, 183 N.C. App. 15, 19, 644 S.E.2d 10, 13 (2007) (quoting *Fabrikant v. Currituck Cnty.*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2005) (citations omitted)).

Our Supreme Court, in addressing whether the State was immune from suit in a breach of contract action brought by an employee of a state agency, held "that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423 (1976).

> (1) To deny the party who has performed his obligation under a contract the right to sue the state when it defaults is to take his property without compensation and thus to deny him due process; (2) To hold that the state may arbitrarily avoid its obligation under a contract after having induced the other party to change his position or to expend time and money in the performance of his obligations, or in preparing to perform them, would be judicial sanction of the highest type of governmental tyranny; (3) To attribute to the General Assembly the intent to retain to the state the right, should expedience seem to make it desirable, to breach its obligation at the expense of its citizens imputes to that body "bad faith and shoddiness" foreign to a democratic government; (4) A citizen's petition to the legislature for relief from the state's breach of contract is an unsatisfactory and frequently a

> totally inadequate remedy for an injured party; and (5) The courts are a proper forum in which claims against the state may be presented and decided upon known principles.
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> . . .
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> Thus, in this case, and in causes of action on contract arising after the filing date of this opinion, 2 March 1976, the doctrine of sovereign immunity will not be a defense to the State.

Id. at 320, 222 S.E.2d at 423-4.

> As to its contract, the State should be held to the same rules and principles of construction and application of contract provisions as govern private persons and corporations in contracting with each other. But . . . a contract of the State must ordinarily rest upon some legislative enactment and in this respect is distinguished from contracts with individuals . . . Unless there is an appropriation, courts have no power to enforce a contract of a state, even though they do not doubt its validity.

Id. at 310-11, 222 S.E.2d at 417-8 (internal citations omitted).

In *Hubbard v. County of Cumberland*, 143 N.C. App. 149, 150-1, 544 S.E.2d 587, 589 (2001), the plaintiffs, deputy sheriffs, alleged that the County failed to comply with its statutory duties in the administration of the Sheriff's Department longevity pay plan such that the plaintiffs were wrongfully deprived of compensation. The defendant County's motion for summary judgment was denied. On appeal, the appellant-defendant County argued that it was immune from suit because no statute waived its right to sovereign immunity nor had it otherwise consented to the action. *Id.* at 151, 544 S.E.2d at 589. This Court reasoned that where the County had statutorily committed itself to provide salaries to deputy sheriffs and those salaries served as the consideration necessary for the deputy sheriffs' employment contracts, the County, after having availed itself of the law enforcement officers' services, was prohibited from using sovereign immunity as a defense to its statutory obligation and contractual commitment. *Id.* at 153-4, 544 S.E.2d at 590.

In the instant case, plaintiffs allege that at all times relevant to this action, each plaintiff and putative class member "has been employed as a forester in the Division of Forest Resources (DFR), a division of NCDENR, and in this capacity, each plaintiff is and/or has been an 'employee' of defendants, within the meaning of N.C.G.S. § 113-56.1, and the FLSA, 29 U.S.C. § 203(e)." Plaintiffs assert that the

State has waived its governmental immunity to their claims which are premised on their asserted right to overtime compensation pursuant to N.C. Gen. Stat. § 113-56.1. This statute provides for overtime compensation, as follows: "The Department [of Environment and Natural Resources] shall, within funds appropriated to the Department, provide overtime compensation to the professional employees of the Division of Forest Resources involved in fighting forest fires." N.C.G.S. § 113-56.1 (2009).

Here, the State has statutorily committed itself to provide a right to overtime compensation. By the use of the word "shall" the statute unambiguously provides a right to overtime compensation. By enacting this statute the legislature has waived sovereign immunity as to those employees referred to in the statute. And, having availed itself of the services of the professional employees of the Division of Forest Resources, the State is now prohibited from using sovereign immunity as a defense to its contractual commitment. *Hubbard*, 143 N.C. App. at 153-4, 544 S.E.2d at 590. Accordingly, we reverse the trial court's dismissal of plaintiffs' claim for lack of jurisdiction based on sovereign immunity.

II

[2] Next, plaintiffs contend that the trial court erred in dismissing their claims for relief under the FLSA pursuant to Rule 12(b)(6), for failure to state a claim upon which relief can be granted. Plaintiffs specifically contend the FLSA exemption for "learned professionals" is not applicable to them. We agree.

On appeal, consistent with their motion to dismiss and memorandum of law in support of the motion to dismiss in lieu of an answer, defendants counter plaintiffs' argument and contend that because the FLSA exempts bona fide executive, administrative, and professional employees from overtime pay requirements, per 29 U.S.C. § 213(a)(1), and because plaintiffs assert in their complaint that they are "Professional Employees," plaintiffs are exempt from the overtime requirements of the FLSA. We disagree with defendants' contentions.

> The decision "whether an employee is exempt under the Act is primarily a question of fact which must be reviewed under the clearly erroneous standard. . . ." *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135, 1137 (5th Cir.1988) (quoting *Cobb v. Finest Foods, Inc.*, 755 F.2d 1148 (5th Cir.1985), and quoted in *Dalheim*,

> infra). Although historical facts regarding the employment history, and inferences based on these facts, are reviewed under the factual standard, the ultimate decision whether an employee is exempt is a question of law. *Dalheim v. KDFW TV*, 918 F.2d 1220 (5th Cir.1990). Exemptions are to be narrowly construed. The burden of proving the applicability of a claimed exemption is on the employer. *Brennan v. Corning Glass Works*, 417 U.S. 188, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974).

Smith v. Jackson, 954 F.2d 296, 298 (1992). We review a trial court's dismissal of a complaint pursuant to Rule 12(b)(6) de novo. *State Emps. Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 210, 695 S.E.2d 91, 95 (2010).

> [When reviewing a dismissal pursuant to Rule 12(b)(6)] "[w]e determine 'whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. . . .' *Shepard v. Ocwen Fed. Bank, FSB*, 361 N.C. 137, 139, 638 S.E.2d 197, 199 (2006) [(internal citation omitted)]. Dismissal is warranted if an examination of the complaint reveals that no law supports the claim, or that sufficient facts to make a good claim are absent, or that facts are disclosed which necessarily defeat the claim. *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

Id.

Here, the trial court found that "[t]he Complaint alleges that the Plaintiffs are 'Professional Employees' as defined by State law." The trial court then concluded that "[t]he Plaintiffs' second and third claims for relief under the FLSA fail to state claims upon which relief can be granted since facts disclosed in the Complaint necessarily defeat those claims."

Plaintiffs have alleged they are professional employees as defined by North Carolina law and have been involved in fighting fires. Specifically, plaintiffs allege they are all foresters and are "responsible for forest management, providing education and services to protect the State's forests," and have also "continually been involved in fighting forest fires." Upon close examination of the allegations in the complaint, we cannot agree with the trial court that plaintiffs fail to state a claim for relief under the FLSA.

Under the FLSA, 29 U.S.C. § 201 *et seq.*, the term " 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency . . . ." 29 U.S.C. § 203(d). "[T]he term 'employee' means . . . any individual employed by a State, political subdivision of a State, or an interstate governmental agency . . . ." 29 U.S.C. § 203(e)(2)(c). " 'Public agency' means . . . the government of a State or political subdivision thereof; any agency of . . . a State, or a political subdivision of a State . . . ." 29 U.S.C. § 203(x). Pursuant to § 207, an employer is required to compensate an employee for time worked beyond the prescribed maximums 'at a rate not less than one and one half times the regular rate at which he is employed." 29 U.S.C. § 207(k). However, "[t]he provisions of [that] section[] . . . shall not apply with respect to . . . any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1).

> The term 'employee employed in a bona fide professional capacity' in section 13(a)(1) of the [Fair Labor Standards] Act shall mean any employee: (1) Compensated on a salary or fee basis at a rate of not less than $455 per week . . ., exclusive of board, lodging, or other facilities; and (2) Whose primary duty is the performance of work: (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

29 C.F.R. § 541.300(a) (2009). But, "section 13(a)(1) exemptions and the regulations in this part also do not apply to . . . fire fighters . . . and similar employees, *regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type* . . . ." 29 C.F.R. § 541.3(b)(1) (2009) (emphasis added). These employees "do not qualify as exempt executive employees because their primary duty is not management of the enterprise [or the performance of work related to management] in which the employee is employed or a customarily recognized department or subdivision thereof . . . . [F]or example, a . . . fire fighter whose primary duty is to . . . fight fires is not exempt under section 13(a)(1) of the Act merely because the . . . fire fighter also directs the work of other employees in the conduct of . . . fighting a fire." 29 C.F.R. § 541.3(b)(2) (2009).

> Such employees do not qualify as exempt professionals because their primary duty is not the performance of work requiring

> knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor . . . .

29 C.F.R. § 541.3(b)(4) (2009).

Therefore, we hold that plaintiffs have stated a claim sufficient to show that the FLSA exemption applicable to those in a bona fide executive, administrative, or professional capacity is not applicable to them.[1] Defendants' motion to dismiss, contending that plaintiffs are exempt professional employees under the FLSA, is insufficient to satisfy defendants' burden of proving the exemption they raise. *See Smith*, 954 F.2d at 298 ("Exemptions are to be narrowly construed. The burden of proving the applicability of a claimed exemption is on the employer." (citation omitted)). Therefore, to the extent the trial court's order granting defendants' Rule 12(b)(6) motion was premised on the conclusion that plaintiffs fell within the scope of the FLSA exemption for those in a bona fide professional capacity, the conclusion was made in error. It is apparent the trial court's conclusion was based on the fact that plaintiffs alleged they were professional employees. It is also apparent that the definition of professional as referenced by plaintiffs is not the same as in the FLSA. Therefore, plaintiffs' claims should not be dismissed on that basis.

Whether plaintiffs are exempt from the provisions of the FLSA for being bona fide executive, administrative, or professionals under 29 U.S.C. § 213(a)(1) is primarily a question of fact to be resolved by an analysis of the duties required of the employees. Where the burden of proof, as to the exemption, has not been satisfied, we cannot hold that plaintiffs fall within the exemption as a matter of law. Therefore, it was error to dismiss plaintiffs' claims pursuant to Rule 12(b)(6), for failure to state a claim upon which relief could be granted.

III

[3] Last, plaintiffs argue that the trial court's dismissal of their FLSA claims for lack of subject matter jurisdiction was error as they were not required to exhaust administrative remedies. Plaintiffs urge our

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1. Because plaintiffs' challenge, and the State's defense, is based on the trial court's ruling which considered only the applicability of the "professional employee" exemption, and did not consider the applicability of "executive or administrative" employees' exemptions, our holding on this issue is likewise limited to the issue of the "professional employees" exemption.

consideration that the General Assembly, under N.C. Gen. Stat. § 143-300.35(a), has authorized actions taken pursuant to the FLSA to be heard in state court.

The ultimate issue that must be addressed in determining whether the trial court correctly dismissed plaintiffs' FLSA claims on exhaustion grounds is the extent to which N.C.G.S. § 143-300.35(a) authorizes the maintenance of a separate action in the trial division of the General Court of Justice for claims brought by state employees against state agencies under the FLSA or whether a state employee's exclusive remedy for a FLSA violation in the state system is the initiation of a contested case pursuant to N.C. Gen. Stat. § 126-34.1(a)(11)a, with recourse to the judicial branch being available through the judicial review process authorized by N.C. Gen. Stat. §§ 150B-43 and 150B-45. Although it is well-established that, "where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts," *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979) (citing *King v. Baldwin*, 276 N.C. 316, 172 S.E.2d 12 (1970), aggrieved litigants are not required to pursue administrative remedies in the event that the applicable statutory provisions " 'create alternative means for an aggrieved party to seek relief.' " *Newberne v. Dep't of Crime Control and Pub. Safety*, 359 N.C. 782, 797, 618 S.E.2d 201, 212 (2005) (quoting *Wells v. N.C. Dep't of Corr.*, 152 N.C. App. 307, 313, 567 S.E.2d 803, 809 (2002). As a result, a proper evaluation of the trial court's decision to dismiss plaintiffs' FLSA claims on exhaustion grounds requires us to construe N.C.G.S. § 143-300.35.

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), *cert. denied*, 526 U.S. 1098, 143 L. Ed. 2d 671, 119 S. Ct. 1576 (1999)). "The best indicia of that intent are the language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted). "If possible, a statute must be interpreted so as to give meaning to all its provisions." *State v. Buckner*, 351 N.C. 401, 408, 527 S.E.2d 307, 311 (2000) (citing *State v. Bates*, 348 N.C. 29, 35, 497 S.E.2d 276, 279 (1998)). " '[S]ignificance and effect should, if possible, . . . be accorded every part of the act, including every section, paragraph, sentence or clause, phrase, and word.' " *Hall v. Simmons*, 329 N.C. 779, 784, 407 S.E.2d 816, 818

(1991) (quoting *State v. Williams*, 286 N.C. 422, 432, 212 S.E.2d 113, 120 (1975)). "In discerning the intent of the General Assembly, statutes in *pari materia* should be construed together and harmonized whenever possible." *State v. Jones*, 359 N.C. 832, 836, 616 S.E.2d 496, 498 (2005) (citing *Williams v. Williams*, 299 N.C. 174, 180-81, 261 S.E.2d 849, 854 (1980)). "Individual expressions must be construed as part of the composite whole and be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." *State v. Tew*, 326 N.C. 732, 739, 392 S.E.2d 603, 607 (1990) (citing *In re Hardy*, 294 N.C. 90, 95-6, 240 S.E.2d 367, 371-2 (1978)). We now attempt to construe the relevant statutory provisions utilizing these familiar canons of statutory construction.

N.C.G.S. § 143-300.35(a) provides that:

> The sovereign immunity of the State is waived for the limited purpose of allowing State employees, except for those in exempt policy-making positions designated pursuant to [N.C. Gen. Stat. § 126-5(d), to maintain lawsuits in State and federal courts and obtain and satisfy judgments against the State or any of its departments, institutions, or agencies under:
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> (1) The Fair Labor Standards Act, 29 U.S.C. § 201, et seq.
>
> (2) The Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq.
>
> (3) The Family and Medical Leave Act, 29 U.S.C. § 2601, et seq.
>
> (4) The Americans with Disabilities Act, 42 U.S.C. § 12101, et seq.

N.C.G.S. § 143-300.35(a) (2009). As a result, the relevant portion of N.C.G.S. § 143-300.35(a) for purposes of this case is that portion authorizing state employees, such as plaintiffs and the class that they seek to represent, "to maintain lawsuits in State and federal courts and obtain and satisfy judgments against the State or any of its departments, institutions, or agencies" for alleged violations of a number of federal statutory schemes, including the FLSA.[2] Read literally, this language clearly permits plaintiffs to maintain an ordinary

2. In its brief, the State notes that N.C. Gen. Stat. § 126-86, which was held to provide an alternative judicial remedy at issue under the Whistleblower Act in *Newberne*, explicitly provided for a separate judicial remedy and that N.C.G.S. § 143-300.35(a) lacks equally explicit language. However, while the State has accurately described the "explicit" nature of the statutory provision at issue in *Newberne*, that fact does not change the essential nature of the inquiry we must undertake in this case, which revolves around the entirely separate issue of how N.C.G.S. § 143-300.35(a) should be construed.

civil action in the state judicial system for the purpose of enforcing their rights, if any, under the FLSA.

The State argues that the essential purpose of N.C.G.S. § 143-300.35(a) was to restore a litigant's right to seek relief for alleged violations of the FLSA and similar federal statutory schemes in federal court, so that the two avenues of relief available to state employees seeking to assert a claim against a state agency under the FLSA are a civil action in the federal district courts and a contested case brought pursuant to N.C.G.S. § 126-34.1(a)(11)a. Although this construction, which hinges upon the title of the legislation that enacted N.C.G.S. § 143-300.35(a), has the benefit of giving some meaning to the reference to federal litigation contained in the relevant statutory language, it overlooks the fact that the references to federal and state litigation in N.C.G.S. § 143-300.35(a) are couched in essentially identical terms. As a result, there is no basis in the relevant statutory language, for understanding the federal remedy authorized by N.C.G.S. § 143-300.35(a) to be judicial in nature while understanding the state remedy authorized by the same provision of N.C.G.S. § 143-300.35(a) to be purely administrative.

Therefore, for the foregoing reasons, we conclude that plaintiffs are entitled to " 'choose to pursue a [FLSA] claim in either [a judicial or an administrative] forum, but not both,' " *Newberne*, 359 N.C. at 797, 618 S.E.2d at 212 (quoting *Swain v. Efland*, 145 N.C. App. 383, 389, 550 S.E.2d 530, 535, *cert. denied*, 354 N.C. 228, 554 S.E.2d 832 (2001)), rather than being required to exhaust the administrative remedy made available by N.C.G.S. § 126-34.1(a)(11)a. *See also Johnson v. N.C. Dep't of Health and Human Servs.*, 454 F. Supp. 2d 467 (M.D.N.C. 2006) (holding that "the [S]tate of North Carolina has waived its sovereign immunity with respect to ADA claims filed by state employees" by virtue of the enactment of N.C.G.S. § 143-300.35(a)).

The judgment of the trial court is reversed.

Reversed.

Judges STEELMAN and ERVIN concur.

INLAND AMERICAN WINSTON HOTELS, INC., PLAINTIFF v. KENNETH R. CROCKETT AND ROBERT W. WINSTON, III, DEFENDANTS

No. COA10-593

(Filed 7 June 2011)

Employer and Employee— non-compete agreements—breach of contract claim

The trial court did not err in a breach of contract case by granting summary judgment in favor of defendants, denying plaintiff's motion for summary judgment, and dismissing plaintiff's complaint with prejudice. There was no genuine issue of material fact because defendants did not solicit, recruit, or induce two of plaintiff's former employees to work for defendants in violation of the non-compete agreements. Further, there were no terms in the non-compete agreements preventing defendants from hiring a former employee of plaintiff whom they had not solicited, recruited, or induced for employment.

Appeal by plaintiff from order entered 15 February 2010 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 16 November 2010.

Moore & Van Allen, PLLC, by Scott M. Tyler, and DLA Piper US LLP, by Jeffrey D. Herschman and Melissa R. Roth, for plaintiff-appellant.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester, Charles E. Johnson, and Richard C. Worf, for defendants-appellees.

STROUD, Judge.

Inland American Winston Hotels, Inc., ("plaintiff Inland") appeals from an order granting summary judgment in favor of Kenneth R. Crockett and Robert W. Winston, III (referred to collectively as "defendants"). As there were no genuine issues of material fact and defendants were entitled to relief as a matter of law, we affirm the trial court's order granting summary judgment in favor of defendants, denying plaintiff Inland's motion for summary judgment, and dismissing plaintiff Inland's complaint with prejudice.

I. Background

On or about 11 February 2009, plaintiff Inland filed a "First Amended Complaint" against defendants, setting forth two claims for

breach of contract alleging that defendants had breached the terms of their "Non-Compete Agreements" "by soliciting, recruiting, or inducing the employment of" two former employees of plaintiff Inland, Brent West and Brian Fry. Plaintiff Inland requested liquidated damages, "prejudgment interest, costs and attorneys' fees[,]" and for the court to "[e]njoin defendants from further violations of the Non-Compete Agreements[.]" Defendants filed an answer on or about 9 March 2009, denying plaintiff Inland's allegation that they breached their "Non-Compete Agreements" and raising several affirmative defenses, including "the doctrines of estoppel and waiver." On or about 6 October 2009, plaintiff Inland filed a motion for summary judgment. On or about 29 December 2009, defendants also filed a motion for summary judgment. The affidavits, depositions, and documents filed with those motions tended to show that defendants Crockett and Winston were formerly employed by Winston Hotels, Inc. as executive vice president and chief executive officer, respectively. On 1 July 2007, Winston Hotels merged into an entity that became Inland American Winston Hotels, Inc., a subsidiary of Inland American Real Estate Trust, Inc., a publically owned real estate investment trust engaged in the business of owning and operating real properties throughout the country. As part of this merger, defendants Crockett and Winston each executed non-compete agreements, effective 1 July 2007. The relevant portions of the non-compete agreements prohibited defendants "during the period of [their] employment with the Company and for a period of two years from and after any termination of [their] employment with the Company, . . . [or] without the express written consent of the Company" from

> solicit[ing], recruit[ing] or induc[ing] for employment (or assist or encourage any other person or entity to solicit, recruit or induce for employment), directly or indirectly . . . any officer or non-clerical employee of the Company or any person who was an officer or non-clerical employee of the Company at any time during the final year of the Executive's employment with the Company[.]

Following the merger, defendants terminated their employment with Winston Hotels or its successor plaintiff Inland and established two new companies, Crockett Capital Corporation ("CCC") and Winston Hospitality, Inc. On 29 August 2007, Brent West, plaintiff Inland's chief accounting officer, resigned his employment with plaintiff Inland. On 10 September 2007, defendant Winston signed an employment agreement with Mr. West, hiring him as chief financial officer

for Winston Hospitality, Inc. and CCC. Brian Fry had been employed by Winston Hotels, Inc. as director of development. On 30 June 2007, Mr. Fry was informed that he would not be employed by plaintiff Inland following the merger and that his employment was terminated. Shortly thereafter, Mr. Fry contacted defendant Winston to request assistance in finalizing some of the hotel development projects Mr. Fry had been working on while he had been employed by Winston Hotels, Inc. and agreed to be paid a finder's fee if the development transactions were completed. Defendant Winston agreed to pay Mr. Fry such a fee and, on 10 September 2007, defendant Winston sent Mr. Fry a letter outlining their understanding that Mr. Fry would be paid fees only if and after transactions closed on certain hotel development projects. Sometime after this letter, Mr. Fry obtained fulltime employment with another organization and ceased any involvement on these projects, and he never received any compensation related to the hotel development projects.

On 15 February 2010, the trial court entered a written order denying plaintiff Inland's motion for summary judgment and granting defendants' motion, dismissing plaintiff Inland's complaint with prejudice, and concluding "that there is no genuine issue as to any material fact, and Defendants are entitled to judgment as a matter of law." On 17 March 2010, plaintiff Inland gave written notice of appeal from the trial court's 15 February 2010 order.

II. Summary Judgment

Plaintiff Inland contends that the trial court erred in denying its motion for summary judgment and granting defendants' motion for summary judgment as there are no genuine issues of material fact and plaintiff Inland is entitled to judgment as a matter of law "because [defendants] solicited, recruited, and/or induced Brent West and Brian Fry in breach of their non-compete agreements."

A. Standard of Review

The standard of review from a motion for summary judgment is well established:

> Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' N.C. Gen. Stat. § 1A-1, Rule 56(c). 'A trial court's grant of summary judgment receives *de novo* review on appeal,

> and evidence is viewed in the light most favorable to the non-moving party.' *Sturgill v. Ashe Memorial Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008).

Mitchell v. Brewer, ––– N.C. App. ––––, ––––, 705 S.E.2d 757, 764-65 (2011) (quoting *Liptrap v. Coyme*, 196 N.C. App. 739, 741, 675 S.E.2d 693, 694 (2009)). Specifically, plaintiff Inland argues that summary judgment in favor of defendants was in error as (1) defendants breached their non-compete agreements by hiring Brent West and Brian Fry without plaintiff Inland's express written consent; (2) plaintiff Inland did not waive its right to enforcement of the non-compete agreements and "is not estopped from enforcing the Non-compete Agreements[;]" and (3) since summary judgment in favor of defendants was in error and the trial court should have entered summary judgment for plaintiff Inland, the court should determine the damages that should be awarded to plaintiff Inland. We first address plaintiff Inland's arguments regarding defendants' breach of the non-compete agreements, as this issue is dispositive.

B. Breach of the Non-Compete Agreements

Plaintiff Inland contends that the trial court's decision should be reversed and judgment entered in its favor as it "is entitled to summary judgment (and Defendants are not) because there is no question that Messrs. Winston and Crockett breached the Non-Compete Agreements based on the established facts in the record." Plaintiff Inland contends that because defendants executed employment agreements with Mr. West and Mr. Fry, defendant solicited, recruited, or induced them to leave in violation of the non-compete agreements. Plaintiff Inland further argues that the mere extension of a job offer to Mr. West or Mr. Fry "would qualify as solicitation." In the alternative, plaintiff Inland also argues that "there are genuine issues of material fact, making summary judgment in favor of the Defendants inappropriate, and the case should be remanded for trial."

Defendants counter that plaintiff Inland's only argument is that defendants breached their non-compete agreements by hiring Mr. West and Mr. Fry, but "*hiring* may take place without any solicitation or inducement where . . . a covered employee decides to leave without any luring or persuasion by the defendant and then joins the defendant's company, [which is] exactly what happened here." Defendants further argue that plaintiff Inland's "torturing of the words 'induce' and 'solicit' to encompass the act of entering into an

employment contract has no precedent[,]" as "[h]iring can and does occur without any inducement or solicitation[.]" Defendants further contend that summary judgment in their favor was appropriate as "the undisputed facts show that no solicitation or inducement occurred[,]" and "[plaintiff Inland] has advanced no testimonial or documentary evidence to contradict" the sworn statements of Mr. Fry, Mr. West, and defendants that no solicitation or inducement occurred. As the parties' arguments focus on the meaning of the terms in the non-compete agreements, we turn to the interpretation of those terms.

1. Interpretation of the Non-Compete Agreements

Defendants Winston's and Crockett's non-compete agreements have identical provisions regarding hiring plaintiff Inland's employees:

> (b) during the period of his employment with the Company and for a period of two years from and after any termination of his employment with the Company, whether as a result of a termination by the Company or resignation by the Executive, he shall not, other than on behalf of the Company or any successor, without the express written consent of the Company or any successor, *solicit*, *recruit or induce for employment* (or assist or encourage any other person or entity to solicit, recruit or induce for employment), *directly or indirectly* or on behalf of himself or any other Person, any officer or non-clerical employee of the Company or any person who was an officer or non-clerical employee of the Company at any time during the final year of the Executive's employment with the Company, to work for the Executive or any Person with which the Executive is or intends to be affiliated . . .[1]

(Emphasis added). Plaintiff Inland contends that defendants violated the terms of the non-compete agreements by "solicit[ing], recruit[ing], or induc[ing] . . . for employment . . . directly or indirectly" plaintiff Inland's former employees, Brent West and Brian Fry to work for defendants "without the express written consent of [plaintiff Inland.]" Essentially, plaintiff Inland argues that defendants could not "hire" Mr. Fry or Mr. West without "soliciting," "recruiting" or "inducing" them, so that proof of hiring necessarily proves solicitation, recruiting or inducing. We disagree.

1. This section of the non-compete agreements also prohibits defendants from "directly or indirectly encourag[ing] any such person to terminate his or her employment or other relationship with the Company or any successor without the express written consent of the Company." However, plaintiff Inland makes no specific argument that defendants encouraged Mr. West or Mr. Fry to terminate their employment from plaintiff Inland.

We note that the terms "solicit, recruit or induce" are not defined in the non-compete agreement. This Court has stated that "[a] contract which is plain and unambiguous on its face will be interpreted as a matter of law by the court. If the agreement is ambiguous, however, interpretation of the contract is a matter for the jury." *Metcalf v. Black Dog Realty, LLC*, —— N.C. App. ——, ——, 684 S.E.2d 709, 719 (2009) (citation omitted). Non-compete agreements, as any contract, "are interpreted according to the intent of the parties. The intent of the parties is determined by examining the plain language of the contract. Extrinsic evidence may be consulted when the plain language of the contract is ambiguous." *Id.* We hold that that the terms in the non-compete agreements are unambiguous. Accordingly, we look to the plain meaning of these terms. *See id.* "Solicit" is defined as (1) "to make petition to[;]" (2) "to approach with a request or plea[;]" (3) "to urge (as one's cause) strongly[;]" (4) "to entice or lure esp. into evil[;]" (5) "to proposition . . . [;]" and (6) "to try to obtain by [usually] urgent requests or pleas[.]" Merriam-Webster's Collegiate Dictionary 1187 (11th ed. 2005). Similarly Black's Law Dictionary defines solicitation as "[t]he act or an instance of requesting or seeking to obtain something; a request or petition[.]" Black's Law Dictionary 1520 (8th ed. 2009). The relevant definition of "recruit" is (1) "to fill up the number of (as an army) with new members[;]" (2) "to increase or maintain the number of[;]" and (3) "to secure the services of[;]" and (4) "to seek to enroll[.]" Merriam-Webster's Collegiate Dictionary 1041 (11th ed. 2005).[2] The relevant definition of "induce" is (1) "to move by persuasion or influence[;]" (2) "to call forth or bring about by influence or stimulation[;]" and (3) "to cause the formation of[.]" Merriam-Webster's Collegiate Dictionary 637 (11th ed. 2005). Similarly Black's Law Dictionary defines inducement as "[t]he act or process of enticing or persuading another person to take a certain course of action." Black's Law Dictionary 845 (8th ed. 2009). We note that all of the above-cited definitions of "solicit, recruit or induce" are similar in that they involve active persuasion, request, or petition.

After a thorough review of the record, we hold that there is no genuine issue of material fact, as defendants did not "solicit, recruit or induce" Brent West or Brian Fry to work for defendants in violation of the non-compete agreements and therefore, defendants were entitled to judgment as a matter of law.

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2. Although not relevant to this analysis, recruit is also defined as "to enlist as a member of an armed service[;]" and "to restore or increase the health, vigor, or intensity of[.]" Merriam-Webster's Collegiate Dictionary 1041 (11th ed. 2005).

2. Brent West

The record on appeal shows that defendants did not "solicit, recruit or induce" Mr. West for employment. Prior to the 1 July 2007 merger of Winston Hotels, Inc. with Inland, Brent West had served as chief accounting officer for Winston Hotels, Inc. After the merger, Mr. West continued with plaintiff Inland and served as executive vice president/chief financial officer. However, Mr. West began having difficulty working with his newly appointed supervisor Michael Broadfoot, and had concerns regarding plaintiff Inland's lack of support for him, as the Inland executives had not executed his employment agreement. Mr. West complained to Thomas McGuinness, Inland's President, about his concerns but no action was taken. On 19 August 2007, Mr. West contacted defendant Winston by telephone and told him he was resigning and asked if defendant Winston would consider hiring him. However, defendant Winston told Mr. West that because he was under a non-compete agreement he could not talk to him about employment and he thought that he could not afford his salary. Again on 27 August 2007, Mr. West went to defendant Winston's office with a draft employment agreement that Mr. West had prepared and defendant Winston did not look at the draft agreement and told him he could not discuss employment with Mr. West "as long as [he] was employed by Inland." On 29 August 2007, Mr. West resigned his employment from plaintiff Inland and agreed to work a two-week notice. That same day, Mr. West called defendant Winston to tell him that he had resigned and to again ask if he would consider employing him. Defendant Winston told him if he had resigned he would talk to him about employment but made no further comments or offers regarding employment. On 4 September 2007, Mr. West approached defendant Winston with a draft employment agreement, and again told him that he had resigned. Defendant Winston told Mr. West he would think about his proposal but made no commitment regarding hiring him. On 10 September 2007, Mr. West approached defendant Winston with another employment agreement which he had prepared. That same day, defendant Winston signed that employment agreement with Mr. West to work for Winston Hospitality and CCC as chief financial officer, starting 17 September 2007. Although defendant Winston did tell Mr. West that while he was employed by plaintiff Inland, he could not discuss employment "as long as [he] was employed by Inland[,]" we cannot say that defendant Winston's statements amounted to a solicitation, recruitment, or inducement as defendants did not make an active persuasion,

request, or petition to Mr. West to leave Inland and work for defendants. In fact, the record clearly shows that Mr. West approached defendant Winston several times for employment and that defendant Winston refused to discuss employment until after Mr. West had resigned from his position with plaintiff Inland. Accordingly, we hold that defendants did not "solicit, recruit or induce for employment" Mr. West in violation of their non-compete agreements and plaintiff Inland's arguments are overruled.

In addressing plaintiff Inland's argument that executing an employment agreement and hiring someone would amount to solicitation, recruitment, or inducement, we note that the terms of defendants' non-compete agreements do not prohibit defendants from hiring certain former employees of plaintiff Inland; it only prohibits them from "solicit[ing], recruit[ing] or induc[ing] for employment" certain employees of plaintiff Inland. If plaintiff Inland wished to have such a provision prohibiting defendants from hiring certain former employees of plaintiff Inland, it could have included a limitation on employing or hiring former employees in the non-compete agreements. Mr. West was unsatisfied with his employment, resigned his employment with plaintiff Inland, approached defendant Winston, and was hired by defendant Winston; his hiring was permitted by the terms of the non-compete agreements. Therefore, plaintiff Inland's argument is overruled.

Plaintiff Inland also contends that defendants solicited Mr. West during the "several meetings with Mr. Winston, during which they discussed Inland and the 'difficulties' and 'stress' Mr. West encountered in working for Inland." In support of its argument, plaintiff Inland points us to the portions of Mr. West's and Mr. Winston's affidavits showing that Mr. West talked to defendant Winston several times regarding employment. However, the record shows that Mr. West approached defendant Winston and defendant Winston told Mr. West that he could not discuss employment, indicating that he was not soliciting Mr. West during these meetings. Plaintiff Inland fails to point us to any specific conversation in the record between Mr. West and defendant Winston in which they specifically discussed "difficulties" and "stress" which would support its argument. Accordingly, plaintiff Inland's argument is overruled.

Plaintiff Inland also contends that defendant Winston violated the terms of his non-compete agreement by first contacting "Mr. West to discuss CCC's and Winston Hospitality's accounting requirements."

However, plaintiff Inland fails to point us to any conversation or action by defendant Winston in support of its argument that would amount to solicitation, recruitment or inducement for employment in violation of his non-compete agreement. Accordingly, this argument is overruled. Therefore, there is no genuine issue of material fact that defendants did not breach their non-compete agreements by "solicit[ing], recruit[ing] or induc[ing] for employment" Mr. West. Thus, defendants were entitled to judgment as a matter of law on this issue.

3. Brian Fry

As to Brian Fry, plaintiff Inland contends that defendants hired Mr. Fry as their director of development and that "alone . . . constitutes a solicitation in violation of the Non-Compete Agreements." Like Mr. West, the record on appeal shows that defendants did not "solicit, recruit or induce" Mr. Fry for employment. Mr. Fry was director of development for Winston Hotels for about a year, from 2006 to 2007, prior to the merger with plaintiff Inland. Mr. Fry learned that he would not be a part of the company post-merger. In fact, plaintiff Inland did not retain any of the development employees from Winston Hotels, Inc., including Mr. Fry, who was terminated on 30 June 2007. Following his termination, Mr. Fry reached out to defendant Winston. Mr. Fry stated that he "express[ed] interest" to defendant Winston "in helping in any way [he] could" not for a salary but possibly for payment after the hotel development projects were complete. Just as with Mr. West, the record on appeal shows that Mr. Fry approached defendant Winston for employment and defendants did not make any active persuasion, request, or petition to Mr. Fry for employment. Accordingly, we hold that there was no genuine issue of material fact as defendant's did not "solicit, recruit or induce for employment" Mr. Fry in breach their non-compete agreements. As stated above, there were no terms in the non-compete agreements preventing defendants from hiring a former employee of plaintiff Inland whom they had not solicited, recruited or induced for employment.[3] Thus, defendants were also entitled to judgment as a matter of law on this issue.

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3. The only case cited by plaintiff Inland in support of its argument that the mere extension of a job offer to Mr. West or Mr. Fry "would qualify as solicitation" is the unpublished United States District Court for Middle Tennessee case *International Security Management Group, Inc. v. Sawyer*, 2006 U.S. Dist. LEXIS 37059, *48 (M.D. Tenn. 2006). We do not find this case persuasive. First, it is an unpublished case from a trial court. In addition, the facts are quite different. The defendant former employee signed a non-compete agreement not to "solicit" current employees to work for a competitor, but then left the plaintiff company, advertised in a local newspaper, and interviewed the current employees of the plaintiff company, but did not offer them jobs.

III. Conclusion

As the evidence forecast by plaintiff demonstrates no genuine issue of material fact that defendants did not violate the terms of their non-compete agreements, they were entitled to judgment as a matter of law. Accordingly, we need not address plaintiff Inland's arguments as to defendants' affirmative defenses of estoppel or waiver or their argument as to damages. We affirm the trial court's order granting summary judgment as to defendant, denying summary judgment as to plaintiff Inland, and dismissing plaintiff's complaint.

AFFIRMED.

Judges BRYANT and BEASLEY concur.

ROBERT C. RAY AND KIMBERLY C. RAY, PLAINTIFFS v. GARY WAYNE GREER, M.D., AND CATAWBA VALLEY EMERGENCY PHYSICIANS, P.A., DEFENDANTS

No. COA10-767

(Filed 7 June 2011)

1. Appeal and Error— preservation of issues—contempt—mootness

Plaintiffs' argument that the trial court erred by allegedly failing to comply with statutory provisions before it held plaintiffs' trial counsel in willful contempt of a previous court order was dismissed as moot because the attorney suffered no injury or prejudice as a result of the contempt order.

2. Contempt— attorney's willful violation of court order—sanctions—dismissal of case

The trial court did not abuse its discretion by imposing the most severe sanction and dismissing plaintiffs' claims based on

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The Court noted that the extension of a job offer to a current employee of the plaintiff "alone would qualify as solicitation, as it constitutes 'an instance of requesting or seeking to obtain something.' " *Id.* In contrast, here, defendants made no advertisement or solicitation to Mr. West or Mr. Fry; Mr. West and Mr. Fry approached defendant Winston for employment. Neither Mr. West nor Mr. Fry were current employees of plaintiff Inland when they discussed employment with defendants, and there was no evidence to show that defendants offered Mr. West or Mr. Fry employment while they were still employed by plaintiff Inland. Therefore, *International Security Management Group, Inc.* is inapplicable to the facts before us.

the willful contempt of their trial attorney. The trial court was not required to impose lesser sanctions, but only to consider lesser sanctions. The dismissal was imposed primarily due to a direct violation of a court order, N.C.G.S. § 1A-1, Rule 41(b).

Appeal by Plaintiffs from order entered 1 December 2009 by Judge W. Robert Bell in Catawba County Superior Court. Heard in the Court of Appeals 11 January 2011.

Ferguson, Stein, Chambers, Gresham & Sumter, PA, by John W. Gresham, for Plaintiff-Appellants.

Shumaker, Loop & Kendrick, LLP, by Scott M. Stevenson, Karen H. Stiles, and Scott A. Hefner, for Defendant-Appellees.

BEASLEY, Judge.

Robert and Kimberly Ray (Plaintiffs) appeal from the trial court's order granting a motion by Gary Wayne Greer, M.D. and Catawba Valley Emergency Physicians, P.A. (Defendants) to dismiss Plaintiffs' medical negligence complaint with prejudice based on a finding that Plaintiffs' counsel was in willful contempt of a previous court order. We dismiss in part and affirm in part.

On 5 September 2006, Attorney Karen Zaman filed a complaint on behalf of Plaintiffs, alleging claims for medical negligence and loss of consortium against Defendants. A consent discovery scheduling order dated 23 June 2008 peremptorily set the matter for trial on 26 October 2009. Following entry of a disciplinary order by the North Carolina State Bar on 29 May 2009, which, *inter alia*, required Ms. Zaman to arrange for a member of the Bar to serve as her law practice monitor, she associated with Attorney William Elam in this case. When the case came on for trial before Judge Calvin E. Murphy on 26 October 2009, Attorneys Zaman and Elam informed the court that a divergence of views regarding trial strategy had arisen between them. The trial court gave Plaintiffs time to consult with both attorneys to determine how to proceed and instructed Plaintiffs to return the next morning to report their decision. On 27 October 2009, Mr. Ray advised the trial court that Plaintiffs elected to proceed with Ms. Zaman as their attorney and indicated that he thought she would need co-counsel to litigate the case. Mr. Elam then made an oral motion to withdraw as counsel for Plaintiffs, which was granted by the trial court. When asked if she was ready to proceed with trial, Ms. Zaman replied

that she was not prepared to go forward with the case alone but had already made attempts to associate co-counsel. Accordingly, she asked the trial court to continue the case. Based on representations by Ms. Zaman that additional counsel would be needed and on the substance of the 29 May 2009 Bar disciplinary order, Judge Murphy agreed that co-counsel was warranted and ordered Ms. Zaman to have counsel identified and present in court with her on 9 November 2009. Trial was continued to 12 July 2010.

At the 9 November hearing regarding the status of Ms. Zaman's co-counsel, Ms. Zaman appeared before Judge Bell without co-counsel, and the trial court gave her the opportunity to explain why she had failed to secure the same. She explained, consistent with a "Motion to Extend Time for Plaintiffs' Counsel to Identify Co-Counsel" filed only after the status conference, that she had diligently sought co-counsel and had spent significant time on two other medical malpractice cases. Based on Ms. Zaman's acknowledgment that she had been working on other matters, defense counsel moved to dismiss the case for the failure of Plaintiffs' attorney to comply with Judge Murphy's order. The trial court found Ms. Zaman in contempt of Judge Murphy's order and, "after consideration of less drastic alternatives to dismissal," granted Defendants' motion and dismissed Plaintiffs' complaint with prejudice. Plaintiffs appeal.

[1] Plaintiffs first argue that the trial court, in holding Ms. Zaman in willful contempt of a previous court order, failed to comply with the provisions of N.C. Gen. Stat. § 5A-23 that require notice or show cause order of contempt proceedings and specific findings of fact by the trial court.

Initially, we note that although both parties understand the trial court's finding of contempt to be civil in nature, the order does not indicate whether Ms. Zaman was held to be in civil or criminal contempt. *See Watkins v. Watkins*, 136 N.C. App. 844, 846, 526 S.E.2d 485, 486 (2000) ("We urge our trial courts to identify whether contempt proceedings are in the nature of criminal contempt as set forth in Article I, Chapter 5A of the North Carolina General Statutes or are in the nature of civil contempt as set forth in Article II, Chapter 5A of the North Carolina General Statutes.").

Willful violation of a court order may be punished as criminal or civil contempt of court. *See* N.C. Gen. Stat. § 5A-11(a)(3) (2009) (naming "[w]illful disobedience of, resistance to, or interference with a court's . . . order" as conduct constituting criminal contempt); N.C. Gen. Stat.

§ 5A-21(a) (2009) ("Failure to comply with an order of a court is a continuing civil contempt as long as: (1) The order remains in force; (2) The purpose of the order may still be served by compliance with the order; (2a) The noncompliance by the person to whom the order is directed is willful; and (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order."); *see also Willis v. Duke Power Co.*, 291 N.C. 19, 30, 229 S.E.2d 191, 198 (1976) ("It has long been recognized that one act may be punishable both 'as for contempt,' i.e., as civil contempt, and 'for contempt[]' . . . ."); *Smith v. Smith*, 248 N.C. 298, 300-01, 103 S.E.2d 400, 402 (1958) (distinguishing criminal contempt as "a term applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice" from civil contempt, "a term applied where the proceeding is had to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such parties" (internal quotations and citations omitted)).

Summary proceedings for criminal contempt are authorized "in response to direct criminal contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt." N.C. Gen. Stat. § 5A-14(a) (2009). However,

> [p]roceedings for civil contempt are by motion pursuant to G.S. 5A-23(a1), by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt, or by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt.

N.C. Gen. Stat. § 5A-23(a) (2009). Such order or notice required for civil contempt proceedings "must be given at least five days in advance of the hearing unless good cause is shown." *Id.* This statute also provides that "[i]f civil contempt is found, the judicial official must enter an order finding the facts constituting contempt and specifying the action which the contemnor must take to purge himself or herself of the contempt." N.C. Gen. Stat. § 5A-23(e).

Although the trial court did not so indicate, it appears that the order purports to find Ms. Zaman in criminal contempt, as it seems to be aimed at punishing her for the already completed act of appearing

on 9 November 2009 without co-counsel given that no action by which Ms. Zaman could purge herself of the contempt was specified. Further, the order does not appear aimed at coercing her to comply with that portion of the court order merely requiring her to secure presence of co-counsel in this case. However, where no fine was levied nor imprisonment ordered, the trial court apparently elected not to punish Ms. Zaman individually for her contempt of court. "Since [Ms. Zaman] suffered no injury or prejudice as a result of the contempt order, [Plaintiffs'] exceptions thereto and [allegations] of error are moot and will not be considered by us." *Smithwick v. Frame*, 62 N.C. App. 387, 391, 303 S.E.2d 217, 220 (1983). Accordingly, Plaintiffs' argument for reversal of the trial court's finding Ms. Zaman in willful contempt is dismissed.

[2] Plaintiffs argue that the trial court's dismissal of their claims was erroneously based on the willful contempt of their attorney and, as such, cannot stand. We disagree.

North Carolina Civil Procedure Rule 41(b) provides for involuntary dismissal of a complaint "[f]or failure of the plaintiff . . . to comply with . . . any order of court," and authorizes "a defendant [to] move for dismissal of an action or of any claim therein against him." N.C. Gen. Stat. § 1A-1, Rule 41(b) (2009). The standard of review for an involuntary dismissal under Rule 41(b) is "(1) whether the findings of fact by the trial court are supported by competent evidence, and (2) whether the findings of fact support the trial court's conclusions of law and its judgment." *Dean v. Hill*, 171 N.C. App. 479, 483, 615 S.E.2d 699, 701 (2005).

Plaintiffs argue that the dismissal order was based on an erroneous legal conclusion, and contend that "if the underlying basis for the dismissal is erroneous, then the dismissal is also erroneous." In this case, the trial court's order contained specific findings, based on competent evidence, that Plaintiffs' counsel failed to comply with the court's directive that she appear at the 9 November 2009 status conference with co-counsel, which supports the conclusion that Ms. Zaman violated a court order and that sanctions were warranted. Plaintiffs argue that the record shows Ms. Zaman's efforts to secure co-counsel were diligent and substantial, that she had no ability to compel another attorney to accept the case, and that there was no reason for the order to insist on such a short amount of time in which she must procure co-counsel. However, the trial court had been quite permissive, extending the time by which Ms. Zaman was required to secure co-counsel.

Dismissal as a sanction is an option available to the trial court for a variety of reasons. The law giving rise to the procedures the trial court must follow is often a blend of the rules applicable to the various grounds for dismissal as a sanction. Rule 41(b) provides that a trial court may dismiss an action for failure to prosecute, failure to comply with an order of the court, or failure to comply with any of the rules of civil procedure. N.C. Gen. Stat. § 1A-1, Rule 41(b). Although the statutes giving rise to the particular dismissal vary, the procedure for the trial court and, thereafter, the Court of Appeals on review appears to be the same. The trial court must consider lesser sanctions before imposing the "most severe sanction" available; after considering lesser sanctions, the trial court may determine the appropriate sanction in its discretion. *See Foy v. Hunter*, 106 N.C. App. 614, 620, 418 S.E.2d 299, 303 (1992) ("Before dismissing an action with prejudice, the trial court must make findings and conclusions which indicate that it has considered these less drastic sanctions. If the trial court undertakes this analysis, its resulting order will be reversed on appeal only for an abuse of discretion."); *see also Rivenbark v. Southmark Corp.*, 93 N.C. App. 414, 420, 378 S.E.2d 196, 200 (1989) (noting "that a party's motion for dismissal because the opposing party has violated a rule or court order is directed to the trial court's discretion").

"[T]he trial court is not required to list and specifically reject each possible lesser sanction prior to determining that dismissal is appropriate." *Badillo v. Cunningham*, 177 N.C. App. 732, 735, 629 S.E.2d 909, 911, *aff'd*, 361 N.C. 112, 637 S.E.2d 538 (2006). In *Badillo*, "[w]e reject[ed] plaintiff's argument that the trial court's conclusory statements that it considered lesser sanctions, without listing which specific sanctions it considered, are insufficient to support the ruling that lesser sanctions are inappropriate" and concluded the following language appearing in the trial court's order was sufficient to affirm dismissal.

> [T]he Court having reconsidered this matter and the arguments of counsel, as well as the applicable case law, and having considered certain lesser discovery sanctions as urged by plaintiff, the Court being of the opinion that dismissal of the case was and remains the only appropriate sanction in view of the totality of the circumstances of the case, which circumstances amply demonstrate the severity of the disobedience of counsel for plaintiff in failing to make discovery and thereby impeding the necessary and efficient administration of justice, the Court being of the opinion that lesser sanctions in this case would be inappropriate[.]

Id. at 734-35, 629 S.E.2d at 911. In so holding, we noted that

> [i]n *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 618 S.E.2d 819 (2005), this Court addressed the plaintiff's assertion that the trial court erred in dismissing his claims without considering lesser sanctions. The order dismissing the claims stated that: "the Court has carefully considered each of [plaintiff's] acts [of misconduct], as well as their cumulative effect, and has also considered the available sanctions for such misconduct. After thorough consideration, the Court has determined that sanctions less severe than dismissal would not be adequate given the seriousness of the misconduct...." *In re Pedestrian Walkway Failure*, 173 N.C. App. at 251, 618 S.E.2d at 828-29. The Court held that this language sufficiently demonstrated that the trial judge in fact considered lesser sanctions. *Id.*
>
> We see no material difference between that language and the order of the trial court in the instant case. Judge Albright states that, given the severity of disobedience by plaintiff's counsel, lesser sanctions would be inappropriate. The record supports the seriousness of plaintiff's misconduct: Plaintiff did not answer or object to any of Nationwide's interrogatories or requests for production of documents. Neither did plaintiff seek a protective order or proffer any justification for this inaction. This Court has previously upheld a trial court's dismissal of an action based upon similar circumstances of a disregard of discovery due dates. *See Cheek [v. Poole]*, 121 N.C. App. [370,] 374, 465 S.E.2d [561,] 564 [(1996)] (plaintiff did not object to discovery requests and failed to respond within extended time to comply); *Fulton v. East Carolina Trucks, Inc.*, 88 N.C. App. 274, 276, 362 S.E.2d 868, 869-70 (1987) (plaintiffs did not answer, object, or respond in any way to defendants' requests for discovery). Moreover, Judge Albright expressly states that lesser sanctions were urged by the plaintiff. As such, we can infer from the record that the trial court did in fact consider lesser sanctions. On this record, plaintiff simply fails to establish an abuse of the trial court's discretion in dismissing the action. We affirm.

Id. at 735, 629 S.E.2d at 911.

"The trial court is not required to impose lesser sanctions, but only to *consider* lesser sanctions." *In re Pedestrian Walkway Failure*, 173 N.C. App. at 251, 618 S.E.2d at 828 (internal quotation marks and citations omitted). We are mindful that "this Court will

affirm an order for sanctions where 'it may be inferred from the record that the trial court considered all available sanctions' and 'the sanctions imposed were appropriate in light of [the party's] actions in th[e] case.' " *Id.* (quoting *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 179, 464 S.E.2d 504, 507 (1995)); *see also Badillo*, 177 N.C. App. at 734, 629 S.E.2d at 911 ("[W]here the record on appeal permits the inference that the trial court considered less severe sanctions, this Court may not overturn the decision of the trial court *unless it appears so arbitrary that it could not be the result of a reasoned decision.*" (emphasis added).

Our courts have also recognized the severity of dismissing an action as a sanction.

> Dismissal is the most severe sanction available to the court in a civil case. *See Daniels [v. Montgomery Mut. Ins. Co.*], 81 N.C. App. [600,] 604, 344 S.E.2d [847,] 849 [(1986)]. An underlying purpose of the judicial system is to decide cases on their merits, not dismiss parties' causes of action for mere procedural violations. *See Jones v. Stone*, 52 N.C. App. 502, 505, 279 S.E.2d 13, 15, *disc. rev. denied*, 304 N.C. 195, 285 S.E.2d 99 (1981) (holding that the trial court correctly refused to grant a motion to dismiss for failure to prosecute); *Green v. Eure, Secretary of State*, 18 N.C. App. 671, 672, 197 S.E.2d 599, 600 (1973) (holding that the trial court erred in dismissing plaintiff's action for failure to prosecute). In accord with this purpose, claims should be involuntarily dismissed only when lesser sanctions are not appropriate to remedy the procedural violation. *See Daniels*, 81 N.C. App. at 604, 344 S.E.2d at 849; *Harris v. Maready*, 311 N.C. 536, 551, 319 S.E.2d 912, 922 (1984).

Wilder v. Wilder, 146 N.C. App. 574, 576, 553 S.E.2d 425, 427 (2001) (emphasis added).

> Because the drastic sanction of dismissal is not always the best sanction available to the trial court and is certainly not the only sanction available, dismissal is to be applied only when the trial court determines that less drastic sanctions will not suffice. Less drastic sanctions include: (1) striking the offending portion of the pleading; (2) imposition of fines, costs (including attorney fees) or damages against the represented party or his counsel; (3) court ordered attorney disciplinary measures, including admonition, reprimand, censure, or suspension; (4) informing the North Carolina State Bar of the conduct of the attorney; and (5) dismissal without prejudice.

Foy, 106 N.C. App. at 619-20, 418 S.E.2d at 303 (1992) (internal quotation marks and citations omitted). "[S]anctions may not be imposed mechanically[;] [r]ather, the circumstances of each case must be carefully weighed so that the sanction properly takes into account the severity of the party's disobedience." *Rivenbark*, 93 N.C. App. at 420-21, 378 S.E.2d 196, 378 S.E.2d at 200-01.

In the case *sub judice*, the trial court found that:

> (3) Judge Murphy entered an Order . . . continuing the trial . . . and putting in place certain deadlines and conditions that were to be met between the time the Order and the time of trial.
>
> (4) Included in the Order . . . was a provision reading . . . "Counsel for the parties will appear . . . on November 9, 2009 for a hearing regarding the status of co-counsel, at which time Ms. Zaman shall have identified co-counsel to try this case with her. Such co-counsel shall be present at the hearing to indicate his or her willingness to proceed with this case as co-counsel to Ms. Zaman."
>
> . . . .
>
> (6) At the appointed date and time of the status hearing, as ordered by Judge Murphy, and placed on the civil motions calendar by the Clerk of Court, Ms. Zaman did not have co-counsel present with her in Court and indicated to the Court that she had not yet secured co-counsel for this case.
>
> . . . .
>
> (8) Counsel for the Defendants made an oral motion to dismiss the case, with prejudice, for violation of the previous Order entered by Judge Murphy.
>
> (9) The Court considered less drastic alternatives to dismissal of the case for Ms. Zaman's failure to abide by Judge Murphy's Order.

The trial court then concluded that Ms. Zaman failed to comply with a previous order of the court "by not having identified co-counsel to try this case with her and by not having said co-counsel present in Court on November 9, 2009 to indicate his or her willingness to proceed as co-counsel to Ms. Zaman." In ordering the case dismissed with prejudice, the trial court specified that such was "[b]ased on the foregoing findings of fact and conclusions of law, and after considerations of less drastic alternatives to dismissal."

> [A] trial court may enter sanctions when the plaintiff or his attorney violates a rule of civil procedure or a court order. *Harris v. Maready*, 311 N.C. 536, 551, 319 S.E.2d 912, 922 (1984) (Rule 8(a)(2)); *Rivenbark v. Southmark Corp.*, 93 N.C. App. 414, 420, 378 S.E.2d 196, 200 (1989) (court order). The sanctions may be entered against either the represented party or the attorney, even when the attorney is solely responsible for the delay or violation. *See Smith* [*v. Quinn*], 324 N.C. [316,] 318-19, 378 S.E.2d [28,] 30-31 [(1989)]; *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 674-75, 360 S.E.2d 772, 776 (1987) (trial court properly sanctioned plaintiff for plaintiff's attorney's violation of court order); *cf. Turner v. Duke Univ.*, 101 N.C. App. 276, 280-81, 399 S.E.2d 402, 405, *disc. rev. denied*, 329 N.C. 505, 407 S.E.2d 552 (1991) (attorney committed acts giving rise to sanction).

Foy, 106 N.C. App. at 618, 418 S.E.2d at 302. In Foy, both parties and *their attorney* displayed a repeated pattern of behavior which suggested that lesser sanctions would be ineffective.

In the case before us, on 29 May 2009, Ms. Zaman was required by a Consent Order issued by the Disciplinary Hearing Commission of the North Carolina State Bar to have supervision on all matters related to her practice of law. On 26 October 2009, when the case was called for trial, Ms. Zaman's co-counsel made an oral motion to withdraw as counsel for Plaintiffs which was allowed because he and Ms. Zaman had divergent views on trial strategy. Plaintiffs were aware that Ms. Zaman and her co-counsel had differing views on trial strategy. Judge Murphy allowed Plaintiffs until the next day to decide which counsel they would continue to retain. Because Ms. Zaman was unable to try the case without co-counsel, Ms. Zaman made an oral motion to continue the case which the trial court granted. In its order granting Ms. Zaman's motion to continue, the trial court set a date of 9 November 2009 "for a hearing regarding the status of co-counsel, at which time [Ms. Zaman] shall have identified co-counsel to try this case with her." Plaintiffs were well aware that Ms. Zaman was required to secure co-counsel and were aware that her failure to do so was a violation of the court's order. With this knowledge, Plaintiffs proceeded with Ms. Zaman's representation. At the 9 November 2009 hearing, Ms. Zaman did not have co-counsel accompanying her and indicated that she had not yet secured co-counsel. Thereafter, Defendants made an oral motion to dismiss the case for Ms. Zaman's violation of the trial court's 30 October 2009 order. In an order filed 1 December 2009, the trial court dismissed Plaintiffs' complaint with prejudice.

The trial court made a finding of fact in the December 2009 order that the trial court had considered less drastic alternatives to dismissal. The order went on to further state that, "[b]ased upon the foregoing findings of fact and conclusion of law, and after consideration of less drastic alternatives to dismissal, the [c]ourt hereby orders that this cased be dismissed." Here, the ultimate sanction of dismissal was imposed primarily due to a direct violation of a court order, which is permitted under N.C. Gen. Stat. § 1A-1, Rule 41(b). *In re Pedestrian*, 173 N.C. App. at 247, 618 S.E.2d at 826.

We thus conclude that the imposition of the most severe sanction in this case did not constitute an abuse of the trial court's discretion.

Accordingly, we affirm the dismissal of Plaintiffs' complaint. We also dismiss Plaintiffs' arguments regarding the statutory notice and findings of fact provisions related to Ms. Zaman's contempt order.

Dismissed in part; Affirmed in part.

Judges McGEE and BRYANT concur.

STATE v. AUSTIN PETTY

No. COA10-846

(Filed 7 June 2011)

Jurisdiction— entry of invalid judgment—guilty plea—arrested judgment—trial judge's authority to correct error

The trial court erred by dismissing a charge of driving while impaired following defendant's guilty plea based on alleged non-jurisdictional defects in the district court. The district court judge's decision to arrest judgment constituted the entry of an invalid judgment, and the judge had the authority to correct this error on his own motion even after the court session had come to an end. Once defendant appealed to the superior court for a trial *de novo*, the superior court obtained jurisdiction over the charge. The case was reversed and remanded to the superior court for further proceedings.

Appeal by the State from judgment entered 6 October 2009 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 January 2011.

Attorney General Roy Cooper, by Jess D. Mekeel, Assistant Attorney General, for the State.

H. M. Whitesides, Jr., for Defendant-appellee.

ERVIN, Judge.

The State appeals from an order entered by the trial court granting a motion by Defendant Austin Petty to dismiss a driving while impaired charge that had been lodged against Defendant, following Defendant's appeal from his conviction for this offense in the District Court division to the Superior Court division for trial *de novo*. The trial court dismissed the charge against Defendant based upon a determination that the District Court lacked the authority to enter judgment against Defendant in light of the peculiar circumstances revealed by the present record. On appeal, the State challenges the logic upon which the trial court relied in reaching this conclusion. After careful consideration of the State's challenge to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be reversed and that this case should be remanded to the Mecklenburg County Superior Court for further proceedings not inconsistent with this opinion.

I. Procedural History

On 28 April 2006, Defendant was charged with driving while impaired. On 27 June 2006, Defendant filed a motion to dismiss the DWI charge on the grounds that he had been denied his right to timely pretrial release as guaranteed by the Supreme Court's decision in *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988). On 5 December 2006, Judge Nancy B. Norelli conducted a hearing concerning Defendant's motion and dismissed the driving while impaired charge. The State noted an appeal to the Superior Court division from Judge Norelli's order on 13 December 2006.

On 15 November 2007, the State's appeal was heard before Judge C. Phillip Ginn. On 29 November 2007, Judge Ginn entered an order (1) reversing Judge Norelli's decision to dismiss the driving while impaired charge that had been brought against Defendant, (2) requiring the State to proceed against Defendant solely on the basis of the theory of guilt set out in N.C. Gen. Stat. § 20-138.1(a)(2), and (3) remanding the case to the District Court division for further proceedings.

On 17 April 2008, Defendant filed a motion in the District Court seeking the reinstatement of Judge Norelli's decision to dismiss the

driving while impaired charge in light of this Court's decision in *State v. Morgan*, 189 N.C. App. 716, 660 S.E.2d 545, *disc. review denied*, 362 N.C. 686, 671 S.E.2d 329 (2008). The ultimate disposition of this motion is not clear from the record. On 7 April 2009, Defendant entered a plea of guilty to driving while impaired before Judge Timothy Smith in the Mecklenburg County District Court. After finding Defendant guilty, Judge Smith, as is evidenced by a handwritten notation on a judgment form, arrested judgment without making findings or conclusions or in any other way explaining the basis of his decision.

On 1 May 2009, the State filed a Motion for Appropriate Relief in which the State asserted that Judge Smith was required, following Defendant's conviction for driving while impaired, to conduct a sentencing hearing and enter judgment pursuant to N.C. Gen. Stat. § 20-179(a). A hearing at which Defendant was present and represented by counsel was conducted on the issues raised by the State's motion on the same day. At the conclusion of this hearing, Judge Smith entered a judgment against Defendant imposing Level V punishment.

On 8 May 2009, Defendant filed a notice of appeal in which he stated that, "pursuant to N.C. Gen. Stat. [§] 15A·1431," he was "giving notice of appeal and request[ing] a trial *de novo* in the Superior Court in Mecklenburg County, North Carolina on the above charges . . . [and] shows unto the court that judgment was entered May 1, 2009." On 1 June 2009, Defendant filed a motion seeking dismissal of the driving while impaired charge in which he alleged, among other things, that he had "been prejudiced by further proceeding in this case following the order arresting judgment" and requested the court "to find that all charges against this Defendant should be dismissed with prejudice."

A hearing was held before the trial court at which the issues raised by Defendant's motion were addressed on 25 September 2009. On 6 October 2009, the trial court entered an order granting Defendant's dismissal motion. The State noted an appeal to this Court from the trial court's order.

II. Legal Analysis

On appeal, the State argues that the trial court "lacked subject matter jurisdiction to engage in appellate review of the district court judgment" and erred by failing to simply address the issue of Defendant's guilt of driving while impaired in this case by means of a trial *de novo*. The State's argument has merit.

As a general proposition, a criminal defendant who appeals a conviction from the District Court division to the Superior Court division is effectively writing on a clean slate in the Superior Court. "It is established law in North Carolina that trial *de novo* in the superior court is a new trial from beginning to end, on both law and facts, disregarding completely the plea, trial, verdict and judgment below; and the superior court judgment entered upon conviction there is wholly independent of any judgment which was entered in the inferior court." *State v. Spencer*, 276 N.C. 535, 543, 173 S.E.2d 765, 771 (1970). "When an appeal of right is taken to the Superior Court, in contemplation of law it is as if the case had been brought there originally and there had been no previous trial," so that "[t]he judgment appealed from is completely annulled and is not thereafter available for any purpose." *State v. Sparrow*, 276 N.C. 499, 507, 173 S.E.2d 897, 902 (1970) (citing *State v. Goff*, 205 N.C. 545, 172 S.E. 407 (1934), and *State v. Meadows*, 234 N.C. 657, 68 S.E.2d 406 (1951) (other citations omitted). "[I]nasmuch as the trial in the Superior Court is *de novo*, alleged errors committed in the inferior court must be disregarded." *State v. Crandall*, 225 N.C. 148, 154, 33 S.E.2d 861, 864 (1945) (citing *State v. Brittain*, 143 N.C. 668, 57 S.E. 352 (1907) (other citation omitted). As a result, the Superior Court does not engage in appellate review of the correctness of the District Court's rulings in the course of handling an appeal from a District Court conviction. However, the Superior Court may, if necessary, review the proceedings conducted in the District Court for the purpose of ensuring that it has jurisdiction over the charges against the defendant, since a "trial court must have subject matter jurisdiction over a case in order to act in that case[,]" *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citing *State v. Reinhardt*, 183 N.C. App. 291, 292, 644 S.E.2d 26, 27 (2007)), and since "a court's lack of subject matter jurisdiction is not waivable and can be raised at any time." *In re K.J.L.*, 363 N.C. 343, 346, 677 S.E.2d 835, 837 (2009).

"Jurisdiction, when applied to courts and speaking generally, consists in the power to hear and determine causes[.] . . . It relates to the subject-matter of the controversy or to the person[.]" *State v. Hall*, 142 N.C. 710, 713, 55 S.E. 806, 807 (1906). " 'Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it[,] . . . [and] is conferred upon the courts by either the North Carolina Constitution or by statute.' " *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003) (quoting *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127,

130, *disc. rev. denied*, 354 N.C. 217, 554 S.E.2d 338 (2001), and *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987)). "The jurisdiction of the superior court on appeal from a conviction in district court is derivative. Defendant may not be tried *de novo* in the superior court on the original warrant without a trial and conviction in the district court." *State v. Wesson*, 16 N.C. App. 683, 689, 193 S.E.2d 425, 429 (1972), *cert. denied*, 282 N.C. 675, 194 S.E.2d 155 (1973) (citations omitted). As a result, the Superior Court division lacks jurisdiction over a misdemeanor appeal in the event that the defendant was not tried and convicted in the District Court division, *State v. Johnson*, 251 N.C. 339, 340-41 111S.E.2d 297, 298-99 (1959), or if a warrant is substantially amended in the Superior Court division so as to charge an offense different from that for which Defendant was convicted in the District Court division, *State v. Thompson*, 2 N.C. App. 508, 511-12 163 S.E.2d 410, 412 (1968). Thus, "[u]ntil defendant [is] tried and convicted in district court and [has] appealed to superior court for trial *de novo*, the superior court ha[s] no jurisdiction of the case." *State v. Killian*, 61 N.C. App. 155, 158, 300 S.E.2d 257, 259 (1983).

According to N.C. Gen. Stat. § 7A-272(a), "the district court has exclusive, original jurisdiction for the trial of . . . misdemeanors." For that reason, there can be no dispute but that the District Court division had jurisdiction over Defendant's person and the driving while impaired charge lodged against Defendant. Defendant, however, contends that Judge Smith had no "jurisdiction" to enter judgment, essentially characterizing the trial court's decision to dismiss the driving while impaired charge as a determination that Judge Smith lacked jurisdiction to enter judgment against him. In Defendant's view, the Superior Court division lacked jurisdiction because the lower court judgment had been arrested and because the State did not comply with the motion for appropriate relief statute in seeking to have judgment entered against Defendant. In other words, Defendant contends that the State's failure to comply with the statutory provisions governing motions for appropriate relief resulted in a jurisdictional defect that deprived Judge Smith of the ability to enter judgment against Defendant following his decision to arrest judgment following Defendant's guilty plea. The trial court apparently accepted the validity of Defendant's argument at the time that it dismissed the case against Defendant. We do not believe that Defendant's position rests on a correct understanding of the applicable law.

In its order dismissing the driving while impaired charge against Defendant, the trial court concluded that

> 1. Defendant entered a guilty plea to driving while impaired on April 7, 2007.
>
> 2. The District Court did not have a valid basis for arresting judgment.
>
> 3. The State did not appeal the invalid judgment, nor did it timely prepare, file or serve a Motion for Appropriate Relief.
>
> 4. The District Court was without authority to enter a judgment more than three weeks after accepting Defendant's guilty plea, when the Court had not continued prayer for judgment at the original session of court on April 7, 2009.

Among other things, we note that the trial court did not explicitly conclude that Judge Smith lacked subject matter jurisdiction over the case against Defendant; instead, it only determined that he lacked the "authority" to enter judgment. As a result, it appears that the trial court's decision, consistently with the position espoused by Defendant, rests on the understanding that a failure to comply with the statutory provisions governing motions for appropriate relief constitutes a jurisdictional defect that deprived Judge Smith of the authority to enter judgment. However, this logic is flawed, since not every deviation from required statutory procedures is jurisdictional in nature. Instead, as we have previously stated:

> [A] court's authority to act pursuant to a statute, although related, is different from its subject matter jurisdiction. Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. This power of a court to hear and determine (subject matter jurisdiction) is not to be confused with the way in which that power may be exercised in order to comply with the terms of a statute (authority to act).

Haker-Volkening, 143 N.C. App. at 693, 547 S.E.2d at 130 (citing 1 Restatement (Second) of Judgments § 11, at 108 (1982), and *Amodio v. Amodio*, 247 Conn. 724, 727-28, 724 A.2d 1084, 1086 (1999)).

The trial court's conclusion that Judge Smith erroneously entered judgment against Defendant was based on its determination that (1) Judge Smith "did not have a valid basis" for arresting judgment; that (2) the State did not appeal "the invalid judgment" or "timely prepare, file or serve" a proper motion for appropriate relief; and that (3)

Judge Smith "was without authority to enter a judgment" more than three weeks after accepting Defendant's guilty plea because he "had not continued prayer for judgment at the original session of court on April 7, 2009." These alleged errors amount to a ruling that Judge Smith improperly exercised the jurisdiction that he clearly had over Defendant and the charge against him instead of a ruling that the District Court division lacked subject matter jurisdiction over this case. In addition, assuming, without in any way deciding, that the trial court's determination that Judge Smith lacked "authority" to enter judgment against Defendant was equivalent to a determination that the District Court lacked jurisdiction over the case against Defendant, we conclude that, on the facts of this case, the trial court's ruling was in error.

Generally speaking, a particular judge's jurisdiction over a particular case terminates at the end of the session at which a particular case is heard and decided. However, in the event that a trial judge enters an invalid sentence,[1] it has the power to correct that error even if the session of court at which the sentence was imposed has expired.

> In general, a trial court loses jurisdiction to modify a judgment after the adjournment of the session. Until the expiration of the session, the judgments of the court are *in fieri* and the judge has power, in his discretion, to vacate or modify them. After the expiration of the session, this discretionary authority ends. However, if a judgment is invalid as a matter of law, the courts of North Carolina have always had the authority to vacate such judgments pursuant to petition for writ of *habeas corpus* and, more recently, by way of post conviction proceedings. For example, if it appeared from the record that a defendant was sentenced to a prison term of fifteen years upon a conviction of felonious larceny, punishable by a maximum of ten years' imprisonment, the

1. An invalid sentence or judgment, as those terms are used in this opinion and in the decisions discussed in the text, refers to sentences or judgments that a trial court lacks the authority to impose, such as a sentence that exceeds the statutory maximum. *See, e.g.*, *State v. Branch*, 134 N.C. App. 637, 641, 518 S.E.2d 213, 216 (1999) ("If a judgment is invalid as a matter of law, North Carolina Courts have the authority to vacate the invalid sentence and resentence the defendant accordingly, even if the term has ended. . . . [N.C. Gen. Stat. §] 15A-1415(b)(8) allows relief to be granted when a prison sentence was 'unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.' ") (citing *State v. Bonds*, 45 N.C. App. 62, 64, 262 S.E.2d 340, 342, *disc. review denied*, 300 N.C. 376, 267 S.E.2d 687, *cert denied*, 449 U.S. 883, 66 L. Ed. 2d 107, 101 S. Ct. 235 (1980).

> court had and has the authority to vacate such unlawful sentence either during or after the expiration of the trial session, and the defendant may then be resentenced according to law.

Bonds, 45 N.C. App. at 64, 262 S.E.2d at 342 (citing *State v. Duncan*, 222 N.C. 11, 21 S.E.2d 822 (1942), *State v. Godwin*, 210 N.C. 447, 187 S.E. 560 (1936)); *see also*, *e.g.*, *Branch*, 134 N.C. App. at 641, 518 S.E.2d at 216 (1999) (stating that, despite the defendant's contention "that the resentencing hearing was illegal because the trial court had no jurisdiction over the matter because the term of court had expired," in the event that "a judgment is invalid as a matter of law, North Carolina Courts have the authority to vacate the invalid sentence and resentence the defendant accordingly, even if the term has ended") (citing *Bonds*, 45 N.C. App. at 64, 252 S.E.2d at 342); *State v. Morgan*, 108 N.C. App. 673, 676-78, 425 S.E.2d 1, 2-4 (1993) (suggesting that the principle enunciated in *Bonds* is applicable in the District Court context), *disc. review improvidently granted*, 335 N.C. 551, 439 S.E.2d 127 (1994).

The trial court specifically concluded that "[t]here is no basis appearing on the record for the District Court's decision to arrest judgment." Although he has argued that the record clearly establishes that Judge Smith actually arrested judgment and points to testimony by an Assistant District Attorney concerning a conversation in which Judge Smith explained the reason for his decision to act in that manner, Defendant has neither challenged the trial court's determination that the record contained no explanation for Judge Smith's decision to arrest judgment or pointed to any portion of the record in which Judge Smith stated a valid basis for arresting judgment after accepting Defendant's guilty plea. On the other hand, the State argues that Judge Smith erroneously arrested judgment because N.C. Gen. Stat. § 20-179 required him to conduct a sentencing hearing and enter judgment against Defendant after accepting Defendant's guilty plea and that, even if Judge Smith intended to continue prayer for judgment in Defendant's case, he lacked the authority to do so. In view of the trial court's unchallenged conclusion that Judge Smith lacked the authority to arrest judgment in this case and the fact that we have not found any support for Judge Smith's actions in our own review of the record and the applicable law, we conclude that Judge Smith lacked the authority to arrest judgment following Defendant's guilty plea to driving while impaired in the District Court division, that his decision to arrest judgment constituted the entry of an invalid judgment, and that Judge Smith had the authority to correct this error on his own motion

even after the session of the Mecklenburg County District Court at which Defendant entered his guilty plea had come to an end.

Although the trial court and Defendant have emphasized the State's alleged failure to comply with the statutory provisions governing motions for appropriate relief as a justification for concluding that Judge Smith had no authority to enter judgment after unlawfully arresting judgment in this case, there is no requirement that any particular method be employed to inform a trial judge that he or she has entered an invalid judgment. *See*, *e.g.*, *Branch*, 134 N.C. App. at 641, 518 S.E.2d at 216 (addressing a situation in which the North Carolina Department of Correction contacted the Clerk of Superior Court following the imposition of an erroneous sentence). As a result, there is no requirement that an error of the nature at issue here be brought to the court's attention by means of a motion for appropriate relief, making it unnecessary for us to address the issues that have been debated between the parties concerning the State's compliance with the statutory provisions governing motions for appropriate relief. Having learned, by whatever means, that he lacked the authority to arrest judgment in the aftermath of Defendant's plea of guilty to driving while impaired and that he was required to conduct a sentencing hearing and enter judgment against Defendant once Defendant had pled guilty to driving while impaired, Judge Smith was authorized, and even required, to enter a valid judgment.[2] As a result, once Defendant appealed to the Superior Court from Judge Smith's judgment for a trial *de novo*, the Superior Court obtained jurisdiction over the driving while impaired charge that had been lodged against Defendant and was required to treat Defendant's case like any other misdemeanor

2. Although Defendant correctly notes that the State has not challenged the trial court's determination that Judge Smith arrested judgment and argues that the State's failure to contest this determination has preclusive effect for purposes of appeal, we are not persuaded by this argument. The mere fact that Judge Smith arrested judgment does not preclude the subsequent entry of judgment in appropriate cases. *State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990) (stating that, "[w]hile we agree that in certain cases an arrest of judgment does indeed have the effect of vacating the verdict, we find in other situations that an arrest of judgment serves only to withhold judgment on a valid verdict which remains intact"). Defendant has not established that there is anything about Judge Smith's decision to arrest judgment in this case which establishes that the arrest of judgment at issue here fell into the former, rather than the latter, category, and the trial court specifically concluded that "[t]here was no impediment to the entry of a lawful judgment." As a result, the only apparent basis for the trial court's conclusion that Judge Smith lacked the authority to enter judgment was the State's alleged failure to comply with the statutes governing motions for appropriate relief rather than any determination that Judge Smith's earlier decision to arrest judgment precluded the entry of a proper judgment.

appeal. Since the Superior Court division had jurisdiction over Defendant and the charge against him, the trial court erred by dismissing that charge based on alleged non-jurisdictional defects in the manner in which the District Court proceedings had been conducted.[3]

III. Conclusion

Thus, for the reasons set forth above, the trial court erred by dismissing the driving while impaired charge that had been lodged against Defendant. As a result, the trial court's order should be, and hereby is, reversed and this case should be, and hereby is, remanded to the Mecklenburg County Superior Court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges ELMORE and STEELMAN concur.

3. Defendant has not argued on appeal that Judge Smith was precluded by double jeopardy or other constitutional considerations from entering judgment against him after arresting judgment. Obviously, to the extent that Judge Smith's decision to arrest judgment had preclusive effect on double jeopardy or other grounds, he would have lacked the authority to enter judgment against Defendant. *State v. Morgan*, 189 N.C. App. 716, 721-22, 660 S.E.2d 545, 549-50 (2008). However, since Defendant has not asserted that Judge Smith's decision to arrest judgment triggered the application of the double jeopardy provisions of the federal and state constitutions, those principles have no application to the proper resolution of this case.

LEONARDO CORTEZ VITELA, GREGORIO LANDEROS ORTIZ, RAYMUNDO REYES GALINDO, ARTURO SEGOVIA CASTRO, ISIDRO SILVA AMARO AND EFRAIN VASQUEZ FLORES, PLAINTIFFS V. JOHN A. RICHARDSON, D/B/A J&J AMUSEMENTS, DEFENDANT

No. COA10-693

(Filed 7 June 2011)

Jurisdiction— personal jurisdiction—lack of continuous and systematic contacts

The trial court did not err in a class action alleging overwork and underpayment in violation of state and federal labor laws by granting non-resident defendant's motion to dismiss based on lack of personal jurisdiction. Plaintiffs' allegations did not arise out of defendant's connection to this state, and defendant's contacts with this state were not continuous and systematic in a matter sufficient to justify the exertion of general jurisdiction.

Appeal by plaintiffs from order entered 29 February 2010 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 1 December 2010.

North Carolina Justice Center, *by Carol L. Brooke and Clermont Fraser*, *for plaintiffs.*

Ross & Van Sickle, *PLLC*, *by R. Matthew Van Sickle and C. Thomas Ross*, *for defendant.*

ELMORE, Judge.

Leonardo Cortez Vitela, Gregorio Landeros Ortiz, Raymundo Reyes Galindo, Arturo Segovia Castro, Isidro Silva Amaro, and Efrain Vasquez Flores (together, plaintiffs), appeal from the order of the trial court granting a motion by John A. Richardson (defendant Richardson), d/b/a J&J Amusements (together, defendant), to dismiss for lack of personal jurisdiction and improper venue. After careful review, we affirm.

I. BACKGROUND

Very few facts are undisputed, and the trial court's minimal findings provide this Court with little guidance. It appears that the parties agree that defendant Richardson is the owner and operator of

defendant business, a mobile carnival called J&J Amusements, based in New Middletown, Ohio. In 2006, defendant applied to the U.S. Department of Labor for temporary certification to employ foreign workers through the H-2B visa program for work beginning in 2007. Defendant's application included at least one advertisement for positions with J&J Amusements indicating that the carnival would operate in Fayetteville, Lumberton, and Hamlet, North Carolina. A portion of defendant's application also certified that wages paid would " 'equal[] or exceed[] the prevailing wage[,]' " and that " '[t]he job opportunity's terms, conditions and occupational environment are not in contrary [sic] to Federal, State or Local law.' " Plaintiffs are a group of Mexican nationals who assert that they traveled to the United States to work for defendant in 2007 in response to his H2-B recruitment efforts.

On 22 May 2009, plaintiffs filed a class action against defendant in Wake County Superior Court alleging that defendant Richardson both overworked and underpaid plaintiffs in violation of state and federal labor laws. Defendant thereafter filed a motion, pursuant to Rule 12(b)(2) and Rule 12(b)(3), to dismiss for want of personal jurisdiction and improper venue. In an affidavit supporting the motion, defendant Richardson confirmed that he hired some Mexican nationals through the H2-B program to work for him in the 2007 season, but stated also that he was unable to "determine whether these specific plaintiffs ever worked for me." Defendant Richardson further stated that the Mexican nationals he hired in 2007 only worked for him for "a short period at the start of the season while [the carnival] operated in states other than North Carolina," and that they "left abruptly before they ever worked in North Carolina." These latter statements directly contradicted the plaintiffs' assertion, made in their complaint upon information and belief, that plaintiffs began work for defendant in North Carolina.

Plaintiffs filed a brief in opposition to the motion to dismiss which included several exhibits purporting to demonstrate the extent of defendant's contacts with North Carolina. Those exhibits included websites reflecting defendant's participation in North Carolina fairs in 2004, 2005, 2007, 2008, and 2009; North Carolina Department of Labor ride inspections and advance location notice forms from 2009; websites showing that defendant purchased worker's compensation insurance in North Carolina in 2007 and 2010; and Department of Labor records showing both that defendant's carnival was inspected

at various locations in North Carolina between 17 May 2007 and 7 June 2007 and that the carnival was to operate in Lincoln, Catawba, and Surry Counties in May and June 2007.

After considering the motions of both parties and the supporting documents proffered by each, the trial court rendered its opinion as follows:

> [This court] concludes that neither party resides in North Carolina and therefore Wake County is not the appropriate venue, that there is speculation as to whether the cause of action arose in North Carolina and whether any of the Plaintiffs ever worked in North Carolina, and that accordingly any minimum contacts with the State of North Carolina for purposes of personal jurisdiction over Defendant in this matter is too speculative, and that the Motion to Dismiss for lack of jurisdiction and inappropriate venue should be granted.

Plaintiffs timely appealed.

II. DISCUSSION

Plaintiffs claim that the trial court's determinations of improper venue and lack of personal jurisdiction were erroneous as a matter of law. Because we conclude that the trial court's grant of defendant's motion to dismiss was proper on grounds of lack of personal jurisdiction, we do not reach plaintiffs' contentions concerning the propriety of the trial court's venue determination.

Our Courts apply a two-prong test to determine the existence of personal jurisdiction over a non-resident defendant. *Deer Corp. v. Carter*, 177 N.C. App. 314, 326, 629 S.E.2d 159, 168 (2006). "First, we must determine if a basis for jurisdiction exists under the North Carolina 'long-arm' statute, and second, whether the exercise of jurisdiction over the defendant will comport with the constitutional standards of due process." *Id.* (citing *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 283, 350 S.E.2d 111, 113 (1986)). If we determine that due process would not be satisfied if jurisdiction were exercised over a particular defendant, "we need not address the question of whether jurisdiction exists under our 'long-arm' statute." *Id.*

The Due Process Clause of the Fourteenth Amendment to the United States Constitution is satisfied where either specific or general jurisdiction over a defendant in a civil matter exists in the courts of a forum state. *Havey v. Valentine*, 172 N.C. App. 812, 814-15,

616 S.E.2d 642, 646 (2005). Specific jurisdiction exists where, first, a defendant has certain minimum contacts with a given forum so that traditional notions of fair play and substantial justice are not offended by a court's exercise of jurisdiction over the defendant in that forum, *Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 632, 394 S.E.2d 651, 655 (1990), and, second, where the cause of action against the defendant was related to or arose from the defendant's activities within the forum. *Deer Corp.*, 177 N.C. App. at 327, 629 S.E.2d at 169. General jurisdiction exists where a defendant's contacts with a forum state are so "continuous and systematic" as to allow a court sitting in that forum to exercise personal jurisdiction over that defendant regardless of the nature of a plaintiff's cause of action. *Id.*

We review the trial court's conclusion that neither type of jurisdiction exists in the instant case de novo. *Id.*, 177 N.C. App. at 321-22, 629 S.E.2d at 165. We will, however, defer to the trial court's findings of facts so long as they are supported by competent evidence. *Id.*, 177 N.C. App. at 321, 629 S.E.2d at 165. Here, the trial court made informal findings of fact that neither of the parties resided in North Carolina, and that speculation existed as to whether plaintiffs ever worked in North Carolina. Neither of these findings is necessarily dispositive of defendant's claim of lack of jurisdiction. "However, when there is no request of the trial court to make [specific] findings, 'we presume that the judge found facts sufficient to support the judgment.' " *Cherry Bekaert & Holland*, 99 N.C. App. at 630, 394 S.E.2d at 654 (quoting *Church v. Carter*, 94 N.C. App. 286, 289, 380 S.E.2d 167, 169 (1989)). No such request was made in this case. Therefore, "[if the] presumed findings are supported by competent evidence in the record, [they] are conclusive on appeal, notwithstanding other evidence in the record to the contrary." *Id.* (citation omitted).

A. Lack of general jurisdiction

The trial court correctly determined that defendant's contacts with North Carolina are insufficient to establish general jurisdiction over defendant. The extent of a defendant's contacts with this State "must be determined 'by a careful scrutiny of the particular facts of each case.' " *Deer Corp.*, 177 N.C. App. at 327, 629 S.E.2d at 169 (quoting *Cameron-Brown Co.*, 83 N.C. App. at 284, 350 S.E.2d at 114). The presence of sufficient contacts is determined "not by using a mechanical formula or rule of thumb[,] but by ascertaining what is fair and reasonable under the circumstances." *Rossetto USA, Inc. v. Greensky Financial, LLC*, 191 N.C. App. 196, 200, 662 S.E.2d 909, 913 (2008)

(citation omitted). In determining whether general jurisdiction exists, the factors considered in determining the existence of specific jurisdiction are useful guideposts. *See Deer Corp.*, 177 N.C. App. at 327-28, 629 S.E.2d at 169-70 (using the first two factors of the "minimum contacts" test to determine the extent of a defendant's contacts for the purposes of a general jurisdiction analysis). Such factors include "(1) [the] quantity of the contacts between defendant and the forum state, [and] (2) [the] quality and nature of the contacts[.]" *Id.*, 177 N.C. App. at 327, 629 S.E.2d at 169 (stating further that "[a]dditional factors are 'the location of critical witnesses and material evidence, and the existence of a contract which has a substantial connection with the forum state' ").

As to the quantity and quality of defendant's contacts with North Carolina, plaintiffs produced evidence in opposition to defendant's motion to dismiss indicating that defendant has operated his mobile carnival in this state in 2004, 2005, 2007, 2008, and 2009. In each instance, defendant appears to have operated in North Carolina for no more than a few weeks. Defendant also submitted to the Department of Labor's inspections and regulations for the purposes of operating his carnival in state. Finally, defendant purchased worker's compensation insurance in North Carolina in 2007 and 2010. The trial court concluded that these contacts were insufficient to establish general jurisdiction, and we agree.

Plaintiffs contend that the facts of this case are analogous to the facts presented to this Court in *Cherry Bekaert & Holland.* In that case, this Court concluded that the defendant, a certified public accountant formerly employed by a North Carolina accountant partnership had contacts that were continuous and systematic to justify the trial court's exercise of general jurisdiction over him. *Cherry Bekaert & Holland*, 99 N.C. App. at 634-35, 394 S.E.2d at 657-58. The defendant's contacts in that case, however, were both quantitatively and qualitatively greater than the contacts of defendant; there, at the time that suit was filed against him, the defendant actively participated in the management of a resident North Carolina business. *Id.*, 99 N.C. App. at 634, 394 S.E.2d at 657. That defendant "returned to North Carolina for yearly corporate meetings, participated in partnership management decisions as managing partner of the Mobile [, Alabama,] office, consulted by telephone and corresponded with plaintiff in North Carolina concerning business matters on a continuous and prolonged basis." *Id.* Defendant on the other hand, carries on no substantial activity in North Carolina when his carnival is not operating

here, meaning that, for the vast majority of a given year, defendant's contacts with North Carolina are virtually non-existent.

This case more closely resembles the case of *Deer Corp*: there, we held that a defendant who returned telephone calls to a prospective employee in North Carolina, relayed an offer of employment to that employee in North Carolina, and visited North Carolina a number of times over several years to conduct employee training sessions, wrap-up meetings, and one international sales meeting lacked the continuous and systematic contacts necessary for an exercise of general jurisdiction. 177 N.C. App. at 328, 629 S.E.2d at 169. As was the case in *Deer Corp*., defendant's visits to North Carolina are brief, and constitute a small part of his carnival operation during carnival season. For these reasons, we agree with the trial court that North Carolina courts lack general jurisdiction over Mr. Richardson.

B. Lack of specific jurisdiction

Having decided that defendant's contacts are not sufficient to warrant the exercise of general jurisdiction over him, we must determine whether plaintiffs' cause of action is sufficiently related to the contacts he does have with North Carolina to warrant the exercise of specific jurisdiction. We conclude that any such relation is lacking.

Plaintiffs alleged in their complaint that they began work for defendant in North Carolina. Defendant Richardson, in an affidavit supporting his motion to dismiss, asserted that plaintiffs abandoned the carnival before it arrived in North Carolina. In the face of those assertions, the trial court found plaintiffs' statements as to their work in North Carolina "too speculative" to support the exercise of jurisdiction.

> "Where unverified allegations in the complaint meet plaintiff's initial burden of proving the existence of jurisdiction . . . and [the] defendant [does] not contradict plaintiff's allegations in their sworn affidavit, such allegations are accepted as true and deemed controlling" . . . . However, where, as in this case, defendants submit some form of evidence to counter plaintiffs' allegations, those allegations can no longer be taken as true or controlling and plaintiffs cannot rest on the allegations of the complaint.

Bruggeman v. Meditrust Acquisition Co., 138 N.C. App. 612, 615-16, 532 S.E.2d 215, 218 (2000) (quoting *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998)). A plaintiff's burden of demonstrating prima facie grounds for personal jurisdiction under such circumstances can be satisfied only where some

form of evidence in the record supports the exercise of personal jurisdiction. *Id.*, 138 N.C. App. at 616, 532 S.E.2d at 218 (citing *Liberty Finance Co. v. North Augusta Computer Store*, 100 N.C. App. 279, 395 S.E.2d 709 (1990)).

In response to defendant's motion and affidavit, plaintiffs filed a brief containing evidence concerning defendant's contacts with North Carolina, including evidence that defendant operated the carnival in North Carolina in 2007. None of this evidence, however, contradicts defendant Richardson's assertion that plaintiffs ceased working for him prior to the carnival's arrival in North Carolina. We presume that the trial court's finding that plaintiffs' contentions were "too speculative" amounts to a finding that plaintiffs did not work in North Carolina. This presumed finding is supported by the record.

If, as the trial court found, plaintiffs never worked in North Carolina, defendant's alleged misbehaviors do not arise from or relate to his contacts with this State. *See Brown v. Meter*, 199 N.C. App. 50, 58, 681 S.E.2d 382, 388-89 (2009) (noting that specific jurisdiction did not exist where a tire manufacturer was sued for an accident, allegedly caused by defective tires, that occurred in France). Specific jurisdiction is, therefore, lacking.

Plaintiffs contend, however, that personal jurisdiction might still be properly exercised over defendant because plaintiffs' causes of action relate to the breach of an employment contract that has a substantial relation to North Carolina. "Although a contractual relationship between a North Carolina resident and an out-of-state party alone does not automatically establish the necessary minimum contacts with this State, nevertheless, a single contract may be a sufficient basis for the exercise of in personam jurisdiction." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 367, 348 S.E.2d 782, 786 (1986).

Plaintiffs rely on defendant's application and advertisements for H2-B workers and, specifically, on the references to North Carolina contained therein as conclusive proof that defendant and plaintiffs formed a binding employment contract with a substantial connection to this state. We cannot agree with plaintiffs' view.

In *Tom Togs, Inc.*, for example, this Court that held a contract had a substantial connection with this state where an out-of-state defendant contacted the plaintiff in North Carolina to instigate contract negotiations and where the contract was to be substantially performed in North Carolina. *Id.*, 318 N.C. at 367, 348 S.E.2d at

786-87. By contrast, plaintiffs in the instant case are not North Carolina residents, and only a small portion of the work they were employed to perform was scheduled to take place in North Carolina. For these reasons, we hold that specific jurisdiction has not been shown to exist in this case.

III. CONCLUSION

Because plaintiffs' allegations against defendant did not arise out of defendant's connection to this state, and because defendant's contacts with this state are not continuous and systematic in a manner sufficient to justify the exertion of general jurisdiction over his person, the order of the trial court granting defendant's motion to dismiss for lack of personal jurisdiction is affirmed.

Affirmed.

Judges HUNTER, Robert C. and CALABRIA concur.

EVONIK ENERGY SERVICES GMBH, PLAINTIFF v. FRANK EBINGER, EBINGER KATALYSATORSERVICE GMBH & CO. KG, ENVICA GMBH N/K/A EBINGER GMBH, ENVICA KAT GMBH, AND EBINGER VERWALTUNGS GMBH DEFENDANTS

No. COA10-1299

(Filed 7 June 2011)

Jurisdiction— personal jurisdiction—due process—lack of minimum contacts

The trial court erred in a declaratory judgment action by concluding that exercising personal jurisdiction would not violate defendants' due process rights. Defendants did not have the requisite minimum contacts with North Carolina, defendants' contacts were not the source of or closely related to this cause of action, and North Carolina did not have a strong interest in resolving the effects of a breach of contract under German law on matters of European and United States patent law.

Appeal by Defendants from order entered 21 May 2010 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 March 2011.

Alston & Bird LLP, by Benjamin F. Sidbury, Mark Vasco, Scott Stevens, and Debra Lofano, for Plaintiff.

Robinson Bradshaw & Hinson, P.A., by Mark W. Merritt and Lawrence C. Moore, III, for Defendants.

STEPHENS, Judge.

Factual and Procedural Background

On 21 June 2000, Maik Blohm ("Blohm"), a German citizen, and Katalysatorservice GmbH ("KAS"), a German corporation, entered into an employment agreement, the terms of which provided that "Blohm shall treat all internal corporate matters that have been entrusted to him or that he has otherwise been privy to as confidential. This obligation shall continue beyond the termination of the employment relationship." Subsequently, KAS' name was changed to ENVICA Kat GmbH ("ENVICA Kat"), and Blohm and ENVICA Kat executed another employment agreement, which again provided that "Blohm shall maintain the strictest secrecy about all operational and business matters and processes of ENVICA Kat which become known to him in his work and its surrounding circumstances both during the employment relationship and after its termination." In June 2004, Blohm left ENVICA Kat.[1]

On 16 December 2005, patent application number 05 027 634.4 (the "European Patent") was filed with the European Patent Office;[2] Blohm was listed as co-inventor on the patent application. Between 15 December 2006 and 1 April 2009, patent application numbers 11/640,475, 12/384,122, and 12/384,159 (the "United States Applications") were filed with the United States Patent Office; each application named Blohm as a co-inventor and listed the filing date of the European Patent as the "Foreign Application Priority Date." Sometime thereafter, Blohm transferred ownership of the European Patent and the United States Applications to Plaintiff Evonik Energy Services GmbH ("Evonik"), a German corporation whose wholly-owned subsidiary Evonik Energy Services LLC is a North Carolina company.

On 29 June 2009, Frank Ebinger, on behalf of Ebinger GmbH, of which Ebinger Kat is a wholly-owned subsidiary, sent a letter to

1. ENVICA Kat has since changed its name to Ebinger Katalysatorservice GmbH ("Ebinger Kat").

2. The record contains what appears to be the actual patent "EP 1 797 954 A1," which lists the "Anmeldenummer," or application number, as "05 027 634.4."

Blohm informing him that Ebinger GmbH's "research has shown that [the European Patent] contains information that was almost exclusively obtained within the context of your work for our company." The letter also stated that Blohm's employment agreement contains a non-disclosure clause "that prohibits the dissemination of such information [] after the employment relationship has been terminated[,]" and that Ebinger GmbH "will hold [Blohm] liable for any direct and/or indirect damages that [his] breach of contract might create for [Ebinger GmbH]."

On 16 October 2009, counsel for Ebinger Kat sent another letter to Blohm, informing Blohm that his "consultancy contract" with Evonik "constitutes another grave violation of your [] obligation to maintain confidentiality."[3]

On 17 November 2009, Evonik filed in Mecklenburg County Superior Court a complaint against Frank Ebinger, Ebinger Kat, "Envica GmbH n/k/a Ebinger GmbH," ENVICA Kat, and "Ebinger Verwaltungs GmbH" (collectively "Defendants"). In the complaint, Evonik (1) alleged that Evonik is the owner and assignee of the United States Applications; (2) alleged that Defendants sent to Blohm letters in which Defendants asserted ownership of the United States Applications; and (3) sought "a declaration that [Evonik] is the lawful owner of the [United States Applications]."

On 21 April 2010, Defendants moved to dismiss the complaint under North Carolina Rule of Civil Procedure 12(b)(6) based on an alleged lack of both subject matter and personal jurisdiction. The parties submitted affidavits, exhibits, and memoranda regarding Defendants' motion to dismiss, and on 21 May 2010, following a 12 May 2010 hearing, the trial court, the Honorable W. Robert Bell presiding, denied Defendants' motions. On 26 May 2010, Defendants gave notice of appeal from the trial court's order.

Discussion

In the order denying Defendants' motion to dismiss, the trial court did not make any findings to support its conclusion that "Defendants are subject to personal jurisdiction in the State of North Carolina and that the exercise of jurisdiction over [] Defendants satisfies due process." Where no such findings are made, "it will be

3. According to Frank Ebinger's affidavit, a "criminal complaint" was made "against Blohm in Germany for misappropriation of [Ebinger Kat's] trade secrets."

presumed that the judge, upon proper evidence, found facts sufficient to support his judgment." *City of Salisbury v. Kirk Realty Co.*, 48 N.C. App. 427, 429, 268 S.E.2d 873, 875 (1980) (quoting *Haiduven v. Cooper*, 23 N.C. App. 67, 69, 208 S.E.2d 223, 225 (1974)). On appeal, we "review the record to determine whether it contains competent evidence to support the trial court's presumed findings to support its ruling that [Defendants are] subject to personal jurisdiction in the courts of this state." *A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 258-59, 625 S.E.2d 894, 898 (2006).

We note that on appeal, in support of its argument that the trial court properly determined that this State's exercise of personal jurisdiction over Defendants "satisfies due process," Evonik offers evidence of Defendants' electronic communications with "SCR Tech," a North Carolina corporation based in Charlotte. Evonik contends that these communications establish, *inter alia*, a continuing business relationship between Defendants and SCR Tech.[4] Evonik attempted to put this same evidence before the trial court at the hearing on Defendants' motion to dismiss, but the trial court declined Evonik's "offer" of "the opportunity [] to review some of these [communications] in camera if you think it would assist the Court," stating that the court was "going to stick with the briefs right now, thank you." The hearing ended with that exchange, and there is no indication that the trial court later accepted the offer to review the additional evidence. In light of the trial court's decision not to review any of this evidence, we think it illogical to presume that the trial court made a finding of fact regarding this evidence when the court had declined to consider the evidence at the hearing and had no further opportunity to review it. To the extent there would be a presumption that the trial court properly considered this evidence and made findings regarding the evidence, we conclude that such a presumption has been rebutted. Accordingly, we will not presume findings by the trial court based upon evidence of electronic communications purporting to establish additional contacts between Defendants and North Carolina.

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4. In 2001, ENVICA Kat, along with another company, co-founded "SCR Tech GmbH," which in turn founded "the American company SCR Tech LLC in Charlotte[, North Carolina]." In 2005, SCR Tech, ENVICA Kat, and another company entered into a settlement agreement, whereby ENVICA Kat agreed to sell SCR Tech to the other company. Currently, litigation involving trade secret misappropriation is pending between Evonik and SCR Tech. Evonik contends that Defendants have actively participated in, and supported SCR Tech in, the "SCR Tech litigation." Evonik further contends that Defendants and SCR Tech have corresponded with each other in efforts to form a long-term business partnership.

Without this additional evidence of Defendants' contacts, the only evidence offered by Evonik to satisfy its burden of proving North Carolina's personal jurisdiction over Defendants is as follows: Frank Ebinger's participation as a third-party witness in the SCR Tech litigation; Frank Ebinger's 2008 meeting in North Carolina with the president of SCR Tech, from which no "business transaction" resulted; the two letters to Blohm; and Defendants' contractual obligations under the 2005 settlement agreement following the sale of SCR Tech. For the following reasons, we find this evidence, and those presumed findings logically supported by this evidence, insufficient to support the trial court's conclusion that North Carolina's exercise of personal jurisdiction over Defendants satisfies due process.[5]

> To satisfy the requirements of the due process clause, there must exist certain minimum contacts between the non-resident defendant and the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. There must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.

A.R. Haire, 176 N.C. App. at 259-60, 625 S.E.2d at 899 (internal quotation marks, citations, and brackets omitted).

In determining whether minimum contacts exist, the court looks at several factors, including: (1) "the quantity of the contacts;" (2) "the nature and quality of the contacts;" (3) "the source and connection of the cause of action with those contacts;" (4) the interest of the forum state; and (5) the convenience to the parties. *Phoenix Am. Corp. v. Brissey*, 46 N.C. App. 527, 530-31, 265 S.E.2d 476, 479 (1980). These factors are not to be applied mechanically; rather, the court must weigh the factors and determine what is "fair and reasonable and just" to both parties. *Id.* at 531, 265 S.E.2d at 479 (citation omitted). "No single factor controls, but they all must be weighed in light of fundamental fairness and the circumstances of the case." *B.F. Goodrich Co. v. Tire King of Greensboro, Inc.*, 80 N.C. App. 129, 132, 341 S.E.2d 65, 67 (1986).

Regarding the quantity and quality of Defendants' contacts in this case, we note that the five contacts alleged by Evonik—two letters

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5. For ease of discussion, we assume, without deciding, that all of the Defendants, both corporations and persons, are so interrelated that evidence supporting personal jurisdiction over one defendant would support personal jurisdiction over all Defendants.

written from Germany, Frank Ebinger's participation as a witness in an unrelated litigation, Frank Ebinger's attendance at an unrelated business meeting, and a 2005 settlement agreement—are sporadic rather than continuous, and none of the contacts shows Defendants purposefully availing themselves "of the privilege of conducting activities within the forum state" or "invoking the benefits and protections of its laws." *A.R. Haire*, 176 N.C. App. at 260, 625 S.E.2d at 899. Although, as a general matter, Frank Ebinger's participation as a witness in a North Carolina proceeding may appear to be an invocation of the benefits of North Carolina laws, as previously held by this Court, participation in an unrelated litigation in the forum state is insufficient to support a finding that a defendant's contacts properly subject that defendant to personal jurisdiction in our courts. *See Buck v. Heavner*, 93 N.C. App. 142, 146, 377 S.E.2d 75, 78 (1989) (in ruling that the trial court improperly found defendant subject to personal jurisdiction in North Carolina, noting that "[d]efendant's general appearance in the custody and support action was a submission to jurisdiction in that action only and does not waive his right to object to jurisdiction in separate causes of action."). Furthermore, while Evonik may be correct in asserting that ENVICA Kat's signature on a settlement agreement involving North Carolina parties subjects ENVICA Kat to a "continuing obligation" to North Carolina residents, our Supreme Court has held that a single contract between a nonparty state resident and nonresident defendant does not automatically confer jurisdiction where that contract does not have a substantial connection with the State. *See Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 367, 348 S.E.2d 782, 786 (1986) ("Although a contractual relationship between a North Carolina resident and an out-of-state party alone does not automatically establish the necessary minimum contacts with this State, nevertheless, a single contract may be a sufficient basis for the exercise of in *personam* jurisdiction if it has a substantial connection with this State." (emphasis in original)). The "continuing obligation" referred to by Evonik is the contract provision stating that ENVICA Kat will not use certain licensed intellectual property in "NAFTA Territories."[6] Such an obligation to refrain from operating in "NAFTA Territories," which include North Carolina, can hardly be seen as a contractual obligation with a "substantial connection" to North Carolina. In our view, the quantity and quality of Defendants' contacts with North Carolina do not sup-

6. "NAFTA" is an acronym for the North American Free Trade Agreement. The signatories to this agreement are Canada, the United States, and Mexico.

port a finding that the due process requirement of minimum contacts has been satisfied in this case.

Furthermore, regarding "the source and connection of the cause of action with those contacts," we conclude that Defendants' contacts are not the source of Evonik's cause of action. Evonik contends on appeal that the sources of the cause of action are Frank Ebinger's participation in the SCR Tech litigation and the letters to Blohm. However, while these actions by Defendants may have prompted Evonik to initiate the present litigation, these actions are not the source of the cause of action and did not "give rise to" the litigation. Evonik's claim is not a defamation claim, where the cause of action would arise from statements by Defendants. Rather, it is a declaratory judgment claim, which is only available when a party is asserting rights "under a deed, will, written contract or other writings constituting a contract" or when a party's rights are affected "by a statute, municipal ordinance, contract or franchise." N.C. Gen. Stat. § 1-254 (2009). Evonik is seeking a declaration that it is the owner of the United States Applications. There have been no direct challenges to Evonik's ownership based on the assignment of the United States Applications. The only challenge to Evonik's ownership is the "cloud" placed on that ownership by a series of hypothetical circumstances rooted initially in Frank Ebinger's and Ebinger Kat's assertion that Blohm's application for the European Patent was a violation of an employment agreement between Blohm and KAS/ENVICA Kat.[7] As such, the sources of Evonik's declaratory judgment claim are the employment contracts, which notably were signed by the parties in Germany and are governed by German law. Accordingly, we conclude that Defendants' contacts are only tangentially connected to the cause of action and are certainly not the source of Evonik's declaratory judgment claim.

The next factor in the minimum contacts analysis—the interest of the forum state—likewise militates against North Carolina's exercise of personal jurisdiction in this case. In order for our courts to resolve Evonik's claim and fully determine its ownership of the United States Applications, we would have to ascertain (1) whether Blohm actually violated the non-disclosure clauses of the employment agreements (a

7. Evonik contends that by instituting a trade secret misappropriation action against Blohm, Ebinger Kat has "placed a cloud" on Evonik's ownership of the United States Applications. Evonik contends that "[a]n adverse judgment against [] Blohm, who is co-inventor of the [United States Applications], could affect the ownership status of the [United States Applications]." (Emphasis added).

matter of German contract law currently being considered in German courts); (2) whether Blohm's violation would affect his inventor status on the European Patent (a matter of European patent law); and (3) whether a change in the inventor status on the European Patent would affect Blohm's claim of priority to the European Patent and his inventor status on the United States Applications (a matter of United States patent law). While our courts may have an interest in providing a forum for Evonik to address its grievances, *Tom Togs*, 318 N.C. at 367, 348 S.E.2d at 787 ("It is generally conceded that a state has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 85 L. Ed. 2d 528, 541 (1985))), we clearly have no interest in pronouncing on the effects of a breach of contract under German law on matters of European and United States Patent law. Surely the principles of comity and preemption support a finding that our Courts have little interest in resolving this matter.

Finally, regarding the factor of convenience for the parties, we conclude that, in spite of Frank Ebinger's two trips to North Carolina, it would be inconvenient for Defendants to defend this matter in North Carolina based on their location in Germany. This is especially so in light of our conclusions that (1) Defendants have few contacts with North Carolina; (2) Defendants' contacts are sporadic; (3) Defendants' contacts are not the source of, and are not closely related to, Evonik's cause of action; and (4) the State of North Carolina does not have a strong interest in resolving this matter.

Based on the foregoing, we conclude that Defendants do not have the requisite minimum contacts with this State and that the trial court erroneously found that this State's exercise of personal jurisdiction over Defendants would not violate Defendants' due process rights. Accordingly, the order of the trial court is

REVERSED.

Judges HUNTER, ROBERT C., and ERVIN concur.

STATE OF NORTH CAROLINA v. GEORGE R. WILLIAMSON

No. COA10-883

(Filed 7 June 2011)

1. Appeal and Error— motion for appropriate relief—mootness

Defendant's motion for appropriate relief under N.C.G.S. § 14A-1415(b)(3) in an assault on a female case was moot because the Court of Appeals vacated the trial court's order and remanded for a new hearing on defendant's motion and request for dismissal.

2. Constitutional Law— right to speedy trial—trial court's failure to make proper inquiry

The trial court erred in an assault on a female case by denying defendant's motion for dismissal based on the State's failure to comply with his request for a speedy trial under N.C.G.S. § 15A-711. The record was void of any evidence that the trial court made the appropriate inquiry in consideration of defenddant's motion. The order was vacated and remanded for a new hearing on the motion.

Appeal by Defendant from Judgment entered 4 February 2010 by Judge Alan Z. Thornburg in Yancey County Superior Court. Heard in the Court of Appeals 15 December 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Mabel Y. Bullock, for the State.

Faith S. Bushnaq for defendant-appellant.

HUNTER, JR., Robert N., Judge.

George R. Williamson ("Defendant") appeals from his conviction for assault on a female and argues the trial court erred in denying his Motion and Request for Dismissal. We vacate the Order denying his Motion and remand for a new hearing.

I. Factual & Procedural History

On 4 February 2008, Defendant was indicted for felony assault inflicting serious bodily injury and assault on a female. The indictments stem from an incident that occurred on 12 October 2007, at which time Defendant was on parole from a prior conviction. Consequently, on 30 October 2007, Defendant's parole was revoked

and he was incarcerated at Central Prison in Raleigh, North Carolina. Sometime thereafter, Defendant was transferred to Avery/Mitchell Correctional Facility in Spruce Pine, North Carolina.

On 16 April 2008, Defendant wrote to his appointed counsel requesting his attorney file a motion for a speedy trial. Defendant sent a copy of the letter to the Clerk of Superior Court. Nearly one year later, Defendant drafted a "Motion for a Speedy Trial" in which he stated that he had been detained by the Department of Correction for approximately eighteen months awaiting trial; that his first appointed attorney refused to file a motion for a speedy trial; and pursuant to N.C. Gen. Stat. § 15A-711, he was requesting "a speedy disposition of the charges pending" against him. Defendant's "Motion" was dated 9 April 2009 and indicates that Defendant sent copies to his attorney, Shelly Blum, District Attorney Virginia Thompson, and Senior Resident Judge James L. Baker, Jr.

In a letter dated 20 April 2009, Judge Baker replied to Defendant stating that he received Defendant's Motion; that the Motion did not appear to be filed with the Clerk of Superior Court; and that copies of the Motion were sent to the District Attorney and Defendant's attorney. Judge Baker also stated Defendant's case was scheduled for 26 May 2009 in Yancey County Administrative Court, at which time any pretrial motions could be made and, if the case was not disposed of at that hearing, a trial date would be set. Finally, Judge Baker stated he was sending copies of his response and Defendant's Motion to the Clerk of Court, the District Attorney, and to Defendant's attorney. Both Judge Baker's letter and Defendant's Motion were date-stamped 22 April 2009 by the Yancey County Clerk of Superior Court.

At the 26 May 2009 Administrative Court hearing, Defendant's case was scheduled on the trial calendar, but was subsequently continued several times due to older cases taking precedence, the unavailability of an expert witness, and because the victim in the incident for which Defendant was charged with assault was scheduled for an unrelated surgery. The trial was ultimately scheduled for 1 February 2010.

On 3 November 2009, Defendant drafted a *pro se* Motion and Request for Dismissal pursuant to N.C. Gen. Stat. § 15A-711 for the State's failure to prosecute and for the denial of Defendant's right to a speedy trial guaranteed under the Sixth Amendment of the United States Constitution and the Law of the Land Clause of the North Carolina Constitution; the Motion was filed 9 December 2009.

Defendant's trial came on for hearing during the 1 February 2010 Criminal Session of the Yancey County Superior Court, Judge Alan Z. Thornburg presiding. At the start of the hearing, the trial judge asked counsel if there were any pretrial motions to be heard. In response, Defendant's attorney stated that Defendant filed a "*pro se* motion for a speedy trial" and a Motion and Request for Dismissal for failure to "give him a speedy trial," and that Defendant asked counsel to present evidence on the motions. The trial court permitted Defendant's attorney to present evidence on the Motion and Request for Dismissal including Defendant's in-court testimony concerning his incarceration since 30 October 2007 for the alleged assault. The State participated in the hearing on Defendant's Motion and argued that the Motion should be denied. The District Attorney argued the State responded to Defendant's "speedy trial" motion appropriately, noting that Judge Baker replied to Defendant in his 22 April 2009 letter and calendared the trial for an administrative court date: "The State would contend that we have addressed this as is required by Statute calendaring this trial and has done some [sic] in a timely manner."

The Defendant further testified about his knowledge of the whereabouts of a witness to the 12 October 2007 events on direct examination by his appointed counsel and on cross-examination by the State. The trial court denied Defendant's Motion for a speedy trial, finding "no grounds for dismissal" and questioned whether there was a separate motion for counsels' questions regarding attempts to locate a witness. Defendant's counsel responded there was not a separate motion regarding the availability of the witness; his questions were part of his "evidentiary presentation." The trial court then proceeded with Defendant's trial.

Defendant was found guilty of one count of assault on a female and was sentenced to seventy-five days, with credit for thirty days for time served on the charge prior to his sentencing. The trial court ordered the sentence was to be served at the conclusion of all other sentences Defendant was serving at the time of his sentencing. Defendant gave notice of appeal in open court.

[1] On 6 December 2010, Defendant filed a Motion for Appropriate Relief ("MAR") pursuant to N.C. Gen. Stat. § 15A-1415(b)(3). In this Motion, Defendant alleges that his due process rights under the Fourteenth Amendment of the United States Constitution would be violated if his motion to dismiss based on an alleged violation of N.C. Gen. Stat. § 15A-711 was decided without consideration of additional evidence filed with his MAR. Because we vacate the trial court's

Order and remand for a new hearing on Defendant's Motion and Request for Dismissal, his Motion for Appropriate Relief is moot.

II. Jurisdiction & Standard of Review

As Defendant appeals from the final judgment of a superior court, an appeal lies of right with this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2009). We review the trial court's denial of Defendant's Motion and Request for Dismissal for errors of law *de novo*. *See State v. Doisey*, 162 N.C. App. 447, 453, 590 S.E.2d 886, 891 (2004) (affording no deference to the trial court).

III. Analysis

[2] Defendant's sole argument on appeal is the trial court erred in denying his Motion and Request for Dismissal for the State's failure to comply with his request for a "speedy trial" pursuant to N.C. Gen. Stat. § 15A-711. Before addressing the merits of Defendant's appeal, we feel it is necessary to clarify the nature of Defendant's filings in the trial court; this Court addressed similar misinterpretations of section 15A-711 in *State v. Doisey*, and they bear repeating here. *Doisey*, 162 N.C. App. at 453, 590 S.E.2d at 891.

First, while N.C. Gen. Stat. § 15A-711 is sometimes referred to as a "speedy trial" statute, it is an improper characterization of the statute; the statute does not guarantee a defendant the right to a speedy trial. That right is guaranteed by our state and federal constitutions. *Doisey*, 162 N.C. App. at 450, 590 S.E.2d at 889. Rather, section 15A-711 provides an imprisoned criminal defendant the right "to formally request that the prosecutor make a written request for his return to the custody of local law enforcement officers in the jurisdiction in which he has other pending charges." *Doisey*, 162 N.C. App. at 451, 590 S.E.2d at 890 (explaining N.C. Gen. Stat. § 15A-711 (2003)). The temporary release of the defendant to the local jurisdiction may not exceed 60 days. *Id.* at 449, 590 S.E.2d 889. If the prosecutor is properly served with the defendant's request and fails to make a written request to the custodian of the institution where the defendant is confined within six months from the date the defendant's request is filed with the clerk of court, the charges pending against the defendant must be dismissed. N.C. Gen. Stat. § 15A-711(a), (c) (2009); *Doisey*, 162 N.C. App. at 450, 590 S.E.2d at 889.

The State's compliance with section 15A-711 does not require that the defendant's trial occur within a given timeframe. *State v. Dammons*, 293 N.C. 263, 267, 237 S.E.2d 834, 837 (1977); *Doisey*, 162

N.C. App. at 450, 590 S.E.2d at 889. Rather, the State satisfies its statutory duty when the prosecutor timely makes the written request for the transfer of the defendant, "whether or not the trial actually takes place during the statutory period of six months plus the sixty days temporary release to local law enforcement officials." *Doisey*, 162 N.C. App. at 450-51, 590 S.E.2d at 890.

Second, although requests for the prosecutor's compliance with section 15A-711 are sometimes styled as "motions" for a "speedy trial," the statute does not authorize a defendant to submit a motion to the trial court. *Id.* at 451, 590 S.E.2d at 890 ("[N.C. Gen. Stat.] § 15A-711(c) does not require a defendant to, *e.g.*, 'apply to the trial court' or 'file a motion seeking' that the prosecutor comply with the statute."). Nor does the statute authorize the trial court to enter an order pursuant to a defendant's request. *Id.* Accordingly, Defendant's 22 April 2009 "motion for a speedy trial" is not a motion, but a request for the prosecutor's compliance with the statute. Subsequent to his request, Defendant filed a *pro se* Motion and Request for Dismissal on 9 December 2009, citing N.C. Gen. Stat. § 15A-711, and claiming the District Attorney failed to comply with the statute.

A. Counsel's Adoption of Defendant's *Pro Se* Motion

In response to Defendant's argument that the trial court erred in failing to dismiss the charges against him, the State cites our Supreme Court's decision in *State v. Grooms* and argues that Defendant had no right to file a *pro se* motion while he was represented by appointed counsel. 353 N.C. 50, 61, 540 S.E.2d 713, 721 (2000) ("Having elected for representation by appointed defense counsel, defendant cannot also file motions on his own behalf or attempt to represent himself.") *cert. denied*, 534 U.S. 838, 122 S. Ct. 93 (2001). When Defendant submitted his 22 April 2009 request for a speedy trial and his 9 December 2009 Motion and Request for Dismissal, he was represented by counsel. Defendant argues, however, that his attorney adopted his *pro se* motion when his attorney presented evidence to the trial court in support of the Motion. We agree with Defendant's argument.

While the State also cites *State v. Williams*, 363 N.C. 689, 686 S.E.2d 493 (2009), *cert. denied*, —— U.S. ——, 131 S. Ct. 149 (2010), in which our Supreme Court rejected a similar argument, we find the present case distinguishable. In *Williams*, our Supreme Court rejected the defendant's argument that the prohibition against filing *pro se* motions while represented by counsel did not apply in that case because his counsel "adopted" the motions. *Williams*, 363 N.C.

at 700, 686 S.E.2d at 501 (concluding counsel did not adopt the defendant's motions where counsel made no arguments on the motions and merely stated to the trial court, " 'The defendant filed some *pro se* motions. We need rulings on those.' ").

We conclude the facts of the instant case are more aligned with this Court's recent decision in *State v. Howell*, No. 10-476, —— N.C. App. ——, —— S.E.2d ——, 2011 WL 1645851 (May 3, 2011). In *Howell*, the defendant, while represented by counsel, filed a request pursuant to N.C. Gen. Stat. § 15A-711 and, subsequently, a *pro se* Motion and Request for Dismissal for the State's failure to comply with his request for a speedy trial. *Id.* at ——, —— S.E.2d at ——, 2011 WL 1645851 at *1. At trial, the defendant's counsel and the State made arguments concerning N.C. Gen. Stat. § 15A-711 and the defendant's right to a speedy trial under the state and federal constitutions, and the trial court granted the motion. *Id.* On appeal, the State argued the trial court should not have addressed the motion because the defendant was represented by counsel. *Id.* In rejecting the State's argument, we noted that "[n]owhere in *Williams* or *Grooms* does our Supreme Court state that a trial court cannot consider a motion filed by a defendant personally when the defendant is represented by counsel, only that it is not error for the trial court to refuse to do so." *Id.* at ——, —— S.E.2d at ——, 2011 WL 1645851 at *2.

In the present case, Defendant filed a Motion and Request for Dismissal pursuant to N.C. Gen. Stat. § 15A-711, the trial court addressed the Motion, and Defendant's counsel and the State presented arguments on the merits of the Motion. Accordingly, we reject the State's argument. The trial court did not err in addressing Defendant's Motion.

B. Trial Court's Denial of Defendant's Motion

Next, the State argues Defendant is not entitled to relief under N.C. Gen. Stat. § 15A-711, because the State complied with the statute by making written requests to the Department of Correction to have Defendant transferred to the local authorities for his trial. In support of this argument, the State refers to "numerous writs" included in the amended record. A review of the record reveals one Application and Writ of Habeas Corpus Ad Prosequendum that is dated within the six-month time period after Defendant's 22 April 2009 request pursuant to section 15A-711. That writ is dated 23 April 2009—the day after Defendant's request was filed—but the Writ is not date-stamped by

the clerk of court. *See* N.C. R. App. P. 9(b)(3) (2011) ("Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed . . . ."). While this Court has noted, on at least one occasion, that Rule 9(b)(3) does not require a date-stamp on "each paper" in the record, the record in that case contained an affidavit in which the affiant averred to the date on which the paper in question was filed. *In re S.J.M.*, 184 N.C. App. 42, 49, 645 S.E.2d 798, 802, (2007), *aff'd*, 362 N.C. 230, 657 S.E.2d 354 (2008). The record in the present case contains no such evidence. In fact, we find no reference in the transcript to the 23 April 2009 writ.

During the hearing on the Motion, the District Attorney argued the State complied with section 15A-711 by scheduling Defendant's case on the administrative calendar. The calendaring of Defendant's case, however, is not sufficient to comply with the statute. *See Dammons*, 293 N.C. at 267, 237 S.E.2d at 837 ("The statute provides that following defendant's request the state must proceed within six months 'pursuant to subsection (a),' that is, not to trial but to request a defendant's temporary release for trial . . . .") (quoting N.C. Gen. Stat. § 15A-711(c)); *State v. Turner*, 34 N.C. App. 78, 85, 237 S.E.2d 318, 323 (1977) ("The State proceeded within the six-month limitation when it made the request for the defendant . . . ."). Rather, "[t]he appropriate inquiry upon a motion to dismiss for failure to comply with G.S. § 15A-711 is whether the prosecutor made a written request for defendant's transfer to a local law enforcement facility within six months after defendant files his request." *Doisey*, 162 N.C. App. at 453, 590 S.E.2d at 891. Because the record in the present case is void of any evidence the trial court made the proper inquiry in response to Defendant's Motion, we must vacate the trial court's Order and remand for a new hearing on the Motion. *See Howell*, —— N.C. App. at ——, —— S.E.2d. at ——, 2011 WL 1645851 at *6 (vacating order and remanding to trial court due to trial court's incomplete analysis on the defendant's motion and request to dismiss for State's failure to comply with N.C. Gen. Stat. § 15A-711); *Doisey*, 162 N.C. App. at 453, 590 S.E.2d at 891 (reversing and remanding for same).

IV. Conclusion

In sum, we conclude the trial court did not err in considering Defendant's Motion and Request for Dismissal for the State's alleged failure to comply with N.C. Gen. Stat. § 15A-711. The record, however, is void of any evidence the trial court made the appropriate inquiry in consideration of Defendant's Motion. Accordingly, the trial court's

Order denying Defendant's Motion and Request for Dismissal is vacated and we remand for a new hearing on the Motion.

Vacated and remanded.

Judges STEELMAN and STEPHENS concur.

VARIETY WHOLESALERS, INC., PLAINTIFF v. SALEM LOGISTICS TRAFFIC SERVICES, LLC, SALEM LOGISTICS, INC., SALEM LOGISTICS TRANSPORT SERVICES, LLC, WINSTON TRANSPORTATION MANAGEMENT, LLC, OVERBROOK LEASING, LLC, SALEM LOGISTICS TRANSPORT FINANCE, LLC, DAVID F. ESHELMAN AND ARK ROYAL CAPITAL, LLC, DEFENDANTS

No. COA10-1285

(Filed 7 June 2011)

1. Fraud— constructive fraud—no fiduciary or confidential relationship

The trial court did not err by granting summary judgment in favor of defendant Ark on a constructive fraud claim. There was no evidence to warrant the existence of a fiduciary or confidential relationship between the parties.

2. Conversion— contested funds—no ownership interest

The trial court erred by granting summary judgment in favor of plaintiff on a conversion claim. Plaintiff did not retain an ownership interest in the contested funds.

Appeal by Ark Royal Capital, LLC, from order entered 19 April 2010 and an amended order entered 12 May 2010, and cross-appeal by Variety Wholesalers, Inc., from order entered 19 April 2010, by Judge Howard E. Manning, Jr., in Vance County Superior Court. Heard in the Court of Appeals 11 May 2011.

Wyrick Robbins Yates & Ponton, LLP, by K. Edward Greene, Tobias S. Hampson, Paul J. Puryear, Jr., and Grady L. Shields, for plaintiff cross-appellant-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Jim W. Phillips, Jr., and Alexander Elkan, for Ark Royal Capital, LLC, defendant appellant-appellee.

Bell, Davis & Pitt, P.A., by William K. Davis and Alan M. Ruley for North Carolina Bankers Association amicus curiae.

McCULLOUGH, Judge.

Variety Wholesalers, Inc. ("Variety") filed its initial Complaint against Salem Logistics Traffic Services, LLC ("Salem") on 6 January 2009 seeking compensatory and punitive damages. Variety raised claims of breach of contract, conversion, larceny, fraud, false pretenses, and unfair and deceptive trade practices related to Salem's failure to perform pursuant to its contract and its conversion of funds intended for Variety's carriers. In attempting to attach Salem's bank account, Variety learned that Ark Royal Capital, LLC ("Ark") was the actual owner of the account and filed an Amended Complaint on 17 April 2009 to add Ark as a codefendant for conversion and constructive trust. Variety and Ark both filed motions for summary judgment based on the claims. Ark appeals the granting of Variety's motion for summary judgment on the conversion claim. Variety cross-appeals the trial court's granting of summary judgment in favor of Ark in dismissing Variety's constructive trust claim.

I. Background

Variety is a privately held company out of Henderson, North Carolina, that owns and operates more than four hundred retail stores in fourteen states. It also has extensive shipping and trucking operations. Salem, out of Winston-Salem, North Carolina, was a group of related businesses that provided a range of transportation services, including audit services. Salem has since dissolved and its former owner has filed for bankruptcy. Ark, based in Houston, Texas, is in the business of making asset-backed loans to domestic corporations and is a senior secured lender to Salem.

Variety and Salem entered into a Freight Services Agreement ("Freight Agreement") in July 2007 in which Salem would provide Variety with freight bill audit services. The Freight Agreement provided that various motor carriers for Variety would submit bills for services to Salem, Salem would audit the bills, present valid bills to Variety, receive funds from Variety for the bills, and pay the carrier. Variety would deposit the funds in Salem's Wachovia account, which unbeknownst to Variety was actually owned by Ark. The Freight Agreement contained a Schedule A, explaining the process by which Salem would perform its services, and a Schedule B, laying out the fee arrangement in which Salem would receive $0.18 to $0.68 per

transaction for freight billing and payment services. Schedule A stipulated that Salem would "immediately distribute" monies to the proper carrier.

Prior to the making of the Freight Agreement, in March 2006 Salem entered into an Accounts Receivable Finance Agreement with Ark, in which Ark would extend a revolving line of credit to Salem. The parties updated the prior agreement and entered a First Amended and Restated Accounts Receivable Finance Agreement ("Finance Agreement") on 7 March 2008. Pursuant to the Finance Agreement, Ark extended credit not to exceed the lesser of $2.2 million or 80% of Salem's "Eligible Accounts." An Eligible Account is defined in the Finance Agreement as a "valid, legally enforceable obligation" owed to Salem that "is not subject to any claim, dispute or other defense." As collateral, Salem granted Ark a first lien in all of its assets, including accounts receivable. Ark set up a "lockbox" and corresponding Wachovia account, and Ark was authorized to receive all funds sent to either.

On a weekly basis Salem sent Ark a list of outstanding accounts receivable and a schedule of payments received on such accounts to calculate the amount Ark would advance on the line of credit. Salem would indicate whether or not a particular account was an Eligible Account and warranted that Ark could rely on its representations. Ark's Chief Operating Officer, Allison Hanslik, along with David Pearson, an Ark Research Analyst, would review Salem's accounts and the provided summary. Neither Hanslik nor Pearson ever took issue with the summaries submitted by Salem.

Salem directed all of its customers to send all payments due to Salem directly to the Wachovia account. Salem and Variety did not stipulate in the Freight Agreement that Salem was required to keep the funds paid by Variety for payment to carriers in a separate account. As a result, Variety deposited the funds in the Wachovia account, not knowing of Ark's ownership of the account. Salem, from the beginning, had a hard time paying Variety's carriers in a timely manner. Variety raised the issue and Salem committed that it was in the process of fixing the problem.

Between September and December 2008, Variety claims it forwarded somewhere in excess of $700,000 to Salem, which Salem failed to forward to the carriers. During the same period, Salem received other large sums of money in the Wachovia account. Ark relied on this paydown of Salem's debt, along with Salem's represen-

tations as to Eligible Accounts, to advance an equally large sum of money to Salem during that time. In January 2009, Ark declared Salem in default of the Finance Agreement and as a result claimed a loss of around $1.8 million.

Upon determining that Ark was the actual owner of the Wachovia account, Variety amended its complaint against Salem to include Ark on the basis of common law conversion and constructive trust. The trial court granted summary judgment for Variety on the conversion claim and summary judgment for Ark on the constructive trust claim. Ark appeals the summary judgment award on conversion and Variety cross-appeals on the constructive trust summary judgment.

II. Analysis

On appeal Ark initially contends that the trial court was correct in awarding summary judgment in its favor on Variety's claim for constructive trust. Ark also contests the trial court's granting of summary judgment in favor of Variety on Variety's conversion claim. In the alternative, Variety on cross-appeal challenges the trial court's decision on the constructive trust issue and moves to affirm the decision on the conversion claim. For the following reasons we agree with the trial court's decision in granting summary judgment in favor of Ark on the constructive trust claim, but reverse in favor of Ark on the conversion claim.

A. Constructive Trust

[1] The first issue raised on appeal is whether the trial court erred in granting summary judgment in favor of Ark on Variety's claim for constructive trust. As there is no evidence to warrant the existence of a fiduciary or confidential relationship between Ark and Variety, we affirm the decision of the trial court in granting judgment as a matter of law in favor of Ark regarding the constructive trust claim.

This Court reviews the trial courts' rulings on motions for summary judgment *de novo* and views the evidence in the light most favorable to the non-moving party. *Scott & Jones, Inc. v. Carlton Ins. Agency, Inc.*, 196 N.C. App. 290, 293, 677 S.E.2d 848, 850 (2009). In determining whether summary judgment is appropriate our Court reviews whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009).

Variety claims that, because the trial court ruled in its favor on the conversion claim, it implies a fiduciary relationship between Variety and Ark sufficient enough to establish a constructive trust. Variety also argues that Ark owed it a fiduciary duty by being in possession of Variety's allegedly converted funds and by having a position on Salem's Board of Directors.

For a constructive trust to arise there must be a fiduciary relationship between the parties and no adequate remedy at law. *See Sec. Nat'l Bank of Greensboro v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 95, 143 S.E.2d 270, 276 (1965). Variety's claim for constructive trust fails because it cannot establish that Ark owed it a fiduciary duty. A fiduciary relationship is one in which " 'there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . . , [and] "it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and *resulting domination and influence on the other.*" ' " *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707-08 (2001) (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (citations omitted)). A constructive trust must be established by clear and convincing evidence. *Upchurch v. Upchurch*, 128 N.C. App. 461, 464, 495 S.E.2d 738, 740 (1998).

Here, Variety did not present sufficient evidence to warrant a constructive trust. Variety and Ark were not in privity of contract and the Freight Agreement did not establish any such relationship. Further, Ark did not exercise domination or influence over Variety. As will be further discussed below, Ark did not wrongfully possess Variety's funds or deprive Variety of its rights and dominion over the funds. Consequently, Ark did not owe a fiduciary duty to Variety and Variety's claim for constructive trust fails. We affirm the trial court's granting of summary judgment in favor of Ark regarding Variety's claim for constructive trust.

B. Conversion

[2] The second issue raised on appeal is whether the trial court erred in granting summary judgment in favor of Variety on its claim for conversion. Ark contends that Variety's conversion claim fails as a matter of law because Variety did not retain an ownership interest in the contested funds. We agree.

A claim for common law conversion is established by the showing of " 'an unauthorized assumption and exercise of the right of owner-

ship over goods or personal chattels belonging to another, to the alteration of their condition, or the exclusion of an owner's rights.' " *Peed v. Burleson's, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956) (quoting 89 C.J.S. Trover & Conversion § 1 (1955)). The party claiming conversion must prove that it retained lawful ownership in the chattel and a right to immediate possession. *See Patterson v. Allen*, 213 N.C. 632, 197 S.E. 168 (1938).

Variety argues that it retained an ownership interest in the funds when transferred to Salem because the Freight Agreement established a bailment relationship. Variety has the burden of establishing a bailor-bailee relationship between it and Salem. *Troxler v. Bevill*, 215 N.C. 640, 643, 3 S.E.2d 8, 10 (1939). "A bailment is created upon the delivery of possession of goods and the acceptance of their delivery by the bailee." *Fabrics, Inc. v. Delivery Service*, 39 N.C. App. 443, 447, 250 S.E.2d 723, 726 (1979). "An acceptance is established upon a showing directly or indirectly of a voluntary acceptance of the goods under an express or implied contract to take and redeliver them." *Id.* Money may be the object of a bailment relationship. *Crow v. McCullen*, 235 N.C. 380, 383, 70 S.E.2d 198, 200 (1952).

We must interpret the Freight Agreement by examining the language of the Agreement for the parties' intent. *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973). "If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996). An "actual meeting of minds is necessary for an implied bailment." 8 C.J.S. Bailments § 28 (2011). Variety attempts to rely on the wording of Schedule A of the Freight Agreement, describing Salem's required process for performing the services, to establish a bailment relationship. The relevant section provides: "(8) Payment is received from client," and "(9) Monies are immediately distributed to carriers." Black's Law Dictionary defines payment as "[t]he money or other valuable thing so delivered in satisfaction of an obligation." Black's Law Dictionary 1165 (8th ed. 2004).

The use of the term "payment" is clear, so we may infer that Variety and Salem intended that the money transferred was for the satisfaction of an obligation in the form of Salem's services. But there was not a sufficient meeting of the minds to establish a bailment relationship. Variety failed to show that Salem accepted the payments with the intent to redeliver the exact funds. In fact, Salem's financial statements treated the funds due Salem pursuant to Schedule A as "revenue" and the payments to carriers as "costs of goods sold."

The use of the term "payment" does not support an interpretation that Variety retained ownership in the funds upon transfer. Variety's own leaders acknowledged in their depositions that Salem could have satisfied its obligation by paying the carriers from Salem's general funds and did not necessarily need to use the exact funds received from Variety. If Variety desires to create a bailment relationship in these situations, it will have to devise a stronger freight agreement, which clearly spells out the relationship. Based on the current Freight Agreement, Variety did not retain ownership in the funds and therefore does not present sufficient evidence to support a conversion claim. Consequently, we reverse the trial court's granting of summary judgment in favor of Variety and in turn grant Ark's motion for summary judgment on the issue of conversion.

We would note that the trial court's reliance on *Lake Mary Ltd. P'ship v. Johnston*, 145 N.C. App. 525, 551 S.E.2d 546 (2001), is misplaced. In *Lake Mary* the defendant admitted that he did not have an ownership interest. The case at hand is distinguishable in that Ark never admitted that it did not have an ownership interest in the funds and, in actuality, argued the complete opposite. Even further, as stated above, the Freight Agreement did not support Variety's retaining of any ownership rights in the funds.

We reverse the trial court's decision on Variety's conversion claim; therefore, we decline to address the issue of damages or the applicability of the Uniform Commercial Code.

III. Conclusion

For the above mentioned reasons, we affirm in part and reverse in part the Order of the trial court.

Affirmed in part and reversed in part.

Judges HUNTER (Robert C.) and BRYANT concur.

EDITH L. JOHNSON, WIDOW AND SOLE DEPENDENT OF RUSSELL L. JOHNSON, DECEASED EMPLOYEE, PLAINTIFF v. COVIL CORPORATION, EMPLOYER, ST. PAUL TRAVELERS/USF&G AND/OR S.C. PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION AND/OR NORTHERN INSURANCE CO. OF NEW YORK AND/OR PENN NATIONAL INSURANCE CO. AND/OR TRAVELERS CASUALTY & SURETY/AETNA CASUALTY, CARRIERS, DEFENDANTS

No. COA10-1440

(Filed 7 June 2011)

Workers' Compensation— death benefits—method and calculation

The Industrial Commission erred in a workers' compensation case by the method and calculation used to determine plaintiff's death benefits. The case was remanded for more specific findings as to why the first method of N.C.G.S. § 97-2(5) would be unjust and to recalculate plaintiff's compensation.

Appeal by plaintiff from opinion and award entered 26 May 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 April 2011.

Wallace and Graham, P.A., by Edward L. Pauley, for plaintiff appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Mathew E. Flatow and M. Duane Jones, for defendant appellees.

McCULLOUGH, Judge.

Edith L. Johnson, dependent and representative of the Estate of Russell Lee Johnson, ("plaintiff") appeals from the Full Commission's denial of her Motion to Amend or Reconsider the Opinion and Award dated 26 May 2010. For the reasons discussed herein, we agree with plaintiff in part, reverse, and remand.

I. Background

Russell Lee Johnson ("decedent") worked for Covil Corporation ("Covil") in various capacities from 1957 to 1987. Covil was an insulation company that used asbestos on many of its sites. Decedent began his career as an insulator, installing and removing asbestos insulation, and gradually moved up from foreman to President of Covil. In 1987, decedent retired from Covil and in 1989 he served as Chief Executive Officer ("CEO") of an insulation company started by his son-in-law. As CEO of his son-in-law's company, he served as a figurehead without receiving any compensation.

In late 2005, decedent began experiencing abdominal pain. The following February he was diagnosed with cancer of the peritoneum membrane, which forms the lining of the abdominal cavity. Biopsies were taken, indicating that it was peritoneal mesothelioma, a rare cancer only caused by asbestos. The biopsies also established that decedent had extensive pleural plaquing and fibrotic scarring on his lungs, related to the asbestos exposure. On 5 June 2006, decedent filed a claim for benefits with the Industrial Commission based on asbestos exposure, pleural disease, and mesothelioma. Decedent suddenly died the next day as a result of mesothelioma, lung fibrosis, and septic shock.

On 3 October 2006, plaintiff filed an amended form with the Industrial Commission seeking death benefits. The Commission determined that decedent's death was the result of his occupational exposure to asbestos and awarded benefits to plaintiff. The Commission found that decedent had average weekly wages of $807.69 in 1987, his last full year of employment. Based on the use of 1987 in determining his average weekly wages, the Commission used the maximum compensation rate for 1987 of $308.00 to award plaintiff 400 weeks of death benefits at $308.00 per week. Plaintiff filed a Motion to Amend or Reconsider the Order based on the maximum compensation rate of $308.00. The Commission denied the Motion and plaintiff appeals.

II. Analysis

Plaintiff contends that the Full Commission erred in its method and calculation of determining plaintiff's death benefits by using the maximum compensation rate for 1987. Upon review of the relevant statutes, we agree. Plaintiff raises multiple, similar issues regarding the Commission's selection of the proper maximum compensation rate. We will address these issues together in our discussion of the overlying issue.

Generally, appellate review of an opinion and award from the Industrial Commission is limited to: "(i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact." *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006). To aid this Court in performing its duty of "determining whether the Commission's legal conclusions are justified, the Commission must support its conclusions with sufficient findings of fact." *Gregory v. W.A. Brown & Sons*, 363 N.C. 750, 761, 688 S.E.2d 431, 439 (2010). "Findings not sup-

ported by competent evidence are not conclusive and will be set aside on appeal." *Penland v. Bird Coal Co.*, 246 N.C. 26, 30, 97 S.E.2d 432, 436 (1957). But findings supported by competent evidence are conclusive, "even when there is evidence to support contrary findings." *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999). "The Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted).

In its 26 May 2010 opinion and award, the Full Commission found in Finding of Fact 28:

> 28. Decedent-Employee's last full year of employment with Defendant-Employer was 1986, when he earned $42,000.00. He had an average weekly wage of $807.69 during 1987. That average weekly wage results in the maximum compensation rate which was in effect in 1987 of $308.00. When Decedent-Employee worked for Insulation Services, a company started by his son-in-law Mr. Coggins, on a full-time basis between 1989 and approximately February 24, 2006, he was not compensated for the work that he performed. Use of the maximum compensation rate in effect for the last year Decedent-Employee worked for Defendant-Employer is a fair and just method of determining the compensation rate in this case.

The Commission went on to hold in Conclusion of Law 8:

> 8. Basing Decedent-Employee's compensation rate on his average weekly wage when he was last employed by Defendant-Employer produces a fair and just result in the instant case. Decedent-Employee's compensation rate is $308.00, the maximum compensation rate for 1987, the year Plaintiff retired. N.C. Gen. Stat. § 97-2(5).

To discuss the issue of the proper method to determine the maximum compensation rate, some background information on workers' compensation benefits is necessary. A widow is entitled to 400 weeks of compensation and burial expenses where death results proximately from an occupational disease as explained under N.C. Gen. Stat. § 97-38 (2009), which states:

> If death results proximately from a compensable injury or occupational disease and within six years thereafter, or within two years of the final determination of disability, whichever is

> later, the employer shall pay or cause to be paid, subject to the provisions of other sections of this Article, weekly payments of compensation equal to sixty-six and two-thirds percent (66 ⅔%) of the average weekly wages of the deceased employee at the time of the accident, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29, nor less than thirty dollars ($30.00), per week, and burial expenses not exceeding three thousand five hundred dollars ($3,500)[.]

Here, the Commission correctly determined that decedent died as a result of an occupational disease, mesothelioma, and awarded plaintiff $3,500.00 for burial expenses. The Commission also found that decedent's average weekly wages were $807.69 and that plaintiff was entitled to 400 weeks of compensation. In determining average weekly wages the Commission looks to the first and final methods of N.C. Gen. Stat. § 97-2(5) (2009), which state in relevant parts:

> (5) Average Weekly Wages.—"Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . .
>
> But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

Section 97-2(5) " 'provides a hierarchy' of five methods for computing average weekly wages." *Abernathy v. Sandoz Chems./Clariant Corp.*, 151 N.C. App. 252, 258, 565 S.E.2d 218, 222 (2002) (quoting *McAninch v. Buncombe County Schools*, 347 N.C. 126, 130, 489 S.E.2d 375, 378 (1997)). Although we agree with the Commission's determination of the average weekly wages, the Supreme Court has determined:

> The final method, as set forth in the last sentence, *clearly may not be used unless there has been a finding that unjust results would occur by using the previously enumerated methods.* Ultimately, the primary intent of this statute is that results are reached which are fair and just to both parties. "Ordinarily, whether such results will be obtained . . . is a question of fact; and in such case a finding of fact by the Commission controls decision."

McAninch, 347 N.C. at 130, 489 S.E.2d at 378 (citations omitted) (emphasis added).

It can be inferred from the Commission's decision of the average weekly wages using decedent's 1987 wages that, using decedent's weekly wages from 2006, his last year of employment, according to the first method of N.C. Gen. Stat. § 97-2(5), would produce an unjust result. In 2006 decedent had been retired from defendant's employment for a number of years and was merely acting as a figurehead for his son-in-law's company. We agree that if the Commission used the first method of section 97-2(5) the decedent's average weekly wages would be zero, as decedent did not earn any wages in the period of 52 weeks prior to the date of his diagnosis in 2006. This falls below the $30.00 threshold as set in section 97-38. *See* N.C. Gen. Stat. § 97-38. Therefore, to have a just and fair result the Commission resorted to using decedent's average weekly wages from his last year of employment with defendant. *See Abernathy*, 151 N.C. App. at 258, 565 S.E.2d at 222. The Commission made the correct determination, but failed to explain why the first method would produce unjust results. *See Pope v. Johns Manville*, ––– N.C. App. –––, –––, 700 S.E.2d 22, 29-30, *disc. review denied*, ––– N.C. App. –––, 705 S.E.2d 375 (2010). In so doing the Commission erred, and we remand for a more explicit finding as to why the use of the first method would be unjust.

A major role of our appellate courts is statutory interpretation and our Supreme Court has held that when construing a statute, " 'our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished.' " *State v. Rawls*, ––– N.C. App. –––, –––, 700 S.E.2d 112, 115 (2010) (quoting *Elec. Supply Co. of Durham, Inc. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991)). In performing this function, " '[l]egislative purpose is first ascertained from the plain words of the statute.' " *Id.* If the words of the statute are unambiguous, we are to give them the plain and ordinary meaning; however, if they are ambiguous, judicial interpretation must be used to ascertain the legislative intent. *Id.* at –––, 700 S.E.2d at 115. In the case at hand, we review the Commission's determination of the appropriate maximum compensation rate *de novo*. *McRae*, 358 N.C. at 496, 597 S.E.2d at 701.

To determine the compensation rates for total incapacity and the maximum compensation rate, we look to N.C. Gen. Stat. § 97-29 (2009), which in pertinent part provides:

> Except as hereinafter otherwise provided, where the incapacity for work resulting from the injury is total, the employer shall pay or cause to be paid, as hereinafter provided, to the injured employee during such total disability a weekly compensation equal to sixty-six and two-thirds percent (66 ⅔%) of his average weekly wages, but not more than the amount established annually to be effective October 1 as provided herein, nor less than thirty dollars ($30.00) per week.
>
> . . . If death results from the injury then the employer shall pay compensation in accordance with the provisions of G.S. 97-38.
>
> *Notwithstanding any other provision of this Article*, on July 1 of each year, a maximum weekly benefit amount shall be computed . . . and *this said maximum weekly benefit shall be applicable to all injuries and claims arising on and after January 1 following such computation.* Such maximum weekly benefit shall apply to all provisions of this Chapter and shall be adjusted July 1 and effective January 1 of each year as herein provided.

(Emphasis added.)

In its findings and conclusions, the Commission figured that decedent had average weekly wages of $807.69 based on his 1987 wages and consequently concluded that the maximum compensation rate of $308.00 for 1987 should apply. We believe the Commission erred in this determination.

As the clear language of section 97-29 provides, the maximum compensation rate for a given year shall apply to all injuries and claims arising on or after 1 January following the computation of that year's compensation rate. *See id.* In cases involving occupational diseases, the claim arises when the disease is diagnosed. *Abernathy*, 151 N.C. App. at 257, 565 S.E.2d at 221. Here, decedent's asbestosis and mesothelioma were diagnosed in 2006, which corresponds with the 2006 maximum compensation rate of $730.00. Although the proper year for determining decedent's average weekly wages is 1987, N.C. Gen. Stat. § 97-29 does not provide an unjust result, but requires that the maximum compensation rate for 2006 be used, as that was the year of decedent's diagnosis.

The last issue that we would like to address is the Commission's use of decedent's average weekly wages. The Commission correctly determined that decedent's average weekly wages for 1987 were $807.69 based on section 97-2(5), but the Commission erred by failing

to apply the average weekly wages in conjunction with section 97-38. " '[I]n discerning the intent of the General Assembly, statutes *in pari materia* should be construed together and harmonized whenever possible.' " *State v. Abshire*, 363 N.C. 322, 330, 677 S.E.2d 444, 450 (2009) (quoting *State v. Jones*, 359 N.C. 832, 836, 616 S.E.2d 496, 498 (2005)).

As stated above, N.C. Gen. Stat. § 97-38 provides the guidelines for compensation where death results from an occupational disease. The statute states that the employer shall pay compensation equal to sixty-six and two-thirds (66 ⅔ %)of the average weekly wages of decedent, but not more than the maximum compensation rate as provided in N.C. Gen. Stat. § 97-29. The Commission failed to apply the 66 ⅔% aspect of the statute to the average weekly wages of $807.69. Upon applying the 66 ⅔ %, the compensation becomes $538.41. Because $538.41 is below the maximum compensation rate of $730.00 for 2006, plaintiff is entitled to the full amount of $538.41 for 400 weeks.

III. Conclusion

Based on the foregoing reasons, we remand the case to the Industrial Commission for more specific findings as to why the first method of section 97-2(5) would be unjust and to recalculate plaintiff's compensation in accordance with this opinion.

Reversed and remanded.

Judges HUNTER (Robert C.) and BRYANT concur.

STATE OF NORTH CAROLINA v. KENNETH RAY ADAMS, JR., AND MICHAEL LAMONT SOWELL, DEFENDANTS

No. COA10-906

(Filed 7 June 2011)

Criminal Law— jury instructions—separate consideration of charges and defendants—instruction not given

The trial court committed plain error in an attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury case by failing to instruct the jury to consider the charges against each defendant separately from the other charges, and to consider the charges against each defend-

ant separately from the other defendant. Defendants were entitled to a new trial.

Appeal by defendants from judgments entered 16 December 2009 by Judge Carl R. Fox in Rowan County Superior Court. Heard in the Court of Appeals 9 February 2011.

Attorney General Roy Cooper, by Assistant Attorneys General David N. Kirkman and Philip A. Lehman, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Daniel Shatz, for defendant Adams.

Reita P. Pendry for defendant Sowell.

ELMORE, Judge.

Kenneth Ray Adams, Jr. (defendant Adams), and Michael Lamont Sowell (defendant Sowell) appeal from judgments entered pursuant to jury verdicts of guilty on two counts each of attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. After careful review, we reverse and remand for a new trial.

Johnnie Thompson and Cecil Hall (together, the victims) were at Mr. Thompson's home, where Mr. Hall also sometimes stayed, on 29 April 2007 when a car slowly drove past the house four times. Two men—defendants—then appeared at the edge of the yard, and Mr. Hall went to see what they wanted. Defendant Sowell approached Mr. Hall; defendant Adams stood in the yard talking on his cell phone and never spoke to either of the victims.

Defendant Sowell told Mr. Hall that someone had sent them to purchase drugs from Mr. Thompson; Mr. Hall responded that Mr. Thompson was now in barber school and no longer sold drugs. Mr. Thompson came outside at that point, and he and defendant Sowell had a similar exchange, in which defendant Sowell asked if he could "cop an ounce" from Mr. Thompson. Mr. Thompson replied "I don't know what you're talking about[,]" and, per Mr. Hall's testimony, defendant Sowell replied "Well, what about this?" and pulled out a gun. Defendant Sowell then began shooting at the victims.

Both men were shot—Mr. Hall had been shot twice in the legs, and Mr. Thompson had been shot eight times in the leg, abdomen, and chest. When the shooting started, Mr. Hall ran inside the house; he

emerged again moments later to find Mr. Thompson lying on the porch covered in blood.

Meanwhile, defendant Sowell ran away from Mr. Thompson's house, up the street. According to the testimony of a man visiting Mr. Thompson's neighbor, defendant Adams, who had been standing fifteen to twenty-five feet away from defendant Sowell at the time of the shooting, started to run away, tripped in a ditch, and then continued to run away. The men got into a car, with defendant Adams driving, and began to drive away; a police car gave chase.

Defendants pulled off of the highway onto a smaller street and the car stalled, at which point defendants exited the car and began to attempt to escape on foot. Defendant Sowell testified that the gun fell out of his lap as he jumped out of the car; he then ran approximately half a mile to a mile into an open field. When he turned around to see whether an officer was chasing him, he ran into a tree and knocked himself out. He was apprehended at that point. Defendant Adams was apprehended soon after hiding in the utility closet of a nearby apartment complex.

Defendant Sowell testified that Mr. Thompson fired a gun at defendant Sowell before defendant Sowell fired at Mr. Thompson, and that defendant Sowell fired only in self-defense; the neighbor's friend who testified as to the events of the shooting found a gun belonging to Mr. Thompson in Mr. Thompson's hands when he ran over immediately after the shooting to render aid. Defendant Sowell also testified that defendant Adams pulled a gun out when Mr. Thompson began firing, and forensic evidence showed that at least one bullet retrieved from the walls of Mr. Thompson's house was fired from a gun belonging to defendant Adams; that gun was recovered from under defendant Adams's seat in the getaway car after defendants were apprehended. Defendant Adams did not testify.

Both defendants were convicted of attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury as to each victim. Defendant Adams was sentenced to two consecutive terms of imprisonment of 201 to 251 months, followed by a term of fifteen to eighteen months; defendant Sowell was sentenced to two consecutive terms of imprisonment of 251 to 311 months, followed by a term of twelve to fifteen months. Both defendants now appeal.

Defendants make five similar arguments in their separate briefs; both argue that the trial court committed plain error in failing to

instruct the jury (1) to consider the charges against each defendant separately from the other charges and (2) to consider the charges against each defendant separately from the other defendant. Because we agree, we do not address either defendant's other arguments.

> Plain error is fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or . . . grave error which amounts to a denial of a fundamental right of the accused[.] In order to prevail under a plain error analysis, a defendant must show: (1) there was error; and (2) without this error, the jury would probably have reached a different verdict.

State v. Smith, 152 N.C. App. 29, 37-38, 566 S.E.2d 793, 799 (2002) (quotations and citations omitted; alteration in original).

The charge to the jury on attempted first degree murder, in pertinent part, was as follows:

> The defendants have been charged with attempted first degree murder. For you to find *the defendants guilty* of this offense, the State must prove two things beyond a reasonable doubt:
>
> First, that each of the defendants intended to commit first degree murder. . . .
>
> And, second, that at the time each of the defendants had this intent[,] *they performed* an act which was calculated and designed to accomplish the crime but which fell short of the completed crime.

(Emphases added.)

The trial court's instructions on self-defense as to the charge of attempted first degree murder, in pertinent part, were as follows:

> *The defendants would not be guilty* of attempted first degree murder on the grounds of self-defense if: First, it appeared to each of the defendants that they believed it to be necessary to use potentially deadly force against the victims in order to save themselves from death or great bodily harm. Second, the circumstances as they appeared to each of the defendants at the time were sufficient to create such a belief . . . .
>
> If the State fails to prove that *the defendants did not act in self-defense, you must find the defendants not guilty.*

(Emphases added.)

The trial court's instructions on assault with a deadly weapon with intent to kill inflicting serious injury, in pertinent part, were as follows:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date *the defendants intentionally shot the victims* repeatedly with a handgun or attempted to shoot the victims repeatedly with a handgun and that the gun or guns was or were deadly weapons and that each of the defendants intended to kill the victims and did seriously injure them or attempt to seriously injure them, nothing else appearing, *it would be your duty to return verdicts of guilty.*
>
> However, if you do not so find or have a reasonable doubt as to one or more of these things, *then you consider whether the defendants are guilty* of assault with a deadly weapon inflicting serious injury.

(Emphases added.)

Defendants argue that the emphasized portions of the instructions above "instructed the jury to consider the defendants' guilt collectively, rather than individually[,]" and as such affected the outcome of the trial. We agree.

Our Courts have repeatedly "found reversible error where two or more defendants are tried together for the same offense upon jury instructions susceptible to the construction that the jury should convict all of the defendants if they find beyond a reasonable doubt that any of the defendants committed the offense charged." *State v. McCollum*, 321 N.C. 557, 559-60, 364 S.E.2d 112, 113 (1988) (citation omitted). This Court remanded for new trial in *State v. Lockamy* where the trial court's instructions mentioned the co-defendants together throughout, using phrases such as "they knew or should have known" and "they intended," and never referring to the defendants individually. 31 N.C. App. 713, 715, 230 S.E.2d 565, 567 (1976). We concluded by holding that "the trial judge must either give a separate final mandate as to each defendant or otherwise clearly instruct the jury that the guilt or innocence of one defendant is not dependent upon the guilt or innocence of a codefendant." *Id.* at 716, 230 S.E.2d at 568. The same type of lumping together of defendants and charges occurred in the case at hand and, as such, we find that the instructions were in error.

The State contends that the jury instructions were not in error, though it makes no supporting argument for that statement aside from its bald assertion. Instead, in a section devoid of case law, the State argues at length that any error in the instructions actually *increased* the burden for the State, as it would have required the State to prove that both defendants had committed both crimes in order for the jury to convict either defendant. We find this argument unconvincing.

The jury instructions reproduced above impermissibly grouped defendants together in presenting the charges, the issues, and defendants to the jury. Given that conflicting evidence was presented as to the order in which weapons were drawn and what role generally each defendant played in the incident, this confusion likely had an effect on the jury's verdict. As in *McCollum*, "we are unable to say here, as we have said in other cases, that we are 'convinced that the jurors were not misled by the portion of the charge to which defendants except.' " 321 N.C. at 560, 364 S.E.2d at 113 (quoting *State v. Tomblin*, 276 N.C. 273, 277, 171 S.E.2d 901, 904 (1970)).

New trial.

Judges STEELMAN and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 JUNE 2011)

AETNA HEALTH OF THE CAROLINAS v. PIEDMONT ENDOCRINOLOGY No. 10-1049	Mecklenburg (09CVS25800)	Affirmed
BLAIR v. RANDOLPH CNTY. BD. OF EDUC. No. 10-605	Randolph (09CVS3185)	Affirmed
CAMPBELL v. NAT'L PIPE & PLASTICS, INC. No. 10-1253	Indus. Comm. (883751)	Affirmed
CASSTEVENS v. WAKE FOREST UNIV. No. 10-1292	Indus. Comm. (885245)	Dismissed
CHURCH v. DECKER No. 10-993	Caldwell (01CVD1391)	Affirmed in part; Remanded in part Dismissed in part.
DIAZ v. DIAZ No. 10-851	Forsyth (08CVD8976)	Dismissed
DILLINGHAM v. DILLINGHAM No. 10-514	Buncombe (04CVD3124)	Affirmed
DURAND v. KRISPY KREME DOUGHNUTS, INC. No. 10-983	Gaston (09CVS6317)	Affirmed
EVERHART v. NORANDAL USA, INC. No. 10-812	Indus. Comm. (078061)	Reversed
HIGH POINT BANK & TRUST CO. v. HOFFMAN BUILDERS, INC. No. 10-1181	Guilford (09CVS1555)	Dismissed
IN RE J.S.G. No. 11-76	Catawba (09JT110-111)	Affirmed

IN RE K.J.B-L. No. 10-1379	Surry (09JT104)	Affirmed
IN RE M.M. No. 10-1520	Cumberland (07JA505)	Reversed and Remanded
IN RE MIDGETT No. 10-1518	Dare (08CVS372)	Reversed and Remanded
IN RE R.H. No. 11-13	Pitt (09JA12-13)	Affirmed
IN RE T.J. No. 10-1548	Buncombe (06J463-464) (08JT375)	Affirmed
MACE v. LAPRADE No. 10-1268	Orange (10CVD885)	Affirmed
MINOR v. UNITED HEALTH SERVS., INC. No. 10-1434	Indus. Comm. (765713)	Reversed and Remanded
MOOREFIELD v. MOOREFIELD No. 10-886	Guilford (09CVD11346)	Affirmed
N.C. STATE BAR v. BADGETT No. 10-1200	Disciplinary Hearing Commission (09DHC6)	Affirmed
PETE FORTNER, PLLC v. KOONCE WOOTEN & HAYWOOD, LLP No. 10-1260	Wake (08CVS14338)	Affirmed
RIOUX v. ACCURATE HOME INSPECTION, INC. No. 10-1439	Orange (09CVS1720)	Dismissed
ROYAL PALMS MHP, LLC v. CITY OF WILMINGTON No. 10-1259	New Hanover (09CVS3086)	Affirmed
SANDER v. SANDER No. 10-948	Henderson (09CVD593)	Dismissed

STATE v. ANDERSON No. 10-888	Wilson (09CRS54098)	No Error
STATE v. BALLARD No. 10-789	Brunswick (08CRS3640-41)	Affirmed
STATE v. BARNHILL No. 10-1000	New Hanover (08CRS18736)	No Error
STATE v. BATTLE No. 10-1605	Edgecombe (09CRS54195)	No Error
STATE v. BENOY No. 10-813	Cleveland (08CRS835) (10CRS1)	No Error
STATE v. CLARK No. 10-1218	Guilford (08CRS25046)	Affirmed
STATE v. CROMARTIE No. 10-1378	Sampson (08CRS52332) (08CRS52336)	No Error
STATE v. DICKENS No. 10-1322	Edgecombe (09CRS53031)	No Error
STATE v. ELLIS No. 10-1346	Wilson (09CRS53718)	No error in part, reversed and remanded with instructions in part
STATE v. FRANKLIN No. 10-1082	Mecklenburg (09CRS234697) (09CRS61932)	No Error
STATE v. FRANKLIN No. 10-1222	Scotland (09CRS50035)	No Error
STATE v. FRASIER No. 10-997	Johnston (09CRS3072) (09CRS52441)	No Error
STATE v. FRENCH No. 10-1525	Lee (08CRS53912) (08CRS53913-16) (09CRS1499)	New trial in part, no error in part, judgments vacated and remanded for resentencing.

STATE v. GOREE No. 10-1465	Wake (09CRS26618)	No error in part; vacated and remanded in part
STATE v. GREER No. 10-1330	Transylvania (08CRS52668)	No prejudicial error
STATE v. GRIFFIN No. 10-1347	Lee (07CRS53539)	Affirmed
STATE v. HILL No. 10-1504	Guilford (09CRS79065-66) (09CRS79068-72)	No Error
STATE v. HINTON No. 10-1125	Mitchell (09CRS304) (09CRS50347)	Dismissed
STATE v. HOUSE No. 10-1071	Brunswick (08CRS6990)	Affirmed in part, reversed and remanded in part.
STATE v. JACOBS No. 10-1310	Robeson (05CRS9189)	Reversed and Remanded
STATE v. JENNINGS No. 10-1250	Wake (09CRS14056)	No Error
STATE v. KETTER No. 10-1006	Mecklenburg (07CRS231422-24)	No Error
STATE v. KNOTTS No. 10-1266	Columbus (08CRS53710)	No Error
STATE v. MANGUM No. 10-1317	Johnston (09CR6300-6301)	Dismissed
STATE v. MASSEY No. 10-743	Mecklenburg (04CRS233667) (04CRS233669-670)	Other, No Error as to 04 CRS 233667, 233670; Appeal Dismissed as to 04 CRS 237424, 235113; Reversed and Remanded as to 04 CRS 233669.

STATE v. MCCLARTY No. 10-1166	Rowan (08CRS53569)	Reversed and Remanded
STATE v. MILLER No. 10-1362	New Hanover (09CRS54036)	No Error
STATE v. MOORE No. 10-1427	Guilford (09CRS82349-50) (09CRS82352)	No Error
STATE v. MORGAN No. 10-1416	Mecklenburg (08CRS238547-48)	No Error
STATE v. MURRAY No. 10-868	Buncombe (07CRS51491-94)	Affirmed
STATE v. PRATT No. 10-1583	Stokes (09CRS52221-22) (09CRS52224)	No error in part; no prejudicial error in part; dismissed in part
STATE v. RUSSELL No. 10-1140	Wayne (08CRS58126)	No Error
STATE v. SANDERS No. 10-1289	Cleveland (08CRS4270) (08CRS55457)	No Prejudicial Error
STATE v. SOUTHERN No. 10-1025	Rockingham (08CRS3974)	No Error
STATE v. STEPP No. 10-867	Buncombe (09CRS15216) (09CRS60984-88) (09CRS60991) (09CRS61772-73) (09CRS662) (09CRS706185-86) (09CRS706188) (09CRS706190)	Affirmed
STATE v. STOVER No. 10-1126	Mecklenburg (08CRS974)	No Error
STATE v. TILLEY No. 10-1056	Forsyth (07CRS14180) (07CRS14182-83)	Affirmed

STATE v. TUCCI-CASSELLI No. 10-825	Macon (08CRS50409) (09CRS1286)	No Error
STATE v. TUCKER No. 10-938	Guilford (08CRS24677) (08CRS24708) (08CRS80410) (09CRS24677)	No Error
STATE v. TUCKER No. 10-1207	Randolph (08CRS53470)	No Error
STATE v. WATSON No. 10-1468	Halifax (07CRS1080) (07CRS50954) (07CRS56290-91)	Affirmed
STATE v. WELLS No. 10-1109	Mecklenburg (08CRS232500)	No Error
STATE v. WILLIAMS No. 10-1085	Rockingham (09CRS51701)	No Error
STATE v. WILLIAMS No. 10-1343	Wayne (06CRS53563)	Reversed
STATE v. WILLIAMS No. 10-1508	Wilson (08CRS54559) (08CRS55111)	No Error
STATE v. WOOD No. 10-1272	Randolph (06CRS57124)	No error in part; vacated and remanded in part
STATE v. YOUNG No. 10-1358	Mecklenburg (08CRS228809)	No Error
STB OF CHARLOTTE, INC. v. THE ZONING BD. OF ADJUST. No. 10-1220	Mecklenburg (10CVS5401)	Affirmed

STEVENSON v. N.C. DEP'T OF CORR. No. 10-1168	Indus. Comm. (TA-20589) (TA-20590) (TA-20591)	Affirmed
TINCHER v. ADECCO No. 10-548	Indus. Comm. (712483)	Dismissed in part; affirmed in part; reversed and remanded in part
WARD v. BUCKEYE HOMEOWNERS ASS'N No. 11-3	Forsyth (09CVS1829)	Affirmed

JIMMY K. JESSEE, PLAINTIFF v. CHRISTINE JESSEE AND SANDRA L. STEWART, INDIVIDUALLY AND AS TRUSTEE OF THE JESSEE FAMILY TRUST AND THE JESSEE FAMILY TRUST, DEFENDANTS

No. COA09-1704

(Filed 7 June 2011)

1. Appeal and Error— interlocutory orders and appeals—motion to change venue and dismiss—prior related action

An order denying a motion to change venue and dismiss a complaint because of a prior related action did not dispose of the case and was interlocutory, but the Court of Appeals issued a writ of *certiorari* on its own motion to reach the merits.

2. Jurisdiction— pending related equitable distribution action—second action not subsumed by first

The trial court correctly denied defendants' motion to dismiss a Forsyth County action that alleged fraud where there was an equitable distribution action pending in Alamance County. Although defendants contended that plaintiff's claims were subject to the exclusive jurisdiction of the district court pursuant to N.C.G.S. § 7A-244, they offered no specific reasons for the Forsyth County claims being barred by or completely subsumed within the pending Alamance County domestic action.

3. Trials— prior pending action doctrine—second action not subsumed by first—second action held in abeyance

The trial court did not err by denying defendants' motion to dismiss a Forsyth County complaint alleging fraud while there was a pending domestic action in Alamance County. Defendants contended that the action should have been dismissed under the "prior pending action doctrine" but did not demonstrate that any of the issues raised in the Forsyth County action were completely subsumed in the Alamance County action. However, there was a clear interrelationship between the cases and the Forsyth County action was to be held in abeyance pending resolution of the Alamance County action.

Judge STROUD concurring in the result only.

Appeal by defendants from order entered 3 September 2009 by Judge Richard W. Stone in Forsyth County Superior Court. Heard in the Court of Appeals 9 June 2010.

David B. Hough, P.A., by David B. Hough, for plaintiff-appellee.

Vernon, Vernon, Wooten, Brown, Andrews & Garrett, P.A., by Benjamin D. Overby, for defendant-appellants.

ERVIN, Judge.

Defendants Christine Jessee; Sandra L. Stewart, individually and as Trustee of the Jessee Family Trust; and the Jessee Family Trust appeal from an order entered by the trial court denying their motion to dismiss the complaint filed by Plaintiff Jimmy K. Jessee on the grounds that the pleading in question involved issues that had already been joined between the parties in an equitable distribution case that was pending before the Alamance County District Court. After careful consideration of Defendants' challenges to the trial court's order in light of the record and the applicable law, we conclude that Plaintiff's complaint should not be dismissed, that the trial court's order should be affirmed, and that the Forsyth County case should be held in abeyance pending resolution of the Alamance County domestic relations case.

I. Factual Background

Plaintiff and Defendant Christine Jessee married on 28 September 2002 and separated 9 May 2008. On 21 July 2008, Defendant Christine Jessee filed a complaint in Alamance County District Court seeking a divorce from bed and board, post-separation support and alimony, and equitable distribution. On 3 September 2008, Plaintiff filed an answer to Defendant Christine Jessee's Alamance County complaint in which he denied the material allegations of Defendant Christine Jessee's complaint and counterclaimed for divorce from bed and board based on a number of grounds, including an allegation that Defendant Christine Jessee had impermissibly utilized Plaintiff's credit card "to borrow the sum of $24,000.00 . . . without the knowledge or consent of" Plaintiff, and equitable distribution.

On 24 April 2009, Plaintiff filed a complaint in Forsyth County Superior Court alleging that Defendant Christine Jessee had committed various fraudulent acts which resulted in the conversion of $56,663.00 of funds to which Plaintiff was entitled for her personal use and improperly conveyed the marital residence to Defendant Jessee Family Trust. According to the allegations of Plaintiff's com-

plaint, Defendant Christine Jessee resided in the former marital residence in Burlington after she and Plaintiff separated, while Plaintiff decided to live in Winston-Salem. As of the date of separation, Plaintiff received monthly Social Security checks in the amount of $1,977.00. However, during the months of May and June, 2008, Defendant Christine Jessee, without Plaintiff's knowledge and consent, redirected two of Plaintiff's Social Security checks for her own personal use, depriving him of $3,954.00 in Social Security benefits. In addition, Plaintiff alleged that Defendant Christine Jessee obtained the issuance of various credit cards or other loan proceeds, which she utilized for her own benefit, by fraudulently providing Plaintiff's personal identification information, including his social security number, date of birth, and mother's maiden name, to the entities issuing the cards in question after the date of separation. More specifically, Plaintiff alleged in his Forsyth County complaint that Defendant Christine Jessee improperly obtained the following "loans," the proceeds of which she improperly utilized for her own purposes, for which the lending entities were seeking to hold Plaintiff liable:

> 1. An indebtedness of $24,200.00 arising from Defendant Christine Jessee's decision to improperly utilize an L.L. Bean credit card issued by Bank of America in Plaintiff's name and to utilize the card for her own purposes.
>
> 2. An indebtedness of $19,940.00 arising from Defendant Christine Jessee's decision to improperly obtain a credit card issued by American Express in Plaintiff's name and to utilize the card for her own purposes.
>
> 3. An indebtedness of $3,251.00 arising from Defendant Christine Jessee's decision to improperly obtain a credit card issued by J.P. Morgan Chase in Plaintiff's name and to utilize the card for her own purposes.
>
> 4. An indebtedness of $661.00 arising from Defendant Christine Jessee's decision to improperly obtain a credit card issued by Citigroup in Plaintiff's name and to utilize the card for her own purposes.
>
> 5. An indebtedness of $3,657.00 arising from Defendant Christine Jessee's decision to improperly obtain an additional credit card issued by J.P. Morgan Chase in Plaintiff's name and to utilize the card for her own purposes.

6. An indebtedness of $1,000.00 arising from Defendant Christine Jessee's decision to improperly obtain a credit card issued by Discover in Plaintiff's name and to utilize the card for her own purposes.

Moreover, Plaintiff alleged in his Forsyth County complaint that, on or about 3 September 2008, Defendant Christine Jessee, directly or indirectly utilizing funds that "she obtained from the fraudulent social security check and credit card transactions, satisfied all of the existing mortgage secured by" the marital home and filed the necessary satisfaction notice with the Alamance County Register of Deeds. In addition, Plaintiff alleged that, on or about 26 November 2008, Defendant Christine Jessee and her close personal friend, Defendant Sandra L. Stewart, formed Defendant Jessee Family Trust, with Defendant Sandra L. Stewart designated as trustee and with the trust corpus to be used for the benefit of Defendant Christine Jessee. According to Plaintiff's complaint, Defendant Christine Jessee fraudulently conveyed the unencumbered marital residence to Defendant Sandra L. Stewart in her capacity as trustee of the Jessee Family Trust, with a retained life estate for the benefit of Defendant Christine Jessee. Based upon these allegations, Plaintiff alleged that he was entitled to recover at least $3,954.00 relating to the converted Social Security checks and at least $52,709.00 relating to the improperly obtained credit cards from Defendants Christine Jessee and Sandra L. Stewart, to recover punitive damages from Defendant Christine Jessee, to recover statutory damages for identity theft and attorneys fees pursuant to N.C. Gen. Stat. § 1-539.2C, and to have the transfer of the marital residence to the Jessee Family Trust invalidated.

On 3 June 2009, Defendants filed a motion seeking to have the venue for the Forsyth County action changed to Alamance County on the grounds that "[a]ll of the alleged actions were purported to occur in Alamance County." On 17 August 2009, Defendants filed an Answer, Motion to Change Venue and Motion to Dismiss in the Forsyth County action in which Defendants denied the material allegations of Plaintiff's complaint, sought the dismissal of the Forsyth County action based upon N.C. Gen. Stat. § 7A-244 and the "prior pending action" doctrine in light of the pending domestic action in Alamance County, asserted certain affirmative defenses, and renewed their motion that venue for the Forsyth County action be changed to Alamance County. On 19 August 2009, Plaintiff filed a reply to Defendant's dismissal and change of venue motions.

After conducting a hearing concerning Defendants' dismissal and change of venue motions at the 31 August 2009 civil session of Forsyth County Superior Court, the trial court entered an Order Denying Defendants' Motions to Change Venue and to Dismiss on 3 September 2009. In its order, the trial court found as a fact that:

Motion to Dismiss

> 9. On or about July 18, 2008, Defendant Christine Jessee filed against the Plaintiff a domestic action in Alamance County (08 CVD 2228), seeking a Divorce from Bed and Board, Post Separation Support/Alimony and Equitable Distribution.
>
> 10. The instant case does involve two of the same parties, yet raises different causes of action, namely, the alleged theft by Defendant Christine Jessee of two Social Security checks and the identity of the Plaintiff and the alleged fraudulent conveyance by the Defendant Christine Jessee of a parcel of real property.
>
> 11. The instant case, therefore, is not subject to the provisions of N.C. [Gen. Stat.] § 7A-244 and does not include the same subject matter of the Alamance County domestic case. Furthermore, the Complaint in the instant case does state a claim upon which relief can be granted.
>
> 12. The instant case, therefore, should not be dismissed as against the Plaintiff and the Defendants' motion to dismiss should be denied.

Based upon these findings of fact[1], the trial court "conclude[d] as a matter of law that the Defendants' motions to change the venue of this action and to dismiss this action ought to be denied" and denied both motions. Defendants noted an appeal to this Court from the trial court's order.

II. Legal Analysis

On appeal, Defendants contend that the trial court erred by failing to dismiss the Forsyth County action in light of the pending domestic action in Alamance County District Court because Plaintiff's claims implicate the exclusive jurisdiction of the District Court over domestic relations cases established by N.C. Gen. Stat. § 7A-244 and because the

1. In view of the fact that Defendants have not challenged the denial of their motion for change of venue on appeal, we have not set out the trial court's findings of fact relating to this issue in the text of our opinion.

Forsyth County action is barred under the "prior pending action" doctrine. We are not persuaded by either of Defendants' contentions.

A. Appealability

[1] As a preliminary matter, the order from which Defendants have sought to appeal is clearly interlocutory rather than final in nature, since the trial court's orders were "made during the pendency of an action [and] do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy," *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999) (citing *Veazey v. City of Durham*, 231 N.C. 357, 361, 57 S.E.2d 377, 381 (1950)), and since the trial court's order did not "settle[] and determine[]" the "entire controversy" between the parties. As a general proposition, "there is no right of immediate appeal from interlocutory orders and judgments." *Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992) (citing *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990)). A trial court's refusal to abate an action based upon the prior pending action doctrine is, however, 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) (citing *Atkins v. Nash*, 61 N.C. App. 488, 489, 300 S.E.2d 880, 881 (1983)). On the other hand, a trial court order's refusal to dismiss a complaint for lack of subject matter jurisdiction is not subject to appellate review on an interlocutory basis as a matter of right. *Shaver v. Construction Co.*, 54 N.C. App. 486-87, 283 S.E.2d 526, 527 (1981). In this case, however, given the necessity for us to address the "prior pending action" issue on the merits and given the interrelated nature of Defendants' twin challenges to the trial court's order, we conclude that we should exercise our authority to treat the record on appeal and briefs as a petition for the issuance of a writ of *certiorari* with respect to the exclusive jurisdiction issue and issue the writ on our own motion pursuant to N.C. Gen. Stat. § 7A-32(c) and N.C.R. App. P. 21 in order to reach the merits of both of Defendants' challenges to the trial court's order. *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997). As a result, we will address both of Defendants' claims on the merits.[2]

2. In addition to a record on appeal, Defendants filed a Supplement pursuant to N.C.R. App. P. 11(c). In his brief, Plaintiff argues that none of the materials contained in the proposed Rule 11(c) supplement were actually tendered to the trial court at the time of the hearing held with respect to Defendants' dismissal motions. As best we can tell, the trial court never had an occasion to determine whether the materials contained in the Rule 11(c) supplement were actually considered during the proceedings

B. Substantive Legal Issues

1. Exclusive District Court Jurisdiction

[2] In their first challenge to the trial court's order, Defendants contend that the trial court should have dismissed the Forsyth County action because Plaintiff's claims were subject to the exclusive jurisdiction of the District Court pursuant to N.C. Gen. Stat. § 7A-244 (providing that "[t]he district court division is the proper division without regard to the amount in controversy, for the trial of civil actions and proceedings for annulment, divorce, equitable distribution of property, alimony, child support, child custody and the enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof"). In their brief, Defendants argue that this Court's decisions in *Hudson Int'l, Inc. v. Hudson*, 145 N.C. App. 631, 550 S.E.2d 571 (2001), and *Garrison v. Garrison*, 90 N.C. App. 670, 369 S.E.2d 628 (1988), demonstrate that the trial court erred by refusing to grant their dismissal motion. We disagree.

In *Hudson*, the wife filed an action in the district court seeking, among other things, postseparation support. *Hudson*, 145 N.C. App. at 632, 550 S.E.2d at 572. During the pendency of the domestic claim, a corporation in which the husband owned an interest filed a declaratory judgment action in the superior court seeking sole ownership of a residence which had been titled to the corporation despite the fact that it had been built using marital property. *Id.* at 632-33, 550 S.E.2d at 572. This Court affirmed the superior court's decision to dismiss the declaratory judgment action pursuant to N.C. Gen. Stat. § 7A-244. *Id.* at 637-38, 550 S.E.2d at 575. Similarly, in *Garrison*, after granting the parties an absolute divorce, the district court announced the intention of addressing the parties' equitable distribution claims at a later time. *Garrison*, 90 N.C. App. at 671, 369 S.E.2d at 628-29. Subsequently, the husband initiated a partition proceeding in the

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leading up to the entry of the challenged orders. Although the record strongly suggests that Defendants did not follow the procedures set out in N.C.R. App. P. 11(c) in connection with the submission of the proposed supplement to the record on appeal, we have, out of an abundance of caution, elected to consider those materials in the course of our review of Defendants challenges to the trial court's orders. However, given that they merely show that certain information concerning the $24,000.00 that Defendant Christine Jessee allegedly converted to her own use was the subject of an information disclosure order entered in the Alamance County domestic case and that Plaintiff obtained access to the former marital residence for the purpose of attempting to identify and obtain possession of certain items of allegedly separate personal property in that same litigation, we do not believe that the materials contained in the Rule 11(c) supplement substantially affect our decision in this case.

superior court seeking to have property that he held jointly with his former wife partitioned. *Id.* In overturning the superior court's decision to grant the husband's partition petition, this Court held that the district court had not lost jurisdiction and that its exclusive jurisdiction over the disposition of the property barred the husband's request for partition. *Id.* at 672, 369 S.E.2d at 629. According to Defendants, the principles enunciated in *Garrison* and *Hudson* compel the conclusion that the equitable distribution claims pending in the Alamance County domestic action deprived the Forsyth County Superior Court of jurisdiction to hear the Forsyth County action.

As this Court has recently stated, "[a]t the core of *Garrison* and *Hudson* were two principles: (1) the same property was the subject of both the superior and district court actions, and (2) the relief sought and available was similar in each suit." *Burgess v. Burgess*, ___ N.C. App. ___, ___, 698 S.E.2d 666, 669 (2010). In reliance on this standard, we held in *Burgess* that, while the maintenance of a separate superior court action for equitable divestiture of certain shares of stock in a closely held corporation was barred by the parties' equitable distribution action, the same was not true of separate superior court claims for breach of fiduciary duty, an accounting, and the inspection of corporate books and records. *Id.* at ___, 698 S.E.2d at 672. When evaluated against the standard enunciated in *Burgess*, Defendants' argument fails.

The resolution of an equitable distribution action requires the District Court to "determine what is the marital [] and divisible property" and to "provide for an equitable distribution of the marital property[3] and divisible property[4] between the parties in accordance with the provisions of [the Equitable Distribution Act.]" N.C. Gen. Stat. § 50-20(a). In conducting an equitable distribution proceeding, "the trial court is required to conduct a three-step analysis: 1) identifica-

3. "Marital property" is defined as "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned[.]" N.C. Gen. Stat. § 50-20(b)(1).

4. "Divisible property" is defined as "all appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution" exclusive of "that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse[;]" "[a]ll property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation[;]" "[p]assive income from marital property received after the date of separation[;]" and "[i]ncreases and decreases in marital debt and financing charges and interest related to marital debt." N.C. Gen. Stat. § 50-20(b)(4).

tion of marital and separate property; 2) determination of the net market value of the marital property as of the date of separation; and 3) division of the property between the parties." *Estate of Nelson v. Nelson*, 179 N.C. App. 166, 168, 633 S.E.2d 124, 126-27 (2006) (citing *Willis v. Willis*, 86 N.C. App. 546, 550, 358 S.E.2d 571, 573 (1987)), *aff'd*, 361 N.C. 346, —— S.E.2d —— (2007). As part of this process, "[d]ebt[s], as well as assets, must be classified as marital or separate property[,]" *Byrd v. Owens*, 86 N.C. App. 418, 424, 358 S.E.2d 102, 106 (1987), with "marital debt[s]" defined as "a debt incurred during the marriage for the joint benefit of the parties." *Geer v. Geer*, 84 N.C. App. 471, 475, 353 S.E.2d 427, 429 (1987) (citing *Allen v. Allen*, 287 S.C. 501, 506, 339 S.E.2d 872, 875-76 (1986)).

The matters in dispute between the parties in the Forsyth County case stem from Plaintiff's claims that (1) Defendant Christine Jessee wrongfully converted Plaintiff's Social Security checks after the date of separation, (2) Defendant Christine Jessee wrongfully incurred substantial amounts of indebtedness in Plaintiff's name after the date of separation, and (3) Defendants Christine Jessee, Sandra L. Stewart, and the Jessee Family Trust utilized the proceeds of the debts for which Plaintiff was wrongfully obligated to obtain unencumbered title to the former marital residence and then fraudulently conveyed the former marital residence to Defendant Jessee Family Trust, subject to a retained life estate in Defendant Christine Jessee. Defendants have offered no specific suggestions as to the reason that these claims are barred by or completely subsumed within the pending Alamance County domestic action, and none appear to us.

The first two categories of claims asserted in the Forsyth County action relate to property allegedly accumulated and debts allegedly incurred, contrary to contentions repeatedly stated in Defendants' brief, after the date of separation. In addition, these items of property and debts do not stem from activities in any way related to the marriage or the parties' marital or divisible property; in fact, Plaintiff's complaint in the Forsyth County action explicitly alleges that Defendant Christine Jessee converted these checks and incurred this indebtedness for her own personal benefit. For that reason, the check and debts in question are not "marital property" or "divisible property" subject to distribution in an equitable distribution action. Moreover, we see no adequate mechanism for fully accommodating Plaintiff's claims for compensatory and punitive damages relating to these amounts within the confines of the Alamance County domestic action, particularly given that the District Court's distribution deci-

sion is supposed to be predicated on, among other things, waste or neglect involving "marital property or divisible property, or both," occurring "during the period after separation of the parties and before the time of distribution" in determining the appropriateness of an unequal distribution in favor of one party or another. N.C. Gen. Stat. § 50-20(c)(11a).[5] In addition, without more information than is contained in the present record, we are unable to determine whether the amount of marital and divisible property that will be subject to the court's jurisdiction in the Alamance County domestic case is sufficiently large to permit the complete rectification of the wrong that Plaintiff alleges that Defendant committed by means of an unequal distribution of marital and divisible property as authorized by N.C. Gen. Stat. § 50-20. Similarly, although a trial judge deciding an equitable distribution case "must consider" "the liabilities of each party" and "the separate property owned by each party at the time the property division is to become effective[,]" *Talent v. Talent*, 76 N.C. App. 545, 554-55, 334 S.E.2d 256, 261-62 (1985) (citing N.C. Gen. Stat. § 50-20(c)(1) and *Loeb v. Loeb*, 72 N.C. App. 205, 216, 324 S.E.2d 33, 41, *cert. denied*, 313 N.C. 508, 329 S.E.2d 393 (1985)), in equitably distributing the parties' marital and divisible property, we do not believe that this generalized ability to consider the overall financial position of the parties in making a distribution decision assures that Plaintiff will receive relief or even obtain complete consideration of his tort-based claims in the Alamance County domestic case to such an extent as to deprive the Forsyth County Superior Court of jurisdiction over Plaintiff's claims. As we noted in connection with our discussion of the distribution factor set out in N.C. Gen. Stat. § 50-20(c)(11a), in the event that the size of Plaintiff's claim exceeds the net value of the property available for distribution in the Alamance County domestic case and Defendant Christine Jessee later obtains additional assets upon which Plaintiff would be entitled to levy, Plaintiff will have effectively been deprived of an adequate remedy for his tort-based damage claims. As a result, Plaintiff is clearly not barred from asserting compensatory and punitive damage claims relating to these checks and debts separately and apart from the Alamance County domestic case.

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5. In the event that the District Court's ability to consider other relevant factors in its distribution decision pursuant to N.C. Gen. Stat. § 50-20(c)(12) sufficed to sweep these components of Plaintiff's claims into the ambit of the Alamance County domestic action, then no claim could ever survive a jurisdictional challenge lodged pursuant to N.C. Gen. Stat. § 7A-244, a result that is clearly untenable in the aftermath of *Burgess*.

Similarly, while the extent to which the former marital residence should be classified as marital property and distributed among the parties will, necessarily, be addressed in the Alamance County domestic action, the same is not necessarily true of the extent, if any, to which Defendant Christine Jessee utilized impermissibly obtained monies to obtain clear title to the former marital residence and then engaged in a fraudulent conveyance by transferring the property in question to Defendant Sandra L. Stewart in her capacity as trustee of Defendant Jessee Family Trust. On the contrary, the extent to which Defendants utilized impermissibly obtained funds to obtain clear title to and then fraudulently transferred the unencumbered former marital residence to Defendant Jessee Family Trust has little, if anything, to do with claims between Plaintiff and Defendant as to the value of that asset and the extent to which and manner in which it is subject to distribution between the parties pursuant to N.C. Gen. Stat. § 50-20. Moreover, since the allegedly fraudulent conveyance occurred after and involved the use of monies impermissibly obtained at Plaintiff's expense after the date of separation, it is not clear that Defendants' alleged actions can be appropriately considered and, if necessary, fully rectified in the course of the District Court's distribution decision pursuant to N.C. Gen. Stat. §§ 50-20(c)(1) and 50-20(c)(11a) for the reasons we have previously discussed in connection Plaintiff's tort-based damage claims. Finally, as Plaintiff points out in his brief before this Court, the entry of a judgment returning title to the former marital residence to Defendant Christine Jessee will make even that portion of the value of the former marital residence that is distributed to Defendant Christine Jessee or treated as her separate property in the Alamance County domestic action available for use in satisfying any judgment that Plaintiff obtains as a result of the independent monetary claims he has asserted against Defendant Christine Jessee in the Forsyth County action. Although the District Court certainly has the authority to join Defendants Sandra L. Stewart and the Jessee Family Trust as additional parties to the Alamance County equitable distribution case, *Upchurch v. Upchurch*, 122 N.C. App. 172, 176, 468 S.E.2d 61, 63-64 (stating that, "when a third party holds legal title to property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with their participation limited to the issue of the ownership of that property"), *disc. review denied*, 343 N.C. 517, 472 S.E.2d 26 (1996);[6] to return

6. In fact, the court presiding over the Alamance County domestic case would lack jurisdiction to value and distribute the former marital residence unless Defendants Sandra L. Stewart and the Jessee Family Trust were made parties to that

title to the divorcing parties, *Sharp v. Sharp*, 133 N.C. App. 125, 128, 514 S.E.2d 312, 314 (stating that "[a] judge in an equitable distribution action may recognize both legal and equitable interests in property and distribute such interests to the divorcing parties, even if such distribution requires an interest be 'wrested from the hands of the legal titleholder by the imposition of a constructive trust' ") (quoting *Upchurch v. Upchurch*, 128 N.C. App. 461, 463, 495 S.E.2d 738, 739, *disc. review denied*, 348 N.C. 291, 501 S.E.2d 925 (1998)), *rev'd on other grounds*, 351 N.C. 37, 519 S.E.2d 523 (1999), *Mugno v. Mugno*, ––– N.C. App. –––, –––, 695 S.E.2d 495, 498 (2010) (stating that "[w]hile third-party entities, whether corporations or individuals, holding marital assets in trust or whom are transferees defrauding a creditor spouse may be subject to legal action to secure marital property in an equitable distribution action, there are no findings here to suggest that such subterfuge was present") (citing *Upchurch*, 122 N.C. App. at 176, 468 S.E.2d at 63-64); to make an award to Plaintiff that reflects the value of his marital interest in the former marital residence and to account for any "[a]ct[] of either party . . . to waste, neglect, devalue or convert the marital property or divisible property . . . during the period after separation of the parties and before the time of distribution[,]" N.C. Gen. Stat. § 50-20(c)(11a), in the course of equitably distributing the parties' marital and divisible property, our decisions do not assure that it would be able to ensure that any portion of the former marital residence allocated to Defendant Christine Jessee would remain titled to her individually so as to render it available for the purpose of satisfying any judgment that Plaintiff might obtain against Defendant Christine Jessee independent of the claims that the parties have against each other as a result of the termination of their marital relationship. In addition, the trial judge responsible for deciding the parties' equitable distribution case would not be able to render any of Defendant Christine Jessee's separate property subject to execution to satisfy Plaintiff's tort-based claims. As a result, we conclude that the trial court correctly denied Defendants' motion to dismiss the Forsyth County action based on the exclusive jurisdiction provisions of N.C. Gen. Stat. § 7A-244.

2. Prior Pending Action

[3] Secondly, Defendants contend that the trial court erred by failing to find that the Alamance County domestic action required the dis-

proceeding. *Daetwyler v. Daetwyler*, 130 N.C. App. 246, 252, 502 S.E.2d 662, 666 (stating that "[t]he trial court was therefore without jurisdiction to distribute any portion of the certificates because Defendant's mother and sister were not parties to the equitable distribution proceeding"), *aff'd*, 350 N.C. 375, 514 S.E.2d 89 (1998).

missal of the Forsyth County case under the "prior pending action" doctrine. Once again, we are not persuaded by Defendants' argument.

"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) (citing *McDowell v. Blythe Brothers Co.*, 236 N.C. 396, 398, 72 S.E.2d 860, 862 (1952) (stating that "[t]he pendency of a prior action between the same parties for the same cause in a State court of competent jurisdiction works an abatement of a subsequent action either in the same court or in another court of the State having like jurisdiction") and *Cameron v. Cameron*, 235 N.C. 82, 84, 68 S.E.2d 796, 798 (1952) (stating that "[t]he pendency of a prior action between the same parties for the same cause in a State court of competent jurisdiction works [a]n abatement of a subsequent action either in the same court or in another court of the State having like jurisdiction")). The "prior pending action" doctrine involves "essentially the same questions as the outmoded plea of abatement," *Nationwide Mut. Ins. Co. v. Douglas*, 148 N.C. App. 195, 197, 557 S.E.2d 592, 593 (2001), and is, obviously enough, intended to prevent the maintenance of a "subsequent action [that] is wholly unnecessary" and, for that reason, furthers "the interest of judicial economy." *State ex rel. Onslow County v. Mercer*, 128 N.C. App. 371, 375, 496 S.E.2d 585, 587 (1998). "The ordinary test for determining 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*, 235 N.C. at 85, 68 S.E.2d at 798 (citations omitted); *see also Clark v. Craven Regional Medical Authority*, 326 N.C. 15, 20, 387 S.E.2d 168, 171 (1990).

As we have already noted, while both Plaintiff and Defendant Christine Jessee are parties to the Alamance County action, Defendants Sandra L. Stewart and the Jessee Family Trust are only named as parties in the Forsyth County action. In addition, the issues raised by the Forsyth County action include whether Defendant Christine Jessee, after the date of separation, improperly converted two Social Security checks that properly belonged exclusively to Plaintiff to her own use, incurred large amounts of indebtedness in Plaintiff's name and without his permission for her own use after the date of separation, and utilized the proceeds of the impermissibly

incurred debts to obtain clear title to and, with the assistance of Defendants Sandra L. Stewart and Jessee Family Trust, fraudulently conveyed the former marital residence to Defendant Jessee Family Trust after the date of separation. For the reasons set forth in more detail above, Defendants have not demonstrated that any of the issues raised by these claims are completely subsumed in or will be completely resolved by the litigation of the parties' claims in the Alamance County domestic action. Thus, for essentially the same reasons set forth in connection with our analysis of Defendants' claim that the trial court erred by denying their dismissal motion predicated upon the exclusive jurisdiction provisions of N.C. Gen. Stat. § 7A-244, we conclude that the trial court did not err by denying Defendants' motion that the Forsyth County action be dismissed pursuant to the "prior pending action" doctrine.

III. Conclusion

For the reasons stated above, we conclude that the trial court did not err by denying Defendants' motions to dismiss the Forsyth County action based upon the exclusive jurisdiction provisions of N.C. Gen. Stat. § 7A-244 and the "prior pending action" doctrine. Thus, the trial court's order should be, and hereby is, affirmed. However, despite our belief that neither N.C. Gen. Stat. § 7A-244 nor the "prior pending action" doctrine mandate dismissal of the Forsyth County action, there is a clear interrelationship between the two cases, such that the equitable distribution portion of the Alamance County domestic relations case should be resolved prior to the determination of the Forsyth County case. For that reason, we further conclude that the Forsyth County case should be held "in abeyance pending resolution of the" Alamance County domestic relations case, *Keith v. Wallerich*, —— N.C. App. ——, ——, 687 S.E.2d 299, 304 (2009), and the results of that equitable distribution case taken into consideration in the resolution of the Forsyth County case.

AFFIRMED.

Judge McGEE concurs.

Judge STROUD concurs in result only by separate opinion.

STROUD, Judge, concurring in result only.

I concur with the result reached by the majority opinion. I write separately to note that I continue to disagree with the analysis of

Garrison and *Hudson* as stated in the majority opinion. Defendant-wife argues that

> [o]ur Courts have uniformly held that when a party files an action listed in Section 7A-244 in District Court and another action relating to the subject matter of the prior action is then filed in Superior Court, the District Court's jurisdiction over the subject has already been invoked by the parties to the first action . . . . In actions similar to this one, our Courts have been unvarying in ruling that the trial court should dismiss the action.

Until *Burgess v. Burgess*, —— N.C. App. ——, 698 S.E.2d 666 (2010) defendant-wife was correct. As I stated in my opinion concurring in part and dissenting in part in *Burgess*,

> I differ somewhat from the majority opinion as to the interpretation of *Garrison v. Garrison*, 90 N.C. App. 670, 369 S.E.2d 628 (1988) and *Hudson Int'l, Inc. v. Hudson*, 145 N.C. App. 631, 550 S.E.2d 571 (2001). The majority opinion notes that "[a]t the core of *Garrison* and *Hudson* were two principles: (1) the same property was the subject of both the superior and district court actions, and (2) the relief sought and available was similar in each suit." However, I differ with the majority opinion as to its assertion that identity of the property and similarity of relief are the controlling principles of *Garrison* and *Hudson*. The controlling principle of *Garrison* and *Hudson* is the invocation of the jurisdiction of the District Court. *See Hudson Int'l, Inc. v. Hudson*, 145 N.C. App. 631, 550 S.E.2d 571 (2001); *Garrison v. Garrison*, 90 N.C. App. 670, 369 S.E.2d 628 (1988).

Id. at ——, 698 S.E.2d at 673.

I concur in the result in part because I am bound to follow *Burgess* as precedent, despite my disagreement with certain parts of the opinion. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court."). In addition, it appears from the record before us that the trial court did not have the benefit of all of the orders entered in the Alamance County equitable distribution case when it ruled upon defendant-wife's motion to dismiss. Plaintiff-husband filed a counterclaim for equitable distribution in Alamance County, as noted by the majority. But it appears that the Superior Court, Forsyth

County may not have been informed that the District Court, Alamance County had also entered several orders addressing some of the very same issues raised in the Forsyth County action. For example, on 3 September 2008, the parties entered a consent order in which they agreed that their date of separation was 9 May 2008, a date upon which the parties inexplicably still seem to disagree in their briefs before this court, and plaintiff-husband was ordered to provide documentation regarding some of the credit card debts he alleges that defendant-wife incurred after the date of separation. On 19 March 2009, District Court, Alamance County entered an order which granted plaintiff-husband's request for an injunction against defendant-wife's "transfer, sale, conveyance, disappearance, waste or conversion" of marital property, specifically including the marital home, which is also a subject of this action. Plaintiff-husband filed the Forsyth County action *after* entry of both of these Alamance County orders. However, I concur in the result, as the Forsyth County action will be stayed until completion of the Alamance County action, so that any overt conflict between the orders of the two courts addressing the same parties, property, and issues will be avoided.

I therefore concur in result only.

FRANCES JAMES, EMPLOYEE, PLAINTIFF v. CAROLINA POWER & LIGHT (NOW PROGRESS ENERGY), EMPLOYER, RSKCO, SERVICING AGENT, DEFENDANTS

No. COA10-1136

(Filed 7 June 2011)

1. Workers' Compensation— average weekly wage—method of calculating

The Industrial Commission erred in a workers' compensation case in calculating plaintiff's average weekly wage where the nature of her work for the employer varied and the Commission found that plaintiff had worked less than fifty-two weeks, triggering the third statutory method of calculating compensation, without a finding that method one would be unfair.

2. Workers' Compensation— disability—evidence and findings

The evidence in a workers' compensation case regarding plaintiff's disability supported the findings, which supported the conclusions.

3. Workers' Compensation— authorization for medical treatment—reasonable time

The Industrial Commission's conclusions in a workers' compensation case that plaintiff sought authorization for medical treatment within a reasonable time were supported by the findings, which were supported by the evidence.

4. Workers' Compensation— authorized medical care—prior to date of request

The Industrial Commission erred in a workers' compensation case by limiting authorized medical care to that received on or after the date plaintiff requested authorization for the treatment.

Appeal by Defendants and cross-appeal by Plaintiff from Opinion and Award entered 16 February 2007 by the Full Commission of the North Carolina Industrial Commission (Commission). Heard in the Court of Appeals 9 March 2011.

Anderson & Anderson, by Michael J. Anderson, for Plaintiff-Appellee/Cross-Appellant.

Teague, Campbell, Dennis & Gorham, LLP, by Bruce A. Hamilton and Tamara R. Nance, for Defendant-Appellants.

BEASLEY, Judge.

Where Plaintiff sought the Commission's approval for her unauthorized medical treatment within a reasonable time, and where the Commission ordered reinstatement of temporary total disability, we affirm. Where the Commission did not properly calculate Plaintiff's average weekly wage, we reverse and where the Commission limited medical care authorized to that received by Plaintiff on or after a certain date, we reverse and remand.

On 23 November 1999, Frances James (Plaintiff) sustained an admittedly compensable injury while working for Carolina Power & Light, now Progress Energy (Employer). Employer and servicing agent RSKCo. (collectively Defendants) accepted Plaintiff's claim on 31 December 1999 until their Form 24 Application was approved on 23 August 2002 and Defendants were allowed to suspend Plaintiff's ongoing temporary total disability compensation as of 5 July 2002. On 31 December 2002, Plaintiff filed a Form 33, noting the parties' disagreement on the issue of disability, and a hearing was held on 11 August 2003. Defendants appealed the deputy commissioner's opinion

and award to the Full Commission, which issued an opinion and award on 16 February 2007. Defendants filed an appeal on 16 March 2007, which this Court dismissed as interlocutory, as Plaintiff had moved for reconsideration of the Full Commission's opinion and award on 6 March 2007. *James v. Carolina Power & Light*, No. 189 N.C. App. 210, 657 S.E.2d 445 (2008) (unpublished). The Full Commission denied Plaintiff's motion for reconsideration by written order entered 5 August 2009, and both parties now appeal from the 16 February 2007 opinion and award. For the following reasons, we affirm in part and reverse in part and remand.

Prior to the subject injury, Plaintiff had been rendered a paraplegic as the result of a car accident in 1989. Plaintiff underwent several years of extensive rehabilitation and, on 18 November 1997, began working for Employer as a switchboard operator on a part-time basis. In September 1998, Plaintiff was involved in another non-work-related accident when a vehicle struck her as she was crossing the street in her wheelchair. Following the 1998 incident and treatment for various symptoms, including legs, arm, and finger pain and bowel control problems, Plaintiff obtained a full-time job with Employer on 26 April 1999 as a support assistant in I/T. In the course of her employment on 23 November 1999, Plaintiff was hand-delivering a package of diskettes to a co-worker in another building and crossing the street at a pedestrian crosswalk when a van hit her wheelchair repeatedly. Defendants accepted the compensability of Plaintiff's injury and began making payments for benefits at a compensation rate of $293.92 per week, based on an average weekly wage of $440.86.

Upon Employer's first Form 24 Application, the Commission, on 15 March 2000, ordered Plaintiff to comply with all reasonable and prescribed medical treatments and vocational rehabilitation provided by Defendants. At that point, Plaintiff's treatment had included emergency services at Raleigh Community Hospital (RCH), immediately following the injury, and then at the WakeMed Hospital Emergency Room on 1 December 1999. On 9 December 1999, Plaintiff presented to WakeMed for treatment and evaluation of severe back pain and changes with her bowel movements that she had begun to suffer following the work-related accident. She was admitted by her family doctor, Dr. Charles Cook, who examined Plaintiff and referred her to neurosurgeon, Dr. Robin Koeleveld. On 10 December 1999, Dr. Koeleveld examined Plaintiff and concluded that she had developed a new spinal fracture and noted that the trauma from her work injury

was causing lower back pain and rectal numbness. Dr. Koeleveld prescribed a brace to allow Plaintiff's fracture to heal.

As Plaintiff continued to experience chronic back pain following her release by Dr. Koeleved on 8 February 2000, Dr. Charles Cook referred her to Dr. David Cohen, an orthopedic surgeon at Johns Hopkins Hospital in Baltimore, Maryland. Dr. Cohen first examined Plaintiff on 23 March 2000 and, after a second visit on 10 May 2000, recommended surgery to decompress the spinal cord to address Plaintiff's posterior discomfort. After Dr. Cohen performed surgery on 17 June 2000, Plaintiff moved to South Carolina and began seeing her family practitioner, Dr. Raymond Sy on 18 July 2000. Defendant had requested a second opinion evaluation, and Dr. Robert Elkins examined Plaintiff on 12 February 2001. Dr. Elkins provided his opinion that Plaintiff had reached maximum medical improvement of her work-related injury, rating her as having a 30% impairment to her spine for the November 1999 accident.

When Dr. Sy began treating Plaintiff, she was being treated for severe depression and also had complete bowel and urinary incontinence. During this time, Plaintiff also saw Dr. Cohen for follow-up appointments and reported that the surgery had provided relief for her back pain but that her bowels remained incontinent. At her two-year follow-up appointment, in March 2002, Dr. Cohen considered Plaintiff to have reached maximum medical improvement with respect to her loss of bowel sensation. Around that same time, a vocational assessment of Plaintiff was performed, and the file was transferred to vocational rehabilitation counselor, Frances Somogyi, on 16 April 2002. Plaintiff had just begun a bowel incontinence program when Ms. Somogyi contacted her to begin vocational rehabilitation, and Plaintiff repeatedly informed the counselor that she felt she could not participate in vocational rehabilitation due to her bowel incontinence. During the course of her vocational rehabilitation program, Plaintiff failed to comply with several of Ms. Somogyi's requests, including registering with a job seeking service, placing applications with potential employers, and registering for an online tutorial to enhance her keyboarding skills. Plaintiff also missed two scheduled interviews, despite being under the order of cooperation from 15 March 2000. Defendants then filed a second Form 24 on 5 July 2002, which was granted by order dated 23 August 2002, suspending benefits as of the date Defendants' application was filed for Plaintiff's unjustified non-compliance and refusal to comply with vocational rehabilitation. Thereafter, Dr. Christopher Lahr adjusted

Plaintiff's bowel medication regimen and, on 15 November 2002, wrote a letter to Ms. Somogyi to inform her that Plaintiff could not keep all of her appointments, due to uncontrollable bowel activity.

As of 23 April 2003, Dr. Sy was of the opinion that due to Plaintiff's bowel incontinence and depression, she was unable to work in a public setting but may be able to work at home. Dr. Sy also attributed Plaintiff's inability to work or focus on work to her post-traumatic stress disorder (PTSD) resulting from the November 1999 accident. While Ms. Somogyi opined that Plaintiff was able to obtain employment in the range of $450 to $500 per week, the Commission adopted Dr. Sy's recommendation that vocational efforts should be limited to finding employment where Plaintiff can work at home. Defendant requested further one-time evaluations from licensed professional counselor, Dr. Lawrence Bergmann, and from gastroenterolologist, Dr. Judd Adelman, which Plaintiff attended on 28 May and 3 October 2003 respectively. While Dr. Bergmann indicated that Plaintiff's symptoms were consistent with a person who had been exposed to traumatic events, he was not able to relate her depressive symptoms to the November 1999 accident, believed that she had not yet reached maximum medical improvement for psychological symptoms that developed after her work-related injury, and thought she could participate in a job search from a psychological standpoint. Dr. Adelman could not relate Plaintiff's incontinence to her work-related accident and felt that she could participate in vocational rehabilitation but also stated that he would defer to Dr. Cohen's opinion about what conditions resulted from Plaintiff's 1999 accident and whether her loss of bowel sensation was permanent. The Commission specifically found that greater weight was given to Dr. Sy's opinion that Plaintiff's incontinence was causally related to the November 1999 accident and to evidence that indicated Plaintiff's psychological problems were a proximate result of the same.

While the Commission found Plaintiff was and remains unable to work or earn wages in any capacity as a result of her 1999 accident from that date forward, it also found that Plaintiff unjustifiably refused to cooperate with vocational rehabilitation efforts beginning 5 July 2002. However, as of 23 April 2003, when Dr. Sy determined she was unable to work, Plaintiff was deemed justified in refusing vocational services, and the Commission found it proper to hold those rehabilitation efforts in abeyance until Plaintiff's physicians determine otherwise. Observing that Plaintiff had not requested Commission approval of medical treatment until 31 December 2002,

when she filed the Form 33 on that date, the Commission found the request was made within a reasonable time under the circumstances. Based on its finding that Plaintiff's full-time employment with Employer prior to her injury had extended over a period of less than fifty-two weeks prior, the Commission found that Plaintiff should be compensated for her loss of full-time wages. While the Commission concluded that Plaintiff sustained a 30% partial impairment to her spine as a result of her compensable work-related injury, her more munificent remedy was under N.C. Gen. Stat. § 97-29. The Commission concluded that Plaintiff was entitled to temporary total disability benefits at all times following her work-related injury other than for the period from 5 July 2002 through 23 April 2003, when her refusal to participate in vocational rehabilitation was no longer unjustified; that her average weekly wage of $501.44 yields a compensation rate of $344.30; and that Plaintiff's request for the Commission's approval for authorization of her medical care was done within a reasonable time after receiving treatment, entitling her to medical benefits commencing on 31 December 2002, the date she filed the Form 33 request for hearing, including psychological treatment, for her compensable injury by accident. Both parties timely appealed to this Court.

Standard of Review

On appeal from the Full Commission's opinion and award, this Court's task is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). " 'The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (citation omitted). Thus, our "duty goes no further than to determine whether the record contains any evidence tending to support the finding[,]" and this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Deese*, 352 N.C. at 115, 530 S.E.2d at 552 (internal quotation marks and citations omitted). As such, the Commission's findings of fact "are conclusive on appeal when supported by [any] competent evidence, even though there be evidence that would support findings to the contrary," *id.* at 115, 530 S.E.2d at 552-53 (internal quotation marks and citations omitted), and may be set aside only "when there is a complete lack of competent evidence to support them," *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). However, the Commission's conclusions of

law are reviewed de novo. *Ramsey v. Southern Indus. Constructors, Inc.*, 178 N.C. App. 25, 30, 630 S.E.2d 681, 685 (2006).

Defendants' Appeal

On appeal, Defendants argue that the Commission erred in: (i) calculating Plaintiff's average weekly wage; (ii) ordering reinstatement of temporary total disability benefits as of 23 April 2003; and (iii) finding and concluding that Plaintiff sought Commission approval for her unauthorized medical treatment within a reasonable time.

I.

[1] Defendants argue that the Commission erred in calculating Plaintiff's average weekly wage where there is no competent evidence that Plaintiff worked for Employer for less than fifty-two weeks prior to her 23 November 1999 injury.

An award of temporary total disability entitles the injured worker to weekly compensation equal to 66 ⅔% of his or her average weekly wages. *See* N.C. Gen. Stat. § 97-29 (2009); *see also Loch v. Entertainment Partners*, 148 N.C. App. 106, 111, 557 S.E.2d 182, 185 (2001) (noting that the average weekly wage is based on earning capacity and "is determined by calculating the amount which the injured employee would be earning were it not for the injury"). An employee's "average weekly wages" are computed pursuant to § 97-2(5), which sets forth, in preferential order, five methods by which such calculation may be made. *McAninch v. Buncombe County Schools*, 347 N.C. 126, 129, 489 S.E.2d 375, 377 (1997) (holding N.C. Gen. Stat. § 97-2(5) "sets forth in priority sequence five methods by which an injured employee's average weekly wages are to be computed"). According to the statute:

> "Average weekly wages" shall mean [1] the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, including the subsistence allowance paid to veteran trainees by the United States government, provided the amount of said allowance shall be reported monthly by said trainee to his employer, divided by 52; [2] but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. [3] Where the employment prior to the injury

> extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. [4] Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.
>
> [5] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C. Gen. Stat. § 97-2(5) (2009).

Here, finding of fact 36 sets forth the Commission's basis for resorting to the third method[1]:

> 36. Based upon the Form 22 submitted in this matter, along with the supplemental material provided by the defendants and plaintiff's responses thereto, the Full Commission finds that where the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will thereby be obtained. The Full Commission finds that this method, more commonly known as "method [three]" is the appropriate means of determining Plaintiff's average weekly wage because Plaintiff's full-time employment with Defendant-employer was for less than fifty-two weeks prior to the injury. After her injury, Plaintiff has lost full-time wages (but not part-time wages) and, thus, should be compensated for her loss of full-time wages.

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1. The opinion and award states in both this finding and the correlative conclusion of law that the Commission employed the method "commonly known as 'method two' " in computing Plaintiff's weekly wage; however, it is clear from its analysis and determination that "method three" was applied, and we adjust our review to reflect the Commission's intent.

Defendant argues that there is no competent evidence to support this finding of fact that Plaintiff's employment extended over a period of less than fifty-two weeks prior to the date of injury. While the undisputed evidence indeed establishes that Plaintiff's employment, in both her part-time and full-time capacities, did extend over a period of fifty-two weeks, competent evidence also shows that her full-time employment was the result of her promotion to a new, permanent position that was completely different from the first. The Commission's own finding 4, which is unchallenged on appeal, states that "Plaintiff began working for Defendant-Employer on November 18, 1997 on a part-time basis as a switchboard operator. She went to full-time work for Defendant-Employer as a Support Assistant I in the I/T Control Administration Section on April 26, 1999." Thus, this is not the case where the Commission is required to average an employee's part-time and full-time wages earned during the relevant period when the employee has done the same character of work at the same pay grade but, based on either the employee's availability or the employer's need, has worked a greater number of hours at times and a lesser number at others. *See*, *e.g.*, *Mabry v. Bowers Implement Co.*, 48 N.C. App. 139, 144-45, 269 S.E.2d 165, 167-68 (1980) (holding Commission was required to average employee's eleven weeks of full-time employment with the forty-one weeks of part-time, where the employee held the same distributive education job and the same rate of pay at all times, relying on *Liles v. Electric Co.*, 244 N.C. 653, 94 S.E.2d 790 (1956), which "rejected as unfair and unjust a method which emphasized the worker's earnings during periods of full employment to the exclusion of consideration of the part time nature of the employment"). However, the more similar cases addressing the varying nature of the employee's work for the employer do not limit consideration of the duration of employment to the last position held. Thus, as discussed below, the Commission in this case did err in deeming Plaintiff's work for Employer to have spanned less than fifty-two weeks, as there was no competent evidence to support the finding.

The *Liles* Court distinguished several cases where the injured employee had been promoted separate from the part-time versus full-time inquiry:

> In *Munford v. Construction Co.*, 203 N.C. 247, 165 S.E. 696, decedent had been employed some three months at the time of his injury. The Commission had found as a fact that decedent's work "in the beginning of his employment . . . was not regular, but later he was assigned a truck and placed upon regular duty." Based

thereon, the Commission made a further unchallenged finding of fact that results fair and just to both parties would not be obtained by said second method; and this Court upheld an award based on the average weekly amount earned by a person of the same grade and character employed in the same class of employment, to wit, a full-time truck driver.

In *Mion v. Marble & Tile Co., Inc.*, 217 N.C. 743, 9 S.E.2d 501, 505, the decedent, who had worked less than fifty-two weeks prior to his injury, had twice received an increase in hourly pay. This Court held erroneous an award based on his average weekly wages during the last seven weeks of his employment, during which his compensation was greater than during the preceding portion of his period of employment. As stated *by Winborne, J.*, (now *C. J.*): "There is no finding that under the method provided as stated above (second method) for ascertaining the average weekly wage, the results here would be unfair to both parties, nor is there evidence tending to show such state of facts."

In *Early v. Basnight & Co.*, 214 N.C. 103, 198 S.E. 577, decedent, who had been a warehouse clerk for three years or thereabout, was promoted to the position of salesman some six months before his fatal accident. When injured his salary was $100.00 per month, or $23.07 per week, substantially more than he had earned as warehouse clerk. This Court held the evidence sufficient to support these findings by the Commission: "(4) That for exceptional reasons the average weekly wage of the plaintiff's deceased over the twelve months immediately preceding his injury and death would be unfair to the deceased employee and his dependents. (5) That the plaintiff's deceased would have been earning $23.07 per week if it had not been for the injury." It is noted that this statement appears in the opinion of the Commission: "The Full Commission has not taken into consideration the anticipated increase, but has given consideration to the actual increase that the deceased received from 1 January to 16 March." This Court held that the words, "the foregoing," in the second paragraph of G.S. s 97-2(e) referred *to the three methods* set out in the first paragraph thereof. *Winborne, J.* (now *C. J.*), speaking for this Court, said: "Hence, it is manifest that where exceptional reasons are found which make the computation on the basis of either of 'the foregoing' methods unfair to the employee, the legislature intended that the Industrial Commission might resort to such other method of computing the average

> weekly wages *as would most nearly approximate the amount the injured employee would be earning if he were living.*" (Italics added.)

Liles, 244 N.C. at 659-60, 94 S.E.2d at 795.

We agree with Plaintiff that our Supreme Court's opinion in Early presents a situation most analogous to the case *sub judice*. The difference, however, which we believe to be fatal in this instance, is that the Commission in *Early* specifically found that-where the employee had been regularly employed in several capacities by the employer for three or four years, all in the warehouse besides the last six months; had been promoted to a salesman position approximately six months prior to the injury; and had received an average weekly wage of $20 in the warehouse and for three months following his promotion to the position of salesman, but his salary was then increased to $23.07 per week-"*[t]hat for exceptional reasons the average weekly wage of the plaintiff's deceased over the twelve months immediately preceding his injury and death would be unfair to the deceased employee and his dependents." Early*, 214 N.C. at 105, 198 S.E. at 578. Our Supreme Court described the initial question presented on appeal as: whether the average weekly wages of an employee who "has been employed for the fifty-two weeks prior to the time of the injury which results in death, at wages the weekly average of which is definitely ascertainable by dividing the total by fifty-two" must be computed by the first, preferred method. *Id*. at 105-06, 198 S.E. at 578. While our Court answered in the negative, its formulation of the issue indicates that, notwithstanding the employee's promotion to a new position and pay raise, he had still been employed, as "employment" is defined, for a continuous fifty-two weeks. Accordingly, the Commission's finding that Plaintiff worked less than fifty-two weeks for Employer, triggering method three of the statute, was erroneous.

And while it would have been proper for the Commission to decline using method one, *notwithstanding Plaintiff's employment of over fifty-two weeks*, and calculate Plaintiff's average weekly wages as it did pursuant to method *five* for exceptional circumstances, such is permissible only in conjunction with a finding that the first four methods would be unfair, either to the employer or employee. The Commission did find that "results fair and just to both parties" would be obtained by applying the third method; however, this is not the same as finding that method one would be unfair. Therefore, we are constrained to reverse the Commission's calcula-

tion of Plaintiff's average weekly wage according only to her loss of full-time wages and remand for findings to support any recalculation that the Commission deems appropriate.

II.

[2] Defendant argues that the Commission erred in ordering reinstatement of temporary total disability benefits as of 23 April 2003. Specifically, Defendant contends that there is no competent evidence supporting the Commission's finding of fact that Plaintiff's incontinence was causally related to the 23 November 1999 accident or its finding that Plaintiff's unjustified refusal to cooperate with medical treatment and vocational rehabilitation ended by 23 April 2003. However, where Dr. Sy's testimony constitutes sufficient competent evidence to support each of these findings, which support the Commission's respective conclusions that Plaintiff was and continues to be totally unable to earn wages in any employment since the date of her work-related injury and is entitled to a reinstatement of her temporary total disability benefits as of 23 April 2003 until further order by the Commission, we affirm.

III.

[3] Defendants argue that the Commission erred in finding and concluding that Plaintiff sought Commission approval for her unauthorized treatment within a reasonable time. We disagree.

The Commission made the following findings related to Plaintiff's unapproved treatment and her delay in requesting authorization therefor, which Defendants challenge as unsupported by competent evidence:

> 33. Plaintiff suffered a serious injury to her spine on November 23, 1999, and she immediately began having neurological problems. Already being a paraplegic, she rightfully was concerned with obtaining the best medical treatment possible, particularly since Plaintiff had lived very independently prior to the accident of November 23, 1999. The physicians chosen by Defendants did not provide all the necessary medical treatment that was required to effectively treat Plaintiff's injury and provide the relief she needed, so she properly sought the best medical treatment she could find through a referral to Johns Hopkins Hospital and specifically to Dr. Cohen. Dr. Cohen is Harvard trained, he is a full-time professor at Johns Hopkins Medical School, and he teaches, treats patients, and does research.

. . . .

> 35. Plaintiff requested Industrial Commission approval of medical treatment as of December 31, 2002, which was within a reasonable time considering the circumstances. Defendants were timely aware of the treatment Plaintiff received and Plaintiff's request for them to authorize the same. Plaintiff had a serious injury that required major surgery and rehabilitation such that she had to move back in with her family in South Carolina, causing her a significant loss of independence. Plaintiff was dealing with her physical condition and relied upon her former attorney to represent her interests in her action before the Commission. Plaintiff's former attorney's delay in requesting authorization should not be imputed to Plaintiff.

Based on these findings, the Commission concluded that "Plaintiff's request for approval from the Commission for authorization for her medical care was done in a reasonable time after receiving the treatment, considering the circumstances of her case," entitling her "to medical benefits commencing on December 31, 2002, the date she filed the Form 33 request for hearing, including psychological treatment, for her compensable injury by accident of November 23, 1999.

Defendants first contend that the Commission's findings regarding Plaintiff's reasons for seeking unauthorized treatment and the Defendants' knowledge that Plaintiff was doing so are irrelevant to explain her delay. However, in *Ruggery v. N.C. Dep't of Corrections*, 135 N.C. App. 270, 520 S.E.2d 77 (1999), this Court addressed the reasonableness of the employee's request for medical authorization under the particularly relevant circumstance that the employer had notice of the treatment by physician's of the employee's own choosing:

> There is no evidence in the present case that employer suffered from a lack of notice that employee was receiving treatment from physicians the employer did not authorize. The uncontroverted evidence is that employee did not return to the employer-approved physician, Dr. Siegel, but instead sought treatment from other physicians because Dr. Siegel refused to see employee. We do not believe that the legislature intended to shield employers from paying for medical expenses arising from work related injuries when the employer-approved physician has refused to treat the employee, forcing the employee to seek treatment from other physicians.

Ruggery, 135 N.C. App. at 277, 520 S.E.2d at 82. Moreover, Finding of Fact 33 clearly relates to the reasonableness of Plaintiff's choice to proceed with treatment despite the lack of approval therefor in light of the seriousness of her condition and sense of urgency related thereto. Finally, while there may be evidence to the contrary, Plaintiff's own testimony presents competent evidence that her former attorney was responsible for her delay in seeking Commission authorization. Defendants emphasize that Plaintiff was repeatedly advised that she would have to get approval if she wanted Defendants to ultimately pay for her unauthorized treatment, but Plaintiff did not dispute her knowledge of the requirement, stating, "My attorney made me aware that it was necessary to do that—for her to get it approved by the Commission." Such constitutes competent evidence that Plaintiff was relying on her former attorney to seek approval and supports the Commission's finding that the delay should not be attributed to Plaintiff. We conclude that those portions of Findings of Fact 33 and 35 challenged by Defendants are thus supported by competent evidence and, accordingly, support the Commission's conclusion that Plaintiff's ultimate request for authorization was done within a reasonable time after receiving treatment.

Plaintiff, however, also disputes Finding of Fact 35 to the extent that it finds she requested authorization only for medical treatment received on or after 31 December 2002.

Plaintiff's Appeal

[4] Plaintiff cross-assigns as error the Commission's limitation of the medical care authorized to that received by Plaintiff on or after 31 December 2002. We agree.

Where we have affirmed the Commission's conclusion that Plaintiff's request for approval of her medical treatment was done within "a reasonable time *after receiving the treatment*," Finding of Fact 35 and other findings related to Plaintiff's unauthorized treatment unfailingly lead to the conclusion that Plaintiff's treatment *prior* to the date she filed the request was authorized.

While an employee's "authorized treating physician" is generally selected by the employer," if a workers' compensation claimant prefers, he may select, subject to Industrial Commission's approval and authorization, a new treating physician. *Schofield v. Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980). As discussed above, the Commission's approval and authorization need not be obtained prior to seeking ser-

vices of a new treating physician but, rather, within a reasonable time after claimant has selected a new physician. Thus, where the claimant "*seeks retroactive authorization* of a new treating physician, the Commission 'must make findings relative to whether such approval was sought . . . within a reasonable time.' " *Jenkins v. Public Service Co. of N.C.*, 134 N.C. App. 405, 411, 518 S.E.2d 6, 12 (1999) (quoting *Schofield*, 299 N.C. at 586-87, 264 S.E.2d at 60) (emphasis added). Our Supreme Court has further required that, upon submission of a claim for approval for medical treatment rendered by employee's own physician, there must be findings based upon competent evidence that the treatment was required to effect a cure or give relief, or where additional time is involved, that it has tended to lessen the period of disability and that condition treated is, or was, caused by, or was otherwise traceable to or related to injury giving rise to compensable claim.

In addition to Findings of Fact 33 and 35, the Commission found, in unchallenged Finding of Fact 34, that

> Dr. Cohen's treatment of Plaintiff, including the surgical procedure and all follow-up treatment, was directly related to her November 23, 1999 injury. Dr. Cohen noted objective evidence of the injury that required surgery, and the surgery was performed to remove the compression that was present on the spinal cord and to stabilize Plaintiff's spine to get the bones to heal together, so that she would not have any further progression of her kyphosis, any further worsening of her neurologic function, and to possibly aid in the recovery of some of her lost functioning. After the surgery, Plaintiff's pain was diminished, and she recovered part of her motor function. Dr. Cohen's treatment of the Plaintiff was necessary to effect a cure, provide relief and/or lessen Plaintiff's period of disability.

Where findings of this nature are required only when an employee is seeking approval for medical treatment already received, it defies logic that the Commission would limit its authorization to Plaintiff's prospective treatment from the date of her request forward. Moreover, the Commission's findings specifically validate Dr. Cohen's treatment of Plaintiff, which began on 23 March 2000, emphasizing the surgery he performed on 17 June 2000 and the follow-up visits, totally at least four as of March 2002. Thus, it is inexplicable that the Commission would-in light of the findings which tend to authorize Plaintiff's prior treatment, as the finding that her request was made

within a reasonable time did not limit the reasonableness thereof to treatment by any certain physician or any certain procedure over another-limit the reimbursement for Plaintiff's medical care to that obtained after 31 December 2002. Where the findings simply do not support this aspect of the Commission's conclusion, we reverse and remand.

Affirmed in part; Reversed in part and Remanded.

Judges CALABRIA and STEELMAN concur.

BRANCH BANKING AND TRUST COMPANY, PLAINTIFF-APPELLEE v. CHICAGO TITLE INSURANCE COMPANY; LEWIS A. THOMPSON, III; AND BANZET, THOMPSON & STYERS, PLLC, DEFENDANTS-APPELLANTS

No. COA10-196

(Filed 7 June 2011)

1. **Reformation of Instruments— title insurance—exclusion of prior deed**

The trial court did not err by granting summary judgment for BB&T on the issue of reformation of a 2003 title insurance policy where Chicago Title did not forecast a showing that BB&T and Chicago Title mutually intended to exclude a prior deed of trust from the policy and that the policy failed to express those intentions as a result of mutual mistake.

2. **Mortgages and Deeds of Trust— subsequent deed of trust—debt not extinguished**

The trial court did not err by granting summary judgment for BB&T on the issue of whether an exclusion in a 2003 title insurance policy applied to BB&T's cause of action. Chicago Title contended that no amount remained to be paid on a promissory note secured by a 2003 deed of trust because it was effectively replaced by a 2005 deed of trust on the same property. Enforcing the document as written, the debt owed on the 2003 deed of trust was renewed and extended by a new document, the 2005 deed of trust, and the 2003 debt was not extinguished.

3. Statutes of Limitation and Repose— title insurance—prior deed of trust—notice and exclusion

The trial court did not err in its determination of the statute of limitations applicable to a title insurance case where Chicago Title would not have been barred by either N.C.G.S. § 1-52(9) or N.C.G.S. § 1-15 from filing a claim for professional malpractice or negligent misrepresentation when it was notified of a prior deed of trust. Additionally, Chicago Title had issued a policy for the prior deed of trust, and, by excluding prior unrecorded liens, Chicago Title implicitly agreed to insure against liens that were recorded.

Appeal by Defendants-Appellants from order entered 29 June 2009 by Judge Lindsay R. Davis, Jr. in Superior Court, Forsyth County; order entered 3 November 2009 by Judge Richard W. Stone in Superior Court, Forsyth County; and judgment entered 3 November 2009 by Judge Richard W. Stone in Superior Court, Forsyth County. Heard in the Court of Appeals 12 October 2010.

Bell, Davis & Pitt, P.A., by Alan M. Ruley and Bradley C. Friesen, for Plaintiff-Appellee.

Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell and Christopher C. Finan, for Defendants-Appellants.

McGEE, Judge.

Chicago Title Insurance Company (Chicago Title) issued a title insurance policy (the 2003 policy) to Branch Banking and Trust Company (BB&T) on 11 April 2003, insuring a deed of trust (the 2003 deed of trust) encumbering a 5.678 tract of real property in Warren County, North Carolina. The real property was acquired by Duane White Land Company, LLC (Land Company) from Eaton Ferry Marina, Inc. on 10 April 2001. The 2003 policy included two other deeds of trust as exceptions to the coverage provided to BB&T. The two exceptions listed were (1) a deed of trust in favor of two individuals, known as the "Purchase Money Deed of Trust" and (2) a deed of trust in favor of The Money Store Commercial Mortgage, Inc., known as the "Money Store Deed of Trust." The 2003 deed of trust was recorded in the Warren County Registry on 11 April 2003, by Banzet, Banzet & Thompson, PLLC (the Banzet Firm), through attorneys Lewis A. Thompson (Thompson) and Julius Banzet, III (Banzet). The firm is presently known as Banzet, Thompson & Styers, PLLC. The Banzet Firm issued a final opinion on title, effective 11 April 2003,

and submitted it to Chicago Title. Chicago Title is the only Defendant that is a party to this appeal.

A second deed of trust was executed by BB&T and Land Company on 23 March 2005 (the 2005 deed of trust), and encumbered the same real property as that described in the 2003 deed of trust. Although BB&T requested the Banzet Firm obtain title insurance from Chicago Title on the 2005 deed of trust, no title policy was issued for the 2005 deed of trust. The 2005 deed of trust settlement statement shows that $8,265.00 was allocated to Chicago Title for title charges, and that $8,180.00 was allocated to Chicago Title for title insurance premium. From the record, it appears the check to Chicago Title for title charges was subsequently voided, but that Chicago Title deposited the check for the title insurance premium, even though no title insurance policy was issued for the 2005 deed of trust.

BB&T discovered "no later than" 21 December 2005 that, on the date the 2003 Deed of Trust was executed, a third deed of trust existed. This third deed of trust was dated 6 March 1998 and was in favor of Centura Bank (the Centura deed of trust). The Centura deed of trust encumbered a portion of the 5.678 tract described in the 2003 deed of trust. That portion of real property was not explicitly mentioned in the 2003 deed of trust or in the 2003 policy. Chicago Title had issued the policy of title insurance to Centura Bank in March 1998 (the Centura policy), insuring the Centura deed of trust. However, the Centura deed of trust was not listed as an exception to the coverage under the 2003 policy. BB&T first notified Chicago Title of the additional encumbrance on 26 March 2006.

The notice provision of the 2003 policy, section 3, reads in relevant part as follows:

> [BB&T] shall notify [Chicago Title] promptly in writing . . . in case knowledge shall come to [BB&T] of any claim of title or interest which is adverse to the title to the estate or interest or the lien of the insured mortgage, as insured, and which might cause loss or damage for which [Chicago Title] may be liable by virtue of this policy[.] . . . If prompt notice shall not be given to [Chicago Title], then as to [BB&T] all liability of [Chicago Title] shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify [Chicago Title] shall in no case prejudice the rights of [BB&T] under this policy unless [Chicago Title] shall be prejudiced by the failure and then only to the extent of the prejudice.

Centura Bank initiated foreclosure on the Centura deed of trust in early 2006. This foreclosure action was later dismissed. Centura Bank initiated a second foreclosure proceeding on 14 March 2007. BB&T then filed a claim with Chicago Title on 26 March 2007 pursuant to the 2003 policy in which BB&T requested Chicago Title cover BB&T's losses related to the Centura deed of trust. BB&T's subsidiary, BB&T Collateral Service Corporation, acquired the Centura deed of trust for $464,000.00 on 26 April 2007. The pending 2007 foreclosure proceeding was then dismissed. BB&T initiated a foreclosure proceeding on the 2003 deed of trust on 15 August 2007. The real property described in the 2003 deed of trust, including the disputed tract, was sold at foreclosure for $3,263,400.00. BB&T filed an additional claim with Chicago Title to recover the $464,000.00 in damages as a result of the alleged breach of the 2003 policy. Chicago Title denied BB&T's claim for damages on 18 March 2008.

BB&T filed a complaint against Chicago Title in Forsyth County Superior Court for breach of contract and negligence on 20 March 2008. Chicago Title filed a motion to dismiss, answer and counterclaim on 30 May 2008. Chicago Title's counterclaim requested reformation of the 2003 policy on the grounds that the 2003 policy did not conform to the intent of either BB&T or Chicago Title. In the alternative, Chicago Title's counterclaim requested a declaratory judgment from the trial court that BB&T had suffered "no loss or damage" as defined in the 2003 policy. Chicago Title argued that, because no remaining balance was due on the 2003 Deed of Trust, BB&T had not suffered any loss or damage and, thus, should be denied relief under this provision of the 2003 policy.

BB&T filed a reply to the counterclaim on 30 June 2008 in which it denied that reformation would be proper because the 2003 policy accurately described the real property BB&T intended to have covered. BB&T claimed that it believed the 2003 deed of trust, and thus the 2003 policy, included the portion of real property covered by the Centura deed of trust. In its reply, BB&T also denied Chicago Title's claim that BB&T had suffered no loss or damage in relation to the Centura deed of trust. BB&T filed a motion for summary judgment on its claim for breach of contract and Chicago Title's counterclaim for reformation on 15 May 2009. Chicago Title filed a motion for summary judgment on 26 May 2009 on BB&T's claim for breach of contract and Chicago Title's counterclaim to declare that BB&T had not suffered any loss or damage.

The trial court entered an order on 29 June 2009 granting BB&T's motion for summary judgment on Chicago Title's counterclaims and defenses relating to mutual mistake and no loss or damage. The trial court determined, however, that there was sufficient evidence to go to trial on Chicago Title's defense that it was prejudiced pursuant to the terms of the 2003 policy because BB&T did not provide Chicago Title with sufficient notice of BB&T's discovery of the Centura deed of trust. At trial, the trial court ultimately found for BB&T and, in its 3 November 2009 judgment, awarded BB&T $404,000.00, prejudgment interest, and costs. Chicago Title appeals.

I.

[1] Chicago Title argues that the trial court erred in granting summary judgment to BB&T on the issue of reformation of the 2003 policy because an issue of material fact existed concerning the intent of the parties regarding the 2003 policy. We disagree.

" 'We review an order allowing summary judgment *de novo*. If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal.' " *Wiggs v. Peedin*, 194 N.C. App. 481, 485, 669 S.E.2d 844, 847 (2008) (citation omitted).

" 'Reformation is a well-established equitable remedy used to reframe written instruments where, through mutual mistake or the unilateral mistake of one party induced by the fraud of the other, the written instrument fails to embody the parties' actual, original agreement.' " *Metropolitan Property and Cas. Ins. Co. v. Dillard*, 126 N.C. App. 795, 798, 487 S.E.2d 157, 159 (1997) (citation omitted). Chicago Title makes no argument that there was any fraud involved in the execution of the 2003 policy; instead its argument for reformation is based solely on its contention that there existed a mutual mistake concerning the real property the 2003 policy was intended to cover. " 'A mutual mistake is one common to both parties to a contract . . . wherein each labors under the same misconception respecting a material fact, the terms of the agreement, or the provisions of the written instrument designed to embody such agreement.' " *Id.* (citations omitted).

"When a party seeks to reform a contract due to an affirmative defense such as mutual mistake . . . the burden of proof lies with the moving party." *Smith v. First Choice Servs.*, 158 N.C. App. 244, 250, 580 S.E.2d 743, 748 (2003) (citation omitted).

> [T]here is "a strong presumption in favor of the correctness of the instrument as written and executed, for it must be assumed that the parties knew what they agreed and have chosen fit and proper words to express that agreement in its entirety." This presumption is strictly applied when the terms of a deed are involved in order "to maintain the stability of titles and the security of investments." With these principles in mind, we must examine the record to determine whether [Chicago Title] proved that there was a mutual mistake of fact as to what land was [covered] . . . by "clear, cogent and convincing evidence."

Hice v. Hi-Mil, Inc., 301 N.C. 647, 651, 273 S.E.2d 268, 270-71 (1981) (citations omitted).

> " 'The party asking for relief by reformation of a deed or written instrument, must allege and prove, first, that a material stipulation, as alleged, was agreed upon by the parties, to be incorporated in the deed or instrument as written, and second, that such stipulation was omitted from the deed or instrument as written, by mistake, either of both parties, or of one party, induced by the fraud of the other, or by the mistake of the draughtsman. Equity will give relief by reformation only when a mistake has been made, and the deed or written instrument because of the mistake does not express the true intent of both parties. The mistake of one party to the deed, or instrument, alone, not induced by the fraud of the other, affords no ground for relief by reformation.' "
>
> When the pleader has alleged (1) the terms of an oral agreement made between the parties; (2) their subsequent adoption of a written instrument intended by both to incorporate the terms of the oral agreement but differing materially from it; and (3) their mutual but mistaken belief that the writing contained their true, *i.e.*, the oral, agreement, our cases hold that the pleading will survive a demurrer.

Matthews v. Van Lines, 264 N.C. 722, 725, 142 S.E.2d 665, 668 (1965) (citations omitted).

Chicago Title fails to forecast evidence required for the remedy of reformation. Chicago Title does not allege that it had an oral agreement with BB&T that was mistakenly omitted from the 2003 policy. *Id.* Chicago Title argues that a mutual mistake by both it and BB&T led to the "inadvertent windfall of coverage" because neither party ever intended for the real property encumbered by the Centura deed

of trust to be included in the 2003 policy. BB&T argues that it was not BB&T's intention that the 2003 policy exclude the real property encumbered by the Centura deed of trust, and that BB&T and Chicago Title never agreed that the 2003 policy would exclude coverage for the real property encumbered by the Centura deed of trust.

Chicago Title cites no evidence of any oral agreement between it and BB&T that would have excluded the Centura deed of trust from the 2003 policy. It follows that, without such an agreement between the two parties, their subsequent adoption of the 2003 policy could not have "differ[ed] materially" from the oral agreement as required in order to establish mutual mistake as a basis for reformation. *Matthews*, 264 N.C. at 725, 142 S.E.2d at 668. Having failed to present evidence in support of the first element, Chicago Title necessarily fails the second and third elements. *Id.* Therefore, Chicago Title has not made the necessary showing to support reformation based upon mutual mistake. *Id.*

Even assuming *arguendo* that Chicago Title presented sufficient evidence to support its contention that BB&T intended to exclude the contested parcel from the 2003 policy, Chicago Title's own argument defeats its appeal on this issue. Chicago Title does not argue that its own intent was erroneously represented by the 2003 policy. Chicago Title alleges that when it executed the 2003 policy, its specific intent was to "insure only that interest in real property that BB&T actually intended to encumber and insure in connection with its recordation of the [2003 policy]." We believe more is required for reformation of a title insurance policy. Chicago Title needed to show that it and BB&T had a meeting of the minds as to the specific terms of the 2003 policy, and that some material part of their agreement was mistakenly omitted from the 2003 policy. In the present case, Chicago Title and BB&T needed to have orally agreed upon the specific description of the real property to be covered by the 2003 policy. A general intent on the part of Chicago Title to cover whatever real property BB&T intended to have covered is insufficient to form the basis for a reformation based upon mutual mistake. Chicago Title fails to make any argument that it and BB&T had *specifically* agreed that the contested parcel *would be excluded* from coverage by the 2003 policy. *Matthews*, 264 N.C. at 725, 142 S.E.2d at 668. There is no evidence that a " 'material stipulation . . . *agreed upon by the parties* . . . was omitted from the deed or instrument as written, by [the] mistake . . . of both parties[.]' " *Id.* (citation omitted) (emphasis added).

Viewing the evidence in the light most favorable to the party opposing summary judgment, Chicago Title "simply has not provided a factual basis to support equitable reformation of the [2003 policy]." *Carter v. Am. Ins. Co.*, 190 N.C. App. 532, 539, 661 S.E.2d 264, 270 (2008) (citation omitted). Chicago Title did not present evidence sufficient to forecast a showing that BB&T and Chicago Title had mutual intentions to exclude the Centura deed of trust from the 2003 policy and that the 2003 policy, as the result of a mutual mistake, failed to properly express those intentions. *Matthews*, 264 N.C. at 725, 142 S.E.2d at 668.

II.

[2] Chicago Title next argues that the trial court erred in granting summary judgment in favor of BB&T by concluding that an exclusion in the 2003 policy, namely section 5—the "no loss or damage" exclusion—did not apply to BB&T's cause of action. The "no loss or damage" exclusion provision in the title insurance policy states that if BB&T is unable to show proof that it suffered an actual loss due to any fault of Chicago Title, Chicago Title's obligations to BB&T under the 2003 policy shall terminate.

Chicago Title claims that no amount remained to be paid in connection with the promissory note secured by the 2003 deed of trust, because the 2005 deed of trust, executed on the same real property described in the 2003 deed of trust, effectively replaced the 2003 deed of trust and the debts owed in connection with it. Chicago Title argues that since it did not explicitly insure the 2005 deed of trust, it was not liable for the loss or damage suffered by BB&T in connection with Chicago Title's defective/mistaken coverage of the 2003 deed of trust. We disagree.

When reviewing the provisions of an insurance contract, we employ the following "general principles of construction . . . to divine the meaning of [the] contract." *Woods v. Insurance Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978). "The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect." *Id.* at 506, 246 S.E.2d at 777. "[I]f the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written[.]" *Id.* We consider Chicago Title's argument in light of these principles of construction.

The 2003 policy states:

> The insured mortgage and assignments thereof, if any, are described as follows:

> Deed of Trust from DUANE WHITE LAND COMPANY, LLC to BB&T COLLATERAL SERVICE CORPORATION, Trustee for BRANCH BANKING AND TRUST COMPANY, dated April 11, 2003, filed for record April 11, 2003, at 10:37 am, in Book 746, page 298, Warren County Registry, securing $8,000,000.00.

The 2003 policy insures the 2003 deed of trust without restriction, except for those exceptions included in the "Exclusion from Coverage" section of the 2003 policy, none of which are relevant here.

The 2003 deed of trust contains a Statement of Purpose, which states in part:

> In this Deed of Trust reference shall be made simply to the "Note or other Document" and such a reference is deemed to apply to all of the instruments which evidence or describe the Debt, or which secure its payment, and to all renewals, extensions and modifications thereof, whether heretofore or hereafter executed, and includes without limitation all writings described generally and specifically on the first page of this Deed of Trust in numbered paragraph 2. This Deed of Trust shall secure the performance of all obligations of Grantor and of any third party to Beneficiary which are described in this Deed of Trust, in the Note or other Document, and such performance includes the payment of the Debt. In this Deed of Trust the definition of "Debt" includes: (i) the principal; (ii) all accrued interest including possible fluctuations of the interest rate if so provided in the Note or other Document; (iii) all renewals or extensions of any obligation under the Note or other Document (even if such renewals or extensions are evidenced by new notes or other documents)[.]

This Court is required to give weight to every word and provision of the insurance contract and to the documents it covers. *Woods*, 295 N.C. at 506, 246 S.E.2d at 777. We find the third subsection of the definition of "Debt" to be dispositive in this case.

The 2003 deed of trust, which was incorporated into the 2003 policy, defined "Debt" to include "all renewals or extensions of any obligation under the Note or other Document (even if such renewals or extensions are evidenced by new notes or other documents)[.]" We find that that the language is clear, and that only one reasonable interpretation exists. *Id.* at 506, 246 S.E.2d at 777. We are, therefore, obligated to "enforce the contract as written." *Id.* We hold that the 2005 deed of trust is, for the purposes of its inclusion in the 2003 policy's

coverage of the 2003 deed of trust, an "extension[] evidenced by a new note" of the 2003 policy. Therefore, the debt owed on the 2003 deed of trust was not extinguished by the 2005 deed of trust. The debt owed on the 2003 deed of trust was, instead, renewed and extended by a new note or document—the 2005 deed of trust. The trial court did not err in granting summary judgment in favor of BB&T on this issue. This argument is without merit.

III.

[3] Chicago Title also contends the trial court erred in determining that N.C. Gen. Stat. § 1-52(9) was the statute of limitations that controlled claims Chicago Title may have filed against the Banzet Firm rather than N.C. Gen. Stat. § 1-15. Chicago Title further argues the trial court erred in determining that Chicago Title had failed to show it had been prejudiced by any delay on the part of BB&T in informing Chicago Title of the Centura deed of trust. We disagree.

Chicago Title argued at trial that because of BB&T's delay in informing Chicago Title of the Centura deed of trust, Chicago Title was effectively prevented from bringing a claim against the Banzet Firm for improperly issuing a final opinion on title for the 2003 deed of trust to Chicago Title that omitted the Centura deed of trust. The standard of appellate review for a decision rendered in a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001) (citation omitted). If there is competent evidence to support the findings of fact, they are binding on appeal. *Id.* (citation omitted). While a trial court's findings of fact are binding if supported by sufficient evidence, a trial court's conclusions of law are reviewed *de novo*. *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996) (citation omitted).

N.C. Gen. Stat. § 1-52(9) (2009) sets forth a three-year statute of limitations for claims of negligent misrepresentation. For a claim of professional malpractice, N.C. Gen. Stat. § 1-15(c) (2009) states in relevant part:

> [A] cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided

> that whenever there is . . . economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action[.]

The trial court concluded at the time of trial that

> [a]ssuming Chicago Title's first discovery of the Centura [deed of trust] as a lien prior to BB&T's 2003 [deed of trust] was on March 26, 2007, the three year statute of limitations for Chicago Title to commence an action for negligent misrepresentation [against the Banzet Firm] still ha[d] not expired.

Similarly, the trial court concluded that the three-year statute of limitation set forth in N.C.G.S. § 1-15 would have expired on 11 April 2006, and that the

> [f]our year statute of repose set forth in N.C. Gen. Stat § 1-15 would have expired . . . on April 11, 2007, but Chicago Title did not commence any action against [the Banzet Firm], Lewis A. Thompson, or Julius Banzet, III before April 11, 2007, even though Chicago Title had received BB&T's Claim Letter two weeks before that date.

Chicago Title argues that the trial court improperly applied N.C.G.S. § 1-52(9) and that "the only proper claim" available against Thompson was "one for professional negligence[,]" which would apply the statute of limitations set forth in N.C.G.S. § 1-15. However, the trial court found as fact that Chicago Title had

> a period of at least eight (8) days . . . to determine what actions, if any, it could . . . take against [the Banzet Firm and Thompson and/or Banzet] . . . prior to the expiration of the four (4) year period of time following [the] parties['] last act with respect to Chicago [Title's] issuance of the [2003 policy]. Chicago Title did not take any such actions against said attorneys.

Chicago Title does not contest this finding of fact and it is, therefore, binding on appeal. *Cornell v. Western & S. Life Ins. Co.*, 162 N.C. App. 106, 110-11, 590 S.E.2d 194, 297 (2004) (citation omitted). The trial court found that Chicago Title was not time barred from filing a claim for professional negligence or negligent misrepresentation, but it took no such actions against The Banzet Firm, Thompson, or Banzet.

We find that, at the time Chicago Title was notified of BB&T's claim and of the Centura deed of trust, Chicago Title was not barred, by either N.C.G.S. § 1-15 or N.C.G.S. § 1-52(9), from filing a claim for professional malpractice or negligent misrepresentation against the Banzet Firm, Thompson, or Banzet. Chicago Title did not suffer any prejudice as a result of any delay by BB&T in informing Chicago Title of the Centura deed of trust; therefore, section 3 of the 2003 policy does not apply.

In addition, Chicago Title issued the Centura policy for the Centura deed of trust. The Banzet Firm provided both the preliminary and the final title opinions for the Centura deed of trust. The Centura policy covered the Centura deed of trust at issue in the present case.

"Ordinarily, an insurance company is presumed to be cognizant of data in the official files of the company, received in formal dealings with the insured." *Gouldin v. Insurance Co.*, 248 N.C. 161, 165, 102 S.E.2d 846, 849 (1958) (citation omitted). "[K]nowledge of the prior existing policy may be inferred from the fact that both policies are issued by the same company and upon the same life." *Hicks v. Insurance Co.*, 226 N.C. 614, 617, 39 S.E.2d 914, 916 (1946).

> " 'Knowledge of facts which the insurer has or should have had constitutes notice of whatever an inquiry would have disclosed and is binding on the insurer. The rule applies to insurance companies that whatever puts a person on inquiry amount in law to 'notice' of such facts as an inquiry pursued with ordinary diligence and understanding would have disclosed.' "

Supply Co. v. Insurance Co., 49 N.C. App. 616, 620, 272 S.E.2d 394, 397 (1980) (citation omitted).

> The majority of decided cases adopt the view that where the insurer is affected with knowledge of the existence of the prior policy, either the issue of the second policy or the continued acceptance, with such knowledge, of premiums paid thereupon, will work an estoppel or constitute a waiver of the condition.

Hicks, 226 N.C. at 617, 39 S.E.2d at 916. In the present case, Chicago Title issued the Centura policy in 1998 for the exact real property currently at issue. Chicago Title argues it had no notice of the Centura deed of trust that was insured by the Centura policy that Chicago Title itself issued.

Furthermore, the 2003 policy excludes from coverage "[d]efects, liens, encumbrances, adverse claims or other matters . . . not known to [Chicago Title], not recorded in the public records at Date of Policy, but known to [BB&T] and not disclosed in writing to [Chicago Title] by [BB&T] prior to the date [BB&T] became an insured under this policy[.]" By specifically excluding from coverage liens not recorded prior to the issuance of the 2003 policy, Chicago Title implicitly agreed to insure against liens that were recorded prior to the issuance of the 2003 policy. "[T]he doctrine of *expressio unius est exclusion* [alterius] ('expression of one thing is the exclusion of the other') is still the rule in North Carolina[.]" *In re Appeal of Appalachian Student Housing Corp.*, 165 N.C. App. 379, 388, 598 S.E.2d 701, 706 (2004); *see also Pritchard v. Steamboat Co.*, 169 N.C. 457, 460-61, 86 S.E. 171, 173 (1915) (*expressio unius est exclusio alterius* applied in interpreting deed). Chicago Title defines "public records" in the 2003 policy as "records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge." In uncontested finding of fact number 9, the trial court found: "The Centura Deed of Trust was recorded prior to BB&T's 2003 Deed of Trust." Therefore, by the express terms of the 2003 policy, which Chicago Title drafted and issued, Chicago Title had constructive notice of the Centura deed of trust at the time it issued the 2003 policy.

We find that, because Chicago Title was the insurer of the Centura deed of trust, Chicago Title is presumed to have had knowledge of the existence of the Centura deed of trust. An inquiry by Chicago Title, "pursued with ordinary diligence and understanding" would have revealed the Centura policy issued by Chicago Title and the underlying Centura deed of trust. We find this to be sufficient notice to Chicago Title of an additional encumbrance on the 2003 deed of trust, regardless of the timing of notice presented by BB&T. We hold that Chicago Title had either actual or constructive notice of the Centura deed of trust at the time it issued the 2003 policy. This argument is without merit.

We note that though Chicago Title included the order filed 3 November 2009 denying its motion to compel in its notice of appeal to our Court, Chicago Title makes no argument on appeal concerning the 3 November 2009 order. Chicago Title has therefore abandoned any appeal it may have had from the 3 November 2009 order. N.C.R. App. P. 28(b)(6); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 367 (2008).

Affirmed.

Judges HUNTER, JR. and BEASLEY concur.

DOUGLAS SINGLETARY, III, PLAINTIFF v. P & A INVESTMENTS, INC. D/B/A ANDY'S MOBILE HOME AND LAND SALES, DEFENDANT

No. COA10-1089

(Filed 7 June 2011)

1. Uniform Commercial Code— mobile homes—goods—not a part of real estate

Mobile homes are generally goods in North Carolina, and, given the trial court's findings on severability and relocation, the mobile home in this case was personal property under the Uniform Commercial Code and not a part of the real estate.

2. Uniform Commercial Code— mobile home—risk of loss—controlled by UCC

The risk of loss for a mobile home that burned during a sale was controlled by the Uniform Commercial Code (UCC) rather than the North Carolina Motor Vehicle Act. Under the UCC, plaintiff was the owner of the vehicle when it was destroyed.

3. Motor Vehicles— mobile home—completion of sale—right to resell

Defendant had the right to sell plaintiff a mobile home even though defendant had not paid consideration and the certificate of title had not been issued at the time of the agreement between defendant and plaintiff. Plaintiff, not defendant, bore the loss of the mobile home when it burned.

Appeal by Defendant from judgment entered 5 May 2010 by Judge W. Erwin Spainhour in Anson County Superior Court. Heard in the Court of Appeals 8 February 2011.

Carpenter & Flake, PLLC, by Jeffery K. Carpenter, for Plaintiff-Appellee.

Gordon, Hicks and Floyd, P.A., by Charles L. Hicks, Jr., for Defendant-Appellant.

BEASLEY, Judge.

P & A Investments, Inc. d/b/a Andy's Mobile Home and Land Sales (Defendant) appeals from the trial court's judgment in favor of Douglas Singletary, III (Plaintiff), concluding that Defendant seller bore the risk of loss at the time a mobile home purchased by Plaintiff was destroyed by fire and awarding Plaintiff damages. Because we conclude that the Uniform Commercial Code-Sales (UCC or Code) is not supplanted by the Motor Vehicle Act (MVA) in this case and that the UCC's risk of loss provisions therefore govern, we reverse the trial court's judgment.

On 5 February 2008, Plaintiff filed a complaint against Defendant for breach of contract and deceptive trade practice. A bench trial was held on 1 March 2010, where the matter was tried upon stipulated facts as set forth in a pre-trial order filed in open court that same date. The trial court's findings mirror the stipulations to which the parties agreed and establish the factual background of the case, as follows.

This action arises out of an agreement between the parties for the purchase of a mobile home. At all times relevant hereto, Defendant was engaged in the principal business of selling new and used "manufactured homes," and was a "manufactured home dealer," as those terms are defined in N.C. Gen. Stat. § 143-143.9(6) and (7), respectively. On 15 November 2007, Defendant and Vanderbilt Mortgage and Finance, Inc. (Vanderbilt), acting on behalf of Oakwood Acceptance Corp. (Oakwood), contracted to purchase a 1996 Oakwood mobile home for resale. Oakwood had repossessed the "manufactured home" under a chattel mortgage or conditional sales contract from the persons who held title. Defendant, Vanderbilt, and Oakwood were all "merchants" with respect to the sales of manufactured homes under N.C. Gen. Stat. § 25-2-104.

On or about 17 November 2007, Plaintiff entered into a written contract with Defendant for the sale of the same mobile home and

paid the purchase price in full. Although the certificate of title, together with appropriate documentation that would authorize the issuance of a certificate title in the name of any party to whom Defendant sold the mobile home, had not yet been received by Defendant from Vanderbilt, Defendant represented to Plaintiff that it did indeed have the right and authority to sell him the home. In the course of negotiations, Defendant proposed a contractual provision requiring it to relocate the mobile home from its existing location to Plaintiff's property, but Plaintiff ultimately declined the inclusion of such provision. Instead, Plaintiff elected to purchase and accept the mobile home "As is where is," as reflected in the sales contract, rather than bear additional costs for Defendant's assumption of the delivery responsibility. While Defendant failed to attach a separate "Notice of Cancellation" to the contract in duplicate, as required for manufactured home purchase agreements by N.C. Gen. Stat. § 143-143.21A(c), the requisite "right to cancel" statutory language did appear in the contract itself and provided that Plaintiff had three business days after signing the agreement to cancel his mobile home purchase.

Following the execution of the sales contract, on 19 November 2007 Defendant paid Vanderbilt the purchase price of the mobile home in accord with their 15 November agreement, and Plaintiff undertook efforts to arrange for the home to be broken down and moved from its location. Notwithstanding findings that it was located upon a third party's property in North Carolina, and removal of the home's brick and masonry underpinnings was required prior to any relocation thereof, the trial court found that it could be detached from the land without material harm to either the mobile home or the real property. As of midnight on 21 November 2007, the third business day following the execution of the agreement between Plaintiff and Defendant, neither party had expressed any intention to cancel the sale. Moreover, Plaintiff had at no time advised Defendant of any inability to obtain insurance on the home, nor had he requested Defendant's assistance in that regard. In fact, the only communication between the parties from the date of sale through 21 November 2007 was a telephone call on 20 November 2007, during which Plaintiff reported experiencing some difficulties with the owner of the property upon which the mobile home was located while Plaintiff's crew was taking down the underpinning and readying the home for relocation to Plaintiff's property.

On 22 November 2007, the mobile home was destroyed by fire, and in a telephone conference initiated by Plaintiff the following day,

Defendant was informed of the occurrence. Plaintiff demanded return of the funds he had paid Defendant for the purchase of the mobile home, but Defendant refused. Where Defendant had come into possession of the certificate of title to the mobile home and the appropriate documentation for transfer to Plaintiff shortly after 27 November 2007, Defendant diligently requested that Plaintiff cooperate in having the certificate of title issued in Plaintiff's name. Plaintiff, however, refused to provide Defendant with either a driver's license or identification card number, as required by N.C. Gen. Stat. § 20-52(a), and the trial court found that the failure to have a certificate of title to the mobile home issued in Plaintiff's name is the result of Plaintiff's own refusal to cooperate with Defendant in causing the same to be issued.

The trial court concluded that Defendant did not commit an unfair or deceptive trade practice but awarded $22,000, the purchase price of the mobile home in damages to Plaintiff plus interest, based on its conclusion that at the time of the mobile home's destruction, the risk of loss fell on Defendant. Defendant appeals, arguing that the trial court erred in its conclusion of law that Plaintiff did not bear the risk of loss sustained to the mobile home and in its judgment in favor of Plaintiff.

Our standard of review for a judgment following a bench trial, in which the trial court sits without a jury, "is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001) (citation omitted). "Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*." *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (internal citation omitted). Here, Defendant does not challenge any of the trial court's findings of fact—which, in any event, were based entirely on the parties' stipulations. Thus, the sole issue on appeal is whether the trial court properly concluded that Plaintiff was not responsible for the destruction of the mobile home because the risk of loss remained upon Defendant.

Plaintiff contended before the trial court, as he does on appeal, that the legal result obtained from application of various UCC provisions is overridden by the North Carolina Motor Vehicle Act, specifi-

cally N.C. Gen. Stat. § 20-72 thereof, as set forth in *Nationwide Mutual Insurance Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970). It is Plaintiff's position that the MVA governs the sales transaction and that no ownership of, title to, or interest in the mobile home passed to him before its destruction because the requirements of *Hayes* had not been met. His contention is that under *Hayes* and the MVA's title transfer provisions, ownership of the mobile home remained with the seller at the time of its destruction, and thus, Defendant bore the loss thereof. Defendant, however, argues that our Supreme Court's decision in *Hayes* is inapposite to the facts of this case and that any conflict that may arise between the applicability of section 20-72 and the UCC, in which the MVA's specific provision would govern, is not present in the case at bar. Accordingly, the UCC's risk of loss provisions, as applied to the parties' agreement, shifted the risk of loss from Defendant merchant-seller to Plaintiff upon the execution of the sales contract. For the following reasons, we agree with Defendant that the issue here, involving risk of loss, is controlled by and resolved through application of the UCC.

[1] As an initial matter, before attempting to resolve any conflict between the UCC and MVA, we must determine whether the mobile home sale at issue here comes within the general scope of the UCC in the first place. Where the sales provisions in Article 2 of the UCC apply to "transactions in goods," N.C. Gen. Stat. § 25-2-102 (2009), the law traditionally "treats a mobile home not as an improvement to real property but as a good, defined and controlled by the UCC as something 'movable at the time of identification to the contract for sale,' " *Hensley v. Ray's Motor Co. of Forest City, Inc.*, 158 N.C. App. 261, 264, 580 S.E.2d 721, 723 (2003) (quoting N.C. Gen. Stat. § 25-2-105(1)(2001)); *see also Reece v. Homette Corp.*, 110 N.C. App. 462, 466, 429 S.E.2d 768, 770 (1993) ("The sale of a mobile home is a 'transaction in goods.' ").

> For example, this Court determined a mobile home was a good, the sale of which was controlled as a transaction under the UCC. *Alberti v. Manufactured Homes, Inc.*, 329 N.C. 727, 732, 407 S.E.2d 819, 822 (1991). Moreover, we have "note[d] that prior decisions of this Court and our Supreme Court have classified a mobile home as a 'motor vehicle' for purposes of interpreting the application of our motor vehicle laws to mobile homes." *Hughes v. Young*, 115 N.C. App. 325, 328, 444 S.E.2d 248, 250 (1994) (citing *Peoples Sav. & Loan Ass'n v. Citicorp Acceptance Co.*, 103 N.C. App. 762, 407 S.E.2d 251 (1991); *King Homes, Inc. v. Bryson*, 273 N.C. 84, 159 S.E.2d 329 (1968)).

Hensley, 158 N.C. App. at 264, 580 S.E.2d at 723. Indeed, we have acknowledged that mobile homes can be considered realty where a plaintiff shows: (1) that the home was annexed to land with the intent that it be permanent; or (2) demonstrates that circumstances surrounding the association between the land and the mobile home or the relationship between various parties claiming an interest in the item otherwise justifies treating the mobile home as realty affixed to the land. *Id.* at 264, 580 S.E.2d at 723-24 (citing *Hughes*, 115 N.C. App. at 328, 444 S.E.2d at 250). Our determination on the permanence of the mobile home in this case is also guided by the latter portion of the UCC's definition of "goods," which includes "other identified things attached to realty as described in the section on goods to be severed from realty." N.C. Gen. Stat. § 25-2-105(1) (2009). The referenced section provides that when, pursuant to a contract for the sale apart from land, the buyer (or the seller for that matter) is to sever an item attached to realty and is capable of doing so without material harm thereto, that item is a good under the UCC, "and the parties can by identification effect a present sale before severance." N.C. Gen. Stat. § 25-2-107(2) (2009); *see also id.* cmt. ("[I]tems affixed to real property which can be removed without injury to the realty are treated as goods by this subsection of the UCC even though attached at the time the contract is made and without regard to which party (buyer or seller) is to make the severance[,]" and "[w]hether an item is to be deemed 'real' or 'personal' property ('goods') will be determined under the Code by its potential for severability without injury to the realty to which it is attached and not upon the more difficult determination of whether the item is a 'fixture.' ").

Here, although Plaintiff argues on appeal that "the subject matter of this action concerns the purported sale of a mobile home that had been permanently attached to realty with a brick foundation," the parties have stipulated that "the mobile home was located upon the real property in the State of North Carolina of a third party but could be removed therefrom without material harm to either the mobile home or the real property." While the trial court likewise acknowledged that the home was affixed by brick and masonry underpinning, it found, as reflected by the parties' mutual recognition, that severance of the mobile home was achievable without harm to the realty. Where the sales contract clearly contemplated Plaintiff-buyer's removal of the mobile home from the property upon which it was located, and his severance thereof could be done without subjecting the realty to any material harm, the mobile home comes within the

Code's definition of a "good." Plaintiff's only argument concerning permanence is that the mobile home had a brick foundation, but the trial court's finding that Plaintiff undertook removal of the brick and masonry underpinning and arranged for the mobile home to be broken down and relocated further indicates that the home was indeed movable at the time of the parties' agreement. Thus, consistent with our general view that mobile homes are goods, and in light of the trial court's findings regarding the severability and relocation of the home in question by Plaintiff, we conclude that it was not part of the real estate but, rather, personal property and a "good" under the UCC.

[2] Having established that the Code's Article 2 sales provisions do indeed apply, and where both the UCC and MVA deal with the transfer of vehicle ownership, we must determine which statutory compilation will resolve the risk of loss issue in this case. *See* N.C. Gen. Stat. § 20-4.01(23) (2009) (defining "motor vehicle" as "[e]very vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle"); *Bryson*, 273 N.C. at 88-89, 159 S.E.2d at 332 (noting that "[a] mobile home is classified by statute as a motor vehicle" because it "is designed to be operated upon the highways"); *see also In re Meade*, 174 B.R. 49, 51 (Bankr. M.D.N.C. 1994) ("It is clear under North Carolina law that a mobile home is a 'motor vehicle' for purposes of the statutes dealing with registration and ownership of motor vehicles."). The MVA provides, in pertinent part:

> In order to assign or transfer title or interest in any motor vehicle registered under the provisions of this Article, the owner shall execute in the presence of a person authorized to administer oaths an assignment and warranty of title on the reverse of the certificate of title in form approved by the Division, including in such assignment the name and address of the transferee; and no title to any motor vehicle shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee. . . .
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> Any person transferring title or interest in a motor vehicle shall deliver the certificate of title duly assigned in accordance with the foregoing provision to the transferee at the time of delivering the vehicle . . . .

N.C. Gen. Stat. § 20-72(b) (2009).[1] North Carolina's adaptation of the UCC "abolishes the traditional 'property passage' or 'title' approach as regards the question of who bears the risk of loss," N.C. Gen. Stat. § 25-2-509 (Commentary) (2009), and states that, if the contract does not provide for the seller's shipment of the goods by carrier or a bailee's holding of the goods for delivery without being moved, and the seller is a merchant, "the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery." N.C. Gen. Stat. § 25-2-509(3) (2009).

The potential for conflict between the transfer of ownership provisions in the MVA and the overlapping subject matter covered by the UCC was first addressed in *Hayes*. *See Hayes*, 267 N.C. at 632, 174 S.E.2d at 519 (noting issue of first impression in our Courts). Our Supreme Court in *Hayes* was called upon to resolve which of two insurance companies-one providing a "non-owner's" policy and the other, an "owner's" policy-afforded liability coverage for an automobile accident. *See id*. at 622-26, 174 S.E.2d at 512-14. To answer the question, the Court had to fix the date upon which the purchaser of the vehicle acquired an ownership interest therein, which occurred at an earlier point in time under the UCC than under the MVA. *Id*. at 626, 174 S.E.2d at 514. Where "*Hayes* dealt with a situation in which the rights of parties not privy to the sales transaction itself, hinged on the time when legal title to the vehicle passed," *American Clipper Corp. v. Howerton*, 311 N.C. 151, 161, 316 S.E.2d 186, 192 (1984), the Court applied the "public regulations" of the MVA over the conflicting title transfer provisions of the UCC, a "private law," explaining:

> The [UCC], in general, covers transactions in personal property and is particularly related to negotiable instruments, bills of lading and sales in general. The [MVA] is concerned only with the automobile and although the word "automobile" comes within the general term of "goods," automobiles are a special class of goods which have long been heavily regulated by public regulatory acts. In this connection, the official comment to section 25-2-401 seems to say that the [UCC] makes no attempt to set a specific line of

1. While N.C. Gen. Stat. § 20-75 excepts a dealer-transferee, such as Defendant in the transaction between it and Vanderbilt, from executing a reassignment and warranty of title to a subsequent transferee "who has the option of cancelling the transfer of the vehicle within 10 days of delivery of the vehicle" until "the end of that period," the three-day cancellation period between Plaintiff and Defendant in this case had expired just prior to the destruction of the mobile home. *See* N.C. Gen. Stat. § 20-75 (2009). Thus, this section does not alter our analysis.

> interpretation where a public regulation is involved, but that in case a court should decide to apply this private law definition and reasoning to its public regulation, that there should be a clear and concise definitional basis for so doing. Such comment leads to the conclusion that the sales act, a private law, is not necessarily applicable to public regulations unless the court chooses to make it so.

Hayes, 276 N.C. at 638-39, 174 S.E.2d at 523. Where section 20-72(b) of the MVA contains "specific, definite, and comprehensive terms concerning the *transfer of ownership* of a motor vehicle," *Hayes* concluded that "*for purposes of tort law and liability insurance coverage*," the later-enacted UCC "do[es] not override the earlier Motor Vehicle statutes relating [thereto]." *Id.* at 640, 174 S.E.2d at 524 (emphases added); *see also Batts v. Lumberman's Mut. Cas. Ins. Co.*, 192 N.C. App. 533, 536, 665 S.E.2d 578, 581 (2008) (noting *Hayes's* holding that the word "title" used in section 20-72(b) was intended by the legislature as a synonym for "ownership" such that the two words can be used interchangeably). Thus,

> for purposes of tort law and liability insurance coverage, no ownership passes to the purchaser of a motor vehicle which requires registration under the [MVA] until (1) the owner executes, in the presence of a person authorized to administer oaths, an assignment and warranty of title on the reverse of the certificate of title, including the name and address of the transferee, (2) there is an actual or constructive delivery of the motor vehicle, and (3) the duly assigned certificate of title is delivered to the transferee.

Hayes, 276 N.C. at 640, 174 S.E.2d at 524. We acknowledge that this explicit limitation to tort and liability insurance "left open the question whether the MVA, as opposed to the UCC, would control in all circumstances." *American Clipper*, 311 N.C. at 162, 316 S.E.2d at 192. We conclude, however, that Plaintiff's attempt to extend *Hayes* to govern our risk of loss analysis here is not supported by our case law.

Plaintiff's proposition that "[n]o ownership, title, or interest" passed to him as the purchaser of the mobile home because the comprehensive terms provided in N.C. Gen. Stat. § 20-72(b) had not been met might be germane to our analysis if tort law or liability insurance coverage were implicated. *But see N. C. National Bank v. Robinson*, 78 N.C. App. 1, 336 S.E.2d 666 (1985) (declining to apply the MVA even where the cause of action was the tort of wrongful conversion because the dispute primarily involved, "not an automobile accident

case," but, rather, security interest and entrustment issues arising out of "a business transaction in which the policies underlying the private UCC law [were] fully implicated"). The fact that the *Hayes* Court expressly limited its holding to these circumstances has been emphasized by our courts on several occasions. *See*, *e.g.*, *id.* at 9, 336 S.E.2d at 671 (recognizing that "[t]he Supreme Court [in *Hayes*] consistently limited its holding, that the MVA title provisions applied instead of the UCC, to cases involving 'tort law and liability insurance coverage' "); *Roseboro Ford, Inc. v. Bass*, 77 N.C. App. 363, 366, 335 S.E.2d 214, 216 (1985) (emphasizing this limitation of *Hayes* and concluding that while, "as between vendor and vendee, . . . the vendee does not acquire 'valid owner's liability insurance' " until the vendor transfers or assigns legal title to the vendee, neither "*Hayes* [n]or the general rule concerning *liability insurance* . . . controlling on the [issue] of *collision* insurance coverage here"). While none of our cases distinguishing *Hayes* address the exact risk of loss issue here—most deal with conflicting security interests and have applied Article 9 of the UCC over the ownership requirements of the MVA—various principles articulated therein, often citing *Hayes* itself, support our view that the UCC's sales provisions control the instant dispute. *See*, *e.g.*, *American Clipper*, 311 N.C. at 151, 316 S.E.2d at 186 (applying the UCC to resolve conflicting security interests in a consignment transaction involving manufacturer, dealer, lender, and buyer of a recreational vehicle, based, in part, on pre-Code reliance on "the general law of sales, bailment and entrustment" in similar transactions).

Our Supreme Court in *American Clipper* revisited its earlier opinion in *Hayes* and explained that *Hayes* did acknowledge the waning importance of title under the UCC, *see American Clipper*, 311 N.C. at 161, 316 S.E.2d at 192; *see also Hayes*, 276 N.C. at 632, 174 S.E.2d at 518 ("The most basic departure from previous law which is found in the Uniform Commercial Code is the abandonment of the concept of title as a tool for resolving sales problems."), but applied the MVA's title transfer provisions over the UCC's general position that the rights and liabilities of the parties to a sales transaction are defined "irrespective of title to the goods," *see* N.C. Gen. Stat. § 25-2-401 (2009) ("Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place . . . ."). The Court noted that propriety of the *Hayes* decision lies in the relationship of the

insurance companies involved to the nature of the action, as the situation affected "the rights of parties not privy to the sales transaction itself." *American Clipper*, 311 N.C. at 161, 316 S.E.2d at 192; *see also Robinson*, 78 N.C. App. at 9-11, 336 S.E.2d at 671-72 (distinguishing *Hayes's* application of the MVA's "public regulations," where "the rights of the parties were directly dependent upon when legal title to a vehicle passed, and neither party had been privy to the actual sale of the vehicle," from the UCC's displacement of the MVA "when automobiles are used as collateral and are held in inventory for sale" and "issues of security interests and priorities" among parties actually involved in the various transactions are involved).

While neither *American Clipper* nor *Robinson*, both applying the UCC on their facts, are sufficiently on point to control the outcome of this case, these principles are instructive. Thus, where this case presents no issue as to tort liability or automobile liability insurance coverage, and deals with the rights and obligations of the parties directly involved in the sales transaction at issue, their obligations "revolve around their relationships as commercial actors." *Robinson*, 78 N.C. App. at 10, 336 S.E.2d at 672. As such, this case involves a business transaction which fully implicates the policies underlying the private UCC law. *See id.* As our predecessor cases observed in the context of motor vehicle security interests, "the title transfer provisions of the MVA were not designed to resolve the kind of question here presented." *American Clipper*, 311 N.C. at 163, 316 S.E.2d at 193. Thus, the UCC, which supplanted traditional concepts of title as affecting the transfer of interest in and ownership of goods, and the sales provisions codified thereunder, properly resolve the risk of loss contest here. Moreover, Plaintiff's suggestion that, pursuant to *Hayes*, section 20-72 controls, not only the transfer ownership of motor vehicles, but also the interests therein generally—a position that is nowhere articulated in *Hayes*—is untenable in light of our courts' several decisions that have distinguished *Hayes* and analyzed various types of interests in motor vehicles under the UCC.

This Court's decision in *Roseboro Ford* provides further support for applying the UCC in the particular case where the risk of loss in a motor vehicle sales transaction is at issue. In that case, involving an insurance carrier hoping to avoid its obligations to a purchaser of *collision*—not liability-insurance under *Hayes*' proposition that title to the vehicle had not been transferred. *See Roseboro Ford*, 77 N.C. App. 363, 335 S.E.2d 214. Because the "controversy [t]here [did] not involve liability insurance coverage," *Hayes* did not control to add

further conditions to the MVA's general definition of "owner," within N.C. Gen. Stat. § 20-4.01(26), on the date of the accident. *Id.* at 366, 335 S.E.2d at 216; *see also* N.C. Gen. Stat. § 20-4.01(26) (2009) (defining "owner" as "[a] person holding the legal title to a vehicle, or in the event a vehicle is the subject of a chattel mortgage or an agreement for the conditional sale or lease thereof or other like agreement, with the right of purchase upon performance of the conditions stated in the agreement, and with the immediate right of possession vested in the mortgagor, conditional vendee or lessee, said mortgagor, conditional vendee or lessee").

> As owner of the vehicle as defined in G.S. 20-4.01(26), [the purchaser] had an insurable interest in the subject matter to be insured. As a general rule, "anyone has an insurable interest in property who derives a benefit from its existence or would suffer loss from its destruction." 7 Am. Jur. 2d, Automobile Insurance, Section 42 (1980). Pursuant to G.S. 25-2-509(3) *risk of loss passes to the buyer upon receipt of the automobile.* Bass had obligated himself by contract to comply with the terms of the agreement. Following the accident he could not have simply returned the damaged car and walked away.

Roseboro Ford, 77 N.C. App. at 367, 335 S.E.2d at 216 (emphasis added).

Similarly, Plaintiff in this case was the "owner" of the motor vehicle on the date the mobile home was destroyed by fire, within the meaning of N.C. Gen. Stat. § 20-4.01(26). Pursuant to section 25-2-509(3) of the UCC, the risk of loss passed to Plaintiff from the merchant-seller Defendant on Plaintiff's receipt of the goods or otherwise, on tender of delivery, which occurred simultaneously due to the "as is where is" nature of the parties' agreement. For, at the time the parties executed the sales agreement, Plaintiff accepted the mobile home at its then-current location, and Defendant concurrently made tender of delivery. Plaintiff thus received delivery of home "as is where is" and obtained possession and control over it. Thus, the risk of loss fell squarely upon Plaintiff when the contract was made. Plaintiff thereupon stood to benefit from the home's existence or suffer loss from its destruction and, accordingly, had an insurable interest in the mobile home.

[3] We briefly address Plaintiff's contention that at the time of the parties' agreement on 17 November 2007, Defendant did not have the right to sell him the mobile home in the first place because it did not pay consideration to Vanderbilt until 19 November 2007 and had not

been issued a certificate of title from Oakwood. However, Plaintiff's reliance on the common law of contracts fails to consider the UCC's effect on that sales agreement, which was also characterized as an "as is/where is" contract. We reject Plaintiff's argument that the date of payment between Defendant and Vanderbilt and delivery of the certificate of title were material to the finality of that transaction, which was specifically described in the closing agreement between Defendant and Vanderbilt as a "closed" and "complete" sale on the "effective sale date" of "November 15, 2007" pursuant to various provisions of the UCC and the MVA. *See*, *e.g.*, N.C. Gen. Stat. § 25-1-201(29) (2009) (defining "purchase" as a "taking by sale, lease, discount, negotiation . . . or any other voluntary transaction creating an interest in property); N.C. Gen. Stat. § 25-2-106(1) (2009) ("A 'sale' consists in the passing of title from the seller to buyer for a price[,]" which, under § 25-2-401, occurs "at the time and place at which the seller completes his performance with reference to the physical delivery of the goods."); N.C. Gen. Stat. § 20-75 ("When the transferee of a vehicle registered under [the MVA] is . . . [a] dealer who is licensed under Article 12 of this Chapter and who holds the vehicle for resale[,]" such as Defendant in this case, "the transferee shall not be required to register the vehicle nor forward the certificate of title to the Division [of Motor Vehicles] . . . .").

In conclusion, we hold that Defendant had the right and authority to sell the mobile home it had purchased from Oakwood/Vanderbilt and that Plaintiff, not Defendant, bore the loss of the mobile home when it was destroyed by fire on 22 November 2007. Thus, we reverse the trial court's judgment awarding Plaintiff $22,000 plus interest at the legal rate and direct that judgment be entered in favor of Defendant.

Reversed.

Judges McGEE and BRYANT concur.

STATE OF NORTH CAROLINA v. GEORGE JUNIOR HAYDEN

No. COA10-1306

(Filed 7 June 2011)

1. Homicide— first-degree murder—motive to kill—evidence sufficient

Taking the evidence in the light most favorable to the State, there was sufficient evidence in a first-degree murder prosecution for a rational juror to find the existence of a motive to kill the victim where there was evidence of hostility between the victim and defendant that erupted at times into physical violence and threats.

2. Homicide— first-degree murder—opportunity to kill—evidence not sufficient

In a first-degree murder prosecution, the State did not present sufficient evidence of defendant's opportunity to kill the victim where the only evidence was a statement made 26 years after the murder that defendant was located two miles away. There was no evidence placing defendant at the scene of the crime, much less at the scene when the crime was committed.

3. Homicide— first-degree murder—means to kill—evidence not sufficient

The State did not present sufficient evidence that defendant had the means to kill a first-degree murder victim where the State could only establish that a high velocity rifle that might have been an M16 could have fired bullets associated with shell casings found at the scene, but could not establish that an M16 actually fired that type of shell casing, that defendant had an M16, or how defendant could have obtained one other than his boasts and vague testimony that such a theft might have been possible.

Appeal by defendant from judgment entered 26 May 2010 by Judge Kenneth F. Crow in Onslow County Superior Court. Heard in the Court of Appeals 11 April 2011.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

Marilyn G. Ozer for defendant.

Elmore, Judge.

George Junior Hayden (defendant) appeals from a judgment entered pursuant to a jury verdict of guilty on a charge of first degree murder in the shooting death of William Miller (Bill or the victim). After careful review, we reverse.

I. Facts

On 16 September 1972, four men driving on Western Boulevard in Onslow County found the body of the victim on the side of the road in a wooded area, his car stopped in the road. The driver noted that the car was running; its door was open; and its headlights and tail lights were on. The victim was lying in the road in front of the car with blood on the ground around him and a clear gunshot wound to the head. A still-smoldering cigarette was at his feet, and a handgun was on the front seat of the car. The men called the Sheriff's Department to report the incident; that call was received at 10:25pm.

Defendant was questioned during the investigation immediately following the murder, but never charged. In 2009, defendant was indicted for first degree murder; he was found guilty by a jury on 26 May 2010 and sentenced to life imprisonment.

Defendant and the victim knew each other because defendant had moved in with the victim's wife, Vickie Miller, while defendant, a member of the Marine Corps, had been stationed in Okinawa during the year prior to his death. The victim returned home from this tour shortly before his death.

At trial, the jurors heard testimony from, among others, Robert Fitta, a neighbor of the Millers'; Rodger Gill, an acquaintance of the victim's; and a myriad of investigators who had dealt with the case since 1972.

In total, defendant made three statements to investigators: one on 17 September 1972 (the 1972 statement), one on 23 January 1973 (the 1973 statement), and one on 6 July 1998 (the 1998 statement). The statements made by defendant therein were introduced at trial via the testimony of the investigating officers who took the statements from defendant, as were statements made by other persons who did not testify at trial. More details regarding the facts are provided below as they are germane to defendant's arguments on appeal.

II. Motion to Dismiss

Defendant's first argument is that the trial court erred by denying his motion to dismiss the murder charge based on insufficient evi-

dence that defendant was the perpetrator. More specifically, defendant argues that the State's evidence of defendant's motive, means, and opportunity raised no more than a suspicion that defendant was the perpetrator of the crime. We agree.

The standard of review of a trial court's denial of a motion to dismiss is *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). In evaluating a defendant's argument, this Court will consider whether "there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant's being the perpetrator of such offense." *State v. 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." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002). The Court considers the evidence taken as a whole when considering its sufficiency. *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978). Furthermore, the evidence should be viewed "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992).

Circumstantial evidence may be sufficient to overcome a motion to dismiss "even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). If a reasonable inference of defendant's guilt may be made, 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." *Thomas*, 296 N.C. at 244, 250 S.E.2d at 209 (quotations and citation omitted); *see also*, *e.g.*, *State v. Brooks*, 2008 N.C. App. LEXIS 392, *11-12 (holding that, although the State did not present evidence directly contradicting the defendant's story that he had shot his son in the top of the head in self-defense, the State did present evidence contradicting the story sufficient to support the denial of his motion to dismiss the charge of first degree murder, including evidence that he "put his son's body, along with his son's dog and material possessions, into a garbage pit on his property" and waited two weeks to inform anyone of the death). However, where the evidence is "sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it," the motion to dismiss should be allowed. *Scott*, 356 N.C. at 595, 573 S.E.2d at 868.

III. Evidence of defendant's motive, opportunity, and means to commit the crime to support defendant's identity as the perpetrator of the crime.

[1] In the case *sub judice*, the State presented only circumstantial evidence of defendant's identity as the perpetrator.

> When the evidence establishing the defendant as the perpetrator of the crime is circumstantial, "courts often [look to] proof of motive, opportunity, capability and identity" to determine whether a reasonable inference of defendant's guilt may be inferred or whether there is merely a suspicion that the defendant is the perpetrator.

State v. Pastuer, ––– N.C. App. –––, –––, 697 S.E.2d 381, 385 (quoting *State v. Bell*, 65 N.C. App. 234, 238, 309 S.E.2d 464, 467 (1983)) (alteration in original), *disc. rev. granted*, ––– N.C. –––, 705 S.E.2d 381 (2010). As we noted in *Bell*, "courts often speak in terms of proof of motive, opportunity, capability and identity, all of which are merely different ways to show that a particular person committed a particular crime. . . . [These] are circumstances which are relevant to identify an accused as the perpetrator of a crime." *Bell*, 65 N.C. App. at 238, 309 S.E.2d at 467. "[E]vidence of either motive or opportunity alone is insufficient to carry a case to the jury." *Id.*, 65 N.C. App. at 238-39, 309 S.E.2d at 467.

A. Evidence of defendant's motive to kill the victim.

Defendant argues that the State's evidence of motive was insufficient to overcome his motion to dismiss. Evidence presented by the State tending to prove motive included the following:

1. Defendant's 1972 statement to investigators that he lived with Vickie Miller, the victim's wife, while the victim was serving in the military overseas.

2. Testimony from Rodger Gill, an acquaintance of the victim and defendant, that defendant made "some offhanded comments . . . that, you know, if [the victim] did anything to them, [defendant] would get him."

3. Testimony from a neighbor that she observed the victim and defendant get into a physical altercation after the victim returned from overseas. After the fight, Vickie, the victim's daughter, and defendant left and began living together elsewhere.

4. Testimony from the victim's sister that the victim called her after the fight and told her that the victim "beat the shit out of" the defendant and that defendant "threatened to kill him."

5. Testimony from Robert Fitta, a neighbor of the victim, that the victim asked Fitta to intercept an allotment check mailed to Vickie from the military. Mr. Fitta removed the check from the mailbox. Defendant saw this and told Mr. Fitta to give him the check. Mr. Fitta refused. According to Mr. Fitta, defendant "was a little frustrated and said a few words, and told me that he had an M16, and he either preceded it or followed it up with, 'That's okay. He will get his. I've got an M16.' "

6. Testimony that the victim expressed plans to divorce Vickie, obtain custody of their daughter, and sue defendant for credit card fraud.

7. Defendant's 1998 statement to an SBI investigator that defendant "never got in trouble for using [the victim's] checks and credit cards and signing [the victim's] name, because Vickie Miller stated it was okay for him to use the checks and sign [the victim's] name to those checks and receipts."

8. Testimony from a neighbor, Denise Fitta, that she accompanied the victim to a local attorney's office about the divorce and credit card fraud matters. [T. p. 738]. The victim brought a folder with various items, including credit card receipts related to the victim's fraud claim and photos of his wife Vicki posing in a negligee with defendant. [T. p. 739]. The victim entrusted these items to Denise to keep at her house. Denise testified that defendant came to her house after the victim's death and said, "I want the stuff that [the victim] had given you." Denise gave the items to defendant.

9. Defendant's 1972 statement to investigators that, on the evening of the victim's murder, Vickie and defendant had "an argument over her comment that she was thinking of leaving him, Hayden, and going back to her husband." Defendant also stated that Vickie left around 10:00 pm that night to meet the victim, and then returned about 20 minutes later. After Vickie returned, defendant told investigators that he "took the car and drove around to cool off[.]"

Viewing all this in the light most favorable to the State, we hold that a rational juror could infer from these circumstances defendant's intent to kill the victim. This Court has, in the past, held that evidence of a defendant's history of threats or physical abuse of the victim constitute evidence of defendant's motive to kill that victim. *See*, *e.g.*,

State v. Pastuer, —— N.C. App. ——, ——, 697 S.E.2d 381, 385-86 (2010) (finding sufficient evidence of motive where the defendant "had displayed hostility towards [the victim], [the defendant] had a history of abusing [the victim], and [the victim] was extremely afraid of [the defendant] to the point of obtaining a domestic violence protective order against him several months prior to her death"); *State v. Lee*, 294 N.C. 299, 303, 240 S.E.2d 449, 451 (1978) (finding sufficient evidence of motive where "the State's evidence show[ed] that defendant probably beat the victim on two occasions just before her death, and it further show[ed] that defendant threatened to kill the victim a day or two before her death"); *State v. Furr*, 292 N.C. 711, 716-17, 235 S.E.2d 193, 197-98 (1977) (finding sufficient evidence of motive where "the evidence show[ed] that defendant wanted [the victim] dead; that he actively sought her death; and that he harbored great hostility toward her[,]" including telling the victim he would "grind her up like hamburger meat" and asking several people to kill his wife).

As noted above, in the case at hand, the evidence tended to show hostility between the victim and defendant that erupted at times in physical violence and threats: e.g., the physical altercation between defendant and the victim, the victim's anger at his wife's having lived with another man during his absence, the victim's preventing his wife from receiving her allotment check, and defendant's three statements—amounting to threats against the victim's life—to Mr. Gill and Mr. Fitta that he had an M16 and the victim "would get his[.]"

Defendant argues that his threats were not as "explicit" as those in *Furr* and *Lee* and could have only constituted "ego-preserving boasts," but such interpretations are within the province of the jury. *See Thomas*, 296 N.C. at 244, 250 S.E.2d at 209. Furthermore, the State is not required to eliminate every innocent explanation of the facts. *See State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). Taken in a light most favorable to the State, this Court concludes that the State presented sufficient evidence from which a rational juror could conclude the existence of a motive to kill the victim.

B. Evidence of defendant's opportunity to kill the victim.

[2] Evidence presented by the State tending to prove defendant's opportunity to kill the victim included the following:

1. Defendant's 1972 statement to investigators that Vickie left to meet the victim around 10:00 pm on 16 September 1972. Defendant stated that Vickie was gone for about 20 minutes.

2. Defendant's statement to investigators that defendant took a drive to "cool off" after Vickie returned home. In defendant's 17 September 1972 statement to investigators, he stated that he left the home around 10:30 pm and returned home around 10:40 to 10:45 pm. In defendant's 1973 statement, defendant stated that he returned home around 10:30 or 10:40 pm.

3. The 911 call reporting the discovery of the victim's body was received at 10:25 pm on 16 September 1972.

4. Defendant's statements to law enforcement investigators describing the route he drove to "cool off" the night the victim died. In defendant's 1972 statement, he stated that he drove by the New River Shopping Center. Defendant's 1973 statement also described his route as including New River Shopping Center. In defendant's 1998 statement, he said that he drove by the Brynn Marr Shopping Center and made no mention of the New River Shopping Center. An investigator testified at trial that defendant's 1998 statement "was significant . . . because in all of the previous reporting [defendant] indicated he had driven down to the New River Shopping Center, which is quite a distance from the crime scene. And the reason [the investigator] thought it was significant when [defendant] mentioned this—and he volunteered it—is because Brynn Marr is where [the police] had the reports that Vickie was supposed to meet Bill when she called him the night of the murder, and it's not too far from the crime scene itself." Another investigator estimated at trial that the shopping center was approximately two miles from the scene of the murder.

5. Testimony that Brynn Marr Shopping Center was located on the "Western Boulevard end, closest to [Highway] 24[,]" and that the victim was found dead outside of his car on the part of Western Boulevard that "was just a two-lane road through the woods." The first witnesses on the scene found a cigarette on the ground next to the victim that was still burning.

In order for this Court to hold that the State has presented sufficient evidence of defendant's opportunity to commit the crime in question, the State must have presented at trial evidence not only placing the defendant at the scene of the crime, but placing him there at the time the crime was committed. *See*, *e.g.*, *Pastuer*, —— at ——, 697 S.E.2d at 386 (holding insufficient evidence of opportunity was presented where the State presented physical evidence, including the

victim's blood on the defendant's shoe and the defendant's fingerprints at the crime scene, because it presented no evidence "that defendant was seen around [the victim]'s home or in her car any time" near the time of the murder); *State v. Scott*, 296 N.C. 519, 522, 251 S.E.2d 414, 416-17 (1979) (holding insufficient evidence of opportunity was presented where the State presented testimony that the defendant's fingerprint was on a box that had only been seen being handled by the victim's family, but also testimony that the box could have been handled by the defendant at a time other than the time of the crime, because the State was required to present "substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed") (citation and quotations omitted). *Cf. State v. Lowry*, 198 N.C. App. 457, 470, 679 S.E.2d 865, 873 (2009) (holding that "(1) defendant's being in possession of the victim's car shortly after the probable time of her death, (2) defendant's also having possession of other property (jewelry and an ATM card) belonging to the victim that would have likely been taken at the time of the victim's death, (3) defendant's familiarity with the victim's house and access to the house [in] the days before the murder, and (4) defendant's effort to eliminate evidence by wiping down the car and his flight when confronted by police" constituted sufficient evidence of opportunity); *State v. Cutler*, 271 N.C. 379, 381, 384, 156 S.E.2d 679, 681, 682 (1967) (holding sufficient evidence of opportunity was presented where the State presented evidence that, on the day of the murder, a truck similar to defendant's was seen at the victim's house, which was the scene of the crime, before and after the body was discovered, its interior covered in human blood of two different types; on that day, the defendant went to the home of a relative 500 yards from the victim's home and was described as drunk and "bloody as a hog" with a large gash on his head; after the murder, the defendant was found by police wearing bloody clothing; and the defendant was found in possession of a knife with both human blood and a hair deemed "similar" to the chest hair of the victim on it).

In the case *sub judice*, taking the evidence in the light most favorable to the State, the only evidence presented at trial as to defendant's opportunity to commit the crime in question was from defendant's 1998 statement, made 26 years after the murder, that he was briefly in a spot two miles away from the scene of the crime. No evidence was presented at trial placing defendant at the scene of the crime, much less placing him there at the time the crime was com-

mitted. As such, we cannot hold that the State presented sufficient evidence of defendant's opportunity to commit the crime in question.

C. Evidence of defendant's means to kill the victim—specifically, of his connection to the murder weapon.

[3] Defendant argues that the State's evidence of defendant's means to kill the victim rested on "hearsay evidence that [defendant] allegedly claimed he had an M16" and on a theory that the defendant could steal an M16 during his tenure in the military without being detected. Defendant argues that the fact that no murder weapon was recovered, the lack of evidence that defendant actually had an M16, and the lack of identifying characteristics between the shell casings found at the scene compared to test rounds fired from an M16 prevented the State from presenting sufficient evidence of defendant's means to kill the victim. We agree.

Evidence relevant to the issue of defendant's connection to a murder weapon included the following:

1. Testimony from Mr. Gill that defendant told him that he stole an M16 off a military float, but that Gill never actually saw defendant with an M16.

2. Mr. Gill's statement to an investigator in 1974 that "one month prior to [the victim's return] from Okinawa, [Gill] was at . . . Miller's [house]; that [defendant] was working on his car and took out a live M16 round from the glove box; that he took . . . it to the trunk of the vehicle and loaded it into a magazine; that, at that time, [Gill] also saw another magazine in the trunk, and that the other magazine also had some live rounds in it. That when [defendant] did this, he said that he had an M16 rifle that he had stolen off a ship while they were on a Mediterranean or Caribbean cruise." Mr. Gill further stated that he never actually saw an M16 rifle.

3. Testimony from Mr. Fitta that defendant told him he had an M16.

4. Testimony that two M16 magazines were found in the glove box of defendant's vehicle the morning after the victim was killed.

5. Defendant's 1998 statement to an investigator that he had "admitted having M16 magazines, but no live ammunition."

6. Testimony from an investigator that the marines maintained "close records kept by serial numbers of weapons" and that a missing weapon would result in a "lockdown." The investigator testified on redirect that there were "ways to get around the checks."

7. Testimony that the two shell casings found near the victim's body were 0.233/5.56 caliber; that the shell casings were stamped "TW71" indicating that they were manufactured by Twin Cities; and that, according to the State's witness, Twin Cities is a "government-owned company that manufactures ammunition for the military."

8. Testimony by the State's ballistics expert comparing the shell casings found at the scene with test cartridges fired from an M16 rifle registered to defendant by the military, which had been retrieved from the military base for the purpose of comparison. The expert witness testified that he did not find any "identifying characteristics" between the shell casings found at the scene and the cartridges that were test fired from the M16.

9. The ballistics expert testified that he could not determine whether the two shell casings found at the scene were fired from the same gun; that he could not determine the type of rifle that fired the shell casings; and that he could not determine whether the bullet fragments found in the victim's body came from the shell casings. On redirect, the ballistics expert testified that the shell casings could have been fired from an M16.

Defendant's argument that the State's evidence was insufficient to connect defendant to a murder weapon finds fairly strong support in the analogous case of *State v. Lee*, 34 N.C. App. 106, 237 S.E.2d 315 (1977). In that case, this Court held that the State presented strong evidence of a motive to kill the victim, but ultimately failed to provide sufficient evidence "to permit a jury to find that the criminal act was committed by the defendant." *Id.* at 108, 237 S.E.2d at 317. The following constituted the State's evidence linking defendant to a weapon:

> Two lead fragments were taken from the body of [the victim], but they were unsuitable for identification. The State introduced into evidence a .25 caliber pistol, identified as State's Exhibit 1, that defendant's sister gave to the officer when he went to the home of defendant's father on [the evening of the murder]. Defendant's father testified that the defendant had a "small pistol" with him

> when he came [home that evening]. One of defendant's neighbors . . . testified that defendant had a black .25 caliber pistol with him in his trailer a few days before the death of [the victim], and that the pistol was similar to State's Exhibit 1. The State introduced into evidence a fired cartridge casing, identified as State's Exhibit 7, which was found to be similar to cartridges test-fired from State's Exhibit 1. However, the State's firearms expert could not conclusively determine whether or not State's Exhibit 7 had been fired from State's Exhibit 1.

Id. at 107, 237 S.E.2d at 315. This Court held that there was

> no direct evidence to connect [the .25 caliber pistol introduced by the State] with the defendant. Only by indulging in speculation and assuming facts not in evidence can the inference be drawn that State's Exhibit 1 was ever at any time in defendant's possession. Neither was there any evidence that State's Exhibit 1 was used to kill the deceased. State's Exhibit 7, the fired cartridge casing, could not be conclusively connected to State's Exhibit 1, but even if the connection could have been made, there was no evidence as to where State's Exhibit 7 had come from or what connection, if any, it may have had with the death of the decedent.

Id. at 108-09, 237 S.E.2d at 317.

The facts of this case are also similar to those in *State v. Allred*, 279 N.C. 398, 183 S.E.2d 553 (1971). The victim in that case died as a result of a .25 bullet fired from a .25 automatic pistol. *Id.* at 404, 183 S.E.2d at 557. The only evidence tending to connect the defendant to the murder weapon was the victim's father's testimony that the defendant said he bought a .25 automatic "blue steel" pistol a month before the victim's death. *Id.* at 404, 183 S.E.2d at 557-58. There was "no evidence *such a pistol* was seen in defendant's possession at any time before or after [the victim's] death" or that "defendant fired any pistol on [the night victim died]." *Id.* at 404, 183 S.E.2d at 558 (emphasis original). The State also offered the testimony of three witnesses who observed the defendant and the victim "scuffle" that night, but noted that each witness's version "differ[ed] sharply" and could not be "reconcile[d] . . . particularly on the issues of whether defendant had a 'gun' and, if so, what he did with it." *Id.* The Court noted that "[t]here [wa]s no testimony that defendant had a .25 automatic pistol at Robbins Crossroads on [the night the victim died]. Nor [wa]s there testimony that defendant fired any pistol on that occasion." *Id.* at 404, 183 S.E.2d at 557. In conclusion, the Court held that "the State . . .

failed to offer substantial evidence that the bullet which caused [the victim's] death was from a .25 automatic pistol *fired by defendant*." *Id.* at 406, 183 S.E.2d at 559 (emphasis original).

In the case *sub judice*, as in *Lee*, no one saw defendant in the possession of an M16; and, as in *Allred*, the only evidence that defendant had a gun, much less the murder weapon, was the testimony of someone to whom defendant stated that he had such a gun.

In sum, the State's evidence of defendant's means to commit the murder consists of three statements made to Mr. Gill and Mr. Fitta that defendant had stolen an M16 from the military and an investigator's testimony that it was possible to steal a weapon from the military without being detected. The State did not present evidence as to how defendant could have obtained an M16 beyond his boasts that he had done so and vague testimony that such a theft might have been possible; no witnesses testified that they had ever seen defendant in possession of such a gun, and the State presented no other evidence supporting such a conclusion.

Indeed, the State could not establish that an M16 fired the type of shell casing found at the crime scene. While evidence was presented that the bullets associated with those casings were made by a manufacturer that made bullets for military use, again, the State did not present evidence that tied those bullets to the crime, nor even to the time frame during which the crime took place.

Arguably, the discovery of M16 magazines in defendant's glove box makes the State's evidence of means less speculative; however, it bears repeating that the State did not present evidence that an M16 was in fact the murder weapon. The State presented evidence only that a high velocity rifle that *might* have been an M16 could have fired the bullets associated with those shell casings. The State presented no evidence that the magazines in defendant's glove box contained the type of bullets associated with the shell casings found at the scene.

IV. Conclusion

In conclusion, the State presented sufficient evidence of hostility between the defendant and victim from which a rational juror could conclude defendant had a motive to kill the victim. However, the State did not present sufficient evidence that defendant had either the opportunity or the means to commit the murder: no evidence was presented to connect defendant with the crime scene at any time, much less the time the crime was committed, and no murder weapon

was introduced at trial. While it is true that "[c]ontradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve[,]" *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted), the lack of evidence does not qualify as either. Accordingly, we hold that the State failed to present sufficient evidence from which a rational juror could conclude that defendant was the perpetrator of the victim's murder.

As we reverse on this basis, we do not address defendant's other arguments.

Reversed.

Chief Judge MARTIN and Judge GEER concur.

LINDA METZ, PLAINTIFF/MOTHER v. MICHAEL METZ, DEFENDANT/FATHER

No. COA10-1382

(Filed 7 June 2011)

1. Appeal and Error— interlocutory orders and appeals—child support order—pending alimony claim resolved—temporary support moot

The appeal of a child support order was interlocutory when filed because an alimony claim was still pending, but the case became ripe for appeal when the alimony claim was dismissed without prejudice. The challenge to the temporary support order became moot when the permanent support order was entered.

2. Child Custody and Support— imputed income—findings sufficient for review

There were sufficient findings in a child support case to allow appellate review of the trial court's imputed income conclusions

3. Child Custody and Support— imputed income—bad faith

The trial court did not err in a child support case by finding that a father acted in bad faith, so that income could be imputed to him, where the father molested his daughter and lost his position as a nurse anesthetist.

4. Child Custody and Support— imputed income—money under father's control

The trial court did not err in a child support case in the amount of income imputed to a father who had molested his daughter where the father could no longer work as a nurse anesthetist, but had more than $355,000 under his control.

5. Child Custody and Support— children's expenses and parents' ability to pay—not reached—imputed income proper

Contentions in a child support case concerning findings or conclusions about the children's expenses and the parent's ability to pay were not reached where those issues involved an alternate route to the amount of support awarded and the initial route, imputation of income to the father, was proper.

Appeal by defendant from orders entered 6 February 2009 and 27 May 2010 by Judge Jane V. Harper in Mecklenburg County District Court. Heard in the Court of Appeals 11 April 2011.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, Jonathan D. Feit, and Sarah M. Brady, for plaintiff-appellee.

Law Office of Richard B. Johnson, by Richard B. Johnson, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Michael Metz and plaintiff Linda Metz were married on 1 November 1997. During their marriage, the parties adopted four children. The parties separated from one another on 3 July 2008 and are now divorced.

During their marriage, Mr. Metz worked at Presbyterian Hospital ("Presbyterian") as a nurse anesthetist, where he earned $18,867.00 a month. Ms. Metz worked and continues to work as a teacher employed by Charlotte Mecklenburg Schools. Her monthly income is $7,607.00. Thus, prior to their separation and divorce, the Metz's combined monthly income was $26,474.00.

While the parties were still married, Mr. Metz sexually assaulted one of his daughters. He was charged with three felony charges of taking indecent liberties with a minor. As a result of those charges, he was suspended from his position at Presbyterian without pay on 15 September 2008.

On 27 October 2009, a consent order addressing equitable distribution of the parties' property was entered. As part of that order, Mr. Metz was distributed a Wachovia IRA account with a balance of $107,497.72, the proceeds of a Wachovia Roth IRA account, a Vanguard Traditional IRA account with a balance of $11,171.76, and a Vanguard Rollover IRA account with a balance of $62,219.33. That same day, a consent order was entered giving Ms. Metz sole permanent legal and physical custody of the children and ordering that Mr. Metz have no contact, visitation, or communication with the children.

As of the temporary child support hearing on 8 January 2009, Mr. Metz's criminal case had not yet been resolved and he was working delivering pizzas, earning $6.85 an hour for a total gross monthly income of $1,172.00. A temporary child support and interim distribution order was entered on 6 February 2009, finding that Mr. Metz was "capable of contributing to the support of the minor children" and it was equitable "to impute income to [Mr. Metz] in light of his voluntary actions, unreasonable behavior, conscious disregard of his obligation to support his minor children and his termination from the healthcare field being entirely predictable."

Following the temporary child support hearing, Mr. Metz continued to work at the pizza store for a total of seven months until 27 July 2009 when he was convicted of sexual battery of a minor and incarcerated for two months. As a result of that conviction, Mr. Metz was placed on the sex offender registry, was asked to resign from his position at Presbyterian, and, after completing his incarceration, was not permitted to return to delivering pizzas because of the possibility of contact with children. His licenses as a certified registered nurse anesthetist and as a registered nurse practitioner were suspended by the state licensing board. The licenses will remain revoked for as long as he remains on the sex offender registry—a period of at least ten years.

As of the 8 April 2010 hearing, despite an extensive job search, Mr. Metz still had not found regular work. In his financial affidavit which he provided to the court, Mr. Metz listed his income as $25,000.00; however, he explained at the hearing that this figure was "speculation," that it is "a hopeful number," and that "it's an overestimate if [he] had to work for minimum wage."

When calculating permanent child support, the trial court imputed to Mr. Metz a monthly gross income of $18,867.00, which was the last salary he received while working as a nurse anesthetist and the same salary figure which the court had imputed to Mr. Metz in the

temporary child support order. The court noted that Mr. Metz's efforts to find employment were "well-documented and unchallenged" but that he had been unable to secure any employment besides "temporary jobs lasting only a day or two, because of his status as a convicted sex offender." The court also noted that:

> As sympathetic as [Mr. Metz's] plight might be, unavoidably, the Court comes back to the plain fact: his plight resulted from his own behavior in sexually abusing his child, and unemployment was the foreseeable result. While he probably did not intend all the consequences which have occurred, certainly, Mrs. Metz and the parties' four children did nothing to cause the destruction of this family, or the loss of income.

The court then noted that Ms. Metz's monthly gross income combined with the imputed monthly gross income of Mr. Metz is $26,474.00, which is above the maximum amount contemplated by the North Carolina Child Support Guidelines and that therefore the court would consider the reasonable needs of the children in determining the appropriate amount of child support. The court found that the children's total reasonable monthly needs and expenses total $7,956.00. The court noted that if it were to base Mr. Metz's child support obligation on this figure, Mr. Metz would be responsible for 71% of $7,956.00 or $5,670.00.

The court considered both parties' submissions as to what a reasonable amount of child support would be. Mr. Metz requested that his monthly income be calculated at $2,083.00, resulting in a monthly child support obligation of $447.00. Ms. Metz submitted a child support worksheet which based the parties' monthly combined income at the highest level set forth in the Child Support Guidelines, $25,000.00—a figure slightly lower than the parties' monthly combined gross income with Mr. Metz's salary imputed at the level he earned at Presbyterian, $26,474.00. At the $25,000.00 income level, the combined monthly child support obligation would be $3,350.00 and Mr. Metz's 71% share would be $2,627.00.

The court ordered that Mr. Metz's child support obligation be set at $2,627.00 per month, a number which was calculated by imputing Mr. Metz's income so that the parties' combined monthly income is calculated at the highest level of income set forth in the Guidelines. The trial court also found that the parties were "capable of providing child support for the benefit of their minor children" at this level.

In the alternative to imputing Mr. Metz's income at the level he made while working at Presbyterian, the court justified the $2,627.00 monthly child support obligation by finding that Mr. Metz's proposed monthly child support obligation of only $447.00 was insufficient to meet the reasonable needs of the parties' four children and that an upward deviation from the Guidelines was appropriate based on the children's actual needs and expenses and the combined income of the parties.

Mr. Metz appeals.

Mr. Metz argues that in both the temporary and permanent child support orders the trial court failed to make sufficient findings of fact supporting the imputation of income, erred in imputing income, and, even if imputation was proper, erred in the amount of income imputed. Furthermore, Mr. Metz contends that the trial court's alternative basis for the award, a deviation from the Guidelines, lacked sufficient findings of fact or conclusions of law regarding the reasonableness of the children's expenses and the parents' ability to pay support.

[1] Preliminarily we must address whether this appeal is properly before us at this time. When Mr. Metz filed this appeal, it was interlocutory, as Ms. Metz's alimony claim was still pending. However, her claim for alimony was dismissed without prejudice on 11 October 2010 and therefore the case is ripe for appeal.

We will not consider Mr. Metz's challenge to the temporary support order because the entry of the 27 May 2010 permanent support order mooted any appeal of the 6 February 2009 temporary support order, which was interlocutory on its face. *See Smithwick v. Frame*, 62 N.C. App. 387, 391, 303 S.E.2d 217, 220 (1983) ("Any objections that defendants may have had to [the challenged] order, interlocutory on its face, were made moot by the . . . Order awarding plaintiff permanent custody of his minor child. We therefore will not consider them.").

In reviewing the permanent child support order, our review is limited to a determination of whether the trial court abused its discretion. *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002). Under this standard of review, the trial court's ruling will be overturned "only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

I.

[2] Mr. Metz first argues that the trial court's findings of fact were insufficient to provide "any detail as to why [it] [imputed] income to

[him]." The trial court must make sufficient findings of fact to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law. *Id.* at 441-42, 567 S.E.2d at 837. In the present case, the court specifically found that:

> 10. Prior to his arrest and conviction, Defendant/Father was employed at Presbyterian Hospital and earned a monthly salary of $18,867.00. Defendant/Father lost his position in the health care field as a result of his own criminal behavior.
>
> . . . .
>
> 14. As sympathetic as [Mr. Metz's] plight might be, unavoidably, the Court comes back to the plain fact: his plight resulted from his own behavior in sexually abusing his child, and unemployment was the foreseeable result. While he probably did not intend all the consequences which have occurred, certainly, Mrs. Metz and the parties' four children did nothing to cause the destruction of this family, or the loss of income.

We hold these findings are sufficient to permit us to determine that the trial court's legal conclusions were a correct application of the law. Therefore, we overrule this assignment of error.

II.

[3] Mr. Metz next contends that the trial court erred in finding that he acted in bad faith and, therefore, the imputation of his income was improper. We disagree.

We first note that, in his financial affidavit, Mr. Metz himself listed his annual income at $25,000.00—a figure which was already an imputation, as he explained at the hearing that he was currently unemployed and had been for some time and that the $25,000.00 figure was "speculation," "a hopeful number," and that it would in fact be an "overestimate if [he] had to work for minimum wage." Mr. Metz could therefore be deemed to have waived his objection to imputation at trial. *See State ex rel. Carteret Cty. Child Support Enforcement Office v. Davis*, —— N.C. App. ——, ——, 700 S.E.2d 85, 88 (2010) ("[O]ur Supreme Court has long held where a theory argued on a appeal was not raised before the trial court the argument is deemed waived on appeal." (citing *State v. Augustine*, 359 N.C. 709, 721, 616 S.E.2d 515, 525 (2005), *cert. denied*, 548 U.S. 925, 165 L. Ed. 2d 988 (2006))); N.C.R. App. P. 10(b)(1).

Even assuming that Mr. Metz had not already conceded at the hearing that imputation was appropriate, the trial court did not abuse its discretion by imputing income to Mr. Metz. "Generally, a party's ability to pay child support is determined by that party's actual income at the time the award is made." *McKyer v. McKyer*, 179 N.C. App. 132, 146, 632 S.E.2d 828, 836 (2006) (citing *Atwell v. Atwell*, 74 N.C. App. 231, 235, 328 S.E.2d 47, 50 (1985)), *disc. review denied*, 361 N.C. 356, 646 S.E.2d 115 (2007). The trial court may, however, impute to a party their capacity to earn as the basis for an award in certain circumstances.

"[A] party's capacity to earn income may become the basis of an award if it is found that the party deliberately depressed its income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for the child." *Askew v. Askew*, 119 N.C. App. 242, 244-45, 458 S.E.2d 217, 219 (1995). "It is clear, however, that '[b]efore the earnings capacity rule is imposed, it must be shown that [the party's] actions which reduced his income were not taken in good faith.' " *Ellis v. Ellis*, 126 N.C. App. 362, 364, 485 S.E.2d 82, 83 (1997) (alterations in original) (quoting *Askew*, 119 N.C. App. at 245, 458 S.E.2d at 219); *see also Wolf v. Wolf*, 151 N.C. App. 523, 527, 566 S.E.2d 516, 519 (2002).

"[T]he determination of bad faith . . . is best made on a case by case analysis by the trial court." *Pataky v. Pataky*, 160 N.C. App. 289, 307, 585 S.E.2d 404, 416 (2003), *aff'd in part, review dismissed in part*, 359 N.C. 65, 602 S.E.2d 360 (2004). Mr. Metz argues that his loss of his position as a nurse anesthetist and the forfeiture of his licenses, subsequent difficulty in finding other employment, and resulting loss in income were involuntary and are not the result of bad faith on his part. We cannot agree.

In fact, involuntarily terminated obligors have been still found to have exhibited the bad faith required so that their former income level may be imputed to them. As acknowledged by Mr. Metz, "[b]ad faith has been found where the obligor had a history of reckless behavior at his employment and that [sic] his loss of employment was inevitable." *See Wolf*, 151 N.C. App. at 528, 566 S.E.2d at 519 (finding bad faith and imputing income when misconduct "lead[s] to an entirely predictable [employment] termination").

Mr. Metz attempts to distinguish his case from the facts in *Wolf* by arguing that "the obligor [in *Wolf*] had a history of reckless actions that directly related to his behavior at his employment." He argues

that, on the other hand, his own "criminal charges were due to actions that occurred outside of his work environment and were totally unrelated to his work performance or his behavior at his employment." Frankly, the distinction which Mr. Metz attempts to draw is unpersuasive. The court's finding in *Wolf* that the obligor disregarded his support obligations did not turn on the fact that his voluntary actions occurred at work. Rather, the court in *Wolf* emphasized that the obligor "voluntarily effected" his termination and continued unemployment. *Id.* at 527-28, 566 S.E.2d at 519.

Here there is substantial evidence in the record, and the trial court did not err by finding and concluding, that the plaintiff disregarded his parental obligations. The court found that Mr. Metz's "plight resulted from his own behavior in sexually abusing his child, and unemployment was the foreseeable result." Mr. Metz acted voluntarily when he sexually abused his daughter. Criminal prosecution, conviction, registration as a sex offender, termination of his employment in the field of nursing, and difficulty finding employment in any other field are clearly foreseeable results of the abuse which Mr. Metz voluntarily committed, and to argue otherwise approaches absurdity. We hold that the trial court did not err in imputing income to Mr. Metz.

III.

[4] Mr. Metz also argues that, even if the court properly found that he acted in bad faith and that imputation was therefore appropriate, it erred by assigning him a gross monthly income of $18,867.00, the income which he earned as a nurse anesthetist. Specifically, Mr. Metz contends the court's findings of fact were insufficient to support a conclusion that he was currently capable of earning $18,627.00 per month. He argues that he no longer has the potential to make $18,627.00 per month because, with the loss of his nursing license, his qualifications have drastically changed.

The trial court, however, found that Mr. Metz was "capable of providing child support for the benefit of [the] minor children as set forth herein." This finding is amply supported by evidence in the record in that Mr. Metz testified that he had $355,000.00 under his control, over $40,000.00 of which was in cash, and the evidence shows that in December 2009, January 2010, March 2010, and April 2010 Mr. Metz withdrew a total of $40,000.00 out of retirement accounts which were not included in his financial affidavits. This assignment of error is overruled.

IV.

[5] Finally, Mr. Metz contends that the court failed to make sufficient findings of fact or conclusions of law regarding the children's expenses and the parents' ability to pay support when it noted that, "[a]s an alternate route to the amount of child support awarded," a "deviation [from the North Carolina Child Support Guidelines] is appropriate based on the children's actual needs and expenses and the combined income of the parties." This Court does not need to reach this argument as we have held that imputation in this case was proper.

Affirmed.

Judges ELMORE and GEER concur.

STATE OF NORTH CAROLINA v. LEE ROBERT MERRELL

No. COA10-1304

(Filed 7 June 2011)

1. **Criminal Law— voluntary intoxication—instruction not given—no plain error**

   There was no plain error in a prosecution for the rape of a child under the age of thirteen and indecent liberties where the court did not give an instruction on voluntary intoxication. Defendant did not present evidence to support a conclusion that, at the time the acts were committed, his mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming the requisite intent.

2. **Satellite-Based Monitoring— statutory premise for order—incorrect**

   The trial court erred by ordering a defendant convicted of the rape of a child under the age of thirteen and indecent liberties to register as a sex offender and to submit to lifetime satellite-based monitoring. The trial court's order was premised on violation of a statute under which defendant was not convicted.

Appeal by defendant from judgment entered 10 March 2010 by Judge Charles H. Henry in Carteret County Superior Court. Heard in the Court of Appeals 27 April 2011.

Attorney General Roy Cooper, by Assistant Attorney General Susannah B. Cox, for the State.

Russell J. Hollers, III, for defendant-appellant.

BRYANT, Judge.

Where defendant fails to present evidence of intoxication to the degree required to show he was incapable of forming the requisite intent, the trial court did not err in failing to instruct the jury on voluntary intoxication. Where the trial court erred in ordering defendant to enroll in a satellite-based monitoring program for his natural life, we reverse the court's order on satellite-based monitoring and remand for a new hearing.

Defendant was indicted on charges of first-degree rape involving a child under the age of thirteen and five counts of taking indecent liberties with a child. The evidence presented at trial tended to show that defendant Lee Robert Merrell, age 47 at the time of trial, lived with his adult sister and her family throughout much of his adult life. At trial, his sister described him as a severe alcoholic: "He drank and was very rarely sober. He just woke up drinking and passed out drinking." The only job he was able to hold was working for the family of her husband. "[I]f he could work, he worked. If he couldn't, he couldn't, or they would find things for him to do around the house."

Q. Would you let him babysit your children?

A. Yes.

Defendant's sister had three children: two daughters and a son. The youngest daughter was Laura[1]. At trial, Laura testified that in 2002 and 2003, when she was nine and in the fourth grade, defendant began touching her in a way that made her feel uncomfortable. Testifying before a jury and family members in the audience, Laura recounted incidents such as when she returned to her living room to find defendant sitting on a couch wearing no pants, being forced to the floor by defendant while he wore no clothes, and, having her shirt pulled up and her pants pulled down. Laura testified that defendant tried to place his penis in her vagina but couldn't and instead rubbed it against her. On another occasion, defendant entered the bathroom just after Laura had taken a bath and touched her breasts. On two occasions, defendant came into Laura's bedroom and masturbated

1. A pseudonym has been used to protect the victim's identity.

while touching her. At dinner, defendant would sit beside Laura and rub her legs, at which point she would get up and go to the bathroom perhaps two or three times during the meal. Laura testified that defendant would touch her "[p]robably twice a week." Laura's immediate family members testified to noticeable changes in Laura's behavior around this time: if defendant was to watch her after school, Laura would not enter the house but ask the bus driver to call her mother or sit outside until someone else came home; at dinner, when defendant was sitting near her, Laura would be fidgety and often excuse herself to go to the bathroom two or three times during the meal. At the close of the evidence, a jury found defendant guilty of attempted first-degree rape of a female under the age of thirteen and five counts of taking indecent liberties with a child. The trial court entered judgment in accordance with the jury's verdict, sentencing defendant concurrently to 220 to 273 months for attempted first-degree rape and 21 to 26 months for each count of taking indecent liberties with a child. Following the entry of judgment and commitment, defendant gave oral notice of appeal. The next day, the court entered an order that upon his release from imprisonment defendant was to enroll in a satellite-based monitoring program for his natural life.

On appeal, defendant raises the following questions: did the trial court (I) commit plain error in failing to instruct the jury on voluntary intoxication; and (II) err in ordering defendant to register as a sex offender and submit to lifetime satellite-based monitoring.

I

[1] First, defendant argues the trial court erred in failing to instruct the jury on voluntary intoxication. Defendant contends that alcohol consumption was "his job, his hobby, and his life" and, because there is substantial evidence that he "blacked out" when he touched Laura, the trial court committed plain error in failing to instruct the jury on voluntary intoxication. We disagree.

Notwithstanding defendant's argument on appeal, defendant failed to request an instruction on voluntary intoxication during the trial. We review defendant's argument only for plain error.

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error,

> something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to 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) (citation omitted).

Defendant was convicted of attempted first-degree statutory rape of a female child under the age of thirteen and five counts of indecent liberties with a child.

> A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> (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[.]

N.C. Gen. Stat. § 14-27.2(a)(1) (2009). In order to convict a defendant of first-degree rape, the State must prove that the defendant had the intent to have vaginal intercourse with the victim. *State v. Nicholson*, 99 N.C. App. 143, 145, 392 S.E.2d 748, 750 (1990).

Defendant was also convicted of taking indecent liberties with a child.

> A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C. Gen. Stat. § 14-202.1 (2009).

> The crime of taking indecent liberties with a minor is a specific intent crime. A specific intent crime requires the State to prove

> that defendant acted willfully or with purpose in committing the offense. However, 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 (1998) (internal citations and quotations omitted). Where a crime requires a showing of specific intent, voluntary intoxication may be a defense to the criminal charge. *State v. Harris*, 171 N.C. App. 127, 131, 613 S.E.2d 701, 704 (2005) (citing *State v. Jones*, 300 N.C. 363, 365, 266 S.E.2d 586, 587 (1980)).

> [However,] voluntary drunkenness is not a legal excuse for crime. . . . [I]t is said that the law does not permit a person who commits a crime in a state of intoxication to use his own vice or weakness as a shelter against the normal legal consequences of his conduct. . . . When, on a given occasion, a person takes his first drink by choice and afterwards drinks successively and finally gets drunk, that is voluntary intoxication, even though he may be an alcoholic.

State v. Bunn, 283 N.C. 444, 457, 196 S.E.2d 777, 786 (1973) (internal citations and quotations omitted). While most often stated in the context of discussing the premeditation and deliberation elements of first-degree murder, our appellate courts have consistently held that "[f]or [voluntary intoxication] to constitute a defense it must appear that [the] defendant was not able, by reason of drunkenness, to think out beforehand what he intended to do and to weigh it and understand the nature and consequence of his act." *Id.* at 461, 196 S.E.2d at 788 (quoting *State v. Cureton*, 218 N.C. 491, 494, 11 S.E.2d 469, 470-71 (1940)); *see also State v. Long*, 354 N.C. 534, 557 S.E.2d 89 (2001); *State v. Mash*, 323 N.C. 339, 372 S.E.2d 532 (1988)).

> Before the trial court will be required to instruct on voluntary intoxication, defendant must produce substantial evidence which would support a conclusion by the trial court that at the time of the crime for which he is being tried defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming [the requisite intent to commit the crime.] In the absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon.

State v. Keitt, 153 N.C. App. 671, 676-77, 571 S.E.2d 35, 39 (2002) (quoting *State v. Kornegay*, 149 N.C. App. 390, 395, 562 S.E.2d 541, 545 (2002).

Here the jury heard evidence from the State that showed defendant made careful plans to be alone with the child, and in at least one instance, tricked her into coming out of her room after she had locked herself away from him. Defendant offers only that he has abused alcohol and drugs for so long his memory has deteriorated to a point that he cannot remember the events for which he was convicted. A law enforcement officer who aided in the investigation and who spoke with defendant during an interview testified that his impression was that defendant "was using drugs and drinking heavily during that time and he did not remember a lot about what occurred back then." However, our Supreme Court had acknowledged the principle held by other jurisdictions that "[a]mnesia, loss of memory, may lead to crimes entirely unknown to the culprit at a later date. . . . [However,] [f]ailure to remember later, when accused, is in itself no proof of the mental condition when [sic] crime was performed." *State v. Caddell*, 287 N.C. 266, 286, 215 S.E.2d 348, 361 (1975) (quoting *Thomas v. State*, 201 Tenn. 645, 301 S.W. 2d 358). Defendant does not present evidence to support a conclusion that, at the time the acts were committed, his mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming the requisite intent. Absent such evidence, the trial court was not required to instruct the jury on voluntary intoxication and defendant cannot establish plain error.

II

[2] Next, defendant argues the court erred in ordering him to register as a sex offender and submit to lifetime satellite-based monitoring. Defendant contends that, during the hearing on sex offender registration and satellite-based monitoring, the court erred in finding that defendant was convicted of attempted rape of a child, pursuant to N.C.G.S. § 14-27.2A, compelling enrollment in satellite-based monitoring for his natural life when in fact defendant was convicted of attempted rape pursuant to N.C. Gen. Stat. § 14-27.2. We agree with defendant's contention as to the order on satellite-based monitoring.

Within the North Carolina Sex Offender and Public Protection Registration Programs, codified in Article 27A of Chapter 14, first-degree rape, defined under § 14-27.2, and indecent liberties with children, defined under § 14-202.1, are classified as "sexually violent offenses." N.C.G.S. § 14-208.6(5) (2009). "A final conviction for . . . a sexually violent offense, or an attempt to commit [a sexually violent offense]" is a "reportable conviction." N.C.G.S. § 14-208.6(4). 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 the offender has been classified as a sexually violent predator, is a recidivist, that the conviction offense was an aggravated offense, that the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or the offense involved the physical, mental, or sexual abuse of a minor. N.C.G.S. § 14-208.40A(a) (2009). "If the court finds that the offender has been classified as a sexually violent predator, is a recidivist, has committed an aggravated offense, or was convicted of G.S. 14-27.2A or G.S. 14-27.4A, 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).

> (d) If the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, that the offense is not an aggravated offense or a violation of G.S. 14-27.2A or G.S. 14-27.4A and the offender is not a recidivist, *the court shall order that the Department do a risk assessment of the offender*. . . .
>
> (e) Upon receipt of a risk assessment from the Department pursuant to subsection (d) of this section, the court shall determine whether, based on the Department's risk assessment, the offender requires the highest possible level of supervision and monitoring. If the court determines that the offender does require the highest possible level of supervision and monitoring, the court shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court.

N.C.G.S. § 14-208.40A(d), (e) (2009) (emphasis added).

Defendant was convicted of attempted first-degree rape, pursuant to N.C.G.S. § 14-27.2, and five counts of indecent liberties with a child, pursuant to § 14-202.1. These are sexually violent offenses as defined under N.C.G.S. § 14-208.6(5) and thus reportable convictions subject to registration pursuant to Article 27A (Sex Offender and Public Protection Registration Programs). At the sentencing hearing, the court found that the offenses for which defendant was convicted "did involve the physical, mental, or sexual abuse of a minor . . . *but no risk assessment is required from the Department of Correction because lifetime satellite-based monitoring is required* . . . ." The court ordered that upon his release from imprisonment, defendant was to be enrolled in a satellite-based monitoring program for his natural life based upon a finding that defendant had been convicted of

"rape of a child, G.S. 14-27.2A, or sexual offense with a child, G.S. 14-27.4A, or an attempt, solicitation, or conspiracy to commit such offense . . . as a principal." However, defendant was convicted for offenses in violation of N.C.G.S. §§ 14-27.2 and 14-202.1, not G.S. § 14-27.2A or § 14-27.4A. Moreover, the court did not find that defendant was a sexually violent predator or that defendant was a recidivist, and the court found that the offense was not an aggravated offense. Therefore, the trial court erred in finding that lifetime satellite-based monitoring was required and in failing to order that a risk assessment of defendant be performed pursuant to N.C.G.S. § 14-208.40A(d) prior to ordering defendant to enroll in a lifetime satellite-based monitoring program upon release from prison. Accordingly, we reverse the lower court's order compelling lifetime satellite-based monitoring premised on a violation of a statute under which defendant was not convicted (N.C.G.S. § 14-27.2A) and remand for a new hearing.

Reversed in part and remanded.

Judges HUNTER, Robert C., and McCULLOUGH concur.

DOUGHERTY EQUIPMENT COMPANY, INC., PLAINTIFF v. M.C. PRECAST CONCRETE, INC., DEFENDANT

No. COA10-646

(Filed 7 June 2011)

Process and Service— package left at front desk—rebuttable presumption of service

The trial court abused its discretion by granting defendant's motion for relief from a default judgment without considering the presumption of proper service provided by N.C.G.S. § 1A-1, Rule 4(j2)(2). Federal Express delivered a package containing the summons and complaint to the "front desk" of the registered agent, and the delivery form was signed by someone other than the addressee.

Appeal by plaintiff from order entered on or about 30 December 2009 by Judge Angela Foster in District Court, Guilford County. Heard in the Court of Appeals 16 November 2010.

Tuggle Duggins & Meschan, P.A., by Emma C. Merritt Baggett and J. Nathan Duggins III, for plaintiff-appellant.

Vann & Sheridan LLP, by Cody R. Loughridge and James R. Vann, for defendant-appellee.

STROUD, Judge.

Plaintiff appeals from the trial court's order granting defendant's motion for relief from judgment and motion to dismiss due to improper service. As the trial court failed to consider whether service of process was proper under N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2), we reverse and remand.

I. Background

On 25 May 2009, plaintiff filed a complaint against defendant for breach of contract based upon defendant's failure to pay plaintiff for equipment, goods, and services sold and provided to defendant on an open account. Plaintiff sought payment of $46,573.17, plus interest of 1.5% per month. The summons was directed to Raymond Duchaine, defendant's registered agent, and was served by FedEx Priority Overnight mail on 27 May 2009. Plaintiff filed an affidavit of service on 3 June 2009. On 21 July 2009, plaintiff filed a "MOTION FOR ENTRY OF DEFAULT" as defendant had failed to file an answer or respond to plaintiff's complaint. On 22 July 2009, the trial court entered default against defendant. Also on 22 July 2009, plaintiff filed a "MOTION FOR ENTRY OF DEFAULT JUDGMENT[.]" On 24 July 2009, the trial court entered judgment by default against defendant.

On 19 October 2009, defendant filed a "MOTION FOR RELIEF FROM JUDGMENT & MOTION TO DISMISS[,]" alleging that defendant was not properly served because Mr. Duchaine did not receive the summons and complaint. After a hearing upon defendant's motion, on 30 December 2009, the trial court found:

1. On May 26, 2009, Plaintiff Dougherty Equipment Company, Inc. ("Plaintiff") initiated this action by filing a Complaint against Defendant M.C. Precast Concrete, Inc. ("Defendant") seeking a recovery of a certain sum allegedly owed from Defendant to Plaintiff.

2. Also on May 26, 2009, a Summons was issued in this action addressed to:

   c/o Raymond Duchaine, Registered Agent
   520 Pristine Water Drive
   Apex, NC 27502

3. Defendant is a corporation organized and existing under the laws of North Carolina, with its principal office and place of business located at 520 Pristine Water Drive, Apex, NC 27502. Defendant's president and registered agent is Raymond Duchaine, and the address of Defendant's registered office is 520 Pristine Water Drive, Apex, NC 27502, as listed with the North Carolina Secretary of State.

4. On May 26, 2009, Plaintiff's counsel deposited via Federal Express (FedEx) Priority Overnight service a service letter and a copy of the Summons and Complaint issued in this action, addressed to:
   Raymond Duchaine
   Reg Agent for M.C. Precast Concrete
   520 PRISTINE WATER DR
   APEX, NC 27539.

5. On May 27, 2009, at 11:35 a.m., Defendant's employee Chad West signed for and received the FedEx package containing a copy of the Summons and Complaint.

6. Mr. West apparently works at the front desk of Defendant's office located at 520 Pristine Water Drive in Apex, North Carolina.

7. Mr. Duchaine also works in Defendant's office located at 520 Pristine Water Drive in Apex, North Carolina.

8. On June 2, 2009, Plaintiff's counsel filed a sworn Affidavit of Service stating that she had deposited a service letter and a copy of the Summons and Complaint via Federal Express overnight service addressed to Defendant's registered agent; that the letter, Summons and Complaint were delivered to the registered agent; and that the Federal Express Confirmation form evidencing delivery on May 27, 2009 was attached to the Affidavit as Exhibit A.

9. Attachment A to the Affidavit of Service is an electronic delivery receipt provided by FedEx indicating that the package containing the Summons and Complaint and addressed to Mr. Duchaine was delivered to the "Receptionist/Front Desk" and was signed for by "C. West."

11. Defendant's attorney filed a Notice of Appearance on or about August 7, 2009. On or about October 16, 2009, Defendant filed its Motion for Relief from Judgment and Motion to Dismiss, seeking, *inter alia*, relief [from] the Default Judgment on the

> grounds of invalid service and excusable neglect, and dismissal for insufficiency of process.

The trial court determined that plaintiff failed to properly serve defendant pursuant to North Carolina Rule of Civil Procedure 4(j)(6)(d), and accordingly concluded that "the Default Judgment entered in this action is void[.]" The trial court therefore granted defendant's motion for relief from judgment and motion to dismiss. Plaintiff appeals.

II. Service

Plaintiff contends that the trial court erred in granting defendant's motion for relief from judgment because it erroneously concluded that defendant was not properly served. Plaintiff first notes that the trial court erred in failing to recognize the presumption that it had made proper service pursuant to N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2). Defendant argues that pursuant to N.C. Gen. Stat. § 1A-1, Rule 4(j)(6)(d), plaintiff was required to deliver the summons and complaint directly "to the addressee[,]" Mr. Duchaine, and because plaintiff failed to comply with the plain language of Rule 4(j)(6)(d), no further analysis is necessary.

"The standard of review for a trial court's ruling on a Rule 60(b)[, "[r]elief from judgment or order[,]"] motion is abuse of discretion. Abuse of discretion exists when the challenged actions are manifestly unsupported by reason." *Barnes v. Wells*, 165 N.C. App. 575, 580, 599 S.E.2d 585, 589 (2004) (citation and quotation marks omitted). "On motion and upon such terms as are just, the court may relieve a party . . . from a final . . . order . . . [when t]he judgment is void[.]" N.C. Gen. Stat. § 1A-1, Rule 60(b)(4). "If . . . an order is rendered without an essential element such as . . . proper service of process, it is void." *County of Wayne ex rel. Williams v. Whitley*, 72 N.C. App. 155, 157, 323 S.E.2d 458, 461 (1984).

Regarding service of process, Rule 4(j)(6)(d) provides that a domestic corporation may be served

> [b]y depositing with a designated delivery service[1] authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the officer, director, or agent to be served as specified in paragraphs a. and b., delivering to the addressee, and obtaining a delivery receipt.

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1. There is no dispute that FedEx Priority Overnight mail is a "designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2)[.]" N.C. Gen. Stat. § 1A-1, Rule 4(j)(6)(d).

N.C. Gen. Stat. § 1A-1, Rule 4(j)(6)(d) (2009). Furthermore,

> [b]efore judgment by default may be had on service by registered or certified mail, signature confirmation, or *by a designated delivery service* authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, the serving party shall file an affidavit with the court showing proof of such service in accordance with the requirements of G.S. 1-75.10(a)(4), 1-75.10(a)(5), or 1-75.10(a)(6), as appropriate. This affidavit together with the return receipt, copy of the proof of delivery provided by the United States Postal Service, or delivery receipt, *signed by the person who received the mail or delivery if not the addressee raises a presumption that the person who received the mail or delivery and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process* or was a person of suitable age and discretion residing in the addressee's dwelling house or usual place of abode.

N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2) (2009) (emphasis added).

Defendant argues that the summons can be served only on the named "addressee" because Rule 4(j)(6)(d) provides that service should be "deliver[ed] to the addressee." N.C. Gen. Stat. § 1A-1, Rule 4(j)(6)(d). Thus, defendant contends that service was not proper as the summons and complaint was not delivered to Mr. Duchaine, as the "addressee[,]" but was instead delivered to Mr. West. However, defendant's argument fails to consider Rule 4(j2)(2). Rule 4(j)(6)(d) must be construed in the context of the other provisions of Rule 4. *See Duggins v. North Carolina State Bd. of Exam'rs*, 25 N.C. App. 131, 135, 212 S.E.2d 657, 660 (1975). "Our courts have consistently held that statutes dealing with the same subject matter must be construed in pari materia, and harmonized, if possible, to give effect to each[,]" *Id.* (citation, quotation marks, and brackets omitted).

Each subsection of Rule 4 addresses a particular aspect of service of process: (a) issuance of a summons; (b) contents of a summons; (c) return of a summons; (d) extension of a summons; (e) discontinuance of a summons; (f) date of multiple summonses; (g) docketing a summons by the clerk; (h) when proper officer is not available for executing summons; (h1) when summons returns unexecuted; (i) amendment of a summons; (j) process of service to exercise personal jurisdiction upon various types of persons and legal entities, including subsection (6) as to corporations; (j1) service by publication; (j2) proof of service, including provisions as to: (1) personal service, (2) registered or certified mail, signature confirmation,

or designated delivery service, and (3) publication; (j3) foreign service; (j4) when process or default judgment cannot be attacked; (j5) personal jurisdiction by acceptance of service; (j6) service not allowed by electronic mailing; and (k) process of service to exercise jurisdiction in rem or quasi in rem. *See* N.C. Gen. Stat. § 1A-1, Rule 4. Considered as a whole, Rule 4 includes comprehensive provisions for service of process, and the provisions of Rule 4(j2)(2) clearly apply to service made under any of the applicable provisions of Rule 4. *See id.* Accordingly, in considering whether service was proper under Rule 4(j)(6)(d), the trial court was required to consider the presumption described in Rule 4(j2)(2). *See id.*

The applicability of the Rule 4(j2)(2) presumption, *see* N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2), is demonstrated by the uncontested findings of fact as to the service of the summons and complaint, *In re M.M.*, ––– N.C. App. –––, –––, 684 S.E.2d 463, 469 (2009):

> 8. On June 2, 2009, Plaintiff's counsel filed a sworn Affidavit of Service stating that she had deposited a service letter and a copy of the Summons and Complaint via Federal Express overnight service addressed to Defendant's registered agent; that the letter, Summons and Complaint were delivered to the registered agent; and that the Federal Express Confirmation form evidencing delivery on May 27, 2009 was attached to the Affidavit as Exhibit A.
>
> 9. Attachment A to the Affidavit of Service is an electronic delivery receipt provided by FedEx indicating that the package containing the Summons and Complaint and addressed to Mr. Duchaine was delivered to the "Receptionist/Front Desk" and was signed for by "C. West."

Based upon these findings of fact, a presumption that defendant was properly served arises under Rule 4(j2)(2). The "delivery receipt" was "signed by the person who received the mail or delivery[,]" Mr. West; he was "not the addressee" but the delivery receipt "raises a presumption that the person who received the mail or delivery and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process[.]" *See* N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2). This presumption of service is rebuttable. *See id; see generally Taylor v. Brinkman*, 108 N.C. App. 767, 771, 425 S.E.2d 429, 432 (1993) (noting the presumption in Rule 4(j2)(2) is rebuttable). But here the trial court concluded that "[w]hether Mr. West was authorized to receive and sign for mail or

FedEx packages on behalf of Mr. Duchaine and/or Defendant . . . is irrelevant to this Court's inquiry under Rule 4(j)(6)(d)[.]" This conclusion is in direct contravention with Rule 4(j2)(2) which when applied to these facts raises the presumption that Mr. West was "an agent of the addressee authorized by appointment or by law[.]" N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2).

While defendant contends that Mr. West was neither actually nor impliedly authorized to receive service on behalf of defendant, these are disputed facts which the trial court should have considered rather than dismissing such facts as "irrelevant[.]" Plaintiff attempted to present evidence regarding Mr. West's authority, as plaintiff subpoenaed Mr. West to testify at the hearing, but Mr. West did not appear and defendant filed a motion to quash plaintiff's subpoena. Plaintiff also requested "continuance of the hearing for the purpose of questioning Mr. West, through discovery or otherwise" regarding his authority "to receive and sign for mail or FedEx packages" for Mr. Duchaine or defendant, but the trial court denied plaintiff's request for continuance because it determined that Mr. West's authority was "irrelevant[.]" In order to rebut the Rule 4(j2)(2) presumption, defendant would have to demonstrate that Mr. West was not "an agent of the addressee authorized by appointment or by law to be served or to accept service of process[.]" N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2). On remand, the trial court must consider the presumption of proper service raised by Rule 4(j2)(2), and this consideration would properly include evidence regarding Mr. West's authority, or lack thereof, to receive mail or FedEx packages on behalf of Mr. Duchaine or defendant. Because the trial court determined that evidence regarding Mr. West's authority was irrelevant, a new hearing will be necessary on defendant's motions for relief from judgment and to dismiss.

III. Conclusion

As the trial court abused its discretion by failing to consider the presumption of proper service pursuant to Rule 4(j2)(2), we reverse and remand for further proceedings consistent with this opinion. As we are reversing and remanding the order, we need not consider plaintiff's other arguments.

REVERSED AND REMANDED.

Judges BRYANT and BEASLEY concur.

STATE OF NORTH CAROLINA v. KEITH ANTIONE CARTER, DEFENDANT

No. COA10-974

(Filed 21 June 2011)

1. Confessions and Incriminating Statements— denial of pretrial motion to suppress—not in custody

The trial court did not err in a second-degree murder case by denying defendant's pretrial motion to suppress the statement he made to detectives at the police station. Considering the totality of circumstances, defendant was not in custody at the time of his recorded statement to police.

2. Jury— Batson challenge—race-neutral reasons—failure to show purposeful discrimination

The trial court did not err in a second-degree murder case by excluding prospective African-American jurors from the jury. The trial court found the prosecutor made race-neutral explanations and defendant failed to show purposeful discrimination.

3. Homicide— second-degree murder—motion to dismiss—sufficiency of evidence—intentional use of deadly weapon

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder. Evidence of defendant's intentional use of a deadly weapon, a semi-automatic handgun, that proximately caused death triggered a presumption that the killing was done with malice.

4. Sentencing— aggravating factors—committed against police officer

The trial court did not err in a second-degree murder case by submitting to the jury the aggravating factor under N.C.G.S. § 15A-1340.16(d)(6) that the offense was committed against a police officer engaged in the performance of his official duties. Sentencing factors that might lead to sentencing enhancement do not have to be alleged in the indictment.

Appeal by defendant from judgment entered 12 March 2010 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 22 March 2011.

Attorney General Roy Cooper, by Assistant Attorney General Charles E. Reece, for the State.

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

HUNTER, Robert C., Judge.

Defendant Keith Antione Carter appeals his second-degree murder conviction. After careful review, we find no error.

Facts

At trial, the State presented evidence tending to establish the following facts: Late in the evening of 22 February 2007 and into the early morning hours of 23 February 2007, several Forsyth County deputies were working off-duty as security at the Red Rooster nightclub in Winston-Salem. Around 2:00 a.m., several fights broke out inside the nightclub. As the deputies and bouncers tried to stop the fights, someone threw a chair which hit several people, and the fighting escalated. The deputies then began using pepper spray to break up the groups of people fighting and to force them outside. As the crowd—consisting of roughly 400 to 500 people—moved outside, at least 30 separate fights broke out in the parking lot.

Defendant, who had gone to the Red Rooster to meet his friend Brandon Horne, was involved in one of the fights and was hit in the face, leaving "[a] big gash under his eye." When the deputies began using pepper spray, defendant and Mr. Horne went outside and began walking to defendant's car. When Mr. Horne pointed out that defendant's cut was "bleeding pretty bad," defendant looked at his cut in his car's rearview mirror and got upset. Defendant then reached under the driver's seat and pulled out a 9mm semi-automatic handgun. He walked around to the front passenger's side, retrieved the "clip" from the glove box, loaded the clip, and "rack[ed]" a round in the chamber. Yelling "Fuck it. Who wants some?," defendant fired several shots "towards the crowd" in the parking lot. After "spraying" the crowd, defendant quickly got into his car and drove off "really fast."

Sergeant Howard Plouff, who was one of at least four Winston-Salem police officers who had responded to the deputies' call for emergency assistance at the Red Rooster, was hit in the neck by one of the bullets from defendant's gun. The bullet entered Sgt. Plouff's body under his jaw, "cut[ting]" his carotid artery and his jugular vein,

"fractur[ing]" his spine, and "destroy[ing]" part of his spinal cord. Sgt. Plouff was rushed to the hospital, where he died from the injuries resulting from the gunshot wound.

In the course of investigating Sgt. Plouff's death, Detective Stan Nieves learned that defendant may have been at the Red Rooster on 22-23 February 2007. Detective Nieves contacted defendant on 27 February 2007 and defendant agreed to come down to the police station to be interviewed. Because defendant was having problems with his car, two detectives picked him up from his mother's residence and defendant voluntarily went with the detectives to the police station. After being interviewed for several hours, defendant gave a tape recorded statement in which he stated that he was angry after being injured in the fight inside the nightclub, and that he went outside to his car, got out his handgun, loaded it, and fired five or six times "straight up" into the air.

At the conclusion of the interview, defendant was arrested and charged with the first-degree murder of Sgt. Plouff. A superceding indictment was later issued, alleging, among others, the aggravating factor that the murder was committed against a law enforcement officer while the officer was engaged in the performance of his official duties. Defendant was also charged with one count of felony engaging in a riot while possessing a handgun and one count of misdemeanor engaging in a riot[1]. Prior to trial, defendant filed a motion to suppress his statement to the police on the basis that the statement was obtained in violation of his Fifth Amendment rights. After conducting a suppression hearing, the trial court denied defendant's motion. At the close of the State's evidence at trial, defendant moved to dismiss all charges against him. The trial court denied the motion. After electing not to present any evidence in his defense, defendant renewed his motion to dismiss. The trial court denied this motion as well.

The jury found defendant guilty of second-degree murder, felony engaging in a riot while in possession of a handgun, and misdemeanor engaging in a riot. The jury also found the aggravating circumstance that the murder was committed against a law enforcement officer while engaged in the performance of his official duties. The trial court sentenced defendant to a presumptive-range sentence of six to eight months imprisonment on the felony riot conviction, followed by an aggravated sentence of 196 to 245 months imprisonment on the

1. Neither the indictments nor the verdict sheets regarding these charges are included in the record on appeal.

second-degree murder charge. Defendant gave notice of appeal in open court.

I. Motion to Suppress

[1] Defendant first contends that the trial court erred in denying his pre-trial motion to suppress the statement he made to detectives at the police station. Because, defendant argues, the statement was obtained as a result of a custodial interrogation conducted without his having been advised of his rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), the statement should have been suppressed. As defendant does not challenge any of the trial court's findings of fact on appeal, the only question for review is whether those findings support the court's conclusion of law that "[d]efendant was not in custody" at the time of his statements to the detectives. *In re J.D.B.*, 363 N.C. 664, 668, 686 S.E.2d 135, 137-38 (2009).

Pertinent here, the United States Supreme Court has emphasized that

> "[p]olice officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' "

Oregon v. Mathiason, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977) (per curiam). Rather, the "definitive inquiry" in determining whether a person is "in custody" for *Miranda* purposes is whether, based on the totality of the circumstances, there was a "formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405 (1997) (citing *Stansbury v. California*, 511 U.S. 318, 128 L. Ed. 2d 293 (1994) (per curiam)).

This determination involves "an objective test, based upon a reasonable person standard, and is 'to be applied on a case-by-case basis considering all the facts and circumstances.' " *State v. Hall*, 131 N.C. App. 427, 432, 508 S.E.2d 8, 12 (1998) (quoting *State v. Medlin*, 333 N.C. 280, 291, 426 S.E.2d 402, 407 (1993)), *aff'd per curiam*, 350 N.C. 303, 513 S.E.2d 561 (1999). While "no single factor controls the determination of whether an individual is 'in custody' for purposes of *Miranda*[,]" *State v. Garcia*, 358 N.C. 382, 397, 597 S.E.2d 724, 737

(2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005), our appellate courts have "considered such factors as whether a suspect is told he or she is free to leave, whether the suspect is handcuffed, whether the suspect is in the presence of uniformed officers, and the nature of any security around the suspect," *State v. Waring*, ––– N.C. –––, –––, 701 S.E.2d 615, 633 (2010) (internal citations omitted).

Here, at the conclusion of the suppression hearing, the trial court entered its order orally from the bench, finding that Detective Nieves went to defendant's mother's house around 3:00 p.m. on 27 February 2007, where he was told that defendant was not at home. Detective Nieves left a business card with defendant's sister and asked her to have defendant contact him. Around 4:15 p.m., defendant called Detective Nieves, who explained to defendant that the police were investigating the shooting at the Red Rooster nightclub and were "interviewing everybody who had been at the scene." When defendant told Detective Nieves that he had been at the nightclub on the night of 22-23 February 2007, Detective Nieves "asked [defendant] if he would come down to the police station to give a statement . . . ." Defendant told Detective Nieves that there was "something wrong" with his car and that he was unable to come down to the police station at that time. Detective Nieves offered to send someone to "pick [defendant] up at his house," and defendant agreed to being picked up.

Detective Nieves called Detectives Phillip Cox and B.G. Kirk and asked them to pick up defendant and bring him to the police station. When they arrived and knocked on the door, defendant came outside, talked briefly with Detectives Cox and Kirk, who were in plain clothes, and then went back inside unaccompanied to get his wallet and keys. Defendant was neither searched nor patted down before getting into the passenger seat of the detectives' unmarked Honda Accord. While driving to the police station, defendant was told that "he could leave at any time" and that "he was not under arrest." When they arrived at the station, they parked in the public parking lot in front of the station and entered the building through the public entrance rather than through the "secure entrance" in the back. While unlocking the door allowing access to the offices and interview rooms, Detective Kirk told defendant that "the door only locks from the outside, and if he wanted to leave he could get out the door, it didn't require unlocking . . . ." The detectives led defendant to an interview room where they again told him that he was not in custody and that he "could exit through th[e] door at any time."

After leaving defendant unattended for roughly five minutes, Detectives Nieves and Sean Flynn entered the interview room at approximately 4:40 p.m. They explained to defendant that they were investigating the shooting death of Sgt. Plouff; that he was "not under arrest" and that "he could leave at any time"; but that they wanted to ask him some questions about what happened on the night of 22-23 February 2007. As the interview began, defendant was offered something to drink, which he declined. Later during the interview, defendant again was offered something to eat or drink and was given two sandwiches, some potato chips, a soda, and a cupcake.

The interview, which was "conversational" in tone, lasted several hours. During the interview, defendant signed a form consenting to the search of his residence, but refused to give a DNA sample or submit to a polygraph test. At 7:51 p.m. on 27 February 2007, defendant gave a tape recorded statement to the detectives, in which he indicated that he was at the Red Rooster on 22-23 February 2007; that several fights broke out at the nightclub, during one of which he was knocked to the ground and kicked in the face; and, that after the fight was broken up, he went to his car in the club's parking lot, got his semi-automatic handgun out from under the driver's seat, retrieved the magazine from the glove box, loaded the gun, and fired five or six times "straight up" into the air. After giving this statement, defendant was formally arrested. Based on these findings, the trial court concluded that "[d]efendant was not in custody" at the time he gave his statement and denied his motion to suppress.

Considering the totality of the circumstances, defendant was not in custody at the time of his recorded statement to the police. Defendant rode with the detectives to the police station voluntarily, without being frisked or handcuffed. Defendant was told at least three times—once in the car, once while entering the police station, and once at the beginning of the interview—that he was not in custody and that he was free to leave at any time. Defendant was not restrained during the interview and, in fact, was left unattended in the unlocked interview room before the interview began. Nor was defendant coerced or threatened. To the contrary, defendant was repeatedly asked if he wanted anything to eat or drink and was given food and a soda when he asked for it. The trial court properly denied defendant's motion to suppress his statement. *See State v. Deese*, 136 N.C. App. 413, 417-18, 524 S.E.2d 381, 384-85 ("In this case, defendant was permitted to arrange the first interview at a time convenient to him; at his request, the officers provided transportation from his res-

idence to the courthouse and back. Defendant was told on both occasions that he was not under arrest, that he was free to leave at any time, and that he would be driven home upon request. He was not restrained in any manner; in fact, he was left alone in an open room during the first interview. He was neither coerced nor threatened. . . . Considering the totality of the circumstances, we agree with the trial court's conclusion that defendant was not in custody on either occasion when he made statements to law enforcement officers and we find no error in the denial of his motion to suppress those statements."), *appeal dismissed and disc. review denied*, 351 N.C. 476, 543 S.E.2d 499-500 (2000).

II. *Batson* Challenge

[2] Defendant, an African-American male, contends that the State "wrongfully excluded" prospective African-American jurors from the jury in this case in violation of his constitutional right, under *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), to a jury selected without regard to race. Jury selection began on 2 March 2010 with the clerk calling the first panel of 12 prospective jurors, which included Kesha Wisley and Pamela Turner, both African-American women. Although the jury selection regarding the first panel was not recorded, it appears from the record that defense counsel asked to be heard outside the presence of the jury. After the prospective jurors were escorted from the courtroom, defense counsel made a *Batson* challenge, noting that the State had accepted 11 Caucasian jurors but had used two peremptory challenges to strike Ms. Wisley and Ms. Turner. When the trial judge asked the prosecutor to explain his "decision" to excuse Ms. Wisley and Ms. Turner, the prosecutor responded that Ms. Wisley indicated that her sister was then-presently incarcerated and that she "d[id] not believe [that] her sister was treated fairly by law enforcement"; that she had "visited several friends in prison"; that she was "a person without . . . much experience in the community"; and, that her "poor eye contact" and low voice indicated that she had a "very low level of enthusiasm" as a potential juror. As for Ms. Turner, the prosecutor stated that he had peremptorily excused her because she "tearfully" explained that her son had been sentenced to 35 years in prison for attempted murder and that she "d[id] not believe he was treated fairly." In response, defense counsel noted that both women had indicated that "they could be fair and impartial in this particular case"; that among the Caucasian jurors accepted by the State, there were two who had criminal records, several who had had "run-ins" with the police, and

one juror (Mr. Rierson) whose father was incarcerated; and that two Caucasian jurors had indicated that they had been living in the area for a "limited" period of time.

After hearing these arguments, the trial judge found that the State had offered race-neutral explanations for excusing Ms. Wisley and Ms. Turner:

> I think in the case of Ms. Wisley the State stated a racially neutral reason, which is the fact that her sister is in prison, she's visited several friends in prison, and she did not believe her sister was treated fairly.
>
> As to Ms. Turner she has a son in prison for 35 years in the State of Maryland, he received a 35 year sentence in the State of Maryland for attempted murder. Ms. Turner was very emotional when she described that, and she did say that her son was not treated fairly . . . .

The judge also noted that Mr. Rierson had indicated that he was not "close" to his father and that he felt that his father had been treated fairly.

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

To facilitate appellate review, "the trial court must make specific findings of fact at each stage of the *Batson* inquiry that it reaches." *State v. Cofield*, 129 N.C. App. 268, 275, 498 S.E.2d 823, 829 (1998). "The trial court's findings will be upheld on appeal unless they are clearly erroneous—that is, unless 'on the entire evidence [the reviewing court is] left with the definite and firm conviction that a mistake ha[s]

been committed.' " *Taylor*, 362 N.C. at 528, 669 S.E.2d at 254 (quoting *Hernandez v. New York*, 500 U.S. 352, 369, 114 L. Ed. 2d 395, 412 (1991)) (first alteration added). Under this standard, "the fact finder's choice between two permissible views of the evidence cannot be considered clearly erroneous." *State v. Headen*, —— N.C. App. ——, ——, 697 S.E.2d 407, 412 (citation and quotation marks omitted), *disc. review denied*, —— N.C. ——, 704 S.E.2d 275 (2010).

Where, as here,

> the trial court requires the prosecutor to give his [or her] reasons without ruling on the question of a prima facie showing, the question of whether the defendant has made a prima facie showing becomes moot, and it becomes the responsibility of the trial court to make appropriate findings on whether the stated reasons are a credible, nondiscriminatory basis for the challenges or simply pretext.

State v. Williams, 343 N.C. 345, 359, 471 S.E.2d 379, 386 (1996). In such a case, "the appellate court considers the prosecutor's explanations pursuant to step two of *Batson*, and then proceeds to step three, inquiring whether the trial court was correct in its ultimate determination that the State's use of peremptory challenges did not constitute intentional discrimination." *State v. Mays*, 154 N.C. App. 572, 575, 573 S.E.2d 202, 205 (2002).

To rebut a prima facie showing of discrimination, "the prosecution must 'articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group.' " *State v. Cummings*, 346 N.C. 291, 308-09, 488 S.E.2d 550, 560-61 (1997) (quoting *State v. Jackson*, 322 N.C. 251, 254, 368 S.E.2d 838, 840 (1988), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989)). The prosecutor's explanations, however, "need not 'rise to the level justifying a challenge for cause,' and need not be 'persuasive, or even plausible.' " *Cofield*, 129 N.C. App. at 277, 498 S.E.2d at 830 (quoting *State v. Barnes*, 345 N.C. 184, 209, 481 S.E.2d 44, 57 (1997)). Indeed, "[s]o long as the motive does not appear to be racial discrimination, the prosecutor may exercise peremptory challenges on the basis of 'legitimate hunches and past experience.' " *State v. Porter*, 326 N.C. 489, 498, 391 S.E.2d 144, 151 (1990) (quoting *State v. Antwine*, 743 S.W.2d 51, 65 (Mo. 1987)). "The issue at this stage is mere 'facial validity,' and 'absent a discriminatory intent, which is inherent in the reason, the explanation given will be deemed race-neutral.' " *Headen*, ——

N.C. App. at ——, 697 S.E.2d at 413 (quoting *State v. McClain*, 169 N.C. App. 657, 668, 610 S.E.2d 783, 791 (2005)).

In this case, the prosecutor's explanation with respect to Ms. Wisley and Ms. Turner included the fact that both women had a close family member who was then-currently incarcerated and that both women felt that their relative had not been "treated fairly." This Court has held that "[t]he criminal conviction of a potential juror's relative has been recognized as a race-neutral reason for the exclusion of that juror by peremptory challenge." *McClain*, 169 N.C. App. at 669, 610 S.E.2d at 791. Consistent with *McClain*, we conclude that the trial judge's determination that the prosecutor's reason was race-neutral is not clearly erroneous.

Turning to *Batson's* third step, we consider whether the trial court's ultimate finding that "[t]he state did not exercise its peremptory challenges in a discriminatory manner" is clearly erroneous. At this stage, "the defendant may introduce evidence that the State's explanation is merely a pretext, and 'the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.' " *Headen*, —— N.C. App. at ——, 697 S.E.2d at 413 (quoting *Gaines*, 345 N.C. at 668, 483 S.E.2d at 408). It is at this step "that the persuasiveness of the justification becomes relevant . . . ." *Purkett v. Elem*, 514 U.S. 765, 768, 131 L. Ed. 2d 834, 839 (1995).

In attempting to show that the prosecutor's explanation was pretextual, the defendant may offer evidence "that the reasons presented 'pertained just as well to some white jurors who were not challenged and who did serve on the jury.' " *State v. McCord*, 158 N.C. App. 693, 696, 582 S.E.2d 33, 35 (2003) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 343, 154 L. Ed. 2d 931, 954 (2003)). In addition to disparate treatment, other factors that a defendant may rely upon to demonstrate pretext include:

> (1) the characteristic in question of the defendant, the victim and any key witnesses; (2) questions and comments made by the prosecutor during jury selection which tend to support or contradict an inference of discrimination based upon the characteristic in question; (3) the frequent exercise of peremptory challenges to prospective jurors with the characteristic in question that tends to establish a pattern, or the use of a disproportionate number of peremptory challenges against venire members with the characteristic in question; (4) whether the State exercised all of its

> peremptory challenges; and, (5) the ultimate makeup of the jury in light of the characteristic in question.

State v. Wiggins, 159 N.C. App. 252, 263, 584 S.E.2d 303, 312 (2003).

Defendant first points to the fact that the State accepted Mr. Rierson, a Caucasian male juror, whose father had been incarcerated. Defendant also notes that "several other of the white jurors had connections with the criminal justice system"; that "[a]t least one of the white jurors kept in touch with people in prison"; and that "[t]wo of the white jurors had limited contact with the community," having lived in the county for a short period of time. Defendant claims that this disparate treatment between African-American and Caucasian jurors "[i]lluminat[es]" the State's explanation as being a pretext. Our Supreme Court, however, has held that "alleged disparate treatment of prospective jurors" does not "necessarily" demonstrate discriminatory intent:

> Choosing jurors, more art than science, involves a complex weighing of factors. Rarely will a single factor control the decision-making process. Defendant's approach in this appeal involves finding a single factor among the several articulated by the prosecutor as to each challenged prospective juror and matching it to a passed juror who exhibited that same factor. This approach fails to address the factors as a totality which when considered together provide an image of a juror considered in the case undesirable by the State. . . . Merely because some of the observations regarding each stricken venireperson may have been equally valid as to other members of the venire who were not challenged does not require finding the reasons were pretextual. A characteristic deemed to be unfavorable in one prospective juror, and hence grounds for a peremptory challenge, may, in a second prospective juror, be outweighed by other, favorable characteristics.

Porter, 326 N.C. at 501, 391 S.E.2d at 152-53 (internal alterations, citations, and quotation marks omitted). With respect to Mr. Rierson in particular, as the trial judge observed, although Mr. Rierson's father had been incarcerated, he indicated that he was not close to his father and that he felt that his father had been treated fairly.

Defendant also emphasizes that the effect of the State's peremptory challenges "le[ft] [defendant] with an all-white jury . . . ." This Court has explained, however, that

> the requirement under *Batson* is purposeful discrimination; disparate impact is not sufficient. In other words, a defendant must demonstrate that the State intentionally challenged the prospective juror based on his or her race. It is not enough that the effect of the challenge was to eliminate all or some African-American jurors.

Headen, ––– N.C. App. at –––, 697 S.E.2d at 414 (internal citation omitted).

As for the other factors pertinent to establishing pretext, defendant fails to present any argument that this case was susceptible to racial discrimination; that the prosecutor revealed any racial animus through his questions or comments during jury selection; or that the prosecutor used peremptory challenges to excuse African-American jurors in a disproportionate fashion or in a manner suggesting a pattern of discrimination. In sum, we cannot conclude, based on the record and under the applicable standard of review, that the trial judge's findings as to the prosecutor's race-neutral explanation and defendant's failure to show purposeful discrimination are clearly erroneous. The trial judge, consequently, did not err in denying defendant's *Batson* motion.

III. Motion to Dismiss

[3] Defendant's third argument on appeal is that the trial court erred in denying his motion to dismiss the second-degree murder charge for insufficient evidence. A defendant's motion to dismiss should be denied "[i]f there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it . . . ." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). "Substantial evidence" is that amount of relevant evidence that 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 considering the issue of substantial evidence, the trial court must view all of the evidence presented "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). Whether the evidence produced at trial constitutes substantial evidence is a question of law for the trial court, which the appellate court reviews de novo. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007).

Defendant was convicted of second-degree murder, which is defined as "the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Foust*, 258 N.C. 453, 458, 128 S.E.2d 889, 892 (1963); N.C. Gen. Stat. § 14-17 (2009). Although the intent to kill is not a necessary element of second-degree murder, "there must be an intentional act sufficient to show malice." *State v. Brewer*, 328 N.C. 515, 522, 402 S.E.2d 380, 385 (1991). Evidence of the intentional use of a deadly weapon—here, a semi-automatic handgun—that proximately causes death triggers a presumption that the killing was done with malice. *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984). This presumption is sufficient to withstand a motion to dismiss a second-degree murder charge for insufficient evidence. *State v. Taylor*, 155 N.C. App. 251, 266, 574 S.E.2d 58, 68 (2002). The issue of whether the evidence is sufficient to rebut the presumption of malice in a homicide with a deadly weapon is then a jury question. *Id.*

The evidence in this case, viewed in the light most favorable to the State, tends to show that defendant, after being kicked in the face in a fight inside the nightclub, went outside and looked at his injury in his car's rearview mirror. Defendant became angry, retrieved a 9mm semi-automatic pistol from under the driver's seat of his car, walked around to the passenger side of the car, got out a loaded magazine from the glove box, and loaded the gun. Exclaiming "Fuck it. Who wants some?," defendant began firing his gun "toward the crowd," discharging the weapon seven times. A bullet from defendant's gun hit Sgt. Plouff in the neck, resulting in his death.

The evidence of defendant's use of a firearm, resulting in Sgt. Plouff's death, is sufficient to support the trial court's submission of the second-degree murder charge to the jury. *See Pressley v. State*, 395 So.2d 1175, 1177 (Fla. App. Ct. 1981) ("Clearly, a person of ordinary judgment would know that firing a loaded gun toward a group of people is reasonably certain to kill or do serious bodily injury to another. [Defendant]'s acts also indicated an indifference to human life and demonstrated ill will. Even though a defendant has no intent to hit or kill anyone, firing a gun into a crowd of people constitutes second degree murder when a person is killed as a result."); *Commonwealth v. Santiago*, 425 Mass. 491, 498, 681 N.E.2d 1205, 1211 (1997) ("Repeatedly firing a weapon near a large crowd is wanton and reckless behavior that may supply an element of murder in the second degree . . . ."). Defendant's argument is overruled.

IV. Aggravating Factor

[4] Defendant's final argument on appeal challenges the trial judge's submission of the aggravating factor set out in N.C. Gen. Stat. § 15A-1340.16(d)(6) (2009) ("subsection (d)(6)"):

> The offense was committed against or proximately caused serious injury to a *present or former law enforcement officer*, employee of the Department of Correction, jailer, fireman, emergency medical technician, ambulance attendant, social worker, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, *while engaged in the performance of that person's official duties or because of the exercise of that person's official duties.*

(Emphasis added.)

This Court, in construing subsection (d)(6)'s aggravating factor, has found "instructive" the Supreme Court's decisions addressing a "nearly identical" factor "for determining whether a defendant may or may not be tried capitally." *State v. Pope*, 122 N.C. App. 89, 92, 468 S.E.2d 552, 555 (1996). That statute provides that a defendant may be tried capitally when

> *[t]he capital felony was committed against a law-enforcement officer*, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, *while engaged in the performance of his official duties or because of the exercise of his official duty.*

N.C. Gen. Stat. § 15A-2000(e)(8) (2009) (emphasis added) ("subsection (e)(8)").

In *State v. Gaines*, 332 N.C. 461, 421 S.E.2d 569 (1992), *cert. denied*, 507 U.S. 1038, 123 L. Ed. 2d 486 (1993), the Supreme Court explained that "[t]he essence of [subsection (e)(8)] requires that the State first produce evidence that the victim was 'a law enforcement officer' and second the State must meet one or the other of a disjunctive, two-pronged test: (1) that the officer was murdered 'while engaged in the performance of his official duties' or (2) 'because of the exercise of his official duty.' " *Id.* at 470, 421 S.E.2d at 573 (quoting N.C. Gen. Stat. § 15A-2000(e)(8)) (emphasis omitted). As subsection (d)(6) and subsection (e)(8) share similar phraseology, we believe subsection (d)(6) incorporates the same disjunctive framework,

requiring the State to establish that (1) the victim was a "law enforcement officer" and (2) the offense was committed against the officer (a) "while engaged in the performance of [his or her] official duties" or (b) "because of the exercise of [his or her] official duties." N.C. Gen. Stat. § 15A-1340.16(d)(6).

Here, by superceding indictment, the State alleged that "[t]he defendant committed the offense [of first-degree murder], including all lesser included offenses, against a law enforcement officer while the officer was engaged in the performance of his official duties as an officer with the Winston-Salem Police Department, in violation of NCGS § 1340.16(d)(6)." After the jury found defendant guilty of second-degree murder, the trial judge held a charge conference at which the prosecutor requested that the judge instruct the jury "alternative[ly]" on both prongs of subsection (d)(6). Defense counsel objected, arguing that there was insufficient evidence of either aggravating circumstance. The trial court overruled defense counsel's objection, and instructed the jury on both prongs:

> Having found the defendant guilty of second-degree murder, you must find—you must consider the following question: Do you find from the evidence beyond a reasonable doubt the existence of the following aggravating factor: "That the offense was committed against or approximately [sic] caused serious injury to a present or former law-enforcement officer while engaged in the performance of that person's official duties, or because of the exercise of that person's official duties."

As indicated by the verdict sheet, the jury found that defendant committed the offense "against or proximately caused serious injury to a present or former law enforcement officer, while engaged in the performance of that person's official duties or because of the exercise of that person's official duties."

Defendant first argues that the trial court erred in submitting to the jury subsection (d)(6)'s "because of" prong since the superceding indictment alleged only the "engaged in" prong. This argument was raised for the first time during oral argument before this Court. Despite not being raised at trial, defendant contends that the issue is properly before this Court for review because the absence of the aggravating factor being alleged in the indictment implicates the trial court's subject-matter jurisdiction to submit the factor to the jury for consideration. *See generally State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008) ("It is well-established that the issue of a

court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*.").

With respect to N.C. Gen. Stat. § 15A-2000(e)'s aggravating circumstances, in *State v. Allen*, 360 N.C. 297, 317, 626 S.E.2d 271, 286 (2006), the Supreme Court "rejected" the capital defendant's argument that "the trial court lacked jurisdiction to enter a death sentence because the indictment did not list the aggravating circumstances to be proven by the State during the penalty phase." *Accord State v. Roache*, 358 N.C. 243, 267-68, 595 S.E.2d 381, 398 (2004) ("overul[ing]" capital defendant's argument that indictment not alleging aggravating circumstances for which death penalty was imposed "deprived the trial court of jurisdiction"). This Court has similarly concluded that "sentencing factors that might lead to a sentencing enhancement do not have to be alleged in the indictment." *State v. Dierdorf*, 173 N.C. App. 753, 754, 620 S.E.2d 305, 306 (2005); accord *State v. Boyce*, 175 N.C. App. 663, 668-69, 625 S.E.2d 553, 557 (2006) ("[A]ggravating circumstances need not be specifically alleged in an indictment."). Thus, the absence of any allegation in the indictment that defendant committed the offense "because of" Sgt. Plouff's exercise of his official duties did not deprive the trial court of jurisdiction to submit this prong of the aggravating factor to the jury.

Alternatively, defendant contends that even if the trial court had "jurisdiction" to submit both prongs of subsection (d)(6), the evidence was insufficient to support their submission. In determining whether an aggravating factor should be submitted to the jury, "the trial court must use the same standard applied in determining the appropriateness of a motion to dismiss at the end of the evidence." *Gaines*, 332 N.C. at 469, 421 S.E.2d at 573. Succinctly stated, "[i]n determining the sufficiency of the evidence to submit an aggravating circumstance to the jury, the trial court must consider the evidence in the light most favorable to the State, with the State entitled to every reasonable inference to be drawn therefrom, and discrepancies and contradictions resolved in favor of the State." *State v. Syriani*, 333 N.C. 350, 392, 428 S.E.2d 118, 141 (1993).

Defendant first argues that the trial court erred in submitting the "engaged in" prong of subsection (d)(6) because the evidence was insufficient to show that defendant knew that Sgt. Plouff was a law enforcement officer engaged in the performance of his official duties at the time of the killing. Although subsection (d)(6) does not explicitly require a defendant's knowledge of the victim's protected status,

defendant claims that because the purpose of "aggravating factor[s] is to punish more severely those defendants who have acted with culpability beyond that necessary to commit the crimes of which they stand convicted," the State was required to prove that defendant "fired at Sgt. Plouff knowing that he was a law enforcement officer . . . ."

Neither the Supreme Court nor this Court has specifically addressed whether subsection (d)(6)'s "engaged in" prong requires proof that the defendant knew, or reasonably should have known, that the victim was a member of the protected class engaged in the performance of his or her official duties at the time of the offense. Nor has the Supreme Court concluded whether subsection (e)(8)'s "engaged in" prong includes a knowledge component. *See State v. Nicholson*, 355 N.C. 1, 47, 558 S.E.2d 109, 140 (2002) ("This Court has never addressed whether the trial court may submit the (e)(8) aggravating circumstance under the 'engaged in' prong in the absence of evidence tending to show the defendant knew or had reasonable grounds to know that the victim was a law enforcement officer.").

The Supreme Court has, however, explained that subsection (e)(8)'s two prongs focus on different aspects of the offense: "one prong is concerned with the *victim's conduct* at the time of the murder ('engaged in'), while the other prong is concerned with the *defendant's motive* ('because of')." *State v. Long*, 354 N.C. 534, 541, 557 S.E.2d 89, 94 (2001) (emphasis added). Because the "engaged in" prong focuses on the victim's conduct, the Supreme Court has described it as "address[ing] the *objective fact* that the victim was a law enforcement officer performing his official duties." *State v. Maness*, 363 N.C. 261, 290, 677 S.E.2d 796, 814 (2009) (emphasis added), *cert. denied*, —— U.S. ——, 176 L. Ed. 2d 568 (2010). In contradistinction, the "because of" prong has been construed as relating to the defendant's subjective intent, "purpose," or "motivation" for murdering the officer. *Gaines*, 332 N.C. at 476, 421 S.E.2d at 577; *accord Long*, 354 N.C. at 542, 557 S.E.2d at 94 ("To submit the 'because of' prong, the State must . . . show that defendant's motivation in killing the victim was that she was a [member of the class protected by subsection (e)(8)].").

Consistent with this objective-subjective distinction between subsection (e)(8)'s "engaged in" and "because of" prongs, as developed by the Supreme Court, we hold that subsection (d)(6)'s "engaged in" prong does not require the State to prove that the defendant knew or reasonably should have known that the victim was a member of the protected class engaged in the exercise of his or her

official duties. Submission of the aggravating factor simply requires evidence sufficient to establish the "objective fact" that the victim was a member of the protected class—here, a law enforcement officer—engaged in the performance of his or her official duties at the time of the offense. *Maness*, 363 N.C. at 290, 677 S.E.2d at 814.

This conclusion is further supported by considering subsection (d)(6)'s "engaged in" prong in context with the statute's other aggravating factors. N.C. Gen. Stat. § 15A-1340.16(d)(8), for example, provides that a sentence may be aggravated if, during the commission of the offense, "[t]he defendant *knowingly* created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." (Emphasis added.) The General Assembly's inclusion of a knowledge requirement in N.C. Gen. Stat. § 15A-1340.16(d)(8) indicates that it purposefully omitted such a requirement from subsection (d)(6)'s "engaged in" prong. *See N.C. Dep't of Revenue v. Hudson*, 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009) ("When a legislative body 'includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislative body] acts intentionally and purposely in the disparate inclusion or exclusion.' " (quoting *Rodriguez v. United States*, 480 U.S. 522, 525, 94 L. Ed. 2d 533, 537 (1987))); *compare* Alaska Stat. § 12.55.155(e)(13) (2009) (establishing as aggravating circumstance fact that "the defendant *knowingly* directed the conduct constituting the offense at a[] . . .law enforcement officer . . . during or because of the exercise of official duties" (emphasis added)).

Other jurisdictions with aggravating factors similar to subsection (d)(6) have likewise concluded that such a factor does not contain a knowledge element. In *Unites States v. Wilson*, the federal district court held:

> The statutory aggravating factors enumerated by Congress include that "[t]he defendant committed the offense against . . . a Federal public servant who is . . . a law enforcement officer . . . while he or she is engaged in the performance of his or her official duties," regardless of whether the defendant knew or believed his victim[] was a law enforcement officer.

493 F. Supp.2d 491, 498 (E.D.N.Y. 2007) (quoting 18 U.S.C. § 3592(c)(14)(D)). Similarly, the Supreme Court of Georgia has construed Ga. Code Ann. § 17-10-30(b)(8), which provides that a defendant may be tried capitally if "[t]he offense of murder was committed

against any peace officer, corrections employee, or firefighter while engaged in the performance of his official duties," as "not requiring knowledge on the part of the defendant that the victim was a peace officer or other designated official engaged in the performance of his duties." *Fair v. State*, 284 Ga. 165, 170, 664 S.E.2d 227, 233 (2008). Although not controlling, *Morton Bldgs., Inc. v. Tolson*, 172 N.C. App. 119, 127, 615 S.E.2d 906, 912 (2005), we find these authorities persuasive and consistent with our construction of subsection (d)(6).

We note, moreover, that importing a knowledge requirement into subsection (d)(6)'s "engaged in" prong would have the untoward consequence of potentially precluding the submission of this aggravating factor when the offense was committed against a plainclothes or "undercover" officer. *See Fair*, 284 Ga. at 169, 664 S.E.2d at 232 (observing that imposing knowledge requirement "would wholly preclude . . . punishment for the murder of an 'agent acting under cover' " (quoting *United States v. Feola*, 420 U.S. 671, 684, 43 L. Ed. 2d 541, 553 (1975))). We do not believe that the Legislature intended such an unreasonable result. *See Comr. of Insurance v. Automobile Rate Office*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978) ("In construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results.").

Here, the State presented uncontroverted evidence that Sgt. Plouff was a police officer with the Winston-Salem Police Department engaged in the performance of his official duties when he was shot and killed by defendant. This evidence is sufficient to enable a reasonable jury to conclude that defendant murdered Sgt. Plouff while "engaged in" the performance of his official duties. The trial court, therefore, properly submitted subsection (d)(6)'s "engaged in" prong to the jury to consider as an aggravating circumstance.

Defendant also argues that the evidence is insufficient to support submission of subsection (d)(6)'s second prong because there is no evidence that defendant shot and killed Sgt. Plouff "because of the exercise of [his] official duties." N.C. Gen. Stat. § 15A-1340.16(d)(6). We have already held, however, that the evidence with respect to subsection (d)(6)'s "engaged in" prong was sufficient to support submission of the aggravating factor to the jury. As subsection (d)(6)'s "engaged in" and "because of" prongs are "disjunctive," *Gaines*, 332 N.C. at 470, 421 S.E.2d at 573, we need not address whether the trial

court erred in submitting the "because of" prong given the fact that defendant did not raise any issue with respect to jury unanimity at trial or on appeal. Consequently, we find no error.

No Error.

Judges STEPHENS and ERVIN concur.

IN THE MATTER OF THE PROPOSED FORECLOSURE OF CLAIM OF LIEN FILED AGAINST JEFFREY J. JOHNSON, DONNA N. JOHNSON, GARY PROFFIT AND JO PROFFIT BY STARBOARD ASSOCIATION, INC., DATED APRIL 30, 2008 RECORDED IN DOCKET NO. 08-M-676 IN THE OFFICE OF THE CLERK OF SUPERIOR COURT FOR BRUNSWICK COUNTY

No. COA COA10-703

(Filed 21 June 2011)

1. Liens— condominium assessment—calculation of unit share

The trial court erred by dismissing a foreclosure of claim of lien for unpaid condominium assessments where respondents contended that the assessment was not computed properly. Petitioner had the authority to assess the cost of windows and doors for a building solely against the unit owners in that building, but separate findings and conclusions should have been made for the portions of the renovations that were for the common areas and facilities.

2. Attorney Fees— after appeal—jurisdiction

The trial court lacked jurisdiction under N.C.G.S. § 1-294 to enter an award of attorney fees where petitioner had already appealed an order dismissing the underlying action. The trial court's deferral of the issue at the time the dismissal order was entered did not create jurisdiction.

Judge HUNTER concurring in part and dissenting in part.

Appeal by petitioner from orders entered 11 December 2009 and 21 May 2010 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 December 2010.

Sellers, Hinshaw, Ayers, Dortch & Lyons, P.A., by Michelle Price Massingale, for petitioner-appellant.

Kenneth T. Davies, for respondent-appellees.

CALABRIA, Judge.

Starboard Association, Inc. ("petitioner"), appeals the trial court's order dismissing petitioner's foreclosure of claim of lien pursuant to N.C. Gen. Stat. § 1A-1, Rule 41 (2009) ("Rule 41"). Petitioner also appeals the order awarding attorney's fees in the amount of $19,780.83 to Donna N. Johnson, Jeffrey J. Johnson, Gary Proffit and Jo Proffit (collectively, "respondents"). We vacate and remand.

I. BACKGROUND

On 18 June 1981, petitioner filed Articles of Incorporation ("the Articles") with the North Carolina Secretary of State for the purpose of administering the operation and management of Starboard By The Sea Condominium ("Starboard") in Ocean Isle Beach, North Carolina, in accordance with Chapter 47A of the North Carolina General Statutes ("the Unit Ownership Act"). A Declaration of Condominium ("the Declaration") and the By-Laws of Starboard Association, Inc. ("the By-Laws") were filed on 2 July 1981 with the Brunswick County Register of Deeds ("register of deeds") pursuant to the Unit Ownership Act. The property, known and identified as Starboard, consists of 139 residential units located in 33 separate buildings.

The Declaration was amended four times. The fifth amendment, "Phase V" beachfront property, added three condominium units in one building ("Building 33") and a second swimming pool to Starboard. Each unit in Building 33 had a 1.06160 percentage of undivided interest in Starboard's common areas and facilities. As a result of this amendment, the individual undivided interests of the other units in the common areas were recalculated, based upon the fair market value of each unit in relation to the aggregate fair market value of all units.

On 11 October 1997, petitioner's general membership amended the By-Laws ("the amended By-Laws") and authorized petitioner to make, levy, and collect assessments against members to defray costs, as provided in Article XXIII of the Declaration ("Article XXIII"). Article XXIII provided "all assessments levied against the Unit Owners and their Condominium Units shall be uniform" and, unless specifically otherwise provided for in the Declaration, all assess-

ments made by petitioner shall be in such an amount that any assessment levied against the unit owner and its condominium unit "shall bear the same ratio to the total assessment made against all unit owners and their condominium units as the undivided interest in common property appurtenant to each condominium." Article III of the amended By-Laws required petitioner's Board of Directors ("the Board") to adopt a budget for each fiscal year to estimate common expenses for, *inter alia*, operation, management and maintenance of the common property.

On 6 August 2004, respondents acquired Unit B of Building 33, Phase V, as tenants in common. Two months later, at the annual meeting of petitioner's general membership, an extensive renovation for most of Starboard's buildings was proposed, but was not approved until the 8 October 2005 annual meeting. The attending members approved the renovation project by a vote of 33 to 29 as a non-binding vote to guide the new Board. Following the annual meeting, the Board entered into a contract to renovate all the buildings except Building 33, and levied a special assessment against the unit owners of all the buildings except Building 33. The capital renovation project included: (1) replacing the exterior siding, windows, sliding glass doors; (2) installing new stairways, landings, decks, and new wiring; and (3) other repairs.

In 2006, respondents and the unit owners of Building 33 requested renovations for Building 33. The Board notified the unit owners in Building 33 to expect renovations "in the near future." Prior to the renovations for Building 33, the Board received three bids, then entered into a contract with Puckett Enterprises, Inc., to renovate Building 33. The renovations included: (1) new vinyl siding, windows, and doors; (2) renovation of the stairways and decks; (3) pylon repairs; and (4) other capital repairs and renovations.

On 8 November 2007, the Board approved a special assessment for the renovations in the amount of $55,000.00 per unit for all unit owners in Building 33. Later, the amount for each unit owner in Building 33 was lowered to $54,000.00 ("the assessment"). Subsequently, the Board adopted a written resolution ratifying the assessment. On 15 December 2007, respondents paid petitioner $27,000.00 of the assessment, under protest.

On 20 August 2008, petitioner notified respondents of a Notice of Hearing Prior to Foreclosure of Claim of Lien ("the Notice") of respondents' units. The Notice stated that the foreclosure proceedings

were initiated pursuant to N.C. Gen. Stat. § 47C due to respondents' alleged "failure to timely pay assessments and other charges levied by [Starboard]."[1] Respondents were given thirty-five days to dispute the validity of a $30,887.00 debt. On 7 October 2008, respondents filed an Objection to Foreclosure of Claim of Lien, contesting, *inter alia*, the right of petitioner to proceed with foreclosure proceedings and objecting to the validity of the alleged $30,887.00 debt which formed the basis of the foreclosure proceeding. Respondents claimed they were not in default because the assessment was not uniform and was not included in any annual budget or special assessment budget which was ratified by the Association, as required by the Articles, the Declaration, the amended By-Laws, and Chapter 47C of the North Carolina General Statutes. Respondents asked the trial court to dismiss the foreclosure proceeding with prejudice and award respondents reasonable attorney's fees. The trial court entered a consent order transferring the matter from Brunswick County to Mecklenburg County Superior Court "due to the complexity of the issues."

On 3 August 2009, at the conclusion of petitioner's evidence at the hearing, respondents moved for dismissal of this non-jury action on the ground that petitioner had no right to relief on the facts and the law. The trial court referred to the assessment in its findings as the "alleged assessment," then concluded that the assessment by the Board was unlawful because it was not computed in accordance with respondents' percentage undivided interest in the common areas and facilities and violated the Unit Ownership Act and the Declaration. The court also concluded that the alleged debt which formed the basis for petitioner's claim of lien and foreclosure of respondents' unit was invalid. The trial court entered an Order of Dismissal and Judgment on 11 December 2009 ("the 2009 order") dismissing petitioner's action with prejudice pursuant to Rule 41, and entered another order on 21 May 2010 ("the 2010 order"), awarding respondents reasonable attorney's fees in the amount of $19,780.83. Petitioner appeals both the 2009 and the 2010 orders.

II. STANDARD OF REVIEW

"The proper standard of review for a motion for an involuntary dismissal under Rule 41 is (1) whether the findings of fact by the trial

1. While the pleadings in the instant case cited Chapter 47C of the North Carolina General Statutes, this case is governed by the provisions of Chapter 47A of the General Statutes, rather than Chapter 47C, because Chapter 47A applies to all condominiums created within this State before 1 October 1986. *See Dunes South Homeowners Assn. v. First Flight Builders*, 341 N.C. 125, 127, 459 S.E.2d 477, 477 n.1 (1995).

court are supported by competent evidence, and (2) whether the findings of fact support the trial court's conclusions of law and its judgment." *Dean v. Hill*, 171 N.C. App. 479, 483, 615 S.E.2d 699, 701 (2005) (internal quotations and citation omitted). When this Court reviews a trial court's dismissal under Rule 41, the "trial court's findings of facts supported by substantial competent evidence are conclusive on appeal, even where there is conflict in the evidence." *Smith v. Butler Mtn. Estates Property Owners Assoc.*, 324 N.C. 80, 85, 375 S.E.2d 905, 908 (1989) (citations omitted). "[A] trial court's conclusions of law are reviewable de novo on appeal." *Riley v. Ken Wilson Ford, Inc.*, 109 N.C. App. 163, 168, 426 S.E.2d 717, 720 (1993).

As an initial matter, we note that, "[i]n the absence of a valid objection, the [trial] court's findings of fact are presumed to be supported by competent evidence, and are binding on appeal." *Miles v. Carolina Forest Ass'n.*, 167 N.C. App. 28, 34 35, 604 S.E.2d 327, 332 (2004). In the instant case, petitioner does not object to any of the trial court's twenty seven findings of fact in the 2009 order. Therefore, they are binding on appeal. *Id.*

III. FORECLOSURE OF CLAIM OF LIEN

Petitioner argues that the trial court improperly dismissed its foreclosure under claim of lien based upon petitioner's failure to allocate the cost of the renovations for the common areas for all unit owners on a *pro rata* basis in accordance with the percentage interests instead of allocating the cost per building.

A. Unit Owners' Undivided Interest in the Common Areas

[1] The claims in the instant case are governed by the Unit Ownership Act, N.C. Gen. Stat. §§ 47A-1 to 28 (2008).

> Unit ownership may be created by an owner or the co owners of a building by an express declaration of their intention to submit such property to the provisions of the Article, which declaration shall be recorded in the office of the register of deeds of the county in which the property is situated.

N.C. Gen. Stat. § 47A-2. "The administration of every property shall be governed by bylaws, a true copy of which shall be annexed to the declaration. No modification of or amendment to the bylaws shall be valid, unless set forth in an amendment to the declaration and such amendment is duly recorded." N.C. Gen. Stat. § 47A-18.

N.C. Gen. Stat. § 47A-6 states:

(a) Each unit owner shall be entitled to an undivided interest in the common areas and facilities in the ratio expressed in the declaration. Such ratio shall be in the approximate relation that the fair market value of the unit at the date of the declaration bears to the then aggregate fair market value of all the units having an interest in said common areas and facilities.

(b) The ratio of the undivided interest of each unit owner in the common areas and facilities as expressed in the declaration shall have a permanent character and shall not be altered except with the unanimous consent of all unit owners expressed in an amended declaration duly recorded.

(c) The undivided interest in the common areas and facilities shall not be separated from the unit to which it appertains and shall be deemed conveyed or encumbered with the unit even though such interest is not expressly mentioned or described in the conveyance or other instrument.

N.C. Gen. Stat. § 47A-6. In accordance with this statute and Article IV of the Declaration, each unit owner is granted an undivided interest in the common areas and facilities in the ratio expressed in the declaration, which is based upon the fair market value of the unit in relation to the total aggregate fair market value of all the units.

B. Uniform Assessments for Additions or Improvements

N.C. Gen. Stat. § 47A-9 states, in pertinent part:

> The necessary work of maintenance, repair, and replacement of the common areas and facilities and the making of any additions or improvements thereto shall be carried out only as provided herein and in the bylaws.

N.C. Gen. Stat. § 47A-9. N.C. Gen. Stat. § 47A-12 states, in pertinent part:

> The unit owners are bound to contribute pro rata, in the percentages computed according to G.S. 47A-6 of this Article, toward the expenses of administration and of maintenance and repair of the general common areas and facilities and, in proper cases of the limited common areas and facilities, of the building and toward any other expense lawfully agreed upon.

N.C. Gen. Stat. § 47A-12. In accordance with this statute and Article XXIII of the Declaration, all assessments levied against all unit own-

ers shall be uniform and, unless specifically otherwise provided for in the Declaration, all assessments made by petitioner shall be in such an amount that any assessment levied against the unit owner and its condominium unit "shall bear the same ratio to the total assessment made against all Unit Owners and their Condominium Units as the undivided interest in Common Property appurtenant to all Condominium Units." "[T]he provisions of section 47A-12 are designed to protect unit owners from shouldering a disproportionate share of the maintenance expenses for common areas . . . ." *Dunes South Homeowners Assn. v. First Flight Builders*, 341 N.C. 125, 130, 459 S.E.2d 477, 479 (1995).

However, Article XVI of the Declaration ("Article XVI") allows for an assessment other than *pro rata* amongst all unit owners in special circumstances in which a certain unit or units are exclusively benefitted. Article XVI provides, in pertinent part:

> [W]here any alterations and improvements are exclusively or substantially for the benefit of the Owner or Owners of certain Condominium Unit or Units requesting the same, then the cost of such alterations or improvements shall be assessed against and collected solely from the Owner or Owners of the Condominium Unit or Units exclusively or substantially benefitted, the assessment to be levied in such proportion as may be determined by the Board of Directors of [Starboard].

(emphases added).

"Where a statute contains two clauses which prescribe its applicability and clauses are connected by the disjunctive 'or', application of the statute is not limited to cases falling within both clauses but applies to cases falling within either one of them." *Grassy Creek Neighborhood Alliance, Inc. v. City of Winston-Salem*, 142 N.C. App. 290, 297, 542 S.E.2d 296, 301 (2001).

> "In its elementary sense the word 'or', as used in a statute, is a disjunctive particle indicating that the various members of the sentence are to be taken separately . . . . When in the enumeration of persons or things in a statute, the conjunction is placed immediately before the last of the series, the same connective is understood between the previous members."

Id. (quoting 73 Am.Jur. 2d, *Statutes* § 241 (1974)). Therefore, petitioner can show that it had the authority to provide for an assessment

against respondents if it can prove that the improvements "exclusively" *or* "substantially" benefitted the units in Building 33.

Respondents contend that the units in Building 33 were not exclusively or substantially benefitted since "[t]he only unit improvements were replacement of the windows and doors, a relatively *insubstantial* part of the assessment." (emphasis added). Respondents further contend that "[t]he common areas, which by definition belong to all the unit owners, were the substantial and primary subject of the renovations and repairs to Building 33." (emphasis added). However, the test under Article XVI is a two-part test, *i.e.*, whether the improvements substantially *or exclusively* benefitted the units in Building 33. Respondents only address whether the improvements "substantially" benefitted the units. Furthermore, they argue that the common areas were the "primary" benefit of the improvements. However, "primary" is not synonymous with "exclusive."

Under the provisions of the Unit Ownership Act and the Declaration, as amended, the common areas involved in the assessment included the siding, stairways and decks, pylons, the roof, and other exterior renovations and capital improvements to the building. The renovations to Building 33 included new vinyl siding, renovation of the stairways and decks, pylon repairs, and other capital repairs and renovations. Therefore, under the Unit Ownership Act and the amended Declaration, these common areas, which by definition belong to all the unit owners, must be assessed uniformly against all Starboard members according to their *pro rata* share. The trial court was correct in concluding that petitioner's assessment against respondents' unit for the Building 33 renovations was unlawful in that it was not computed in accordance with respondents' percentage undivided interest in the common areas and facilities, as required by the Unit Ownership Act and the amended Declaration.

However, under the Articles, exterior windows and doors are not common areas. *See* Article III.A ("All exterior doors, window frames, panes and screens shall be part of the respective Condominium Units[.]"). Therefore, under the Unit Ownership Act and the amended Declaration, the improvements to Building 33's exterior windows and doors were not common area improvements for the benefit of all Starboard unit owners. The exterior windows and doors were "exclusively" for the benefit of the unit owners in Building 33. As a result, petitioner had the authority to assess the cost of the windows and doors for Building 33 solely against the unit owners in Building 33 "in

such proportion as may be determined by the Board of Directors of [Starboard]." Article XVI.

The court dismissed the foreclosure action without making separate findings or conclusions for the renovations for the windows and doors that exclusively benefitted the unit owners of Building 33 and the portions of the renovations that were for common areas. Therefore, the trial court's 2009 order dismissing petitioner's action with prejudice is vacated and remanded. Consequently, petitioner must perform a new assessment. The assessment will separate respondents' windows and doors that exclusively benefitted the unit owners of Building 33 from the portion of the renovations that were for the common areas and facilities.

IV. ATTORNEY'S FEES

[2] Subsequent to the Unit Ownership Act, our General Assembly enacted the North Carolina Condominium Act ("the Condominium Act"), N.C. Gen. Stat. § 47C-1-101 *et seq*. As a general rule, the Condominium Act applies prospectively "to all condominiums created . . . after October 1, 1986." N.C. Gen. Stat. § 47C-1-102 (2007).

> The Condominium Act also expressly lists, however, a number of sections which are to be retroactively applied to condominiums created prior to 1 October 1986. One of these provisions, G.S. 47C-4-117, expressly authorizes the recovery of attorney's fees and provides in pertinent part: "If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of person adversely affected by that failure has a claim for appropriate relief. The court may award reasonable attorney's fees to the prevailing party." G.S. 47C-4-117 (1986). This statute is specific authority contained within the very Chapter that currently governs in part the operation of [petitioner].

Brookwood Unit Ownership Assn. v. Delon, 124 N.C. App. 446, 448-49, 477 S.E.2d 225, 226 (1996).

> It is left to the sound discretion of the trial court whether attorney fees will be granted. To show an abuse of discretion, [petitioner] must prove that the trial court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

Rosenstadt v. Queens Towers Homeowners' Ass'n, 177 N.C. App. 273, 276, 628 S.E.2d 431, 433 (2006).

> "The issue of jurisdiction over the subject matter of an action may be raised at any time during the proceedings, including on appeal. This Court is required to dismiss an appeal *ex mero motu* when it determines the lower court was without jurisdiction to decide the issues." *McClure v. County of Jackson*, 185 N.C. App. 462, 469, 648 S.E.2d 546, 550 (2007) (internal citations omitted).
>
> In *McClure*, this Court held that a trial court lacked subject matter jurisdiction under N.C. Gen. Stat. § 1-294 (2007) to enter an order awarding attorneys' fees and costs after notice of appeal had been filed as to the underlying judgment. *McClure*, 185 N.C. App. at 471, 648 S.E.2d at 552. As *McClure* acknowledged, and prior decisions of this Court had held, if an award of attorneys' fees is the result of a party's prevailing as to the underlying judgment, then the issue of attorneys' fees cannot be deemed a "matter included in the action and not affected by the judgment appealed from," N.C. Gen. Stat. § 1-294, and, therefore, the trial court lacks jurisdiction to enter an order awarding attorneys' fees following appeal of the judgment. *See McClure*, 185 N.C. App. at 471, 648 S.E.2d at 551 ("When, as in the instant case, the award of attorney's fees was based upon the plaintiff being the 'prevailing party' in the proceedings, the exception set forth in N.C. Gen. Stat. § 1-294 is not applicable."); *Gibbons v. Cole*, 132 N.C. App. 777, 782, 513 S.E.2d 834, 837 (1999) ("Here, the trial court's decision to award attorneys fees was clearly affected by the outcome of the judgment from which plaintiffs appealed."); *Brooks v. Giesey*, 106 N.C. App. 586, 590-91, 418 S.E.2d 236, 238 (holding that when "a statute such as section 6-21.5, which contains a 'prevailing party' requirement," is the basis for award of attorneys' fees, trial court "is divested of jurisdiction" over request for attorneys' fees by appeal of judgment), *disc. review allowed*, *disc. review on additional issues denied*, 332 N.C. 664, 424 S.E.2d 904 (1992), *aff'd*, 334 N.C. 303, 432 S.E.2d 339 (1993).

Swink v. Weintraub, 195 N.C. App. 133, 159-60, 672 S.E.2d 53, 70 (2009).

In the instant case, the basis for the award of attorney's fees was N.C. Gen. Stat. § 47C-4-117, which provides in pertinent part:

> If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declara-

> tion or bylaws, any person or class of person adversely affected by that failure has a claim for appropriate relief. The court may award reasonable attorney's fees to the prevailing party.

N.C. Gen. Stat. § 47C-4-117. Therefore, an award of attorney's fees "is directly dependent upon whether the judgment is sustained on appeal." *Swink*, 195 N.C. App. at 160, 672 S.E.2d at 70. Accordingly, a trial court lacks jurisdiction to enter an award of attorney's fees under N.C. Gen. Stat. § 47C-4-117 once notice of appeal has been filed as to the judgment. *See id.*

In the instant case, the 2009 Order was entered 11 December 2009. Petitioner filed notice of appeal from that order on 6 January 2010. The trial court entered its order awarding attorney's fees on 21 May 2010. Since petitioner had already appealed from the 2009 Order, the trial court lacked jurisdiction under N.C. Gen. Stat. § 1-294 to enter the order awarding attorney's fees. We note that the 2009 Order stated, "The Respondents [sic] request for attorney's fees pursuant to Chapter 47C of the North Carolina General Statutes is deferred for hearing at a later date." "This Court in *McClure*, however, held that such a 'reservation' of an issue was not sufficient to permit the trial court to subsequently enter an order on the issue, because '[i]t is fundamental that a court cannot create jurisdiction where none exists.' " *Swink*, 195 N.C. App. at 160, 672 S.E.2d at 70 (quoting *McClure*, 185 N.C. App. at 471, 648 S.E.2d at 551).

Respondents may or may not have a claim for attorney's fees under N.C. Gen. Stat. § 47C-4-117 (2009). However, since the 2010 order awarding attorney's fees is a matter of jurisdiction, we must vacate and remand the 2010 Order.

> As this Court suggested in *McClure*, "the better practice is for the trial court to defer entry of the written judgment until after a ruling is made on the issue of attorney's fees . . ., and incorporate all of its rulings into a single, written judgment. This will result in only one appeal, from one judgment, incorporating all issues in the case."

Id. at 160, 672 S.E.2d at 71 (quoting *McClure*, 185 N.C. App. at 471, 648 S.E.2d at 551-52.

V. CONCLUSION

The trial court's orders dismissing petitioner's action with prejudice and awarding attorney's fees are vacated and remanded for further proceedings not inconsistent with this opinion.

Vacated and remanded.

Judge ELMORE concurs.

Judge HUNTER, Robert C., concurring in part and dissenting in part by separate opinion.

HUNTER, Robert C., Judge, concurring in part and dissenting in part.

I agree with the majority's conclusion that this case must be vacated and remanded to the trial court for a proper determination regarding the costs of those renovations which were "exclusively" for the benefit of the condominium unit owned by respondents Jeffrey J. Johnson, Donna N. Johnson, Gary Proffit, and Jo Proffit. I likewise concur in vacating the trial court's order awarding attorney's fees to respondents due to the lack of jurisdiction to enter such an order. I disagree, however, with the majority's holding that the trial court correctly concluded that petitioner Starboard Association, Inc.'s assessment was "unlawful" because it was not uniform and not levied on a *pro rata* basis. Consequently, I respectfully dissent.

Starboard filed this action to foreclose on the claims of lien asserted against respondents ownership interest in the condominium unit located in Building 33 of the Starboard by the Sea condominium complex in Ocean Isle, North Carolina. The foreclosure proceedings were initiated under N.C. Gen. Stat. § 45-21.16 (2009) based on respondents' alleged "failure to timely pay assessments and other charges levied by [Starboard]."

According to N.C. Gen. Stat. § 45-21.16(d), "there are only four issues before the clerk at a foreclosure hearing: [1] the existence of a valid debt of which the party seeking to foreclose is the holder, [2] the existence of default, [3] the trustee's right to foreclose, and [4] the sufficiency of notice to the record owners of the hearing." *In re Foreclosure of Helms*, 55 N.C. App. 68, 71, 284 S.E.2d 553, 555 (1981), *disc. review denied*, 305 N.C. 300, 291 S.E.2d 149 (1982); *accord In re Foreclosure of Brown*, 156 N.C. App. 477, 489, 577 S.E.2d 398, 406 (2003) ("In a foreclosure proceeding, the [petitioner] bears the burden of proving that there was a valid debt, default, right to foreclose under power of sale, and notice."). " 'On appeal from a determination by the clerk that the trustee is authorized to proceed, the judge of the district or superior court having jurisdiction is limited to determining [*de novo*] the same four issues resolved by the clerk.' " *In re Adams*, ––– N.C. App. –––, –––, 693 S.E.2d 705, 709 (2010) (quoting *In re*

Foreclosure of Burgess, 47 N.C. App. 599, 603, 267 S.E.2d 915, 918, *appeal dismissed*, 301 N.C. 90, —— S.E.2d —— (1980)).

After this matter was transferred to superior court from the clerk of court, the court conducted a bench trial where, at the close of Starboard's evidence, it granted respondents' motion for involuntary dismissal pursuant to Rule 41(b), ruling that Starboard had failed to establish the existence of a valid debt under N.C. Gen. Stat. § 45-21.16(d)'s first prong. With respect to the validity of the debt, the trial court found that in 2005, Starboard contracted for the renovation of Buildings 1 through 32, but not Building 33; that Starboard imposed a special assessment against the owners of the units in Buildings 1 through 32; that in 2007, Starboard contracted for the repair and renovation of Building 33; that Starboard levied a special assessment against the unit owners of Building 33, including respondents, in the amount of $54,000.00 per unit; that the total cost of the renovations to Buildings 1 through 33 was $5,074,000.00; and, that "applying the Respondent's [sic] common area percentage ownership interest[] to this total would have resulted in an assessment against Respondents of $53,865.54, just $134.46 less than the actual assessment against Respondents for the Building 33 renovations alone." Based on these findings, the trial court concluded:

> 2. The assessment by the Board of Directors of Starboard against the Respondents' unit for the Building 33 renovations was unlawful in that it was not computed in accordance with Respondent's [sic] percentage undivided interest in the common areas and facilities, as required by § 47A-6 and 47A-12 of the N.C. Unit Ownership Act, Chapter 47A of the North Carolina General Statutes, and the Declaration of Condominium for Starboard By The Sea.
>
> 3. The Board of Directors did not have the authority to assess the cost of renovations for Building 33 solely against the units located in Building 33, despite the fact that Respondents and other owner[s] of units located in Building 33 requested such renovations.
>
> [4].The alleged debt which forms the basis for the claim of lien and foreclosure of the Petitioner against Respondents' unit is therefore invalid.

The trial court, consequently, dismissed with prejudice Starboard's foreclosure action.

In concluding that the debt based on Starboard's claim of lien was invalid, the trial court determined, and the majority agrees, that Starboard violated N.C. Gen. Stat. § 47A-12 (2009) and Article XXIII of the amended Declaration of Condominium in that the challenged assessment was not uniform and was not levied on a *pro rata* basis. The statute provides in pertinent part:

> The unit owners are bound to contribute pro rata, in the percentages computed according to G.S. 47A-6 of this Article, toward the expenses of administration and of maintenance and repair of the general common areas and facilities and, in proper cases of the limited common areas and facilities, of the building and toward any other expense lawfully agreed upon. No unit owner may exempt himself from contributing toward such expense by waiver of the use or enjoyment of the common areas and facilities or by abandonment of the unit belonging to him.

N.C. Gen. Stat. § 47A-12. Section A of Art. XXIII of the Declaration provides in pertinent part:

> All assessments levied against the Unit Owners and their Condominium Units shall be uniform and, unless specifically otherwise provided for in this Declaration of Condominium, all assessments made by the Association shall be in such an amount that any assessment levied against a Unit Owner and his Condominium Unit shall bear the same ratio to the total assessment made against all Unit Owners and their Condominium Units as the undivided interest in Common Property appurtenant to each Condominium bears to the total undivided interest in Common Property appurtenant to all Condominium Units.

Respondents argued at trial, and the majority appears to agree, that respondents are not obligated to pay for any of the renovations (except for the "exclusive" benefit renovations) because the costs of both phases of the renovations were not aggregated and apportioned *pro rata* in a single, uniform assessment of all unit owners at the conclusion of all the work, but rather each unit owner was assessed piecemeal at the conclusion of the phase of the renovations affecting the owner's unit. Neither § 47A-12 nor Declaration Art. XXIII, Sec. A mandate such a severe result. Notably, both § 47A-12 and the declaration focus on the ultimate outcome of the assessment process, not the process itself. N.C. Gen. Stat. § 47A-12 only requires unit owners to "*contribute* pro rata" according to their calculated share; it does not impose any restrictions on owners' associations regarding the

sequencing of assessments. (Emphasis added.) Nor does any other provision of the Unit Ownership Act dictate the procedure through which an owners' association may assess unit owners so long as the "work" is "carried out" in compliance with the Act and the association's declaration. N.C. Gen. Stat. § 47A-6. Similarly, Sec. A, Art. XXIII of Starboard's Declaration merely requires "uniform" assessments levied in accordance with the specified ratio.

Here, Starboard's assessment was clearly uniform in that the record indicates that all unit owners were assessed. And each unit owner was ultimately assessed on a *pro rata* basis. To be candid, as the trial court found and Starboard concedes, Starboard miscalculated respondents' assessment by $134.46. The majority appears to hold, however, that this minor discrepancy ($54,000.00 versus $53,865.54) warrants finding the entire assessment void. Our Supreme Court's reasoning in *Dunes South Homeowners Assn. v. First Flight Builders*, 341 N.C. 125, 459 S.E.2d 477 (1995), one of the few appellate decisions dealing with the Unit Ownership Act, does not support the majority's holding. In *Dunes South Homeowners Assn.*, 341 N.C. at 130, 459 S.E.2d at 480, the Court held that a condominium developer, as a unit owner, could not "unilaterally exempt itself from the payment of its pro rata share of the maintenance expenses for the common areas" under § 47A-12. As the Court noted, the overarching goal of Unit Ownership Act is to "ensure the orderly, reliable and fair government of condominium projects and to protect each owner's interest in his or her own unit as well as the common areas and facilities." *Id.* at 130, 459 S.E.2d at 479. To that end, the Court concluded that the statute was intended to be a shield to "protect unit owners from shouldering a disproportionate share of the maintenance expenses for common areas" not a sword to allow unit owners to escape paying their *pro rata* share of community expenses. *Id.* at 130, 459 S.E.2d at 479. Yet, to borrow *Dunes South Homeowners Assn.'s* words, "[t]his is exactly what [respondents] attempted to do." *Id.* at 130-31, 459 S.E.2d at 480.

In the end, all 33 buildings were renovated and each unit owner was assessed approximately their *pro rata* share of the costs of those renovations. The fact that the amount of respondents' assessment was incorrectly calculated does not require invalidating the entire debt on the assessment. Rather, as this Court has held, N.C. Gen. Stat. § 45-21.16(d) "permit[s] the clerk to find a valid debt of which the party seeking to foreclose is the holder if there is competent evidence that the party seeking to foreclose is the holder of some valid debt,

irrespective of the exact amount owed." *Burgess*, 47 N.C. App. at 603, 267 S.E.2d at 918 (citation and internal quotation marks omitted) (emphasis added).

The $134.46 difference between respondents' actual assessment and the amount their assessment would have been if Starboard had aggregated the renovation costs on all 33 buildings before levying the assessments underscores the illogic of respondents' argument and the majority's holding. The per unit expense of the renovations of all 33 buildings was substantially the same—approximately $54,000.00—irrespective of whether the assessment based on that per unit expense was levied at the end of the first phase of the renovations or at the end of all the renovations. Neither § 47A-12 nor *Dunes South Homeowners Assn.* mandate hyper-technical compliance at the expense of "ensur[ing] the orderly, reliable and *fair* government of condominium projects . . . ." *Id.* at 130, 459 S.E.2d at 479 (emphasis added).

Moreover, despite the majority's reliance on *Dunes South Homeowners Assn.* for the proposition that § 47A-12 is "designed to protect unit owners from shouldering a *disproportionate share* of the maintenance expenses for common areas," 341 N.C. at 130, 459 S.E.2d at 479-80 (emphasis added), that is precisely the result dictated by the majority's holding. Because the majority affirms the trial court's dismissal of Starboard's foreclosure action against respondents, all the other condominium unit owners will necessarily be forced to "shoulder[]" the cost of respondents unpaid assessment. This makes no sense and clearly conflicts with the legislative intent behind § 47A-12. Consequently, I would hold that the trial court erred in concluding that the challenged assessment was unlawful, reverse the trial court's order dismissing the foreclosure action, and remand the case for further proceedings in accordance with N.C. Gen. Stat. § 45-21.16.

Furthermore, in simply concluding that the assessment was "unlawful" under the Unit Ownership Act and Starboard's Declaration, the majority fails to address Starboard's independent argument that the trial court erred in determining that Starboard could not assess the units located in Building 33—including respondents' unit—for the renovations done to that building "despite the fact that Respondents and other owner[s] of units located in Building 33 requested such renovations." This Court has held that assessments may be imposed under an implied contract theory where the governing owners' association declaration does not provide for the assess-

ments. *See Miles v. Carolina Forest Ass'n*, 141 N.C. App. 707, 714, 541 S.E.2d 739, 742 (2001) (holding invalid extension of declaration which authorized assessments against owners in subdivision, but remanding case for "trial court to address whether all of the plaintiffs have impliedly agreed to pay for maintenance, upkeep and operation of the roads, common areas and recreational facilities within the subdivision, and if so, in what amount"). Generally, " '[a]n implied in law contract will . . . lie wherever one man has been enriched or his estate enhanced at another's expense under circumstances that, in equity and good conscience, call for an accounting by the wrongdoer.' " *Id.* at 713, 541 S.E.2d at 742 (quoting *Ellis Jones, Inc. v. Western Waterproofing Co.*, 66 N.C. App. 641, 646, 312 S.E.2d 215, 218 (1984)). Here, however, the trial court simply concluded that because the Declaration did not authorize the assessment based on the renovations of Building 33, Starboard could not assess respondents. As Starboard argued at trial in opposition to respondents' motion for involuntary dismissal, there is evidence in the record that respondents—as well as other Building 33 owners—made a request to Starboard that their building be renovated and that Starboard resultantly incurred the cost of performing the requested renovations. Under *Miles*, there is an issue as to whether a contract implied in law existed between Starboard and respondents for the renovation of Building 33. As the trial court did not address this issue in its order, believing that the Declaration did not authorize the assessment, I would direct the trial court to make findings of fact and conclusions of law on this issue on remand.

STATE OF NORTH CAROLINA v. WILLIAM DAVID WHETSTONE

No. COA10-1046

(Filed 21 June 2011)

1. Criminal Law— self-defense—instruction—deadly force or non-deadly force

There was no plain error in a prosecution for assault with a deadly weapon inflicting serious injury where defendant contended that the trial court should have given the self-defense instruction concerning death or great bodily harm rather than bodily injury or offensive physical contact. Taking the evidence in the light most favorable to defendant, there was sufficient evi-

dence to reach the jury on the question of whether defendant had a reasonable apprehension of death or great bodily harm.

2. Criminal Law— self-defense—knife as deadly weapon

The trial court did not err in an assault prosecution in which defendant claimed self-defense by concluding on the evidence that the knife defendant used was a deadly weapon as a matter of law.

Appeal by Defendant from judgment entered 11 March 2010 by Judge J. Gentry Caudill in Catawba County Superior Court. Heard in the Court of Appeals 24 February 2010.

Roy Cooper, Attorney General, by Ebony J. Pittman, Assistant Attorney General, for the State.

Faith S. Bushnaq, for Defendant.

THIGPEN, Judge.

William David Whetstone ("Defendant") was convicted of assault with a deadly weapon inflicting serious injury. The evidence at trial supported a jury instruction of self-defense. The trial court gave the jury instruction that provided Defendant could use force reasonably appearing necessary to Defendant to protect Defendant from bodily injury or offensive physical contact rather than the instruction that provided Defendant could use force necessary to protect Defendant from death or great bodily harm. We must determine whether the instruction given constituted error. We conclude the trial court gave the incorrect instruction and grant Defendant a new trial.

I: Factual and Procedural Background

The evidence of record in this case tends to show the following: Jeremy Dwayne Dula ("Dula") frequently spent nights at the Defendant's residence. Dula had previously been in the Marine Corps and was trained in hand-to-hand combat. Defendant testified that Dula told him he had assaulted two government officials in the military and that was why he was discharged.

According to Dula, on the evening of 31 July 2008 and the early morning hours of 1 August 2008, he and Defendant went to a bar and both consumed alcoholic beverages. When they returned to Defendant's house, they got into an argument and Defendant assaulted Dula by striking him and stabbing him with a knife.

Dula was hospitalized at Frye Regional Medical Center for one week for treatment of the wounds he sustained in the altercation. Dula also underwent follow-up treatment, including treatment for his punctured colon and kidney and treatment of a damaged nerve in his arm.

Defendant testified and recounted his version of the events on the evening of 31 July 2008 and the early morning of 1 August 2008. That evening, according to Defendant, he and Dula went to the bar and both consumed alcoholic beverages. When they returned to Defendant's house, Dula called his girlfriend and began arguing with her on the phone. When Defendant told Dula his yelling on the telephone might disturb the neighbors, Dula threw Defendant on the floor and told Defendant that he would kill him. After getting up from the floor, Defendant called Dula's girlfriend and told her she needed to come to Defendant's residence and pick up Dula. When Defendant got off the phone, Dula attacked him from behind, hit him in the back of his head, forced and held him to the ground, and started choking him. Defendant grabbed a knife that had fallen from a table and started swinging back at Dula with the knife. Defendant testified he was afraid of Dula.

On 11 March 2010, the jury found Defendant guilty of assault with a deadly weapon inflicting serious injury. On the same day, Defendant was adjudged to be a prior record level III offender and sentenced, consistent with the jury's verdict, to 33 to 49 months incarceration. From this judgment, Defendant appeals.

II: Jury Instruction

In Defendant's argument on appeal, Defendant contends that the trial court committed plain error by charging the jury with a "self-defense instruction that related to assaults not involving deadly force" when Defendant "stood accused of assault with a deadly weapon with intent to kill inflicting serious injury." Based on the circumstances of this particular case, we agree that the trial court committed error.

A: Standard of Review

[1] In Defendant's argument on appeal, Defendant contends that the trial court committed plain error by charging the jury with a "self-defense instruction that related to assaults not involving deadly force" when Defendant "stood accused of assault with a deadly weapon with intent to kill inflicting serious injury." Based on the circumstances of this particular case, we agree.

Defendant did not properly preserve this issue for appeal[1] but requests that the Court review for plain error. "Plain error analysis applies to evidentiary matters and jury instructions." *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634 (2009). "A prerequisite to our engaging in a 'plain error' analysis is the determination that the instruction complained of constitutes 'error' at all[;] [t]hen, '[b]efore 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. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468, *cert denied*, 479 U.S. 836, 107 S. Ct. 133, 93 L. Ed. 2d 77 (1986) (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (internal quotation omitted)). Our Courts have further stated, with regard to plain error review, the following:

> [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) (quotations omitted) (Emphasis in original). Defendant bears the burden of showing that an error arose to the level of plain error. *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

"It is elementary that the trial court, in its instructions to the jury, is required to declare and explain the law arising on the evidence." *State v. Anderson*, 40 N.C. App. 318, 321, 253 S.E.2d 48, 50 (1979) (citing N.C. Gen. Stat. § 15A-1232). Our Supreme Court has held "when there

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1. At trial, although Defendant engaged in discussions with the court regarding the appropriateness of the self-defense jury instruction given—specifically, whether an intent to kill was implied in "death or great bodily harm"—Defendant did not object to the trial court's instruction using the phrase "bodily injury or offensive physical touching" rather than "death or great bodily harm." Therefore, review for plain error is proper. N.C. R. App. P. 10(a)(4); *State v. Maready*, 362 N.C. 614, 621, 669 S.E.2d 564, 568 (2008) (When a "defendant fail[s] to object to the jury instruction at trial, his challenge is subject to plain error review").

is evidence from which it may be inferred that a defendant acted in self-defense, he is entitled to have this evidence considered by the jury under proper instruction from the court." *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977). " 'Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence.' " *Anderson.*, 40 N.C. App. at 321, 253 S.E.2d at 50 (quoting *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974)). Thus, "if the defendant's evidence, taken as true, is sufficient to support an instruction for self-defense, it must be given even though the State's evidence is contradictory." *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010) (citation omitted). "[T]he evidence is to be viewed in the light most favorable to the defendant." *Id.*

B: Pattern Jury Instruction 308.40

The instruction given by the trial court in this case was Pattern Jury Instruction 308.40[2], which states, in pertinent part, the following:

> . . . Even if you find beyond a reasonable doubt that the defendant assaulted the victim, the assault would be justified by self-defense under the following circumstances:
>
> (1) If the circumstances, at the time the defendant acted, would cause a person of ordinary firmness to reasonably believe that such action was *necessary or apparently necessary to protect that person from bodily injury or offensive physical contact*, and
>
> (2) The circumstances created such belief in the defendant's mind. You determine the reasonableness of the defendant's belief from the circumstances appearing to the defendant at the time.
>
> Additionally, even if the defendant believed there was a right to use force, the amount of force would be limited to reasonable force—not excessive force. The right to use force extends only to such force reasonably appearing to the defendant under the circumstances, *necessary to protect the defendant from bodily injury or offensive physical contact.* In so determining, you

2. The title of the Pattern Jury Instruction is "N.C.P.I.—CRIM. 308.40 SELF-DEFENSE—ASSAULTS NOT INVOLVING DEADLY FORCE." The Pattern Jury Instruction contains the following notation: "NOTE WELL: Use only with N.C.P.I.—Crim. 208.40, 208.40A, 208.70, 208.70A, 208.75, and 208.60 when no evidence of deadly force."

should consider the circumstances you find to have existed from the evidence. You should consider (the size, age and strength of the defendant as compared to the victim), (the fierceness of the assault, if any, upon the defendant), (whether the victim possessed a weapon), (the reputation, if any, of the victim for danger and violence) (and) (describe other circumstances supported by the evidence). Again, you determine the reasonableness of the defendant's belief from the circumstances appearing to the defend- ant at the time. (Emphasis added).

C: Pattern Jury Instruction 308.45

The instruction Defendant contends should have been given is Pattern Jury Instruction 308.45[3], which states, in pertinent part, the following:

If the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was *necessary or appeared to be necessary to protect that person from death or great bodily harm*, and the circumstances did create such belief in the defendant's mind at the time the defendant acted, such assault would be justified by self-defense. You, the jury, determine the reasonableness of the defendant's belief from the circumstances appearing to the defendant at the time.

A defendant does not have the right to use excessive force. The defendant had the right to use only such force as *reasonably appeared necessary to the defendant under the circumstances to protect the defendant from death or great bodily harm.* In making this determination, you should consider the circumstances as you find them to have existed from the evidence, (including the size, age and strength of the defendant as compared to the victim), (the fierceness of the assault, if any, upon the defendant), (whether or not the victim possessed a weapon), (and the reputation, if any, of the victim for danger and violence) (describe other circumstances as appropriate from the evidence). Again, you, the jury, determine the reasonableness of the defendant's belief from the circumstances appearing to the defendant at the time. . . .

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3. The title of this Pattern Jury Instruction is "N.C.P.I.—CRIM. 308.45 SELF-DEFENSE—ALL ASSAULTS INVOLVING DEADLY FORCE." The Pattern Jury Instruction contains the following notation: "NOTE WELL: This charge is intended for use with N.C.P.I.—Crim. 208.09, 208.10, 208.15, 208.16, 208.25, 208.50, 208.55, 208.85, and 208.60 where the evidence shows that defendant used deadly force."

NOTE WELL: If the defendant used a weapon which is a deadly weapon "per se," do not give the following paragraph, or the paragraph on page 3. If the weapon is not a deadly weapon per se, give the following paragraph and the paragraph on p. 3. *State v. Clay*, 297 N.C. 555, 566 (1979).

(If you find from the evidence beyond a reasonable doubt that the defendant assaulted the victim, *but not with a deadly weapon or other deadly force*, that the circumstances would create a reasonable belief in the mind of a person of ordinary firmness that the action was necessary or appeared to be *necessary to protect that person from bodily injury or offensive physical contact*, and the circumstances did create such belief in the defendant's mind at the time the defendant acted, the assault would be justified by self-defense—even though the defendant was not thereby put in *actual danger of death or great bodily harm;* however, the force used must not have been excessive. Furthermore, self-defense is an excuse only if the defendant was not the aggressor.) (Emphasis added).

D: Difference Between Pattern Jury Instruction 308.40 and 308.45

The difference in the two charges pertinent to this appeal is the language from Pattern Jury Instruction 308.40, "[i]f the circumstances, at the time the defendant acted, would cause a person of ordinary firmness to reasonably believe that such action was necessary or apparently necessary to protect that person from *bodily injury or offensive physical contact*[,]" and the language from Pattern Jury Instruction 308.45, "[i]f the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or appeared to be necessary to protect that person from *death or great bodily harm.*" (Emphasis added).

III: Analysis

In certain circumstances, "[t]he theory of self-defense entitles an individual to use such force as is necessary or apparently necessary to save himself from death or great bodily harm. . . . A person may exercise such force if he believes it to be necessary and has reasonable grounds for such belief." *State v. Moore*, 111 N.C. App. 649, 653, 432 S.E.2d 887, 889 (1993) (quotation omitted). However, in other circumstances a person may only use such force as is necessary "to protect himself from bodily harm or offensive physical contact[.]" *State v. Beaver*, 14 N.C. App. 459, 463, 188 S.E.2d 576, 579 (1972) (citations omitted).

Our courts have recognized that a defendant may use either deadly force or nondeadly force to defend himself, depending on the circumstances of each case. *See*, *generally*, *State v. Pearson*, 288 N.C. 34, 215 S.E.2d 598 (1975). Deadly force is "force intended or likely to cause death or great bodily harm[,]" and nondeadly force is "force neither intended nor likely to do so[.]" *Id.*, 288 N.C. at 39, 215 S.E.2d at 602. "Because the only justification for the use of *deadly force* is a reasonable belief that one is in danger of death or great bodily harm, 'where the assault being made upon defendant is insufficient to give rise to a reasonable apprehension of death or great bodily harm, then the use of deadly force by defendant to protect himself from bodily injury or offensive physical contact is excessive force as a matter of law.' " *Richardson*, 341 N.C. at 590, 461 S.E.2d at 728 (quoting *State v. Clay*, 297 N.C. 555, 563, 256 S.E.2d 176, 182 (1979), *overruled on other grounds*, *Richardson*, 341 N.C. 585, 589-90, 461 S.E.2d 724, 727-28, *State v. McAvoy*, 331 N.C. 583, 600-01, 417 S.E.2d 489, 500, and *State v. Davis*, 305 N.C. 400, 415, 290 S.E.2d 574, 583 (1982)).

Although the law allows a defendant, in certain circumstances, to use deadly force to defend himself, the determination by the trial court of which jury instruction is appropriate depends on the evidence in each case. *State v. Clay*, 297 N.C. 555, 256 S.E.2d 176, is instructive on this point.

First, the Court in *Clay*, in addressing the self-defense instruction to be given in an assault with a deadly weapon case, stated the following: "In cases involving assault with a deadly weapon, trial judges should, in the charge, instruct that the assault would be excused as being in self-defense only if the circumstances at the time the defendant acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from death or great bodily harm."[4] *Id.*, 297 N.C. at 565-66, 256 S.E.2d at 183.

Second, the Court then addressed the type of instruction that should be given if a deadly weapon *per se* were used: "If the weapon used is a deadly weapon per se, no reference should be made at any

4. However, a prior decision of this Court suggests that the possession of a deadly weapon does not necessarily constitute the use of deadly force, and therefore, in certain circumstances, does not necessitate a deadly force jury instruction. *See State v. Polk*, 29 N.C. App. 360, 361-62, 224 S.E.2d 272, 273 (1976) (When the defendant fired shots from a gun "in order to scare" his attacker, but did not use deadly force, he was entitled to an instruction on the right to defend against bodily injury or offensive physical contact, a nondeadly-force defense).

point in the charge to bodily injury or offensive physical contact." *Id.*, 297 N.C. at 566, 256 S.E.2d at 183 (quotation omitted).

Third, in those cases where a deadly weapon *per se* is not used, the Court stated: "If the weapon used is not a deadly weapon per se, the trial judge should instruct the jury that if they find that defendant assaulted the victim *but do not find that he used a deadly weapon*, that assault would be excused as being in self-defense if the circumstances at the time he acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from bodily injury or offensive physical contact." *Id.*, 297 N.C. at 566, 256 S.E.2d at 183-84 (quotation omitted) (Emphasis in original). "In determining whether the weapon used was a deadly weapon, the jury should consider the nature of the weapon, the manner in which it was used, and the size and strength of the defendant as compared to the victim." *Id.*, 297 N.C. at 566, 256 S.E.2d at 184.

Our Courts have defined a deadly weapon as "an instrument which is likely to produce death or great bodily harm, under the circumstances of its use." *State v. Riddick*, 315 N.C. 749, 759, 340 S.E.2d 55, 61 (1986) (quotation omitted). "The deadly character of the weapon depends sometimes more upon the manner of its use and the condition of the person assaulted than upon the intrinsic character of the weapon itself." *Id.*, 315 N.C. at 760, 340 S.E.2d at 61. "Some weapons are *per se* deadly, e.g., a rifle or pistol: others, owing to the great and furious violence and manner of use, become deadly." *Id.*, 315 N.C. at 759-60, 340 S.E.2d at 61. "The definition of a deadly weapon clearly encompasses a wide variety of knives[.]"[5] *State v. Walker*, —— N.C. App. ——, ——, 694 S.E.2d 484, 493 (2010).

"[Generally,] the law does not justify or excuse the use of a deadly weapon to repel a simple assault." *Pearson*, 288 N.C. at 40, 215 S.E.2d at 603 (1975) (quotation omitted). "This principle does not apply, however, where from the testimony it may be inferred that the use of such weapon was or appeared to be reasonably necessary to save the person assaulted from great bodily harm[.]" *Id.*

Based on the foregoing law, to determine whether an instruction containing the language "to protect himself from bodily harm or

5. "[T]he evidence in each case determines whether a certain kind of knife is properly characterized as a lethal device as a matter of law or whether its nature and manner of use merely raises a factual issue about its potential for producing death." *Walker*, —— N.C. App. at ——, 694 S.E.2d at 493..

offensive physical contact" or an instruction containing the language, "to save himself from death or great bodily harm," is correct on the facts of this case, we must examine Defendant's evidence surrounding Dula's assault on Defendant.

Here, viewing the evidence in the light most favorable to Defendant and taking Defendant's evidence as true, we believe there is sufficient evidence of record to support the proposition that Dula's assault upon Defendant gave rise to Defendant's reasonable apprehension of death or great bodily harm.[6] Dula had previously been in the Marine Corps and was trained in hand-to-hand combat. According to Defendant, after Defendant told Dula "[y]ou can't be yelling out here. I've got neighbors[,]" Dula "hit [Defendant] in the back of the head," and knocked Defendant to the ground. Dula told Defendant "I'll [expletive deleted] kill you[;] [y]ou don't [expletive deleted] know me[.]" Defendant said he "was scared to death." After knocking Defendant to the ground, Dula "put [Defendant] on [his] back" and into the fighting position called "full guard[,]" which means "you've got both of your legs on top of you and you can't really do anything." Dula started choking Defendant. Only then does Defendant admit that he "started swinging back" with a knife. After the fight, Defendant told his parents that "Dula tried to kill me[,]" and he was afraid to go to his house because, "I was afraid that [Dula] was going to come back."

Dula also gave some testimony that corroborated Defendant's testimony, including Dula's statements that Dula approached Defendant: "[I] walked back over there [toward Defendant] and asked [Defendant] what really is his problem, . . . and that's when we got into it[,]" and that during the fight, "I put [Defendant] on the ground and I held him on the ground[.]"

The trial court gave the Pattern Jury Instruction 308.40 to the jury, which states that Defendant could use force reasonably appearing necessary to Defendant to protect Defendant from bodily injury or offensive physical contact. The trial court also instructed the jury that "[a] deadly weapon is a weapon which is likely to cause death or serious bodily injury[,]" and twice instructed the jury that "[a] knife is a deadly weapon."

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6. We also note there is sufficient evidence of record contrary to this proposition; however, "if the defendant's evidence, taken as true, is sufficient to support an instruction for self-defense it must be given even though the State's evidence is contradictory." *Moore*, 363 N.C. at 796, 688 S.E.2d at 449.

Taking the evidence in a light most favorable to Defendant, we believe the foregoing evidence of Dula's assault upon Defendant was sufficient for the question, whether Defendant had a reasonable apprehension of death or great bodily harm, to be one for the jury. We further believe that, on this evidence, when the trial court instructed the jury that "[a] knife is a deadly weapon[,]" but that "[t]he right to use force extends only to such force reasonably appearing to the defendant under the circumstances necessary to protect the defendant from bodily injury or offensive physical contact[,]" the trial court gave an instruction which (1) was not supported by the evidence[7], (2) was contrary to existing law,[8] and (3) essentially lessened the burden of the State in disproving Defendant's claim of self-defense.[9] The required standard of proof by the State that Defendant's use of deadly force and a deadly weapon was excessive to protect Defendant "from bodily injury or offensive physical contact" was reduced in comparison to proof that Defendant's use of deadly force and a deadly weapon was excessive to protect Defendant from "death or great bodily harm." Because the instruction implied, contrary to

7. *See State v. Spaulding*, 298 N.C. 149, 156, 257 S.E.2d 391, 395 (1979) (holding that, even though the defendant did not see a weapon and the victim did not actually make a show of deadly force, the defendant's apprehension was reasonable).

8. *Clay*, 297 N.C. at 565-66, 256 S.E.2d at 183-184 (holding, "[i]f the weapon used is a deadly weapon per se, no reference should be made at any point in the charge to bodily injury or offensive physical contact") (quotation omitted). Generally, our courts have not distinguished between the terms deadly weapon "per se" and deadly weapon "as a matter of law." *See Torain*, 316 N.C. at 121, 340 S.E.2d at 471 (stating that "[t]he distinction between a weapon which is deadly or dangerous per se and one which may or may not be deadly or dangerous depending upon the circumstances is not one that lends itself to mechanical definition" and "the evidence in each case determines whether a certain kind of [knife] is properly characterized as a lethal device as a matter of law[:]" the "evidence [in this case] amply supports the trial judge's instruction to the effect that a utility knife is a dangerous or deadly weapon per se") (quotation omitted); *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725-26 (1981) (stating that "the evidence in each case determines whether a certain kind of knife is properly characterized as a lethal device as a matter of law" and that "a hunting knife, a kitchen knife and a steak knife have been denominated deadly weapons *per se*"); *State v. Palmer*, 293 N.C. 633, 642, 239 S.E.2d 406, 412 (1977) (stating that "whether simple assault should have been submitted as an alternative verdict depends upon whether the stick was a deadly weapon per se, or as a matter of law"); *see also State v. Parker*, 7 N.C. App. 191, 195, 171 S.E.2d 665, 667 (1970) (holding that the trial court did not err in declaring "as a matter of law that the steak knife was a deadly weapon *per se*").

9. "In prosecutions for felonious assault and for assault with a deadly weapon, it is not incumbent on a defendant to satisfy the jury he acted in self-defense. On the contrary, the burden of proof rests on the State throughout the trial to establish beyond a reasonable doubt that defendant unlawfully assaulted the alleged victim." *State v. Fletcher*, 268 N.C. 140, 142, 150 S.E.2d 54, 56 (1966).

Defendant's evidence, that the assault being made upon Defendant did not put Defendant in fear of death or great bodily harm, the instruction bordered on requiring that the jury conclude that the force Defendant used was excessive force. *Moore*, 111 N.C. App. at 653, 432 S.E.2d at 889 ("If an assault does not threaten death or great bodily harm, the victim of the assault may not use deadly force to protect himself from the assault") (citation omitted). Here, Defendant's evidence taken in the light most favorable to Defendant is sufficient to reach the jury on the question of whether Defendant had a reasonable belief that Dula's assault put Defendant in danger of death or great bodily harm. Therefore, the trial court committed error by instructing the jury that the appropriate inquiry was whether Defendant had a reasonable belief that Dula's assault put Defendant in danger of bodily injury or offensive physical contact. *See Torain*, 316 N.C. at 116, 340 S.E.2d at 468 ("A prerequisite to our engaging in a plain error analysis is the determination that the instruction complained of constitutes error at all") (quotation omitted).

IV: Extension of Holding in *Clay*

[2] We believe, however, there is one additional issue that must be addressed in this case. In *Clay*, our Supreme Court only addressed those cases in which either a deadly weapon *per se* was used or the matter was submitted to the jury for its determination whether the weapon used was a deadly weapon. *Clay* did not address the scenario, which we have here, where the weapon used is not a deadly weapon *per se*, but the question was not submitted to the jury whether the weapon used was a deadly weapon. *See Walker*, ––– N.C. App. at –––, 694 S.E.2d at 493 (stating that "the evidence in each case determines whether a certain kind of knife is properly characterized as a lethal device as a matter of law or whether its nature and manner of use merely raises a factual issue about its potential for producing death") (quotation omitted). In the present case, the trial court did not submit the question to the jury whether the knife used by Defendant was a deadly weapon, but concluded instead, on the evidence of the case, that the knife used was a deadly weapon as a matter of law. The court's determination that the knife used was a deadly weapon was appropriate on the facts of this case. *See State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924) (stating, "[w]here the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly . . . is one of law, and the Court must take the responsibility of so declaring") (citation omitted).

Withholding this question from the jury and concluding, as a matter of law, that Defendant used a deadly weapon made this case similar to, if not indistinguishable from, those cases in which a deadly weapon *per se* was used.

We hold, therefore, presuming the evidence otherwise supports an instruction on self-defense, that in those cases where the weapon is not a deadly weapon *per se*, but the question of whether the weapon is a deadly weapon is not submitted to the jury because the trial judge concludes on the evidence of the case that the weapon used was a deadly weapon as a matter of law, the jury should be instructed that the assault would be excused as being in self-defense only if the circumstances at the time the defendant acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from death or great bodily harm. We believe this holding is a logical extension of the Supreme Court's holding in *Clay*.

For the foregoing reasons, and on the facts of this case, we conclude that a jury instruction containing the language of Pattern Jury Instruction 308.45, "[i]f the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or appeared to be necessary to protect that person from *death or great bodily harm*[,]" was correct in law and supported by the evidence. We further conclude that, on the facts of this case, the instruction given, Pattern Jury Instruction 308.40, was not supported by the evidence and was contrary to existing law. By giving this instruction, the trial court committed error. Moreover, because the instruction given essentially lessened the State's burden of proving Defendant did not act in self-defense, we conclude the error amounted to plain error; we are "convinced that absent the error the jury probably would have reached a different verdict." *Torain*, 316 N.C. at 116, 340 S.E.2d at 468 (quotation omitted). We grant Defendant a new trial.[10]

NEW TRIAL.

Judges STROUD and HUNTER, JR., concur.

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10. Because we grant Defendant a new trial on the basis of the jury instruction, we need not reach Defendant's remaining arguments on appeal.

LABORATORY CORPORATION OF AMERICA HOLDINGS, DIANON SYSTEMS, INC., PLAINTIFFS v. CINDY CACCURO AND LAKEWOOD PATHOLOGY ASSOCIATES, INC. D/B/A PLUS DIAGNOSTICS, DEFENDANTS

No. COA10-877

(Filed 21 June 2011)

1. Appeal and Error— interlocutory orders and appeals— personal jurisdiction

Although defendant's appeal from an order denying her motion to dismiss based on lack of personal jurisdiction was from an interlocutory order, it was proper under N.C.G.S. § 1-277(b).

2. Jurisdiction— personal—long-arm statute

The trial court did not err in a breach of contract, breach of covenant of good faith and fair dealing, conversion, and unfair competition case by denying defendant's motion to dismiss for lack of personal jurisdiction based on the long arm statute under N.C.G.S. § 1-75.4(5)(d). All that was required to satisfy the statute was that defendant demanded money from plaintiff, and plaintiff paid the money from North Carolina.

3. Jurisdiction— minimum contacts—due process

The trial court did not err by concluding that the exercise of personal jurisdiction satisfied the minimum contacts requirement of due process.

Appeal by defendant from order entered 21 April 2010 by Judge J.B. Allen, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 27 January 2011.

Parker Poe Adams & Bernstein LLP, by Patricia T. Bartis and Matthew H. Mall, for plaintiffs-appellees.

Robinson & Lawing, LLP, by Michael L. Robinson and H. Stephen Robinson; and Winston & Strawn LLP, by William G. Miossi, for defendant-appellant Cindy Caccuro.

GEER, Judge.

Defendant Cindy Caccuro appeals from an order denying her motion to dismiss for lack of personal jurisdiction. Because the trial court's unchallenged findings of fact support its conclusion that (1) the exercise of personal jurisdiction satisfies the requirements of our

State's long-arm statute, N.C. Gen. Stat. § 1-75.4 (2009), and (2) Caccuro had sufficient minimum contacts with the State to satisfy the requirements of due process, we affirm the trial court's order.

Facts

Plaintiffs Laboratory Corporation of America Holdings ("LabCorp") and Dianon Systems, Inc., a subsidiary of LabCorp, filed a complaint on 12 June 2009, an amended complaint on 6 October 2009, and a second amended complaint on or about 22 February 2010 against Caccuro, a former LabCorp employee, and Lakewood Pathology Associates, Inc. d/b/a/ PLUS Diagnostics, Caccuro's new employer. Plaintiffs asserted claims for relief against Caccuro for breach of contract, breach of the covenant of good faith and fair dealing, conversion, and unfair competition. With respect to PLUS Diagnostics, plaintiffs asserted claims for tortious interference with contract and unfair competition.

Plaintiffs alleged in their second amended complaint that, from February 2006 through November 2008, Caccuro worked for LabCorp as a Special Development Executive ("SDE"). In this capacity, she was responsible for developing new accounts and servicing existing accounts in Philadelphia, Pennsylvania, and the surrounding areas. According to the second amended complaint, Caccuro, during her employment, developed relationships with LabCorp customers and had access to LabCorp's highly confidential and proprietary information, including customer lists, pricing, marketing practices, methods of operation, and the needs and requirements of LabCorp's customers.

Plaintiffs alleged that after Caccuro terminated her employment in November 2008, she went to work for PLUS Diagnostics, a direct competitor of LabCorp, and violated the terms of the Non-Solicitation/ Confidentiality Agreement ("Non-Solicitation Agreement") she had executed with LabCorp. Specifically, plaintiffs claimed that Caccuro had unlawfully retained confidential and proprietary materials belonging to LabCorp and had solicited the business of a particular LabCorp customer for whom she had primary responsibility while a LabCorp employee.

Plaintiffs further alleged that on or about 2 June 2009, Caccuro called LabCorp's client services office, falsely represented herself as being a customer of LabCorp, and provided the customer's LabCorp account number in order to obtain confidential LabCorp information relating to that customer that she could then use to solicit the

customer's business for her new employer. Plaintiffs asserted that Caccuro was acting on behalf of PLUS Diagnostics when she violated the terms of the Non-Solicitation Agreement and that she and PLUS Diagnostics "fraudulently sought LabCorp's confidential information to gain an unfair competitive advantage for the benefit of PLUS Diagnostics and to the detriment of LabCorp."

In response to the complaint and first amended complaint, both Caccuro, a Pennsylvania resident, and PLUS Diagnostics, a nonresident corporation, filed joint motions to dismiss for lack of personal jurisdiction pursuant to N.C.R. Civ. P. 12(b)(2). After plaintiffs filed the second amended complaint, only Caccuro filed a motion to dismiss for lack of personal jurisdiction.[1] The trial court denied Caccuro's motion to dismiss, finding that jurisdiction over Caccuro is proper pursuant to N.C. Gen. Stat. § 1-75.4(5)(c), (d), and (e) and comports with due process requirements. Caccuro appealed from that order to this Court.

Discussion

[1] Although the order denying Caccuro's motion to dismiss is an interlocutory order, her appeal of the trial court's Rule 12(b)(2) decision is proper under N.C. Gen. Stat. § 1-277(b) (2003). *See Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982) ("[T]he right of immediate appeal of an adverse ruling as to jurisdiction over the person, under [N.C. Gen. Stat. § 1-277(b)], is limited to rulings on 'minimum contacts' questions, the subject matter of Rule 12(b)(2).").

"A two-step analysis applies in determining whether a North Carolina court has personal jurisdiction over a nonresident defendant: 'First, the transaction must fall within the language of the State's "long-arm" statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution.' " *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005) (quoting *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986)). It is well established that the long-arm statute is "to be liberally construed in favor of finding personal jurisdiction, subject only to due process considerations." *Dataflow Cos. v. Hutto*, 114 N.C. App. 209, 212, 441 S.E.2d 580, 582 (1994).

1. In their briefs, the parties state that PLUS Diagnostics agreed to withdraw its jurisdictional challenges in January 2010. PLUS Diagnostics is not a party to this appeal.

When this Court reviews a trial court's ruling on a motion to dismiss for lack of personal jurisdiction, it considers " 'whether the findings of fact by the trial court are supported by competent evidence in the record . . . .' " *Banc of Am.*, 169 N.C. App. at 694, 611 S.E.2d at 183 (quoting *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999)). The trial court's conclusions of law are subject to de novo review. *Cambridge Homes of N.C. Ltd. P'ship v. Hyundai Constr., Inc.*, 194 N.C. App. 407, 417, 670 S.E.2d 290, 298 (2008). Since Caccuro does not challenge the sufficiency of the evidence to support the trial court's findings, the only question is whether the findings support the court's conclusions of law.

I. Long-Arm Statute

[2] We first address Caccuro's contention that the court erred in determining that jurisdiction is proper under N.C. Gen. Stat. § 1-75.4(5)(d), the subsection of the long-arm statute that provides:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j), Rule 4(j1), or Rule 4(j3) of the Rules of Civil Procedure under any of the following circumstances:
>
> . . . .
>
> (5) Local Services, Goods or Contracts.—In any action which:
>
> . . . .
>
> d. Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction[.]

The trial court found and Caccuro does not dispute that during Caccuro's employment with LabCorp, plaintiffs made money payments to Caccuro by sending checks to her. There is no question that these checks constituted "a 'thing of value' within the meaning of the long-arm statute." *Hiwassee Stables, Inc. v. Cunningham*, 135 N.C. App. 24, 27, 519 S.E.2d 317, 320 (1999) (quoting *Pope v. Pope*, 38 N.C. App. 328, 331, 248 S.E.2d 260, 262 (1978)).

The question in this case is whether those "things of value" were sent from North Carolina at Caccuro's request. Caccuro insists that N.C. Gen. Stat. § 1-75.4(5)(d) is inapplicable because she did not

specifically direct that plaintiffs send the checks from North Carolina. This Court, however, rejected that argument in *Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 394 S.E.2d 651 (1990).

The defendant in *Cherry Bekaert* withdrew from the plaintiff's partnership in North Carolina, moved to Alabama, and demanded money owed to him. *Id.* at 631, 394 S.E.2d at 655. In support of his motion to dismiss for lack of personal jurisdiction, the defendant argued that the plaintiff could have chosen to pay him from accounts in states other than North Carolina, but that the plaintiff—and not the defendant—chose to use a North Carolina account. *Id.* at 630, 394 S.E.2d at 655. According to the defendant, "a strict interpretation of N.C.G.S. § 1-75.4(5)(d) . . . would require personal jurisdiction only if defendant's 'order or direction' specifies that plaintiff *ship from this* state a thing of value." *Id.* at 631, 394 S.E.2d at 655.

This Court rejected the defendant's argument as "untenable in light of our courts' policy of liberally and broadly construing statutory jurisdictional requirements in favor of finding personal jurisdiction." *Id.* The Court held that "[b]ecause defendant directed plaintiff to send his monies to him in Alabama and plaintiff distributed the money from North Carolina, the money paid is 'shipped from this State by the plaintiff to . . . defendant on his order or direction.' " *Id.* (quoting N.C. Gen. Stat. § 1-75.4(5)(d)). In other words, under *Cherry Bekaert*, all that is required to satisfy N.C. Gen. Stat. § 1-75.4(5)(d) is that a defendant demanded money from the plaintiff and the plaintiff paid the money from North Carolina.

According to the trial court's unchallenged findings of fact in this case, Caccuro chose to enter into a Non-Solicitation Agreement and two Compensation Plans providing for her receipt of compensation payments from LabCorp. Under *Cherry Bekaert*, because Caccuro contracted to receive compensation from LabCorp and directed LabCorp to send her checks to her out of state, and LabCorp distributed the checks from North Carolina, the checks were " 'shipped from this State by the plaintiff to . . . defendant on his order or direction.' " *Id.* (quoting N.C. Gen. Stat. § 1-75.4(5)(d)).

We, therefore, hold that the trial court's findings of fact adequately support its conclusion that personal jurisdiction over Caccuro is proper under N.C. Gen. Stat. § 1-75.4(5)(d). *See Hiwassee Stables*, 135 N.C. App. at 27, 519 S.E.2d at 320 (holding N.C. Gen. Stat. § 1-75.4(5)(d) applied when "defendants directed plaintiffs to send payment due them to Florida, and plaintiffs distributed the payment

from North Carolina . . . in the form of a check drawn on a bank in this state"); *ETR Corp. v. Wilson Welding Serv., Inc.*, 96 N.C. App. 666, 667, 668-69, 386 S.E.2d 766, 767, 768 (1990) (holding N.C. Gen. Stat. § 1-75.4(5)(d) applied when bill was sent from defendant's out-of-state office to plaintiff, and check was drawn on plaintiff's North Carolina bank account and mailed to defendant). Consequently, we need not address Caccuro's arguments regarding N.C. Gen. Stat. § 1-75.4(5)(c) or (e).

II. Minimum Contacts

[3] Our inquiry now turns to whether the exercise of personal jurisdiction satisfies the requirements of due process. Under the due process clause, there must exist "certain minimum contacts [between the non-resident defendant and the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102, 66 S. Ct. 154, 158 (1945) (internal quotation marks omitted).

As our Supreme Court has stated, "[i]n each case, there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws; the unilateral activity within the forum state of others who claim some relationship with a non-resident defendant will not suffice." *Tom Togs*, 318 N.C. at 365, 348 S.E.2d at 786. Instead, the "relationship between the defendant and the forum must be 'such that he should reasonably anticipate being haled into court there.' " *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501, 100 S. Ct. 559, 567 (1980)).

The United States Supreme Court has recognized two bases for finding sufficient minimum contacts: specific jurisdiction and general jurisdiction. Specific jurisdiction exists when "the controversy arises out of the defendant's contacts with the forum state." *Id.* at 366, 348 S.E.2d at 786. General jurisdiction may be asserted over a defendant "even if the cause of action is unrelated to defendant's activities in the forum as long as there are sufficient 'continuous and systematic' contacts between defendant and the forum state." *Replacements*, 133 N.C. App. at 145, 515 S.E.2d at 51 (quoting *Fraser v. Littlejohn*, 96 N.C. App. 377, 383, 386 S.E.2d 230, 234 (1989)). General jurisdiction is

not at issue in this case. Specific jurisdiction is the only possible basis for finding minimum contacts here.[2]

With respect to specific jurisdiction, "the relationship among the defendant, the forum state, and the cause of action is the essential foundation for the exercise of *in personam* jurisdiction." *Tom Togs*, 318 N.C. at 366, 348 S.E.2d at 786. Our courts consider the following factors in determining whether minimum contacts exist: (1) the quantity of the contacts, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) the convenience to the parties. *Replacements*, 133 N.C. App. at 143, 515 S.E.2d at 49.

"Although a contractual relationship between a North Carolina resident and an out-of-state party alone does not *automatically* establish the necessary minimum contacts with this State, nevertheless, a single contract may be a sufficient basis for the exercise of *in personam* jurisdiction if it has a substantial connection with this State." *Tom Togs*, 318 N.C. at 367, 348 S.E.2d at 786. In *Tom Togs*, the Court concluded that there was sufficient evidence of a substantial connection with this State when (1) "the defendant made an offer to plaintiff whom defendant knew to be located in North Carolina," (2) the "[p]laintiff accepted the offer in North Carolina," and (3) the "[d]efendant was . . . aware that the contract was going to be substantially performed in this State." *Id.*, 348 S.E.2d at 786-87. Based on this evidence, the Court ruled that the "defendant purposefully availed itself of the protection and benefits of [North Carolina's] laws." *Id.*, 348 S.E.2d at 787.

In this case, the trial court made the following unchallenged findings of fact pertinent to specific jurisdiction. Caccuro chose to enter into employment contracts with LabCorp, a corporation with its headquarters, research centers, laboratories, and patient service centers all located in North Carolina. The corporate Human Resources Division and National Sales Administration, Corporate Payroll, and other corporate offices related to Caccuro's employment were all located in Burlington, North Carolina. As a LabCorp SDE, Caccuro was trained to sell and was responsible for selling medical laboratory testing—testing that was to be performed exclusively in North Carolina laboratories. In other words, Caccuro was selling North Carolina services.

2. We note that although Caccuro argues about specific and general jurisdiction with respect to the application of the long-arm statute, the question of specific or general jurisdiction relates to due process and the minimum contacts analysis.

Caccuro entered into not one but three agreements with LabCorp: the Non-Solicitation Agreement and the two Compensation Plans. As the trial court found, each of these agreements "contemplated continuing obligations between Caccuro and LabCorp's North Carolina headquarters and were performed in substantial part in North Carolina." Pursuant to the Non-Solicitation Agreement, Caccuro's employment was administered from North Carolina. Both of the Compensation Plans signed by Caccuro directed that the plans be sent to the National Sales Administration in North Carolina. In addition, under the agreements, Caccuro received employee benefits and technical marketing assistance that were administered from LabCorp's North Carolina headquarters.

With respect to compensation, Caccuro received at least 100 checks for base salary and incentive compensation that were drawn from LabCorp's North Carolina bank account. The checks and Caccuro's W-2 forms list North Carolina addresses for LabCorp. In addition to compensation checks, Caccuro received business and expense reimbursement on checks drawn on LabCorp's North Carolina account.

Caccuro also had the benefit of a company-provided vehicle, which was coordinated through the Corporate Fleet Department in North Carolina. Caccuro was allowed to use the vehicle not only for business purposes, but also for personal use in exchange for a $75.00 per month deduction from her paycheck by Corporate Payroll in North Carolina. She, in essence, was paying for part of the vehicle in North Carolina. Insurance on the vehicle was obtained by the Corporate Risk Management Department also located in North Carolina.

As for communications, during her employment, Caccuro made at least three phone calls to LabCorp's Information Technology Service Desk in North Carolina. She also sent a fax to LabCorp headquarters in North Carolina.

We further observe that the lawsuit arises directly out of one of the contracts that had a substantial connection with this State, the Non-Solicitation Agreement. Plaintiffs allege that Caccuro breached that Agreement—an agreement Caccuro knew was being administered in North Carolina and would result in benefits to Caccuro being provided from North Carolina.

In *Century Data Systems, Inc. v. McDonald*, 109 N.C. App. 425, 430-33, 428 S.E.2d 190, 192-94 (1993), even though the four defendant employees had either worked in or visited North Carolina as part of their employment with the plaintiff, this Court focused not on their prior physical presence in North Carolina, but on the fact that the defendants had entered into employment contracts with the plaintiff in North Carolina, and the lawsuit arose out of the defendants' violation of their covenants not to compete.

The Court in *Century Data Systems* observed that " '[i]n light of modern business practices, the quantity, *or even the absence of actual physical contacts with the forum state*, merely constitutes a factor to be considered and is not of controlling weight.' " *Id.* at 433, 428 S.E.2d at 194 (quoting *Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 607-08, 334 S.E.2d 91, 93 (1985)). Not only had the defendants in *Century Data Systems* entered into contracts with the plaintiff in North Carolina, but, as in this case, "[t]he cause of action arose directly out of [defendants'] activities for which [they were] compensated by [the plaintiff].' " *Id.* (quoting *B.F. Goodrich Co. v. Tire King of Greensboro, Inc.*, 80 N.C. App. 129, 133, 341 S.E.2d 65, 68 (1986)).

The defendants in *Century Data Systems* entered into contracts with a North Carolina-based company under which they were compensated for their sales and service of the plaintiff's products outside of North Carolina and were provided payroll services out of plaintiff's North Carolina office. *Id.* at 431-32, 428 S.E.2d at 194. The Court also pointed out that the defendants "relied on plaintiff's North Carolina offices for training, meetings, issuance of pay checks, receipt of purchase orders and even shipment of goods." *Id.* at 433, 428 S.E.2d at 194. According to the Court, each of the defendants "was engaged in an ongoing relationship with the plaintiff," a North Carolina company. *Id.* In light of *Century Data Systems*, we hold that, given the trial court's findings of fact in this case, the trial court did not err in determining that Caccuro had the necessary minimum contacts with this State.

Caccuro argues, however, that she had no more contacts with North Carolina than those held insufficient to comport with due process in *Curvcraft, Inc. v. J.C.F. & Assocs.*, 84 N.C. App. 450, 352 S.E.2d 848 (1987). In *Curvcraft*, the defendant was a Maryland corporation that acted as a distributor for the North Carolina-based plaintiff for about four months. *Id.* at 450-51, 352 S.E.2d at 848-49. The services to be performed under the contract were to occur outside

North Carolina, and the defendant's only contacts with North Carolina were phone calls, three shipments of office chairs from the plaintiff in North Carolina to the defendant, and the receipt of a single commission check. *Id.* at 452, 352 S.E.2d at 849.

Here, by contrast, the parties' contractual relationship lasted nearly three years, Caccuro sold laboratory testing that was performed in North Carolina, and at least 100 checks were sent from LabCorp in North Carolina to Caccuro, in addition to all the other contacts found by the trial court. *Curvcraft* is not analogous.

Next, we note that even when the trial court concludes that a defendant has "purposefully established minimum contacts within the forum State," the court must also consider those contacts "in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' " *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 85 L. Ed. 2d 528, 543, 105 S. Ct. 2174, 2184 (1985) (quoting *Int'l Shoe Co.*, 326 U.S. at 320, 90 L. Ed. at 104, 66 S. Ct. at 160). In making this determination, our courts have considered (1) the interest of North Carolina and (2) the convenience of the forum to the parties. *Replacements*, 133 N.C. App. at 143, 515 S.E.2d at 49. *See also Burger King*, 471 U.S. at 477, 85 L. Ed. 2d at 543, 105 S. Ct. at 2184 (noting that courts should consider " 'the forum State's interest in adjudicating the dispute' " and " 'the plaintiff's interest in obtaining convenient and effective relief' " (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 292, 62 L. Ed. 2d at 498, 100 S. Ct. at 564)).

With respect to North Carolina's interest, " '[i]t is generally conceded that a state has a "manifest interest" in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.' " *Century Data Sys.*, 109 N.C. App. at 433, 428 S.E.2d at 194 (quoting *Tom Togs*, 318 N.C. at 367, 348 S.E.2d at 787). "This principle holds true where . . . defendants are alleged to have purposefully violated their contracts to engage in open competition with the plaintiff." *Id.* at 433-34, 428 S.E.2d at 194. *See also Cherry Bekaert*, 99 N.C. App. at 633, 394 S.E.2d at 656 (explaining that North Carolina has legitimate interest in establishment and operation of enterprises and trade within its borders and protection of its residents in making of contracts with persons and agents who enter the State for that purpose); *Ciba-Geigy Corp.*, 76 N.C. App. at 608, 334 S.E.2d at 93 (recognizing "powerful public interest of a forum state in protecting its citizens against out-of-state tortfeasors" where defendant committed fraud upon North Carolina corporation without physically coming into this State).

In addition, here, as in *Tom Togs*, 318 N.C. at 367-68, 348 S.E.2d at 787, the parties provided that North Carolina law would apply to any dispute. "While choice of law clauses are not determinative of personal jurisdiction, they express the intention of the parties and are a factor in determining whether minimum contacts exist and due process was met." *Tejal Vyas, LLC v. Carriage Park Ltd. P'ship*, 166 N.C. App. 34, 41, 600 S.E.2d 881, 887 (2004), *aff'd per curiam*, 359 N.C. 315, 608 S.E.2d 751 (2005).

As for the convenience of the parties, it appears that litigating in North Carolina would not be convenient for Caccuro, but, by the same token, litigation in another state would not be convenient for plaintiffs. The findings of fact do "not indicate that any one State would be more convenient to all of the parties and witnesses than another." *Banc of Am.*, 169 N.C. App. at 700, 611 S.E.2d at 186. *See Climatological Consulting Corp. v. Trattner*, 105 N.C. App. 669, 675, 414 S.E.2d 382, 385 (holding that although three of defendant's material witnesses were located in Washington, D.C., "this fact is counterbalanced by the fact that plaintiff's materials and offices are located here[,]" and "North Carolina is a convenient forum to determine the rights of the parties"), *disc. review denied*, 332 N.C. 343, 421 S.E.2d 145 (1992).

Finally, with respect to the fairness of this State's exercising jurisdiction, our courts have observed that "[i]t is well settled . . . 'that a defendant need not physically enter North Carolina in order for personal jurisdiction to arise.' " *Williamson Produce, Inc. v. Satcher*, 122 N.C. App. 589, 594, 471 S.E.2d 96, 99 (1996) (quoting *Better Bus. Forms, Inc. v. Davis*, 120 N.C. App. 498, 501, 462 S.E.2d 832, 834 (1995)). *See also Tom Togs*, 318 N.C. at 368, 348 S.E.2d at 787 ("Lack of action by defendant *in* a jurisdiction is not now fatal to the exercise of long-arm jurisdiction."). Moreover, Caccuro has not "pointed to any disparity between plaintiff[s] and [herself] which might render the exercise of personal jurisdiction over [her] unfair." *Id.*

We, therefore, hold that the contacts in this case rose to the level satisfying the constitutional minimum under the due process clause necessary in order to justify the exercise of personal jurisdiction over Caccuro. Accordingly, we affirm the order of the trial court denying Caccuro's motion to dismiss.

Affirmed.

Judges STEPHENS and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. KENNEDY EDMONDS, DEFENDANT

No. COA10-464

(Filed 21 June 2011)

1. Appeal and Error— preservation of constitutional issues— no specific objection—waiver

Constitutional arguments not raised by a specific objection at trial were waived.

2. Evidence— rape shield law—victim's inconsistent statements—not admissible

Evidence in an indecent liberties and statutory rape prosecution concerning the victim's inconsistent statements about her sexual history did not fit within any of the exceptions to the exclusionary mandate of the rape shield law.

3. Evidence— impeachment—victim's prior sexual history— not admissible

The trial court did not err in a prosecution for indecent liberties and statutory rape by not admitting evidence of the victim's prior sexual activity for impeachment purposes. The prosecuting witness offered no testimony about her previous sexual activity, the testimony defendant sought to elicit involved activity months earlier that had no direct relationship to this incident, and there was no issue of consent.

4. Evidence— statutory rape—victim's unredacted medical records—not admissible

The trial court did not err in a prosecution for indecent liberties and statutory rape by excluding the victim's unredacted medical records, which contained statements about her sexual history.

5. Appeal and Error— record on appeal —— closing argument not recorded—contention dismissed

An argument on appeal concerning the limitation of defendant's closing argument was dismissed where closing arguments were not recorded.

Appeal by defendant from judgments entered on or about 20 November 2009 by Judge Alma L. Hinton in Superior Court, Halifax County. Heard in the Court of Appeals 11 October 2010.

Attorney General Roy A. Cooper, III by Assistant Attorney General Sonya M. Calloway-Durham, for the State.

Paul F. Herzog, for defendant-appellant.

STROUD, Judge.

Defendant appeals from his convictions for statutory rape and indecent liberties with a child. He alleges there were constitutional and statutory errors in his conviction arising from limitations upon his cross-examination of the prosecuting witness, the admission of evidence, and the limitations upon his closing arguments. We disagree and find no error.

I. Background

Defendant was indicted for statutory rape of a person who is 13, 14, or 15 years old and indecent liberties with a child. He was convicted by a jury on 20 November 2009 of statutory rape of a fifteen year old and indecent liberties with a child. Defendant was sentenced to consecutive terms of 336 months to 413 months for the charge of statutory rape of a child and 21 to 26 months for the charge of taking indecent liberties with a child.

At trial, the State presented evidence that defendant telephoned Carolyn, a fifteen-year-old girl, to ask her to come to his home to pick up a camera and some money she was owed for babysitting. When she arrived at defendant's house, he pulled her inside. Carolyn testified that once she was inside, the defendant hit her, ripped her clothes, and penetrated her vaginally with his penis. As she was leaving the house, defendant told her not to tell anyone. When she arrived home, she told her father about the assault and identified defendant as her attacker. Her father called the police. After speaking with police at her home, Carolyn was taken to the hospital where medical personnel examined her and made notes of her explanation of what had happened. At trial, Carolyn identified the clothes that she had been wearing on the night in question. All three items of clothing were damaged. Both she and her father affirmed that they had not been torn when she left for defendant's house. The State also presented DNA evidence which showed that defendant could "not be excluded as a contributor" to the samples collected from Carolyn.

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1. We will refer to the minor child by the pseudonym Carolyn to protect the child's identity and for ease of reading.

Defendant testified that he knew Carolyn because she had come to visit his wife. He had arranged for Carolyn to purchase a camera from one of his friends and said that Carolyn called him to see if she could come to his house to pick up the camera. He claimed that she had attempted to leave without paying for the camera and that her pants had been torn when he tried to stop her from leaving with the camera without paying. Defendant further asserted that after accidentally tearing her pants, he had stopped trying to prevent her from leaving and she left with the camera. Defendant further testified that his nephew had been staying with him through the summer of the incident and that he had seen his nephew and Carolyn talking.

II. Analysis

Defendant first asserts that the trial court committed error in limiting his cross-examination of the prosecuting witness regarding her sexual history. He also asserts that the court erred in not admitting the un-redacted medical records of the prosecuting witness which contained information regarding her prior sexual history. Finally, defendant contends that his closing arguments were improperly limited when the court would not allow him to argue that his nephew or someone else committed the assault on Carolyn. He asserts these errors were prejudicial and in violation of his rights under the constitutions of both North Carolina and the United States as well as in violation of statutory law. For the reasons below, we disagree.

A. Asserted Constitutional Errors

[1] We begin by addressing defendant's assertion that his constitutional rights were violated by each of his assignments of error. Generally, "error may not be asserted upon appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection or motion." N.C. Gen. Stat. § 15A-1446(a) (2009); N.C.R. App. P. (10) (a)(1). Objections must "stat[e] 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). "Failure to make an appropriate and timely motion or objection constitutes a waiver of the right to assert the alleged error on appeal . . . ." N.C. Gen. Stat. § 15A-1446(b). Constitutional errors not raised by objection at trial are deemed waived on appeal. *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal."), *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002); *State v. Anderson*, 350 N.C. 152, 175, 513 S.E.2d 296, 310 (1999) (citations omitted).

A thorough review of the record in this case gives us no indication that defendant raised any constitutional grounds or argument as to any of the issues which the defendant now argues on appeal. Since those constitutional arguments were not raised by a specific objection at trial, those arguments are waived. *Id.*

B. Assertions of Error Based Upon Statutory Grounds

We next turn to defendant's assertions of error under statutory grounds as to (1) the limitations placed upon his cross-examination, (2) the court's refusal to admit Carolyn's un-redacted medical records and (3) the limitations placed upon his closing argument.

Defendant's first two issues fall under Rule 412, the rape shield law. The North Carolina Rules of Evidence provide for the admission of all relevant evidence absent some constitutional, statutory, or rule-based exception to its admission. N.C. Gen. Stat. § 8C-1, Rule 402 (2009). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2009). Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." N.C. Gen. Stat. § 8C-1, Rule 403 (2009). Rule 412 governs the use of the prior sexual history of the prosecuting witness in a prosecution for sex crimes and provides in relevant part:

> (a) As used in this rule, the term "sexual behavior" means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.
>
> (b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:
>
> (1) Was between the complainant and the defendant; or
>
> (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
>
> (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in

> such a manner as to lead the defendant reasonably to believe that the complainant consented; or
>
> (4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

N.C. Gen. Stat. § 8C-1, Rule 412 (2009). Rule 412 also provides for an *in camera* hearing to determine the relevancy and admissibility of evidence which might be in contravention of the Rule. *Id.* Our Supreme Court, in defining substantially similar exceptions in the former rape shield law, has said they are meant to "define those times when the prior sexual behavior of a complainant is relevant to issues raised in a rape trial, and are not a revolutionary move to exclude evidence generally considered relevant in trials of other crimes." *State v. Fortney*, 301 N.C. 31, 42, 269 S.E.2d 110, 116 (1980).

(1) Limitations on Cross-examination

[2] Defendant asserts that it was reversible error for the trial court not to allow him to question Carolyn regarding her inconsistent statements about her sexual history to the police at her home and to the medical personnel at the hospital. We disagree.

"The scope of cross-examination is . . . within the sound discretion of the trial court, and its ruling thereon will not be disturbed absent a showing of abuse of discretion." *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988) (citation omitted). This Court has characterized the proper limitations on defendant's right to cross-examination as follows:

> [A] defendant's right to cross-examination is subject to the sound discretion of the court and is therefore not absolute. *See State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990); *State v. Pallas*, 144 N.C. App. 277, 548 S.E.2d 773 (2001). The testimony sought to be elicited on cross-examination " 'must be relevant to some defense or relevant to impeach the witness[]' " and, in certain instances, may " 'bow to accommodate other legitimate interests in the criminal trial process[]' " such as the rules of evidence. *Pallas*, 144 N.C. App. at 283, 548 S.E.2d at 779 (citations omitted).

State v. Oliver, 159 N.C. App. 451, 454, 584 S.E.2d 86, 87 (2003).

The limitations on cross-examination in this case were based upon inadmissibility under Rule 412, as one of those instances as referenced in *Oliver*, in which the right to cross-examination must "bow

to accommodate other legitimate interests in the criminal trial process[,]" *Oliver*, 159 N.C. App. at 454, 584 S.E.2d at 87 (internal citation, quotation marks, and brackets omitted). There is no evidence presented in the record that defendant intended the evidence he proposed on cross-examination to fit within any of the exceptions to Rule 412's exclusionary mandate. Though defendant's apparent theory of the defendant's nephew "or someone else" having committed the crime would most closely align with the second exception, as there are no "specific instances of sexual behavior" to which defendant points, we must conclude that it does not fit therein. N.C. Gen. Stat. § 8C-1, Rule 412 (2009).

[3] The lack of a specific basis under Rule 412 for admission of the evidence does not end our analysis. As we have noted, our Supreme Court has made clear that the Rule does not "exclude evidence generally considered relevant in trials of other crimes." *Fortney*, 301 N.C. at 42, 269 S.E.2d at 116. Following that rationale, "a victim's statements about prior specific sexual activity are sometimes admissible for impeachment purposes even though the statements do not fall within one of the Rule 412(b) exceptions." *State v. Bass*, 121 N.C. App. 306, 465 S.E.2d 334 (1996); *see also State v. Younger*, 306 N.C. 692, 295 S.E.2d 453 (1982); *State v. Najewicz*, 112 N.C. App. 280, 436 S.E.2d 132 (1993) ("Thus, contrary to defendant's position, Rule 412 may not be utilized as a barrier to prevent inconsistencies in **sworn** testimony." (emphasis added)). But even when such testimony has been admitted, it has been with the realization that, "absent some factor which ties [the proposed testimony] to the specific act which is the subject of the trial, [it] is irrelevant due to its low probative value and high prejudicial effect." *Younger*, 306 N.C. at 698, 295 S.E.2d at 457. Therefore, "the relevance and probative value of such an inconsistent statement must be weighed against its prejudicial effect." *Id.* at 697, 295 S.E.2d at 456.

As defendant asserts *Younger* supports his position that his questioning regarding Carolyn's disparate statements to the police at her home and to medical personnel at the hospital regarding her prior sexual activity should have been allowed, we turn now to that case. In *Younger*, our Supreme Court held that not allowing the defendant to cross-examine the prosecuting witness regarding inconsistent statements she made in sworn testimony and to her treating physician regarding her sexual activity on the day of her supposed rape was reversible error. *Younger*, 306 N.C. at 698, 295 S.E.2d at 456-57. In its ruling, the Court observed that, "the fact that [a] question includes

previous sexual behavior does not prevent its admission into evidence, instead the sexual conduct reference goes to the degree of prejudice which must be balanced against the question's probative value." *Id.* In that case, where the prosecuting witness had testified in sworn testimony regarding her sexual activity on the day of the alleged rape and defendant argued the prosecuting witness had consented to their sexual encounter, the Supreme Court found that, in "light of the extreme importance of an eyewitness's credibility," "the denial of an opportunity to impeach the prosecuting witness with prior inconsistent statements was highly prejudicial to defendant's case." *Id.* at 698, 295 S.E.2d at 457.

Three relevant factors reduce the probative value of the evidence in the case *sub judice* and distinguish the value of that evidence offered in *Younger* from the evidence offered here. The first is that the prosecuting witness in this case offered no testimony regarding her previous sexual history. The second is that the testimony defendant sought to elicit from Carolyn was regarding sexual activity that occurred months before the incident in this case and as best we can tell bore no direct relationship to the incident in question here. Finally, there is no issue as to the consent of the prosecuting witness in this case. We fail to see, given the lack of an issue of consent, the apparent lack of any developed temporal or causative link between the proposed impeachment and the incident in question and particularly the lack of in-court testimony to form a strong basis for impeachment of the witness, how "the probative value" of the proposed impeachment in any way balances in the positive against its prejudicial effect, even in "light of the extreme importance of eyewitness credibility." *Id.*; *State v. Dorton*, 172 N.C. App. 759, 766-67, 617 S.E.2d 97, 102 (2005) ("Rather, defendant asserts he "simply wanted to attack [the victim's] credibility as a witness . . . ." The evidence defendant sought to present does not fall within any of the four exceptions to the Rape Shield Statute and is inadmissible under our Supreme Court's holding in *State v. Autry*, 321 N.C. 392, 364 S.E.2d 341, 345 (1988) (noting that, because a "victim's virginity or lack thereof does not fall within any of the four exceptions[,]" it is an area "prohibited from cross-examination by Rule 412[,]" and the rule does not violate a defendant's right to confront an adverse witness))"). In essence, defendant asked the trial court to do what our Supreme Court said it should not in *Younger*, to admit "some distant sexual encounter which has no relevance to this case other than showing that the witness [was] sexually active." *Younger*, 306 N.C. at 696, 295

S.E.2d at 456. The trial court properly sustained the State's objections to this evidence.

(2) Court's Refusal to Admit Carolyn's Un-redacted Medical Records

[4] Defendant next asserts that the trial court erred in not admitting Carolyn's un-redacted medical records which contained statements regarding her prior sexual history. We disagree.

The redacted portions of the medical records in this case indicated that Carolyn had told hospital personnel that she was "previously sexually active," and provided details regarding that previous sexual experience, including specific details of the type of sexual acts and whether or not a condom was used. These prior sexual experiences occurred at least months prior to the incident which is the subject of this case.

Though review of relevancy determinations is *de novo*, *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1992), "[a] trial court's ruling on an evidentiary point will be presumed to be correct unless the complaining party can demonstrate that the particular ruling was in fact incorrect." *Herring*, 322 N.C. at 749, 370 S.E.2d at 373 (citations and quotation marks omitted). "Even if the complaining party can show that the trial court erred in its ruling, relief will not ordinarily be granted absent a showing of prejudice." *Id.*

As we have noted above, the North Carolina Rules of Evidence provide for the admission of all relevant evidence absent some constitutional, statutory, or rule-based exception to its admission, but evidence of prior sexual behavior of the victim is limited by Rule 412. Defendant points to *In re: K.W.*, 192 N.C. App. 646, 666 S.E.2d 490 (2008), to justify introduction of the prosecuting witness's unredacted medical records in this case. In that case, this Court considered whether the Myspace page of a prosecuting witness in an abuse and neglect proceeding which called the witness's testimony regarding her virginity into question could be used for impeachment purposes, where her sworn testimony and statements to police regarding her prior sexual activity were in conflict. *In re: K.W.*, 192 N.C. App. at 650-51, 666 S.E.2d at 494-95. This Court found, following the reasoning in *Younger*, that failure to admit the Myspace page in question was harmless error. *Id.* Again, *In re: K.W.* is distinguished by its factual underpinnings. The probative value of the evidence here is reduced by the lack of sworn testimony regarding sexual history in this case. As we look to "the degree of prejudice which must be balanced

against the question's probative value[,]" *Younger*, 306 N.C. at 698, 295 S.E.2d at 456-57, and in light of our thorough review of the record in this case, we do not see how admission of the medical records of the prosecuting witness, with no sworn testimony developed at trial regarding the prior sexual history of the victim and with the proposed impeachment's having no discernible relationship to the alleged crime, particularly when consent to sexual conduct is not at issue, has any but salacious value at trial. Though we are mindful of the strong interest of defendant in cross-examination on prior inconsistent statements in trials of this type, we find little or no probative value in the admission of the redacted portion of the medical records and therefore find that it was properly excluded.

Even were we to accept that defendant's questioning had some measure of probative value and should have been allowed, there is no evidence that the ability to question Carolyn regarding her prior sexual history would have had any effect on the outcome of the trial. It is evident on the face of the record that defendant was allowed ample cross-examination of Carolyn regarding the events of the day in question as well as ample opportunity to examine her veracity with respect to that testimony. Given the lack of an offer of proof of any evidence to support defendant's apparent theory that Carolyn engaged in another sexual encounter which might explain the DNA findings and her physical examination, it is evident that the questioning intended by the defendant was not likely to have caused the jury to change its verdict. As any supposed error is not prejudicial, it will not yield a new trial. *Herring*, 322 N.C. at 749, 370 S.E.2d at 373.

(3) Limitation on Defendant's Closing Arguments

[5] Defendant contends that he was improperly limited in his closing arguments by the trial court's rulings that he could not argue that his nephew or someone else had committed the sexual assault against Carolyn. We disagree.

a. Standard of Review

It is established law in this state that whether closing arguments are proper "is a matter ordinarily left to the sound discretion of the trial judge, and [appellate courts] will not review the exercise of this discretion unless there is such gross impropriety in the argument as would be likely to influence the verdict of the jury." *State v. Riddle*, 311 N.C. 734, 738, 319 S.E.2d 250, 252 (1984) (citation omitted) ("Argument of counsel must be left largely to the control and discre-

tion of the trial judge, and counsel must be allowed wide latitude in their arguments which are warranted by the evidence and are not calculated to mislead or prejudice the jury."); *State v. Covington*, 290 N.C. 313, 328, 226 S.E.2d 629, 640 (1976).

Appellate review is to be made "solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to Rule 9." N.C.R. App. P. Rule 9(a). "The defendant . . . has the duty to see that the record on appeal is properly made up." *State v. McCain*, 39 N.C. App. 213, 215, 249 S.E.2d 812, 814 (1978) (citations omitted). "An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." *State v. Phifer*, 290 N.C. 203, 212, 297 S.E.2d 393, 396 (1982).

b. Substantive Law

Closing arguments of counsel are governed by N.C. Gen. Stat. § 15A-1230(a):

> (a) During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of the analysis of the evidence, argue any position or conclusion with respect to the matter at issue.

N.C. Gen. Stat. § 15A-1230(a)(2009).

c. Application

Defendant points to the following exchange with the trial court as supporting his contention that the trial court's limitations on his closing arguments constitute reversible error:

> THE COURT: You can argue that it wasn't him, but you can't argue that it was somebody else. Are we clear on my ruling?
>
> [DEFENSE]: I can argue that it wasn't this defendant?
>
> THE COURT: Correct, but you can't argue it was X.
>
> [DEFENSE]: Can I argue it must've been someone else?

THE COURT: No. Must have been somebody else is even more speculative. I mean, it does not cast more than a suspicion on another or raise more than a mere conjectural inference. That is the law that is here.

. . . .

THE COURT: Well, you can argue that he didn't have sex with her. You can argue that he didn't do what she said. But you can't say that somebody else did it.

. . . .

THE COURT: I understand what you are saying. But, understand what my ruling is, that you can't say somebody else. You are not allowed—you will not be permitted to argue that somebody else, John Doe, Jane Doe—that someone else did it.

[DEFENSE]: I can say it wasn't his DNA evidence?

THE COURT: You can. You can stand up there and say "not him." You cannot say "somebody else." Now, they can infer from whatever argument you make that it was somebody else, but you can't say it. You can imply so that they can infer, but you can't say it.

Although defendant argues that he was improperly prevented from arguing that someone else raped the victim, defendant is unable to point to specific portions of his closing argument which were limited by the trial court's ruling, as closing arguments in this case were not recorded. Therefore, defendant has not met his burden of establishing the trial court's alleged error within the record on appeal. This court will not "assume error by the trial judge when none appears on the record before [it]." *State v. Phifer*, 290 N.C. at 212, 297 S.E.2d at 393, 396 (1982). Therefore, the arguments are properly dismissed. *Id.*

III. Conclusion

For the reasons stated above, we find no error in the rulings of the trial court in this case as to the limitations placed on defendant's cross-examination, admission of redacted medical records excluding statements regarding prior sexual activity of the victim, and limitations upon defendant's closing arguments.

NO ERROR.

Chief Judge MARTIN and Judge STEPHENS concur.

IN RE A.J. M.-B.

[212 N.C. App. 586 (2011)]

IN THE MATTER OF: A.J. M.-B.

No. COA10-1350

(Filed 21 June 2011)

1. Appeal and Error— juveniles—underlying charge dismissed—adjudication not dismissed—appeal proper

An appeal in a juvenile matter was properly before the Court of Appeals where the trial court dismissed a charge of resisting a public officer and ordered commitment to the Department of Juvenile Justice and Delinquency Prevention. Although the trial court dismissed the case of resisting a public officer, the adjudication order was not dismissed.

2. Search and Seizure— anonymous tip—assertion of illegality—reliability

The denial of a juvenile's motion to dismiss a charge of resisting a public officer at the adjudication stage was reversed, along with the resulting adjudication of delinquency, where officers received an anonymous call about two juveniles walking behind a residence in an open field with a shotgun, responding officers saw two juveniles in a wood line but not in the field and not carrying a firearm, and the juveniles ran from the officers. One element of the offense presupposes lawful conduct by the officer and reasonable suspicion requires that a tip be reliable in its assertion of illegality. Since there were insufficient indicia of reliability as to any criminal activity by the juvenile, the State presented insufficient evidence that the officer acted lawfully in discharging or attempting to discharge a duty of his office.

3. Probation and Parole— post-supervision release—revoked—violation of condition

An order revoking a juvenile's post-release supervision was affirmed even though the underlying charge, resisting a public officer, was reversed where the juvenile had also violated an unrelated condition of his post-supervision release.

Appeal by juvenile from orders entered 30 April 2010 by Judge William G. Hamby, Jr. in Cabarrus County District Court. Heard in the Court of Appeals 28 April 2011.

IN RE A.J. M.-B.

[212 N.C. App. 586 (2011)]

Attorney General Roy Cooper, by Assistant Attorney General Jonathan D. Shaw, for the State.

Mary McCullers Reece, for juvenile-appellant.

CALABRIA, Judge.

A.J. M.-B. ("Andy")[1] appeals the trial court's Juvenile Orders dismissing the case of resisting a public officer and ordering Andy's commitment to the Department of Juvenile Justice and Delinquency Prevention ("DJJDP") for placement in a youth development center. We reverse in part and affirm in part.

I. BACKGROUND

Andy was adjudicated delinquent on two counts of breaking and entering and two counts of larceny after breaking and entering. On 25 June 2008, the trial court ordered a Level 2 disposition for Andy. As part of the disposition, Andy was required to cooperate with placement in a wilderness program or any out-of-home placement deemed necessary by the treatment team. Andy was also placed on supervised probation for twelve months. Andy was required, by the conditions of his probation, to remain on good behavior, to attend school regularly, and not to violate any laws.

On 5 December 2008, the trial court adjudicated Andy delinquent on a charge of simple assault. As a result, the trial court revoked Andy's probation and ordered him committed to the DJJDP for placement in a youth development center for a minimum period of six months, and thereafter, for an indefinite period. On 23 December 2009, Andy was released from the youth development center and placed on post-release supervision.

On 20 January 2010, Andy was charged with resisting a public officer. Andy's case was heard on 5 March 2010 in Cabarrus County District Court. At the adjudication hearing, Andy did not present any evidence. At the close of all of the evidence, Andy moved to dismiss the charge of resisting a public officer, and the trial court denied the motion. The trial court then adjudicated Andy delinquent for resisting a public officer. That same day, Kelly Stoy, a juvenile court counselor, filed a Motion for Review and asked the trial court to revoke Andy's post-release supervision. The trial court continued Andy's case for disposition.

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1. We use a pseudonym to protect the identity of the juvenile and for ease of reading.

On 30 April 2010, the trial court found that after Andy was placed on post-release supervision, he "committed another offense, missed school without an excuse, and was suspended for the remainder of the school year." During disposition, the trial court dismissed the case of resisting a public officer because, according to the court, it would serve "no useful purpose" since Andy had violated the terms of his post-release supervision. The trial court ordered Andy's commitment to the DJJDP for placement in a youth development center for a minimum of ninety (90) days and, thereafter, a period not to exceed his 18th birthday. Andy appeals.

II. INITIAL MATTER

[1] As an initial matter, we address whether Andy's appeal is properly before us. At disposition, Andy orally entered notice of appeal. However, since the trial court dismissed the case of resisting a public officer, the exact nature of Andy's appeal to this Court is unclear. Acknowledging these circumstances, on 14 December 2010, Andy filed a petition for writ of *certiorari*, asking this Court to hear the merits of his appeal from the adjudication order.

" 'An adjudication of delinquency is not a final order' " and is therefore not appealable. *In re M.L.T.H.*, ___ N.C. App. ___, ___, 685 S.E.2d 117, 121 (2009) (quoting *In re Taylor*, 57 N.C. App. 213, 214, 290 S.E.2d 797, 797 (1982)); *see also* N.C. Gen. Stat. § 7B-2602. In juvenile delinquency cases, appeal may only be taken from final orders, including an "order of disposition after an adjudication that a juvenile is delinquent[.]" N.C. Gen. Stat. § 7B-2602 (2009). *See also In re A.L.*, 166 N.C. App. 276, 277, 601 S.E.2d 538, 538 (2004) ("[a]ppealable final orders include '*[a]ny* order of disposition after an adjudication that a juvenile is delinquent or undisciplined.' ") (quoting N.C. Gen. Stat. § 7B-2602 (2003) (emphasis added)).

At a disposition hearing, "[t]he court may dismiss the case[.]" N.C. Gen. Stat. § 7B-2501(d) (2009). Generally, when a juvenile appeals a final disposition order, he also effectively appeals the underlying adjudication order. *See generally In re D.M.B.*, 196 N.C. App. 775, 776, 676 S.E.2d 66, 67 (2009) ("D.M.B. . . . appeals his 27 November 2007 adjudication and disposition . . . ."). The reason for also appealing the adjudication order is because "[t]he 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* and to the juvenile's probation status[.]" N.C. Gen. Stat. § 7B-2507 (a) (2009) (emphasis added).

In the instant case, on 30 April 2010, the trial court entered a disposition and commitment order ordering Andy's commitment to the DJJDP for placement in a youth development center. On the same day, the trial court entered a separate order, dismissing the case of resisting a public officer. The trial court stated:

> Given that the juvenile is returning to a youth development center for violating the terms of his post-release supervision, further action regarding the resisting a public officer [charge] would serve no useful purpose. As a disposition on the March 5, 2010 adjudication, the court does hereby dismiss the case of resisting a public officer.

Therefore, although the trial court dismissed the case of resisting a public officer, the adjudication order was not dismissed. The only way to appeal the adjudication of a case that was dismissed is to appeal the final order of disposition. Therefore, Andy's appeal is properly before us, and his writ of *certiorari* is denied.

III. MOTION TO DISMISS

[2] Andy argues that the trial court erred by denying his motion to dismiss the charge of resisting a public officer at his adjudication hearing. We agree.

"We review a trial court's denial of a motion to dismiss *de novo*." *In re S.M.S.*, 196 N.C. App. 170, 171, 675 S.E.2d 44, 45 (2009) (citation omitted). "Where the juvenile moves to dismiss, the trial court must determine 'whether there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of [juvenile's] being the perpetrator of such offense.' " *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)).

A. Resisting a Public Officer

"If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor." N.C. Gen. Stat. § 14-223 (2009).

[T]he elements of [N.C. Gen. Stat. § 14-223] are as follows:

1) that the victim was a public officer;

2) that the [juvenile] knew or had reasonable grounds to believe that the victim was a public officer;

3) that the victim was discharging or attempting to discharge a duty of his office;

4) that the [juvenile] resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and

5) that the [juvenile] acted willfully and unlawfully, that is inten tionally and without justification or excuse.

State v. Dammons, 159 N.C. App. 284, 294, 583 S.E.2d 606, 612 (2003) (citing N.C. Gen. Stat. § 14-223 (2001); 2 N.C.P.I.—Crim. 230.30 (1999)). In the instant case, the parties do not dispute that there was substantial evidence of the first, second, and fourth elements of the offense.

"The third element of the offense presupposes lawful conduct of the officer in discharging or attempting to discharge a duty of his office." *State v. Sinclair*, 191 N.C. App. 485, 489, 663 S.E.2d 866, 870 (2008). "Decisions of this Court recognize the right to resist illegal conduct of an officer." *State v. Sparrow*, 276 N.C. 499, 512, 173 S.E.2d 897, 905 (1970). Flight from a lawful stop may provide probable cause to arrest an individual for violation of N.C. Gen. Stat. § 14-223. *State v. Washington*, 193 N.C. App. 670, 668 S.E.2d 622 (2008). However, flight from an unlawful stop cannot be used to establish probable cause for an arrest. *State v. Williams*, 32 N.C. App. 204, 231 S.E.2d 282 (1977).

B. Investigatory Stops

"As the starting point in our analysis, we first determine whether the encounter between [Andy] and [the officer] was consensual or whether [the officer] was attempting to effectuate an investigatory stop." *Sinclair*, 191 N.C. App. at 489, 663 S.E.2d at 870. In the instant case, the State concedes that the officer, Officer Michael Price ("Officer Price") of the Concord Police Department, was attempting an investigatory stop.

An investigatory stop is lawful and proper as long as the officer's actions are both " 'justified at its inception, and . . . reasonably related in scope to the circumstances which justified the interference in the first place.' " *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779 (1979) (quoting *Terry v. Ohio*, 392 U.S. 1, 20, 20 L. Ed. 2d 889, 905 (1968)). "Before a law enforcement officer can conduct a brief investigatory stop, 'the officer must have a reasonable suspicion of criminal activity.' " *Washington*, 193 N.C. App. at 682, 668 S.E.2d at 629 (quoting

State v. McArn, 159 N.C. App. 209, 212, 582 S.E.2d 371, 374 (2003) (internal quotation and citation omitted)).

> The standard set forth in *Terry* for testing the conduct of law enforcement officers in effecting a warrantless "seizure" of an individual is that "the police officer must be able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant [the] intrusion."

Thompson, 296 N.C. at 706, 252 S.E.2d at 779 (quoting *Terry*, 392 U.S. at 21, 20 L. Ed. 2d at 906). Therefore, in order to determine whether Officer Price lawfully discharged or attempted to discharge a duty of his office, we must determine whether he had reasonable suspicion to stop Andy.

C. Reasonable Suspicion

1. Anonymous Tip Identifying a Particular Person

The instant case is similar to *Florida v. J.L.*, 529 U.S. 266, 146 L. Ed. 2d 254 (2000). In *J.L.*, there was also an anonymous caller who called law enforcement to express concern about a young person possessing a firearm. However, in *J.L.*, the caller identified the person carrying the gun as "a young black male standing at a particular bus stop and wearing a plaid shirt . . . carrying a gun." *Id.* at 268, 146 L. Ed. 2d at 259. When the officers in *J.L.* approached a group of black males at a bus stop and observed the defendant in a plaid shirt, they frisked the defendant and seized a gun from his pocket without observing anything suspicious. *Id.* The Supreme Court found that, in *J.L.*,

> the anonymous tip, with nothing more, did not constitute a reasonable suspicion and therefore did not justify the subsequent frisk of defendant. The Court reasoned that "unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity.' " *[J.L.*, 529 U.S.] at 270, 146 L. Ed. 2d at 260 (quoting *Alabama v. White*, 496 U.S. 325, 329, 110 L. Ed. 2d 301, 308 (1990) (citations omitted)).

In re D.D., 146 N.C. App. 309, 322-23, 554 S.E.2d 346, 355 (2001).

In the instant case, at 1:00 p.m. on 20 January 2010, an anonymous caller reported to law enforcement "two juveniles in Charlie district . . . walking, supposedly with a shotgun or a rifle" in "an open field behind a residence." A dispatcher relayed the information to

Officer Price, who exited his patrol vehicle and proceeded to an open field behind the residence, "about forty feet from where the initial call was called in." Officer Price was joined by two other officers, but they did not observe anyone in the field. The other officers then directed Officer Price to look to his right. When Officer Price looked to his right, he observed two juveniles "pop their heads out of the wood line" and look at him. However, neither of the juveniles was carrying firearms.

When Officer Price called out to the juveniles to stop, they "turned to the right and ran to the right around the [residence]." As Officer Price approached the residence, an unidentified female was standing outside. Officer Price testified that she asked him, "Are you looking for the two juveniles?" When Officer Price replied in the affirmative, the female told him that she observed two juveniles run down the road.

The Supreme Court in *J.L.* found that "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." 529 U.S. at 270, 146 L. Ed. 2d at 260 (internal quotation and citation omitted). Therefore, information regarding a specific person possessing a gun, without observing anything suspicious, did not provide reasonable suspicion to justify the frisk of the defendant. In the instant case, the anonymous tip alone, without more evidence, also did not establish reasonable suspicion. Therefore, since the State did not present sufficient specific, articulable facts to warrant the stop, Andy's subsequent detention and arrest were not justified.

2. Knowledge of Concealed Criminal Activity

> [R]easonable suspicion does not arise merely from the fact that the individual met the description given to the officers. As the Court stated in *J.L.*,
>
> an accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

State v. Hughes, 353 N.C. 200, 209, 539 S.E.2d 625, 632 (2000) (quoting *J.L.*, 529 U.S. at 272, 120 S.Ct. at 1379, 146 L. Ed. 2d at 261).

At the 5 March 2010 juvenile hearing, Officer Price testified as follows:

Q. [the State]. What was the description of the juveniles you were looking for?

A. [Officer Price]. I'm not exactly sure exactly what the description was. I don't—right now, but they said two juveniles in the area of the field behind the house we got the call at.

Q. But you had a description at the time?

A. Yes.

Q. And did [Andy] match that description?

A. Yes.

Andy's counsel requested that Officer Price's testimony be stricken since he could not provide the court with a description of the juveniles. The court overruled the objection. On cross-examination, Andy's counsel engaged in the following colloquy with Officer Price:

Q. Officer, did you take the call from—about these juveniles?

A. Excuse me?

Q. Did you speak to the caller about these juveniles?

A. No, I did not.

Q. Do you know who the caller was?

A. No.

Q. Do you know if this was a source that the department had relied upon in previous cases?

A. No.

Q. When you first saw [Andy] here, did you see a rifle or shotgun?

A. No.

Q. Thank you, sir.

Andy's counsel then argued to the court that "[a]ll you have here . . . is a case where multiple officers . . . are out here on an anonymous phone call about a rifle and a shotgun." He further argued that the officers saw two juveniles looking at them, but that there was no testimony that they looked frightened or that they looked suspicious in

any way, and they were not even in the field but were apparently near the field. Furthermore, Officer Price did not see Andy in the field, nor did he observe Andy carrying a firearm of any type, and the anonymous tipster had no knowledge of concealed criminal activity. *See Hughes*, 353 N.C. at 209, 539 S.E.2d at 632.

The Supreme Court suggested in *J.L.* that there may be "circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability." 529 U.S. at 273, 146 L. Ed. 2d at 262. However, the Court expressly held that a mere allegation that a person is carrying a firearm, without more, is insufficient to justify such an exception to the rule that officers must have reasonable suspicion before conducting an investigatory stop. *Id.* at 272-73, 146 L. Ed. 2d at 261-62.

In the instant case, the description of the juveniles' location merely helped to identify them. Such a tip, however, did not show that the tipster had knowledge of concealed criminal activity. There is no evidence in the record showing circumstances under which the danger alleged by the anonymous tipster—that two juveniles walking and carrying a firearm—justified Andy's subsequent detention without a showing that the tipster had knowledge of concealed criminal activity.

D. Insufficient Evidence

Reasonable suspicion requires that a tip be reliable in its assertion of illegality. The State's evidence, regarding the anonymous tip or Andy's actions at the time of the stop, was not sufficient to indicate any reliability as to the criminal activity alleged in the anonymous tip. The anonymous tip and subsequent corroboration by Officer Price merely established the reliability of the tip to identify a "determinate person." Since there were insufficient indicia of reliability as to any criminal activity by Andy established through the tip or subsequent corroboration by Officer Price, the State presented insufficient evidence that Officer Price acted lawfully "in discharging or attempting to discharge a duty of his office." *Sinclair*, 191 N.C. App. at 489, 663 S.E.2d at 870. Accordingly, we reverse the trial court's denial of Andy's motion to dismiss, and reverse the trial court's 5 March 2010 order adjudicating him delinquent for the charge of resisting a public officer.

IV. REVOCATION OF POST-RELEASE SUPERVISION

[3] Andy also argues that the trial court's order revoking his post-release supervision should be reversed and remanded because "[t]he new adjudication was a significant part of the basis" for revoking his

post-release supervision and the trial court dismissed the case of resisting a public officer. We disagree.

Initially, we note that in the portion of his brief addressing this argument, Andy failed to include "a concise statement of the applicable standard(s) of review for [this] issue[.]" N.C. R. App. P. 28(b)(6) (2010). Furthermore, he failed to include "citations of the authorities upon which [he] relies." *Id.* Therefore, we dismiss Andy's argument. *Id.*

However, even assuming *arguendo* Andy's argument is properly presented, the trial court's revocation of his post-release supervision was proper.

N.C. Gen. Stat. § 7B-2516 (2009) states, in pertinent part:

> (b) If the court determines by the greater weight of the evidence that the juvenile has violated the terms of post-release supervision, the court may revoke the post-release supervision or make any other disposition authorized by this Subchapter.
>
> (c) If the court revokes post-release supervision, the juvenile shall be returned to the Department for placement in a youth development center for an indefinite term of at least 90 days . . . .

N.C. Gen. Stat. § 7B-2516 (2009).

In the instant case, there were several conditions for Andy's post-release supervision. He was required to enroll in school and attend Cabarrus County Schools. In addition, Andy agreed to abide by all of the other terms of his post-release supervision. Furthermore, Andy agreed that if a court found that he violated "one or more" of the terms, he could be returned to a youth development center.

On 30 April 2010, the trial court revoked Andy's post-release supervision because the court found that he "missed school without an excuse, and was suspended for the remainder of the school year." Therefore, even though we reverse the trial court's order adjudicating Andy delinquent for the offense of resisting a public officer, the trial court was only required to find by the greater weight of the evidence that he violated "one or more" of the conditions of his post-supervision release. Andy does not dispute on appeal that the greater weight of the evidence showed that he "missed school without an excuse" or that he "was suspended for the remainder of the school year." "These findings are unchallenged on appeal and are therefore binding on this

Court." *In re D.L.H.*, 364 N.C. 214, 218, 694 S.E.2d 753, 755 (2010). Furthermore, these findings are sufficient to support the trial court's revocation of Andy's post-release supervision. The trial court's order revoking Andy's post-supervision release and committing him to the DJJDP for placement in a youth development center for a minimum of ninety (90) days and, thereafter, a period not to exceed his 18th birthday, is affirmed.

V. CONCLUSION

The trial court's denial of Andy's motion to dismiss, and the 5 March 2010 adjudication order, are reversed. Even though the trial court dismissed the case of resisting a public officer, under N.C. Gen. Stat. § 7B-2507(a), if Andy's adjudication was not reversed, his case of resisting a public officer would affect his delinquency history level, which is determined by calculating the sum of the points assigned to each of his prior adjudications. The trial court's 30 April 2010 order revoking Andy's post-supervision release is affirmed.

Affirmed in part, reversed in part.

Judges ERVIN and THIGPEN concur.

IN THE MATTER OF THE FORECLOSURE OF THE DEED OF TRUST OF ORMSBY KING HACKLEY, III, GRANTOR, AS RECORDED IN BOOK 1932, AT PAGE 689 OF THE HENDERSON COUNTY PUBLIC REGISTRY. RAINTREE REALTY & CONSTRUCTION, INC., SUBSTITUTE TRUSTEE. SEE APPOINTMENT OF SUBSTITUTE TRUSTEE AS RECORDED IN BOOK 1390, AT PAGE 190 OF THE HENDERSON COUNTY REGISTRY

No. COA10-757

(Filed 21 June 2011)

Appeal and Error— appealability—mootness

Respondent's appeal from the trial court's authorization of a substitute trustee to proceed with a foreclosure sale of certain real property as permitted by the deed of trust was dismissed as moot. The foreclosure was complete and the real property had been duly conveyed to the highest bidder at the foreclosure sale, and the Court of Appeals was unable to consider respondent's claims that the completed sale was void in violation of a bankruptcy stay.

IN RE FORECLOSURE OF HACKLEY

[212 N.C. App. 596 (2011)]

Appeal by respondent from order entered on or about 14 December 2009 by Judge Laura J. Bridges in Superior Court, Henderson County. Heard in the Court of Appeals 30 November 2010.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Travis L. Smuckler and Larry C. Harris, Jr., for petitioner-appellees.

F.B. Jackson and Associated Law Firm, PLLC, by Angela S. Beeker, for respondent-appellant.[1]

STROUD, Judge.

Ormsby King Hackley, III, ("respondent") appeals from a trial court's order authorizing Raintree Realty & Construction, Inc., as the substitute trustee, to proceed with a foreclosure sale of certain real property as permitted by the deed of trust. Because the foreclosure has been completed and the real property duly conveyed to the highest bidder at the foreclosure sale, and because we are unable to consider respondent's claims that the completed sale is void as in violation of a bankruptcy stay, this appeal is moot, so we dismiss respondent's appeal.

On 25 March 2009, United Bank and Trust Company ("the secured creditor"), filed a "Notice of Hearing in Foreclosure" with the Clerk of Superior Court, Henderson County ("the clerk"), requesting to proceed with a foreclosure and sale on a real estate security interest "described in a Deed of Trust dated, executed by [respondent], to Charles E. Jones, original Trustee for the benefit of United Bank and Trust Company, the original holder of the Note." The notice further stated that the deed of trust was given to secure a note made and executed by respondent in the amount of $200,000; respondent was in default on the note; the real estate security interest was described as a "1/4 undivided interest" in certain real property located in Henderson County and recorded in Deed Book 690 at Page 299 of the Henderson County Registry ("the subject real property"); Raintree Realty & Construction, Inc., was named as the substitute trustee; and a hearing was set on 21 April 2009 before the clerk. On 28 April 2009, the clerk continued the foreclosure hearing to 21 May 2009. On 29 May 2009, the secured creditor filed an "Amended Notice of Hearing in Foreclosure" changing the date of the hearing to 23 June 2009. Following two continuances, the hearing was held on 20 August 2009, and the clerk issued an order on 1 September 2009 denying the

1. In respondent's brief Angela Beeker's law firm is listed as Whitmore & Beeker. However, in respondent's reply brief Ms. Beeker's law firm is listed as F.B. Jackson and Associated Law Firm, PLLC.

petition for foreclosure and sale. On 9 September 2009, the secured creditor appealed from the clerk's order to Superior Court, Henderson County. On 19 December 2009, the Superior Court entered an "Order in Foreclosure[,]" permitting the trustee to proceed with the foreclosure sale. On 17 December 2009, the trustee filed a "Notice of Sale" of the subject real property. On 15 January 2010, respondent, filed a "Notice of Appeal" from the 19 December 2009 order permitting the trustee to proceed with the foreclosure sale. On 19 January 2010, respondent filed a "Notice of Bankruptcy" stating that "pursuant to 11 U.S.C § 362(a), the filing of said petition operates as an automatic stay of the initiation or continuation of any actions against [respondent], or its property in the above-styled action." On the same date, respondent filed a "Voluntary Petition" for Chapter 7 bankruptcy with the "United States Bankruptcy Court, North District of Georgia[.]" On 20 January 2010, the substitute trustee filed its first "Notice of Postponement of Sale" stating that the sale for the subject real property set for 20 January 2010 would be postponed until 9 February 2010. On 9 February 2010, the substitute trustee filed a second "Notice of Postponement of Sale" stating that the sale for the subject real property set for 9 February 2010 would be postponed until 19 April 2010.

On appeal, respondent contends that the trial court erred in authorizing the foreclosure sale as (1) the promissory note did not constitute a valid debt; (2) the judicial foreclosure action and deficiency judgment entered in the Kentucky Circuit Court on the same promissory note were *res judicata* and precluded a second foreclosure on the same note in North Carolina; (3) the subordination of a second mortgage to a third mortgage was not valid; and (4) "the proceeds of the sale of the collateral securing the first, second and third mortgages in Kentucky should have been applied to satisfy the second mortgage securing the note at issue." In addition to addressing respondent's arguments on appeal, the secured creditor also raises the additional argument that respondent's appeal is moot and should be dismissed.

Even though it is raised by the secured creditor, we first address the issue of mootness as this issue is dispositive and generally, an "appeal presenting a question which has become moot will be dismissed." *Matthews v. North Carolina Dep't of Transp.*, 35 N.C. App. 768, 770, 242 S.E.2d 653, 654 (1978) (citation omitted). The secured creditor argues that "because [the] debtor failed to post a bond to stay the foreclosure sale and the subject real property was foreclosed upon and sold to a third party, debtor's appeal should be denied based on the doctrine of mootness."

Our Supreme Court has stated that "[a] case is considered moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Lange v. Lange*, 357 N.C. 645, 647, 588 S.E.2d 877, 879 (2003) (citation and quotation marks omitted). When the questions originally at issue in a case are no longer at issue when the case is on appeal, the appeal is moot and should be dismissed. *N.C. Press Assoc., Inc. v. Spangler*, 87 N.C. App. 169, 171, 360 S.E.2d 138, 139 (1987). Specifically, the secured creditor argues that "the Debtor failed to post the bond required by N.C. Gen. Stat. § 1-292 to stay the execution of the judgment of the trial court, [and] the Secured Creditor proceeded by holding a valid foreclosure sale on April 19, 2010[;]" that this foreclosure sale "fixed" the rights of the parties as to the subject real property; and therefore, "rendered any appeal by the Debtor moot[.]" Respondent argues that when he filed for Chapter 7 Bankruptcy on 19 January 2010, "[p]ursuant to 11 U.S.C § 362, the filing of the bankruptcy imposed an automatic stay on the . . . foreclosure proceeding." Respondent further contends that the secured creditor did nothing "to acquire [] relief from [the bankruptcy] stay[,]" and the bankruptcy had not closed, been dismissed or discharged when the trustee sold the subject real property at foreclosure; therefore, the foreclosure sale was in violation of the bankruptcy stay. Respondent further argues that because the sale was in violation of the bankruptcy stay, the trustee's deed was invalid, as the secured creditor proceeded with a foreclosure sale in violation of N.C. Gen. Stat. § 45-21.22, and therefore, his appeal is not moot.

The secured creditor's mootness argument is based on the completed foreclosure sale of the subject real property. Respondent's counter-argument is based on the effect the 19 January 2010 bankruptcy filing had on the completed foreclosure sale. However, these substantive arguments raise issues which we cannot fully consider based on the record on appeal before us. In accord with North Carolina Rule of Appellate Procedure 28(c), the secured creditor raised the new issue of mootness in its brief, but did not include the required appendix in support of its new issue, pursuant to N.C.R. App. P. 28(d)(3). In response to the secured creditor's new issue, respondent filed a reply brief, pursuant to N.C.R. App. P. 28(h), including a supporting appendix. North Carolina Rule of Appellate Procedure 9(a) states that "[i]n appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any

other items filed pursuant to this Rule 9." Additionally, N.C.R. App. P. 9(a)(1)(j) states that

> [t]he record on appeal in civil actions . . . shall contain: . . . . copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all issues presented on appeal unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2).

Here, the record on appeal contains the trial Court's 19 December 2009 "Order in Foreclosure[,]" which permitted the substitute trustee to proceed with the foreclosure sale; the 17 December 2009 "Notice of Sale[;]" respondent's 15 January 2010 "Notice of Appeal" from the 19 December 2009 order; the 19 January 2010 "Notice of Bankruptcy" stating that "pursuant to 11 U.S.C. § 362(a), the filing of said petition operates as an automatic stay of the initiation or continuation of any actions against [respondent], or its property in the above-styled action[;]" respondent's "Voluntary Petition" showing that he filed for Chapter 7 Bankruptcy on 19 January 2010; the trustee's first "Notice of Postponement of Sale" stating that the sale for the subject real property set for 20 January 2010 would be postponed to 9 February 2010; and a second "Notice of Postponement of Sale" stating that the sale for the subject real property set for 9 February 2010 would be postponed to 19 April 2010. We note that the record does not include any documentation showing how respondent's bankruptcy proceeded or if or when the subject real property in question was ever actually sold in foreclosure. N.C.R. App. P. 11(c) permits an appellee to amend or submit a supplement to the printed record on appeal. The secured creditor did not make any amendment to or supplement the record on appeal to include this information.

Respondent's mootness argument in its reply brief makes reference to several documents contained in the appendix of the reply brief, which include an affidavit from respondent; an affidavit from A. Keith Logue, respondent's bankruptcy attorney, explaining the progress of respondent's bankruptcy proceedings; correspondence from Mr. Logue to the secured creditor's attorney explaining his understanding as to how the foreclosure would be affected by the bankruptcy filing; a responding email from the secured creditor's attorney regarding his understanding of how the bankruptcy would affect the foreclosure; a

summary from the "Pacer Service Center"[2] of the progress of respondent's bankruptcy case as of 10 June 2010; an affidavit from the secured creditor's attorney Larry C. Harry, Jr., summarizing the foreclosure and stating that the subject real property was sold on 19 April 2010; a "Final Report and Account of Foreclosure Sale" filed 10 June 2010 by the trustee showing how the proceeds from the sale were distributed and the deficiency remaining; and a "Trustee's Deed" filed 10 June 2010, showing that the trustee conveyed the property to the highest bidders from the 19 April 2010 sale.[3] As these documents were not provided as supplements to the printed record on appeal and, as our "review is solely upon the record on appeal[,]" N.C.R. App. P. 9(a), we cannot consider most of this information in the manner it was provided.

Yet this Court can take judicial notice of certain documents even though they were not included in the record on appeal. The only document that we are able to take judicial notice of in the appendix to respondent's reply brief is the recorded "Trustee's Deed" which was done as a result of the foreclosure sale in this same case and as directed by the foreclosure order. N.C. Gen. Stat. § 8C-1, Rule 201(b) (2009) states that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot

2. "Public Access to Court Electronic Records (PACER) is an electronic public access service that allows users to obtain case and docket information from federal appellate, district and bankruptcy courts, and the PACER Case Locator via the Internet." PACER, Public Access to Court Electronic Records, http://www.pacer.gov/ (last visited May 31, 2011).

3. These documents were also included as an appendix to respondent brief's in response to the secured creditor's 2 July 2010 "Motion for Dismissal of Appeal[,]" based on respondent's "failure to timely file the settled record on appeal as required by Rule 12(a) of the North Carolina Rules of Appellate Procedure." The secured creditor's motion to dismiss was denied by this Court on 22 July 2010. On 30 July 2010, the secured creditor filed a motion to reconsider his 2 July 2010 motion to dismiss arguing again that (1) respondent had not settled the record as required by N.C.R. App. P. 12 and (2) that respondent's appeal was moot as the foreclosure sale had already taken place. Respondent responded to this motion but did not include any supporting documents. This Court denied the secured creditor's motion to reconsider its motion to dismiss on 11 August 2010. We address the secured creditor's argument as to mootness on appeal, as this Court is permitted to address an issue of mootness at any time. *See Messer v. Town of Chapel Hill*, 346 N.C. 259, 260, 485 S.E.2d 269, 270 (1997) (stating that "whenever during the course of litigation it develops that . . . the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain an action merely to determine abstract propositions of law. If the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action." (citation, brackets, and quotation marks omitted)).

reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201(d) further states that "[a] court shall take judicial notice if requested by a party and supplied with the necessary information." Here, the fact that the foreclosure sale did occur and the property was conveyed by the trustee is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," *see* N.C. Gen. Stat. § 8C-1, Rule 201(b), specifically the Trustee's Deed. The accuracy of the emails, letters, and affidavits included in the appendix is subject to question; in fact, the parties themselves express these questions in their very correspondence. The Trustee's Deed provides evidence of the completed foreclosure sale of the subject real property on 19 April 2010. *See Rodriguez v. Rodriguez*, —— N.C. App. ——, ——, —— S.E.2d ——, ——, 2011 N.C. App. LEXIS 736, *5-6 (N.C. Ct. App., April 19, 2011) ("The record on appeal before our Court did not include any orders from the juvenile court subsequent to the 5 May 2008 adjudication order. Under these circumstances, it is appropriate for this Court to take judicial notice of the 4 August 2008 juvenile review order which was entered in the juvenile case. *See In re Stratton*, 159 N.C. App. 461, 462, 583 S.E.2d 323, 324 (referring to an order terminating the parental rights of the appellant by stating, '[t]his Court is entitled to take judicial notice of this recent order'), *disc. review denied and appeal dismissed*, 357 N.C. 506, 588 S.E.2d 472 (2003).").

Respondent does not dispute that the sale was completed and that the property was conveyed to the highest bidder from the sale, but instead asks us to make a ruling that the completed foreclosure sale was in violation of the bankruptcy stay. 11 U.S.C. § 362(a) (2009) states, in pertinent part, that the filing of a bankruptcy petition "operates as a stay, applicable to all entities, of[:]"

> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (4) any act to create, perfect, or enforce any lien against property of the estate[.]

Here, as noted above, the record on appeal contains respondent's 19 January 2010 bankruptcy petition and notice from respondent that he had filed for bankruptcy. Therefore, the filing of the petition by

respondent could operate as a stay on the foreclosure proceeding. *See id.* However, 11 U.S.C. § 362(c) further states that a bankruptcy stay will remain in place "until such property is no longer property of the estate;" the case is closed or dismissed; or a "discharge is granted or denied." 11 U.S.C. § 362(d) further states that "a party in interest" can make a request for a "grant [of] relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay[.]" As stated above, we cannot consider the documents addressing the progression of respondent's bankruptcy case, as respondent did not provide them as a supplement to the printed record on appeal.[4] Therefore, even though the record shows that respondent did file for bankruptcy, that fact alone does not permit us to draw the same conclusion as the respondent: that the trustee sold the subject real property *in violation* of the bankruptcy stay. As 11 U.S.C. § 362 notes, the stay could have been lifted by the bankruptcy court prior to the sale of the subject real property on 19 April 2010 by dismissing respondent's bankruptcy petition; the court could have declared that the subject real property in question was no longer "property of the [bankruptcy] estate[;]" or the court could have closed respondent's bankruptcy case or granted a discharge. *See* U.S.C. § 362(c). Additionally, the secured creditor, as a "party of interest[,]" could have requested and been granted a relief from the stay, prior to the foreclosure sale of the subject real property on 19 April 2010. *See* U.S.C. § 362(d). Without full documentation of the bankruptcy proceeding, we cannot properly make a determination regarding the status of the bankruptcy stay at the time of the sale. *See CRLP Durham, LP v. Durham City/County Bd. of Adjustment*, ___ N.C. App. ___, ___, 706 S.E.2d 317, 322 (2011) (" '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." (citations and quotation marks omitted)). We believe it would be particularly inappropriate and unwise for us to presume to make any ruling upon the issue of a violation of the bankruptcy stay, which would more properly be considered by the bankruptcy court and could possibly

4. We also note that the PACER summary provides only brief descriptions of documents and orders filed in the bankruptcy court and the documents themselves were not provided, so even if we were able to consider the PACER printout in the appendix to respondent's brief, we still would be unable to determine exactly what determinations the bankruptcy court made regarding the stay or the foreclosure sale. Although we could potentially examine all of the orders entered in the bankruptcy case ourselves and possibly take judicial notice of any relevant orders, it would be improper for this Court to go to such lengths to assist either party, as the content of the record on appeal is the responsibility of the parties.

impair the rights of the innocent third party who purchased the property at the foreclosure sale, where the record before us provides such limited information. Accordingly, we cannot consider respondent's arguments as to how the bankruptcy stay proceedings affected the foreclosure of the subject real property.

We are thus left with a completed foreclosure sale. The limited record before us shows that there was an order of foreclosure and we are able to take judicial notice that the sale was completed based on the recorded Trustee's Deed. N.C. Gen. Stat. § 1-292 (2009) states that

> [i]f the judgment appealed from directs the sale or delivery of possession of real property, the execution is not stayed, unless a bond is executed on the part of the appellant, with one or more sureties, to the effect that, during his possession of such property, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment is affirmed he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of this deficiency.

N.C. Gen. Stat. § 45-21.29A (2009) states in pertinent part that "[i]f an upset bid is not filed following a sale, resale, or prior upset bid within the period specified in this Article, the rights of the parties to the sale or resale become fixed." (emphasis added). N.C. Gen. Stat. § 45-21.34 (2009) provides, in pertinent part, that:

> Any owner of real estate . . . may apply to a judge of the superior court, prior to the time that the rights of the parties to the sale or resale becoming *fixed* pursuant to [N.C. Gen. Stat. § 45-21.29A] to enjoin such sale, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient.

(emphasis added). In *Goad v. Chase Home Fin., LLC*, —— N.C. App. ——, ——, 704 S.E.2d 1, 4 (2010), this Court summarized the relevant law in determining "when the rights of a party to a foreclosure sale have become 'fixed'[:]"

> A review of the relevant statutory procedures governing the conduct of foreclosure proceedings indicates that determining the point at which the rights of the parties have become fixed depends, in the ordinary course of events, upon the date by which an upset bid must be filed. According to N.C. Gen. Stat. § 45-21.27(a), an upset bid must be filed with the "clerk of superior court, with whom the report of sale or last notice of upset bid was filed by the close of normal business hours on the tenth day after the filing of the report of the sale or the last notice of upset bid." "If an upset bid is not filed [in compliance with N.C. Gen. Stat. § 45-21.27], the rights of the parties to the sale or resale become fixed." N.C. Gen. Stat. § 45-21.29A. As a result, in the absence of a properly filed upset bid, the rights of the parties to a foreclosure sale become fixed ten days after the filing of the report of the sale. *Id.* However, even if no upset bid is submitted, the rights of the parties to a foreclosure sale will not become fixed in the event that a temporary restraining order or preliminary injunction is properly obtained prior to the expiration of the ten-day period for filing upset bids. *Morroni*, 2004 N.C. App. LEXIS 997, at *6-7. As a result, the rights of the parties to a foreclosure sale become fixed upon either the expiration of the period for filing an upset bid, the provision of injunctive relief precluding the consummation of the foreclosure sale, or the occurrence of some similar event.

Here, the subject real property was sold and the Trustee's Deed was recorded. There is no indication in the record that respondent paid a bond to stay the foreclosure sale, *see* N.C. Gen. Stat. § 1-292; nor was there an upset bid during the 10 day period, *see* N.C. Gen. Stat. § 45-21.29A, or any indication in the record that respondent obtained a temporary restraining order or preliminary injunction prior to the end of the ten-day upset bid period. *See Goad*, ___ N.C. App. at ___, 704 S.E.2d at 4. Therefore, respondent's and the secured creditor's rights in the subject real property are fixed and respondent's appeal is moot. *See Austin v. Dare County*, 240 N.C. 662, 663, 83 S.E.2d 702, 702-03 (1954) (dismissing the plaintiff's appeal from the trial court's denial of its application for a temporary restraining order to stop the sale and conveyance of a certain piece of real property, and noting that the County had already sold and conveyed the land in question and the restraint of the County's sale of the property "is now an academic question" as "[i]t is quite obvious that a court cannot restrain the doing of that which has been already consummated."); *National Surety Corp. v. Sharpe*, 233 N.C. 644, 645, 65 S.E.2d 137, 138 (1951) (dismissing the plaintiff's appeal, and noting that it was "con-

ceded here that pending this appeal the sale was had and the property was sold as ordered and advertised. The question the appellant now seeks to present is academic."). Accordingly, we dismiss respondent's appeal.

DISMISSED.

Judges BRYANT and BEASLEY concur.

GAINES AND COMPANY, INC., PLAINTIFF v. WENDELL FALLS RESIDENTIAL, LLC, WAKE COUNTY, A SUBDIVISION OF THE STATE OF NORTH CAROLINA, AND WAKE COUNTY BOARD OF EDUCATION, DEFENDANTS

No. COA10-760

(Filed 21 June 2011)

1. Appeal and Error— aggrieved party on appeal—subsequent summary judgment

An appeal by Wake County from the denial of its motions to dismiss plaintiff's claims was itself dismissed where Wake County was subsequently granted summary judgment. Wake County was not an aggrieved party on appeal.

2. Liens— materialman's—work after sale and lien waiver—no contract with county

Plaintiff could not enforce a materialman's lien against Wake County where it had begun the work while the property was owned by a developer, a portion of the property was sold to Wake County, there was no contractual relationship between plaintiff and Wake County, and plaintiff sought to enforce a lien for work that was done after the conveyance and accompanying lien waiver. Plaintiff could not enforce the lien without a contractual relationship with Wake County.

Appeal by plaintiff from judgment entered 18 February 2010 by Judge Donald W. Stephens in Wake County Superior Court. Appeal by defendant from order entered 11 September 2009 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 14 December 2010.

Everett Gaskins & Hancock, LLP, by E.D. Gaskins, Jr., and The Wooten Law Firm, by Louis E. Wooten, III, for plaintiff-appellant.

Office of the Wake County Attorney, by Scott W. Warren and Mary Elizabeth Smerko, for Wake County.

BRYANT, Judge.

Because Gaines and Company, Inc., (Gaines) waived its materialmen lien rights prior to a conveyance of real property to Wake County, did not allege a contractual relationship between it and Wake County for work performed after the conveyance and, because materialmen liens on public bodies and buildings are prohibited by statute, Gaines may not enforce a lien on Wake County property. We therefore affirm the 18 February 2010 order granting summary judgment to Wake County. We dismiss Wake County's appeal.

Wendell Falls Development, LLC, (Wendell Falls Development) and Wendell Falls Residential, LLC, (Wendell Falls Residential) were engaged in the development of a 4,000 unit residential subdivision on over 920 acres in Marks Creek Township, Wake County. The acreage was divided into four tracts. On 25 May 2007, Gaines entered into a contract with Wendell Falls Residential to install a 900 gpm wastewater pump station and a 10″ DIP forced main to be located on each of the tracts (the Pump Station and Forced Main Contract). On the same day, Gaines also entered into a contract with Wendell Falls Residential for the installation of a gravity sewer outfall to be located on the same property as part of the same project (the Sewer Outfall Contract).

Gaines provided labor and materials for the Pump Station and Forced Main Contract beginning 29 May 2007 until 22 November 2008. Gaines provided labor and materials for the Sewer Outfall Contract from 5 June 2007 to 21 November 2008. Before the trial court, Wendell Falls stipulated that Gaines performed its work in accordance with the terms of the contracts.

Prior to 7 June 2007, Wendell Falls entered into discussions to sell a portion of the property under development to Wake County. Wake County made known throughout the closing process that it would require a lien waiver to close on the property. On 1 June 2007, Gaines signed an Owner/Seller/Contractor Affidavit and Indemnification which waived and released his right to file a mechanics' or materialmen's lien against the property for work done in the prior 120 days. On 7 June 2007, Wendell Falls transferred a 125 acre land parcel, known as Tract 1, to Wake County for $3,020,000.00; however, the property was

taken subject to an easement which allowed Gaines to complete work on the sewer improvements. Wake County did not procure title insurance or any other type of insurance for the closing on the property. Gaines continued to work to meet the terms of the Pump Station and Forced Main Contract and the Sewer Outfall Contract with Wendell Falls Residential; however, later, Wendell Falls Residential defaulted on its contractual obligations.

On 19 March 2009, within 120 days of the last day materials or labor were furnished for the entire project, Gaines filed a claim of lien on real property for Tracts 1, 2, 3, and 4. On 24 March 2009, within 180 days of the last day materials or labor were furnished, Gaines filed a complaint against Wendell Falls Development, LLC, Wendell Falls Residential, LLC, Wake County, and Roy Eugene Richardson—a record owner of a portion of the property Gaines claimed was subject to liens. Gaines claimed to be owed a principal amount of $120,183.96 under the Pump Station and Forced Main Contract and $281,678.82 under the Gravity Sewer Outfall Contract. On 14 July 2009, Gaines voluntarily dismissed defendants Wendell Falls Residential and Roy Richardson. The complaint was later amended to include defendants Wendell Falls Development, Wake County, and Wake County Board of Education, which was also claimed to be a legal or beneficial owner of a portion of the property subject to lien claims. Gaines sought recovery on grounds of breach of contract, quantum meruit and quantum valebant, and enforcement of lien on real property.

On 24 August 2009 and 3 September 2009, the Wake County Board of Education and Wake County, respectively, filed motions to dismiss Gaines' claims against them. Wake County presented defenses under Rule 12(b)(6)—failure to state a claim upon which relief can be granted; 12(b)(7)—failure to join a necessary party; lien waiver; estoppel; void lien; and sovereign immunity. On 11 September 2009, Wake County Superior Court Judge Abraham Penn Jones entered an order denying the motions to dismiss from Wake County and Wake County Board of Education. From this order Wake County appeals.

Along with its motion to dismiss, Wake County answered Gaines' complaint and filed a counterclaim for declaratory judgment seeking a declaration that Gaines lacked the required statutory authority necessary to enforce a statutory lien against public property. On 3 February 2010, Wake County filed a motion for summary judgment. A hearing was held in Wake County Superior Court on 16 February 2010, and on 18 February 2010, after reviewing the pertinent documents and considering the arguments of counsel, Judge Donald

Stephens found there existed no genuine issues of material fact and concluded that Wake County was entitled to judgment on all remaining claims as a matter of law. Summary judgment was entered in favor of Wake County.

On 4 May 2010, Gaines entered notice of voluntary dismissal with prejudice as to Wake County Board of Education. On 6 May 2010, Gaines appealed from the 18 February 2010 order granting Wake County's motion for summary judgment noting that, with the dismissal of all claims against Wake County Board of Education, all claims among all parties were resolved and the 18 February order granting summary judgment in favor of Wake County became the final judgment as to all remaining claims and parties.

On appeal from the order entered 11 September 2009 denying its motion to dismiss Gaines' claims, Wake County raises the following questions: did the trial court err in failing to grant Wake County's motion pursuant to Rule 12(b)(6) where Gaines (I) seeks to enforce a lien against a public body; and (II) failed to allege a waiver of sovereign immunity.

On appeal from the 18 February 2010 summary judgment order, Gaines raises the following questions: Did the trial court properly grant Wake County summary judgment based on (III) the Doctrine of Waiver, (IV) the Doctrine of Release, (V) the Doctrine of Estoppel, or (VI) sovereign immunity; and further, (VII) was Gaines entitled to partial summary judgment.

Wake County's Appeal

I and *II*

[1] First, we consider Wake County's appeal from the trial court order entered 11 September 2009 denying Wake County's motion to dismiss Gaines' claims.

Under North Carolina General Statutes, section, 1-271, "[a]ny party aggrieved may appeal in the cases prescribed in this Chapter."

> Only a "party aggrieved" may appeal from the superior court . . . . G. S. 1-271; *Langley v. Gore*, 242 N.C. 302, 87 S.E. 2d 519. "(A) 'party aggrieved' is one whose right has been directly and injuriously affected by the action of the court." McIntosh, North Carolina Practice and Procedure, § 675; *Freeman v. Thompson*, 216 N.C. 484, 5 S.E. 2d 434.

Waldron Buick Co. v. General Motors Corp., 251 N.C. 201, 205, 110 S.E.2d 870, 874 (1959). "Where a party is not aggrieved by the judicial order entered . . . his appeal will be dismissed." *Gaskins v. Blount Fertilizer Co.*, 260 N.C. 191, 195, 132 S.E.2d 345, 347 (1963) (citing G.S. 1-271; G.S. 1-277; *Coburn v. Timber Corp.* 260 N.C. 173, 132 S.E.2d 340); *see also McInerney v. Pinehurst Area Realty, Inc.*, 162 N.C. App. 285, 590 S.E.2d 313 (2004) (holding the defendant's appeal was dismissed where the party appealed from an order dismissing the plaintiff's case).

Here, Wake County appeals from an 11 September 2009 order denying its motion to dismiss Gaines' claims; however, on 18 February 2010, the trial court entered an order concluding that Wake County was entitled to summary judgment on all claims against it. Having prevailed before the trial court, Wake County is not an aggrieved party on appeal. *See Waldron Buick Co.*, 251 N.C. at 205, 110 S.E.2d at 874. Accordingly, Wake County's appeal is dismissed.

Gaines' Appeal

III, *IV*, and *V*

[2] Gaines argues that the trial court erred in granting Wake County summary judgment because Gaines neither expressly nor implicitly waived its materialmen lien rights, which Wake County should have understood, and did not release its materialmen lien rights to the property conveyed to Wake County. Also, Gaines contends that the trial court erred in granting Wake County summary judgment on the ground that Gaines was estopped from asserting a materialmen's lien on the property by virtue of the lien affidavit. We disagree.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). "We review a trial court's grant of a motion for summary judgment *de novo*." *Jones v. Miles*, 189 N.C. App. 289, 292, 658 S.E.2d 23, 26 (2008) (citing *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007)).

"The 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." *Carolina Bldg. Servs.' Windows & Doors, Inc. v. Boardwalk, LLC*, 362 N.C. 262, 264, 658

S.E.2d 924, 926 (2008) (quoting *O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006)).

> "[T]he statutory lien is incident to and security for a debt." *Eason v. Dew*, 244 N.C. 571, 574, 94 S.E. 2d 603, 606 (1956). "A laborers' and materialmen's lien arises out of the relationship of debtor and creditor, and it is for the debt that the lien is created by statute. Without a contract the lien does not exist." *Clark v. Morris*, 2 N.C. App. 388, 391, 162 S.E. 2d 873, 874 (1968) (quoting *Air Conditioning Co. v. Douglass*, 241 N.C. 170, 84 S.E. 2d 828 (1954).

Lowe's v. Quigley, 46 N.C. App. 770, 772, 266 S.E.2d 378, 379 (1980).

Under North Carolina General Statutes, Article 2—Statutory Liens on Real Property,

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

N.C. Gen. Stat. § 44A-8 (2009). Where the lien claimant does not deal directly with the owner of the property, the claimant may file a claim of lien on real property pursuant to N.C.G.S. § 44A-23. *See* N.C.G.S. § 44A-23 (2009) (Contractor's claim of lien on real property); *Watson Elec. Constr. Co. v. Summit Cos., LLC*, 160 N.C. App. 647, 587 S.E.2d 87 (2003). And, under N.C.G.S. § 44A-23, "the owner's property is subject to sale in a lien enforcement . . . ." *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 659, 403 S.E.2d 291, 296 (1991). "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.G.S. § 44A-10 (2009). However, Article 2 of Chapter 44A does not apply to public bodies or public buildings. N.C.G.S § 44A-34 (2009); *see also Morganton Hardware Co. v. Morganton Graded Sch.*, 151 N.C. 489, 493, 151 N.C. 507, 512, 66 S.E. 583, 585 (1909) ("Property which is exempt from seizure and sale under an execution, upon grounds of public necessity, must for the same reason be equally exempt from the operation of the mechanic's [or material-

men's] lien law, unless it appears by the law itself that property of this description was meant to be included . . . . Therefore, under an ordinary statute, a lien cannot be acquired for work done or materials furnished towards the erection of a public-school house . . . .").

Prior to 7 June 2007, Wendell Falls entered into discussions with Wake County to transfer a parcel of real property from the 920 acre development in Marks Creek Township. Wake County made known that it would require a lien waiver to close on the property. On 1 June 2007, Gaines signed an Owner/Seller/Contractor Affidavit and Indemnification.

> The undersigned, Wendell Falls Development, LLC "Owner", and Gaines and Company, Inc., hereinafter "General Contractor", being first duly sworn, depose and say:
>
> . . .
>
> 3. As to mechanics' and materialmen's liens:
>
> > Bills Unpaid for Improvements/Repairs (work or materials) Completed Within Last 120 Days
> >
> > Owner and General Contractor (if any) hereby certify that any work, service, or labor which has been done, or any fixture, apparatus or material which has been furnished in connection with, or to, the property has been paid in full EXCEPT those furnished by persons, firms, or corporations whose names appear on the WAIVER OF LIENS or SUBORDINATION OF LIENS section of this affidavit and indemnification. General Contractor (if any) hereby waives and releases his right to file a mechanics' or materialmen's lien against the Property.

On 7 June 2007, Wendell Falls transferred Tract 1, a 125 acre land parcel, to Wake County for $3,020,000.00. Meanwhile, Gaines continued to work to meet the terms of the Pump Station and Forced Main Contract and the Sewer Outfall Contract that still existed with Wendell Falls Residential. Pursuant to a sewer easement, Gaines was allowed to continue work on Tract 1 and later testified that the sewer outflow work was primarily on the acreage conveyed to Wake County. Wendell Falls defaulted on its contractual obligations, and, on 19 March 2009, Gaines filed a claim of lien on all real property in the Wendell Falls development, including the tract conveyed to Wake County—Tract 1. On 24 March 2009, Gaines filed a complaint alleging that Wendell Falls breached its contracts and that Wendell Falls was

liable to Gaines for the value of its labor and materials under theories of quantum meruit and quantum valebant. For these reasons, it was requested "that judgment be awarded to Gaines declaring a lien in favor of Gaines on the Property . . . [and] that the Property be sold in accordance with North Carolina General Statutes and the proceeds of such sale be applied against and/or in satisfaction of the judgment and lien recovered by Gaines hereunder[.]"

In anticipation of the conveyance of Tract 1 from Wendell Falls to Wake County, Gaines executed a waiver of its materialmen's lien rights within the Wendell Falls development. Now it seeks to enforce a lien on the property for work performed after the lien waiver was signed and after the property was conveyed to Wake County; however, Gaines does not allege a contractual relationship between Gaines and Wake County.[1] Absent such a relationship, Gaines cannot enforce a lien on Wake County real property. *See Lowe's*, 46 N.C. App. at 772, 266 S.E.2d at 379 ("Without a contract the lien does not exist."). Moreover, pursuant to N.C.G.S. § 44A-34, liens established under Article 2 of Chapter 44A are inapplicable to public bodies or public buildings. N.C.G.S. § 44A-34; *see also Morganton Hardware Co.*, 151 N.C. at 493, 151 N.C. at 512, 66 S.E. at 585 ("Property which is exempt from seizure and sale under an execution, upon grounds of public necessity, must for the same reason be equally exempt from the operation of the mechanic's [or materialmen's] lien law, unless it appears by the law itself that property of this description was meant to be included . . . . Therefore, under an ordinary statute, a lien cannot be acquired for work done or materials furnished towards the erection of a public-school house . . . ."). Therefore, because there was no contractual relationship between Gaines and Wake County, Gaines cannot enforce a lien on Tract 1, the real property conveyed to Wake County. Accordingly, Gaines' arguments premised upon enforcing a lien on property conveyed to Wake County are overruled.

VI and *VII*

Next, Gaines argues that the trial court erred by granting summary judgment in favor of Wake County on the basis of sovereign immunity, and, further, Gaines contends that it is entitled to partial summary judgment because Wake County cannot establish essential

1. On 19 March 2007, Gaines filed two claims of lien on real property (09M2610, 09M2611) in relation to the two contracts for the installation of the pump station, forced main, and the gravity sewer outfall. As to each claim, Gaines indicated that it "contracted with Wendell Falls Residential, LLC" for the furnishing of labor or materials.

elements of its affirmative defenses. Because of our holding on issues III, IV, and V, *supra*, we need not address these arguments.

Affirmed.

Judges STROUD and BEASLEY concur.

ANDREW J. MAXWELL, PLAINTIFF v. KRISTINA MAXWELL, DEFENDANT

No. COA10-1390

(Filed 21 June 2011)

1. Appeal and Error— interlocutory orders and appeals—failure to set specific date to reconvene and review

The trial court failed to set forth a specific date on which to reconvene and review plaintiff father's mental and emotional evaluation in a modification of child custody case, and thus, the Court of Appeals viewed the order as permanent and appropriate for immediate appellate review.

2. Contempt— civil—present ability to comply

The trial court did not err in a child custody modification case by holding plaintiff father in civil contempt based on competent evidence in the record regarding plaintiff's present ability to comply with the contempt order.

3. Child Custody and Support— requiring parent to submit to mental and emotional evaluation—court discretion

The trial court did not err in a child custody modification case by requiring plaintiff father to submit to a mental and emotional evaluation in the absence of a motion or sufficient notice under N.C.G.S. § 1A-1, Rule 35. The trial court's authority arose from the broad discretion granted to courts in child custody proceedings.

4. Child Visitation— improper suspension—written findings of unfitness as parent or best interest of child required

The trial court erred in a child custody modification case by suspending plaintiff father's visitation absent written findings of his unfitness as a parent or that it was in the best interest of the minor children.

Appeal by Plaintiff from order and judgment entered 10 February 2010 by Judge Donnie Hoover in Mecklenburg County District Court. Heard in the Court of Appeals 23 March 2011.

Horack Talley Pharr & Lowndes, P.A., by Kary C. Watson, Elizabeth Johnstone James and Christopher T. Hood, for Plaintiff-Appellant.

The Honnold Law Firm, P.A., by Bradley B. Honnold, for Defendant-Appellee.

BEASLEY, Judge.

Andrew J. Maxwell ("Plaintiff") appeals from an order and judgment in which the trial court granted Kristina Maxwell's ("Defendant") motion to modify child custody provisions of a previous consent agreement. For the reasons stated below, we affirm the trial court's order with respect to Plaintiff's first two arguments on appeal. However, we reverse and remand for further findings of fact with respect to Plaintiff's final argument.

At all times relevant to this action, Plaintiff was a citizen of Australia, and Defendant was a citizen of Mecklenburg County, North Carolina. Plaintiff and Defendant were married in Australia on 12 November 1999. The parties are the parents of four children (the "minor children"), a set of quadruplets, born on 18 January 2004. Sometime between 2005 and 2006 the parties separated, and Plaintiff returned to Australia while Defendant moved with the minor children to Mecklenburg County, North Carolina. On 1 August 2006, Plaintiff filed a Complaint in which he sought custody, or in the alternative, joint custody of the minor children. On 26 October 2007, the trial court entered a consent order addressing the issues of child custody and child support.

In its consent order, the trial court granted Defendant permanent custody of the minor children and provided visitation to Plaintiff. Additionally, the trial court ordered Plaintiff to make child support payments "in the amount of $900.00 Australian dollars per month." In December 2007, Defendant traveled to Australia with the minor children in an attempt to reconcile with Plaintiff and resume their marriage. The attempt at reconciliation proved to be unsuccessful. During Defendant's trip to Australia, Plaintiff became both physically and verbally abusive toward Defendant. Plaintiff confiscated Defendant's and the minor children's passports, confiscated a number of personal

papers that Defendant brought with her on the trip, and threatened to evict Defendant and the minor children from his home. "With the assistance of the United States Embassy in Australia, [Defendant] and the [m]inor [c]hildren were able to leave Australia on February 6, 2008 and return home to [North Carolina]."

Defendant filed a "Complaint and Motion for Domestic Violence Protective Order on February 12, 2008." On 5 June 2008, Plaintiff filed an action in the United States District Court for the Western District of North Carolina seeking a return of the minor children to Australia pursuant to provisions of the Hague Convention Action. The Hague Convention Action acted as a stay to any hearing on the Domestic Violence Protective Order and any other pending state actions. Following a trial held in the United States District Court on 31 July 2008, Defendant prevailed in Plaintiff's Hague Convention Action. Plaintiff subsequently appealed the District Court Ruling to the United States Court of Appeals for the Fourth Circuit. After receiving oral arguments, the Fourth Circuit Court of Appeals affirmed the District Court's ruling on 30 November 2009.

On 17 September 2009, while awaiting the decision of the Fourth Circuit Court of Appeals, Defendant filed a Motion for Order to Show Cause in Mecklenburg County District Court. Defendant requested that the trial court hold Plaintiff in contempt of court for violating several provisions of the 2007 consent order. On 3 December 2009, Defendant filed a Verified Motion for Show Cause Order. In her motion, Defendant alleged that Plaintiff failed to make the child support payments required by the terms of the October 2007 consent order.

On 10 February 2010, all issues raised throughout these proceedings were heard and addressed by the trial court. The trial court issued an Order and Judgment filed 15 May 2010, *nunc pro tunc*, 10 February 2010. In its Order and Judgment, the trial court granted Defendant's motion for a Domestic Violence Protective Order; denied Defendant's motion to modify the child support payments; denied and dismissed Plaintiff's motion for a finding of Contempt and Order to Show Cause; and granted Defendant's motion to modify the child custody provision of the October 2007 consent order. Additionally, the trial court held Plaintiff in civil contempt of court for failing to make child support payments.

On appeal Plaintiff argues that: (I) the trial court erred by holding him in civil contempt of court; (II) the trial court erred by ordering

him to submit to a medical evaluation of his mental and emotional state; (III) the trial court erroneously suspended his visitation absent a finding of his unfitness as a parent.

[1] As a preliminary matter, we must first address the grounds for appellate review of this action. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "However, interlocutory orders are immediately appealable if 'delaying the appeal will irreparably impair a substantial right of the party.' " *Hayes v. Premier Living, Inc.*, 181 N.C. App. 747, 750, 641 S.E.2d 316, 318 (2007) (quoting *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 311 (1999)).

"Normally, 'a temporary child custody order is interlocutory and does not affect any substantial right . . . which cannot be protected by timely appeal from the trial court's ultimate disposition . . . on the merits.' " *Brewer v. Brewer*, 139 N.C. App. 222, 227, 533 S.E.2d 541, 546 (2000) (quoting *Berkman v. Berkman*, 106 N.C. App. 701, 702, 417 S.E.2d 831, 832 (1992)). "[T]his Court held that 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 v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003). However,

> [a] trial court's mere designation of an order as 'temporary' is not sufficient to make the order interlocutory and nonappealable. Rather, an appeal from a temporary custody order is premature only if the trial court: (1) stated a clear and specific reconvening time in the order; and (2) the time interval between the two hearings was reasonably brief.

Brewer v. Brewer, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000) (citing *Cox v. Cox*, 133 N.C. App. 221, 233, 515 S.E.2d 61, 69 (1999)).

In *Senner*, our Court cited the reasonably brief time period exception noted in *Brewer* along with another case[1], and held that "where neither party sets the matter for a hearing within a reasonable

1. *LaValley v. LaValley*, 151 N.C. App. 290, 292-93, 564 S.E.2d 913, 915 (2002).

time, the 'temporary' order is converted into a final order." *Senner*, 161 N.C. App. at 81, 587 S.E.2d at 687. There, our Court focused on the length of time between the first and second hearing. In the current action, the relevant issue is the lack of a specific reconvening date. Accordingly, because the trial court fails to state a "clear and specific reconvening time" in its otherwise temporary order, it will be treated as a permanent one.

The trial court failed to designate the order as either temporary or permanent, and did not discuss whether the order was entered with prejudice as to any party. Modifying the terms of the parties' original consent order, the trial court ordered that all visitation between Plaintiff and the minor children was suspended until Plaintiff obtained a mental evaluation from a licensed psychologist or psychiatrist and satisfied the court that he possessed the "judgment and skills necessary to parent the Minor Children." The trial court further decreed that it would schedule a review of the custody/visitation order upon Plaintiff's completion of a mental evaluation. The trial court did not set a specific date by which it would revisit the issues of Plaintiff's visitation rights.

Arguably, the trial court's order could be construed as temporary because it was entered without prejudice as to either party, and contemplated further action following Plaintiff's mental health evaluation. *See Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677 (noting that this Court will find that an order is "temporary" where an order is entered without prejudice as to either party, or the order is not determinative of all the issues presented to the trial court for review). However, the trial court failed to set forth a specific date on which to reconvene and review Plaintiff's evaluation. Accordingly, this Court will view the trial court's order as a permanent one and appropriate for immediate appellate review. *See Cox*, 133 N.C. App. at 233, 515 S.E.2d at 69.

I.

[2] Plaintiff first argues that the trial court erroneously held him in civil contempt of court. We disagree.

"The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997).

> To hold a defendant in civil contempt, the trial court must find the following: (1) the order remains in force, (2) the purpose of the order may still be served by compliance, (3) the non-compliance was willful, and (4) the non-complying party is able to comply with the order or is able to take reasonable measures to comply.

Shippen v. Shippen, ––– N.C. App. –––, –––, 693 S.E.2d 240, 243 (2010) (citing N.C. Gen. Stat. § 5A-21 (2009)). "The party alleged to be delinquent has the burden of proving either that he lacked the means to pay or that his failure to pay was not willful." *Shumaker v. Shumaker*, 137 N.C. App. 72, 76, 527 S.E.2d 55, 57 (2000).

In the case at bar, Plaintiff contends that the trial court's findings of fact do not support its conclusion that he was able to comply with the underlying order. In its order, the trial court found that: "At all times since entry of the Consent Order, Plaintiff/Father has been aware of its terms, has had the ability to comply with the child support provisions, and has willfully failed to provide any child support as ordered without any justification." Defendant testified at trial that to her knowledge, Plaintiff has maintained employment from the date the consent order was executed until the date of the show cause hearing. Moreover, Defendant testified that during a conversation she had with Plaintiff, he explained that:

> he has a line of credit and other funding methods that he could just keep me in court for the rest of my life, and keep going after me and after me and after me unless I agree to go back, where he would give me, you know, the house and the car and half the tax benefit. But if I wasn't willing to do that, he was just going to keep after me for the rest of my life.

Defendant's evidence supports the trial court's determination that Plaintiff had the present ability to comply with the contempt order. "Though not specific, the finding regarding [Plaintiff's ability to comply with the consent order] is minimally sufficient to satisfy the statutory requirement for civil contempt." *Adkins v. Adkins*, 82 N.C. App. 289, 292, 346 S.E.2d 220, 222 (1986). In *Adkins*, the trial court found that the defendant had the present means to comply with a court order and purge himself of a finding of contempt. *Id.* at 291, 346 S.E.2d at 222. On appeal, this Court reviewed the record evidence and held that the unspecific finding of a present means to comply was sufficient in light of competent evidence presented in support of the findings. *Id.* at 292, 346 S.E.2d at 222. Similarly, in the present action, though the trial court's finding as to Plaintiff's ability with the contempt order is

unspecific, there was competent evidence in the record to support the trial court's finding of fact. Accordingly, Plaintiff's argument on appeal is without merit.

II.

[3] Plaintiff next argues that the trial court erroneously required him to submit to a mental and emotional evaluation in the absence of a proper motion or sufficient notice pursuant to N.C. Gen. Stat. § 1A-1, Rule 35 (2009). We disagree.

"In cases involving child custody, the trial court is vested with broad discretion." *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 97 (2000). "The decision of the trial court should not be upset on appeal absent a clear showing of abuse of discretion." *Id.* (citing *Falls v. Falls*, 52 N.C. App. 203, 209, 278 S.E.2d 546, 551 (1981)). In several prior cases, this Court has affirmed the decision of trial courts to order mental health evaluations in child custody and visitation cases. *See e.g. Pass v. Beck*, 156 N.C. App. 597, 601, 577 S.E.2d 180, 182 (2003) (holding that "the trial court did not abuse its discretion in delaying determination of the best interests of the child regarding visitation pending a recommendation from a psychologist"); *Rawls v. Rawls*, 94 N.C. App. 670, 676-77, 381 S.E.2d 179, 183 (1989) (holding that where the trial court's findings of fact support its order, the trial court did not abuse its discretion by requiring a defendant to consult a psychiatrist or a psychologist before awarding specific visitation rights).

In the case at bar, the trial court's findings support its conclusion that Plaintiff was required to obtain a mental health evaluation. The trial court found that:

> 15. [O]n or about February 3 and February 11, 2008, Plaintiff/Father made threats to do bodily harm to Defendant/Mother and his conduct and threats have caused Defendant/Mother to have a legitimate fear for her safety and well-being and a fear that Plaintiff/Father will carry out his threats.
>
> . . . .
>
> 17. While Defendant/Mother and the Minor Children were in Australia, Plaintiff/Father became physically and verbally abusive toward Defendant/Mother. He confiscated passports belonging to Defendant/Mother and the Minor Children, took Defendant/Mother's personal papers and records she had brought with her, tore out

the "attorneys" section of the local Yellow Pages, and threatened to evict Defendant/Mother from the residence occupied by the parties and the Minor Children, leaving her no place to live in a foreign country.

. . . .

19. After Defendant/Mother returned to Charlotte, Plaintiff/ Father attempted to coerce her return to Australia and threatened her with bodily harm and violence. Plaintiff/Father engaged in additional abusive behavior directed toward Defendant/Mother and the Minor Children, including leaving harmful and inappropriate voicemails on the family telephone answering machine.

20. Plaintiff/Father has engaged in a pattern of harassing and inappropriate contact with personnel at the elementary school attended by the Minor Children and with medical and dental providers for the Minor Children. The Court finds that this is in no way helpful to the Minor Children.

21. Additionally, Plaintiff/Father has repeatedly defamed and disparaged Defendant/Mother in communications to school personnel and to medical providers.

Based on a review of these findings of fact, it is clear that the trial court's decision to require Plaintiff to obtain a mental health evaluation did not represent an abuse of discretion. Citing N.C. Gen. Stat. § 1A-1, Rule 35(a) (2009), Plaintiff argues that because no motion was made pursuant to Rule 35 and he was not provided with the requisite notice, the trial court erred in requiring him to submit to a mental health evaluation. N.C. Gen. Stat. § 1A-1, Rule 35(a) provides that when the mental condition of a party is in controversy, a trial court judge may order the party to submit to a mental health evaluation. *Id.* "The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made." *Id.*

Plaintiff erroneously argues that the trial court violated N.C. Gen. Stat. § 1A-1, Rule 35(a) by ordering him to submit to a mental health evaluation. However, that statute is inapplicable where it authorizes the trial court to order a mental health examination for a "person in the custody or under the legal control of a party". Rule 35(a). The trial court's authority to require Plaintiff to submit to a mental health evaluation arose from the broad discretion granted to courts in child custody proceedings. Accordingly, Plaintiff's argument is without merit.

III.

[4] In his final argument on appeal, Plaintiff contends that "the trial court erred in suspending his visitation absent a finding of [his] unfitness as a parent." We agree.

The right of a parent to visit their children is both a "natural and legal right." *In re Custody of Stancil*, 10 N.C. App. 545, 551, 179 S.E.2d 844, 849 (1971). "[T]he court should not deny a parent's right of visitation at appropriate times unless the parent has by conduct forfeited the right or unless the exercise of the right would be detrimental to the best interest and welfare of the child." *Id.* Our General Assembly has provided that:

> [i]n any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, *shall make a written finding of fact* that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.

N.C. Gen. Stat. § 50-13.5(i) (2009) (emphasis added). Before a trial court can deny parents of their visitation rights, the trial court must first make a written finding of fact that: (1) the parent being denied the right to visitation is unfit; or (2) visitation would not be in the child's best interests.

In the case at bar, the trial court, possibly assuming it was entering a temporary order, failed to make the required findings of fact to support its conclusion that Plaintiff's visitation rights should be suspended until his completion of a mental health evaluation. In its order, the trial court suspended all visitation and contact between Plaintiff and the minor children. Absent from the trial court's order is a finding that the suspension of Plaintiff's visitation rights was in the best interest of the minor children, or otherwise addressed Plaintiff's unfitness as a parent. A review of the record and findings included in the trial court order suggests that, due to the involvement of the U.S. Embassy in assisting Defendant and the minor children with their emergent departure from Australia after Plaintiff confiscated their passports, the suspension of Plaintiff's visitation rights may indeed have been in the best interest of the minor children. However, a plain reading of N.C. Gen. Stat. § 50-13.5(i) requires courts to include a determination as to the fitness of a parent or the best interest of a child in its written findings of fact. Here, the trial court failed to make those findings. Accordingly, we reverse and remand this matter for

further findings of fact as to Plaintiff's fitness as a parent or the best interest of the minor children. *See Moore v. Moore*, 160 N.C. App. 569, 574, 587 S.E.2d 74, 77 (2003).

Affirmed in part; Reversed in part and Remanded.

Judges CALABRIA and STEELMAN concur.

INTEGON NATIONAL INSURANCE COMPANY, PLAINTIFF v. KELLEY PHILLIPS, TAMMY PHILLIPS, TARRAH KASEY JONES, HAILEE JONES, BY AND THROUGH HER GUARDIAN AD LITEM, ANDREW FINK, DONALD BURRELL PRESSLEY, AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., DEFENDANTS

No. COA10-1185

(Filed 21 June 2011)

Insurance— motor vehicles—identical excess clauses

The trial court erred in a declaratory judgment action arising out of a motor vehicle accident by granting summary judgment in favor of plaintiff insurance company. Defendant insurance company's policy did not provide primary coverage for the personal injury claim, but instead, the claim was prorated between the two insurers according to the limits specified in the policies because the "excess" clauses of both companies were identically worded and deemed mutually repugnant.

Appeal by defendant from order entered 8 June 2010 by Judge Mark E. Klass in Union County Superior Court. Heard in the Court of Appeals 8 March 2011.

Bennett & Guthrie, P.L.L.C., by Rodney A. Guthrie and Roberta B. King, for plaintiff-appellee Integon National Insurance Company.

McAngus, Goudelock & Courie, P.L.L.C., by John T. Jeffries and James D. McAlister, for defendant-appellant North Carolina Farm Bureau Mutual Insurance Company, Inc.

Fink & Hayes, P.L.L.C., by Andrew Fink, for Andrew Fink, guardian ad litem for defendant-appellee Hailee Jones.

HUNTER, Robert C., Judge.

Defendant North Carolina Farm Bureau Mutual Insurance Company, Inc. appeals from the trial court's entry of summary judgment in favor of plaintiff Integon National Insurance Company.[1] After careful review, we reverse.

Facts

This case arises out of a motor vehicle accident occurring on 8 January 2007, in Monroe, North Carolina. At the time of the accident, Tarrah Kasey Jones was driving a 2006 Chevrolet vehicle, with her sister, Hailee Jones, in the passenger seat. The Jones vehicle collided with a 2005 Mercury automobile, driven by Donald Burrell Pressley, in which Mr. Pressley's wife, Carolyn Pressley, was a passenger. As a result of the accident, Mrs. Pressley sustained fatal injuries; Mr. Pressley and Hailee Jones were also injured. It is undisputed that Tarrah Jones' negligence proximately caused the auto accident and the resulting injuries.

At the time of the accident, there were two automobile liability insurance policies providing coverage. Farm Bureau issued a policy to Tammy Phillips, Tarrah and Hailee Jones' mother, carrying bodily injury coverage of $100,000 per person and $300,000 per accident. Tarrah Jones was listed as an additional driver on Mrs. Phillips' policy. The only vehicle listed on Mrs. Phillips' policy was a 2005 Honda Civic. The other policy in effect at the time of the accident was issued by Integon to Kelley Phillips, Tarrah and Hailee Jones' stepfather. This policy carried bodily injury coverage limits of $50,000 per person and $100,000 per accident. The Integon policy listed a 1999 Buick Century as the only covered vehicle and the only drivers listed on the policy were Mr. and Mrs. Phillips.

The 2006 Chevrolet being driven by Tarrah Jones on 8 January 2007 was a rental car owned by Hertz Vehicles, Inc. Mrs. Phillips had rented the car while the listed 2005 Honda Civic was out for repairs.

Claims for personal injury were filed by Hailee Jones and Mr. Pressley, as well as a wrongful death claim by the estate of Mrs. Pressley. The wrongful death claim was settled, with Farm Bureau contributing its per person limit of $100,000 and Integon paying its per person limit of $50,000. Mr. Pressley also filed a claim to recover for his personal injuries stemming from the 8 January 2007 accident.

1. We note that defendants Donald Burrell Pressley, Kelley Phillips, Tammy Phillips, Tarrah Kasey Jones, and Hailee Jones, through her guardian *ad litem*, Andrew Fink, joined with Integon ("appellees") in filing a "joint appellees' " brief with this Court.

Mr. Pressley's claim was settled for $50,000: Farm Bureau paid $33,000 and Integon paid $16,667. As a result of these settlements, Integon has paid $66,667, leaving $33,333 on its per accident coverage to be applied toward the settlement of Hailee Jones' claim; Farm Bureau has paid $133,333, leaving more than its $100,000 per person coverage limit.

The Integon policy issued to Mr. Phillips and the Farm Bureau policy issued to Mrs. Phillips contain identical "Other Insurance" clauses:

> If there is other applicable liability insurance, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, *any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.*

(Emphasis added.)

Integon filed a declaratory judgment action on 24 August 2009, seeking a declaration that "the automobile insurance policy issued by [Integon] to Kelley Phillips as named insured provides excess coverage over the primary coverage provided under the automobile insurance policy issued by [Farm Bureau] to Tammy Phillips as named insured for any claims arising from the [8 January 2007] accident[.]" Both Integon and Farm Bureau filed motions for summary judgment in March 2010. After conducting a hearing on 19 April 2010 on the parties' cross-motions, the trial court entered an order on 8 June 2010 granting Integon's motion for summary judgment and, consequently, denying Farm Bureau's motion. Farm Bureau timely appealed to this Court.

Discussion

In this case, there is no dispute regarding the relevant facts. The sole issue is the proper interpretation of the personal automobile insurance policies issued by Integon and Farm Bureau. The interpretation and application of insurance policy provisions to undisputed facts is a question of law, appropriately resolved on summary judgment. *McGuire v. Draughon*, 170 N.C. App. 422, 424 25, 612 S.E.2d 428, 430 (2005); *Certain Underwriters at Lloyd's London v. Hogan*, 147 N.C. App. 715, 718, 556 S.E.2d 662, 664 (2001), *disc. review denied*, 356 N.C. 159, 568 S.E.2d 188 (2002).

It is well established that "[a]n insurance policy is a contract to be construed under the rules of law applicable to other written con-

tracts." *Chavis v. Southern Life Ins. Co.*, 76 N.C. App. 481, 484, 333 S.E.2d 559, 561 (1985), *aff'd*, 318 N.C. 259, 347 S.E.2d 425 (1986). "As with all contracts, the object of construing an insurance policy is to arrive at the insurance coverage intended by the parties when the policy was issued." *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 9, 692 S.E.2d 605, 612 (2010) (citation and internal quotation marks omitted). As the language of the policy "is the clearest indicator of the parties' intentions[,]" *Metropolitan Prop. and Casualty Ins. Co. v. Lindquist*, 120 N.C. App. 847, 851, 463 S.E.2d 574, 576 (1995), where the policy is unambiguous, "[i]t must be presumed the parties intended what the language used clearly expresses, and the [policy] must be construed to mean what on its face it purports to mean[,]" *Hartford Acc. & Indemnity Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946) (internal citations omitted). "[I]t is the duty of the court to construe an insurance policy as it is written, not to rewrite it and thus make a new contract for the parties." *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 346, 152 S.E.2d 436, 440 (1967).

With respect to the policy's terms, our Supreme Court has explained:

> "Where a policy defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect."

Gaston County Dyeing Machine Co. v. Northfield Ins. Co., 351 N.C. 293, 299-300, 524 S.E.2d 558, 563 (2000) (quoting *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 505-06, 246 S.E.2d 773, 777 (1978)).

Under the "Insuring Agreement" of the policies' liability coverage provisions, both Farm Bureau and Integon agree to "pay damages for *bodily injury or property damage* for which any *insured* becomes legally responsible because of an auto accident."[2] For purposes of liability coverage, an "insured" is defined, in pertinent part, as:

> 1. You or any *family member* for the ownership, maintenance or use of any auto or *trailer*.

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2. The Farm Bureau and Integon insurance policies are identical in all material respects. Unless specified otherwise, all quotations in this opinion reflect the language of both policies.

2. Any person using *your covered auto*.

Both Farm Bureau and Integon agreed at summary judgment, as well as now on appeal, that, under these terms, both policies provide liability coverage for the 8 January 2007 auto accident. The focus of the parties' dispute is their relative obligations under each policy in light of the policies' identically worded "Other Insurance" provisions:

> If there is other applicable liability insurance, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, *any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.*

(Emphasis added.) *See generally Aetna Casualty and Surety Co. v. Continental Ins. Co.*, 110 N.C. App. 278, 282, 429 S.E.2d 406, 409 (1993) ("An excess clause in an insurance policy 'generally provides that if other valid and collectible insurance covers the occurrence in question, the "excess" policy will provide coverage only for liability above the maximum coverage of the primary policy or policies.' " (quoting *Horace Mann Ins. Co. v. Continental Casualty Co.*, 54 N.C. App. 551, 555, 284 S.E.2d 211, 213 (1981))).

In construing "excess" clauses, this Court has explained that "[w]here it is impossible to determine which policy provides primary coverage due to identical 'excess' clauses, 'the clauses are deemed mutually repugnant and neither . . . will be given effect.' " *Iodice v. Jones*, 133 N.C. App. 76, 78, 514 S.E.2d 291, 293 (1999) (quoting N.C. *Farm Bureau Mut. Ins. Co. v. Hilliard*, 90 N.C. App. 507, 511, 369 S.E.2d 386, 388 (1988)). Where "excess" clauses are not given effect due to mutual repugnancy, the claim is "prorated between the two insurers according to their respective policy limits." *Hilliard*, 90 N.C. App. at 511, 369 S.E.2d at 389; *accord Hlasnick v. Federated Mut. Ins. Co.*, 136 N.C. App. 320, 330, 524 S.E.2d 386, 393 ("Where . . . the 'other insurance' clauses in the policies are mutually repugnant, the claims will be prorated."), *aff'd in part and disc. review improvidently allowed in part*, 353 N.C. 240, 539 S.E.2d 274 (2000). Thus, in this case, "if the identically worded 'excess' clauses in the [Farm Bureau] and [Integon] policies prevent a determination of which policy provides primary [liability] coverage, a *pro rata* allocation of [liability] coverage . . . is appropriate." *Iodice*, 133 N.C. App. at 78, 514 S.E.2d at 293.

In making the primary-excess coverage determination, the operative language in the "excess" clause is the phrase "vehicle you do not own." *See Sitzman v. Government Employees Ins. Co.*, 182 N.C. App.

259, 262, 641 S.E.2d 838, 841 (2007) (explaining that in construing "other insurance" provisions, "[t]he key language is the phrase 'with respect to a vehicle you do not own' "). The policies define the term "you" as:

> 1. The "named insured" shown in the Declarations; and
>
> 2. The spouse if a resident of the same household.

As Mrs. Phillips is the named insured on the Farm Bureau policy and Mr. Phillips is the named insured on the Integon policy, and each is the resident spouse of the other, they are the "you[s]" referred to in the "excess" clauses. *See id.* ("The word 'you' . . . means the named insured and, if they live together, the named insured's spouse.").

The policies also provide identical definitions for an "owned" vehicle:

> For the purpose of this policy, a private passenger type auto, pickup or van shall be deemed to be owned by a person if leased:
>
> 1. Under a written agreement to that person; and
>
> 2. For a continuous period of at least 6 months.

In addition to the policies' definition, N.C. Gen. Stat. § 20-4.01(26) (2009) provides that a vehicle is owned by the "person holding the legal title to a vehicle . . . ." *See also Gaddy v. State Farm Mut. Auto. Ins. Co.*, 32 N.C. App. 714, 716, 233 S.E.2d 613, 614 (1977) ("Under North Carolina law, an automobile is not 'owned' within the meaning of an automobile liability insurance policy until the transferee obtains from the transferor a properly executed certificate assigning and warranting title.").

It is undisputed in this case that Hertz, the rental agency from which Mrs. Phillips rented the 2006 Chevrolet, holds legal title to the vehicle and that neither Mr. Phillips nor Mrs. Phillips have any ownership interest in the rental car. Thus, according to the plain language of the Farm Bureau and Integon policies, the rental car is not an "own[ed]" vehicle for purposes of the "excess" clauses. *See Strickland v. State Farm Mut. Auto. Ins. Co.*, 133 N.C. App. 71, 75, 514 S.E.2d 304, 305 (1999) (rejecting argument, for purposes of applying an exclusion from liability coverage, that "since the rental car was a substitute for an owned vehicle, it must be considered owned by [the insured]").

Appellees nonetheless contend that the Farm Bureau policy provides primary coverage because the Hertz rental car "was a tempo-

rary substitute for the 2005 Honda, making the Hertz rental vehicle a 'covered auto' under the Farm Bureau policy." Appellees misinterpret the policies. There does not appear to be any dispute that the Hertz rental car was a "temporary substitute" for Mrs. Phillips' listed 2005 Honda Civic and thus qualifies as a "covered auto" under the Farm Bureau policy, which defines a "covered auto," in pertinent part, as:

> Any auto or trailer not owned by you while used as a *temporary substitute* for any other vehicle described in this definition which is out of normal use because of its:
>
> a. breakdown;
>
> b. *repair;*
>
> c. servicing;
>
> d. loss; or
>
> e. destruction.

(Second and third emphasis added.) Indeed, Farm Bureau, in its appellate brief, concedes that "Mrs. Phillips rented th[e] [2006 Chevrolet] to temporarily replace the 2005 Honda Civic vehicle covered under the Farm Bureau policy, as that vehicle was out of use due to repair." Farm Bureau's policy's "excess" clause, however, does not differentiate between primary and excess coverage based on whether the vehicle at issue is a "covered auto," but, rather, whether the vehicle is "own[ed]" by the named insured or his or her resident spouse. *See Sitzman*, 182 N.C. App. at 263, 641 S.E.2d at 841 (noting, in construing "excess" clause identical to the clauses in this case that the insurer's "excess clause differentiates on the basis of whether the insured owns, or does not own, the vehicle"). Thus the determinative factor under these policies is ownership of the vehicle, not its status as a covered auto.

As neither Mr. Phillips nor Mrs. Phillips owned the Hertz rental car, the Farm Bureau policy provides excess liability coverage with respect to Hailee Jones' personal injury claim. Similarly, under the terms of Integon's identically worded "excess" clause, it purports to provide primary coverage. Nevertheless, relying on this Court's holding in *Iodice*, appellees argue that identical "excess" clauses "are not always mutually repugnant." In *Iodice*, 133 N.C. App. at 78, 514 S.E.2d at 293, this Court held that "identically worded" excess clauses were not mutually repugnant because they "d[id] not have identical meanings . . . ." In reaching this conclusion, the *Iodice* Court reasoned:

> Because "you" is expressly defined as the named insured and spouse, the Nationwide "excess" clause reads: "[A]ny insurance we provide with respect to a vehicle [Penney] do[es] not own shall be excess over any other collectible insurance." It follows that Nationwide's UIM coverage is not "excess" over other collectible insurance (and is, therefore, primary), because the vehicle in which the accident occurred is owned by Penney. The GEICO "excess" clause reads: "[A]ny insurance we provide with respect to a vehicle [Iodice's mother] do[es] not own shall be excess over any other collectible insurance." It follows that GEICO's UIM coverage is "excess" (and is, therefore, secondary), because the vehicle in which the accident occurred is not owned by Iodice's mother. Accordingly, Nationwide provides primary UIM coverage in this case.

Id. at 78-79, 514 S.E.2d at 293.

Here, in contrast to *Iodice*, the Farm Bureau and Integon policies have "identical meanings." As the "you" referenced in the policies is defined as the named insured or his or her resident spouse, the Farm Bureau excess clause reads: "[A]ny insurance we provide for a vehicle [Mrs. Phillips or her spouse, Mr. Phillips,] do not own shall be excess over any other collectible insurance." Similarly, the Integon excess clause provides: "[A]ny insurance we provide for a vehicle [Mr. Phillips or his spouse, Mrs. Phillips,] do not own shall be excess over any other collectible insurance." Since neither Mr. Phillips nor Mrs. Phillips owned the Hertz rental car, the Farm Bureau and Integon policies, unlike the policies at issue in *Iodice*, have identical meanings when applied to the facts in this case.

Due to the "excess" clauses being identically worded, it is "impossible . . . to determine which policy is primary," and thus the "excess" clauses must be deemed mutually repugnant, with neither clause being given effect. *Aetna Cas. and Surety Co.*, 110 N.C. App. at 282, 429 S.E.2d at 409; *accord Alliance Mutual Ins. Co. v. N.Y. Central Ins. Co.*, 70 N.C. App. 140, 142, 318 S.E.2d 524, 525 (1984) ("Where, as here, the excess insurance clauses are identical in language, we do not see how we can hold the coverage of either company is primary or excess."). As a result, the claim must be "prorated between the two insurers according to their respective policy limits." *Hilliard*, 90 N.C. App. at 511, 369 S.E.2d at 389; *see N.C. Farm Bureau Mut. Ins. Co. v. Bost*, 126 N.C. App. 42, 52, 483 S.E.2d 452, 459 ("Both policies have 'Other Insurance' provisions which are identical, and therefore, the provisions nullify each other, leaving Farm Bureau and defendant

Allstate to share the Ezzelle settlement on a pro rata basis."), *disc. review denied*, 347 N.C. 138, 492 S.E.2d 25 (1997); *Onley v. Nationwide Mutual Ins. Co.*, 118 N.C. App. 686, 690, 456 S.E.2d 882, 884 (holding identical "excess" clauses were "mutually repugnant" and thus neither could be given effect with regard to UIM benefits; both policies stated that coverage provided with respect to vehicle not owned by insured was excess over any other collectible insurance), *disc. review denied*, 341 N.C. 651, 462 S.E.2d 514 (1995); *Alliance Mutual Ins. Co.*, 70 N.C. App. at 142, 318 S.E.2d at 525 ("When . . . neither policy is primary or excess, we must hold that the ["excess"] clauses are mutually repugnant and the coverage must be prorated.").

Appellees further argue that the "purpose behind North Carolina's Financial Responsibility Act—to compensate innocent victims"—is "best served if this Court upholds the ruling of the Trial Court." The Motor Vehicle Safety and Financial Responsibility Act ("FRA"), N.C. Gen. Stat. §§ 20-279.1 through -279.39 (2009), "is remedial in nature and is 'to be liberally construed' " in order to accomplish its " 'avowed purpose' " of " 'compensate[ing] the innocent victims of financially irresponsible motorists.' " *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 573, 573 S.E.2d 118, 120 (2002) (quoting *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989)). This goal, our Supreme Court has explained, "is best served when the statute is interpreted to provide the innocent victim with the fullest possible protection." *Proctor v. N.C. Farm Bureau Mutual Ins. Co.*, 324 N.C. 221, 225, 376 S.E.2d 761, 764 (1989). Thus, to effectuate FRA's purpose, "when the terms of [a] policy conflict with the statute, the provisions of the statute will prevail." *Wilson v. State Farm Mut. Auto. Ins. Co.*, 327 N.C. 419, 424, 394 S.E.2d 807, 810 (1990).

Appellees, however, do not suggest that any provisions of the policies at issue here are in conflict with the FRA—indeed, in all material respects, the Farm Bureau and Integon policies are identical and have been approved by the North Carolina Rate Bureau. Rather, appellees simply contend that any holding reversing the trial court is inconsistent with the purpose of the FRA because "[a] finding that the Farm Bureau policy is primary and the Integon policy excess provides a more complete recovery for Hailee Jones." While we certainly sympathize with appellees' position, the policies do not conflict with the provisions of the FRA, and this Court is not free to rewrite the parties' policies. *Allstate Ins. Co.*, 269 N.C. at 346, 152 S.E.2d at 440.

Although the trial court did not explicitly conclude that Farm Bureau's policy provided primary liability coverage over Integon's

excess coverage, that determination is implicit in the trial court's granting Integon's motion for summary judgment. As Farm Bureau's policy does not provide primary coverage for Hailee Jones' personal injury claim, but, rather, the claim must be prorated according to the limits specified in the policies, the trial court erred in granting summary judgment in favor of Integon. Accordingly, we are bound to reverse the trial court's summary judgment order.

Reversed.

Judges STEPHENS and ERVIN concur.

WAKE FOREST GOLF & COUNTRY CLUB, INC., PLAINTIFF v. TOWN OF WAKE FOREST, VIVIAN A. JONES, IN HER OFFICIAL CAPACITY AS MAYOR, CHRIS KAEBERLEIN, ANNE HINES, FRANK DRAKE, PETE THIBODEAU, MARGARET STINNETT, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WAKE FOREST BOARD OF COMMISSIONERS, DEFENDANTS

No. COA10-972

(Filed 21 June 2011)

1. Zoning— modification of special use permit—estoppel

The trial court did not err in a declaratory judgment action by concluding that defendant town's refusal to consider and act upon plaintiff's 2009 application for a modification to a special use permit was not unlawful. Plaintiff was estopped from attacking the zoning ordinance because it voluntarily designated the golf course as open space.

2. Declaratory Judgments— writ of mandamus—mandatory injunction

The trial court did not err in a declaratory judgment action by concluding that plaintiff was not entitled to a writ of *mandamus* or a mandatory injunction because plaintiff had no right to demand that the Board of Commissioners consider its 2009 application for a modification to a special use permit.

Appeal by plaintiff from judgment entered 6 July 2010 by Judge Shannon R. Joseph in Wake County Superior Court. Heard in the Court of Appeals 26 January 2011.

The Brough Law Firm, by Michael B. Brough, for plaintiff-appellant.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Charles George, and Tobias S. Hampson, for defendant-appellees.

STEELMAN, Judge.

Where Wake Forest Golf & Country Club, Inc. (WFGCC) voluntarily designated its entire golf course as open space in its 1999 PUD application and subsequently exercised the right to develop the property in accordance with the special use permit, the Wake Forest Board of Commissioners did not abuse its discretion when it refused to consider WFGCC's 2009 application to reduce the area covered by the special use permit in order to selectively develop the remaining property for residential use. Where WFGCC had no right to demand that the Board of Commissioners consider its 2009 application, it was not entitled to the issuance of a writ of mandamus or to injunctive relief.

I. Factual and Procedural Background

WFGCC owned a 165.5 acre tract of real property located in Wake Forest and used 149 acres as a golf course and county club. In 1998, WFGCC sold approximately 16 acres of the property to Oakmark Development Co., LLC (Oakmark) for the development of a Planned Unit Development (PUD) contingent upon approval by the Town of Wake Forest (Wake Forest). On 4 February 1999, Oakmark submitted an application for a special use permit (1999 application) authorizing the construction of the PUD. The proposed PUD included four small tracts of land to be developed as follows: Tract 1 (5.5 acres)—twenty townhomes; Tract 2 (4.45 acres)—ten townhomes; Tract 3 (1.7 acres)—six "zero lot line" homes[1]; and Tract 4 (5 acres)—commercial. In 1999, the property was zoned R-40W by Wake Forest, which allowed a maximum density of one dwelling unit per acre and required that 25% of the acreage within the PUD remain as open space. The tracts of land that Oakmark intended to purchase and develop did not meet the above requirements. The zoning ordinance required additional open space from the remainder of WFGCC's property to be included in the development.

Because the golf course had been existence for 32 years and WFGCC intended to continue to operate the golf course, WFGCC did

1. Prior to approval, the 1999 application was amended to delete the six "zero lot line" homes from Tract 3, reducing the total number of proposed residences to 30.

not deem it necessary to designate a specific portion of its property for inclusion in the PUD, and the entire 149 acres of golf course was designated as open space in the 1999 PUD application. On 18 May 1999, the Wake Forest Board of Commissioners approved a special use permit authorizing development of the PUD. One of the specific conditions of approval was that "[t]he entire acreage of the [WFGCC] shall be subject to the provisions and conditions of the special use permit and master plan as approved including, but not limited to, calculations of density, open space, and impervious surface area." Upon approval, WFGCC sold Oakmark Tracts 1, 2, and 4. Oakmark developed 20 townhomes on Tract 1, which is known as Fairway Villas. In 2005, Wake Forest approved a revised plan for Tract 2 and Oakmark developed 10 single-family detached homes known as Clubhouse Villas. Tract 4 was sold to Wake Union Baptist Church and remains undeveloped.

Over time, the golf course and country club became economically infeasible to operate and in November of 2007 it was closed. WFGCC began to investigate alternative uses for the property and determined it would be best to selectively develop the property for residential use. WFGCC entered into a contract to sell its remaining property to a professional real estate developer, contingent upon approval by Wake Forest of a development plan. On 10 December 2007, several individuals residing near the property and the homeowners association of Fairway Villas filed a complaint against WFGCC, Oakmark, Wake Forest, and Joel R. Young, WFGCC's president, individually, alleging that WFGCC's property had to remain in use as a golf course in perpetuity in accordance with the 1999 PUD. After defendants filed motions for summary judgment, the plaintiffs voluntarily dismissed their action on 22 May 2008.

On 1 September 2009, WFGCC submitted an application to Wake Forest for a modification of the 1999 special use permit. WFGCC sought to "remove from the coverage of the existing [special use permit] that portion of the Remaining Property that is not necessary to comply with the density, open space, impervious surface, and other requirements of the Ordinance related to the approved or constructed residential components (i.e. Tracts 1 and 2) of the original PUD." The 2009 application also sought to delete Tract 4 from the PUD. WFGCC proposed to reduce the area covered by the special use permit from 165.5 acres to 40 acres to comply with the minimum requirements for

2. Because of the litigation described above, the contract to sell was never executed and no development application was submitted to Wake Forest.

a residential PUD that included "cluster development" such as Fairway Villas and Clubhouse Villas.

On 15 December 2009, the Wake Forest Board of Commissioners elected not to conduct a public hearing or otherwise consider the 2009 application. On 14 January 2010, WFGCC filed a complaint against Wake Forest, Vivian A. Jones, in her official capacity as Mayor, and Chris Kaeberlein, Anne Hines, Frank Drake, Pete Thibodeau, and Margaret Stinnett, in their official capacities as members of the Wake Forest Board of Commissioners (collectively, defendants) and alleged that it was entitled to a declaratory judgment that the Board of Commissioners' refusal to consider the 2009 application was in violation of Article I, Section 19 of the North Carolina Constitution and was otherwise unlawful. WFGCC also sought a writ of mandamus or a mandatory injunction requiring the Board of Commissioners to consider the 2009 application. On 23 February 2010, defendants filed separate motions to dismiss pursuant to Rule 12(b)(6). On 7 April 2010, WFGCC filed a motion for summary judgment.

This matter was heard on 8 June 2010 before Judge Joseph in the Superior Court of Wake County. On 11 June 2010, the trial court entered an order granting defendants' motions to dismiss Vivian A. Jones, Chris Kaeberlein, Anne Hines, Frank Drake, Pete Thibodeau, and Margaret Stinnett. In an order filed 6 July 2010, the trial court (1) denied WFGCC's motion for summary judgment; (2) converted Wake Forest's motion to dismiss into a motion for summary judgment; and (3) granted Wake Forest's motion for summary judgment and dismissed WFGCC's action with prejudice.

WFGCC only appeals the 6 July 2010 order.

II. Standard of Review

The standard of review of 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). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). "All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citation omitted).

III. Refusal to Consider 2009 Application

[1] In its first argument, WFGCC contends that Wake Forest's refusal to consider and act upon its 2009 application as required by its own ordinance violated Article I, Section 19 of the North Carolina Constitution and was otherwise unlawful. We disagree.

The Wake Forest Board of Commissioners relied upon our Supreme Court's decision in *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 388 S.E.2d 538 (1990), in refusing to process or consider WFGCC's 2009 application. In *River Birch*, the plaintiff-developer filed an application with the City of Raleigh for subdivision and site plan approval for a 144-unit townhome project on 19.6 acres to be known as Riverbirch Township. *Id.* at 104, 388 S.E.2d at 540. The preliminary site plan and landscaping plan depicted a three-acre common area set aside for recreational purposes. *Id.* In 1980, the Raleigh City Council approved the site plan. *Id.* Riverbirch Township was subsequently developed and townhomes were sold according to the site plan. *Id.* It was undisputed that the three-acre common area was not necessary to meet the requirements of the ordinance for the 16.6 acres that were developed. *Id.* at 105, 388 S.E.2d at 540-41.

In December of 1985, River Birch filed a new site plan proposing the construction of twenty-nine townhomes on the three-acre common area, which was designated as "Marsh Creek Townes." *Id.* at 105, 388 S.E.2d at 541. On 2 September 1986, River Birch submitted its application for approval of the new site plan. *Id.* The City Council refused to process the application because the three-acre parcel had been set aside as common area in the plan approved by the City in 1980, even though the preliminary plat met the minimum requirements of the Raleigh ordinance. *Id.*

Our Supreme Court affirmed the City's decision. River Birch argued that the refusal to process its application for the development of Marsh Creek Townes constituted an improper exercise of the City's police power for private purposes and that it was a violation of due process under Article I, section 19 of the North Carolina Constitution. *Id.* at 115, 388 S.E.2d at 546. Our Supreme Court rejected these arguments and held:

> that where a developer submits a project plan for approval and undertakes the development of the property according to the approved preliminary plan, a city may refuse to consider a subsequent stage of the overall project that fails to take into account

> the prior development as proposed and undertaken in the prior stages of development.

Id.

In expounding on the reasoning for its holding, the Court stated that the refusal to process the application was not an abuse of police power because the City was merely enforcing established standards. *Id.* at 117, 388 S.E.2d at 548. The Court also emphasized that River Birch had taken "advantage of the benefits that accrued as a result of voluntarily depicting common area in its preliminary plat. Upon approval of its plan, River Birch received and exercised the right to cluster the development and effectively increase the housing density to greater than otherwise allowed under the zoning ordinance." *Id.* at 119, 388 S.E.2d at 549. The Court would not allow River Birch to "attack a condition of its own making which the City ha[d] accepted." *Id.*

The facts of *River Birch* are materially indistinguishable from those in the instant case. On 4 February 1999, Oakmark submitted an application for a special use permit authorizing the construction of the proposed PUD. The entire 149 acres of golf course was designated as open space within the PUD. The Wake Forest Board of Commissioners approved a special use permit authorizing the development of the PUD. An express condition of approval was that "[t]he entire acreage of the [WFGCC] shall be subject to the provisions and conditions of the special use permit and master plan as approved including, but not limited to, calculations of density, open space, and impervious surface area." Oakmark subsequently developed the property in accordance with the approved PUD and special use permit.

Several years later, WFGCC filed an application to alter the special use permit to reduce the area covered by the permit from 165.5 acres to 40 acres in order to selectively develop the property for residential use. This reduction represented the portion of the property that was not necessary to comply with the requirements of the ordinance related to the approved residential components of the original PUD. The Wake Forest Board of Commissioners elected not to conduct a public hearing or otherwise consider the 2009 application.

WFGCC argues that "the consequence of the Town of Wake Forest's refusal to consider WFGCC's application is that 150 acres of plaintiff's land . . . must forever remain as open space, in return for which plaintiff was allowed to sell five acres to a church and a total of ten acres for the development of thirty homes." However, WFGCC voluntarily designated the entire golf course as open space in the pro-

posed PUD and, upon approval of the special use permit, "received and exercised the right to cluster the development and effectively increase the housing density to greater than otherwise allowed under the zoning ordinance." *Id.* WFGCC is estopped from attacking its own condition which Wake Forest accepted. *Id.*

Because the facts of the instant case are materially indistinguishable from those in *River Birch*, we are bound by its holding. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (this Court has "no authority to overrule decisions of the Supreme Court and has the responsibility to follow those decisions until otherwise ordered by the Supreme Court." (Quotations and alterations omitted)).

WFGCC attempts to distinguish the holding in *River Birch by citing Robins v. Town of Hillsborough*, 361 N.C. 193, 639 S.E.2d 421 (2007), for the proposition that Wake Forest's decision must be reversed on the basis that it failed to comply with its own rules of procedure. In *Robins*, the plaintiff filed an application for the approval of his site development plan to construct an asphalt plant. *Id.* at 194, 639 S.E.2d at 422. Three hearings were held to consider the plaintiff's site development plan. *Id.* at 194-95, 639 S.E.2d at 422. The same day as the third hearing, plaintiff's case was continued and the Town of Hillsborough issued a notice of hearing on a proposed moratorium on asphalt plants. *Id.* at 195, 639 S.E.2d at 422. The moratorium was subsequently approved and the defendant's fourth hearing was cancelled. *Id.* at 195, 639 S.E.2d at 422-23.

Our Supreme Court castigated the Town of Hillsborough for violating its own procedures:

> Instead of following the proper procedures by which the Board of Adjustment would have rendered an up or down decision on plaintiff's application, defendant, acting through its Board of Commissioners, passed the moratorium and eventually amended the ordinance, effectively usurping the Board of Adjustment's responsibility in the matter. In essentially dictating by legislative fiat the outcome of a matter which should be resolved through quasi-judicial proceedings, defendant did not follow its own ordinance pertaining to the disposition of site specific development plans, thus leaving the Town Board no defense to the charge that its actions were arbitrary and capricious.

Id. at 199, 639 S.E.2d at 425.

The holding in *Robins* is inapposite to the instant case. *Robins* dealt with the initial issuance of a permit to develop a site plan for the construction of an asphalt plant, not a modification of an existing permit. In this case, Wake Forest did, in fact, follow its own procedures in issuing WFGCC a special use permit in 1999. WFGCC voluntarily designated the golf course as open space and subsequently developed the property in accordance with the approved PUD and the special use permit.

Under existing law enunciated by our Supreme Court, the Wake Forest Board of Commissioners had the discretion to refuse to process or consider WFGCC's 2009 application for a modification to the special use permit. This argument is without merit.

IV. Writ of Mandamus or Injunctive Relief

[2] In its second argument, WFGCC contends that it is entitled to a writ of mandamus or a mandatory injunction. We disagree.

It is well-established that

> a party seeking the writ . . . must have a clear legal right to demand it, and the party to be coerced must be under a positive legal obligation to perform the act sought to be required. The function of the writ is to compel the performance of a ministerial duty—not to establish a legal right, but to enforce one which has been established.

Meares v. Town of Beaufort, 193 N.C. App. 49, 55, 667 S.E.2d 244, 249 (2008) (internal quotations and alterations omitted). As set forth above, WFGCC has no right to demand that the Board of Commissioners consider its 2009 application.

This argument is without merit.

AFFIRMED.

Judges ELMORE and ERVIN concur.

STATE OF NORTH CAROLINA v. MICHAEL LEE WRIGHT, JR.

No. COA10-1251

(Filed 21 June 2011)

1. Constitutional Law— double jeopardy—one course of conduct—multiple victims

Defendant's constitutional right against double jeopardy was not violated where he was sentenced for two attempted murder convictions consolidated with two assault convictions arising from a single course of conduct with multiple shots and two victims.

2. Constitutional Law— confrontation clause—defendant not present at in-chambers conference—harmless error

The trial court's error in excluding defendant from an in-chambers conference prior to the sentencing hearing was harmless where the conference was recorded, defendant was represented by counsel at the conference, he was given an opportunity to be heard and to make objections at the sentencing hearing, and the trial court reported the class level for each offense and any aggravating or mitigating factors on the record in open court.

3. Sentencing— restitution—greater than evidence—remanded

A restitution order was remanded for amendment where the record on appeal supported only $15,400 rather than the $15,760 awarded.

Appeal by defendant from judgments and order entered 20 January 2010 by Judge Jay D. Hockenbury in Sampson County Superior Court. Heard in the Court of Appeals 10 March 2011.

Roy Cooper, Attorney General, by David J. Adinolfi, II, Special Deputy Attorney General, for the State.

Brock, Payne & Meece, P.A., by C. Scott Holmes, for defendant.

THIGPEN, Judge.

Defendant Michael Lee Wright, Jr., appeals from eight convictions arising out of a shooting at Moore Cuts Barbershop in Clinton, North Carolina and from a restitution order. The three principal issues on appeal are whether the trial court: (1) punished Defendant multiple times for the same transaction in violation of his constitutional right

against double jeopardy, (2) violated Defendant's constitutional right to be present by conducting sentencing proceedings outside of his presence, and (3) erred by ordering restitution without proper evidence. Because there was a $360 discrepancy between the amount of restitution ordered, $15,760, and the amount of restitution supported by the evidence, $15,400 in awards from the Crime Victims Compensation Commission, we remand the restitution order for the trial court to amend the order accordingly. For all other issues, we find no error.

On 16 February 2008, Corey Bennett, an old friend of Defendant, was standing in front of Moore Cuts Barbershop in Clinton, North Carolina when he received a call on his cell phone from Defendant. Mr. Bennett said that he could hardly hear the conversation, but Defendant said something about "a baby or a baby momma[.]" Mr. Bennett testified that while he was on the phone, he saw a small, white four-door car. Mr. Bennett recognized the driver as his ex-girlfriend, Terry Oates, and also saw Donte Singleton, Deangelo Jacobs ("DJ"), and Defendant in the car. Mr. Bennett had seen the car earlier at a traffic light, and then saw it make a U-turn and follow him for a while. As Mr. Bennett turned to go into the barbershop, he heard gun shots, the glass window broke, and he dove to the floor. Mr. Bennett testified that he did not see who was shooting. Mr. Bennett saw Marcus London, a barber, and another man inside of the barbershop, and he knew Mr. London was hurt because he saw blood on the floor.

Henry Moore, the owner of Moore Cuts, had stepped out of his barbershop to get a soda. On the way back, he saw Mr. Bennett standing in front of the barbershop on his cell phone. Mr. Moore then saw a white Kia drive toward Moore Cuts. Mr. Moore saw four people in the car, including a young woman driving that he did not recognize and three men that he recognized. Mr. Moore recognized Donte Singleton in the front passenger seat, Defendant in the back passenger seat, and DJ behind the driver. As the Kia pulled in front of Moore Cuts, Mr. Moore heard someone shout, "[t]here he is," and he saw Defendant lean out of the window and start shooting. Mr. Moore stated, "I looked dead at them, they looked dead back at me, and I paused because I was shocked it was broad daylight and somebody shooting." Mr. Moore heard at least five shots fired, and he saw Mr. Bennett dash into the barbershop when the shooting started. Mr. Moore called 911, and Mr. Bennett told him Mr. London had been shot in the head.

Mr. London was working inside the barbershop when he was shot on the left side of his head. As a result of being shot, he was in the hospital for approximately two months and is permanently disabled in his right arm and leg.

Defendant and Donte Singleton were arrested in Greensboro, North Carolina on 10 April 2008. The white Kia Optima was found at the residence of Regina Brown, after her uncle, Donte Singleton, arrived in the vehicle with a woman and two men and left the car in the backyard.

Defendant was charged with attempted first degree murder of Mr. London, attempted first degree murder of Mr. Bennett, assault with a deadly weapon with intent to kill inflicting serious injury on Mr. London, assault with a deadly weapon with intent to kill Mr. Bennett, discharging a firearm into occupied property inflicting serious bodily injury, two counts of discharging a firearm into occupied property, and discharging a firearm within city limits. The jury found Defendant guilty on all counts and found aggravating factors. The trial court consolidated the convictions into three groups and sentenced Defendant to three consecutive sentences in the presumptive range of 220-273 months, 180-225 months, and 34-50 months imprisonment. The trial court also ordered Defendant to pay $15,760 in restitution to North Carolina Department of Crime Control and Public Safety, Division of Victim's Compensation Services. Defendant appeals.

On appeal, Defendant argues the trial court (I) erroneously punished Defendant multiple times for the same transaction in violation of his constitutional right against double jeopardy, (II) violated Defendant's constitutional right to be present when it conducted sentencing proceedings outside of his presence, and (III) erroneously ordered restitution without proper evidence.

I. Double Jeopardy

[1] Defendant first argues the trial court erroneously punished him multiple times for the same transaction in violation of his constitutional right against double jeopardy. Specifically, Defendant contends there was one series of shots constituting one assault; therefore, it violated double jeopardy to sentence him and punish him for multiple assaults. We disagree.

Our standard of review for double jeopardy claims is *de novo*. *State v. Hagans*, 188 N.C. App. 799, 804, 656 S.E.2d 704, 707 (citation omitted), *disc. review denied*, 362 N.C. 511, 668 S.E.2d 344 (2008).

"The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects against multiple punishments for the same offense. The North Carolina Constitution provides similar protection." *State v. Washington*, 141 N.C. App. 354, 368, 540 S.E.2d 388, 398 (2000) (citing U.S. Const. amend. V.; N.C. Const. art. I, § 19), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). However, "[i]t is elementary that a defendant may be charged with more than one offense based on a given course of conduct." *State v. Ward*, 301 N.C. 469, 476, 272 S.E.2d 84, 88 (1980). A defendant may be properly charged with two separate and distinct offenses that arise out of a single course of conduct. *Id.*

In this case, the trial court consolidated Defendant's convictions of attempted murder of Mr. London, assault with a deadly weapon with intent to kill on Mr. London, and discharging a firearm into occupied property inflicting serious bodily injury into one sentence of 220 to 273 months imprisonment. The court also consolidated his convictions of attempted murder and assault with a deadly weapon with intent to kill with respect to Mr. Bennett into one sentence of 180 to 225 months imprisonment. Defendant contends "the single assaultive conduct cannot support two attempted murder convictions consolidated with two assault convictions."

Defendant cites *State v. Dilldine*, 22 N.C. App. 229, 206 S.E.2d 364 (1974), and *State v. Brooks*, 138 N.C. App. 185, 530 S.E.2d 849 (2000), *appeal dismissed and disc. review denied*, 357 N.C. 253, 582 S.E.2d 612 (2003), in support of his argument that the series of five shots fired in this case constitute one assault. However, Defendant's reliance on *Dilldine* and *Brooks* is misplaced because both of those cases involved a defendant charged with two separate counts of assault for shooting one victim multiple times in one continuous incident. The instant case involved two victims. Therefore, we find it analogous to *State v. Washington*, 141 N.C. App. at 369-70, 540 S.E.2d at 399, in which this Court held that the "defendant was properly charged with two separate and distinct *offenses as to each victim*, felonious assault and attempted murder, even though the offenses both arose out of a single course of conduct." (Emphasis added). Following our holding in *Washington*, we conclude Defendant was properly charged and convicted of two separate and distinct offenses of attempted murder and assault as to each victim, even though the offenses arose out of a single course of conduct.

II. Right to be Present

[2] In his next argument on appeal, Defendant contends the trial court violated his right to be present by conducting sentencing proceedings outside Defendant's presence with no waiver of the right by Defendant. This contention has no merit.

> Our Supreme Court has explained a defendant's right to be present:
>
> The Confrontation Clause in Article I, Section 23 of the North Carolina Constitution guarantees an accused the right to be present in person at every stage of his trial. This right to be present extends to all times during the trial when anything is said or done which materially affects defendant as to the charge against him.

State v. Workman, 344 N.C. 482, 497, 476 S.E.2d 301, 309 (1996) (citations and quotation marks omitted). The right to be present at all critical stages of the prosecution is subject to a harmless error beyond a reasonable doubt standard of review. *Id.* "An in-chambers conference is a critical stage of a defendant's trial . . . at which he has a constitutional right to be present." *State v. Exum*, 343 N.C. 291, 294, 470 S.E.2d 333, 335 (1996) (citation and quotation marks omitted). "[N]otwithstanding an accused's right to be present, certain violations of this right may be harmless if such appears from the record. An error is harmless beyond a reasonable doubt if it did not contribute to the defendant's conviction." *State v. Ferguson*, 145 N.C. App. 302, 309, 549 S.E.2d 889, 894 (citations and quotation marks omitted), *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001).

In the present case, the trial court conducted an in-chambers conference before the sentencing hearing to discuss the class level of each offense and any aggravating or mitigating factors. The trial court also asked each attorney how they wanted to handle the sentencing hearing, whether they planned to present any further evidence, and whether there was any restitution. The in-chambers conference was recorded, and all of the attorneys were present but Defendant was not. After the in-chambers conference, the trial court conducted a sentencing hearing before the jury and in the presence of Defendant. At the sentencing hearing, Defendant stipulated to his prior record level, presented testimony from two witnesses and evidence of mitigating factors, made two motions to dismiss, and objected to the State's request for restitution. The trial court summarized the class level of each offense and any aggravating or mitigating factors before sentencing Defendant and ordering him to pay restitution.

Our Supreme Court has found harmless error under similar circumstances. In *State v. Brogden*, 329 N.C. 534, 542, 407 S.E.2d 158, 163 (1991), our Supreme Court held that "the error in conducting an informal meeting in chambers to discuss the jury instructions, outside the presence of defendant, prior to the formal charge conference held in open court, was harmless beyond a reasonable doubt" because the court subsequently entered the matter into the record in open court, in the presence of the defendant, where both counsel for the State and for the defendant made their legal arguments and took exceptions. Similarly, in *State v. Wise*, 326 N.C. 421, 433, 390 S.E.2d 142, 149-50, *cert. denied*, 498 U.S. 853, 111 S.Ct. 146, 112 L. Ed. 2d 113 (1990), our Supreme Court found harmless error where a charge conference was held out of the presence of the defendant and was not recorded, but the defendant was represented by counsel at the conference, and the trial court subsequently announced the proposed instructions on the record and gave defense counsel an opportunity to be heard.

In the instant case, the in-chambers conference was recorded, Defendant was represented by counsel at the conference, Defendant was given an opportunity to be heard and to make objections at the sentencing hearing, and the trial court reported the class level for each offense and any aggravating or mitigating factors on the record in open court. We find *Brogden* and *Wise* dispositive, and conclude that the error in excluding defendant from the in-chambers conference prior to the sentencing hearing was harmless beyond a reasonable doubt.

III. Restitution

[3] In his final argument on appeal, Defendant contends the trial court erred by ordering restitution without sufficient evidence to support the restitution amount. We disagree.

On appeal, we review *de novo* whether the restitution order was "supported by evidence adduced at trial or at sentencing." *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (citation omitted). "The amount of restitution must be limited to that supported by the record[.]" N.C. Gen. Stat. § 15A-1340.36 (2009). Unsworn statements made by the prosecutor are insufficient to support the amount of restitution ordered. *State v. Wilson*, 340 N.C. 720, 727, 459 S.E.2d 192, 196 (1995) (citation omitted). However, when "there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." *State v. Hunt*, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986).

In this case, contrary to Defendant's assertion, the restitution amount was not based solely upon the unsworn statements of the prosecutor. Rather, the prosecutor introduced into evidence two awards from the Crime Victim's Compensation Commission. The State presented the awards to the trial court, and the court summarized the awards as follows: "I see $12,400 that goes to BioNest, Inc. Then another $3,000 to Mr. Marcus London to pay for physician expenses." The court overruled Defendant's objection to the restitution amount and admitted the awards from the Crime Victim's Compensation Commission as State's Exhibits 1 and 2 at the sentencing hearing.[1] The trial court also admitted the restitution worksheet prepared by the State, ordered Defendant to pay $15,760 in restitution to the North Carolina Department of Crime Control and Public Safety, and found Defendant jointly and severally liable for $3,360 of the restitution amount.

"In the absence of an agreement or stipulation between defendant and the State, evidence must be presented in support of an award of restitution." *State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992). Our courts have found both documentation and victim testimony regarding the amount of restitution to be sufficient evidence to support an award of restitution. *See State v. Canady*, 153 N.C. App. 455, 461-62, 570 S.E.2d 262, 266-67 (2002) (affirming the trial court's award of restitution because "[t]here was both testimony and documentation showing that the victims had already accumulated $680.00 in treatment bills" and testimony that the victims were still undergoing treatment as a result of defendant's actions); *State v. Price*, 118 N.C. App. 212, 221, 454 S.E.2d 820, 826 (1995) (holding that the trial court's recommendation of restitution was not error where the victim testified that "he had to purchase a special van costing $19,900 and that he had incurred $1,000 in medical expenses"); *Hunt*, 80 N.C. App. at 195, 341 S.E.2d at 354 (finding no error in the trial court's recommendation of restitution where the victim testified regarding the amount of the hospital and doctor bills).

The North Carolina Crime Victims Compensation Commission was established by statute, N.C. Gen. Stat. § 15B-3 (2009), and has the power to award compensation for "criminally injurious conduct[.]" N.C. Gen. Stat. § 15B-4(a) (2009). To commence a claim, a claimant must file an application for award with the Director of the Crime Victims Compensation Commission, N.C. Gen. Stat. § 15B-7 (2009),

1. State's Exhibits 1 and 2 at the sentencing hearing are not included in the record on appeal.

and must attach to the application all itemized medical and funeral bills related to the injuries received from the crime. See Victim Compensation Application, State of North Carolina Victim and Justice Services, http://www.nccrimecontrol.org/div/vcs/cvca.pdf. When the Crime Victims Compensation Commission awards a claim for compensation, "[t]he Director shall pay award payments directly to the service provider on behalf of the claimant. Eligible out-of-pocket costs borne by the claimant shall be paid directly to the victim only if such costs can be documented and verified." N.C. Gen. Stat. § 15B-16 (2009). We conclude that an award from the Crime Victims Compensation Commission constitutes sufficient evidence to support an order of restitution.

Here, the awards from the Crime Victims Compensation Commission were admitted into evidence, and although they are not part of the record on appeal, the trial court indicated that the awards showed "$12,400 . . . to BioNest, Inc." and "$3,000 to Mr. Marcus London to pay for physician expenses." These awards from the Crime Victim's Compensation Commission are sufficient evidence to support the restitution award. We note, however, that the trial court ordered restitution in the amount of $15,760, when the trial court's description of the awards from the Crime Victim's Compensation Commission totaled only $15,400. *See State v. Moore*, —— N.C. App. ——, ——, 705 S.E.2d 797, 803 (2011) ("Ordering restitution in an amount greater than the amount supported by the evidence violates the requirement of N.C. Gen. Stat. § 15A-1340.36(a)") (emphasis in original). Although the restitution worksheet requests $15,760, the record lacks competent evidence to support that figure. *See State v. Blount*, —— N.C. App. ——, ——, 703 S.E.2d 921, 927 (2011) (providing that "[a] restitution worksheet, unsupported by testimony, documentation, or stipulation, is insufficient to support an order of restitution") (citations and quotation marks omitted). The awards from the Crime Victims Compensation Commission are the only competent evidence related to restitution, and because they are not a part of the record on appeal, we must rely on the trial court's description of the awards; thus, only an amount of $15,400 is supported. Therefore, we remand the restitution order for the trial court to amend the order accordingly.

REMANDED IN PART, NO ERROR IN PART.

Judges STROUD and HUNTER, JR. concur.

JIM LORENZ, INC. D/B/A SAPPHIRE-TOXAWAY RESORT PROPERTIES, PLAINTIFF V. SHIRLEY S. O'HAIRE AND HUSBAND, MICAHAEL O'HAIRE, DEFENDANT

No. COA10-984

(Filed 21 June 2011)

1. Real Property— realtor's commission—buyer meeting conditions—notice of defect in title

Plaintiff-realtor did not produce a buyer who met all of the conditions of the purchase agreement and was not entitled to a commission from the sale of the certain premises where an outside party (Smith) exercised a right of first refusal and the buyer (Legasus) did not provide timely notice of a title defect under the purchase agreement. Although plaintiff contended that the first refusal was within the chain of title and was not a marketable title defect as contemplated by the agreement, the plain and unambiguous language of the agreement did not distinguish between defects within and those without the chain of title.

2. Real Property— realtor's commission—breach of purchase agreement—right of first refusal

Plaintiff-realtor was not entitled to a commission under the terms of a fee agreement where an outside party came forward to exercise a right of first refusal. Defendants were not responsible for a breach of the terms of the purchase agreement.

3. Appeal and Error— cross-assignment of error—denial of summary judgment—dismissed

A cross-assignment of error from the denial of summary judgment was dismissed.

Appeal by Defendants from order entered 8 April 2010 by Judge Zoro J. Guice, Jr. in Jackson County Superior Court. Heard in the Court of Appeals 23 February 2011.

James M. Kimzey, for Plaintiff-Appellee.

Roberts & Stevens, P.A., by Ann-Patton Hornthal and F. Lachicotte Zemp, Jr., for Defendants-Appellants.

BEASLEY, Judge.

Shirley S. O'Haire and Michael O'Haire ("Defendants") appeal from the trial court's decision to deny their motions for a directed verdict and for a judgment notwithstanding the verdict. For the reasons stated herein, we reverse the trial court's order.

Defendants own approximately 480 acres of undeveloped land in Jackson County, North Carolina. In 2006, Jim Lorenz, Inc. d/b/a Sapphire-Toxaway Resort Properties ("Plaintiff") contacted Defendants to learn of their interest in selling the subject premises to developer, Legasus of North Carolina, LLC ("Legasus"). On 2 May 2006, Defendants entered into a "Disclosure And Fee Agreement For Non-Listed Property Sale" ("fee agreement") with Jim Lorenz, Inc. d/b/a Sapphire-Toxaway Resort Properties ("Plaintiff").

The fee agreement stated that Plaintiff was acting as a buyer's agent for Legasus. The terms of the agreement also provided that "[w]hen [Defendants accept] an unconditional offer from Buyer or when all conditions have been met following the [Defendants'] acceptance of a conditional offer from [Legasus], then [Defendants] shall pay [Plaintiff] a fee equal to 6% of the gross sales price of the Property . . . . On 5 June 2006, Defendants entered into an "Agreement for Purchase and Sale of Real Property" [("purchase agreement")] with Legasus. In the purchase agreement Legasus agreed to pay $10,292,978.72 for the subject premises.

On 30 August 2007, Plaintiff filed suit against Defendants. In the Complaint, Plaintiff alleged that after Defendants and Legasus entered into the purchase agreement, Roger Lance Smith ("Smith") informed Defendants that he intended to exercise his right of first refusal in the subject premises. Smith's intention to exercise his right of first refusal constituted a breach of Defendants' agreement with Legasus. Plaintiff further argued that "[b]ecause [D]efendants breached the Agreement for Purchase and Sale of Real Property with Legasus of North Carolina, LLC, the fee agreed upon by . . . [the parties] in the [a]greement is now due and owing." Plaintiff sought $596,992.72 in damages.

On 14 July 2008, Defendants filed an answer generally denying the allegations that were raised in Plaintiff's complaint and raising several affirmative defenses. The jury trial began on 30 November 2009. During the trial, the trial court denied motions for a directed verdict made by both parties. Following the trial, the jury determined that Defendants breached the fee agreement that they had with Plaintiff, and that Plaintiff was entitled to $568,524.12 in damages. On

14 December 2009, Defendants filed a motion for a judgment notwithstanding the verdict and a new trial. The trial court denied Defendants' motions. On 23 April 2010, Defendants filed notice of appeal from the court's order. On 3 May 2010, Plaintiff filed notice of his intent to appeal from the trial court's decision to deny an earlier filed motion for summary judgment, and his motions for a directed verdict.

On appeal Defendants argue that: I) the trial court erred in denying Defendants' motions for a directed verdict, judgment notwithstanding the verdict, and a new trial; II) the trial court committed several errors in the instructions that it provided to jurors; III) the trial court erroneously admitted evidence that was "inadmissible, irrelevant, and prejudicial."

Standard of Review

"The test for determining the sufficiency of the evidence when ruling on a motion for judgment notwithstanding the verdict is the same as that applied when ruling on a motion for directed verdict." *Northern Nat'l Life Ins. v. Miller Machine Co.*, 311 N.C. 62, 69, 316 S.E.2d 256, 261 (1984). In each motion the trial court is tasked with determining "whether, upon examination of all the evidence in the light most favorable to the nonmoving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury." *Fulk v. Piedmont Music Ctr.*, 138 N.C. App. 425, 429, 531 S.E.2d 476, 479 (2000).

The trial court should deny either motion if there is more than a scintilla of evidence to support the *prima facie* case of the non-moving party. *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 644, 272 S.E.2d 357, 360 (1980); *Handex of the Carolinas, Inc. v. County of Haywood*, 168 N.C. App. 1, 9, 607 S.E.2d 25, 30 (2005). "On appeal, this Court . . . reviews an order ruling on a motion for directed verdict or judgment notwithstanding the verdict *de novo*." *Austin v. Bald II, L.L.C.*, 189 N.C. App. 338, 342, 658 S.E.2d 1, 4 (2008).

I.

[1] Defendants first argue the trial court erroneously denied their motions for a directed verdict, a judgment notwithstanding the verdict, and a new trial. Specifically, Defendants argue that Plaintiff failed to "produce a [b]uyer who met all conditions of the Purchase Agreement;" therefore, Plaintiff was not entitled to a commission from the sale of the subject premises. We agree with Defendants' contention.

"When a court is asked to interpret a contract its primary purpose is to ascertain the intention of the parties." *International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 317, 385 S.E.2d 553, 556 (1989). If "the language of a contract is plain and unambiguous then construction of the agreement is a matter of law for the court." *Whirlpool Corp. v. Dailey Construction, Inc.*, 110 N.C. App. 468, 471, 429 S.E.2d 748, 751 (1993). However, "[w]hen an agreement is ambiguous and the intention of the parties is unclear, interpretation of the contract is for the jury." *International Paper*, 96 N.C. App. at 317, 385 S.E.2d at 556.

Typically, " 'when a broker, pursuant to an agreement with the owner of land, procures a purchaser for his principal's land ready, able and willing to buy the land upon the terms offered, he is entitled to commissions or compensation for his services.' " *Resort Realty of Outer Banks, Inc. v. Brandt*, 163 N.C. App. 114, 117, 593 S.E.2d 404, 407 (2004) (quoting *Carver v. Britt*, 241 N.C. 538, 542, 85 S.E.2d 888, 891 (1955)). When the right of a broker to receive his condition is made dependent upon the occurrence of any other condition, this deviation from the normal rule must be clearly expressed in the contract. *Id.* at 118, 593 S.E.2d at 407 (citation omitted). "It is important in such situations that a distinction be made between language that imposes a condition which goes to the substance of a contract and language which relates only to its ultimate performance." *Id.*

Our Court has explained that a purchaser is "ready, willing, and able" when

> the prospective purchaser desires to purchase, is willing to enter into an enforceable contract to purchase, and has the financial and legal capacity to purchase within the time required on the terms specified by the seller. Further, the purchaser indicates readiness and willingness by executing a valid offer to purchase that either complies with the seller's requirements as set forth in the listing contract or is accepted by the seller.

Id. (internal quotation marks and citations omitted). In most contracts, the interpretation of an unambiguous term between a real estate broker and a seller is controlled by the express language of the agreement. *See Nash v. Yount*, 35 N.C. App. 661, 663, 242 S.E.2d 398, 399 (1978).

In the case at bar, Plaintiff signed a fee agreement with Defendants on 1 May 2006. In pertinent part, the agreement provided that Plaintiff shall receive payment when Defendants "[accept] an

unconditional offer from [Legasus] or when all conditions have been met following the [Defendants'] acceptance of a conditional offer from [Legasus.]" The terms of the fee agreement also provided that

> [i]n the event of any breach by [Defendants], . . . of any contract of purchase and sale, it is understood and agreed that the fee remains earned and payable upon notice given by [Defendants] to [Legasus] of [Defendants'] intent not to proceed with such a sale, notwithstanding the basis of such intent not to proceed.

Plaintiff in this case failed to produce a buyer that satisfied all conditions of a conditional offer.

"Generally, the obligations of a buyer and a seller under a real estate purchase agreement 'are deemed concurrent conditions-meaning, that neither party is in breach of the contract until the other party tenders his/her performance, even if the date designated for the closing is passed.' " *Ball v. Maynard*, 184 N.C. App. 99, 102, 645 S.E.2d 890, 893 (2007) (quoting *Disher Developers, Inc. v. Brown*, 145 N.C. App. 375, 378, 549 S.E.2d 904, 906, *aff'd per curiam*, 354 N.C. 569, 557 S.E.2d 528 (2001)). However, where a condition precedent needs to be performed by a particular date, other than the date of closing, a separate date should be included in the contract to govern the condition. *Fletcher v. Jones*, 314 N.C. 389, 393 n.1, 333 S.E.2d 731, 734 n.1 (1985). Additionally, a separate time is of the essence clause should be included if necessary. *Id.* "It would then . . . [be] clear that this particular condition, separate from the act of closing, must be strictly performed by a different date." *Id.*

In the current action, the purchase agreement signed by Defendants required that Legasus complete a title examination of the subject premises within 60 days of the date of contract. If the search of title revealed that Defendants title was not "fee simple marketable and insurable, subject only to Permitted Exceptions," Legasus was to provide Defendants with written notice of the title defects. Thereafter, Defendants would have a 30 day period in which to cure the defects. If the defects were not cured in 30 days, Legasus was entitled to terminate the agreement. The examination period of this agreement also included a "time is of the essence clause."

Defendants entered into the purchase agreement with Legasus on 5 June 2006. On 29 May 2007, Legasus informed Defendants that "title examination [of the subject premises] revealed the retention by Roger Lance Smith of a right of first refusal in the subject property" and that Roger Smith intended on exercising the right of first refusal.

By letter dated, 21 June 2007, Defendants informed Legasus that the time period to provide notification of title defects had passed. Legasus failed to provide notice of a title defect within the time period contemplated by the contract. Because Legasus failed to notify Defendants of the Smith right of first refusal within the applicable time period of the purchase agreement, Plaintiff was not entitled to payment within the terms of his fee agreement.

On appeal, Defendant does not tend to argue that Legasus provided notice of the right of first refusal within the examination period. Instead, Plaintiff contends that because Defendants had notice of the Smith right of first refusal, it was not a marketable title defect as contemplated by the contract. The Smith right of first refusal was within the chain of title for the subject premises. However, the plain and unambiguous language of the title examination condition fails to distinguish between defects that are within Defendants' chain of title and those that are not. Moreover, the terms of the purchase agreement expressly excluded another right of first of refusal of which Defendants were aware. If Defendants had intended to include the Smith right of first of refusal as an exception to the title examination clause, they could have done so expressly.

[2] Plaintiff also contends that because Defendants breached the terms of the purchase agreement, he was still entitled to his commission under the fee agreement. In support of this argument, Plaintiff cites the following provision of the fee agreement entered into by the parties: "In the event of any breach by [Defendants] . . . of any contract of purchase and sale, it is understood and agreed that the fee remains earned and payable upon notice given by [Defendants] to [Legasus] of [Defendants'] intent not to proceed with such sale."

Our Court has held that "[a] condition precedent is a fact or event, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available." *Cox v. Funk*, 42 N.C. App. 32, 34, 255 S.E.2d 600, 601 (1979) (internal quotation marks omitted). Here, Legasus was required to timely provide Defendants with notice of the Smith right of first refusal before it could demand performance by Defendant under the terms of the contract. Because Defendants were not responsible for a breach of the terms of the purchase agreement, Plaintiff was not entitled to a commission under the terms of the fee agreement.

[3] Plaintiff cross-assigns error from the trial court's decision to deny his motion for summary judgment. "Generally orders denying motions for summary judgment are not appealable." *Hill v. Smith*, 38 N.C. App. 625, 626, 248 S.E.2d 455, 456 (1978). "Ordinarily the denial of a motion for summary judgment does not affect a substantial right so that an appeal may be taken. The moving party is free to preserve his exception for consideration on appeal from the final judgment. . . ." *Motyka v. Nappier*, 9 N.C. App. 579, 582, 176 S.E.2d 858, 859 (1970). Because Plaintiff does not have the right to appeal the trial court's denial of his motion, this argument is dismissed. *Id.* Plaintiff also cross-assigns error from the trial court's denial of his motions for directed verdict. As previously addressed above, the trial court's denial of Plaintiff's motions for directed verdict was not erroneous.

Reversed.

Judges CALABRIA and STEELMAN concur.

STATE OF NORTH CAROLINA v. RAYMOND LORENZO BURKE, JR.

No. COA10-1084

(Filed 21 June 2011)

Search and Seizure— traffic stop—lack of reasonable suspicion

The trial court erred in a drugs and carrying a concealed weapon case by denying defendant's motion to suppress evidence based on lack of reasonable suspicion to conduct a valid stop of defendant's vehicle where the stop was merely based on the possibility that a thirty-day tag was fictitious.

Chief Judge, MARTIN, dissenting.

Appeal by Defendant from judgment entered 24 August 2009 by Judge Theodore S. Royster in Superior Court, Mecklenburg County. Heard in the Court of Appeals 7 March 2011.

Attorney General Roy Cooper, by Assistant Attorney General Martin T. McCracken, for the State.

The Wright Law Firm of Charlotte, PLLC, by Roderick M. Wright, Jr., for Defendant.

McGEE, Judge.

Charlotte-Mecklenburg Police Officer J.A. Allman[1] (Officer Allman) was on patrol on 16 February 2008 when he observed Raymond Lorenzo Burke, Jr. (Defendant) driving an Infiniti automobile (the vehicle) with a thirty-day license tag. Based on Officer Allman's previous observation of current 30-day tag numbers being issued at the time, he believed there was a possibility that the thirty-day tag on the vehicle was fictitious, and he stopped Defendant to investigate. After stopping Defendant, Officer Allman asked for Defendant's registration and informed Defendant of his reason for the stop. When Defendant opened his glove box to retrieve his registration, Officer Allman viewed a handgun in the glove box. Officer Allman asked Defendant to step out of the vehicle. He then arrested Defendant for carrying a concealed weapon. When Officer Allman asked Defendant if Defendant had anything else Officer Allman should know about, Defendant replied that he also had ecstasy and cocaine. Officer Allman searched Defendant and confiscated six ecstasy pills and 1.9 grams of cocaine from Defendant's left front pocket. Officer Allman then removed the handgun, which was loaded, from the glove box.

Defendant was indicted on 7 July 2008 for possession of a Schedule I controlled substance (ecstasy), possession of cocaine, and carrying a concealed weapon. Defendant filed a motion to suppress on 12 November 2008, arguing that Officer Allman's stop of Defendant's vehicle was illegal because Officer Allman lacked reasonable suspicion of criminal activity to justify the stop. Defendant moved to suppress all evidence obtained by Officer Allman as a result of the stop. Defendant further argued that he was questioned in violation of his *Miranda* rights, and that the search of his person was unlawful. Defendant's motion was heard on 9 January 2009. Officer Allman was the only witness to testify at the suppression hearing.

At the suppression hearing, Officer Allman specifically testified that: "The tag on [Defendant's] car appeared to be old and worn. The [number on the] 30-day tag appeared to be much lower than what was given out at the time. I believed the tag to be fictitious." The number on Defendant's thirty-day tag was 14949790. Officer Allman testified that he didn't "recall" what number range he "would have found to be an acceptable range." Officer Allman testified that it was dark, but

1. The arresting officer in this appeal is identified as "Joshua Amond" in the hearing transcript of the motion to suppress and as "J.A. Allman" in the indictments and order denying the motion to suppress. In this opinion, we will refer to him as Officer J.A. Allman.

that he was in a well-lit area and the tag was readable. When questioned about the condition of the tag, Officer Allman testified that though there was ample space available, there was no documentation on the arresting affidavit regarding the tag being old or worn. Officer Allman also did not indicate to Defendant that the tag was dirty or worn. It was not until later, when Officer Allman completed a more detailed report, that he indicated the tag was worn and dirty. Officer Allman testified that he could not recall the level of dirt on the tag. He testified that the only reason given on the arresting affidavit was the "low number" of the tag and that both the number and the condition of the tag contributed to his suspicion, but that "the number was the most important." Officer Allman was asked if the tag "was a proper size, properly placed in a proper location, all of those things?" He answered: "That's correct." Officer Allman testified that the tag was not faded, and that he could read the numbers. The following colloquy occurred at the suppression hearing as Defendant's counsel questioned Officer Allman:

> Q If the tag had the number that it did, the 14949790 but didn't have any dirt or wear, would you have still stopped Mr. Burke's vehicle?
>
> A Yes.
>
> Q If the tag had the amount of dirt and wear that you observed and had a number that was consistent with what you are used to seeing at that time, would you have stopped the vehicle just because of the dirt?
>
> A No.
>
> Q So but for the number, you wouldn't have stopped the vehicle?
>
> A Based on the dirt and wear and the number.
>
> Q If the number had been what you were used to seeing at that time, you wouldn't have stopped it.
>
> A That's correct.
>
> Q But you would have stopped it with no dirt or wear at all, if it was clean as a whistle based upon the number that you saw?
>
> A That's correct.

Officer Allman testified that he observed nothing else suspicious or illegal regarding Defendant's vehicle or the operation of the vehicle at

the time. He also testified there was no specific number range that he would have found acceptable and that there was nothing else out of the ordinary regarding the tag. Despite Officer Allman's testimony regarding the absence of any other suspicious or illegal activity, when Defendant's attorney asked: "But you thought there was a possibility that Mr. Burke's tag was fictitious?[,]" Officer Allman said, "I wondered about the possibility of the tag being fictitious. That's correct." After reviewing Defendant's documentation of the tag, Officer Allman testified that he found nothing fictitious about the tag.

In an order entered 18 August 2009, the trial court denied Defendant's motion to suppress. After the denial of his motion to suppress, Defendant pled guilty to felony possession of a Schedule 1 controlled substance, felony possession of cocaine, and misdemeanor carrying a concealed weapon. Defendant's charges were consolidated for judgment and Defendant was sentenced on 24 August 2009 to four to five months in prison, which was suspended. Defendant received eighteen months of supervised probation. Defendant expressly reserved the right to appeal the denial of his motion to suppress. Pursuant to N.C. Gen. Stat. § 15A-979(b), Defendant appeals.

In Defendant's sole argument, he contends that the trial court erred in denying his motion to suppress because Officer Allman lacked reasonable suspicion to conduct a valid stop of Defendant's vehicle. We agree.

The scope of appellate review of a denial of a motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

This Court has previously stated that "a police officer may conduct a brief investigative stop of a vehicle where justified by specific, articulable facts which give rise to a reasonable suspicion of illegal conduct." *State v. Hudson*, 103 N.C. App. 708, 715, 407 S.E.2d 583, 586 (1991). Furthermore, this Court has stated that reasonable suspicion must "be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). This is not a subjective standard based on the discretion of the officer; it is one that requires "objective justification to validate the detention or seizure." *INS v. Delgado*, 466 U.S. 210, 217, 80 L. Ed. 2d 247, 255 (1984).

We "must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion to make an investigatory stop exists." *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (1994) (citation omitted). This objective standard requires that the officer "must be able to articulate something more than an 'inchoate and unparticularized suspicion or "hunch." ' " *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989) (citation omitted).

Officer Allman testified that his basis for the traffic stop was that the numbers on Defendant's thirty-day tag looked low, based on his recent observations of thirty-day tags. The purportedly "low" number led Officer Allman to "wonder[] about the possibility of the tag being fictitious."

N.C. Gen. Stat. § 20-79.1(e) sets out the information that must appear on all temporary tags, and states that the required information must appear "clearly and indelibly on the face of the temporary registration plate or marker." N.C. Gen. Stat. § 20-79.1(e) (2009). N.C.G.S. § 20-79.1 does not prohibit a temporary tag from being either dirty or worn, so long as the relevant information is legible.

In prior cases before our Court where the condition of a thirty-day tag has been the basis for a traffic stop, the issue has been the legibility of the tag. Our Court has held thirty-day tags that were unreadable, or on which parts of the tag were concealed, obstructed, or illegible, justified the officers in those cases stopping the vehicles involved. *See, e.g.*, *State v. Branch*, 194 N.C. App. 173, 669 S.E.2d 18 (2008) (concealed expiration date on the thirty-day tag justified the stop); *Hudson*, 103 N.C. App. 708, 407 S.E.2d 583 (1991) (where the thirty-day tag was faded out to the point of being illegible, stop was reasonable).

In the case before us, Officer Allman did testify that the thirty-day tag was dirty and worn. However, Officer Allman testified he was able to read the tag without difficulty; the tag was not faded; the information was clearly visible to him; and the information was accurate and proper. Officer Allman's stated basis for the traffic stop was his erroneous belief that the numbers on the tag were too "low." Our standard of review requires "a minimal level of objective justification" in order for an investigatory stop to be legal. *State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994).

In the case before us, it is undisputed that Officer Allman did not observe anything illegal about Defendant's thirty-day tag. Temporary tags are made of paper, and may quickly become dirty and worn due

to common conditions of the weather and the roads. It is not unreasonable to expect law enforcement officers to be familiar with the laws they are charged to enforce. In the present case, we hold that a "reasonable officer" would not have formed a reasonable suspicion that criminal activity was afoot, based upon the observation of a thirty-day tag on which all relevant information was clearly legible, merely because he "wondered about the possibility" that the tag might be fictitious. In the present case, Officer Allman was unable "to articulate something more than an 'inchoate and unparticularized suspicion or "hunch." ' " *Sokolow*, 490 U.S. at 7, 104 L. Ed. 2d at 10 (citation omitted). We must, therefore, reverse the trial court's denial of Defendant's motion to suppress and vacate the judgment in this matter.

Reversed and judgment vacated.

Judge McCULLOUGH concurs.

Chief Judge MARTIN dissents with a separate opinion.

MARTIN, Chief Judge, dissenting.

I respectfully dissent. As the majority recognizes, "[i]t is well-settled law that a police officer may make a brief investigative stop of a vehicle if justified by specific, articulable facts giving rise to a reasonable suspicion of illegal activity." *State v. Holmes*, 109 N.C. App. 615, 619, 428 S.E.2d 277, 279 (internal quotation marks omitted), *disc. review denied*, 334 N.C. 166, 432 S.E.2d 367 (1993). While I agree that, in order to establish a constitutional basis for a warrantless investigatory stop, the law requires "something more than an 'unparticularized suspicion or hunch,' " *State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994) (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)), *appeal after remand*, 120 N.C. App. 804, 463 S.E.2d 802 (1995), it is also true that "[t]he *only* requirement is a *minimal level* of objective justification . . . ." *Id.* (emphasis added). This is so because "[r]easonable suspicion is a 'less demanding standard than probable cause and requires a showing *considerably less than* preponderance of the evidence.' " *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (emphasis added) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000)), *cert. denied*, —— U.S. ——, 172 L. Ed. 2d 198 (2008). Thus, while "the requisite degree of suspicion [for an investigatory stop] must be high enough 'to assure that an individual's reasonable expectation of privacy is not subject to arbitrary

invasions solely at the unfettered discretion of officers in the field,' " *State v. Murray*, 192 N.C. App. 684, 687, 666 S.E.2d 205, 208 (2008) (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)), and an investigatory stop of a vehicle "must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training," the prevailing law requires that such facts and inferences need only establish a "minimal level of objective justification" for an investigatory stop to be constitutional. *See Watkins*, 337 N.C. at 441–42, 446 S.E.2d at 70. With these guiding principles in mind, I believe the trial court's unchallenged findings of fact are sufficient to establish that it was more than an "unparticularized suspicion or hunch" that caused Officer Allman to make an investigatory stop of defendant's vehicle. *See id.* at 442, 446 S.E.2d at 70 (internal quotation marks omitted).

As the majority recognizes, Officer Allman did not have any difficulty reading the information on the thirty-day tag affixed to defendant's vehicle and testified that the temporary tag was dirty and worn. However, the officer also testified that visible dirt and wear were not the primary reasons that he stopped defendant's vehicle. Rather, it was Officer Allman's undisputed testimony that, because the number on defendant's temporary tag seemed to be "much lower" than those numbers he had observed on other temporary tags during the course of his regular daily patrols, the officer "believed the tag to be fictitious." Therefore, in light of the "less demanding standard" that need be met to establish a constitutional basis for a warrantless investigative stop, *see Barnard*, 362 N.C. at 247, 658 S.E.2d at 645 (internal quotation marks omitted), I am persuaded that Officer Allman's specific concern—that the numbering on the temporary tag affixed to defendant's vehicle was atypical and inconsistent with other temporary tags he observed during the course of his daily patrols—when "viewed through the eyes of a reasonable, cautious officer," *see* Watkins, 337 N.C. at 441, 446 S.E.2d at 70, was sufficient to establish "a reasonable or founded suspicion" to justify "a limited investigative seizure" of defendant's vehicle that would allow the officer to verify that the tag affixed to defendant's automobile was valid. *See Holmes*, 109 N.C. App. at 619, 428 S.E.2d at 279 (emphasis added) (internal quotation marks omitted). For these reasons, I would conclude that the trial court did not err by denying defendant's motion to suppress.

STATE OF NORTH CAROLINA v. LUIS BERBER MARTINEZ

No. COA10-885

(Filed 21 June 2011)

1. Evidence— sexual abuse—vouching for victim's credibility

The trial court erred in an indecent liberties and statutory rape case by admitting a DSS social workers' testimony that she substantiated the minor victim's claim of sexual abuse by defendant. There was a reasonable possibility that had the testimony not been admitted, the jury would have reached a different verdict.

2. Discovery— privileged documents—failure to disclose material exculpatory information

The trial court erred in an indecent liberties and statutory rape case by failing to disclose material exculpatory information contained in privileged documents reviewed in camera. On remand for a new trial, the trial court should review the material *de novo* to determine whether it should be made available to defendant.

Appeal by Defendant from Judgments entered 21 January 2010 by Judge Orlando F. Hudson, Jr., in Granville County Superior Court. Heard in the Court of Appeals 12 January 2011.

Attorney General Roy Cooper, by Assistant Attorney General Laura E. Crumpler, for the State.

Russell J. Hollers III for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Luis Berber Martinez ("Defendant") appeals from Judgments imposing an active sentence after a jury found him guilty of three counts of indecent liberties with a child and one count of statutory rape. Defendant argues, *inter alia*, the trial court erred in admitting the testimony of a social worker that an allegation of sexual abuse made against Defendant had been substantiated by the Department of Social Services. Defendant argues this testimony was admitted in error, was prejudicial, and he seeks a new trial. For the reasons stated below, we agree and grant Defendant a new trial.

I. Factual & Procedural Background

The State's evidence tended to establish the following. In 2008, Nadia[1] and her sister Sara were living with their legal guardian and aunt Sharon Martinez ("Mrs. Martinez") and Defendant. Nadia testified that on 27 June 2008, when Nadia was 13 years old, she had some friends sleeping over from the night before. That morning, Mrs. Martinez woke Nadia to look after Mrs. Martinez's infant daughter while Mrs. Martinez ran an errand. Nadia testified that she was sitting in the living room watching the infant and the television when Defendant came into the room and sat beside her on the sofa. Defendant then allegedly sexually molested Nadia before being interrupted by one of Nadia's friends walking into the room. Nadia testified that Defendant grabbed his clothes and ran out of the room. Nadia's friend encouraged Nadia to tell someone what had happened; the friend, however, did not testify.

Nadia called a family friend who called the police. A social worker from the Granville County Department of Social Services ("DSS") took Nadia to the hospital where she was examined and hospital staff collected physical evidence using a rape kit. When Nadia was released from the hospital, DSS placed her and her sister in a foster home.

On 1 December 2008, a Granville County Grand Jury indicted Defendant with three counts of taking indecent liberties with a minor and one count of statutory rape. In June 2009, Judge Henry W. Hight, Jr., reviewed, *in camera*, confidential records pertaining to Nadia's allegations. In an Order entered 2 July 2009, Judge Hight concluded the confidential records did not contain material exculpatory evidence and need not be disclosed to Defendant.

In January 2010, Defendant filed motions *in limine* seeking: to exclude evidence from a then-pending DSS investigation into whether Defendant neglected one or more of his children; and to exclude testimony by the State's expert witness as to the expert's opinion of whether Nadia and Sara were sexually abused children in the absence of physical evidence of abuse. Both Motions were denied.

Defendant's case came on for trial before Judge Orlando F. Hudson in the 19 January 2010 Criminal Session of Granville County Superior Court. At trial, Nadia testified to two other incidents of alleged sexual abuse by Defendant, and stated that such abuse "happened continuously." In one incident, Nadia and Defendant were

1. Pseudonyms are used to protect the identity of juveniles.

cleaning his car in the garage when Defendant came up behind her, rubbed her buttocks, breasts, and vaginal area before attempting to unbutton her pants. Nadia told Defendant to stop and opened the garage door. Defendant allegedly told Nadia not to tell anyone, as she would not like the consequences. Nadia told Mrs. Martinez, who ignored her allegations.

Nadia also admitted, however, that she accused Defendant of raping her in 2006, but the accusation was false. Nadia testified that she recanted the 2006 allegation after DSS began to investigate because Mrs. Martinez and Defendant told her to do so.

The State called as a witness Cassandra Putney ("Putney"), the social worker assigned by DSS to investigate Nadia's allegations of abuse. Putney testified to her credentials, including her position with DSS, her work experience, and her educational background. In response to the State's question as to how Putney became familiar with Nadia and her sister, Putney stated, "The first time I met them was in 2006. A case and investigation was done and *substantiated* for—." (Emphasis added.) Defendant's counsel objected to any "substantiation" testimony. The trial court overruled the objection and Putney continued: "Our agency *substantiated* a case of sex abuse in regards to [Nadia]. And that was in 2006." (Emphasis added.) Defendant's counsel objected again and moved to strike the testimony. When Defendant's counsel cited case law for the proposition that substantiation testimony was not permitted, the trial judge stated he did not believe that was correct and overruled the objection. On cross-examination, Putney admitted that after Nadia confessed that her 2006 allegation was not true, DSS closed that investigation.

The State called as a witness Scott Snider ("Snider"), the Clinical Coordinator at the Duke Child Abuse and Neglect Medical Evaluation Clinic. Snider testified that he interviewed Nadia in July 2008 and that Nadia confirmed she recanted her prior allegations of sexual abuse by Defendant, because Defendant and Mrs. Martinez told her to "say that nothing happened."

The State also called Dr. Karen St. Claire to testify as to her physical examination of Nadia's genitals on 14 July 2008. Dr. St. Claire, qualified by the trial court as an expert witness on child sex abuse, concluded that Nadia's genitals looked "very typical" for an adolescent, and such non-specific findings could be consistent with repeated penile-vaginal penetration.

The jury found Defendant guilty on all charges. The trial court entered consecutive judgments imposing 399 to 491 months imprisonment. The trial court further found Defendant had been classified as a sexually violent predator and ordered Defendant, upon his release from prison, to register as a sex offender and be subject to satellite based monitoring for the remainder of his life. Defendant gave notice of appeal in open court.

II. Jurisdiction & Standard of Review

As Defendant entered a plea of not guilty and appeals from the final judgment of a superior court, an appeal lies of right with this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2009). When the admissibility of evidence by the trial court is preserved for review by an objection, we review the trial court's decision *de novo*. *See State v. Capers*, —— N.C. App. ——, ——, 704 S.E.2d 39, 45 (2010), *appeal dismissed, disc. review denied*, —— N.C. ——, 707 S.E.2d 236 (2011) ("[W]e review a trial court's ruling on the relevance of evidence *de novo* . . . .").

III. Analysis

A. Voucher of Victim's Credibility

[1] Defendant first argues the trial court erred in admitting DSS social worker Putney's testimony that she "substantiated" Nadia's 2006 claim of sexual abuse by Defendant. Defendant contends the admission of this testimony was an error of law as it unfairly bolstered the victim's credibility. We agree.

In *State v. Giddens* this Court concluded similar testimony to be an impermissible expression of opinion as to the credibility of the accuser. 199 N.C. App. 115, 123, 681 S.E.2d 504, 509 (2009), *aff'd*, 363 N.C. 826, 689 S.E.2d 858 (2010) (per curium). At issue in *Giddens* was the testimony by a DSS investigator that he "substantiated" the victim's sexual abuse allegation after an investigation into the claim. *Id.* Because the investigator's testimony was based, in part, on the DSS investigation and not "solely on the children's accounts of what happened," the Court rejected the State's argument that the testimony was a prior consistent statement and merely corroborated the victims' testimony. *Id.* at 120-21, 681 S.E.2d at 507-08. Rather, the testimony amounted to an impermissible voucher of the victims' credibility. *Id.* at 121, 681 S.E.2d at 508 ("Our case law has long held that a witness may not vouch for the credibility of a victim." (citing *State v. Freeland*, 316 N.C. 13, 340 S.E.2d 35 (1986) and *State v. Teeter*, 85

N.C. App. 624, 355 S.E.2d 804, *appeal dismissed*, *cert. denied*, 320 N.C. 175, 358 S.E.2d 67 (1987))).

The *Giddens* Court concluded the investigator's testimony, that DSS "substantiated" the allegations of sexual abuse, essentially told the jury that DSS determined the defendant was guilty of sexually abusing the victims and the trial court erred in admitting the testimony. *Id.* at 121-22, 681 S.E.2d at 508 (stating the testimony "amounted to a statement that a State agency had concluded Defendant was guilty").

The State argues the present case is distinguishable. In *Giddens*, the State's witness testified to the "thorough" nature of the investigation that led DSS to conclude the victims' allegation was substantiated. *Id.* at 121, 681 S.E.2d at 508. Here, Putney did not testify to the thoroughness of the DSS investigation, but merely stated that DSS "substantiated" the claim after conducting an investigation. On this basis, the State contends it would be disingenuous to equate the present case with the facts of *Giddens*. We cannot agree.

In *Giddens*, the DSS investigator testified that her investigation included a "global assessment," in which she inquired about more than the child's specific allegations, but also inquired as to the child's mental needs and supervision. *Giddens*, 199 N.C. App. at 121, 681 S.E.2d at 508. Based on this information, the DSS investigator stated she had no information to substantiate that the child's *other caregivers* were abusive or neglectful. *Id.* We cannot conclude the testimony in the present case, that DSS substantiated Nadia's sexual abuse allegations, is any less prejudicial than the testimony in *Giddens*. As we explained in *Giddens*, although the social worker was not qualified as an expert witness, the jury likely gave the witness' opinion more weight than the opinion of a lay person. *Id.* The trial court erred in admitting Putney's substantiation testimony.

We also note the striking similarity of the evidence in *Giddens* and the present case. Here, as in *Giddens*, there was no physical evidence of sexual abuse. *See id.* at 119-20, 681 S.E.2d at 507 (noting physical exams of the children were normal and revealed no injures). The State's expert medical witness, Dr. St. Claire, testified to Nadia's non-specific genital exam results—she "looked like a very typical adolescent." Thus, the State's case rested solely on Nadia's testimony and additional corroborative testimony. In effect, the essential issue for the jury to consider was Nadia's credibility. *See id.* at 119-20, 681 S.E.2d at 507 (noting that without the improper testimony by the DSS

investigator, the jury was left with the children's testimony and other corroborating testimony, leaving the credibility of the victims as the central issue for the jury to resolve).

Accordingly, we conclude there is a reasonable possibility that had Putney's testimony not been admitted, the jury would have reached a different verdict. N.C. Gen. Stat. § 15A-1443(a) (2009) ("A defendant is prejudiced by errors . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.").

Furthermore, the *Giddens* defendant failed to object to the substantiation testimony at trial and, yet, the Court found it to be sufficiently prejudicial to rise to the level of plain error. *See Giddens*, 199 N.C. App. at 123-24, 681 S.E.2d at 509 (ordering a new trial after concluding that while the victims' testimony and corroborating testimony is strong evidence, it is not sufficient to survive a plain error review of the impermissible testimony of a witness vouching for the credibility of the victim). Unlike the defendant in *Giddens*, here, Defendant preserved the issue for review by objecting to Putney's testimony. Given the lower threshold required for finding prejudicial error when the issue is preserved for review by objection, we conclude Putney's testimony was sufficiently prejudicial to warrant a new trial.

B. Confidential Evidence

[2] Defendant also argues the trial court erred in failing to disclose material exculpatory information contained in privileged documents reviewed in camera. After a review of this evidence, we agree.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963).

The record does not reveal what, if any, of this confidential material was made available to Defendant. Our review of the material, however, leads us to conclude there is sufficient exculpatory material to impeach the State's witnesses. On remand for a new trial, we direct the trial judge to review the material *de novo* to determine, in his or her discretion, what material should be made available to Defendant.

IV. Conclusion

In summary, we conclude the trial court erred by permitting the DSS investigator to testify that she had substantiated the allegation of sexual abuse against Defendant. We also conclude the trial court erred in failing to disclose material exculpatory evidence to Defendant. Defendant is entitled to a new trial. Consequently, we do not reach Defendant's additional arguments regarding the trial court's refusal to instruct on attempted rape, sentencing Defendant as a level III sex offender, and ordering Defendant be subject to satellite-based monitoring for the remainder of his life.

New trial.

Judges CALABRIA and STROUD concur.

PHILLIP B. FISK AND CAROL FISK, PLAINTIFFS V. CHARLES R. MURPHY AND REPUBLIC SERVICES OF NORTH CAROLINA, LLC, DEFENDANTS

NO. COA10-892

(Filed 21 June 2011)

Negligence— contributory—collision at intersection—limited sight distances—failure to reduce speed or keep proper lookout

The trial court did not err by submitting to the jury the issue of contributory negligence in an action arising from the collision of a motorcycle on the dominant road with a pickup truck on the servient road, with both drivers having limited sight distances. A jury could conclude from the evidence that circumstances existed that would reasonably put plaintiff on notice that he could not assume that the other driver would yield at the intersection.

Appeal by Plaintiffs from Judgment entered 27 October 2009 and Order entered 21 December 2009 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 15 December 2010.

McLean Law Firm, P.A., by Russell L. McLean, III, and Lisa A. Kosir, PLLC, by Lisa A. Kosir, for Plaintiffs-appellants.

York Williams & Lewis, LLP, by Thomas E. Williams and David R. DiMatteo, for Defendant-appellee Charles R. Murphy.

Law Offices of H.M. Whitesides Jr., by H.M. Whitesides, Jr., and Ryan Law PLLC, by Stephanie S. Ryan, for Defendant-appellee Republic Services of North Carolina, LLC.

HUNTER, JR., Robert N., Judge.

Phillip B. Fisk and Carol Fisk ("Plaintiffs") appeal from the entry of Judgment denying Plaintiffs recovery from Charles R. Murphy and Republic Services of North Carolina, LLC ("Defendants") and the subsequent Order denying their Motion for Judgment Notwithstanding the Verdict and Motion for New Trial. We affirm the trial court's Judgment and Order.

I. Factual & Procedural Background

This action arises out of a collision that occurred on 15 September 2005 at approximately 10:15 a.m. at the intersection of Glenn Bridge Road and Old Shoals Road in Asheville, North Carolina. Plaintiff Phillip Fisk ("Fisk") was riding his motorcycle east on Glenn Bridge Road when he collided with Defendant Charles Murphy's ("Murphy") pickup truck traveling north on Old Shoals Road. Murphy worked for Defendant Republic Services of North Carolina, LLC ("Republic") and he was on a job-related activity at the time of the collision.

At the site of the collision, Fisk was traveling on Glenn Bridge Road, the dominant road, which was equipped with a continuously flashing yellow caution light and a sign that read "Vehicles Entering When Flashing." Murphy was traveling on Old Shoals Road, the servient road, which was equipped with a stop sign located approximately 50 feet prior to the intersection. Additionally, a flashing red light faces Old Shoals Road and is designed to flash when triggered by a vehicle passing over a sensor on Glenn Bridge Road, located approximately 300 feet from the center of the intersection. Plaintiffs' expert witness, Michael Sutton ("Sutton"), testified that the flashing light system was installed at this intersection because of the limited sight distance at the intersection.

Fisk did not testify at trial, although his deposition was read into evidence during the trial. In his brief, Fisk concedes that he traveled Glenn Bridge Road on a regular basis and was familiar with the intersection. Fisk, however, has no memory of the collision. His last memory prior to the accident was of passing a business located approximately 200 yards before the intersection.

Murphy, the only witness to the accident to testify, stated that he came to a complete stop at the stop sign on Old Shoals Road and looked to his left and his right, did not see Fisk, and "eased" through the intersection. As Murphy crossed Glenn Bridge Road, he heard the squeal of tires and, in response, pressed the accelerator and pulled the steering wheel to the right, but was unable to avoid the collision. At the point of impact, Murphy's four-door pickup truck was straddling the double yellow line of Glenn Bridge Road. Fisk's motorcycle struck Murphy's truck on the driver's side at a point behind the four-door passenger compartment, but immediately in front of the rear tire well.

Trooper Robert Baker of the North Carolina Highway Patrol responded to the scene of the accident. Trooper Baker testified that there were no gouge or skid marks in the roadway.

Fisk and his wife, Carol Fisk, filed this action 6 August 2008 alleging, *inter alia*, negligence by Defendants Murphy and Republic. Murphy and Republic pled the affirmative defense of contributory negligence by Fisk for failing to keep a proper lookout, to maintain proper control, or to otherwise operate his motorcycle in a safe manner.

The case was tried before a jury in the 2009 Civil Session of Buncombe County Superior Court. The jury returned a verdict finding Defendant Murphy negligent and Plaintiff Fisk contributorily negligent. Accordingly, Judge James U. Downs entered a Judgment on 27 October 2009 barring Plaintiffs recovery of damages or costs from Defendants.

On 6 November 2009, Plaintiffs filed a Motion for Judgment Notwithstanding the Verdict and, in the alternative, a Motion for New Trial pursuant to the Rules of Civil Procedure 50(b)(1) and 59, respectively, for, *inter alia*, lack of sufficient evidence of contributory negligence. After a hearing on the Motions, Judge Downs entered an Order on 21 December 2009 denying Plaintiffs' Motions. Plaintiffs timely gave notice of appeal.

II. Jurisdiction & Standard of Review

Plaintiffs appeal from the final judgment of a superior court and appeal lies of right with this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2009). We review the trial court's denial of a motion for judgment notwithstanding the verdict *de novo*. *Austin v. Bald II, L.L.C.*, 189 N.C. App. 338, 342, 658 S.E.2d 1, 4, *disc. review denied*, 362 N.C. 469, 665 S.E.2d 737 (2008). We must determine "whether upon examination of all the evidence in the light most favorable to

the nonmoving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury." *Id.* (citation and quotation marks omitted). Furthermore, if there is more than a "scintilla of evidence" supporting each element of the nonmoving party's claim, the motion should be denied. *Id.*

Our review of a trial court's ruling on a motion for a new trial pursuant to Rule 59 is "strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). The party alleging such abuse bears a heavy burden, as "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.* at 487, 290 S.E.2d at 605.

III. Analysis

As Defendants have not appealed the verdict finding Murphy negligent, the only issue on appeal is whether Fisk was contributorily negligent. Plaintiffs' sole argument is that there was insufficient evidence to submit the issue of contributory negligence to the jury. We disagree.

Contributory negligence "is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." *Jackson v. McBride*, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967). In order to establish that Fisk was negligent, Defendants must establish that (1) Fisk demonstrated a lack of due care and (2) there was a proximate connection between Fisk's negligence and his injury. *See Whisnant v. Herrera*, 166 N.C. App. 719, 722, 603 S.E.2d 847, 850 (2004) (explaining the two elements necessary for establishing contributory negligence). If Defendants presented more than a "scintilla of evidence" of these two elements, the trial court did not err in denying Plaintiffs' Motions. *See id.* (quoting *Snead v. Holloman*, 101 N.C. App. 462, 464, 400 S.E.2d 91, 92 (1991)).

When considered in the light most favorable to the Defendants, the evidence tends to show the following facts. The intersection provided limited sight distance for drivers traveling from the directions Fisk and Murphy were traveling. Murphy came to a complete stop and looked both ways before "eas[ing]" into the intersection. Fisk was

familiar with the intersection as he traveled through it on a nearly daily basis. Fisk's direction of travel was governed by a flashing yellow light and sign that warned of other vehicles entering the intersection. At the point of impact, Murphy's truck was straddling the double yellow line in the middle of the intersection. Fisk's motorcycle struck the rear portion of Murphy's truck.

Our Supreme Court has recognized that

> [o]rdinarily a person has no duty to anticipate negligence on the part of others. In the absence of anything which gives or should give notice to the contrary, he has the right to assume and to act on the assumption that others will observe the rules of the road and obey the law. However, the right to rely on this assumption is not absolute, and if the circumstances existing at the time are such as reasonably to put a person on notice that he cannot rely on the assumption, *he is under a duty to exercise that care which a reasonably careful and prudent person would exercise under all the circumstances then existing.*

Penland v. Green, 289 N.C. 281, 283, 221 S.E.2d 365, 368 (1976) (citations omitted) (emphasis added) (*cited with approval in Whisnant*, 166 N.C. App. at 723, 603 S.E.2d at 850). In the present case, we conclude circumstances existed that should have put Fisk on notice that others may not observe their duty of care and he failed to respond accordingly.

Specifically, Fisk's direction of travel was governed by a flashing yellow light, which required him to yield to traffic approaching or already in the intersection. N.C. Gen. Stat. § 20-158(b)(4) (2009) ("When a flashing yellow light has been erected or installed at an intersection, approaching vehicles facing the yellow flashing light may proceed through the intersection with caution, *yielding the right-of-way to vehicles in or approaching the intersection.*" (emphasis added)). At the point of impact, Murphy's truck was straddling the double yellow line in the middle of the intersection and Fisk's motorcycle struck Murphy's truck at a point on the rear-half of the vehicle. "Where the driver on the servient street is already in the intersection before the vehicle approaching on the dominant street is near enough the intersection to constitute an immediate hazard, the driver on the servient street has the right-of-way." *Farmer v. Reynolds*, 4 N.C. App. 554, 561, 167 S.E.2d 480, 485 (1969).

Plaintiffs place great emphasis on the testimony of their expert witness, Sutton, arguing his testimony established that Fisk's actions could not support a finding of contributory negligence. We disagree.

Sutton, qualified by the trial court as an expert in accident reconstruction, testified for Plaintiffs as to the results from his reconstruction of the accident under different variables. Sutton concluded that under each scenario he tested, Fisk did not have sufficient time to avoid the collision. The record reveals, however, multiple inconsistencies in Sutton's testimony that would permit a jury to reach a different conclusion.

Sutton's multiple reconstruction scenarios differed by varying the assumed speeds of Fisk and Murphy and the distance from the intersection at which Murphy came to a stop. The result of each scenario produced an estimate of the sight distance each driver had of oncoming traffic and an estimate of the number of seconds Fisk had to avoid the collision. Because the stop sign in Murphy's direction of travel was located 50 feet from the intersection, there was a great deal of testimony as to where Murphy came to a stop—at the stop sign, at the intersection, or at some point in between. When Sutton assumed Murphy stopped at a point in between the stop sign and the edge of the intersection—as Murphy testified in court that he did—then both Fisk and Murphy would have been able to see over 700 feet of the road leading up to the point of the collision. Traveling at 35 miles per hour (approximately 51 feet per second), the highest rate of speed Sutton assumed Fisk was traveling, Fisk would have had approximately 14 seconds to perceive Murphy's truck. Sutton insisted, however, that Fisk had less than one second to perceive Murphy's truck as a hazard and attempt to avoid the collision:

> From the reconstruction of the accident, the pickup truck, *from a bunch of different scenarios, is in the lane of travel for less than one second.*
>
> So in this accident, to boil it all down, what you're looking at is is [sic] that this pickup truck would have been a hazard to the motorcycle rider in basically about the time it takes him to perceive and react to it, which doesn't leave him any time to brake. (Emphasis added.)

Sutton's conclusion ignores the possibility that Fisk could have perceived Murphy's truck as a hazard and responded accordingly *before* Murphy was in Fisk's lane of travel. A jury could readily discern this

discrepancy in Sutton's testimony and conclude Fisk had sufficient time to see Murphy's truck and avoid the collision.

In fact, Sutton further testified that Fisk had an opportunity to decide whether he was in danger of colliding with Murphy's truck before Murphy entered the intersection:

> [B]efore the pickup truck crosses the motorcycle's lane of travel, at some point in time Mr. Fisk *would have been able to see that pickup truck moving towards the road.*
>
> . . . .
>
> And so you have to make a decision, if you're Mr. Fisk, is that vehicle just approaching the road to stop? Is he moving up to the intersection slowly and is going to stop again? (Emphasis added.)

This testimony provides more than a scintilla of evidence that Fisk was negligent and his negligence contributed to his own injuries. From this evidence, a jury could conclude circumstances existed that would reasonably put Fisk on notice that he could not assume Murphy would yield at the intersection. Thus, it was proper to put to the jury the issue of whether Fisk was negligent for failing to reduce his speed, keep a proper lookout, or maintain control of his motorcycle such that it contributed to his injuries.

IV. Conclusion

For the reasons stated above, we conclude the trial court did not err in putting before the jury the issue of whether Fisk was contributorily negligent in causing his own injuries. The trial court did not err in denying Plaintiffs' Motion for Judgment Notwithstanding the Verdict, nor abuse its discretion in denying Plaintiffs' Motion for New Trial. The trial court's Judgment and Order are

Affirmed.

Judges STEELMAN and STEPHENS concur.

MARY GRAY, PLAINTIFF, WIDOW OF DAVID D. GRAY, DECEASED EMPLOYEE v. UNITED PARCEL SERVICES, INC., EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. COA10-754

(Filed 21 June 2011)

1. Workers' Compensation— Pickrell presumption—presumption rebutted

The Industrial Commission erred in a workers' compensation case where it correctly concluded that the *Pickrell* presumption applied to plaintiff's workplace death, but erroneously held that the presumption had not been rebutted by defendant's expert testimony. On remand, plaintiff had the burden of showing that the death was the result of an accident arising out of the course and scope of employment.

2. Workers' Compensation— denial of extension of time—no abuse of discretion

The Industrial Commission did not abuse its discretion in a workers' compensation case by denying defendants' motion for extension of time to take additional expert testimony where the case was already over seven years old and the additional testimony would have been duplicative.

Appeal by defendants from opinion and award entered 10 March 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 January 2011.

Teague Rotenstreich Stanaland Fox & Holt, PLLC, by Paul A. Daniels and Lyn K. Broom, for plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by J.A. Gardner, III, Jennifer I. Mitchell, and M. Duane Jones, for defendants-appellants.

STEELMAN, Judge.

Where Dr. Welborne clearly stated that Gray's death was not work-related, this testimony rebutted the *Pickrell* presumption, and the Commission erred in its application of the *Pickrell* presumption. This case is remanded for the Commission to determine whether plaintiff has met her burden of proof of establishing that the death

was a result of an accident arising out of the course and scope of employment. The Commission did not abuse its discretion in denying defendants' motion for extension of time to take additional expert testimony where the testimony would have caused unnecessary delay and been duplicative of the testimony already given by Dr. Welborne.

I. Factual and Procedural History

On 29 November 2001 just after midnight, Charles Gregory McDaniel ("McDaniel") was working at the United Parcel Service ("UPS") hub in Greensboro, North Carolina. As McDaniel walked to his truck he observed David D. Gray ("Gray"), a fellow employee, standing in front of a row of trucks. McDaniel proceeded to his truck and began to perform a safety check. As he performed the safety check McDaniel saw a truck's brake lights, and then it's back up lights come on. The truck began to back up towards McDaniel's truck. McDaniel did not see anyone in the cab of the truck, and honked his horn because he felt he was going to be hit by the moving truck. The truck struck McDaniel's truck. When McDaniel jumped out of his truck, he saw Gray lying on the ground. Gray was lying on his back, and his glasses were three to four inches from his head and appeared to have been run over by the truck. As McDaniel approached Gray, Gray attempted to get up and stated that his head was hurt and that he was cold. McDaniel turned off Gray's truck, returned to Gray, and told him to lie still while McDaniel got help. As McDaniel returned to Gray, an EMS worker began working on Gray. McDaniel heard Gray take his last breath.

Gray was taken to Moses Cone Hospital where he was pronounced dead. His body was sent to Chapel Hill for an autopsy. The autopsy report stated that the most likely cause of death was an acute arrhythmia due to severe coronary atherosclerosis.

On 11 December 2001, UPS filed a "Workers Compensation—First Report of Injury or Illness," Form 1A-1, which stated that Gray "suffered heart attack while backing up tractor & it rolled into another parked UPS tractor." On 15 January 2002, UPS filed a "Denial of Workers' Compensation Claim," Form 61, relating to Gray's case. On 30 April 2002, Mary Gray, Gray's widow ("plaintiff"), filed a "Notice of Accident to Employer and Claim of Employee, Representative, or Dependent," Form 18, stating Gray "fell out of truck striking his head which contributed to a heart attack resulting in his death." On 2 May 2007, plaintiff filed a "Request that Claim be Assigned for Hearing," Form 33.

On 10 March 2010, the North Carolina Industrial Commission filed an opinion and award concluding that Gray's death was a result of an accident sustained in the course of his employment by application of the *Pickrell* presumption, and awarded 400 weeks of death benefits to plaintiff.

UPS and its insurance carrier, Liberty Mutual Insurance Company (collectively "defendants"), appeal.

II. Compensable Incident

In their first argument, defendants contend the North Carolina Industrial Commission erred in concluding that Gray's death was a compensable injury. We agree.

A. Standard of Review

"The scope of this Court's review of an Industrial Commission decision is limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Wooten v. Newcon Transp., Inc.*, 178 N.C. App. 698, 701, 632 S.E.2d 525, 528 (2006) (quotation omitted), *disc. review denied*, 361 N.C. 704, 655 S.E.2d 405 (2007).

B. *Pickrell* Presumption

[1] " 'In order for a claimant to recover workers' compensation benefits for death, he must prove that death resulted from an injury (1) by accident; (2) arising out of his employment; and (3) in the course of the employment.' " *Bason v. Kraft Food Serv., Inc.*, 140 N.C. App. 124, 127, 535 S.E.2d 606, 609 (2000) (quoting *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 366, 368 S.E.2d 582, 584 (1988)). Pursuant to the *Pickrell* presumption "[w]here the evidence shows an employee died within the course and scope of his employment and there is no evidence regarding whether the cause of death was an injury by accident arising out of employment, the claimant is entitled to a presumption that the death was a result of an injury by accident arising out of employment." *Id.* at 127-28, 535 S.E.2d at 609 (citing *Pickrell*, 322 N.C. at 367-68, 368 S.E.2d at 584-85). "In order to rebut the presumption, the defendant has the burden of producing credible evidence that the death was not accidental or did not arise out of employment." *Wooten*. 178 N.C. App. at 703, 632 S.E.2d at 528 (quotation omitted).

> In the presence of evidence that death was not compensable, the presumption disappears. In that event, the Industrial Commission

should find the facts based on all the evidence adduced, taking into account its credibility, and drawing such reasonable inferences from the credible evidence as may be permissible, the burden of persuasion remaining with the claimant.

Pickrell, 322 N.C. at 371, 368 S.E.2d at 586.

The Commission made the following conclusions of law:

> 2. The greater weight of the evidence in this case shows that the circumstances regarding the work-relatedness of decedent's death are unknown and that the death occurred as a result of an injury by accident sustained in the course of decedent's employment. It is uncontested that decedent was engaged in defendant-employer's business at the time of his death. Accordingly, the Full Commission concludes as a matter of law that the presumption applies in this case. Therefore, the burden shifts to defendants to rebut the presumption. *Pickrell*, 322 N.C. at 371, 368 S.E.2d at 587.
>
> . . . .
>
> 4. The evidence fails to show whether decedent had a heart attack that precipitated his falling from the truck, thereafter causing the subsequent accident, or whether decedent fell from the truck and the fall and subsequent accident caused decedent's heart attack. Therefore, defendants have failed to meet their burden showing that plaintiff's attack occurred prior to and caused plaintiff's injury by accident. Defendants have not successfully rebutted the presumption by coming forward with sufficient, credible evidence that death occurred as a result of a non-compensable cause. *Pickrell*, 322 N.C. 363, 368 S.E.2d 582; *Melton v. City of Rocky Mount*, 118 N.C. App. 249, 454 S.E.2d 704 (1995); *see also*, *Wooten*, 178 N.C. App. 698, 632 S.E.2d 525. Accordingly, plaintiff is entitled to the *Pickrell* presumption that decedent's cause of death was an injury by accident arising out of the employment.

Defendants' expert witness Dr. Barry Welborne testified that Gray's "employment had no bearing on his death" and that Gray's employment did not contribute at all to his death. Dr. Welborne testified that Gray had an acute cardiac event in the cab of his truck. Dr. Welborne testified that this was the only explanation that could account for Gray's irrational behavior in exiting the moving truck. This testimony supports finding of fact twelve made by the Commission, which found:

> Dr. Barry Welborne reviewed the medical records stipulated into evidence in this case and concluded that decedent was suffering from ventricular tachycardia. Based upon his review of the documents admitted into evidence in this case, Dr. Welborne was of the opinion that decedent's employment had no bearing on his death. He further was of the opinion, to a reasonable degree of medical certainty and/or probability, that decedent's employment activities or his employment on the occasion of his death were not a significant contributing factor to his death or a causal factor in his death. The Full Commission notes that Dr. Welborne's opinions are based in large part upon assumptions regarding when decedent began to suffer the heart attack, how and why he exited the truck, whether he was conscious or confused at the time he exited the truck, and other facts, which are the result of mere speculation.

This finding of fact demonstrates that the Commission erred in its legal analysis based upon the *Pickrell* presumption. The first step in the analysis is whether the presumption applies, based upon the facts of the case. The Commission correctly concluded that the presumption was applicable, based upon the fact that plaintiff's intestate died while in the course and scope of his employment, but it was not clear whether his death was the result of an injury by accident arising out of employment. *Pickrell*, 322 N.C. at 368, 368 S.E.2d at 585 ("[T]he presumption is really one of compensability. It may be used to help a claimant carry his burden of proving that death was caused by accident, or that it arose out of the decedent's employment, or both."). The effect of the *Pickrell* presumption was to shift the burden of proof from plaintiff to defendants. The second step in the analysis was to determine whether defendants rebutted the presumption. We hold that as a matter of law, Dr. Welborne's testimony was sufficient to rebut the presumption. In holding that the presumption was not rebutted, the Commission erred. If the *Pickrell* presumption is rebutted, then the Commission must consider the issue of compensability as if the presumption did not exist, with the plaintiff having the burden of proof of showing that the death was a result of an accident arising out of the course and scope of employment.

The Commission erred by conflating the second and third steps of the analysis. Upon remand, the Commission should weigh the evidence under the third step of the *Pickrell* analysis to determine whether plaintiff has met her burden of proof.

III. Dr. Calkins Testimony

[2] In their second argument, defendants contend that the Commission erred in not granting them an extension of time to take additional testimony, and thereby not considering the testimony of Dr. Calkins, which was preserved and submitted as an offer of proof. We disagree.

A. Standard of Review

We review the Commission's order denying defendants' motion for an extension of time to take additional expert testimony for an abuse of discretion. *See Legette v. Scotland Mem. Hosp.*, 181 N.C. App. 437, 640 S.E.2d 744 (2007), *appeal dismissed*, *disc. review denied*, 362 N.C. 177, 658 S.E.2d 273 (2008); *Harris-Offut v. N.C. Bd. of Licensed Prof'l Counselors*, No. COA04-1417, 2005 N.C. App. LEXIS 1469, at *6 (unpublished).

B. Analysis

The Commission did not abuse its discretion in denying defendants' motion for an extension of time to take additional expert testimony. The Commission denied this motion based on the fact that it would create unnecessary delay and would be duplicative of the testimony already offered by Dr. Welborne.

The death that was the basis of this claim took place on 29 November 2001. The Commission denied defendants' motion on 24 March 2009. At that time the case was already over seven years old. We hold it was not an abuse of discretion for the Commission to deny defendants' motion.

Further, in their motion defendants' stated that Dr. Calkins was:

> prepared to testify that Mr. Gray's fall from the truck on the night in question had nothing to do with the development of the cardiac arrhythmias and sudden cardiac death which Mr. Gray suffered on the evening in question and that his employment with UPS was causally unrelated to his death.

This does not differ from the testimony of Dr. Welborne. The Commission did not abuse its discretion in denying defendants' motion on the basis that the expected testimony was duplicative of that already offered by Dr. Welborne.

REVERSED and REMANDED in part, AFFIRMED in part.

Judges ELMORE and ERVIN concur.

NEXSEN PRUET, PLLC, PLAINTIFF v. KAREN CARTER MARTIN AND MARTIN COPE LIVINGSTON III, PERSONAL REPRESENTATIVES OF THE ESTATE OF JOHN VAN LINDLEY, DEFENDANTS

No. COA10-848

(Filed 21 June 2011)

Attorney Fees— prejudgment interest—costs

The trial court did not err by granting summary judgment in favor of defendants on the issue of prejudgment interest for legal fees recovered from an estate. The trial court properly characterized the attorney fees as costs, which were specifically excepted from the interest provisions of N.C.G.S. § 24-5(b).

Appeal by plaintiff from order entered 21 May 2010 by Judge Anderson D. Cromer in Guilford County Superior Court. Heard in the Court of Appeals 12 January 2011.

Barron & Berry, L.L.P., by Vance Barron, Jr., for plaintiff.

Hendrick Bryant & Nerhood, LLP, by Matthew H. Bryant, for defendants.

ELMORE, Judge.

Nexsen Pruet, PLLC (plaintiff or Nexsen Pruet), appeals from an order granting a motion by Karen Carter Martin and Martin Cope Livingston III (defendants), for summary judgment. After careful review, we affirm.

I. Background

Plaintiff, a law firm, brought this suit to recover legal fees in the amount of $150,258.54 due from the estate of John Van Lindley; defendants are the personal representatives of the estate. The facts of the case underlying this appeal can be found at *Livingston v. Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C.*, 163 N.C. App. 397, 594 S.E.2d 44 (2004); below are the facts relevant to the current appeal.

The co-executors of the Estate of John Van Lindley (Estate) filed three separate petitions asking the Guilford County Clerk of Superior Court (Clerk) to approve payment of attorney's fees and out-of-pocket expenses for the Estate's law firm, Adams Kleemeier Hagan Hannah & Fouts (the law firm). On 8 October 1991, 12 March 1992,

and 8 January 1993, the Clerk entered three separate orders for the payment of those fees and expenses. The last order approved attorney's fees and expenses through 30 September 1992.

On 29 May 2002, one of the co-executors, Walter Hannah, petitioned the superior court for an additional payment of counsel fees and expenses for services rendered since 30 September 1992. The petition stated that there was an unpaid balance of $150,258.54 due on the 1991, 1992, and 1993 orders and asked for the Clerk's approval of an additional amount of $175,000.00 for services rendered and out-of-pocket expenses incurred by the law firm after 30 September 1992. The petition also asked for the Clerk's approval of a promissory note and other collateral security agreements that had been executed by the Estate to secure the payment of attorney's fees and expenses. While the petition was pending, on 29 January 2004, the successor firm, Nexsen Pruet, was substituted as a party for the original law firm of Adams Kleemeier Hagan Hannah & Fouts.

From March to June of 2005, the Clerk entered four orders ruling on all pending matters raised by the co-executor's petition. In sequence, the orders are:

1. Order denying motions of Virginia L. Livingston to modify prior orders and to dismiss petition as barred by statute of limitations,

2. Order allowing co-executors to file special proceeding to sell land,

3. Order denying approval of additional $175,000.00 in attorney's fees and costs,

4. Order denying Virginia L. Livingston's request that the estate be allowed a credit of $43,961.20 against payments of its attorney's fees.

In the order at issue on this appeal (number 4 in the above list), the Clerk denied the credit of $43,961.20 requested by the Estate's heirs and awarded Nexsen Pruet the unpaid principal balance of $150,258.54 due in attorney's fees and expenses.

All four orders were appealed, first to the superior court of Guilford County and then to this Court. The superior court's orders denying recovery of the additional $175,000.00 in fees and denying the request for a $43,961.20 credit against the approved attorneys's fees

amount were upheld by this Court on 7 August 2007. *See In re Estate of Lindley*, 2007 N.C. App. LEXIS 1774 (N.C. Ct. App., Aug. 7, 2007).

The principal balance due to Nexsen Pruet remained unpaid until 27 October 2009 when Nexsen Pruet received a check for $150,258.54 dated 26 October 2009 paid on behalf of the Estate.

On 16 December 2009, Nexsen Pruet filed its complaint in the present action in Guilford County Superior Court. Nexsen Pruet seeks post-judgment legal interest on the principal balance of $150,258.54 at the legal rate of eight percent per annum from the date of entry of the order of 2 June 2005 until 27 October 2009, when the debt of the Estate was paid.

The Estate responded to Nexsen Pruet's complaint with a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Rules of Civil Procedure and with other motions. Nexsen Pruet moved for summary judgment on 12 March 2010. The Estate's motion to dismiss for failure to state a claim was properly treated as a cross-motion for summary judgment by virtue of the trial court's consideration of matters outside the pleadings. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b) (2009).

On 21 May 2010, the superior court denied Nexsen Pruet's motion for summary judgment and granted the Estate's motion for summary judgment. Nexsen Pruet filed notice of appeal on 26 May 2010.

II. Motion to dismiss

Plaintiff is appealing the grant of defendants' motion for summary judgment and denial of its motion for the same. We review a trial court's grant of summary judgment *de novo*. *Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citation omitted). "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Id.* at 337, 678 S.E.2d at 353 (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009)). We draw all inferences against the movant. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (citation omitted).

III. Interest on the judgment

The order on summary judgment stated as follows:

The Court concludes that:

> a. the Plaintiff's action is one for interest only on attorney's fees awarded by the Clerk of Court of Superior Court, acting as ex officio judge of probate, as reasonable expenses of the Estate;
>
> b. all attorney['s] fees ordered by the Clerk of Court to be paid by the Estate . . . have been paid in full by the Estate.
>
> c. An award of attorney's fees is consider[ed] costs, which do not bear interest.
>
> d. Defendants are entitled to summary judgment on all Plaintiff's claims.

Plaintiff argues that these conclusions are in error because the Clerk's order of 2 June 2005 was a judgment within the meaning of N.C. Gen. Stat. § 24-5(b) and, thus, its attorney's fees are properly deemed compensatory damages, not costs. That statute states:

> In an action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied. Any other portion of a money judgment in an action other than contract, except the costs, bears interest from the date of entry of judgment under G.S. 1A-1, Rule 58, until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

N.C. Gen. Stat. § 24-5(b) (2009). Plaintiff argues that the trial court should have ruled that the attorney's fees were compensatory damages and thus bore interest from the date of the judgment forward. We disagree, and hold that the trial court properly categorized the fees as costs, which are specifically excepted from the interest provisions of the statute.

In *In re Estate of Sturman*, this Court specifically noted that the superior court "is authorized to tax as costs . . . counsel fees . . . 'as provided by law.' " 93 N.C. App. 473, 476, 378 S.E.2d 204, 206 (1989). N.C. Gen. Stat. § 7A-307, "Cost in administration of estates[,]" specifically provides for such recovery of attorney's fees, and, per N.C. Gen. Stat. § 28A-23-4, the clerk of superior court has the discretion to allow attorney's fees when the attorney is functioning as the representative of an estate. N.C. Gen. Stat. § 7A-307(c)(2) (2009); N.C. Gen. Stat. § 28A-23-4 (2009). Taken together, these statutes clearly support the concept underpinning the trial court's ruling: that the superior court

may tax as costs attorney's fees incurred when the attorney is the representative of the estate administering its distribution.

Plaintiff's argument is not supported by the law, and as such is overruled.

Affirmed.

Judges STEELMAN and ERVIN concur.

JEFFREY SCOTT MATHIS AND SHIRLEY CLIFTON MATHIS, PLAINTIFFS v. SUSAN BELINDA HOFFMAN, DEFENDANT

No. COA11-45

(Filed 21 June 2011)

Injunctions— right to enter property—fence mistakenly built on neighbor's property

The trial court did not err in a declaratory judgment action by granting plaintiffs' motion to allow them to enter upon defendant's property to remove and relocate a fence mistakenly constructed on defendant's property, and requiring plaintiffs to pay the costs of this procedure including any damage that may be caused to defendant's property. It was within the trial court's discretion to consider whether the injunctive relief sought was an appropriate remedy.

Appeal by defendant from judgment entered 2 December 2010 by Judge Mark E. Klass in Gaston County Superior Court. Heard in the Court of Appeals 23 May 2011.

Gray, Layton, Kersh, Solomon, Furr, & Smith, P.A., by Ted F. Mitchell, for plaintiffs-appellees.

Arthurs & Foltz, LLP, by Douglas P. Arthurs, for defendant-appellant.

MARTIN, Chief Judge.

Plaintiffs Jeffrey Scott Mathis and Shirley Clifton Mathis and defendant Susan Belinda Hoffman are owners of two adjoining parcels of land. In December 2004, plaintiffs hired a contractor to

construct a fence between the two parcels. The cost of the fence to plaintiffs was over $15,000. In August 2008, plaintiffs learned that, after defendant and her daughter ran a string along what they believed to be the property boundary, defendant contended the fence had been built on her property. Shortly thereafter, defendant had the property surveyed to determine the true property boundary. Defendant then informed plaintiffs that the survey indicated the fence was built on defendant's property, though she refused to provide plaintiffs with a copy of the survey. In April 2009, plaintiffs initiated a special proceeding pursuant to N.C.G.S. § 38 3 to ascertain the true location of the property boundary. As a result of the proceeding, the boundary between the two parcels was judicially established, and it was confirmed that the fence had been constructed on defendant's property.

Plaintiffs offered to relocate the fence to their property at no cost to defendant. Plaintiffs estimate this relocation would cost approximately $2,000. However, defendant has refused to allow plaintiffs to remove the fence. On at least two occasions, defendant has contacted local law enforcement and accused plaintiffs of trespassing after plaintiffs tried to remove and relocate the fence.

Plaintiffs brought the present action on 22 February 2010 seeking a declaratory judgment of the parties' rights; an injunction granting plaintiffs the right to remove the fence and relocate it to their property; and for such other relief as the trial court deemed just and reasonable. The parties filed cross-motions for summary judgment and the trial court granted plaintiffs' motion, granting plaintiffs the right to enter upon defendant's property to remove and relocate the fence and requiring plaintiffs to pay the costs of this procedure including any damage that may be caused to defendant's property. Defendant appeals.

We review a trial court's order for summary judgment under a *de novo* standard of review. *See Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007). Because the parties appear to agree that there is no genuine issue of material fact we only consider whether plaintiffs are entitled to summary judgment as a matter of law.

Defendant contends the trial court exceeded its authority in granting plaintiffs' motion for summary judgment. However, in examining defendant's contention, it must be remembered that "[w]hen equitable relief is sought, courts claim the power to grant, deny, limit, or shape that relief as a matter of discretion." *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 399, 474 S.E.2d 783, 787 (1996). And

the "[i]ssuance of an injunction is a matter of discretion which the trial court exercises after weighing the equities and the advantages and disadvantages to the parties." *Adams v. Beard Dev. Corp.*, 116 N.C. App. 105, 109, 446 S.E.2d 862, 865 (1994).

Defendant contends she was entitled to a choice of either allowing plaintiffs to remove the improvement or being subject to a claim of unjust enrichment. Defendant maintains that because she chose to not allow plaintiffs to remove the improvement, the trial court exceeded its authority in granting plaintiffs' motion for summary judgment. In support of her contention, defendant cites *Beacon Homes, Inc. v. Holt*, 266 N.C. 467, 146 S.E.2d 434 (1966). Her reliance on *Beacon Homes*, however, is misplaced, as the relevant issue in that case was whether the plaintiff had alleged facts from which a jury could find that the defendant property owner had been unjustly enriched. *Id.* at 470, 146 S.E.2d at 437. The Court in *Beacon Homes* never held that a defendant property owner must be allowed to choose what remedy she prefers to offer a plaintiff who has mistakenly constructed an improvement on the defendant's property.

Defendant's reliance on *Siskron v. Temel-Peck Enterprises, Inc.*, 26 N.C. App. 387, 216 S.E.2d 441 (1975), as support for her contention that she was entitled to a choice of what remedy she preferred to offer plaintiffs, is likewise misplaced. In *Siskron*, a contractor had performed work for a lessee of a hotel property under the mistaken belief that the lessee was the actual owner of the property. *Id.* at 388, 216 S.E.2d at 443. Before the contractor was paid for the work, the lessee defaulted and the actual owner reentered the property. *Id.* at 389, 216 S.E.2d at 443. The contractor then brought a claim of unjust enrichment against the owner seeking the value of the improvements he had made on the property. *Id.* at 388, 216 S.E.2d at 443. The Court held that the defendant had not been unjustly enriched because he was never given "an opportunity to either reject the benefits in advance of their bestowal or to return them after they had been conferred." *Id.* at 391, 216 S.E.2d at 444. The Court explained that it would be inequitable to allow the plaintiff to remove the improvements because it would have required the defendant to temporarily close his hotel. *Id.* at 391, 216 S.E.2d at 445.

In the present case, however, there is no indication that the injunction issued by the trial court is inequitable. Here plaintiffs, not defendant, will bear the financial burden of the fence removal and relocation, including any damage that may be caused to defendant's

property. Furthermore, it was within the trial court's discretion to consider whether the injunctive relief sought was an appropriate remedy. *See Roberts*, 344 N.C. at 399, 474 S.E.2d at 787 ("[T]he injunction is a potential remedy in any case in which it may provide significant benefits that are greater than its costs or disadvantages."). The record indicates that the fence originally cost $15,000, while removing and relocating the fence will cost only $2,000. Given the disparity between these two amounts, it was within the discretion of the trial court to find it equitable to allow plaintiffs to remove and relocate the fence. In light of these considerations, we hold the trial court did not exceed its authority in granting plaintiffs' motion for summary judgment.

Because defendant fails to provide any relevant legal support for her remaining arguments, we decline to address them. *See* N.C.R. App. P. 28(b)(6).

Affirmed.

Judges STEPHENS and THIGPEN concur.

YASIN ZAIRY D/B/A AZIZ SONS, PLAINTIFF V. VKO, INC. D/B/A ARLEY CORPORATION, MICHEL OHAYON, JAMES V. MCCABE, JOHN DOE, INC., AND JOHN DOE, DEFENDANTS

No. COA10-777

(Filed 21 June 2011)

1. Appeal and Error— notice of appeal—designation of order

There was no appellate jurisdiction to consider an order from which there was no notice of appeal. Plaintiff's notice of appeal stated that it "included but was not limited to" appeal of a different order.

2. Appeal and Error— interlocutory orders and appeals—denial of motions to reconsider and to compel discovery

An appeal was dismissed where the order appealed from denied motions to compel discovery and to reconsider and was interlocutory; N.C.G.S. § 1-2277(b) does not extend to motions to reconsider; the trial court did not certify the order for appeal; and plaintiff did not argue that a substantial right was affected.

Appeal by plaintiff from order entered on or about 1 March 2010 by Judge Ben F. Tennille in Superior Court, Guilford County. Heard in the Court of Appeals 14 December 2010.

Gordon Law Offices, by Harry G. Gordon, for plaintiff-appellant.

Brooks Pierce McLendon Humphrey & Leonard, LLP, by Eric D. Johnson and Jim W. Phillips, Jr., for defendants-appellees.

STROUD, Judge.

Plaintiff's brief presents arguments as to two orders: (1) a 16 September 2009 order granting defendants Michel Ohayon's and James McCabe's motion to dismiss and (2) a 1 March 2010 order which denied a renewed motion to compel discovery and a motion for reconsideration of the 16 September 2009 order dismissing the case as to defendants Ohayon and McCabe. Plaintiff filed a notice of appeal only from the 1 March 2010 order. For the following reasons, we dismiss.

I. 16 September 2009 Order

[1] Plaintiff first argues that "[t]he Trial Court erred in entering the Order filed 16 September 2009 granting Defendants' Motion to Dismiss[.]" However, plaintiff failed to file a notice of appeal from this order. Plaintiff's "NOTICE OF APPEAL" provides in pertinent part that "[t]his Notice of Appeal includes but is not limited to the appeal of the March 1, 2010 Order on Motion to Renew and Motion to Reconsider." Accordingly, except for the 1 March 2010 order, plaintiff's notice of appeal fails to designate any other orders or judgments from which plaintiff has taken an appeal. *See* N.C.R. App. P. 3(d) ("The 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 . . . ."); *see also Dafford v. JP Steakhouse LLC*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, (April 5, 2011) (No. COA10-101) (noting that "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)." (bracket omitted)). Accordingly, we do not have jurisdiction to consider plaintiff's appeal as to the 16 September 2009 order, and we must dismiss it. *See Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) (dismissing the appeal and noting that "[i]n 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").

II. 1 March 2010 Order

[2] Plaintiff's notice of appeal did specifically identify the 1 March 2010 order. Plaintiff argues that the 1 March 2010 order was entered in error as to its denial (1) of plaintiff's motion to compel and (2) to reconsider the 19 September 2009 order granting the motion to dismiss. Orders denying a motion to compel and a motion to reconsider are interlocutory. *See Slaughter v. Swicegood*, 162 N.C. App. 457, 462-63, 591 S.E.2d 577, 581-82 (2004) (noting that an order denying a motion to reconsider is interlocutory); *Mack v. Moore*, 91 N.C. App. 478, 480, 372 S.E.2d 314, 316 (1988) ("As a general rule, an order compelling discovery is not immediately appealable because it is interlocutory . . . ."), *disc. review denied*, 323 N.C. 704, 377 S.E.2d 225 (1989).

> 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.
>
> An interlocutory order is generally not immediately appealable.
>
> Nonetheless, in two instances a party is permitted to appeal interlocutory orders. First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal. Second, a party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits. *Under either of these two circumstances, it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those grounds.*

Bullard v. Tall House Bldg. Co., 196 N.C. App. 627, 637, 676 S.E.2d 96, 103 (2009) (citations and quotation marks omitted) (emphasis added).

Plaintiff cites to N.C. Gen. Stat. § 1-277(b) as the stated grounds for appeal. N.C. Gen. Stat. § 1-277(b) provides that "[a]ny 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[.]" N.C. Gen. Stat. § 1-277 (2009). However, we are unaware of any cases which extend application of N.C. Gen. Stat. § 1-277(b) to

a motion to reconsider. While the 16 September 2009 order granting defendants Ohayon's and McCabe's motion to dismiss is "an adverse ruling as to the jurisdiction of the court over the person[,]" *id.*, the 1 March 2010 order denying the motion to reconsider is not such an order. The 1 March 2010 order substantively denies plaintiff's request to reevaluate the trial court's 16 September 2009 order; it in no way makes any determinations as to jurisdiction. Accordingly, N.C. Gen. Stat. § 1-277(b) is not applicable to plaintiff's motion to reconsider.

Here, the trial court did not certify its 1 March 2010 order for appeal, and thus plaintiff's only other route to appeal would be that a substantial right has been adversely affected. *See Bullard*, 196 N.C. App. at 637, 676 S.E.2d at 103. Plaintiff fails to argue that a substantial right was affected. Accordingly, we dismiss the appeal as to the 1 March 2010 order. *See id.* at 639, 676 S.E.2d at 104 (dismissing appeal and noting that the trial court did not certify the appeal); *see Slaughter*, 162 N.C. App. at 462-63, 591 S.E.2d at 581-82 (dismissing appeal after noting that parties failed to argue why this Court should consider interlocutory appeal).

III. Conclusion

For the foregoing reasons, we dismiss plaintiff's appeal.

DISMISSED.

Judges BRYANT and BEASLEY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 JUNE 2011)

ADAMS v. PARTS UNLIMITED No. 10-592	Indus. Comm. (891600) (878401)	Affirmed
CHURCH v. DECKER No. 10-1422	Caldwell (01CVD1391)	Affirmed in Part; Reversed and Remanded in Part; Dismissed in Part
CHURCH v. DECKER No. 10-1502	Caldwell (01CVD1391)	Affirmed in Part; Reversed and Remanded in Part; Dismissed in Part
DAVIS v. STATE FARM MUT. AUTO. INS. CO. No. 10-711	Haywood (08CVS1214)	Affirmed
GARLAND GOURMET MUSHROOMS v. BLACK DIAMOND FRENCH TRUFFLES No. 10-1041	Orange (09CVS158)	Dismissed
GREENSBORO RUBBER STAMP CO. v. SOUTHEAST STAMP & SIGN No. 10-914	Guilford (08CVS4819)	Affirmed
HOWE v. HOWE No. 10-1243	Cleveland (09CVD1971)	Affirmed
IN RE C.G.M. No. 10-1393	Clay (09JT7)	Affirmed
IN RE L.T. No. 11-129	Wake (04JT710)	Affirmed
IN RE M.D. No. 10-1411	Wake (06JB387)	Affirmed
IN RE S.P. No. 11-106	Harnett (09J70)	Affirmed
IN RE T.M.B. No. 10-1523	Brunswick (08JT60-62)	Affirmed

LEE v. CITY CAB OF TARBORO No. 10-1017	Indus. Comm. (786921)	Affirmed
LOMAX CONSTR., INC. v. TRIAD SHEET METAL & MECH., INC. No. 10-869	Guilford (09CVS10498)	Affirmed
NEILON v. COMM'R OF MOTOR VEHICLES No. 10-1512	New Hanover (09CVS5604)	Reversed and Remanded
RAJPAL v. LIVINGSTONE COLL., INC. No. 10-529	Rowan (08CVS2559)	Affirmed
SESSIONS v. FIVE C'S, INC. No. 10-1426	Pasquotank (10CVS327)	Affirmed
SMITH v. TEACHERS & STATE EMPS. RET. No. 10-1242	Wake (09CVS1302)	Affirmed
STATE v. BAINES No. 10-1429	Durham (07CRS40815)	Other; Affirmed in Part; Dismissed in Part; and Remanded to Trial Court for Correction of Clerical Error
STATE v. BELLAMY No. 10-1469	Columbus (09CRS52119)	No Error
STATE v. BLUE No. 10-1100	Sampson (07CRS51282-83)	No Error
STATE v. BRENT No. 10-989	Forsyth (08CRS53477) (08CRS8919)	New Trial
STATE v. BURKE No. 10-1539	Rowan (04CRS50675)	Reversed and Remanded
STATE v. FERGUSON No. 09-1507	Mecklenburg (07CRS208926-27)	No prejudicial error. Remanded for new sentencing hearing on restitution.
STATE v. FLETCHER No. 10-1418	Moore (09CRS50446-47)	Dismissed
STATE v. FOLK No. 10-769	Richmond (07CRS53561)	No Error

STATE v. FRAZIER No. 10-782	Forsyth (05CRS55209)	Affirmed
STATE v. GARY No. 10-1471	Forsyth (10CRS50352) (10CRS667)	No Error
STATE v. HARGIS No. 10-1173	Person (09CRS51635)	Dismissed
STATE v. HARPER No. 10-686	Halifax (09CRS53403)	New Trial
STATE v. MELVIN No. 09-62-2	Onslow (07CRS52897)	No prejudicial error in part, reversed and remanded in part
STATE v. MITCHELL No. 10-1328	Catawba (09CRS51087)	No Error
STATE v. MOORE No. 10-1009	New Hanover (09CRS57434)	No Error
STATE v. MORROW No. 10-509	Rowan (06CRS50733-34) (06CRS50444)	No Error Concerning Conviction; Motion for Appropriate Relief Denied
STATE v. NEWMAN No. 11-135	Haywood (90CRS1218) (90CRS1221)	No Error
STATE v. ODOM No. 11-61	Guilford (07CRS92990)	Affirmed
STATE v. REAMS No. 10-1423	Johnston (09CRS51572)	No Error
STATE v. RICHARDSON No. 10-1305	Mecklenburg (08CRS29385) (09CRS35629)	No Error
STATE v. ROBERTS No. 10-1277	Mecklenburg (07CRS22140-43)	No Error
STATE v. SELLERS No. 10-1012	Wayne (09CRS50181)	No Error
STATE v. SHEPHERD No. 11-48	Craven (10CRS824)	Affirmed

STATE v. SOUTHER No. 10-1235	Ashe (07CRS51868)	No Error
STATE v. STANFORD No. 10-1506	Cabarrus (09CRS6807-09)	No Error
STATE v. TAYLOR No. 11-44	Rockingham (09CRS1979) (09CRS53103)	No Error
STATE v. THOMPSON No. 10-1376	Forsyth (09CRS26431-32) (09CRS57950)	No Error
STATE v. TREADWAY No. 10-1355	Union (10CRS838)	Dismissed in Part; Affirmed in Part
TWANDA v. D&D TECHNICAL SERVS., INC. No. 10-1354	Wayne (09CVS1249)	New Trial
WILLIAMS v. CHANEY No. 10-1278	Lincoln (08CVD1649)	Dismissed
WYNTER v. CNTY. OF WAKE No. 10-1176	Wake (10SP1018)	Affirmed in Part and Reversed and Remanded in Part.

APPENDICES

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE LAWYER ASSISTANCE PROGRAM

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING REINSTATEMENT FROM INACTIVE STATUS OR ADMINISTRATIVE SUSPENSION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CERTIFICATION OF PARALEGALS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING PARALEGAL EDUCATION

AMENDMENTS TO THE RULES GOVERNING THE ADMISSION TO PRACTICE LAW IN NORTH CAROLINA

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 25, 2013.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability of attorneys, as particularly set forth in 27 N.C.A.C. 1B, Section .0100, be amended by deleting existing Rule .0118 and replacing it with a new proposed rule as follows:

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

.0118 Disability

(a) Transfer by Secretary where Member Judicially Declared Incompetent—Where a member of the North Carolina State Bar has been judicially declared incapacitated, incompetent, or mentally ill by a North Carolina court or by a court of any other jurisdiction, the secretary, upon proper proof of such declaration, will enter an order transferring the member to disability inactive status effective immediately and for an indefinite period until further order of the Disciplinary Hearing Commission. A copy of the order transferring the member to disability inactive status will be served upon the member, the member's guardian, or the director of any institution to which the member is committed.

(b) Transfer to Disability Inactive Status by Consent—The chairperson of the Grievance Committee may transfer a member to disability inactive status upon consent of the member and the counsel.

(c) Initiation of Disability Proceeding

(1) Disability Proceeding Initiated by the North Carolina State Bar

(A) Evidence a Member has Become Disabled—When the North Carolina State Bar obtains evidence that a member has become disabled, the Grievance Committee will conduct an inquiry which substantially complies with the procedures set forth in Rule .0113 (a)-(h) of this subchapter. The Grievance Committee will determine whether there is probable cause to believe that the member is disabled within the meaning of Rule .0103(19) of this subchapter. If the Grievance Committee

finds probable cause, the counsel will file with the commission a complaint in the name of the North Carolina State Bar, signed by the chairperson of the Grievance Committee, alleging disability. The chairperson of the commission shall appoint a hearing panel to determine whether the member is disabled.

(B) Disability Proceeding Initiated While Disciplinary Proceeding is Pending—If, during the pendency of a disciplinary proceeding, the counsel receives evidence constituting probable cause to believe the defendant is disabled within the meaning of Rule .0103(19) of this subchapter, the chairperson of the Grievance Committee may authorize the counsel to file a motion seeking a determination that the defendant is disabled and seeking the defendant's transfer to disability inactive status. The hearing panel appointed to hear the disciplinary proceeding will hear the disability proceeding.

(C) Pleading in the Alternative—When the Grievance Committee has found probable cause to believe a member has committed professional misconduct and the Grievance Committee or the chairperson of the Grievance Committee has found probable cause to believe the member is disabled, the State Bar may file a complaint seeking, in the alternative, the imposition of professional discipline for professional misconduct or a determination that the defendant is disabled.

(2) Initiated by Hearing Panel During Disciplinary Proceeding—If, during the pendency of a disciplinary proceeding, a majority of the members of the hearing panel find probable cause to believe that the defendant is disabled, the panel will, on its own motion, enter an order staying the disciplinary proceeding until the question of disability can be determined. The hearing panel will instruct the Office of Counsel of the State Bar to file a complaint alleging disability. The chairperson of the commission will appoint a new hearing panel to hear the disability proceeding. If the new panel does not find the defendant disabled, the disciplinary proceeding will resume before the original hearing panel.

(3) Disability Proceeding where Defendant Alleges Disability in Disciplinary Proceeding—If, during the course of a disciplinary proceeding, the defendant contends that he or she is disabled within the meaning of Rule .0103(19) of this subchapter, the defendant will be immediately transferred to disability

inactive status pending conclusion of a disability hearing. The disciplinary proceeding will be stayed pending conclusion of the disability hearing. The hearing panel appointed to hear the disciplinary proceeding will hear the disability proceeding.

(d) Disability Hearings

(1) Burden of Proof

(A) In any disability proceeding initiated by the State Bar or by the commission, the State Bar bears the burden of proving the defendant's disability by clear, cogent, and convincing evidence.

(B) In any disability proceeding initiated by the defendant, the defendant bears the burden of proving the defendant's disability by clear, cogent, and convincing evidence.

(2) Procedure—The disability hearing will be conducted in the same manner as a disciplinary proceeding under Rule .0114 of this subchapter. The North Carolina Rules of Civil Procedure and the North Carolina Rules of Evidence apply, unless a different or more specific procedure is specified in these rules. The hearing will be open to the public.

(3) Medical Examination—The hearing panel may require the member to undergo psychiatric, physical, or other medical examination or testing by qualified medical experts selected or approved by the hearing panel.

(4) Appointment of Counsel—The hearing panel may appoint a lawyer to represent the defendant in a disability proceeding if the hearing panel concludes that justice so requires.

(5) Order

(A) When Disability is Proven—If the hearing panel finds that the defendant is disabled, the panel will enter an order continuing the defendant's disability inactive status or transferring the defendant to disability inactive status. An order transferring the defendant to disability inactive status is effective when it is entered. A copy of the order shall be served upon the defendant or the defendant's guardian or lawyer of record.

(B) When Disability is Not Proven—When the hearing panel finds that it has not been proven by clear, cogent, and convincing evidence that the defendant is disabled, the hearing panel shall enter an order so finding. If the defendant had been transferred to disability inactive

status pursuant to paragraph (c)(3) of this rule, the order shall also terminate the defendant's disability inactive status.

(e) Stay/Resumption of Pending Disciplinary Matters

(1) Stay or Abatement—When a member is transferred to disability inactive status, any proceeding then pending before the Grievance Committee or the commission against the member shall be stayed or abated unless and until the member's disability inactive status is terminated.

(2) Preservation of Evidence—When a disciplinary proceeding against a member has been stayed because the member has been transferred to disability inactive status, the counsel may continue to investigate allegations of misconduct. The counsel may seek orders from the chairperson of the commission, or the chairperson of a hearing panel if one has been appointed, to preserve evidence of any alleged professional misconduct by the member, including orders which permit the taking of depositions. The chairperson of the commission, or the chairperson of a hearing panel if one has been appointed, may appoint counsel to represent the member when necessary to protect the interests of the member during the preservation of evidence.

(3) Termination of Disability Inactive Status—Upon termination of disability inactive status, all disciplinary proceedings pending against the member shall resume. The State Bar may immediately pursue any disciplinary proceedings that were pending when the member was transferred to disability inactive status and any allegations of professional misconduct that came to the State Bar's attention while the member was in disability inactive status. Any disciplinary proceeding pending before the commission that had been stayed shall be set for hearing by the chairperson of the commission.

(f) Fees and Costs—The hearing panel may direct the member to pay the costs of the disability proceeding, including the cost of any medical examination and the fees of any lawyer appointed to represent the member.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 25, 2013.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of February, 2013.

s/L. Thomas Lunsford, II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of March, 2013.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2013.

s/Beasley, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE LAWYER ASSISTANCE PROGRAM

The following amendments to the Rules and Regulation and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 26, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the Lawyer Assistance Program, as particularly set forth in 27 N.C.A.C. 1D, Section .0600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0600, Rules Governing the Lawyer Assistance Program

.0617 Consensual ~~Suspension~~ Inactive Status

Notwithstanding the provisions of Rule .0616 of this subchapter, the court may enter an order ~~suspending a lawyer's license~~ transferring the lawyer to inactive status if the lawyer consents to such suspension. The order may contain such other terms and provisions as the parties agree to and which are necessary for the protection of the public. A lawyer transferred to inactive status pursuant to this rule may not petition for reinstatement pursuant to Rule .0902 of this subchapter. The lawyer may apply to the court at any time for an order reinstating the lawyer to active status.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of February, 2013.

s/L. Thomas Lunsford, II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of March, 2013.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2013.

s/Beasley, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING REINSTATEMENT FROM INACTIVE STATUS OR ADMINISTRATIVE SUSPENSION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 26, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning reinstatement from inactive status or administrative suspension, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

.0902 Reinstatement from Inactive Status

(a) Eligibility to Apply for Reinstatement

....

(c) Requirements for Reinstatement

(1) Completion of Petition.

....

(5) CLE Requirements If Inactive Less Than 7 Years.

[Effective for all members who are transferred to inactive status on or after March 10, 2011.] If more than 1 but less than 7 years have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member must complete 12 hours of approved CLE for each year that the member was inactive. The CLE hours must be completed within 2 years prior to filing the petition. For each 12-hour increment, 4 hours may be taken online; 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism; and 5 hours must be earned by attending courses determined to be practical skills courses by the Board of Continuing Legal Education or its designee. If during the period of inactivity the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision without regard to whether they were taken during the 2 years prior to filing the petition.

(6) Bar Exam Requirement If Inactive 7 or More Years.

[Effective for all members who are transferred to inactive status on or after March 10, 2011.] If 7 years or more have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member must obtain a passing grade on a regularly scheduled North Carolina bar examination.

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of inactive status shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate this provision. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)(5) for each year that the member was inactive up to a maximum of 7 years.

(B) Military Service. Each calendar year in which an inactive member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate the requirement of this paragraph. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)(5) for each year that the member was inactive up to a maximum of 7 years.

(7) Payment of Fees, Assessments, and Costs.

.0904 Reinstatement from Suspension

(a) Compliance Within 30 Days of Service of Suspension Order.

....

(d) Requirements for Reinstatement

(1) Completion of Petition

....

(3) CLE Requirement If Suspended Less Than 7 Years
If more than 1 but less than 7 years have elapsed between the effective date of the suspension order and the date upon which the reinstatement petition is filed, the member must complete 12 hours of approved CLE for each year that the member was suspended. The CLE must be completed within 2 years prior to filing the petition. For each 12-hour increment, 4 hours may be taken

online; 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism; and 5 hours must be earned by attending courses determined to be practical skills courses by the Board of Continuing Legal Education or its designee. If during the period of suspension the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision without regard to whether they were taken during the 2 years prior to filing the petition.

(4) Bar Exam Requirement If Suspended 7 or More Years
If 7 years or more have elapsed between the effective date of the suspension order and the date that the petition is filed, the member must obtain a passing grade on a regularly scheduled North Carolina bar examination.

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of suspension shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate this provision. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended up to a maximum of 7 years.

(B) Military Service. Each calendar year in which a suspended member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate the requirement of this paragraph. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended up to a maximum of 7 years.

(5) Character and Fitness to Practice

....

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of February, 2013.

s/L. Thomas Lunsford, II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of March, 2013.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2013.

s/Beasley, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 25, 2013.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .2500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .2500, Certification Standards for the Criminal Law Specialty

.2505 Standards for Certification as a Specialist

(a)….

(b) Substantial Involvement—An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of criminal law.

(1) Substantial involvement shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of criminal law, but not less than 400 hours in any one year. "Practice" shall mean substantive legal work, specifically including representation in criminal jury trials, done primarily for the purpose of providing legal advice or representation, or a practice equivalent.

(2) ….

(3) For the specialty of criminal law and the subspecialty of state criminal law, the board shall require an applicant to show substantial involvement by providing information that demonstrates the applicant's significant criminal trial experience such as:

(A) representation during the applicant's entire legal career in criminal trials concluded by jury verdict;

(B) representation as principal counsel of record in federal felony cases or state felony cases (Class G or higher);

(C) court appearances in other substantive criminal proceedings in criminal courts of any jurisdiction; and

(D) representation in appeals of decisions to the North Carolina Court of Appeals, the North Carolina Supreme Court, or any federal appellate court.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 25, 2013.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of January, 2013.

s/L. Thomas Lunsford, II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of March, 2013.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2013.

s/Beasley, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 26, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, be amended by adding the following new section:

27 N.C.A.C. 1D, Section .3100, Certification Standards for the Trademark Law Specialty

.3101 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates trademark law as a specialty for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

.3102 Definition of Specialty

The specialty of trademark law is the practice of law devoted to commercial symbols, and typically includes the following: advising clients regarding creating and selecting trademarks; conducting and/or analyzing trademark searches; prosecuting trademark applications; enforcing and protecting trademark rights; and counseling clients on matters involving trademarks. Practitioners regularly practice before the United States Patent and Trademark Office (USPTO), the Trademark Trial and Appeal Board (TTAB), the Trademark Division of the NC Secretary of State's Office, and the North Carolina and/or federal courts.

.3103 Recognition as a Specialist in Trademark Law

If a lawyer qualifies as a specialist in trademark law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Trademark Law."

.3104 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in trademark law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

.3105 Standards for Certification as a Specialist in Trademark Law

Each applicant for certification as a specialist in trademark law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet following standards for certification in trademark law:

(a) Licensure and Practice—An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement—An applicant shall affirm to the board that the applicant has experience through substantial involvement in trademark law.

(1) Substantial involvement shall mean that during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of trademark law, but not less than 400 hours in any one year.

(2) Practice shall mean substantive legal work in trademark law done primarily for the purpose of legal advice or representation or a practice equivalent.

(3) "Practice equivalent" shall mean:

(A) Service as a law professor concentrating in the teaching of trademark law which may be substituted for up to two years of experience to meet the five-year requirement set forth in Rule .3105(b)(1).

(B) Service as a trademark examiner at the USPTO or a functionally equivalent trademark office for any state or foreign government which may be substituted for up to two years of experience to meet the five-year requirement set forth in Rule .3105(b)(1).

(C) Service as an administrative law judge for the TTAB which may be substituted for up to three years of experience to meet the five-year requirement set forth in Rule .3105(b)(1).

(4) The board may, in its discretion, require an applicant to provide additional information as evidence of substantial involvement in trademark law, including information regarding the applicant's participation, during his or her legal career, in the following: portfolio management, prosecution of trademark applications, search and clearance of trademarks, licensing, due diligence, domain name

selection and dispute resolution, TTAB litigation, state court trademark litigation, federal court trademark litigation, trademark dispute resolution, and international trademark law.

(c) Continuing Legal Education—To be certified as a specialist in trademark law, an applicant must have earned no less than 36 hours of accredited continuing legal education credits in trademark law during the three years preceding application. The 36 hours must include at least 20 hours in trademark law and the remaining 16 hours in related courses including: business transactions, copyright, franchise law, internet law, sports and entertainment law, trade secrets, and unfair competition.

(d) Peer Review—An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice law and must have significant legal or judicial experience in trademark law. An applicant consents to confidential inquiry by the board or the specialty committee to the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a colleague at the applicant's place of employment at the time of the application.

(2) The references shall be given on standardized forms mailed by the board to each reference. These forms shall be returned to the board and forwarded by the board to the specialty committee.

(e) Examination—An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of trademark law to justify the representation of special competence to the legal profession and the public.

(1) Terms—The examination shall be given annually in written form and shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter—The examination shall cover the applicant's knowledge and application of trademark law and rules of practice, and may include the following statutes and related case law:

(A) The Lanham Act (15 USC §1501 et seq.)

(B) Trademark Regulations (37 CFR Part 2)

(C) Trademark Manual of Examining Procedure (TMEP)

(D) Trademark Trial and Appeal Board Manual of Procedure (TBMP)

(E) The Trademark Counterfeiting Act of 1984 (18 USC §2320 et seq.)

(F) North Carolina Trademark Act (N.C. Gen. Stat. Chap. 80).

.3106 Standards for Continued Certification as a Specialist

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .3106(d). No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement—The specialist must demonstrate that, for each of the five years preceding application for continuing certification, he or she has had substantial involvement in the specialty as defined in Rule .3105(b) of this subchapter.

(b) Continuing Legal Education—The specialist must earn no less than 60 hours of accredited CLE credits in trademark law and related fields during the five years preceding application for continuing certification. No less than six of the credits may be earned in any one year. Of the 60 hours of CLE, at least 34 hours shall be in trademark law, and the balance of 26 hours may be in the related fields set forth in Rule .3105(c) of this subchapter.

(c) Peer Review—The specialist must comply with the requirements of Rule .3105(d) of this subchapter.

(d) Time for Application—Application for continued certification shall be made not more than 180 days, nor less than 90 days, prior to the expiration of the prior period of certification.

(e) Lapse of Certification—Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such a lapse, recertification will require compliance with all requirements of Rule .3105 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification—If an applicant's certification has been suspended or revoked during the period of certification, the application shall be treated as if it were for initial certification under Rule .3105 of this subchapter.

.3107 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in trademark law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of January, 2013.

s/L. Thomas Lunsford, II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of March, 2013.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2013.

s/Beasley, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CERTIFICATION OF PARALEGALS

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 26, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals

.0122 Right to Review and Appeal to Council

(a) An individual who is denied certification or continued certification as a paralegal or whose certification is suspended or revoked shall have the right to a review before the board pursuant to the procedures set forth below and, thereafter, the right to appeal the board's ruling thereon to the council under such rules and regulations as the council may prescribe.

(b) Notification of the Decision of the Board.

….

(d) Review by the Board.

A three-member panel of the board shall be appointed by the chair of the board to reconsider the board's decision and take action by a majority of the panel….

(1) Review on the Record.

….

(3) Decision of the Panel.
The individual shall be notified in writing of the decision of the panel and, if unfavorable, the right to appeal the decision to the council under such rules and regulations as the council may prescribe. <u>To exercise this right, the individual must file an appeal to the council in writing within 30 days of the mailing of the notice of the decision of the panel.</u>

(e) Failure of Written Examination.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of January, 2013.

s/L. Thomas Lunsford, II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 7th day of March, 2013.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2013.

s/Beasley, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING PARALEGAL EDUCATION

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 26, 2012.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing paralegal education, as particularly set forth in 27 N.C.A.C. 1G, Section .0200, be amended as follows (additions are underlined, deletions are interlined):

27 NCAC 1G, Section .0200, Rules Governing Continuing Paralegal Education

.0202 Accreditation Standards

The Board of Paralegal Certification shall approve continuing education activities in compliance with the following standards and provisions.

(a) ….

(i) A certified paralegal may receive credit for completion of a course offered by an ABA accredited law school with respect to which academic credit may be earned. No more than 6 CPE hours in any year may be earned by attending such courses. Credit shall be awarded as follows: 3.5 hours of CPE credit for every quarter hour of credit assigned to the course by the educational institution, or 5.0 hours of CPE credit for every semester hour of credit assigned to the course by the educational institution.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 26, 2012.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of January, 2013.

s/L. Thomas Lunsford, II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 7th day of March, 2013.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2013.

s/Beasley, J.
For the Court

AMENDMENTS TO THE RULES GOVERNING THE ADMISSION TO PRACTICE LAW IN NORTH CAROLINA

The following amendments to the Rules Governing the Admission to Practice Law in North Carolina were duly adopted by the North Carolina Board of Law Examiners on October 24, 2012, and approved by the Council of the North Carolina State Bar at its quarterly meeting on January 25, 2013.

BE IT RESOLVED by the North Carolina Board of Law Examiners that the Rules Governing the Admission to Practice Law in North Carolina, particularly Section .0500, be amended by adding Rule .0503 regarding requirements for military spouse comity applicants.

.0503 REQUIREMENTS FOR MILITARY SPOUSE COMITY APPLICANTS

A Military Spouse Comity Applicant, upon written application may, in the discretion of the Board, be granted a license to practice law in the State of North Carolina without written examination provided that:

(1) The Applicant fulfills all of the requirements of Rule .0502, except that:

(a) in lieu of the requirements of paragraph (3) of Rule .0502, a Military Spouse Comity Applicant shall prove to the satisfaction of the Board that the Military Spouse Comity Applicant is duly licensed to practice law in a state or territory of the United States, or the District of Columbia, and that the Military Spouse Comity Applicant has been for at least four out of the last eight years immediately preceding the filing of this application with the Secretary, actively and substantially engaged in the full-time practice of law. Practice of law for the purposes of this rule shall be defined as it would be defined for any other comity applicant; and

(b) Paragraph (4) of Rule .0502 shall not apply to a Military Spouse Comity Applicant.

(2) Military Spouse Comity Applicant defined. A Military Spouse Comity Applicant is any person who is:

(a) An attorney at law duly admitted to practice in another state or territory of the United States, or the District of Columbia; and

(b) Identified by the Department of Defense (or, for the Coast Guard when it is not operating as a service in the Navy, by the Department of Homeland Security) as the spouse of a service member of the United States Uniformed Services; and

(c) Is residing, or intends within the next six months to be residing, in North Carolina due to the service member's orders for a permanent change of station to the State of North Carolina.

(3) Procedure. In addition to the documentation required by paragraph (1) of Rule .0502, a Military Spouse Comity Applicant must file with the Board the following:

(a) A copy of the service member's military orders reflecting a permanent change of station to a military installation in North Carolina; and

(b) A military identification card which lists the Military Spouse Comity Applicant as the spouse of the service member.

(4) Fee. A Military Spouse Comity Applicant shall pay a fee of $1,500 in lieu of the fee required in paragraph (2) of Rule .0502. This fee shall be non-refundable.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules Governing the Admission to Practice Law in North Carolina were duly approved by the Council of the North Carolina State Bar at a regularly called meeting on January 25, 2013.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of February, 2013.

s/L. Thomas Lunsford, II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendments to the Rules Governing the Admission to Practice Law in North Carolina as approved by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of March, 2013.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules Governing the Admission to Practice Law in North Carolina be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2013.

s/Beasley, J.
For the Court

HEADNOTE INDEX

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TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

Interlocutory orders and appeals—adverse possession—all interests not resolved—An order addressing the property interests of some of the parties to an adverse possession claim was interlocutory, but the appeal was nevertheless heard, where there were overlapping factual issues between the claims being appealed and those left to be determined in a partition action. **White v. Farabee, 126.**

Interlocutory orders and appeals—child support order—pending alimony claim resolved—temporary support moot—The appeal of a child support order was interlocutory when filed because an alimony claim was still pending, but the case became ripe for appeal when the alimony claim was dismissed without prejudice. The challenge to the temporary support order became moot when the permanent support order was entered. **Metz v. Metz, 494.**

Interlocutory orders and appeals—denial of motions to reconsider and to compel discovery—An appeal was dismissed where the order appealed from denied motions to compel discovery and to reconsider and was interlocutory; N.C.G.S. § 1-2277(b) does not extend to motions to reconsider; the trial court did not certify the order for appeal; and plaintiff did not argue that a substantial right was affected. **Zairy v. VKO, Inc., 687.**

Interlocutory orders and appeals—failure to set specific date to reconvene and review—The trial court failed to set forth a specific date on which to reconvene and review plaintiff father's mental and emotional evaluation in a modification of child custody case, and thus, the Court of Appeals viewed the order as permanent and appropriate for immediate appellate review. **Maxwell v. Maxwell, 614.**

Interlocutory orders and appeals—motion to change venue and dismiss—prior related action—An order denying a motion to change venue and dismiss a complaint because of a prior related action did not dispose of the case and was interlocutory, but the Court of Appeals issued a writ of *certiorari* on its own motion to reach the merits. **Jesse v. Jesse, 426.**

Interlocutory orders and appeals—motion to dismiss—jurisdiction over person—Although an order denying defendant Linx's motion to dismiss for lack of jurisdiction was interlocutory, appeal of the decision was proper under N.C.G.S. § 1-277(b). **State Farm Fire & Cas. Co. v. Durapro, 216.**

Interlocutory orders and appeals—multiple appeals—Although there is typically no right of immediate appeal from an interlocutory order, the Court of Appeals reached the merits of this workers' compensation case because the case had already been heard on appeal once before, was being heard on appeal a second time, and an issue had been reserved for future determination by the Industrial Commission which otherwise would result in an appeal for a third time. **Gregory v. W.A. Brown & Sons, 287.**

Interlocutory orders and appeals—partial denial of class certification—no jurisdiction—The Court of Appeals lacked jurisdiction over plaintiff's appeal from an interlocutory order under N.C.G.S. §§ 1-277(a) and 7A-27(d)(1) that partially denied class certification. Plaintiff failed to show a substantial right or the risk of inconsistent verdicts. Further, the Court of Appeals declined plaintiff's request to treat its appeal as a petition for *certiorari*. **Hamilton v. Mortg. Info. Servs., Inc., 73.**

APPEAL AND ERROR—Continued

CONSTITUTIONAL LAW—Continued

Confrontation Clause—officer's description of autopsy exhibit—There was no Confrontation Clause violation in a rape and murder prosecution where an officer testified that an exhibit contained swabs taken from a victim at an autopsy. **State v. Hartley, 1.**

Confrontation Clause—pathologist who did not perform autopsy—Defendant's right to confront the witnesses against him was not violated where autopsy results were not presented by the pathologist who had performed the victims' autopsy. While the pathologist who testified made minimal reference to the reports of the pathologist who performed the autopsies, those reports were not admitted and the testimony primarily consisted of a description of the victims' injuries as depicted in photos, the result of the wounds, and ultimately the cause of death. Moreover, there was overwhelming evidence of the manner in which defendant killed the victims. **State v. Hartley, 1.**

Double jeopardy—one course of conduct—multiple victims—Defendant's constitutional right against double jeopardy was not violated where he was sentenced for two attempted murder convictions consolidated with two assault convictions arising from a single course of conduct with multiple shots and two victims. **State v. Wright, 640.**

Effective assistance of counsel—failure to object—A defendant was not denied effective assistance of counsel in a felonious operation of a motor vehicle to elude arrest case based on his trial counsel's failure to object to evidence obtained from an alleged illegal search. Defendant failed to show he was prejudiced when defendant voluntarily answered the front door of his house to answer the officers' questions and did not challenge the voluntariness of his later statements to the officers in which he admitted to being the driver of the motorcycle. **State v. Jackson, 167.**

Effective assistance of counsel—no objection at trial—Defendant did not receive ineffective assistant of counsel, and no further investigation was needed, where his trial attorney did not object to his confession at trial but there was no error in the admission of the confession. **State v. Hartley, 1.**

Right to counsel—failure to make sufficient inquiry for waiver—The trial court erred by allowing respondent mother to waive counsel and represent herself during a termination of parental rights hearing. The trial court failed to make sufficient inquiry under N.C.G.S. § 15A-1242 regarding whether respondent understood and appreciated the consequences of her decision to waive counsel, and whether she comprehended the nature of the hearing. **In re P.D.R., 326.**

Right to speedy trial—trial court's failure to make proper inquiry—The trial court erred in an assault on a female case by denying defendant's motion for dismissal based on the State's failure to comply with his request for a speedy trial under N.C.G.S. § 15A-711. The record was void of any evidence that the trial court made the appropriate inquiry in consideration of defendant's motion. The order was vacated and remanded for a new hearing on the motion. **State v. Williamson, 393.**

Right to speedy trial—waiver of review—pro se motion while represented by counsel—The trial court did not deprive defendant of his right to a speedy trial. Defendant waived appellate review of this issue by filing *pro se* motions for a

WORKERS' COMPENSATION—Continued

WORKERS' COMPENSATION—Continued

the case could not be remanded for additional findings because there was no medical evidence found in the transcripts to support this finding. **Newman v. New Hanover Reg'l Med. Ctr., 271.**

ZONING

Modification of special use permit—estoppel—The trial court did not err in a declaratory judgment action by concluding that defendant town's refusal to consider and act upon plaintiff's 2009 application for a modification to a special use permit was not unlawful. Plaintiff was estopped from attacking the zoning ordinance because it voluntarily designated the golf course as open space. **Wake Forest Golf & Country Club, Inc. v. Town of Wake Forest, 632.**

Prior ordinance—common law vested right—Expenditures on a real estate development project prior to the enactment of a Unified Development Ordinance were not made in reasonable reliance on and after the issuance of a building permit. Respondent Crown did not acquire a common law vested right to have its development plan evaluated under the prior ordinances. **Wilson v. City of Mebane Bd. of Adjust., 176.**